Passage of the

Tenements (Scotland)
Bill 2004

SPPB 72
Passage of the

Tenements (Scotland) Bill 2004

SP Bill 19 (Session 2), subsequently 2004 asp 11

SPPB 72
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. Extracts from the Official Report are re-printed as corrected for the archive version of the Official Report.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
- Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.
After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Clerking and Reporting Directorate. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The Finance Committee reported to the Justice 2 Committee on the Bill at Stage 1. Its report is included in Annex A of the Stage 1 Report. However, the written evidence received and oral evidence taken by this committee was not included in that report and it is therefore included in this volume after the Stage 1 Report.

Correspondence from the Deputy Minister for Communities to the Convener of the Justice 2 Committee is also included in the ‘After Stage 2’ section.

Forthcoming titles

The next titles in this series will be:

- **SPPB 73**: School Education (Ministerial Powers and Independent Schools) (Scotland) Bill 2004
- **SPPB 74**: Breastfeeding etc. (Scotland) Bill 2003
- **SPPB 75**: Emergency Workers (Scotland) Bill 2004
- **SPPB 76**: Water Services etc. (Scotland) Bill 2004
Tenements (Scotland) Bill
[AS INTRODUCED]

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Schedule—Tenement Management Scheme
Tenements (Scotland) Bill  

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about the boundaries and pertinents of properties comprised in tenements and for the regulation of the rights and duties of the owners of properties comprised in tenements; to make minor amendments of the Title Conditions (Scotland) Act 2003 (asp 9); and for connected purposes.

5

Boundaries and pertinents

1 Determination of boundaries and pertinents

(1) Except in so far as any different boundaries or pertinents are constituted by virtue of the title to the tenement, or any enactment, the boundaries and pertinents of sectors of a tenement shall be determined in accordance with sections 2 and 3 of this Act.

(2) In this Act, “title to the tenement” means—

(a) any conveyance, or reservation, of property which affects—

(i) the tenement; or

(ii) any sector in the tenement; and

(b) where an interest in—

(i) the tenement; or

(ii) any sector in the tenement,

has been registered in the Land Register of Scotland, the title sheet of that interest.

2 Tenement boundaries

(1) Subject to subsections (3) to (7) below, the boundary between any two contiguous sectors is the median of the structure that separates them; and a sector—

(a) extends in any direction to such a boundary; or

(b) if it does not first meet such a boundary—

(i) extends to and includes the solum or any structure which is an outer surface of the tenement building; or

(ii) extends to the boundary that separates the sector from a contiguous building which is not part of the tenement building.
(2) For the purposes of subsection (1) above, where the structure separating two contiguous sectors is or includes something (as for example, but without prejudice to the generality of this subsection, a door or window) which wholly or mainly serves only one of those sectors, the thing is in its entire thickness part of that sector.

(3) A top flat extends to and includes the roof over that flat.

(4) A bottom flat extends to and includes the solum under that flat.

(5) A close extends to and includes the roof over, and the solum under, the close.

(6) Where a sector includes the solum (or any part of it) the sector shall also include, subject to subsection (7) below, the airspace above the tenement building and directly over the solum (or part).

(7) Where the roof of the tenement building slopes, a sector which includes the roof (or any part of it) shall also include the airspace above the slope of the roof (or part) up to the level of the highest point of the roof.

3 Pertinents

(1) Subject to subsection (2) below, there shall attach to each of the flats, as a pertinent, a right of common property in (and in the whole of) the following parts of a tenement—
   (a) a close;
   (b) a lift by means of which access can be obtained to more than one of the flats.

(2) If a close or lift does not afford a means of access to a flat then there shall not attach to that flat, as a pertinent, a right of common property in the close or, as the case may be, lift.

(3) Any land (other than the solum of the tenement building) pertaining to a tenement shall attach as a pertinent to the bottom flat most nearly adjacent to the land (or part of the land); but this subsection shall not apply to any part which constitutes a path, outside stair or other way affording access to any sector other than that flat.

(4) If a tenement includes any part (such as, for example, a path, outside stair, fire escape, rhone, pipe, flue, conduit, cable, tank or chimney stack) that does not fall within subsection (1) or (3) above and that part—
   (a) wholly serves one flat, then it shall attach as a pertinent to that flat;
   (b) serves two or more flats, then there shall attach to each of the flats served, as a pertinent, a right of common property in (and in the whole of) the part.

(5) For the purposes of this section, references to rights of common property being attached to flats as pertinents are references to there attaching to each flat equal rights of common property; except that where the common property is a chimney stack the share allocated to a flat shall be determined in direct accordance with the ratio which the number of flues serving it in the stack bears to the total number of flues in the stack.

Tenement Management Scheme

4 Application of the Tenement Management Scheme

(1) The Tenement Management Scheme (referred to in this section as “the Scheme”), which is set out in the schedule to this Act, shall apply in relation to a tenement to the extent provided by the following provisions of this section.
Tenements (Scotland) Bill

(2) The Scheme shall not apply in any period during which the development management scheme applies to the tenement by virtue of section 71 of the Title Conditions (Scotland) Act 2003 (asp 9).

(3) The provisions of rule 1 of the Scheme shall apply, so far as relevant, for the purpose of interpreting any other provision of the Scheme which applies to the tenement.

(4) Rule 2 of the Scheme shall apply unless—
   (a) a tenement burden provides procedures for the making of decisions by the owners; and
   (b) the same such procedures apply as respects each flat.

(5) The provisions of Rule 3 of the Scheme shall apply to the extent that there is no tenement burden enabling the owners to make scheme decisions on any matter on which a scheme decision may be made by them under that Rule.

(6) Rule 4 of the Scheme shall apply in relation to any scheme costs incurred in relation to any part of the tenement unless a tenement burden provides that the full amount of those scheme costs (in so far as any of that amount is not to be met by someone other than an owner) is to be met by one or more of the owners.

(7) Subject to subsection (10) below, the provisions of rule 5 of the Scheme shall apply, so far as relevant, for the purpose of supplementing rule 4.

(8) Rule 6 of the Scheme shall apply to the extent that there is no tenement burden making provision for an owner to instruct or carry out any emergency work as defined in that rule.

(9) The provisions of—
   (a) rule 7; and
   (b) subject to subsection (10) below, rule 8,
of the Scheme shall apply, so far as relevant, for the purpose of supplementing any other provision of the Scheme which applies to the tenement.

(10) The provisions of rules 5 and 8 are subject to any different provision in any tenement burden.

(11) The Scottish Ministers may by order substitute for the sums for the time being specified in rule 3.3 of the Scheme such other sums as appear to them to be appropriate.

(12) Where some but not all of the provisions of the Scheme apply, references in the Scheme to “the scheme” shall be read as references only to those provisions of the Scheme which apply.

(13) In this section, “scheme costs” and “scheme decision” have the same meanings as they have in the Scheme.

Resolution of disputes

5 Application to sheriff for annulment of certain decisions

(1) Where—
   (a) a management scheme other than the development management scheme applies as respects the management of a tenement; and
   (b) a decision is made by the owners in accordance with the scheme,
any owner who, at the time the decision was made, was not in favour of the decision may, by summary application, apply to the sheriff for an order annulling the decision.

(2) For the purposes of any such application, the defender shall be all the other owners.

(3) An application by an owner under subsection (1) above shall be made—

(a) in a case where the decision was made at a meeting attended by the owner, not later than 28 days after the date of that meeting; or

(b) in any other case, not later than 28 days after the date on which notice of the making of the decision was sent to the owner for the time being of the flat in question.

(4) The sheriff may, if satisfied that the decision—

(a) is not in the best interests of all (or both) the owners; or

(b) is unfairly prejudicial to one or more of the owners,

make an order annulling the decision (in whole or in part).

(5) Where such an application is made as respects a decision to carry out maintenance, improvements or alterations, the sheriff shall, in considering whether to make an order under subsection (4) above, have regard to—

(a) the age of the property which is to be maintained, improved or, as the case may be, altered;

(b) its condition;

(c) the likely cost of any such maintenance, improvements or alterations; and

(d) the reasonableness of that cost.

(6) Where the sheriff makes an order under subsection (4) above annulling a decision (in whole or in part), the sheriff may make such other, consequential, order as the sheriff thinks fit (as, for example, an order as respects the liability of owners for any costs already incurred).

(7) A party may not later than fourteen days after the date of—

(a) an order under subsection (4) above; or

(b) an interlocutor dismissing such an application,

appeal to the Court of Session on a point of law.

(8) A decision of the Court of Session on an appeal under subsection (7) above shall be final.

(9) Where an owner is entitled to make an application under subsection (1) above in relation to any decision, no step shall be taken to implement that decision unless—

(a) the period specified in subsection (3) above within which such an application is to be made has expired without such an application having been made and notified to the owners; or

(b) where such an application has been so made and notified—

(i) the application has been disposed of and either the period specified in subsection (7) above within which an appeal against the sheriff’s decision may be made has expired without such an appeal having been made or such an appeal has been made and disposed of; or
(ii) the application has been abandoned.

(10) Subsection (9) above does not apply to a decision relating to work which requires to be carried out urgently.

6 Application to sheriff for order resolving certain disputes

(1) Any owner may by summary application apply to the sheriff for an order relating to any matter concerning the operation of—

(a) the management scheme which applies as respects the tenement; or

(b) any provision of this Act in its application as respects the tenement.

(2) Without prejudice to subsection (1) above, where the development management scheme applies, an application under that subsection may be made by the manager of any owners’ association established by the scheme.

(3) Where an application is made under subsection (1) above the sheriff may, subject to such conditions (if any) as the sheriff thinks fit—

(a) grant the order craved; or

(b) make such other order under this section as the sheriff considers necessary or expedient.

(4) A party may not later than fourteen days after the date of—

(a) an order under subsection (3) above; or

(b) an interlocutor dismissing such an application,

appeal to the Court of Session on a point of law.

(5) A decision of the Court of Session on an appeal under subsection (4) above shall be final.

Support and shelter

7 Abolition as respects tenements of common law rules of common interest

Any rule of law relating to common interest shall, to the extent that it applies as respects a tenement, cease to have effect; but nothing in this section shall affect the operation of any such rule of law in its application to a question affecting both a tenement and—

(a) some other building or former building (whether or not a tenement); or

(b) any land not pertaining to the tenement.

8 Duty to maintain so as to provide support and shelter etc.

(1) Subject to subsection (2) below, the owner of any part of a tenement building, being a part that provides, or is intended to provide, support or shelter to any other part, shall maintain the supporting or sheltering part so as to ensure that it provides support or shelter.

(2) An owner shall not by virtue of subsection (1) above be obliged to maintain any part of a tenement building if it would not be reasonable to do so, having regard to all the circumstances (and including, in particular, the age of the tenement building, its condition and the likely cost of any maintenance).
(3) The duty imposed by subsection (1) above on an owner of a part of a tenement building may be enforced by any other such owner who is, or would be, directly affected by any breach of the duty.

9 Prohibition on interference with support or shelter etc.

(1) No owner or occupier of any part of a tenement shall be entitled to do anything in relation to that part which would, or would be reasonably likely to, impair to a material extent—

(a) the support or shelter provided to any part of the tenement building; or

(b) the natural light enjoyed by any part of the tenement building.

(2) The prohibition imposed by subsection (1) above on an owner or occupier of a part of a tenement may be enforced by any other such owner who is, or would be, directly affected by any breach of the prohibition.

10 Recovery of costs incurred by virtue of section 8

Where—

(a) by virtue of section 8 of this Act an owner carries out maintenance to any part of a tenement; and

(b) the management scheme which applies as respects the tenement provides for the maintenance of that part,

the owner shall be entitled to recover from any other owner any share of the cost of the maintenance for which that other owner would have been liable had the maintenance been carried out by virtue of the management scheme in question.

Repairs: costs and access

11 Liability of owner and successors for certain costs

(1) Any owner who is liable for any relevant costs shall not, by virtue only of ceasing to be such an owner, cease to be liable for those costs.

(2) Where a person becomes an owner (any such person being referred to in this section as a “new owner”), that person shall be severally liable with any former owner of the flat for any relevant costs for which the former owner is liable.

(3) Where a new owner pays any relevant costs for which a former owner of the flat is liable, the new owner may recover the amount so paid from the former owner.

(4) For the purposes of this section “relevant costs” means, as respects a flat—

(a) the share of any costs for which the owner is liable by virtue of the Tenement Management Scheme; and

(b) any other costs for which the owner is liable by virtue of this Act.

(5) This section applies as respects any relevant costs for which an owner becomes liable on or after the day on which this section comes into force.

12 Prescriptive period for costs to which section 11 relates

In Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (obligations affected by prescriptive periods of five years to which section 6 of that Act applies)—
(a) after paragraph 1(aa) there shall be inserted—

“(ab) to any obligation to pay a sum of money by way of costs to which section 11 of the Tenements (Scotland) Act 2003 (asp 9) applies;”; and

(b) in paragraph 2(e), for the words “or (aa)” there shall be substituted “, (aa) or (ab)”.

13 Common property: disapplication of common law right of recovery

Any rule of law which enables an owner of common property to recover the cost of necessary maintenance from the other owners of the property shall not apply in relation to any common property in a tenement where the maintenance of that property is provided for in the management scheme which applies as respects the tenement.

14 Access for maintenance purposes

(1) Where an owner gives reasonable notice to the owner or occupier of any other part of the tenement that access is required to, or through, that part for any of the purposes mentioned in subsection (3) below, the person given notice shall, subject to subsection (5) below, allow access for that purpose.

(2) Without prejudice to subsection (1) above, where the development management scheme applies, notice under that subsection may be given by the manager of any owners’ association established by the scheme to the owner or occupier of any part of the tenement.

(3) The purposes are—

(a) carrying out maintenance by virtue of the management scheme which applies as respects the tenement;

(b) carrying out maintenance to any part of the tenement owned (whether solely or in common) by the person requiring access;

(c) carrying out an inspection to determine whether it is necessary to carry out maintenance;

(d) determining whether the owner of the part is fulfilling the duty imposed by section 8(1) of this Act;

(e) determining whether the owner or occupier of the part is complying with the prohibition imposed by section 9(1) of this Act; and

(f) where floor area is relevant for the purposes of determining any liability of owners, measuring floor area.

(4) Reasonable notice need not be given as mentioned in subsection (1) above where access is required for the purpose specified in subsection (3)(a) above and the maintenance requires to be carried out urgently.

(5) An owner or occupier may refuse to allow—

(a) access under subsection (1) above; or

(b) such access at a particular time,

if, having regard to all the circumstances (and, in particular, whether the requirement for access is reasonable), it is reasonable to refuse access.

(6) Where access is allowed under subsection (1) above for any purpose, such right of access may be exercised by—
(a) the owner or manager who gave notice that access was required; or
(b) such person as the owner or, as the case may be, manager may authorise in writing
for the purpose (any such person being referred to in this section as an “authorised
person”).

Where an authorised person acting in accordance with subsection (6) above is liable by
virtue of any enactment or rule of law for damage caused to any part of a tenement—

(a) the owner who authorised that person; or
(b) if the person was authorised by a manager, the owners’ association concerned,

shall be severally liable with the authorised person for the cost of remedying the
damage; but an owner or, as the case may be, owners’ association making any payment
as respects that cost shall have a right of relief against the authorised person.

Insurance

Obligation of owner to insure

It shall be the duty of each owner to effect and keep in force a contract of insurance
against the prescribed risks for the reinstatement value of that owner’s flat and any part
of the tenement building attaching to that flat as a pertinent.

Where a tenement burden requires each flat to be insured by way of a common policy of
insurance as respects the entire tenement building, then for the purposes of satisfying the
duty imposed on an owner by subsection (1) above, the contract of insurance mentioned
in that subsection shall be a common policy of insurance.

The Scottish Ministers may by order prescribe risks against which an owner shall
require to insure (in this section referred to as the “prescribed risks”).

Where, whether because of the location of the tenement or otherwise, an owner—

(a) having made reasonable efforts to do so, is unable to obtain insurance against a
particular prescribed risk; or

(b) would be able to obtain such insurance but only at a cost which is unreasonably
high,

the duty imposed by subsection (1) above shall not require an owner to insure against
that particular risk.

Any owner may by notice in writing request the owner of any other flat in the tenement
to produce—

(a) the policy in respect of any contract of insurance which the owner of that other
flat is required to have or to effect; and

(b) evidence of payment of the premium for any such policy,

and not later than 14 days after that notice is given the recipient shall produce to the
owner giving the notice the policy (or a copy of it) and the evidence of payment.

The duty imposed by subsection (1) above on an owner may be enforced by any other
owner.
Demolition and abandonment of tenement building

16 Demolition of tenement building not to affect ownership

The demolition of a tenement building shall not alone effect any change as respects any right of ownership.

17 Cost of demolishing tenement building

(1) Except where a tenement burden otherwise provides, the cost of demolishing a tenement building shall, subject to subsection (2) below, be shared equally among all (or both) the flats in the tenement, and each owner is liable accordingly.

(2) Where the floor area of the largest (or larger) flat in the tenement is more than one and a half times that of the smallest (or smaller) flat the owner of each flat shall be liable to contribute towards the cost of demolition of the tenement building in the proportion which the floor area of that owner’s flat bears to the total floor area of all (or both) the flats.

(3) An owner is liable under this section for the cost of demolishing a tenement building—

(a) in the case where the owner agrees to the proposal that the tenement building be demolished, from the date of the agreement; or

(b) in any other case, from the date on which the carrying out of the demolition is instructed.

(4) This section applies as respects the demolition of part of a tenement building as it applies as respects the demolition of an entire tenement building but with any reference to a flat in the tenement being construed as a reference to a flat in the part.

(5) In this section references to flats in a tenement include references to flats which were comprehended by the tenement before its demolition.

(6) This section is subject to section 123 of the Housing (Scotland) Act 1987 (c.26) (which makes provision as respects demolition of buildings in pursuance of local authority demolition orders and recovery of expenses by local authorities etc.).

18 Use and disposal of site where tenement building demolished

(1) This section applies where a tenement building is demolished and after the demolition two or more flats which were comprehended by the tenement building before its demolition (any such flat being referred to in this section as a “former flat”) are owned by different persons.

(2) Except in so far as—

(a) the owners of all (or both) the former flats otherwise agree; or

(b) those owners are subject to a requirement (whether imposed by a tenement burden or otherwise) to erect a building on the site or to rebuild the tenement, no owner may build on, or otherwise develop, the site.

(3) Except where the owners have agreed, or are required, to build on or develop the site as mentioned in paragraphs (a) and (b) of subsection (2) above, any owner of a former flat shall be entitled to require that the entire site be sold.
(4) Except where a tenement burden otherwise provides, the proceeds of any sale in pursuance of subsection (3) above shall, subject to subsection (5) below, be shared equally among all (or both) the former flats and the owner of each former flat shall be entitled to the share allocated to that flat.

(5) Where the floor area of the largest (or larger) former flat was more than one and a half times that of the smallest (or smaller) former flat the proceeds of any sale shall be shared among (or between) the flats in the proportion which the floor area of each flat bore to the total floor area of all (or both) the flats and the owner of each former flat shall be entitled to the share allocated to that flat.

(6) The prohibition imposed by subsection (2) above on an owner of a former flat may be enforced by any other such owner.

(7) In this section references to the site are references to the solum of the tenement building that occupied the site and to the airspace that is directly above the solum.

19 Effect of demolition and sale on certain undischarged securities

(1) Where—

(a) a tenement building is demolished and the site is sold; but

(b) a heritable security over any flat formerly comprehended by the tenement has not, on or before such sale, been discharged,

the heritable security shall, by virtue of this subsection, be varied so as to secure instead a pro indiviso interest over the site fixed having regard to the total number of flats which were formerly comprehended by the tenement.

(2) A variation such as is mentioned in subsection (1) above shall take effect as from the date on which the deed conveying the site is recorded in the Register of Sasines or, as the case may be, the terms of the deed are registered in the Land Register of Scotland.

(3) In this section “site” shall be construed in accordance with section 18(7) of this Act.

20 Sale of abandoned tenement building

(1) Where—

(a) because of its poor condition a tenement building has been entirely unoccupied by any owner or person authorised by an owner for a period of more than six months; and

(b) it is unlikely that any such owner or other person will return to occupy any part of the tenement building,

any owner shall be entitled to require that the tenement building be sold.

(2) Subsections (4) and (5) of section 18 of this Act shall apply as respects a sale in pursuance of subsection (1) above as those subsections apply as respects a sale in pursuance of subsection (3) of that section.

