LEASEHOLD CASUALTIES (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. The following documents are published to accompany the Leasehold Casualties (Scotland) Bill introduced in the Scottish Parliament on 10 May 2000:

   - Explanatory Notes;
   - a Financial Memorandum; and
   - the Presiding Officer’s Statement on Legislative Competence.

The Financial Memorandum and Presiding Officer’s statement are required under Rule 9.3 of the Parliament's Standing Orders.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Member in charge of the Bill (Mr. Adam Ingram) with the assistance of the Scottish Administration in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill will largely implement the recommendations of the Scottish Law Commission Report on Leasehold Casualties (Scot Law Com No 165). It will abolish leasehold casualties. Landlords will no longer be able to demand payment of casualties provided for in very long leases, which are common in certain parts of Scotland. There will, however, be provision for tenants to compensate landlords for the loss of the right to payment of casualties. The compensation scale will be related to the current value of the right to collect casualties in future, making assumptions about the rate of return on investment over time and the probability of events triggering the casualties actually occurring.

COMMENTARY ON SECTIONS

Section 1: Extinction of leasehold casualties

5. Section 1 abolishes leasehold casualties automatically from the date of introduction of the Bill - see the definition of “relevant day” in section 9. "Casualty" is also defined in that section. The abolition of leasehold casualties is prospective only. It does not affect arrears which have fallen due before the Bill is introduced.

6. Subsection (1). The casualties must arise under a "relevant lease". This is defined as a lease granted before 1 September 1974 for a period of not less than 300 years. The reason for referring to 1 September 1974 is that it has not been possible to insert a valid casualty provision in a lease since then. The reason for mentioning 300 years is to prevent the section from inadvertently affecting provisions in modern commercial leases. In practice it is only in leases for a period in excess of 300 years (generally for 999 years) that onerous casualty provisions are found. "Lease" includes a sub-lease - see section 9. The last part of the subsection makes it
clear that arrears of casualties are not affected. A casualty payment which fell due before the relevant date would continue to be payable.

7. **Subsection (2).** This subsection is designed to clarify a doubt which could have arisen as to the date when a certain type of casualty payment fell due. A casualty of the type which is payable on an assignation of the lease unless the person who last paid a casualty is still alive - in which case it is payable on the death of that person - is regarded as falling due only on that death and not on the earlier assignation.

**Section 2: Landlord’s right to require compensation in respect of extinction of a casualty**

8. **Section 2** provides for compensation to be payable in respect of all casualties extinguished by the Bill. Compensation is due only if requested by the landlord by written notice not later than a year after the date on which the Bill receives Royal Assent. It is due by the person who is the tenant at the date on which the Bill is introduced. The notice must state the amount required as calculated by the landlord - see subsection (1)(b).

**Section 3: Calculation of compensation**

9. **Section 3** sets out the rules for calculating the compensation payable in respect of the abolition of casualties. The underlying principle (other than in the case of casualties based on rent or rental value) is that the compensation represents the discounted value as at the date of abolition, assuming an appropriate rate of interest, of the future payments which have been lost.

10. **Subsection (1)** covers all casualties other than those based on rent or rental value.

11. **Paragraphs (a) and (b).** In the case of casualties of fixed amount payable at fixed and regular intervals the compensation payable is worked out by reference to formulae, which include multipliers ascertained under schedule 1 or schedule 2. Schedule 1 will apply in most cases which are likely to arise in practice. The formula in schedule 2 provides a method for determining the multiplier for compensation in other cases.

12. **Paragraph (c).** In the case of non-rental value casualties payable on, or by reference to, the entry of an assignee the compensation is determined by applying a multiplier of 0.75 to the amount of the casualty. The words "or by reference to" are included to cover the case where payment is due, say, at the end of the first year of possession by the assignee. The reasons for choosing a multiplier of 0.75 are explained in paragraphs 5.11 to 5.16 of the Scottish Law Commission Report.
Casualties payable by reference to an assignation but with payment deferred until the
death of the last person to pay a casualty are dealt with in paragraph (d).

13.  **Paragraph (d)**. In the case of non-rental value casualties payable on the entry
of an heir or on the death of any person the compensation is the amount of the
casualty times a multiplier of 0.03. This is a small multiplier because these casualties
have a negligible value, if any. The reasons for choosing a multiplier of 0.03 are set
out in paragraphs 5.9 to 5.10 of the Scottish Law Commission Report.