(3) In this section any reference to a tenement building includes a reference to its solum.

Liability for certain costs

21 Liability to non-owner for certain damage costs

(1) Where—
(a) any part of a tenement is damaged as the result of the fault of any person (that person being in this subsection referred to as “A”); and

(b) the management scheme which applies as respects the tenement makes provision for the maintenance of that part,

any owner of a flat in the tenement (that owner being in this subsection referred to as “B”) who is required by virtue of that provision to contribute to any extent to the cost of maintenance of the damaged part but who at the time when the damage was done was not an owner of the part shall be treated, for the purpose of determining whether A is liable to B as respects the cost of maintenance arising from the damage, as having been such an owner at that time.

(2) In this section “fault” means any wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages.

Miscellaneous and general

Amendments of Title Conditions (Scotland) Act 2003

(1) The Title Conditions (Scotland) Act 2003 (asp 9) shall be amended in accordance with subsections (2) to (5) below.

(2) In section 3(8) (waiver, mitigation and variation of real burdens), for “the holder” there shall be substituted “a holder”.

(3) In section 10 (affirmative burdens: continuing liability of former owner), at the end there shall be added—

“(5) This section does not apply in any case where section 11 of the Tenements (Scotland) Act 2004 (asp 00) applies.”.

(4) In section 29 (power of majority to instruct common maintenance)—

(a) in subsection (2)—

(i) in paragraph (b)—

(A) for the words from the beginning to “that” where it first occurs there shall be substituted “subject to subsection (3A) below, require each”;

and

(B) for sub-paragraph (ii) there shall be substituted—

“(ii) with such person as they may nominate for the purpose,”; and

(ii) paragraph (c) shall be omitted;

(b) after subsection (3) there shall be inserted—

“(3A) A requirement under subsection (2)(b) above that each owner deposit a sum of money—

(a) exceeding £100; or

(b) of £100 or less where the aggregate of that sum taken together with any other sum or sums required in the preceding 12 months to be deposited under that subsection by each owner exceeds £200,

shall be made by written notice to each owner and shall require the sum to be deposited into such account (the “maintenance account”) as the owners may nominate for the purpose.
(3B) The owners may authorise persons to operate the maintenance account on their behalf.”;
(c) in subsection (4), for “(2)(b)” there shall be substituted “(3A)”;
(d) in subsection (7)(b)(ii), for “(4)(h)” there shall be substituted “(3B)”;
(e) in subsection (8), for “(2)(b)” there shall be substituted “(3A)”; and
(f) after subsection (9) there shall be inserted—
“(10) The Scottish Ministers may by order substitute for the sums for the time being specified in subsection (3A) above such other sums as appear to them to be appropriate.”.

(5) After section 31 there shall be inserted—
“31A Disapplication of sections 28, 29 and 31 where community consists of a tenement
Sections 28, 29 and 31 of this Act do not apply in relation to a community consisting of one tenement.”.

23 Meaning of “tenement”
(1) In this Act, “tenement” means a building or a part of a building which comprises two related flats which, or more than two such flats at least two of which—
(a) are, or are designed to be, in separate ownership; and
(b) are divided from each other horizontally,
and, except where the context otherwise requires, includes the solum and any other land pertaining to that building or, as the case may be, part of the building; and the expression “tenement building” shall be construed accordingly.
(2) In determining whether flats comprised in a building or part of a building are related for the purposes of subsection (1), regard shall be had, among other things, to—
(a) the title to the tenement; and
(b) any tenement burdens,
treating the building or part for that purpose as if it were a tenement.

24 Meaning of “owner”, determination of liability etc.
(1) Subject to subsection (2) below, in this Act “owner” means a person who has right to a flat whether or not that person has completed title; but if, in relation to the flat (or, if the flat is held pro indiviso, any pro indiviso share in it) more than one person comes within that description of owner, then “owner” means such person as has most recently acquired such right.
(2) Where a heritable security has been granted over a flat and the heritable creditor has entered into lawful possession, “owner” means the heritable creditor in possession of the flat.
(3) Subject to subsection (4) below, if two or more persons own a flat in common, any reference in this Act to an owner is a reference to both or, as the case may be, all of them.
(4) Any reference to an owner in sections 5(1) and (3), 6(1), 8(3), 9, 10, 14(1), (6) and (7), 15(5) and (6), 18, 20 and 21 of this Act shall be construed as a reference to any person who owns a flat either solely or in common with another.

(5) Where two or more persons own a flat in common—

(a) they are severally liable for the performance of any obligation imposed by virtue of this Act on the owner of that flat; and

(b) as between (or among) themselves they are liable in the proportions in which they own the flat.

25 Interpretation

(1) In this Act, unless the content otherwise requires—

“chimney stack” does not include flue or chimney pot;

“close” means a connected passage, stairs and landings within a tenement building which together constitute a common access to two or more of the flats;

“demolition” includes destruction and cognate expressions shall be construed accordingly; and demolition may occur on one occasion or over any period of time;

“the development management scheme” has the meaning given by section 71(3) of the Title Conditions (Scotland) Act 2003 (asp 9);

“door” includes its frame;

“flat” means a dwelling-house, or any business or other premises, in a tenement building;

“lift” includes its shaft and operating machinery;

“owner” shall be construed in accordance with section 24 of this Act;

“sector” means—

(a) a flat;

(b) any close or lift; or

(c) any other three-dimensional space not comprehended by a flat, close or lift, and the tenement building shall be taken to be entirely divided into sectors;

“solum” means the ground on which a building is erected;

“tenement” shall be construed in accordance with section 23 of this Act;

“tenement burden” means, in relation to a tenement, any real burden (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) which affects—

(a) the tenement; or

(b) any sector in the tenement;

“Tenement Management Scheme” means the scheme set out in the schedule to this Act;

“title to the tenement” shall be construed in accordance with section 1(2) of this Act; and

“window” includes its frame.
(2) The floor area of a flat is calculated for the purposes of this Act by measuring the total floor area within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat—
   (a) a balcony; and
   (b) except where it is used for any purpose other than storage, a loft or basement.

(3) For the purposes of any provision of this Act, a document sent shall be taken to be sent on the day on which it is despatched (by whatever means).

26 Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of this Act.

(2) An order under this section may modify any enactment (including this Act), instrument or document.

27 Orders

(1) Any power of the Scottish Ministers to make orders under this Act shall be exercisable by statutory instrument.

(2) A statutory instrument containing an order under this Act (except an order under section 29(2) or, where subsection (3) applies, section 26) shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

(3) Where an order under section 26 contains provisions which add to, replace or omit any part of the text of an Act, the order shall not be made unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, the Parliament.

28 Crown application

This Act, except section 15, binds the Crown.

29 Short title and commencement

(1) This Act may be cited as the Tenements (Scotland) Act 2004.

(2) This Act (other than this section) shall come into force on such day as the Scottish Ministers may by order appoint; and different days may be appointed for different purposes.
SCHEDULE
(introduced by section 4)

TENEMENT MANAGEMENT SCHEME

RULE 1 – SCOPE AND INTERPRETATION

1.1 Scope of scheme

This scheme provides for the management and maintenance of the scheme property of a tenement.

1.2 Meaning of “scheme property”

For the purposes of this scheme, “scheme property” means—

(a) any part of a tenement that is the common property of two or more of the owners,

(b) any part of a tenement (not being common property of the type mentioned in paragraph (a) above) that, by virtue of a tenement burden, must be maintained by two or more of the owners, or

(c) with the exceptions mentioned in rule 1.3, the following other parts of a tenement building—

(i) the ground on which it is built,

(ii) its foundations,

(iii) its external walls,

(iv) its roof (including any rafter or other structure supporting the roof),

(v) if it is separated from another building by a gable wall, the part of the gable wall that is part of the tenement building, and

(vi) any wall (not being one falling within the preceding sub-paragraphs), beam or column that is load-bearing.

1.3 Parts not included in rule 1.2(c)

The following parts of a tenement building are the exceptions referred to in rule 1.2(c)—

(a) any extension which forms part of only one flat,

(b) any—

(i) door,

(ii) window,

(iii) skylight,

(iv) vent, or

(v) other opening,

which serves only one flat,

(c) any chimney stack or chimney flue.
1.4 Meaning of “scheme decision”

A decision is a “scheme decision” for the purposes of this scheme if it is made in accordance with—

(a) rule 2, or

(b) where that rule does not apply, the tenement burden or burdens providing the procedure for the making of decisions by the owners.

1.5 Other definitions

In this scheme—

“maintenance” includes repairs and replacement, cleaning, painting and other routine works, gardening, the day-to-day running of a tenement and the reinstatement of a part (but not most) of the tenement building, but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance,

“manager” means, in relation to a tenement, a person appointed (whether or not by virtue of rule 3.1(c)(i)) to manage the tenement, and

“scheme costs” has the meaning given by rule 4.1.

1.6 Rights of co-owners

If a flat is owned by two or more persons, then one of them may do anything that the owner is by virtue of this scheme entitled to do.

RULE 2 – PROCEDURE FOR MAKING SCHEME DECISIONS

2.1 Making scheme decisions

Any decision to be made by the owners shall be made in accordance with the following provisions of this rule.

2.2 Allocation and exercise of votes

Except as mentioned in rule 2.3, for the purpose of voting on any proposed scheme decision one vote is allocated as respects each flat, and any right to vote is exercisable by the owner of that flat or by someone nominated by the owner to vote as respects the flat.

2.3 Qualification on allocation of votes

No vote is allocated as respects a flat if—

(a) the scheme decision relates to the maintenance of scheme property, and

(b) the owner of that flat is not liable in accordance with this scheme for maintenance of the property concerned.
2.4 Exercise of vote where two or more persons own flat

If a flat is owned by two or more persons the vote allocated as respects that flat may be exercised in relation to any proposal by either (or any) of them, but if those persons disagree as to how the vote should be cast then the vote is not to be counted unless—

(a) where one of those persons owns more than a half share of the flat, the vote is exercised by that person, or

(b) in any other case, the vote is the agreed vote of those who together own more than a half share of the flat.

2.5 Decision by majority

Except as mentioned in rule 2.6, a scheme decision is made by majority vote of all the votes allocated.

2.6 Case where unanimity required

If the number of votes allocated does not exceed three, a scheme decision is made by unanimous vote of all the votes allocated.

2.7 Notice of meeting

If any owner wishes to call a meeting of the owners with a view to making a scheme decision at that meeting that owner must give the other owners at least 48 hours’ notice of the date and time of the meeting, its purpose and the place where it is to be held.

2.8 Consultation of owners if scheme decision not made at meeting

If an owner wishes to propose that a scheme decision be made but does not wish to call a meeting for the purpose that owner must instead—

(a) unless it is impracticable to do so (whether because of absence of any owner or for other good reason) consult on the proposal each of the other owners of flats as respects which votes are allocated, and

(b) count the votes cast by them.

2.9 Consultation where two or more persons own flat

For the purposes of rule 2.8, the requirement to consult each owner is satisfied as respects any flat which is owned by more than one person if one of those persons is consulted.

2.10 Notification of scheme decisions

A scheme decision must, as soon as practicable, be notified—

(a) if it was made at a meeting, to all the owners who were not present when the decision was made, by such person as may be nominated for the purpose by the persons who made the decision, or

(b) in any other case, to each of the other owners, by the owner who proposed that the decision be made.
2.11 Case where decision may be annulled by notice

Any owner (or owners) who did not vote in favour of a scheme decision to carry out, or authorise, maintenance to scheme property and who would be liable for not less than 75 per cent. of the scheme costs arising from that decision may, within the time mentioned in rule 2.12, annul that decision by sending a notice stating that the decision is annulled to each of the other owners.

2.12 Time limits for rule 2.11

The time within which a notice under rule 2.11 must be sent is—

(a) if the scheme decision was made at a meeting attended by the owner (or any of the owners) sending the notice, not later than 21 days after the date of that meeting, or

(b) in any other case, not later than 21 days after the date on which notification of the making of the decision was sent to the owner or owners (that date being, where notification was sent to owners on different dates, the date on which it was sent to the last of them).

RULE 3 – MATTERS ON WHICH SCHEME DECISIONS MAY BE MADE

3.1 Basic scheme decisions

The owners may make a scheme decision on any of the following matters—

(a) to carry out maintenance to scheme property,

(b) to arrange for an inspection of scheme property to determine whether or to what extent it is necessary to carry out maintenance to the property,

(c) except where a power conferred by a manager burden (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) is exercisable in relation to the tenement—

(i) to appoint on such terms as they may determine a person (who may be an owner or a firm) to manage the tenement,

(ii) to dismiss any manager,

(d) to delegate to a manager power to—

(i) decide that maintenance (costing no more than an amount specified by the owners) needs to be carried out to scheme property and to instruct it, and

(ii) arrange for an inspection as mentioned in paragraph (b),

(e) to arrange for the tenement a common policy of insurance complying with section 15 of this Act and against such other risks (if any) as the owners may determine and to determine on an equitable basis the liability of each owner to contribute to the premium,

(f) to determine that an owner is not required to pay a share (or some part of a share) of such scheme costs as may be specified by them,

(g) to authorise any maintenance of scheme property already carried out by an owner,

(h) to modify or revoke any scheme decision.
### 3.2 Scheme decisions relating to maintenance

If the owners decide under rule 3.1(a) to carry out maintenance to scheme property or if a manager decides, by virtue of a scheme decision under rule 3.1(d), that maintenance needs to be carried out to scheme property, the owners may make a scheme decision on any of the following matters—

(a) to appoint on such terms as they may determine a person (who may be an owner or a firm) to manage the carrying out of the maintenance,

(b) to instruct or arrange for the carrying out of the maintenance,

(c) subject to rule 3.3, to require each owner to deposit—

   (i) by such date as they may decide (being a date not less than 28 days after the requirement is made of that owner), and

   (ii) with such person as they may nominate for the purpose,

   a sum of money (being a sum not exceeding that owner’s apportioned share of a reasonable estimate of the cost of the maintenance),

(d) to take such other steps as are necessary to ensure that the maintenance is carried out to a satisfactory standard and completed in good time.

### 3.3 Scheme decisions under rule 3.2(c) requiring deposits exceeding certain amounts

A scheme decision under rule 3.2(c) requiring each owner to deposit a sum of money—

(a) exceeding £100, or

(b) of £100 or less where the aggregate of that sum taken together with any other sum or sums required in the preceding 12 months to be deposited by each owner by virtue any scheme decision under rule 3.2(c) exceeds £200,

shall be made by written notice to each owner and shall require the sum to be deposited into such account (the “maintenance account”) as the owners may nominate for the purpose.

### 3.4 Provision supplementary to rule 3.3

Where a scheme decision is made under rule 3.2(c) in accordance with rule 3.3—

(a) the owners may make a scheme decision authorising persons to operate the maintenance account on behalf of the owners,

(b) there must be contained in or attached to the notice to be given under rule 3.3 a note comprising a summary of the nature and extent of the maintenance to be carried out together with the following information—

   (i) the estimated cost of carrying out that maintenance,

   (ii) why the estimate is considered a reasonable estimate,

   (iii) how the sum required from the owner in question and the apportionment among the owners have been arrived at,

   (iv) what the apportioned shares of the other owners are,

   (v) the date on which the decision to carry out the maintenance was made and the names of those by whom it was made,
(vi) a timetable for the carrying out of the maintenance, including the dates by which it is proposed the maintenance will be commenced and completed,

(vii) the location and number of the maintenance account, and

(viii) the names and addresses of the persons who will be authorised to operate that account on behalf of the owners,

(c) the maintenance account to be nominated under rule 3.3 must be a bank or building society account which is interest bearing, and the authority of at least two persons or of a manager on whom has been conferred the right to give authority, must be required for any payment from it,

(d) if a modification or revocation under rule 3.1(h) affects the information contained in the notice or the note referred to in paragraph (b) above, the information must be sent again, modified accordingly, to the owners,

(e) an owner is entitled to inspect, at any reasonable time, any tender received in connection with the maintenance to be carried out,

(f) if—

   (i) the maintenance is not commenced by the fourteenth day after the proposed date for its commencement as specified in the notice by virtue of paragraph (b)(vi) above, and

   (ii) the owner demands, by written notice, from the persons authorised under paragraph (a) above repayment (with accrued interest) of such sum as has been deposited by that owner in compliance with the scheme decision under rule 3.2(c),

the owner is entitled to be repaid accordingly, except that no requirement to make repayment in compliance with a notice under sub-paragraph (ii) arises if the persons so authorised do not receive that notice before the maintenance is commenced,

(g) such sums as are held in the maintenance account by virtue of rule 3.3 are held in trust for all the depositors, for the purpose of being used by the persons authorised to make payments from the account as payment for the maintenance,

(h) any sums held in the maintenance account after all sums payable in respect of the maintenance carried out have been paid shall be shared among the owners—

   (i) by repaying each depositor, with any accrued interest and after deduction of that person’s apportioned share of the actual cost of the maintenance, the sum which the person deposited, or

   (ii) in such other way as the depositors agree in writing.

RULE 4 – SCHEME COSTS: LIABILITY AND APPORTIONMENT

4.1 Meaning of “scheme costs”

Except in so far as rule 5 applies, this rule provides for the apportionment of liability among the owners for any of the following costs—

(a) any costs arising from any maintenance or inspection of scheme property where the maintenance or inspection is in pursuance of, or authorised by, a scheme decision,
(b) any remuneration payable to a person appointed to manage the carrying out of maintenance by virtue of rule 3.2(a),

(c) running costs relating to any scheme property (other than costs incurred solely for the benefit of one flat),

(d) any costs recoverable by a local authority in respect of work relating to any scheme property carried out by them by virtue of any enactment,

(e) any remuneration payable to a person by virtue of rule 3.1(c)(i),

(f) the cost of any common insurance to cover the tenement arranged by virtue of rule 3.1(e),

(g) any other costs relating to the management of scheme property,

and a reference in this scheme to “scheme costs” is a reference to any of the costs mentioned in paragraphs (a) to (g).

4.2 Maintenance and running costs

If any scheme costs mentioned in rule 4.1(a) to (d) relate to—

(a) the scheme property mentioned in rule 1.2(a), then those costs are shared among the owners in the proportions in which the owners share ownership of that property,

(b) the scheme property mentioned in rule 1.2(b) or (c), then—

(i) in any case where the floor area of the largest (or larger) flat is more than one and a half times that of the smallest (or smaller) flat, each owner is liable to contribute towards those costs in the proportion which the floor area of that owner’s flat bears to the total floor area of all (or both) the flats,

(ii) in any other case, those costs are shared equally among the flats,

and each owner is liable accordingly.

4.3 Provision supplementary to rule 4.2

Where any part of a tenement is scheme property by virtue of both paragraphs (a) and (c) of rule 1.2—

(a) unless paragraph (b) applies, it is to be treated for the purposes of rule 4.2 as scheme property mentioned only in rule 1.2(a),

(b) where—

(i) the part in question is the roof over the close, and

(ii) that part is common property by virtue of section 3(1)(a) of this Act,

it is to be treated for the purposes of rule 4.2 as scheme property mentioned only in rule 1.2(c).

4.4 Remuneration of manager

Any scheme costs mentioned in rule 4.1(e) are shared equally among the flats, and each owner is liable accordingly.
4.5 Insurance premium

Any scheme costs mentioned in rule 4.1(f) are shared among the flats in such proportions as may be determined by the owners by virtue of rule 3.1(e), and each owner is liable accordingly.

4.6 Management costs

Any scheme costs mentioned in rule 4.1(g) are shared equally among the flats, and each owner is liable accordingly.

4.7 When liability arises

With the exceptions mentioned in rule 4.8, each owner is liable for any scheme costs from the date when the scheme decision to incur those costs is made, and for the purposes of this rule that date is—

(a) where the decision is made at a meeting attended by the owner, the date of the meeting, or

(b) in any other case, the date on which notification of the making of the decision is sent to the owner.

4.8 Exceptions to rule 4.7

The exceptions are that each owner is liable for—

(a) the cost of any emergency work from the date on which the work is instructed,

(b) any scheme costs mentioned in rule 4.1(d) from the date of any statutory notice requiring the carrying out of the work to which the costs relate,

(c) any accumulating scheme costs (such as the cost of an insurance premium) on a daily basis.

RULE 5 – SCHEME COSTS: SPECIAL CASES

5.1 Liability where two or more persons own flat

Where two or more persons own a flat—

(a) they are severally liable for the share of any scheme costs for which the owner of that flat is liable in accordance with rule 4, and

(b) as between themselves they are liable for that share in the proportions in which they own the flat.

5.2 Redistribution of share of costs

Where an owner is liable for a share of any scheme costs but—

(a) a scheme decision has been made under rule 3.1(f) determining that the share (or a portion of it) should not be paid by that owner, or

(b) the share cannot be recovered for some other reason such as that—

(i) the estate of that owner has been sequestrated, or

(ii) he cannot be contacted,
then that share must be paid by the other owners in accordance with rule 4 as if it were a scheme cost for which they are liable, but where paragraph (b) applies that owner is liable to each of those other owners for the amount paid by each of them.

5.3 **Liability for scheme costs where procedural irregularity**

If any owner is directly affected by a procedural irregularity in the making of a scheme decision and that owner—

(a) was not aware that any scheme costs relating to that decision were being incurred, or

(b) on becoming aware as mentioned in paragraph (a), immediately objected to the incurring of those costs,

that owner is not liable for any such costs (whether incurred before or after the date of objection), and, for the purposes of determining in accordance with rule 4 the share of those scheme costs due by each of the other owners, that owner is left out of account.

**RULE 6 – EMERGENCY WORK**

6.1 **Power to instruct or carry out**

Any owner may instruct or carry out emergency work.

6.2 **Liability for cost**

The owners are liable for the cost of any emergency work instructed or carried out under rule 6.1 as if the cost of that work were scheme costs mentioned in rule 4.1(a).

6.3 **Meaning of “emergency work”**

For the purposes of this rule, “emergency work” means work which, before a scheme decision can be obtained, requires to be carried out to scheme property—

(a) to prevent damage to any part of the tenement, or

(b) in the interests of health or safety.

**RULE 7 – ENFORCEMENT**

7.1 **Scheme binding on owners**

This scheme binds the owners.

7.2 **Scheme decision to be binding**

A scheme decision is binding on the owners and their successors as owners.

7.3 **Enforceability of scheme decisions**

Any obligation imposed by this scheme or arising from a scheme decision may be enforced by any owner.
7.4 Enforcement by third party

Any person authorised in writing for the purpose by the owner or owners concerned may—

(a) enforce an obligation such as is mentioned in rule 7.3 on behalf of one or more owners, and

(b) in doing so, may bring any claim or action in that person’s own name.

RULE 8 – GENERAL

8.1 Validity of scheme decisions

Any procedural irregularity in the making of a scheme decision does not affect the validity of that decision.

8.2 Giving of notice

Any notice which requires to be given to an owner under or in connection with this scheme may be given in writing by sending the notice to—

(a) the owner, or

(b) the owner’s agent.

8.3 Methods of “sending” for the purposes of rule 8.2

The reference in rule 8.2 to sending a notice is to its being—

(a) posted,

(b) delivered, or

(c) transmitted by electronic means.

8.4 Giving of notice to owner where owner’s name is not known

Where the name of an owner is not known, a notice shall be taken for the purposes of rule 8.2(a) to be sent to the owner if it is posted or delivered to the owner’s flat addressed to “The Owner” or using some other similar expression such as “The Proprietor”.

8.5 Day on which notice is to be taken to be given

For the purposes of this scheme—

(a) a notice posted shall be taken to be given on the day of posting, and

(b) a notice transmitted by electronic means shall be taken to be given on the day of transmission.
Tenements (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about the boundaries and pertinent of properties comprised in tenements and for the regulation of the rights and duties of the owners of properties comprised in tenements; to make minor amendments of the Title Conditions (Scotland) Act 2003 (asp 9); and for connected purposes.

Introduced by:  Ms Margaret Curran
On:  30 January 2004
Supported by:  Cathy Jamieson, Mrs Mary Mulligan
Bill type:  Executive Bill
EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Tenements (Scotland) Bill introduced in the Scottish Parliament on 30 January 2004:
   - Explanatory Notes;
   - a Financial Memorandum;
   - an Executive Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 19–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive 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.

BACKGROUND

4. The Bill forms the third and final part of the Executive’s current programme of property law reform and follows on from the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) and the Title Conditions (Scotland) Act 2003 (asp 9). Both these Acts are expected to be fully commenced on 28 November 2004.

5. Tenements form over a quarter of the housing stock in Scotland and come in all shapes and sizes. Most tenements are residential blocks, but office blocks also fall within the definition. So do large houses which have been divided into flats. This captures a much wider range of properties than is commonly imagined.

6. Common law rules governing the maintenance and management of tenements have developed since the 17th century, but these are not comprehensive nor without anomaly. The development of the law on real burdens, however, has helped to impose obligations on successive owners to adhere to a detailed regime for management and repair of a tenement. These burdens are drawn up to suit the particular circumstances of the tenement.

7. But not all title deeds are comprehensive and they do not always provide burdens to specify how the owners are to decide on matters of mutual interest. If title deeds make no provision on one matter, the common law will apply on that one matter. The common law acts as a background or default law and most tenements, particularly new tenements will have a detailed system of management provided by the title deeds to the property. The common law will only apply where there is a gap in the title deeds.

THE BILL

8. The Bill will largely implement the recommendations of the Scottish Law Commission Report on the Law of the Tenement (Scot Law No 162), published on 25 March 1998. The Bill is intended to produce greater clarity in the law on tenements. The existing common law rules which demarcate ownership within a tenement are restated. The common law doctrine of common interest is codified by a restatement of the law. A statutory right of access is provided for along with compulsory insurance.
9. The Bill introduces a statutory management scheme called the Tenement Management Scheme which will act as a default management scheme for all tenements in Scotland (this is set out in the schedule to the Bill). It will provide a structure for the maintenance and management of tenements if this is not provided for in the title deeds. Where the title deeds are silent on matters of decision making the Scheme will allow a majority of the owners in a tenement to make decisions by majority vote. The Tenement Management Scheme also introduces the new concept of scheme property. This sets out in statute the main parts of a tenement that are so fundamental to the building as a whole that they should be maintained in common. This will not, however, affect the ownership of the different parts of the building which remains unchanged. The Tenement Management Scheme also contains default provisions on emergency repairs and the apportionment of costs.

COMMENTARY ON SECTIONS

Boundaries and pertinents

Section 1 – Determination of boundaries and pertinents

10. Section 1 provides that where neither the title nor other legislation sets out the boundaries of a flat or another sector of a tenement or which parts of a tenement are pertinents of a sector then sections 2 and 3 will apply to determine the boundaries and pertinents of a sector of a tenement. These provisions will apply to all tenements, whether existing or new. One other enactment that will most commonly apply for these purpose is the Prescription and Limitation (Scotland) Act 1973.

11. “Tenement” is defined in section 23 and “flat” and “sector” are defined in section 25. A sector can be a flat or some other separate part of a tenement such as the close or the roofspace. The use of the term “sector” is a convenient way of describing the different areas which go to make up a tenement building.

12. Subsection (2) explains that the “title to the tenement” means any conveyance or reservation of property, or any title sheet comprised in the Land Register of Scotland which affects the tenement or any sector of the tenement. Paragraph (b) is included because under section 3 of the Land Registration (Scotland) Act 1979, title to registered property is vested by registration and not by the conveyance or other deeds that gave rise to the registration.

Section 2 – Tenement boundaries

13. Section 2 is concerned with the boundary features in tenements buildings and restates the common law rules of ownership of parts within a tenement. These rules will apply only where the title deeds to the property or any other enactment do not make different provision.

14. Subsection (1) describes the boundary between sectors as the middle of the structure which separates them. If a sector is not adjacent to another sector, it extends to and includes the solum or any structure which is the outer surface of the tenement building; or it extends to the boundary that separates the tenement from another building. “Solum” is defined in section 25 as the ground on which a building is erected.
15. Subsection (2) states that a structure which wholly or mainly serves one sector will be considered as belonging to that sector only. This means that, for example, the front door of a flat leading to the close is part of the flat and not of the close.

16. Subsections (3) and (4) restate the special rules of the common law in relation to the top and bottom flats in a tenement. The boundary of a top flat extends to include the roof over that flat (subsection (3)) while subsection (4) provides that the boundary of the bottom flat extends to and includes the solum under that flat. Subsection (5) sets out that the boundary of a close extends to and includes the roof over, and the solum under, the close. The “close” includes, under section 25, the passage, stairs and landings in a tenement where they provide common access to two or more flats.

17. Subsection (6) restates the common law rule that ownership of the airspace above the building goes with ownership of the solum. If a sector of the tenement includes the solum of the building, or a part of it, then that sector will also have within its boundaries the airspace above the building and that directly over the solum (or the part of the solum that is included in the sector). Where, under the titles, the solum is the common property of all of the owners in the tenement, the airspace is likewise common property.

18. Subsection (6) is qualified by subsection (7). If the roof of the building slopes, ownership of the triangle of airspace lying between the surface of a sloping roof and an imaginary horizontal plane passing through the highest point of the roof, goes with the ownership of the roof and not with the ownership of the solum. This is important where the top floor flat wishes to build a dormer window into the airspace. Where the title deeds provide that the roof is common property, then the triangle of airspace is also common property.

Section 3 – Pertinents

19. Section 3 deals with the pertinents to tenement buildings. These are the parts of the tenement building which are not within the boundaries of individual flats. The ownership of these parts of the building requires to be apportioned among the various flats. The rules in section 3 will only apply where provision for ownership is not made in the title deeds or in any other enactment.

20. Under subsections (1) and (2) the owners of all the flats which obtain access by way of a close or a lift (where the lift allows access to more than one flat) will have a right of common property in the close and lift. Both “close” and “lift” are defined in section 25(1). Subsection (5) explains that the rights of common property are held in equal shares.

21. Subsection (3) provides for the ownership of land adjoining the tenement building. It sets out that any land pertaining to a tenement building will be owned by the flat or flats nearest to that land or piece of land. This rule does not apply to a path, outside stair or other piece of land that acts as a means of access.

22. Subsection (4) deals with any other part of the tenement which is not provided for in subsections (1) to (3). Examples given are a path, outside stair, fire escape, rhone, pipe, flue, conduit, cable, tank or chimney stack.
23. Ownership of these residual parts is allocated according to a service test. Where a part of a tenement serves one flat, under subsection (4)(a), it will be a pertinent of that flat only. Where two or more flats are served by a part, a right of common property in that part will attach as a pertinent to those flats. The shares of common property amongst those owners whose flats are served by the pertinent will be equal, regardless of the extent of service.

24. Subsection (5) apportions rights of common property into equal shares, except in the case of a chimney stack. If a chimney stack is considered common property under the provisions of the Bill, then shares will be apportioned according to the ratio which the number of flues serving a flat bears to the total number of flues in the stack. “Chimney stack” is defined in section 25(1).

**Tenement Management Scheme**

*Section 4 – Application of the Tenement Management Scheme*

25. Section 4 deals with the application of the Tenement Management Scheme which is found in the schedule to the Bill. The Tenement Management Scheme contains 8 rules which provide a system of management and maintenance in tenements.

26. The rules of the Tenement Management Scheme will apply only where the tenement burdens, as defined in section 25(1), do not make provision in respect of the subject matter of the individual rules in the Scheme. Section 4 and the Scheme together provide a default management regime for tenemental property. Section 4 sets out how each of the rules in the Scheme are to apply.

27. Subsection (2) provides that the Scheme will not apply where the development management scheme (defined in section 25(1) as the scheme under section 71 of the Title Conditions (Scotland) Act 2003) has been applied to the tenement.

28. Under subsection (3) the provisions of rule 1 may, where it is relevant, be used to interpret other provisions of the Scheme.

29. Where the tenement burdens provide a procedure for making decisions and that procedure applies to all flats in the building, then the procedure in the title should be used for all purposes (under subsection (4)). In this case rule 2 would not apply at all. Where there is no procedure in the tenement burdens or the procedure does not apply to all the flats, then rule 2 of the Tenement Management Scheme will apply.

30. Under subsection (5), rule 3 of the Scheme, which deals with what may be covered by basic scheme decisions and decisions relating to maintenance, will apply where there is no alternative provision made by the tenement burdens.

31. If an owner or owners are not liable for the full amount (i.e. 100%) of scheme costs under the provisions in the title to the tenement, then rule 4 of the Scheme, which allocates liability and apportionment of costs, will apply under subsection (6). In considering whether the full amount of a scheme cost has been apportioned among the owners, account is also taken of any amount to be met by someone other than an owner.
32. Rule 5 of the Scheme deals with special cases in relation to scheme costs and subsection (7) provides that rule 5 will apply to supplement rule 4 where relevant. Similarly where any provision of the Scheme applies, rules 7 and 8, which deal with the enforcement of scheme decisions and general matters including notification requirements, will apply to supplement the provision (under subsection (9)). While the enforcement measures under rule 7 will always apply where a Scheme rule has been applied, the application of rules 5 and 8 is subject to any alternative provision in the tenement burdens under subsection (10).

33. Subsection (8) provides that the provisions in the Scheme for emergency work found in rule 6 will not apply where there is an alternative provision in the tenement burdens.

34. Rule 3.3 sets out specific monetary limits which, when exceeded, will require that written notice is made to each owner and that money is deposited into a maintenance account decided upon by the owners. These figures will need to be updated from time to time to take account of inflation, amongst other things. Subsection (11) accordingly gives the Scottish Ministers the power to substitute new sums by order made by statutory instrument (section 27).

Resolution of disputes

Section 5 – Application to sheriff for annulment of certain decisions

35. This section provides a means by which a decision made by the owners according to the procedures of the management scheme applying to the tenement can be challenged, other than where the development management scheme operates within a tenement.

36. Any owner who did not vote in favour of a decision has the right, under subsection (1), to make a summary application to the sheriff court for the annulment of that decision, whether the vote counted for his or her flat was in favour or not. Subsection (2) provides that the defender for the purposes of such an application is all the other owners.

37. Subsection (3) sets out the time limit for making an application. If an owner attended the meeting where the decision was made, then he or she must apply to the court within 28 days of that meeting. In any other case, owners must apply for annulment of the decision no later than 28 days after the notice informing them of the decision was sent to them. Section 25(3) explains that a document will be taken as “sent” on the day on which it is dispatched, by whatever means.

38. Subsection (3) should be read with subsection (9) which provides that decisions must not be implemented until it is known whether an application to the sheriff court is to be made, and if made, until the application has been disposed of or abandoned.

39. Section 5 applies both to decisions made in accordance with rule 2 of the Tenement Management Scheme and decisions made in accordance with the titles. Section 5(3)(b) effectively imports a requirement to give notice of a decision to all those who did not vote in favour. This is because notice is required to commence the 28 day challenge period during which a decision may not be implemented.
40. Subsection (4) deals with the powers of the sheriff, who may make an order annulling the decision, in whole or in part. A sheriff may make such an order if satisfied that the scheme decision was not in the best interests of all the owners, or that it was unfairly prejudicial to one or more of the owners.

41. Subsection (5) only applies in cases where the decision concerned relates to maintenance, improvements or alterations. When deciding whether to grant an order annulling such a decision, the sheriff must have regard to the age and condition of the property, the likely cost of any maintenance, improvements or alterations and the reasonableness of that cost. These circumstances (other than the reasonableness of the cost) are also found in section 8 which deals with the duty to maintain support and shelter.

42. When a sheriff has made an order annulling a decision, subsection (6) provides that the sheriff may make another consequential order if it is thought appropriate in the circumstances. For example in some cases (and despite subsection (9)), costs may be incurred before the application was disposed of by the sheriff. This subsection would enable the sheriff, where a decision has been annulled, to deal with the question of liability of the owners for costs already incurred in relation to that decision.

43. Under subsection (7) any party to an application made to the sheriff court under this section may appeal to the Court of Session on a point of law. This is based on section 106(5) of the Civic Government (Scotland) Act 1982. The appeal must be made within 14 days of the sheriff making an order under this section or an interlocutor dismissing the application. Subsection (8) provides that a decision of the Court of Session will be final. This is based on section 106(6) of the 1982 Act.

44. A decision cannot be implemented for a period of 28 days, under subsection (9), to allow an owner who did not vote in favour of a scheme decision to apply to the sheriff court for an annulment of the decision. If an application is made, the owners must not implement the decision until the court has dealt with the case and the 14 days allowed for appealing against the decision has passed and no appeal has been made (or the appeal has been dealt with by the court or the application has been abandoned).

45. There is, however, an exception to subsection (9). Subsection (10) excludes a decision that concerns work which has to be carried out urgently (see rule 6 of the Tenement Management Scheme).

Section 6 – Application to sheriff for order resolving certain disputes

46. This section gives the sheriff powers to make orders relating to the proper operation of the particular management scheme affecting a tenement or the provisions of the Bill. Subsection (1) provides that an owner may (by summary application) apply to the sheriff court for an order connected to any matter relating to the operation of the management scheme applying to a particular tenement, or any provision in the Bill as it applies in relation to the tenement.
47. Subsection (2) makes clear that, in tenements where the development management scheme has been adopted as the management scheme for a tenement, the manager of any owners’ association will be able to make an application under subsection (1).

48. Under subsection (3) the sheriff may grant the order sought or any other order as the sheriff may think necessary or expedient.

49. Subsection (4) explains that any party to a dispute may appeal to the Court of Session on a point of law. They must do so within fourteen days of the date of an order made under subsection (3) or; within 14 days of the date of an interlocutor dismissing an application. The decision of the Court of Session will be final under subsection (5).

Support and shelter

Section 7 – Abolition as respects tenements of common law rules of common interest

50. Section 7 abolishes the common law rules of common interest as they apply to tenements. This section should be read with sections 8 and 9 which restate the common law in statutory form.

51. Although the doctrine of common interest will no longer apply to tenements, it will still be applicable in any dispute involving a tenement building and any other building (whether a tenement or not) or any land not pertaining to the tenement.

Section 8 – Duty to maintain so as to provide support and shelter etc.

52. This section imposes a positive obligation on an owner of any part of a tenement building to maintain that part so as to ensure that it provides support and shelter (subsection (1)). The positive obligation is confined to the “tenement building” itself and does not extend to the solum or to any land which forms part of the tenement (see section 23)).

53. Subsection (2) makes clear that an owner will not be obliged to maintain a part of the building if it would not be reasonable where the building has ceased to be worth repairing. The circumstances to be taken into account include, in particular, the age of the building, its condition and the likely cost of any maintenance. These particular circumstances are also found in section 5, when a sheriff is considering an application for the annulment of a scheme decision.

54. Enforcement is dealt with in subsection (3). An owner can enforce the duty under subsection (1) if he or she is or would be directly affected by breach of the duty. Where a flat is owned in common, any of the owners may enforce this duty under section 24(4).

Section 9 – Prohibition on interference with support and shelter etc.

55. This section deals with the negative obligation to refrain from any alterations or work which might interfere with the support and shelter of the building. It also covers the rule of common interest relating to the right to light. Unlike section 8, this section applies to occupiers of flats (such as tenants) as well as to owners.
56. The prohibition imposed under this section applies to the whole tenement, including the surrounding ground (see the definition of “tenement” in section 23). This contrasts with section 8 which only applies to the tenement building.

57. Any owner who is or would be affected by breach of the prohibition may enforce the prohibition under subsection (2). An occupier, though bound by the prohibition, has no right to enforce. As with section 8, where a flat is owned in common any of the owners has the right to enforce under section 24(4).

Section 10 – Recovery of costs incurred by virtue of section 8

58. The duty to maintain support and shelter falls to the person who owns that part of the tenement. Where scheme property, as defined in rule 1.2 of the Tenement Management Scheme is owned solely by one owner, there is a danger that a scheme decision to carry out repairs could be blocked by the other owners in the knowledge that the same repair could be insisted upon under section 8. This section seeks to prevent this.

59. This section provides that the cost of a repair which is carried out under section 8 of this Bill could be recovered from the other owners as if the repair had been carried out as part of a management scheme decision. The costs recovered would be equal to the amount that the owners would be liable for under the management scheme.

Repairs: costs and access

Section 11 – Liability of owner and successors for certain costs

60. This section deals with the apportionment of liability for repair and other costs when a flat is sold. It makes it clear that an owner does not cease to be liable when he or she ceases to own a flat. Subsection (1) provides that an owner will remain liable for the “relevant costs”, which are defined in subsection (4), after the property has been sold. This restates in statutory form the principle of the existing law by which liability which has crystallised cannot be avoided by disposing of the property.

61. Subsection (2) deals with the liability of an incoming or “new” owner of a flat. A new owner is jointly and severally liable with the outgoing owner. If there are two or more new owners, both or all are bound.