14.  **Paragraph (e)**. This is a residual category for all non-rental value casualties
other than those dealt with by the preceding rules. The compensation payable is the
total of the discounted values of the various payments lost. Paragraph (e) is inserted
as a safety net. In practice the preceding rules ought to cover all normal types of
casualty. The formula in paragraph (e) has to be general if it is to cover all possible
types of case. That means that it leaves room for argument as to, for example, the
dates when a casualty might have fallen due or the appropriate rate of interest to
apply, taking into account such factors as exceptional levels of risk or difficulties of
collection. Any disputes are to be determined by the Lands Tribunal for Scotland.

15.  **Subsection (2)** applies the provisions of subsection (1) with modifications to
casualties based on rent or rental value. The effect of the modifications is to ensure
that the compensation is based on the ground rent or tack duty payable under the
relevant lease rather than the rental value. The Scottish Law Commission
recommended abolishing casualties based on rent or rental value without
compensation. The Bill, however, adopts the solution of compensating the landlord
for the casualty based on the ground rent, that is to say, without taking account of the
value of any buildings or improvements which the tenant or his predecessors may
have effected on the ground.

**Section 4: Prescriptive period for payment of compensation on extinction of
casualty**

16.  **Section 4** makes it clear that the obligation to pay compensation prescribes
after 5 years. Under section 6(3) of the Prescription and Limitation (Scotland) Act
1973 the starting point of the prescriptive period is the date when the obligation
became enforceable, which in this case would be the date when the notice is given by
the landlord.

**Section 5: Irritancy provisions in certain leases to be void**

17.  **Section 5** abolishes termination of, and any power of a landlord to terminate, a
lease by virtue of an irritancy clause triggered by the tenant failing to comply with any
provision of the lease. The exercise of such a power for, say, non-payment of a small
tack duty or casualty would have the result that the property would revert to the
landlord along with the buildings erected or paid for by the tenants. This would be a grossly excessive penalty in the type of lease covered by the section.

18. **Subsection (1)** makes it clear that the section is confined to leases granted before 10 August 1914 for a period of 300 years or more with a ground rent or tack duty of not more than £100. These restrictions are designed to limit the provision to the old ultra-long ground leases of the type in which casualty provisions may be found and to prevent inadvertent application to modern commercial leases.

19. **Subsection (3)** contains provision deeming the section to have come into force on the relevant day (see definition of “relevant day” in section 9). The section would not affect any decree already obtained before the Bill was introduced but section 7(1) makes it clear that it would apply to any actions still pending at that date.

**Section 6: Liability for casualty due by former tenant not to transmit on assignation, or other transfer, of lease**

20. **Section 6** brings to an end to the current position in which the liability for casualties which were unpaid by a former tenant transmits to a new tenant following assignation or other transfer of a lease. This has resulted in new tenants of affected property being liable for arrears of casualties run up by former tenants.

21. **Subsection (1).** The effect of this subsection is that a tenant is liable only for his own arrears of casualty payments, not for any liabilities incurred by previous tenants. The landlord retains his rights to proceed against previous tenants for any arrears incurred by them and not yet extinguished by prescription.

22. **Subsection (2)** is designed to make it clear that subsection (1) does not affect any case where, in relation to arrears due under earlier tenancies, the landlord has before the date when the Bill is introduced received payment from the current tenant or concluded a settlement with him or obtained a final decree against him. It does, however, apply to any action still pending on the date of introduction - see section 7(2).

**Section 7: Transitional application of sections 5 and 6**

23. **Section 7** makes it clear that sections 5 and 6 apply to actions which have not yet reached the stage of final decree. Without this provision there would be a possibility that landlords would seek to preserve their irritancy rights and rights to recover previous tenants' arrears from the current tenant by commencing actions, and seeking to bring them to a conclusion, before the Act came into force. The two subsections are in similar terms. They do not set out the only circumstances in which sections 5 and 6 apply: they are without prejudice to the generality of those sections.
Section 8: Saving: proceedings in respect of section 12 of the Land Registration (Scotland) Act 1979

24. Section 8 provides that nothing in the Bill shall affect any claim to indemnity under section 12 of the Land Registration (Scotland) Act 1979 where proceedings in respect of the claim have been commenced before introduction of the Bill. Section 12 provides for circumstances in which a person is entitled to indemnification by the Keeper of the Registers of Scotland for mistakes in the Register. Section 8 will apply to proceedings commenced, but not finally disposed of, before the relevant day.

Section 9: Interpretation

25. The definition of "casualty" is similar to that in section 25 of the Long Leases (Scotland) Act 1954.

26. Certain provisions in the Act will be treated as having come into force on the date when the Bill was introduced and that date is the “relevant day” for the purposes of those provisions. The practical effect is to render it pointless for landlords to bring actions during the passage of the Bill.

Section 10: Short title and Crown application

27. Subsection (2). There is no reason why the Act should not apply to any case where the Crown is a party, whether as landlord or tenant, to one of the old leases covered by the Act.