62. Where the new owner pays any relevant costs, under subsection (3) they may recover the amount paid from the former owner, if the former owner is liable.

63. Subsection (4) defines “relevant costs” as the share of costs which the owner is liable for under the Tenement Management Scheme or under any other provisions in the Bill. Subsection (5) is a transitional provision, explaining that section 11 will apply in relation to any relevant costs that the owner becomes liable for on or after the day on which the section comes into force, which will be a day appointed by the Scottish Ministers (section 29(2)).
Section 12 – Prescriptive period for costs to which section 11 relates

64. Section 12 amends the Prescription and Limitation (Scotland) Act 1973. It provides that an obligation to pay costs under section 11 of the Bill will expire after five years as opposed to 20 years.

Section 13 – Common property: disapplication of common law right of recovery

65. This provision makes clear that where a management scheme is in place and provides for the maintenance of common property, the common law recovery of costs for necessary repairs by one owner against the other owners will no longer apply.

66. Without this section, an owner could carry out maintenance works to a piece of scheme property as defined in rule 1.2 of the Tenement Management Scheme and then recover the costs from the other owners, effectively by-passing the decision making procedures in the management scheme. The effect of this provision is that shared costs for the repair of common property cannot be achieved without shared decision making.

Section 14 – Access for maintenance purposes

67. Section 14 introduces a mutual right of access to parts of a tenement that are individually owned, provided that access is required for one of six reasons. When a flat is owned in common, any of the owners may exercise the right of access under section 24(4). In tenements governed by the development management scheme, subsection (2) provides that the right of access may also be exercised by the manager of the owners’ association. If necessary the right may be enforced under section 6 by application to the sheriff court.

68. Subsection (1) and subsection (5) qualify the right of access by reference to a reasonableness test. Subsection (1) sets out that reasonable notice has to be given to the owner or occupier of part of the tenement, when access to or through that part is required. An owner or an occupier may refuse to allow access or access at a particular time under subsection (5) if it is reasonable to refuse access at that time or if, in all the circumstances, it is reasonable to refuse access at any time.

69. Subsection (3) lists the reasons for which access may be granted. The list is exhaustive. Paragraphs (a) and (b) state that access may be granted for the carrying out of maintenance. This may be maintenance that is required as a result of the management scheme which applies to the tenement (paragraph (a)). Under paragraph (b) access may be required to carry out maintenance to any part of the tenement which is owned (wholly or in part) by the person requiring access.

70. Paragraph (c) allows access for an inspection to determine whether it is necessary to carry out maintenance, while paragraph (d) and (e) respectively state that access should be given where an owner is seeking to determine whether another owner is fulfilling their duty to maintain support and shelter or complying with the prohibition not to interfere with the support and shelter of the building.

71. If the floor area of part of the tenement has to be measured for the purposes of determining the liability of the owners, then paragraph (f) allows access.
72. In terms of subsection (4) where maintenance work is urgent and is required under the management scheme applicable, then reasonable notice need not be given under subsection (1).

73. Subsection (6) provides that the right of access may also be used by a manager or a person (for example, a tradesperson) who is authorised in writing by an owner or the manager of an owners’ association. This person is referred to as an “authorised person”. If an authorised person causes damage to any part of the tenement, under subsection (7), the owner or the owners’ association who gave the authorisation will be jointly and severally liable with the authorised person for any damage caused. The owner, or as the case may be, the owners’ association will however have a right of relief against the authorised person.

Insurance

Section 15 – Obligation of owner to insure

74. This section imposes an obligation on the owners of all flats within a tenement to insure their flats and any pertinents attached. Under section 28 there is an exception for the Crown. “Owner” is defined under section 24 to mean an owner of a flat or a heritable creditor in possession.

75. Subsection (1) imposes the basic obligation to insure and specifies that insurance should be for the reinstatement value.

76. If a common policy of insurance is required by a burden in the titles, then under subsection (2), the obligation to insure as imposed by subsection (1) will only be met if the building is insured by a common policy.

77. Subsection (3) defines the term “prescribed risks” as the risks against which owners are obliged to insure, to be prescribed by the Scottish Ministers in subordinate legislation. Section 27 contains the procedure for subordinate legislation.

78. Subsection (4) modifies the obligation to insure in certain circumstances. An owner will not be obliged to insure against a particular risk, if, due to the location of the tenement or other reason an owner, after reasonable efforts, is unable to obtain insurance against a particular risk or the cost of obtaining that insurance is unreasonably high.

79. Subsection (5) deals with enforcement. It gives individual owners (this includes pro indiviso owners where a flat is owned in common) the right to request from another owner in the tenement a copy of their insurance policy. Evidence of recent premium payments can also be requested. Owners have 14 days to produce the required documents. Subsection (6) provides that the duty to insure may be enforced by any other owner in the building.

Demolition and abandonment of tenement building

Section 16 – Demolition of tenement building not to affect ownership

80. This section provides that an owner will continue to own the airspace formerly occupied by their flat after it is demolished. “Demolition” is defined in section 25(1).
Section 17 – Cost of demolishing tenement building

81. This section explains how costs are to be apportioned when a tenement building is wholly or partially demolished. Subsection (1) provides a general rule of equality of contribution. This rule is concerned with the liability of owners amongst themselves and does not import liability in questions with third parties.

82. Subsection (2) qualifies the provisions in subsection (1) where the floor area of the largest flat in the tenement is more than one and a half times that of the smallest flat. In such instances the costs are apportioned according to floor area. Rules on the determination of the floor area are found in section 25(2).

83. Subsection (3) states when an owner becomes liable for their share of the cost of demolition. Where an owner agrees to the proposal that the building should be demolished, they become liable for costs from the date of the agreement. In any other case, owners are liable from the date the demolition is instructed. This is particularly important where a flat changes hands while the work is in progress.

84. The rules for apportioning the costs of demolition are adapted under subsection (4) for cases of partial demolition. Only owners of the flats in the part demolished are liable for the costs of demolition.

85. This section is concerned with the liability of owners among themselves. It does nothing to disturb the rule, under section 123 of the Housing (Scotland) Act 1987, that a local authority that has carried out the demolition may recover the cost from the owners in such proportions as the owners may agree or, failing agreement, as is determined by arbitration.

Section 18 – Use and disposal of site where tenement building demolished

86. This section provides for the use and disposal of the site where a tenement building has been completely demolished and the former flats were owned by different persons.

87. Subsection (2) restricts the use of the “site”, which is defined in subsection (7) as the solum of the tenement building that occupied the site and the airspace that is directly above the solum. It provides that building on or other development of the site is prohibited except where all the owners of the former flats agree or where all the owners are required to do so (by the title deeds or otherwise). Subsection (6) provides for enforcement of the prohibition by the owners of the other former flats.

88. Under subsection (2) owners are prohibited from developing the site except under two conditions. When these conditions are not in place, subsection (3) provides that any owner may require that the site be sold. Where a former flat is owned in common, any pro indiviso owner also has this right under section 24(5).

89. Subsections (4) and (5) deal with apportioning the proceeds of the sale of the site. Under subsection (4) the proceeds of the sale are shared equally among all the flats, subject to subsection (5). Under this subsection, where the floor area of the largest flat is more than one
and a half times that of the smallest flat, then the proceeds of the sale are shared in proportion to the floor area. The method for calculating the floor area is set out in section 25(2).

Section 19 – Effect of demolition and sale on certain undischarged securities

90. This section deals with cases where a tenement building has been demolished and the site has been sold but there remains an outstanding heritable security over one of the former flats.

91. Under subsection (1), on the sale of the site, the heritable security is deemed to be varied so as to secure a proportionate pro indiviso share of the site (instead of the flat which it formerly secured).

92. Subsection (3) states that the term “site” is to be defined according to section 18(7) while subsection (2) provides that the variation referred to in subsection (1) will take effect on the registration of the conveyance (or recording in the Register of Sasines).

Section 20 – Sale of abandoned tenement building

93. This section provides for the sale of derelict and abandoned buildings and the division of the proceeds.

94. Subsection (1) explains the circumstances where an owner can require that a tenement building should be sold. This is where the building, due to its poor condition, has not been occupied by any owner (or someone authorised by an owner) for a period of more than 6 months and it is unlikely that any owner or other person will return to occupy the building. “Owner” is defined under section 24 of the Bill and where the flat is owned in common any pro indiviso owner can exercise the right under section 24(4).

95. The sale proceeds are divided in the same way under subsection (2) as when a site is sold following demolition.

96. Subsection (3) makes it clear that the right to sell the tenement includes the solum of the building and the airspace above.

Liability for certain costs

Section 21 – Liability to non-owner for certain damage costs

97. In some cases a person may have to maintain parts of a tenement which they do not own. This is because, in the case of certain key parts of a tenement, owners are made liable for maintenance, not because they own the part (though they may do) but simply because they own a flat in the same tenement and hence take benefit from the part which is to be maintained. If that part is damaged, however, the owners in the tenement who are liable to pay for its maintenance, but who do not have ownership rights, may suffer loss as the cost of repairs are not recoverable by them under the general law.

98. Subsection (1) sets out that where scheme property is damaged as a result of the fault of any person (including another owner), then the owner of any flat who is bound to pay for the
These documents relate to the Tenements (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 30 January 2004

resulting maintenance, but who does not own the damaged part in question, will be treated as an owner of that part for the purposes of founding a claim against the person who caused the damage.

Miscellaneous and general

Section 22 – Amendments of Title Conditions (Scotland) Act 2003

99. This section amends the Title Conditions (Scotland) Act 2003.

100. Section 3(8) of that Act provides that a person other than “the” holder of a real burden may not waive compliance with it. The reference to “the” holder implies that a burden could only be waived, mitigated or varied by all of the persons entitled to enforce it. It should, however, be possible for a burden to be varied some of the persons entitled to enforce it and not just all the owners. Subsection (2) substitutes “a holder” for “the holder”.

101. Subsection (3) provides that section 10 of the 2003 Act which deals with affirmative burdens and the continuing liability of former owners will not apply where section 11 (the liability of owners and their successors) is applicable in tenement property.

102. Subsection (4) makes changes to section 29 of the 2003 Act, which deals with the power of the majority to instruct common maintenance. The changes will replicate the provisions of rule 3 of the Tenement Management Scheme. Parts of rule 3 provide procedures for the deposit and retention of monies. Similar procedures are found in section 29 of the Title Conditions (Scotland) Act. Subsection (4) provides that both procedures will be the same.

103. Subsection (5) disapplies sections 28, 29 and 31 of the Title Conditions (Scotland) Act 2003 (which relate to community burdens) in relation to a community consisting of one tenement. These sections deal with the power of a majority to appoint a manager, the power of the majority to instruct common maintenance and remuneration of the manager and are superseded by this Bill. If the community (i.e. a group of four or more properties all subject to the same or similar burdens which can be mutually enforced) consists of just one tenement, then this Bill will provide appropriate rules if the title deeds do not do so.

Section 23 – Meaning of “tenement”

104. Section 23 defines a “tenement” for the purposes of the Bill. Most tenement property is residential (though even in those cases there are very commonly shops on the ground floor), but the definition in the Bill includes commercial properties such as office blocks. Large houses which have been converted into flats, high rise blocks, “four in a block” and modern blocks of flats will also qualify as tenements, as well as the traditional sandstone or granite buildings of three or four storeys. A tenement is a building comprising two or more related flats which are owned or designed to be owned separately and which are divided horizontally. Generally a building will comprise a single building of related flats. The definition, however, caters for other possible circumstances.

105. A part of a building may be a separate tenement if it comprises related flats. Where, for instance, two semi-detached houses are part of the same building, then in the event that one
house were to be converted into flats, the definition should result in the converted house being a
 tenement without the whole building becoming a tenement. There may also be circumstances
 where two independent management regimes operate within the same building. In effect this
 means that there are two or more “tenements” rather than one within the same building. This
 may happen where, for example, there are two or three separate tenement stairs within the same
 building perhaps on a corner site. For this reason, subsection (1) makes reference to a “building
 or a part of a building”.

106. The physical features of a building are clearly relevant to deciding the question of
whether flats are “related”, but subsection (2) provides that regard should also be had to the
relevant title deeds and burdens contained therein.

Section 24 – Meaning of “owner”, determination of liability etc.

107. Section 24 defines the meaning of “owner” for the purposes of the Bill. The question of
exactly when people become the owner of a flat is important since they will acquire rights and
obligations at that point. This section brings the Bill into line with the definition in the Title
Conditions (Scotland) Act 2003.

108. In subsection (1) an owner is defined as someone who has a right to a flat, that is
someone who is entitled to take entry under a conveyance of the flat in question. It will not be
necessary for them to have completed their title by registering it in the property registers before
they can be considered owners. If more than one person comes within the description of an
owner, then for the purposes of the Bill the “owner” is the person who has most recently
acquired that right (to take entry under a conveyance).

109. At present heritable creditors are generally regarded as standing in the place of the owner
when they enter into the possession of security subjects. Subsection (2) extends the meaning of
“owner” to mean heritable creditors who have entered into lawful possession of a flat.

110. Subsection (3) provides that where two or more people own a flat the term “owner”
applies to both or all of them. This provision is qualified however by subsection (4). The
provisions listed confer rights on owners (as opposed to obligations) and the effect of this
subsection is that any pro-indiviso owner (part owner) is able to exercise these rights without
consulting his fellow owners.

111. Where two or more people own a flat, under subsection (5)(a) they are jointly and
severally liable for any costs. The other owners in the tenement have a right to sue any of them
for the full amount owed. When one co-owner pays a debt, there is a right of relief against the
other co-owner or co-owners. Paragraph (b) provides that in relation to each other co-owners
should be liable in the proportions in which they own the flat.

Section 25 – Interpretation

112. Subsection (1) explains certain terms used in the Bill. Only a small number of definitions
require explanation here:
• flat: it is made clear that a flat includes business and other premises, not merely residential units.

• sector: the term “sector” is used in the context of boundaries. In the definition of “sector”, the reference to “any other three-dimensional space not comprehended by a flat, close or lift” is intended to make clear that boundaries are an issue only where the units are in separate ownership. For example, a broom cupboard within a flat would not be a sector for the purposes of the Bill.

• tenement burden: this term means any real burden (within the meaning of the Title Conditions (Scotland) Act 2003) which affects the tenement or any sector of the tenement.

113. Subsection (2) explains how “floor area” is to be calculated. The “floor area” is the total floor area within the boundaries of a flat or flats. No account is to be taken of the pertinents or a balcony. A loft or a basement will also be excluded when it is used for storage. If they are used for another purpose then they should be taken into account.

114. Under subsection (3) a document shall be considered as sent from the day on which it was dispatched. The date on which the document was sent is important in relation to the time limits in section 5(3)(b) and in various rules contained in the Tenement Management Scheme.

Section 26 – Ancillary provision

115. This section allows the Scottish Ministers to make such ancillary orders as they consider necessary or expedient for the purposes of or in consequence of the Bill.

Section 27 – Orders

116. The Bill empowers the Scottish Ministers to make orders, exercisable by statutory instrument. This section makes procedural provision in relation to such orders. Section 27 generally provides for negative procedure except where primary legislation is being amended. This requires a resolution of the Parliament.

Section 28 – Crown application

117. With the exception of section 15, the provision for compulsory insurance of tenements, the provisions in the Bill will bind the Crown. The exception is necessary because in practice the Crown carries with it its own insurance risk and so should not be subject to a statutory obligation to take out insurance policies.

Schedule - Tenement Management Scheme

118. The Tenement Management Scheme provides for a system of management and maintenance in tenements. It applies to the extent provided for in section 4 of the Bill to all tenements in Scotland, old and new. It will not apply where the development management scheme under section 71 of the Title Conditions (Scotland) Act 2003 has been adopted.
119. The provisions of the Tenements Management Scheme will act as a background law where
the title deeds to tenements are silent. If, for example, the title deeds set out how decisions
should be taken or costs should be allocated, then those provisions will continue to operate and
will not be superseded by the rules contained in the Tenements Management Scheme.

120. The Tenements Management Scheme is, therefore, a simple scheme which provides the
basic requirements for the management and maintenance of a tenement where the titles fail to
provide appropriate rules.

121. The scheme consists of 8 rules which are outlined below.

Rule 1 – Scope and interpretation

122. Not every part of the tenement is to be managed under the Scheme. The whole basis of
the Scheme is the new concept of scheme property. This does not affect the ownership of a
tenement or its parts but sets out in statute the main parts of the tenement in which owners share
an interest. If a part of the tenement is not scheme property, then it will not be subject to the
maintenance regime in the Tenements Management Scheme.

123. Rule 1.2 sets out what is classified as scheme property. Rule 1.2(a) includes any part of a
tenement that is the common property of two or more owners and rule 1.2(b) includes any other
part of the tenement that is required by the title deeds to be maintained by two or more owners.
Certain other key parts of the tenement, listed in rule 1.2(c), are also scheme property whether
rules 1.2(a) or 1.2(b) apply or not. These are the ground on which the tenement is built, its
foundations, its external walls, its roof, the part of any gable wall that is part of the tenement
building and any other wall, beam or column which is load-bearing.

124. Certain parts of a tenement building which would otherwise fall within rule 1.2(c) are
excepted from that rule and will be scheme property only if they are covered by rule 1.2(a) or
(b). These are listed in rule 1.3 and include any extension which forms part of only one flat, any
door, window, skylight or vent or other opening and any chimney stack or flue.

125. Rule 1.4 provides a definition of a “scheme decision”. Rule 1.5 gives some other
definitions, including that of “maintenance”. Alteration or demolition is not included in the
definition nor is improvement, unless it is incidental to the maintenance. For example an
improvement which involves modernising an existing feature using up to date materials and
technology is more likely to be counted as “maintenance”.

Rule 2 – Procedure for making scheme decisions

126. Rule 2.1 stipulates that any decision to be made by the owners must be in accordance
with the provisions of rule 2. Such decisions will be “scheme decisions”. Section 4(4) of the
Bill provides, however, that if the title deeds contain procedures for the making of decisions by
the owners and the same procedures apply to each flat, then the title provision will prevail. A
decision made by the owners in accordance with the title provisions will also be a scheme
decision (rule 1.4 (b)).
127. Under rule 2.2 one vote is allocated to each flat and the right to vote can be exercised by the owner of that flat or somebody who is appointed by the owner. Under rule 2.3, no vote on a scheme decision relating to maintenance will be allocated to a flat if the owner of the flat is not liable for the cost of maintenance to that part of the tenement.

128. If two or more people own a flat, then the vote allocated to that flat can be exercised by any one of them under rule 2.4. If, however, the owners disagree on how the vote is to be cast, then no vote is accepted for that flat unless one of the owners owns more than a half share of the flat (in which case that owner will exercise the vote) or the vote is agreed among those owners who own more than a half share of the flat.

129. Unless the title deeds set out procedures for making decisions, a majority of owners will now be able to make scheme decisions, but these are restricted to those subjects listed in rule 3.1. Owners are free to make decisions on other matters, but agreement must be unanimous. Scheme decisions are to be reached by simple majority (rule 2.5). If the tenement has fewer than three flats, or if for any reason only the owners of three or fewer flats are entitled to vote (if, for example, only the owners of three flats share liability for a maintenance obligation), then under rule 2.6 decisions must be unanimous.

130. Under rule 2.7 all owners must give at least 48 hours notice before calling a meeting where scheme decisions are to be made. An owner may wish to propose that a scheme decision is made, but may not want to call a meeting. In this case the other owners have to be consulted about the proposal under rule 2.8, except where it is impractical to do so, for example where an owner is absent at the time that the proposal is made. Under rule 2.9, the requirement to consult each owner is satisfied if only one of the co-owners of a flat is consulted.

131. Rule 2.10 provides that owners must be informed of scheme decisions as soon as is practicable. If the decision was made at a meeting then notification must be notified to all owners who were not present when the decision was made, by a person nominated at the meeting to do so. In any other situation, notification must be given to each of the owners by the owner who proposed that the decision be made. It is safer to notify in writing and rule 8.3 explains ways in which written notices can be sent.

132. Once a scheme decision has been made it is binding on all the owners and if the flat changes hands it is binding on any incoming owner as well under rule 7.2. Section 5(9) prevents implementation of the decision for 28 days where an owner did not vote in favour of a decision, as they have the right to apply to the sheriff court to have the decision annulled.

133. Under rule 2.11 the scheme also contains some protection for an owner or owners who are liable for 75% (or more) of the costs arising from a decision made about maintenance under rule 3.1. Any owner or owners who did not vote in favour of a scheme decision to instruct maintenance where they would be responsible for 75% or more of the costs can annul that decision by notifying the other owners within certain time limits.

134. These time limits are set out in rule 2.12. If a decision that an owner wishes to annul has been made at a meeting then notification of the annulment of that decision must be sent within
21 days after the date of the meeting. In any other case notice of the annulment must be sent within 21 days of receiving notification of the relevant decision.

Rule 3 – Matters on which scheme decisions may be made

135. Rule 3.1 gives a list of the subjects on which scheme decisions can be made. Most scheme decisions are about maintenance and repairs and under rule 3.1(a) owners can decide to carry out maintenance to any part of scheme property. Owners are able to arrange for an inspection of scheme property to determine whether or to what extent maintenance is required (rule 3.1(b)). A scheme decision can be made to appoint a manager or factor (rule 3.1(c)) and to delegate to that manager the power to instruct maintenance up to a particular cost (rule 3.1(d)).

136. Under rule 3.1 decisions can also be made to arrange for a common insurance policy for the tenement, to authorise any maintenance of scheme property already carried out by an owner, to determine that an owner is not required to pay a share and to modify or revoke any scheme decision.

137. Rule 3.2 allows owners to make decisions to instruct or carry out maintenance or to appoint a manager to arrange for this. To allow for the fact that tradesmen may be unwilling to start work unless money has already been collected and deposited, each owner may be required to deposit money in advance by a date which the owners decide, subject to rule 3.3. This will be the owner's apportioned share of a reasonable estimate of the costs of the maintenance in accordance with rule 4.

138. Rule 3.3 deals with decisions made under rule 3.2(c) which require owners to deposit a sum of money. The two tier arrangement found in rule 3.3 will allow owners to hand over small sums of money without the safeguards applying. If the sum of money required to be deposited is less than £100, then the safeguards found in rule 3.4 will not apply. If, however, the money required together with any other sums of money handed over as a result of maintenance decisions in the preceding 12 months totals £200 or more, the safeguards will come into play.

139. Rule 3.4 deals with procedures where scheme decisions made under rule 3.2(c) require the deposit of sums exceeding the limits in rule 3.3. It deals with the collection and deposit of funds, which must be paid into a “maintenance account”. The owners can authorise others to operate the maintenance account on their behalf. This rule is supplementary to the provisions of rule 3.3. It provides safeguards for owners who may be required to hand over considerable amounts of money as a result of a single decision or a number of decisions made by the owners over a 12 month period.

Rule 4 – Scheme costs: liability and apportionment

140. Rule 4 explains who is to pay for costs incurred as a result of scheme decisions. These costs are called “scheme costs” and rule 4.1 lists the type of cost which would fall into this category.

141. Rules 4.2 and 4.3 set out liability for the maintenance of and running costs related to scheme property. Liability for maintenance costs depends on the ownership of the part of the tenement that is having work carried out to it. If part of a tenement is classified as scheme
property because it is the common property of two or more owners, then the maintenance costs are shared among those owners in proportion to their ownership in the property (rule 4.2(a) and rule 4.3(a)).

142. The cost of maintaining other scheme property is shared equally among the owners of all the other flats, except where the floor area of the largest flat is more than one and a half times the size of that of the smallest flat. Then the costs are allocated according to the floor area (rule 4.2(b)).

143. Rule 4.3 provides for the situation where the scheme costs relate to scheme property which falls within both rule 1.2(a) and rule 1.2(c). Any of the items listed in rule 1.2(c) might also be common property under rule 1.2(a). As it would not otherwise be clear whether rule 4.2(a) or (b) should apply in that case, rule 4.3 provides that 4.2(a) should be applied in preference to rule 4.2(b) except in the case of the roof over the close.

144. Rule 4.4 provides that scheme costs relating to the management of the tenement including those due to any property manager are shared among the owners equally.

145. Under rule 3.1(e) owners may make a scheme decision to arrange a common policy of insurance for the tenement. Rule 4.5 provides that the liability of owners will be determined according to rule 3.1(e): owners may decide on an equitable basis the contribution of each owner to the insurance premium.

146. Rule 4.6 makes it clear that any other costs relating to the management of scheme property are to be shared equally among the flats and owners are liable accordingly. Rule 4.7 explains the date on which an owner becomes liable for a particular scheme cost. Liability arises for scheme costs from the date on which the scheme decision to incur those costs was made. If a scheme decision was made at a meeting and an owner was present, they are then liable from that date. If an owner does not attend the meeting where the scheme decision is made, or there is no meeting, then the owner is liable for costs from the date the notification of the decision made, was sent. A document is considered as sent under section 25(3) on the day it was dispatched.

147. There are, however, exceptions to rule 4.7 in rule 4.8. An owner is liable for any emergency work from the date on which it is instructed. Where costs have been incurred due to the carrying out of work as a result of a statutory notice under rule 4.1(d), then liability arises on the date of the notice. Liability for any accumulating costs, for example the payment of an insurance premium, will occur on a daily basis.

**Rule 5 – Scheme costs: special cases**

148. Rule 5 sets out three special rules about the payment of scheme costs.

149. Rule 5.1 explains that where two or more people own a flat, any one of them can be made to pay all the scheme costs due for that flat. If one owner paid all the costs owed by the flat then they would be entitled recover a share from the other owner or owners. Between themselves they are liable in the proportions in which they own the flat.
150. Rule 5.2 deals with the situation where an owner is unable to pay their share of the costs perhaps because he or she is bankrupt or cannot be contacted or where a scheme decision has been made under rule 3.1(f) that the owner should be exempted from payment. In such cases, the relevant share must be paid by the other owners as if it was a scheme cost for which they are liable under rule 4. If the share cannot be recovered because the owner is bankrupt or cannot be contacted, then that owner remains liable to all the other owners for the amount paid by each of them.

151. Rule 5.3 exempts an owner who, as a result of a procedural irregularity, did not know that expenditure was being incurred or immediately objected to the expenditure when they did become aware. For example, they may not have been notified of the original scheme decision under rule 2.11.

Rule 6 – Emergency work

152. This rule allows an owner to instruct or carry out work without a scheme decision where it is an emergency, and where, as a consequence, there is no time to consult the other owners. Rule 6.1 allows any owner to instruct or carry out emergency work and rule 6.2 provides that the work is to be paid for as if a scheme decision had been taken under rule 4.1(a).

153. Under rule 6.3, emergency work is defined as work which has to be carried out to scheme property to prevent damage to any part of the tenement or in the interests of health and safety and has to be carried out before a scheme decision can be made.

Rule 7 – Enforcement

154. Rules 7.1 to 7.4 provide for the enforcement of the provisions of the scheme. Scheme decisions are binding on the owners and their successors as owners and any obligation arising from the scheme or as a result of a scheme decision may be enforceable by any owner. Owners may also authorise a third party to enforce an obligation on that owner’s behalf and the third party may bring an action in their own name.

Rule 8 – General

155. Under rule 8.1 a procedural mistake will not make a scheme decision invalid. This will not excuse a failure to achieve a majority as required by rule 2.5.

156. The ways in which notice may be given to an owner are set out in rules 8.2 to 8.4 and provision for determining the date of giving notice, where it is posted or sent electronically, is set out in rule 8.5. These are consistent with the corresponding provisions in the Title Conditions (Scotland) Act 2003.
FINANCIAL MEMORANDUM

INTRODUCTION

157. The Bill is essentially a law reform measure which relates to the private regulation of owner-occupied tenements. The present law affecting tenements takes one of two forms: either the conditions of management and maintenance are set out in the title deeds, or, where the title deeds are silent, a default common law has been developed by the courts to take their place. The Bill is mainly concerned with the common law since the existing law is thought to be unfair and unsatisfactory in a number of respects.

158. Financial obligations may arise as a result of the title provisions affecting tenement property, but these are a matter of private arrangement for the management and maintenance of that property – they do not arise as a result of this Bill, except in one specific area – insurance. The Bill does not prescribe how tenements are to be regulated – it provides a modern and simplified framework of rules which will replace the existing common law rules and which will apply if title deeds do not contain the rudiments necessary for the efficient management and maintenance of individual buildings. But these rules can be supplemented and replaced by owners and developers. The Bill enshrines the principle of free variation under which title deeds – which have been agreed by parties contracting freely with each other – take precedence over the common law.

159. The Bill has two main objectives. The first is to clarify and re-state the common law rules which demarcate ownership of the common parts within a tenement. This will remove a number of uncertainties and anomalies in the existing law. The second objective is to provide a statutory system of management for tenements. The overall effect will be that every tenement will have a management scheme and hence a mechanism for ensuring that repairs are carried out and that decisions are reached on other matters of mutual interest and concern. This should lead to more efficient and cost effective management of tenements. The reform is intended to facilitate repair work and it is hoped that it will lead to many outstanding necessary repairs being carried out.

160. But the Bill does not itself oblige owners to undertake repair work. It merely puts in place a framework under which a majority of owners will be able to take decisions on having repairs carried out. The minority will be obliged to pay their share (though they will have a right of appeal – see below). This arrangement will replace the old common law rule that all owners have to agree before works can be carried out – this very often meant that one recalcitrant owner could frustrate badly needed repairs. The Bill thus supports the view of the Housing Improvement Task Force that the responsibility for the upkeep of houses in the private sector lies first and foremost with their owners and that there is a need for greater awareness and acceptance by owners of this responsibility.

161. The Bill will largely act to remove anomalies from the existing law. Most tenements will continue to be subject to the management arrangements which are set out in the relevant title deeds. In cases where the title deeds are silent in this regard, or where the apportionment of the cost of maintaining the common parts of the tenement does not amount to 100%, the provisions of the Tenement Management Scheme in the Bill will apply unless the developer or owners have
chosen to adopt the development management scheme provided for in the Title Conditions (Scotland) Act 2003 (though this is intended for larger, more complex developments). The Tenement Management Scheme will only apply to the extent that title deeds are silent. It is intended to fill in gaps in titles, particularly in the case of older tenement properties where title provision may be less comprehensive compared with modern developments where quite sophisticated conditions may be imposed.

COSTS ON THE SCOTTISH ADMINISTRATION

Judicial salaries and court service costs

162. The Bill contains two provisions, sections 5 and 6, allowing summary applications to the sheriff court. Section 5 gives a minority which has been outvoted by a majority of the owners within a tenement the right to apply to the sheriff to reverse a decision to go ahead with work on the tenement. This provision is there as a protection for the minority who may not think that works are necessary. Before granting an application the Sheriff will have to be satisfied that the majority decision is not in the best interests of all the owners or that it is unfairly prejudicial to one or more of the owners. These are quite high tests, and this provision may not be used much.

163. Section 6 allows an owner to seek an order from the sheriff on a wider range of disputes which may arise in a tenement. The Executive believes that the small number of tenement disputes which reach the sheriff court at present are not likely to increase in future under section 6 of the Bill. It is not believed that the new provision will lead to many new actions which would not have arisen under the existing law. If there are any more additional actions arising under sections 5 and 6, we do not believe that there will be more than 50 new cases per annum. The cost of these additional actions to the Executive would be in the region of £20,000 per annum, made up of £15,000 for judicial salaries and £5000 for Scottish Court Service running costs. This cost is capable of being absorbed within existing resources.

Legal aid

164. Legal aid will be available to both applicants and those seeking to oppose applications under sections 5 and 6 in the Bill, providing the individuals meet the requisite criteria. Since the Executive does not believe there will be any more than 50 additional actions in the Sheriff Court involving tenement disputes under the Bill (and only some of these will be legally aided), its effect on the legal aid fund is likely to be minimal. This is perhaps likely to be about £60,000 per annum, assuming about 10% of cases attract civil legal aid, advice and assistance under the legal aid scheme is also sought, and on average 1 case reaches the Court of Session each year. This can be absorbed within existing resources.

COSTS ON LOCAL AUTHORITIES

165. Local authorities have significant holdings in tenement properties throughout Scotland and they will benefit from the clarification of the law in the same way as other flat owners. In particular local authorities will benefit from the policy in the Bill that majority voting among owners in tenements will become the norm so that many outstanding repairs will be able to proceed and will not in future be frustrated by the common law rule that all owners must consent before work can be carried out. Where local authorities own only a minority of flats within a
tenement, if they wish to carry out repairs they will be obliged to consult the other owners of the building in order to assemble a majority in favour of carrying out the work.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

166. The Bill is largely a codification and clarification of the existing common law. It will therefore benefit businesses which own flats in residential property or offices in commercial properties which fall within the definition of a “tenement” in the same way that it will benefit all other owners and potential owners by making the law clearer, simpler and more accessible.

167. The Bill therefore provides automatic assistance to tenement owners including businesses: there are no regulatory hoops through which they must jump first. Like the Title Conditions Act, the Bill relates to the private regulation of land between individuals and bodies who are contracting freely with each other. It provides default rules where the title deeds of a particular tenement are silent, since there is a public policy interest in removing any legal impediment to having maintenance and repairs carried out. Developers and owners will continue to have the right (a) to adopt whatever management scheme suits both them and the needs of their tenement and (b) to use the provisions of the Title Conditions (Scotland) Act 2003 to change existing title provisions if they are inadequate or difficult to operate.

168. Section 15 of the Bill obliges owners of tenement flats to insure their property against a list of risks to be prescribed by Scottish Ministers for the reinstatement value of the flat. There is a public policy interest in ensuring that all tenement flats are insured, since an owner is only adequately insured if his neighbours are also adequately insured. It is thought that roughly 10% of flats are uninsured in Scotland at present. There will therefore be an additional cost for those bodies, individuals and businesses that are not insured at present, or have only insured their properties for market, rather than reinstatement, value. The extent of the additional cost will depend on the type and location of the property. Insurance is likely to be more expensive in a city than in town and in an urban rather than a rural location. For Edinburgh city centre, building insurance for a reinstatement sum of £100,000 is likely to cost in the region of £140 to £190 per annum for an all risks policy. A discount is usually allowable if contents are also insured. A no claims bonus system may also operate though the bonus would be unlikely to be as generous as with car insurance. Most insurers allow customers to pay in instalments if they wish, though there may be a surcharge for this facility. If the sum insured is significantly less than £100,000, a minimum premium may apply. Not all insurers calculate their premiums on a sum insured – some use the number of bedrooms as the rating factor. It will be open to owners to decide to have a common insurance policy for the whole of their tenement and this may reduce the cost per flat.
These documents relate to the Tenements (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 30 January 2004

SUMMARY OF COSTS

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
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<tbody>
<tr>
<td>Judicial salaries</td>
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<tr>
<td>Scottish Court Service</td>
<td>£5000 per annum</td>
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<tr>
<td>Legal aid</td>
<td>£60,000 per annum</td>
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<tr>
<td>Insurance</td>
<td>Up to £190 per annum to insure a reinstatement sum of £100,000</td>
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</tbody>
</table>

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

169. On 30 January 2004, the Minister for Communities (Ms Margaret Curran) made the following statement:

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

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

170. On 29 January 2004, the Presiding Officer (George Reid) made the following statement:

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

1. This document relates to the Tenements (Scotland) Bill introduced in the Scottish Parliament on 30 January 2004. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 19–EN.

POLICY OBJECTIVES OF THE BILL

2. The Bill has two main objectives. The first is to clarify and re-state the common law rules which demarcate ownership of the various parts of a tenement. This will remove a number of uncertainties and anomalies in the existing law. The second objective is to provide a statutory system of management for tenements. The overall effect will be that every tenement will have a management scheme and hence a mechanism for ensuring that repairs are carried out and that decisions are reached on other matters of mutual interest and concern. The reform is intended to facilitate repair work and it is hoped that it will lead to many outstanding necessary repairs being carried out.

3. Tenements have existed in Scotland since medieval times and they now form over a quarter of the housing stock. Most tenement property is residential (though even in those cases there are very commonly shops on the ground floor), but the definition in the Bill includes commercial properties such as office blocks. Large houses which have been converted into flats, high rise blocks, “four in a block” and modern blocks of flats will also qualify as tenements, as well as the traditional sandstone or granite buildings of three or four storeys. A definition of tenement is given in section 23 of the Bill. The Executive has refined this definition in the light of points made during the consultation process.

4. Many countries have special legislation codifying the law relating to flatted property. Scotland does not. This is almost wholly due to the increasing use of title conditions called “real burdens” from around the end of the 18th century. These have been used to impose obligations on successive owners of tenement flats. They bind owners under bespoke arrangements for the management and repair of individual tenements. The respective shares of the cost of repair work to the various parts of the building are usually set out. Rules may be provided on how the property is to be managed and how owners are to reach decisions on carrying out repairs and maintenance of the common parts of the tenement. (Individual owners are of course solely responsible for the upkeep of their own flats). Burdens are drawn up to reflect the circumstances
of a particular building. Very many tenements in Scotland (and particularly the more modern ones) thus already have adequate, workable management schemes which allow for the proper maintenance and management of the building.

5. But some deeds do not make adequate provision for the management and maintenance of the tenement: in particular they may not specify how owners are to decide on matters of mutual interest. The aim of the Bill is to make provision for those tenements which do not have management schemes in place or where the arrangements are incomplete or inadequate. These tend to be older properties, particularly those built before the First World War. If title deeds do not make provision on a matter, then the common law applies on that one matter. The common law is based on rules governing the ownership and maintenance of tenements which were developed in the 17th century and which have been supplemented by case law over the intervening period. It is not, however, comprehensive or without anomaly.

6. For example, it is relatively common for burdens to oblige all owners to contribute to the cost of a common repair, but for there to be no provision in the deeds as to how the owners are to decide to carry out a common repair. In such a case, the common law would apply and this requires that all of the owners must agree before the repair can be carried out. If all the owners agree, the burdens would then apply and the owners would have to pay whatever share was allocated to their flat in the burdens. The common law is therefore a default law which applies only where there is a gap in the title deeds.

7. The unanimity rule described above is one of the main deficiencies in the common law since it is very often impossible to obtain the consent of all owners and this makes it very difficult to carry out repairs.

Scottish Law Commission Reports

8. The Bill is based on the draft Bill produced by the Scottish Law Commission (“the Commission”) and published with its *Report on the Law of the Tenement* (Scot Law Com No 162) in March 1998. This work was followed by the Commission’s *Report on Abolition of the Feudal System* (Scot Law Com No 168), which was implemented by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5), and its *Report on Real Burdens* (Scot Law Com No 181), which led to the Title Conditions (Scotland) Act 2003 (asp 9) (“the Title Conditions Act”). These two pieces of legislation are very closely related and they will be fully commenced together on the “appointed day” which is to be 28 November 2004. It is hoped that the Bill, if enacted, will also be commenced on that day so that its provisions, and those in the Title Conditions Act which will have a particular effect in relation to tenements, will all come into force at the same time.

9. The Bill is therefore the third and final stage of the property law reforms which have been recommended by the Commission and taken forward by the Executive. The reason it is being dealt with last (although it was the first report to be produced by the Commission) is that it was logical to begin the reforms of property law with the abolition of the feudal system and the creation in its place of a system of ordinary ownership. This reform changed the basic system of land tenure for the vast majority of properties in Scotland. The Title Conditions Act puts in place a framework of rules for the imposition of conditions on land in the system of simple
ownership following feudal abolition. As explained above, the management of tenements is usually governed by rules and conditions set out as rights and real burdens in the relevant title deeds. The modernisation and simplification of the law on real burdens will rationalise the application and enforcement of burdens on all property, including tenements. It was therefore more appropriate to deal with the specific reform of the law of the tenement after these more wide-ranging and fundamental changes had been made to Scots property law.

10. The Commission updated the Bill at the request of the Executive to take account of its subsequent work on feudal abolition and the reform of real burdens.

11. The Explanatory Notes which accompany the Bill explain the effect in detail of each section in the Bill and the Tenement Management Scheme which is contained in the schedule to the Bill. The Commission’s *Report on the Law of the Tenement* also gives a very thorough explanation of the reasoning behind these provisions. The Executive’s Consultation Paper on the draft Bill contains a summary of its contents. There has been little disagreement with the main principles of the Bill, but a number of detailed provisions have been altered in the light of consultation responses. These are described in the relevant sections of this Memorandum.

**Housing Improvement Task Force**

12. In December 2000, the Executive appointed a Housing Improvement Task Force with a remit “to consider issues relating to housing quality in the private sector and the house buying and selling process”. The Task Force had the opportunity to consider the proposed reforms of the law of the tenement and was broadly supportive of them. The Executive’s Consultation Paper on the draft Bill referred in a number of places to concerns and recommendations of the Task Force in so far as these related to the Bill and the Paper sought comments on these. In its more general consideration of common repairs and maintenance, the Task Force made various other recommendations which may be taken forward in a subsequent Private Sector Housing Bill.