Schedule 1: Table of multipliers

28. The table in this schedule is designed to make it easy for users of the Act to find the appropriate multiplier for determining the compensation payable for the loss of duplicands and other casualties of fixed amount payable at regular intervals of 19, 20, 21, 25 or 30 years, which are the intervals normally encountered in leases containing casualty provisions. It applies only where the lease has 80 years or more still to run at the date of abolition. The figures in the table represent the total of the discounted present values, expressed as figures rounded to three decimal places, of £1 payable on each date when the casualty would have fallen due. In order to make the table manageable the first column is organised in yearly breaks, except for the first year, where there is a half-yearly break.

29. The first casualties to be lost as a result of the Act will be those due on the relevant day itself - see section 1(1). The first row of the table provides the multiplier for this situation. It is the maximum multiplier because the landlord is losing one full casualty plus the discounted values of all subsequent casualties. A casualty due on, say, the nineteenth anniversary of the relevant date would be the second casualty lost. This is why there is no figure in the first column of the table for the case where a
casualty is payable exactly 19 years after the relevant date. The same point applies to the last figures in the columns for casualties payable at intervals of 20, 21, 25 or 30 years.

30. To use the table it must first be discovered when the next payment of the casualty after the date of abolition would have fallen due. Suppose that this would have been more than four but less than five years after abolition. If the casualty is a duplicand of £17 payable every 19 years then the multiplier is 0.816 and the compensation payable, if claimed by the landlord, is £17 times 0.816, which is £13.87.

**Schedule 2: Method for calculating multiplier**

31. This schedule contains the method of finding the multiplier for casualties of fixed amount payable at fixed intervals other than those covered in the table in schedule 1 or payable under a lease which has less than 80 years still to run after the date of abolition. Paragraph 2 deals with the situation covered by the first two rows of the table in schedule 1. It provides for casualties which would have been payable on the relevant day or within one year thereafter. Paragraph 3 ensures that after the first year the calculations proceed with yearly breaks. There are two reasons for this. First, it introduces coherence between the method in schedule 2 and the method used in compiling the figures in the table in schedule 1. Secondly, it facilitates the use of standard tables giving the present value of £1 payable at various dates in the future.

32. An example may be useful to illustrate the use of the formula in schedule 2. Suppose that the casualty in question is a duplicand of £40 payable 5 years and 7 months after the date of abolition and then every 15 years thereafter, under a lease which has 830 years to run. The table in schedule 1 does not have a column for 15 year intervals. So schedule 2 has to be used. The first calculation is \(1/1.15\) which is 0.621. The next calculation is \(1/1.1^{20}\) which is 0.149. The next calculation is \(1/1.1^{35}\) which is 0.036. The next calculation is \(1/1.1^{50}\) which is 0.009. The next calculation is \(1/1.1^{55}\) which is 0.002. The next calculation is \(1/1.1^{80}\) which produces a figure too low to register to three decimal places. From then on it is pointless to continue this stage of the calculations. The total of the values brought out by the calculations is 0.817, which is the multiplier. Applying the multiplier to the amount of the casualty (£40) brings out a sum of £32.68, which is the compensation payable. Standard tables giving the present value of £1 at various dates in the future could also be used to find the values which have to be added together, the assumed rate of interest for present purposes being 10%.
INTRODUCTION

33. In general, the costs associated with the abolition of leasehold casualties will be borne by those who are either landlords (“casualty owners”) or tenants in a long lease. The Bill provides that during the period of one year after the Act has received Royal Assent the landlord may by notice inform the tenant that he requires compensation for the extinguished casualty. Landlords are likely to incur some costs in establishing the cases in which they can require compensation. Tenants will have to pay the compensation according to a formula set out in the Bill.

34. The compensation formula works as follows for the different categories of casualty (the calculations in the case of casualties based on rent or rental value being made on the assumption that the amount payable in respect of the casualty is the amount of the ground rent).

Casualties payable at stipulated intervals

35. The typical case is where a casualty of a fixed sum (usually double the annual rent or “duplicand”) is demanded at regular intervals, say once every 19 years. Schedules 1 and 2 to the Bill provide tables by which the amount of compensation can readily be calculated (schedule 2 dealing with cases where a period of less than 80 years of the lease is unexpired or where the intervals for payment are different from the standard ones specified in schedule 1). The first column in schedule 1 sets out the interval (the period between the date of introduction of the Bill and that on which the next casualty would fall due). The top row sets out the most commonly occurring intervals at which casualties are demanded. The table below sets out the multiplier to be applied to the amount of the casualty, given any particular combination of interval before the casualty next falls due, and frequency of obligation. Thus if the casualty is a duplicand of £17 payable every 19 years and the next payment is due in 4 to 5 years’ time, then the multiplier is 0.816 and the compensation payable, if claimed by the landlord, is £17 times 0.816 which is £13.87. The Scottish Law Commission’s researches revealed few casualties of over £20 and only one as high as £50. Assuming a £50 casualty and assuming the highest multiplier was applied, for such a casualty due within the next year, and due every 19 years, the compensation would be £50 times 1.196 or £59.80. Such a compensation payment would be an exceptional and extreme case. Typical compensation values would be far below this.
Casualties payable on the entry of an heir