**UNDERLYING PRINCIPLES OF THE BILL**

**Free variation**

13. This is the short-hand term for the principle that the title deeds of individual tenements will still override the new statutory law in the way that they took precedence over the old common law. The Bill provides that, if the title deeds make provision as to who owns a part of an existing tenement or who pays for its maintenance or how a decision is to be reached by the owners, that will remain the case. In the future, developers who are drawing up new title deeds will be able to vary from the new law. The new law will be a default law – it will only take effect if the title deeds do not make other arrangements, or if they are defective.

**Alternative approach**

14. Some commentators have argued (because some existing title deeds are defective) that all title deeds should be abolished and that it should not be possible to have variations in the title deeds of future tenements. The Executive does not agree with this. There is a large variety of tenement buildings – traditional 8 or 10 in a block, large office developments, large houses
which have been divided, etc. It would not be practicable to have one type of arrangement for all tenements. The Commission strongly believed that the best titles are those which are drafted specifically for particular tenements and take into account their particular circumstances. Most title deeds work perfectly well, and some are highly elaborate (for instance in sheltered housing developments). It does not seem sensible to sweep them away and replace them with a basic “one size fits all” provision. The Title Conditions Act makes it easier for owners to alter – and therefore remove defects in – existing title deeds.

15. Three-quarters of the consultees agreed that there should be free variation of title deeds. Of the rest, only 3 disagreed outright.

Management of a tenement

16. The objective here is that all tenements should have a management scheme under which the owners will be able to take decisions. The Bill sets out a default management scheme called the Tenement Management Scheme (TMS). The TMS ensures that every tenement in Scotland – existing and built in the future - will have proper rules for maintenance and management. The rules in setting out procedures for effective decision making and effective apportionment of costs, and some useful ancillary matters, provide a minimum standard which is not low. If existing tenements have defective title deeds or if their title deeds are silent on a particular matter, the rules of the TMS will be applied to them. Thus if the title deeds say how expenditure is to be apportioned, but the shares do not add up to 100%, the new law will supersede what is in the title deeds, but if the title deeds make proper provision for the allocation of costs, they will prevail. For the future, developers will either have to make their own rules or the rules in the TMS will apply. As a result of the Bill a management and maintenance regime will be mandatory for all tenements.

17. The TMS is set out in the form of rules on:
   • what “scheme property” consists of;
   • what the owners can decide;
   • the procedure for voting;
   • how costs are to be apportioned;
   • what “maintenance” means;
   • how a manager can be appointed; and
   • how owners can act in an emergency.

18. The provisions in the TMS will only apply where the title deeds do not make provision on the matters it covers. One major change is that if the title deeds do not make any provision on decision making by owners, a majority of owners will be able to take decisions. This changes the common law, where unanimity is necessary.

19. The principle of “scheme property” is an innovation proposed by the Scottish Law Commission. They believed that there are some parts of the tenement which are so vital that they should be the responsibility of all owners as far as maintenance is concerned. Under the
common law, ownership and the responsibility for maintenance go together: if you own a part of the tenement, it is up to you to maintain it. The Bill does not generally redistribute ownership. But it does introduce a change in the responsibility for maintenance. The underlying principle is that (unless the title deeds provide otherwise) there are some parts of a tenement which are so important to the structure of the tenement that they should be treated in a special way. The main structure of a tenement – for instance the walls and roof – is to be treated as “scheme property”. Although the ownership of these parts will not change, responsibility for their maintenance will be separated from ownership, and will (unless the title deeds provide otherwise) be the responsibility of all the owners. The parts of the tenement which are to be “scheme property” are set out in rule 1.2 of the TMS. The Executive believes that this proposal makes good sense, and it was overwhelmingly supported in consultation. Nonetheless, there will be some losers if it becomes law, because it changes the common law that with ownership comes the responsibility to maintain and to pay for maintenance. For example, in blocks where there is no provision in the titles for ownership or maintenance of the roof, the position now is that the owner of the top flat would have to pay for a repair. In future all the owners would have to contribute equally. That may not be popular with all parties, but the Executive believes that it is justifiable on public interest grounds.

**Responsibilities of owners**

20. The other main principle of the Bill is that owners should be responsible for the upkeep of their own property. This was endorsed by the Housing Improvement Task Force which took the view that the primary responsibility for maintaining and improving the condition of private sector housing rests with the owners. But many owners do not know what their responsibilities are in relation to their property. There is undoubtedly a need for greater information for home owners in relation to management and maintenance obligations. The Executive will be undertaking a programme of publicity and information about all of the property law reforms. This will include a simple explanation of the Bill.

21. But this can only be part of the answer to the problem. No guidance, no matter how comprehensive, can tell owners what specific obligations apply to them in relation to their own property. Such information can only be found in the title deeds pertaining to their property. The provisions of the title deeds should be explained to prospective purchasers by their solicitor, so that they are aware of the obligations which will become incumbent upon them if they buy a property. The Executive intends to discuss with the Law Society of Scotland how solicitors can be encouraged to explain this clearly to purchasers.

**BOUNDARIES AND PERTINENTS: SECTIONS 1 – 3**

22. These sections are about who owns the separate parts of a tenement. They are not about who maintains it. But it may be worth repeating the general principle set out above, which is that the Bill will provide that the vital parts of the tenement - but only the vital parts – will be maintained by all the owners, unless the title deeds specify otherwise.

**Boundaries**

23. Section 1 of the Bill provides that the restated common law rules of ownership within a tenement, now expressed in statutory form, would apply to both existing and new tenements
This document relates to the Tenements (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 30 January 2004

except to the extent that the title deeds of the tenement or any enactment make different provision. This will clear up doubts and uncertainties in the existing law. Sections 2 and 3 of the Bill provide the detailed background law as to ownership of parts of a tenement. For example, if the titles are silent about who owns the roof, section 2(3) applies, with the effect that the roof is part of the top flat.

24. The overall effect of the rules will be that a flat will be a section of airspace bounded by 4 walls, a ceiling and a floor. The boundary features will generally be owned to the mid-point, but where they form the outer surface of the building (as with external walls or the roof) the entire feature will be counted as part of the unit.

25. The proposed rules relating to the boundaries within the tenement are set out in section 2 of the Bill. The rules will apply only where the title deeds are silent.

Alternative approach

26. The main issue here is the ownership of the roof. Some commentators believe that it should be shared. But owners of existing top flats may have bought in the expectation that they could expand into the roofspace. To change ownership might lead to claims for compensation. In any case the difficulties over the roof are not about ownership, but rather about repair. The introduction of the notion of "scheme property" (see above and paragraphs 42 – 43 above) should solve this problem.

27. Almost all consultees agreed with the general propositions on the boundaries of ownership within a tenement.

Common parts

28. As explained above, individual flats will continue to be owned and maintained by their owners. But there are also common parts of a tenement. Under the Bill, ownership of the common parts will be as follows (where the titles make no specific provision):

- the close, stair and a lift if there is one will be owned by all flats that have access to them;
- that leaves other common parts of the tenement such as the pipes, rhones, fire escape etc. The Bill allocates ownership of them. The general basis for attributing ownership of these common parts will be service or benefit. So the ownership of any of these parts (often called pertinents) would depend on which flats it served.

Maintenance of common parts

29. Common property will always be treated as scheme property. Where the title to a tenement does not provide or makes inadequate provision for the maintenance of common property then responsibility for meeting the cost of maintenance will lie with the owners of the property in question. The costs will be shared equally between those flats which are served by the pertinent. This means that where the title is silent as to maintenance, liability for repair of, for example, the close will fall to the owners of the flats that take access from the close. The
owners of main door flats will not in this case be liable. This is the position under the common law.

Alternative approaches

30. In the original version of the Bill, the default position was that owners would only own a share in a part of a pertinent in proportion to their use of it. If the titles were silent on maintenance costs then liability would go with ownership. The result is complex. This may be demonstrated by using the example of a fire escape. In a four-storey block, the owner of the top flat would be served by the whole fire escape. The second floor owner would only be served by three-quarters of the fire escape, and so on. If each section of the fire escape cost £9 to repair, the top flat would end up with £18.75 of the £36 bill, the second floor flat would pay £9.75, the first £5.25 and the ground floor £2.25. The Executive believes that this is over complicated and respondents to consultation agreed.

31. An alternative approach would be to give all flats in a tenement an equal share in all the pertinents in a tenement, whether they actually made use of them or not. This would mean in terms of maintenance liabilities, if the titles were silent, then in a block of 8 flats, each would pay £4.50 towards the repair of the fire escape, although the 4 on one side of the close might not have access to it. Although this is perhaps a less equitable approach, it has the advantage that it is simpler to operate in practice. The Commission considered this approach, but said “this would be unprincipled, unfair, and, in relation to existing tenements, bring about a substantial and unwarranted redistribution of ownership”.

32. Most respondents to consultation argued that all flats in a tenement should be given an equal right of common property in the whole pertinent. There may, however, have been a lack of appreciation among some, at least, of the consultees as to the full consequences of this approach. Most of the majority who argued for equal shares in everything were thinking of the “major” common parts of a tenement such as the roof (the maintenance of which is now covered by the scheme property provisions in the Tenement Management Scheme in the absence of title provisions). Few, if any, considered the specific example of, say, a pipe which might only serve two flats. If a pipe were to be owned by all the owners equally then the two owners who actually used the pipe may have to obtain a ”scheme decision” by a majority of the owners in spite of the fact that the majority would have no interest in the pipe and may therefore be unwilling to pay for its repair.

33. The Executive agrees with the Commission that it is wrong to interfere too much with existing rights of ownership. This provision is a default provision. It will have to deal with a large range of circumstances. While a rule that an owner should pay to repair a part of the tenement which serves his or her flat will generally be a fair rule, a rule that obliges owners to pay for repairs to parts of tenements which do not serve their flats might well lead to anomalies and unforeseen results. The most common pertinents will be the pipes and rhones. It might unnecessarily complicate tenement life if repairs of these relatively minor items had to be done by majority decision of all the flat owners and by collecting money from everyone.
TENEMENT MANAGEMENT SCHEME: SECTION 4 AND THE SCHEDULE

General

34. One of the main problems in Scottish tenements is that the common law provides no system of management and decision-making to cover cases where there is no provision in the title deeds. On decision-making, the basic common law rule is that every owner in a tenement must agree before repairs can be carried out. Unanimity is very often impossible to obtain and so repairs are not carried out.

35. The Bill provides that majority decision making should be the norm. This should lead to many outstanding repairs being carried out. If the majority of owners decide to have repairs carried out, the minority will be obliged to pay their share (though there will be an appeal mechanism to cover a situation where the majority may have made a decision which is not in the best interests of all the owners or which is prejudicial to one or more owners).

36. The instrument which will provide for majority decision making and a proper system of management and maintenance in tenements is the Tenement Management Scheme (TMS) which is set out in the schedule to the Bill. The TMS is set out in the form of a number of rules. In line with the general principle of free variation in the Bill, section 4 provides that the individual rules of the TMS will only apply to tenements – existing or built in the future – if the title deeds of the tenements do not cover the subject of that individual rule. This means that the TMS is unlikely to apply in its entirety to all existing tenements, because most tenements will have titles which adequately cover some of the rules. But where there is a gap in existing titles, that gap will be filled by the TMS. For the future, developers and their solicitors may well choose to use the TMS as a template in drawing up title deeds.

37. This is a change from the version of the Bill which accompanied the Executive’s Consultation Paper. That version provided that the TMS would apply to all tenements and that it would supersede the title deeds with two main exceptions. Those exceptions were:
   - where the title deeds provided procedures for taking decisions; and
   - where the title deeds provided how the costs of repairs, maintenance, etc. should be allocated.

38. Slightly over 75% of respondents to consultation took the view that all provisions in title deeds (and not simply those on decision making and apportionment of costs) should continue to prevail over the TMS. They included the Property Managers Association, Royal Institute of Chartered Surveyors, the Scottish Law Agents’ Society, the Council of Mortgage Lenders, the Royal Incorporation of Architects in Scotland, the Scottish Consumer Council, the Law Society and most of the local authorities who responded on this point. Glasgow City Council commented that “In practical terms, it would be difficult to have a one size fits all approach and… the title deeds should prevail if they make specific provision for specific matters.” A significant majority of respondents also thought that the Tenement Management Scheme should only apply to the extent that title deeds were silent.
Alternative approaches

39. The Commission recommended that tenements to be built in the future should be governed either by the development management scheme, (a sophisticated management scheme which is suited to large complex developments and which is introduced by the Title Conditions Act), or simply by the title deeds drawn up by the property developers. The Executive has, however, taken the view that the same law should apply to all tenements irrespective of when they were built. So section 4 treats all tenements in the same way: they will either be covered by their titles (underpinned by the TMS), by the development management scheme or by the TMS in its entirety. There was considerable support for this approach from respondents to consultation.

40. Some commentators have argued that the TMS should simply be imposed on all tenements and that existing title deeds should be swept away. The Executive has not accepted this suggestion. Tenements vary a good deal in nature. There is the typical redstone tenement with 8 or 12 flats leading off a common close. There are 4 or 6 in a block of flats which were part of a council housing scheme. There are conversions of Victorian or Georgian villas, sometimes with only 2 or 3 flats. There are modern blocks. There are office blocks. Most of these tenements will have provisions in their title deeds which reflect the specific circumstances. For instance where there are shops on the ground floor of a traditional tenement, the titles often provide that costs are apportioned in a way which reflects the lay-out of the tenement. Conversions of one-off properties will similarly often have title deeds which have been drawn up with that particular tenement in mind. The Executive does not believe that it is right to interfere with these arrangements, which owners have entered into freely. Over 75% of respondents agreed with this.

41. The Housing Improvement Task Force gave very careful consideration to the possibility that majority decision taking should be imposed on all tenements, irrespective of the provisions in the title deeds. It decided to endorse the approach in the Bill, bearing in mind that the Title Conditions Act does provide new and easier ways for owners to change their title deeds, for example to provide for majority decision making, should they wish to do so.

The concept of “scheme property”

42. The TMS introduces the new concept of “scheme property”. This does not affect the ownership of the tenement or its parts. What it does is to set out in statute the main parts of the tenement in which the owners share an interest. Those parts become “scheme property”, which means that decisions on their repair and maintenance can be taken by a majority of owners. If (and only if) a part of the tenement is scheme property, it will be subject to the maintenance regime in the TMS. What is included in scheme property – and what is excluded – is clearly vital. Rule 1.2 sets out what is scheme property, and rule 1.3 makes some specific exceptions.

43. The concept of scheme property was overwhelmingly welcomed in consultation and there was general agreement as to which items should feature in it. The Executive has, however, included load-bearing beams and columns as a result of suggestions made in the consultation process.
Maintenance and improvement

44. The TMS contains a definition of “maintenance”. It includes any repair. It can also include rebuilding and replacing structures such as floors and walls. At a more mundane level, maintenance may involve the day to day running of the tenement and cleaning, painting and gardening are therefore also classified as maintenance.

Alternative approach

45. Maintenance will not include all out improvement. Some commentators have suggested that the provisions of the Bill on majority voting should also apply to improvements as well as maintenance. For significant improvements which are not incidental to maintenance and repair, the Scottish Law Commission were of the view that the common law should still apply and the unanimous agreement of the owners should be required. The Executive agrees with this assessment and believes that it would be unfair if a majority were to decide to carry out an improvement such as the resurfacing of the close, and to impose that on the remaining owners. This might be unnecessary for the fabric of the building, and would be expensive. The minority owners would be confronted by bills for work which they did not want and might not be able to afford. An overwhelming majority of respondents to consultation agreed that the definition of maintenance should only include incidental improvements as opposed to full-scale improvement and that major works should still be subject to unanimous agreement.

Flats of unequal size

46. There are often flats of different sizes in tenements. In many cases the title deeds will specify how the costs are to be apportioned. But if they do not, the law should supply a solution. The TMS proposes that (as a default rule where there is no apportionment of costs by real burdens and no common property) contributions to maintenance should be equal except where the floor area of the largest flat is more than 1½ times the floor area of the smallest flat, in which case costs should be divided in proportion to floor area.

Alternative approach

47. Some respondents to consultation have suggested that the rule on flats of unequal size should only apply when the floor area of the largest flat is more than twice the floor area of the smallest flat. This view is based on the perception that it may not be immediately obvious, particularly looking from the outside of the building, whether or not the largest flat is more than 1½ times the size of the smallest flat. The Executive would be interested to hear how the argument develops in the Parliament on this point.

SECTIONS 5 AND 6 – APPLICATIONS TO THE SHERIFF COURT

General

48. Although it is reasonable for individual wishes to give way to the majority within a tenement, the Executive agrees with the Commission that some sort of protection should be available to the minority against a potentially oppressive majority. The Bill therefore provides that an individual who did not vote in favour of a decision should be entitled to apply to the sheriff for an annulment of that decision. The sheriff can only grant the application if he or she
is satisfied that the decision is not in the interest of the owners or is unfair to one or more of the owners. The sheriff court was considered the most appropriate forum as it already considers appeals on statutory notice repairs.

49. The Bill also provides a right for owners to apply to the sheriff if there is a dispute about the operation of a management scheme. The sheriff may grant an order to ensure the proper working of the management scheme which is in force for the tenement in question.

**Alternative approach**

50. Some commentators have suggested that there should be an alternative method available to tenement dwellers to resolve disputes which would not involve the expense and stress of raising an action in the sheriff court. The Housing Improvement Task Force suggested that in some cases groups of owners might find it helpful to get outside assistance to resolve disputes about work that needs to be done.

51. Some existing titles already provide for arbitration procedures, but this would not always stop the unsuccessful party appealing to the court. The Executive is not attracted to making legislative provision for arbitration, though parties are free to use that option if they so choose. Arbitration is not an inexpensive option in this context, since the arbiter may well charge commercial rates and if the parties are legally represented, the overall cost to them may not be far short of, or indeed may exceed, the cost of an action in the sheriff court.

52. Mediation is a more attractive option, although mediation services would not be able to provide a complete alternative to court action in all cases. For one thing existing mediation services do not extend throughout Scotland. More importantly, however, the essence of mediation is that the parties enter it voluntarily and there will always be instances where there is reluctance to do so, or where there are important issues of fact, or points of law, in dispute that require an authoritative decision by the court. But mediation can be very useful and the Executive is keen to encourage its use. At best it can be a more satisfactory way of resolving disputes than court action, helping people to maintain relationships and reach a solution satisfactory to both sides, and avoiding a “winner/loser” situation.

53. The Executive is committed to encouraging the growth of mediation services throughout Scotland where appropriate, and is considering how best to encourage the use of mediation generally. There are Executive-backed initiatives in a number of policy areas, including family law, education, health and neighbourhood disputes. The Justice Department supports mediation projects linked to in-court advice services, and is looking at ways to encourage the greater use of mediation as a dispute resolution option, and the development of a network of mediators across Scotland. Up to now, mediation services have tended to develop on a sectoral basis e.g. in family law, and the Scottish Executive is keen to develop a more cross-sectoral approach, looking at what needs to be done on generic issues, such as training and accreditation, to facilitate the growth of a network of mediation services which can deal with a range of types of dispute. This will, it is hoped, both reduce the pressure on the courts and provide a more user friendly and less stressful method of dispute resolution for the public.

54. One of the generic issues currently being considered is the extent to which parties to a dispute should be encouraged or directed to use mediation, either by legislation or by the
provisions of rules of court, for example by giving the sheriff powers to refer parties to mediation, or by allowing the court to take account of parties’ apparent willingness to engage in mediation in any award of expenses. These sorts of issues are being looked at by the Sheriff Court Rules Council, and may result in amendments to the sheriff court rules to make it easier for a sheriff to encourage the use of mediation before, or even during, any type of court proceedings, including tenement disputes. The Executive would prefer to await the outcome of the Council’s deliberations on these issues, rather than pre-empting the issue by making a specific provision in the Bill.

SUPPORT AND SHELTER: SECTIONS 7 – 10

55. The physical layout of tenement buildings means that each owner is particularly vulnerable to the actions of neighbours and at the same time must accept constraints on his or her own behaviour in the interests of the tenement as a whole. This is particularly important where the structure of the building is concerned.

56. Because certain parts of a tenement are so fundamental to the soundness of the building, the principle of common interest (not to be confused with common property) requires owners to maintain any part of the tenement in their ownership which is needed for the shelter or support of the building as a whole. An owner also has a corresponding right of common interest in those parts of the building which are not his. It is the principle of common interest which obliges the owner of the top flat to maintain the roof to provide shelter for the rest of the building.

57. The common law doctrine of common interest is currently used to restrain the behaviour of owners within a tenement so as to preserve the tenement’s function of providing support and shelter. The doctrine has evolved into three main rules. They are:

- an owner is under a duty to maintain his property if it is necessary for the support and shelter of the building;
- an owner must not do anything to interfere with the support and shelter provided by the tenement;
- an owner must not do anything to restrict the natural light the tenement enjoys.

58. The Bill proposes that the doctrine of common interest should be replaced by a statutory re-statement of the rules.

59. All of the provisions on support and shelter received overwhelming support from respondents to the Executive’s Consultation Paper.

REPAIRS: COSTS AND ACCESS: SECTIONS 11 – 14

Section 11: Liability of owner and successors for certain costs

60. Difficulties sometimes arise over the apportionment of costs when a property is sold. Tenements often do not enjoy a stable system of maintenance due to the high turnover of owners. Co-owners may not be aware of changes in ownership or, for the purposes of billing, do not have a forwarding address. The cost then falls to the other owners to share amongst themselves.
Another difficulty arises when an owner is absent and the co-owners do not know how to get in touch with him or her, so they cannot contact him or her to arrange for maintenance or the payment of his or her share of the costs.

61. The Bill provides that the buyer should be severally liable with the seller for the unpaid debts. This means that both the seller and the buyer are liable for the full amount, so that the other owners in the building can choose which to approach for the money. The purpose is to ensure that it will be possible in most cases to collect all sums due following a common repair. It is envisaged that, in line with current practice, solicitors acting on behalf of a purchaser would ensure that the debts were paid out of the proceeds of the sale. This should help with the first of the problems set out above.

62. As for the difficulty of contacting an owner at other times than the point of sale, enquiries at the Registers of Scotland may provide some help. These Registers show the names of the owners of almost all properties in Scotland. They are public registers and enquiries can be made (now by the online Registers Direct service) about ownership. There is, however, a modest charge for this (£2 or £4). All that is supplied is the name of the owner rather than a contact address. Where the owner is a company then details of the registered office of the company can be obtained from the companies registers but this involves a further search.

63. The Executive has also introduced (in section 70 of the Title Conditions Act) a duty on any person who was an owner of a property with a common repair and maintenance burden to disclose to any other person who has an interest in that burden any information he or she has to help to identify the current owner. The Bill should help further by providing for majority decision making because a majority will at least be able to go ahead with repairs even if they cannot contact one of their number. But, in practice, owners may be unwilling to contemplate significant repair work if they cannot contact all owners and get some re-assurance before expenditure is committed that they will agree to pay their share.

**Alternative approaches**

64. The Commission considered the possibility of securing the unpaid costs on the flat. They discarded this because of the difficulties this would have introduced in the system of registration of title.

65. The Housing Improvement Task Force has suggested that there should be a duty on an owner with a common repair or maintenance burden who does not have the flat as his main residence to give other owners, or the property manager if there is one, a contact address. The Task Force commented that the enforcement of such a duty would be difficult in practice, but a clear expectation would be created. It would also be necessary to decide whether absentee owners should provide the relevant information when they initially buy the property or, preferably, whenever details of their contact address change. The Executive is considering how this proposal would impact against privacy and data protection legislation and will indicate how it proposes to proceed later.

66. There has been a further development. There is a proposal in the Antisocial Behaviour etc. (Scotland) Bill that a register of landlords should be established and maintained by local authorities in designated areas. The purpose behind this register would be to provide information
to owners and tenants who may be bothered by antisocial neighbours who may be tenants rather than owners. Some of those who have attempted to get in touch with the landlords of the antisocial tenants have been unable to identify and contact them and have no recourse other than to complain to the police and/or the local authority. However, under the current proposals registers would only be established in designated areas which are likely to be relatively few and far between. The Executive is, however, exploring the scope for establishing a requirement for all private landlords to be registered and this, if agreed, might provide helpful information although it would be necessary for any register to be consistent with ECHR and Data Protection requirements.

Section 12: Prescriptive period for costs to which section 11 relates and section 13: Common property: disapplication of the common law right of recovery

67. These two sections make technical alterations to the law.

68. Section 12 provides that Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 be amended, since as the law currently stands, an obligation to pay a cost would prescribe (i.e. fall) after 20 years. But in dealings with a contractor or an insurer, the obligation would end after only five years if no claim had been made. The Bill provides that the 5 year prescription period will also apply to owners. The result is that the incoming purchaser would only have to look back five years for any outstanding debt. The starting point for prescription will be the time when the original owner became liable for the cost.

69. Section 13 provides that where a management scheme provides for the maintenance of common property, the common law right of recovery of costs by one owner against the other owners will no longer apply. The maintenance of common property at joint expense (and except in the situation envisaged by section 8 where the repairs need to be carried out to protect the shelter and support of the tenement) will in future be subject to a decision making scheme in whichever management scheme applies and a single owner should not be able to impose costs on other owners by circumventing the normal decision making process by invoking the common law rules of common property.

Section 14: Access for maintenance purposes

70. The Bill proposes to introduce a statutory right of access to parts of a tenement that are individually owned, provided access is required for one of 6 reasons. They are:

- to carry out maintenance by virtue of a management scheme decision. The individual, into whose flat access is required, might have voted against repairs and subsequently refuse access;
- to carry out repairs to the flat of the person requiring access;
- to carry out an inspection in order to determine whether maintenance work is necessary;
- to ensure that any part of the tenement building which provides or is intended to provide support and shelter to the building is being maintained;
• to ensure that there is no infringement of the duty to refrain from causing material damage to any part of the building which provides support and shelter, or to ensure that there is no infringement of the duty not to diminish the natural light enjoyed by the building;
• to calculate the floor space of an individual’s flat. This is relevant to various provisions in the draft Bill, for example in relation to liability for maintenance and demolition costs.

71. The right of access is not an absolute right: it is only available when it is reasonable to require access. To ensure that these proposed access rights are not abused, the Bill provides that an individual should demonstrate that there is a reasonable need (based on one of the above criteria) for him or her to enter the flat. Furthermore, even if the demand itself is reasonable, the owner would have the right to refuse if the timing is inconvenient or inappropriate. Reasonable notice would be required before access is permitted, except in cases of emergency.

72. These proposals were generally welcomed on consultation, though some concerns were expressed about the proposed safeguards. The Executive has therefore amended the Bill to ensure that an owner will not abuse the provisions to take access through someone else’s flat to carry out alterations to his own flat just because that would be convenient.

INSURANCE: SECTION 15

General

73. The Bill provides that there will be compulsory insurance for all flats within a tenement. Tenement owners are in a situation where they are particularly vulnerable to the physical condition of neighbouring flats. Essentially, a tenement owner is not adequately insured unless his neighbours are also insured. Many tenement flats will, of course, already be insured whether as a requirement of a mortgage or otherwise. But some flats will not be insured, and certain properties, although insured, may not be adequately covered.

74. The Bill stipulates that the duty of an individual owner to insure his or her own property should be for the reinstatement value and not the market value. This will be an absolute requirement, irrespective of any provision in the title deeds or in a management scheme. Reinstatement value can far exceed market value, and consequently there would be no chance of re-building the tenement if damage occurred and the insurance was based on market value. The Bill gives individual owners the right to inspect the policies of their co-owners and to see evidence that the premiums have been paid.

Alternative approach

75. The Commission considered whether the duty to insure should be extended from a duty to insure individual flats to a mandatory common policy of insurance for all flats within the building. The advantages of a common policy are:

• it is likely to be cheaper;
• it removes the possibility of duplicate insurance;
all common areas will be covered;
• if a claim is made, then the owners will only have to deal with a single insurer.

76. The disadvantages are:
• if the law were changed it would not be easy for owners to comply with it either quickly or easily because existing individual policies would have to be discontinued and permission would need to be sought from lenders;
• in tenements without a factor/manager an individual would have to be nominated who was willing to take on the role of arranging and maintaining the common insurance policy;
• there would be situations where a common policy might not be appropriate, for example where the building contained a mixture of commercial and residential properties;
• there is a real risk that a significant number of tenements would ignore the statutory requirement.

77. The Commission concluded that a common insurance policy should be strongly encouraged but not made mandatory. The Bill provides that the owners will be able, within the Tenement Management Scheme, to make a scheme decision to have a common policy. If a majority of owners desired a common policy, it would be introduced.

78. The Housing Improvement Task Force welcomed the prospect of compulsory insurance. They would prefer it to be on the basis of a common policy for a block of flats, but they recognised that this would be difficult to implement. They suggested that it should be made mandatory for all new developments.

79. The Executive has considered the possibility of requiring common insurance policies in new developments and has discussed this with Scottish Financial Enterprise and representatives of the insurance industry. It has decided not to pursue this option for two reasons. The first is that if just one of the owners who is responsible for paying the insurance premiums of a common insurance policy defaults on payment, then this will have the effect of vitiating the whole policy. This would leave the other owners in a worse position than they are at present.

80. Secondly, it became clear in discussions with representatives of the industry that it would not be possible for any individual owner to top up their insurance cover under a common policy. This would prove difficult for instance where there are shops on the ground floor, which might want a different type of insurance. A further difficulty in relation to shops is that chains of shops will sometimes have a block policy covering all their premises. To prescribe that in future they must tie their insurance to a common policy in an individual tenement would pose problems for them.
81. The purpose of these sections is to clarify the position where a tenement is to be demolished or has been demolished. This should remove any confusion over how costs and receipts are to be divided amongst the owners and how any decisions can be taken.

82. Section 16 sets down the principle, in statutory form, that demolition of a tenement does not end existing ownership. The various flat owners will continue to own the airspace formerly occupied by their now demolished flats (and the owner or owners of the solum will continue to own the airspace above the roof of the former tenement).

83. Under the present law the cost of demolition is thought to be linked to ownership. It is, however, difficult to apportion costs when a tenement is demolished. Problems arise when considering the different sizes of flats and the fact that the upper storeys of the building are harder to demolish than the lower ones.

84. Section 17 of the Bill provides that, in general, liability for the cost of demolition should be borne equally by each flat owner, except where the titles provide otherwise. The advantages of this method are simplicity and clarity. Adopting the approach recommended in relation to liability for repairs under the Tenement Management Scheme, it is proposed that where the floor area of any one flat is more than one and a half times the size of any other flat in the building, the cost should be apportioned according to the relative floor area of each flat.

85. With regard to partial demolition of the tenement, the Commission considered a possible reduction of liability where no actual demolition had taken place to some flats, and also liability based on the degree to which the tenement was previously unstable. Liability falling only on those flats demolished, however, was concluded to be the simplest approach. Again liability would be shared equally except where flats were substantially different sizes. An owner will be liable for the cost of demolition, where he or she agrees to a proposal for the demolition of the building, from the date of that agreement. Alternatively, owners will be liable for the cost from the date the demolition was instructed.

86. Regarding the future of the site (defined as the solum of the building and the airspace directly above), there are two possible options. Any real burdens contained in the titles would first have to be considered. Unless the burden is discharged, it would continue to affect the land, regardless of who came afterwards to purchase the site. If a real burden exists requiring the rebuilding of the tenement, it is possible that rebuilding will be carried out at the insistence of one or more of the owners. Alternatively the site can be sold. Where there is no real burden requiring rebuilding, the rebuilding or any other development of the site can only be carried out with the consent of all the owners. If rebuilding is not agreed to, it is proposed under section 18 of the Bill that any one owner will have the right to require the site to be sold.

87. The proceeds of any sale will be shared equally amongst the owners, except again where the floor space of the biggest flat is more than one and a half times that of the smallest flat. In that case, the price will be allocated according to floor space. The exact determination of previous floor space after demolition will not be an easy task. Sometimes there will be records, sometimes not.
88. Occasionally a site could be sold while heritable securities (mortgages) are still secured over a flat within the former tenement building. The provision in section 19 is that the security is to be treated as a security over a share of the whole site, the shares corresponding to the number of flats in the former tenement. In practice any purchaser is likely to insist on the discharge of any outstanding securities before agreeing to buy the site.

89. When a building has been entirely unoccupied for a period of more than 6 months and has deteriorated to such a state of disrepair that it is unlikely that anyone will return to occupy it, then it is provided in section 20 that any one owner should be entitled to require that the building be sold, with the proceeds of sale being shared among the owners in the same way as they are shared for demolished tenements. Occupation of the building includes that by a person authorised by the owner, for example a tenant. Under the present law owners cannot realise their shares in a building that has become unoccupied and unusable (without unanimous decision). Section 20 addresses the public interest not to allow sites to lie derelict.

90. The proposals on demolition and sale of derelict tenements were broadly welcomed by respondents to consultation.

LIABILITY FOR CERTAIN COSTS: SECTION 21

91. This is a technical section which is designed to ensure that those who are responsible for paying for repairs to a tenement can recover costs from anyone who damages it.

MISCELLANEOUS AND GENERAL: SECTIONS 22 – 29

92. These sections make technical and interpretative provisions. They also make certain minor and consequential amendments to the Title Conditions Act.

OTHER ISSUES

Television aerials, satellite dishes etc: and installation of gas and other services

93. The draft Bill published by the Executive for consultation contained provisions to regularise the position on the placing of television aerials and satellite dishes on tenements. These have been withdrawn pending further consideration of concerns that they relate to reserved matters. Likewise the provision on the installation of gas services could be argued to relate to matters which are reserved under the Scotland Act and has been omitted. The Executive is discussing with Whitehall Departments whether or how provision in respect of those matters might best be made.

Owner-funded long-term maintenance funds

94. The Partnership Agreement contains a commitment to “explore the possibility of owner-funded long-term maintenance funds”. Some commentators have argued that the Bill should be amended to provide that owners would be obliged to contribute to reserve or sinking funds to cover future expenditure on a tenement.
95. It is obviously desirable that property owners should save for future expenditure on repair and maintenance. If the contributions were sufficient, this would ensure that enough money was available in advance and work could be commissioned on that basis. But few owners contribute to non-refundable reserve or sinking funds at present. As well as the reluctance of owners to put aside money (for example, because they may not intend to stay very long in their current flat), the use of reserve or sinking funds is limited because it is difficult for owners to ensure the proper management and accounting for the collected funds and to decide on the level of contributions everyone should make to cover the likely costs of future work. They would have to decide what the funds were for - should they be for routine maintenance or for major works?

96. The Housing Improvement Task Force concluded that it would be impractical to establish compulsory reserve or sinking funds in either existing or new developments. The Task Force believed that there would be no ready means of enforcement: local authorities or some other public agency would have to keep information on the extent of reserve or sinking funds and to oversee and regulate their management. It thought that there would have to be penalties against owners who failed to comply and that the scale of bureaucracy required to enforce this would be very onerous and costly. The Task Force recommended, however, that there should be greater encouragement given to owners to establish reserve or sinking funds and for developers to include provision for sinking funds in the title deeds of new developments.

97. The number of opinions expressed on this issue in response to the Executive’s Consultation Paper totalled 42, with 28 respondents agreeing with the recommendation of the Task Force and 13 advocating that compulsory sinking or reserve funds should be established. Generally consultees felt that owners should be issued with guidance on how to set up and manage funds. While in favour of the establishment of funds in principle, many consultees agreed with the recommendation of the Task Force due to the practicalities involved in administering such a scheme. One comment was: “There are many practical issues round the implementation of the funds, how would the funds be managed, how would a change in ownership impact on contributions to and from the fund.”

98. It has also been pointed out that, with interest rates at historically low levels, many owners would prefer to take out loans to pay for major repairs when they arise, rather than paying money on a non-returnable basis into a fund which is intended to cover the cost of major repairs which may take place many years after the current owners have sold up and moved on.

99. Given the practical difficulties which have been identified by the Task Force and reinforced by responses to consultation, the Executive does not believe that the Bill should be amended to make statutory provision for owner-funded maintenance funds, but that greater encouragement should be given to owners to establish such funds. The Executive has therefore decided that the Bill should not be amended to compel owners to establish long-term maintenance funds. Good practice guidance will, however, be issued by the Executive on the establishment of such funds.
This document relates to the Tenements (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 30 January 2004

Common factoring schemes

100. The Partnership Agreement contains a commitment to “establish an improved framework for encouraging the maintenance of private housing by reforming the law of the tenement to introduce a common factoring scheme”.

101. The Executive’s policy is to encourage the use of good factoring services in a variety of ways. The Bill will allow a majority of owners to appoint or dismiss a property manager. If the majority of owners in a tenement wish to engage a factor, the minority who voted against will nevertheless be obliged to pay for their shares of the fees. The increased ease of appointing or changing a property manager will mean that more owners will be able to employ a factor and more tenements will enjoy the benefits of common factoring by one factor who can act on behalf of all the owners. The Executive is also taking steps to encourage the establishment of a national voluntary accreditation scheme for factors which should improve factoring services and act as a further inducement to owners to engage a factor. The Executive will be issuing a considerable amount of guidance on the operation of the Bill when it is enacted and it will at the same time provide advice to owners about the advantages of having a professional property manager with a continuing responsibility for monitoring the condition of the property and for organising repair and maintenance work. It will also provide advice to developers on good practice on specifying property manager burdens in new title deeds.

102. In its Consultation Paper on the Bill, the Executive raised the issue of whether the Bill should go further, and place a duty on all tenement owners to employ a factor. This matter had previously been considered by the Housing Improvement Task Force, who decided against recommending that it should be a requirement for owners to appoint a property manager. It recognised that owners might quite legitimately prefer to instruct or carry out the work themselves, particularly in a small development. It also noted that concerns had been expressed about the quality of the service provided by some property managers, including some local authorities. The Task Force saw merit in the establishment of a voluntary, single, national accreditation scheme for property managers. It took the view that the policy aim should be to encourage owners to establish effective arrangements for managing communal repairs and maintenance and to ensure that good quality, professional property management services are available to them.

103. Out of 43 respondents to consultation 31 agreed that developers and owners should be encouraged to appoint a property manager, but not compelled to do so. Some consultees thought that owners should be allowed to self-factor as that arrangement may be better suited to a particular tenement and would be less expensive. One argued that: “consumers should be free to decide what type of property management system best suits their needs. The important issue is that the law should make the appointment (and dismissal) of a property manager straightforward”.

104. Several local authorities enquired about possible enforcement measures that would need to be put in place to monitor the imposition of a mandatory factoring service for all tenements. It was pointed out that if this role were to fall to local authorities, then additional funding would be required. A number of consultees felt that the factoring profession was in need of regulation. One suggested that local authorities and Communities Scotland should keep a register of property management companies and that companies on any register should be members of a
This document relates to the Tenements (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 30 January 2004

professional organisation. The Scottish Law Agents Society, the Scottish Federation of Housing Associations, Age Concern and the Law Society of Scotland all agreed that there was a need for better training and regulation of property managers.

105. The weight of evidence, along with the consultation responses, is strongly against any imposition, through this Bill, of a requirement for compulsory common factoring.

Owners’ associations

106. The Housing Improvement Task Force recommended that there should be a requirement for the establishment of an owners’ association in all new residential developments of eight or more flats. It thought that it would be impractical to try to legislate to require all existing owners to establish such associations, but did believe that it should be the norm for new developments. The Task Force concluded that “some formal arrangement for owners to get together on a periodic basis would facilitate decision making and encourage them to take a planned view about maintenance requirements rather than merely reacting to particular problems. Owners’ associations can also provide for overseeing the work of property managers and for making decisions on the use of any reserve or sinking funds.” The Task Force suggested that this proposal would create a framework to facilitate and provide for active co-operation between owners in relation to communal repairs and maintenance which was often lacking at present. The form of association would be for developers to decide, through provision in the title deeds, but, as a minimum, it suggested that there be a requirement for a constitution with provisions for annual and other meetings, specified voting rights and powers to appoint a manager if the owners wished to do so.

107. The Task Force believed that the benefit of an annual meeting is that it would allow owners - to the extent that they wished - to plan ahead beyond an immediate repair. An owners’ association could, possibly with the help of a management agent, agree a programme of planned maintenance and, if necessary, replacement work and make arrangements to budget for this work and collect contributions. This could go a long way towards encouraging owners to place greater emphasis on the pro-active upkeep of their homes.