36. Quite a common type of casualty is a duplicand payable on the entry of an heir. The highest such casualty found by the Scottish Law Commission in a sample survey was £27. There were 2 of £16 and a few more in the £5 to £11 range but the vast majority were under £5. In relation to most if not all, of such casualties it seems likely that the collection costs would exceed the amounts recoverable. The calculation of the multiplier in these cases has to take account of the infrequency of an heir succeeding to a lease. Most leases are disposed of by assignation. The Commission therefore recommended a multiplier of 0.03. This would produce a figure of £0.81 for the £27 case.

Casualties payable on the death of any person

37. Because of the rarity of such conditions and their peculiar terms, the Commission recommended a similarly small multiplier of 0.03.

Casualties payable on the entry of an assignee

38. The Commission considered that allowance ought to be made for the high level of uncertainty about a casualty which is exigible on the entry of an assignee (normally a purchaser of the property) since there is no set interval at which houses change hands and no obligation to inform the landlord when this has taken place. They therefore recommended a multiplier of 0.75 for calculating compensation in such cases.

Other casualties

39. The Bill contains a sweep up provision to provide for compensation for any other kind of casualty not provided for specifically. The amount payable is to be the sum of the discounted values as at the date of introduction of the Bill of the amounts which would, but for the Bill, have been payable in respect of any casualty. Any disputes are to be referred to the Lands Tribunal for Scotland.

COSTS ON THE SCOTTISH ADMINISTRATION

40. Abolition of leasehold casualties may impact on the Scottish Administration in three ways. First there may be resource implications for the Lands Tribunal for Scotland. Second, there may be claims for legal aid from those involved in applications to the Lands Tribunal. It is highly unlikely that the Scottish Administration will be involved as landlord or tenant in the compensation scheme. Thirdly, there will be some costs involved for Registers of Scotland in cleansing the Land Register of redundant casualties after the year has elapsed. However, these will be minimal and can be absorbed without raising fees.
Lands Tribunal for Scotland

41. Very few if any applications to the Lands Tribunal are expected. These are only likely to arise in the event of dispute about the amount of compensation payable under the scheme. In such cases the cost of an application to the Tribunal would probably outweigh the amount of money at stake.

Legal aid

42. Legal aid will be available both to applicants and to those seeking to oppose applications to the Lands Tribunal. However for the reasons set out above this is expected to be minimal. However there could be a more significant demand for advice and assistance for those affected by the Bill. It is not thought that such a demand would impose a significant strain on legal aid resources.

COSTS ON LOCAL AUTHORITIES

43. The extent to which local authorities themselves are landlords under long leases is not known. Unfortunately, it is understood that most local authorities do not have records of the full extent of their land holdings. They are also likely to be unaware of their landlord interests. It is therefore difficult to predict the administrative costs (if any) which would result from their decision to serve a notice requiring compensation, or the lost revenue which would result from failing to do so.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Costs on businesses and other bodies

44. The Bill treats commercial landlords and tenants in the same way as residential ones. It is a matter for individual commercial landlords whether to use the notice provisions to claim compensation.

Costs on individuals

45. The Commission carried out a sample survey of leasehold titles in Scotland. Leasehold titles are common in Lanarkshire but also occur in Clackmannanshire, Renfrewshire and Ayrshire. There were 3,929 leasehold titles in the Lanarkshire Title Sheet Record in the Land Register in the summer of 1997. There were 1,050 in Renfrewshire. The total number in Clackmannanshire and Ayrshire is not known. Detailed examination of a sample of the titles showed that only about one quarter contained any provision for leasehold casualties. On this basis, perhaps 1,000-1,500 properties in Scotland could be affected by the provisions of the Bill. Not all of these will be domestic. As indicated earlier in this Memorandum, the amount payable in
This document relates to the Leasehold Casualties (Scotland) Bill (SP Bill 15) as introduced in the Scottish Parliament on 10 May 2000

compensation per property could, at a maximum, be around £60 but would be likely to be less in the vast majority of cases, if it is demanded at all.


PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

46. On 7 April 2000, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Leasehold Casualties (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”