108. A small majority of respondents to consultation (22-16) agreed that there should be a requirement in the Bill for the establishment of owners’ associations in future developments of eight flats or more. Those who opposed the proposal thought that the introduction of an owners’ association was an excessive and unnecessary layer of bureaucracy and cited difficulties of enforcement and the lack of any sanction against non-compliant developers or owners.

109. Some consultees argued that a provision which imposed a requirement for an owners’ association would make little difference to the behaviour of owners. The only specific additional benefit which an owners’ association would provide would be the requirement for an annual meeting. Although it would be able to take decisions on matters such as planned maintenance and repairs, property management and contributions to any reserve or sinking fund, decisions on these matters could be taken by a majority of owners without an owners’ association. It is not envisaged that any outside body would enforce either the annual meeting or scrutinise the decisions it makes, or enforce the existence of an owners’ association. It has also been suggested that rather than making statutory provision for an owners association, the benefits of an owners’
association could simply be explained in the programme of publicity and guidance for tenement owners which the Executive intends to undertake once the Bill is passed.

110. It would not be competent for the Scottish Parliament to legislate on owners’ associations since they fall within the definition of “business associations” in the Scotland Act 1998 and are therefore reserved. The Executive is therefore considering, along with the UK government, how to proceed in this matter.

CONSULTATION

111. The Commission consulted widely on its Discussion Paper on the Law of the Tenement (Scot Law Com DP No 91) which was published in December 1990 and also held two seminars. The Commission reconsidered the issues raised in the Discussion Paper in the light of these seminars and the responses it received. All of this consultation fed into the Commission’s final Report on the Law of the Tenement which had annexed to it a draft Bill.

112. The Executive issued a Consultation Paper based on the Commission’s draft Bill in March 2003. The Paper identified 38 specific discussion points on which the views of consultees were specifically sought. Although the 12 week consultation period officially ended on 13 June, responses were accepted throughout July and into August due to the difficulty which some organisations had in responding within the timescale. Over 1000 copies of the Paper were distributed and 69 responses were received.

113. The Executive also held meetings to discuss the legislative proposals with the following organisations: Property Managers Association Scotland, Law Society of Scotland, Scottish Consumer Council (including a representative of the Scottish Tenement Group), Scottish Federation of Housing Associations, Chartered Institute of Housing, Royal Institution of Chartered Surveyors, City of Edinburgh Council, Age Concern Scotland, Homes for Scotland, Queens Cross Housing Association, Dr Douglas Robertson (Director of the Housing Policy and Practice Unit at the University of Stirling), the Scottish Mediation Network and Scottish Financial Enterprise (including a representative of Norwich Union – this was to discuss the insurance provisions in the draft Bill). In addition, presentations were given by officials to the Scottish Federation of Housing Associations and the Scottish Association of Landlords.

114. All the points raised in response to the Consultation Paper and in meetings with officials were considered, and the observations made have informed the development of policy on the Bill, with the result that some changes have been made to the final version.

115. A copy of the responses to the consultation (other than those given in confidence) has been made available on the Scottish Executive’s website at http://www.scotland.gov.uk/about/JD/CL/00017975/Bill.aspx along with a summary of the responses. Copies of these documents have also been placed in the Scottish Executive library and further copies are in the Parliament’s Information Centre.
EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

116. The Bill is intended to improve the law relating to the regulation of tenement property in Scotland. The identity of the owner of the tenement property is irrelevant.

117. The Bill’s provisions are not discriminatory on the basis of gender, race, disability, marital status, religion or sexual orientation. There is a rule under the existing law that a title condition in a title deed is invalid and unenforceable if it is illegal, for example if it contravenes any existing statute such as the Race Relations Act 1976. The Disability Discrimination Act 1995 covers issues relating to the conversion of property (including tenement property) to make it suitable for occupation by disabled people and any purported title condition would be invalid and unenforceable to the extent that it contravened that legislation. Title conditions do not appear to have been used in the past to provide for the use of tenement property by disabled people (in the same way as has been the case for elderly people in sheltered housing), but there seems to be no obvious reason why this could not be done. Copies of the Executive’s Consultation Paper including the draft Bill were issued to the Disability Rights Commission, the Equal Opportunities Commission, the Commission for Racial Equality and the Equality Network, but no responses were received from these bodies.

118. It has long been the law of Scotland that property rights must be set out in writing, witnessed and registered in the property registers in order to be presumed authentic and enforceable. Any requirement involving writing might disadvantage people who cannot speak, read or write English. This Bill complements the private regulation of tenement property in title deeds: it merely provides default rules for the management and maintenance of tenements where these are not provided for in the titles. Individual sales of property and the imposition of burdens will remain a matter of freely negotiated individual contract between parties.

119. Title deeds and title conditions are not easy documents even for fluent English speakers to understand. Most people have to have their title deeds and conditions explained to them by their lawyers. The reason is that these deeds are usually written in technical, conveyancing language. Minority ethnic communities (and others who may not be able to read or write English) will usually therefore continue to rely on advice from their legal advisers along with the vast majority of the rest of the property buying population. It is of course in their general interests that their rights should be carefully set out in accordance with the law.

120. So far as blind or otherwise incapacitated people are concerned, there are long established procedures in law for employing notarial execution where such a person is transacting with property. The notary public will read over (and explain) a legal document to the person before subscribing on their behalf, if instructed to do so by the client.

Human rights

121. The Scottish Executive believes that the Bill is compatible with the European Convention on Human Rights. Article 1 of Protocol 1 of the Convention guarantees peaceful enjoyment of possessions. The Bill restates and fills in the gaps in the common law of the tenement but does
not change the rules of ownership so as to expropriate property. It does redistribute liability for the payment of the cost of maintenance of structural parts of the tenement among all of the owners if the title deeds are silent on these matters or if they make inadequate provision. The Executive believes that this is justified on the grounds of the public interest in improving the maintenance of tenements which form a significant part of the housing stock in Scotland.

122. Where the title deeds are silent, the Bill gives the majority of owners the power to take decisions on certain matters. Previously these decisions would have had to be taken unanimously. Owners are therefore losing the right to veto decisions affecting property in the tenement. This is a control of use of property, justifiable in the general interest, to enable owners of flats in tenements to manage and progress repairs and maintenance in a coherent way. The Bill seeks to improve the rights of those owners who desire maintenance to be done but who cannot at the moment implement it because of the difficulties with the current common law. Majority rule is a proportionate way of dealing with the potentially competing rights of owners in a tenement. There are safeguards to protect owners who are in the minority. If they are not in favour of any decision agreed by the majority they can seek to have it annulled on the grounds that it is not in the best interests of all of the owners or that it is unfairly prejudicial to one or more of the owners.

123. The Bill gives owners a right of access to the property of others for particular purposes where it is reasonable in all the circumstances to do so, in order to carry out maintenance or to implement other provisions of the Bill. The Executive believes that these measures are proportionate and justified in pursuance of legitimate aims and do not breach Article 8 of the Convention.

Island communities

124. Tenement properties and owners of flats situated in island communities will benefit from the reform of the law of the tenement in the same way as those properties and owners in other parts of Scotland.

Local government

125. Local authorities have significant holdings in tenement properties throughout Scotland and they will benefit from the clarification of the law in the same way as other flat owners. The Bill does not impose any new duties or obligations on local authorities which might lead them to incur any extra expense.

126. The Housing Improvement Task Force made a number of recommendations in relation to common repairs and maintenance which would give local authorities powers to:

- require common building insurance for owners subject to a maintenance plan and for owners in receipt of assistance with repairs and maintenance;
- establish schemes to encourage owners to establish effective property management arrangements and to provide limited initial funding to registered social landlords and others to establish appropriate schemes;
require owners subject to a maintenance plan to establish a reserve or sinking fund and to provide grant aid towards the cost of establishing such a fund; meet the costs to allow repair work to go ahead (where some owners have refused to deposit their share of essential maintenance or repair work where this work has been agreed according to the required decision making process) and to place a charging order on non-compliant owners together with a levy to meet the administration costs so that these costs can be recovered when their flats are next sold.

127. These measures are likely to form part of a Private Sector Housing Bill which is likely to be introduced later in this session of Parliament. It will largely deal with public intervention in private sector property. The Tenements Bill, by comparison, is intended to reform and codify the private law relating to the relationships and obligations of private owners in tenement property.

Sustainable development

128. Most title provisions for tenement property are concerned with the management and maintenance of the property. They, and the Bill generally, are concerned with the condition and sustainability of tenement property. It is hoped that the Bill will allow many necessary outstanding repairs to be carried out in tenement property and so the effect of the Bill will benefit the overall condition of tenement property in Scotland. Properties are less likely to become dilapidated, and thus less likely to reach the stage where they need major repairs or demolition. The Bill therefore contributes to better resource use – both an economic and an environmental benefit.

Business cost compliance

129. The Bill is largely a codification and clarification of the existing common law. It will therefore benefit businesses which own flats in residential property or offices in commercial properties which fall within the definition of a “tenement” in the same way that it will benefit all other owners and potential owners by making the law clearer, simpler and more accessible.

130. The overall effect of the Bill will be that every tenement in Scotland will have a management scheme and hence a mechanism for ensuring that repairs are carried out and decisions are reached on other matters of mutual interest and concern. This should lead to more efficient and cost effective management of tenements.

131. The Bill will largely act to remove anomalies from the existing law. Many tenements will continue to be subject to the management arrangements which are set out in the relevant title deeds.

132. The Bill provides assistance to tenement owners including businesses: there are no regulatory hoops through which they must jump first. Like the Title Conditions Act, the Bill relates to the private regulation of land between individuals and bodies who are contracting freely with each other. It provides default rules where the title deeds of a particular development are silent, since there is a public policy interest in removing any legal impediment to having maintenance and repairs carried out. Developers and owners will continue to have the right (a)
to adopt whatever management scheme suits both them and the needs of their tenement and (b) to use the provisions of the Title Conditions Act to change existing title provisions if they are inadequate or difficult to operate. For all of these reasons, a Regulatory Impact Assessment is not required.
Justice 2 Committee

5th Report, 2004 (Session 2)

Stage 1 Report on Tenements (Scotland) Bill
JUSTICE 2 COMMITTEE

5TH REPORT, 2004 (SESSION 2)

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Written Evidence
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Oral Evidence
Mary Mulligan, Deputy Minister for Communities

Supplementary letter from the Scottish Executive in relation to Rule 3.4 of the Tenement Management Scheme

ANNEX E – OTHER WRITTEN EVIDENCE

Association of British Insurers
Bartley, Úna
Brown, Graeme
City of Edinburgh Council
Clackmannanshire Council
Cruickshank, Graeme
Disability Rights Commission
Dundee City Council
Falkirk Council
Gardiner, T. T.
Henderson Boyd Jackson
Highland Council
North Ayrshire Council
North Lanarkshire Council
Roseburn House Residents Association
Scottish Borders Council
Scottish Civic Trust
Scottish Federation of Housing Associations
Scottish Legal Aid Board
South Ayrshire Council
South Lanarkshire Council
West Pilton Residents Action Group
REMIT:

To consider and report on matters relating to the administration of civil and criminal justice, the reform of the civil and criminal law and such other matters as fall within the responsibility of the Minister for Justice, and the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigations of deaths in Scotland.

MEMBERSHIP:

MISS ANNABEL GOLDIE (CONVENER)
JACKIE BAILLIE
COLIN FOX
MAUREEN MACMILLAN
MIKE PRINGLE
MS NICOLA STURGEON
KAREN WHITEFIELD (DEPUTY CONVENER)

COMMITTEE CLERKING TEAM:

CLERK TO THE COMMITTEE
LYNN TULLIS
GILLIAN BAXENDINE

SENIOR ASSISTANT CLERK
ANNE PEAT

ASSISTANT CLERK
RICHARD HOUGH
INTRODUCTION

1. The Tenements (Scotland) Bill (SP Bill 19) was introduced on 30 January 2004 by the Minister for Communities, Margaret Curran. On 4 February the Parliament designated the Justice 2 Committee as lead committee on the Bill. Under Rule 9.6 of the Parliament’s Standing Orders, it is for the lead committee to report to the Parliament on the general principles of the Bill.

2. The Justice 2 Committee received reports from the Finance Committee and the Subordinate Legislation Committee. These are attached as Annexes A and B.

3. All oral evidence and associated written evidence given to the Justice 2 Committee is included in Annexe D to this report.

BACKGROUND AND CONSULTATION

4. The Bill arises from extensive discussion and consultation over a number of years. It forms the third and final part of the programme of property law reforms recommended by the Scottish Law Commission. The other recommendations of the Commission have been implemented by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) and the Title Conditions (Scotland) Act 2003 (asp 9). The Executive’s intention, if this Bill is passed by Parliament, is that all three Acts will come into force on the same appointed day, 28 November 2004.

5. The process of developing the Bill began with a Discussion Paper on the Law of the Tenement (Scot Law Com DP No 91) published in December 1990. This led to a Commission Report on the Law of the Tenement (Scot Law Com No 162) published in March 1998 and including a draft Bill. Among other things, the report identified in the existing legal framework uncertainty, rigidity, unfairness and the lack of an effective system of management and decision making. The principle purposes of the draft Bill, which remain those of the Bill as introduced, were to clarify and re-state the existing common law rules of tenement ownership in
modern statutory language and to fill a gap in the existing law by providing for a proper system of management.

6. Although the report on tenement law was the first of the Commission’s property law reports, for reasons which are set out in the Executive’s Policy Memorandum (paragraph 9) it made sense for it to be implemented last. There have been some consequential changes to ensure that it fits consistently with the Feudal Tenure and Title Conditions Acts.

7. In March 2003 the Executive published its Tenements (Scotland) Bill Consultation Paper based on an updated version of the Commission’s draft Bill. The consultation attracted 69 responses and the Executive also held a number of meetings with key interests. Although there were many points of detail raised in the consultation process there was widespread agreement with the main principles.

8. We are satisfied that the Executive has consulted fully on this Bill and we also note its full consideration of equal opportunities and human rights issues in the Policy Memorandum.

EVIDENCE TAKEN BY COMMITTEE

9. The Committee issued a call for evidence on 3 February and received 29 written responses. On 24 February we took oral evidence from the Executive Bill team. On 30 March we took evidence from the Law Society of Scotland and the Scottish Law Agents Society. On 20 April we took evidence from Dr Douglas Robertson from the University of Stirling, the Chartered Institute of Housing in Scotland, the Property Managers Association Scotland Ltd, the Royal Institution of Chartered Surveyors in Scotland (RICS), the Scottish Consumer Council and the Convention of Scottish Local Authorities (COSLA). Finally, on 27 April, we took evidence from the Deputy Minister for Communities, Mary Mulligan.

ISSUES CONSIDERED BY COMMITTEE

General issues

10. Evidence given to the Committee was consistent with the Executive’s evidence that there is widespread support in principle for a clear statement of the law of tenements and an effective management scheme. The issues debated in our evidence were very much points of detail, although detail which might have significant implications for individual tenement owners. We also note that in many cases the arguments between different options are finely balanced between various considerations of fairness, clarity and workability.

11. We note the Executive’s view that many owners are unclear about their responsibilities for maintaining their property and its intention to undertake a publicity and information programme in relation to the whole programme of property law reform which is to be brought into effect at the end of this year. We also note the Scottish Consumer Council’s research and their conclusion that “any information strategy developed will have to take account of the low levels of
awareness of the existing position with regards to what their title deeds contain”.

We welcome the Minister’s comment that, as well as the usual publicity avenues, “we have to be a bit more innovative about how we approach the matter” although at this stage the Executive’s plans are relatively undeveloped. The Committee is interested in the Executive’s plans and wishes to be kept informed about the development of proposals as the strategy is rolled out.

Section 1-3 Boundaries and Pertinents

12. These sections of the Bill clarify and restate the common law rules of ownership of parts of a tenement, one of the two main objectives of the Bill. The rules apply to existing and new tenements except to the extent that the title deeds or any enactment make any different provision. This is consistent with the principle of “free variation” which is followed throughout the bill – the principle that where existing title deeds make provision about ownership, this overrides the bill which forms a default law only.

13. It should be noted that the ownership of tenements is distinct from responsibilities for maintenance which are dealt with in later sections.

14. The Bill defines a flat as an area of airspace bounded by four walls, a ceiling and a floor with boundary features (such as walls) generally owned to the mid-point. It also defines ownership of the roof, airspace, adjoining land and solum (ground). The Bill also attaches a right of common property in the whole of the close (including the stairs and any lift) to each flat with access to them. For other pertinents such as pipes, fire escapes, rhones, flues, tanks or chimney stacks, ownership is allocated by the Bill on the basis of which flats they serve. Pertinents which serve only one flat are owned by that flat; where they serve more than one flat, each of those flats is given a right of common property in the whole of that pertinent.

15. An alternative approach to the service test would be to give all owners an equal right of common property in all the common parts. The strongest argument for this is that it would be simpler to operate in practice. However, the Executive in its approach to the Bill agreed with the Law Commission’s view that this would be too great an interference with existing rights of ownership.

16. The Committee heard some evidence which was not in favour of the service test approach. COSLA suggested that the process should be simplified as much as possible and suggested that this pointed towards the equal shares approach. This view was echoed by RICS who said that the service test approach would cause confusion, for example with items such as chimney heads where the fireplaces and flues might be blocked off.

17. The Law Society and the Scottish Law Agents Society, while acknowledging that there could be difficulties, were in favour of the service test approach. This was on the basis that only those with an interest in maintaining a part would be required to take decisions about, and meet the cost of, maintaining it. However, they noted that there were questions about what would happen if a flat owner...

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1 Scottish Consumer Council written submission, Annex D
made an alteration to a property which meant that there was no longer reliance, or a new reliance was created, on a pertinent. Examples such as shared water tanks or chimneys were mentioned in this context.

18. We questioned the Minister on the issue of the service test. While she defended it in principle, she agreed that the difficulties raised by witnesses merited further consideration since over time it might become more difficult to apply to pertinents which had been taken out of use. She agreed to give the detail of this issue further consideration. **While the Committee supports the service test approach as opposed to one of equal shares, the Committee does recognise the practical difficulties if any part of the building is not used by any proprietor and we therefore welcome the Minister’s offer to consider this matter further.**

**Section 4 – Tenement Management Scheme**

19. Section 4 of the Bill introduces the Tenement Management Scheme (TMS) which implements the second main objective of the Bill, to provide a statutory system of management and maintenance of the “scheme property” of a tenement. As with the rules on ownership, the TMS only applies where the title deeds make no, or an unworkable, provision. The TMS consists of eight rules and is unlikely to apply in its entirety to an existing tenement as most deeds will address sufficiently at least one of the subjects of the rules. The Executive also hopes that it will act as a blueprint to assist developers drawing up title deeds of new tenements.

**Free variation**

20. The Committee considered the issue of whether the TMS should apply regardless of any provisions in individual title deeds. A number of witnesses supported the principle of free variation\(^2\). The Scottish Law Agents Society told the Committee that “free variation would allow people to tailor solutions to particular problems. A set of default rules might not fit every eventuality”\(^3\). The Law Society, while supportive of the principle of free variation, felt that on the issue of apportionment of costs, where title deeds made reference to extrinsic evidence (such as rateable value, feu duty or an equitable share) then the TMS should override the title deeds.

21. Other witnesses however (City of Edinburgh Council, RICS and COSLA, Chartered Institute of Housing and Scottish Borders Council and Dr Douglas Robertson of University of Stirling) were of the view that it would be simpler were the TMS to take precedence over title deeds in respect of future and even existing builds and that “if the scheme is just a default system, we will not tackle the existing disrepair…or make people recognise that buying a property makes them responsible for its long-term maintenance.”\(^4\) City of Edinburgh Council suggested that, at minimum, the TMS should override the title deeds where these did not provide for majority decision making in relation to maintenance decisions and appointing a property manager.

\(^2\) Dundee City Council written submission contained, Annex D, Property Managers Association OR, 20 April 2004, col 707
\(^3\) OR, 30 March 2004, col 669
\(^4\) CIH, OR, 20 April 2004, col 695
22. The Committee explored whether, if the TMS was only a default scheme, an appropriate level of protection would be given to all tenement owners. The Minister told us that as there are so many different styles of tenements, the Executive’s strong view was that in most cases the most appropriate way to deal with them was by title deeds tailored to that building. However, she emphasised that the TMS would deal with the most important deficiencies in title deeds since it would automatically come into play where there are gaps or deficiencies in title deeds. The Committee welcomes the approach of the Bill in making the TMS a default scheme which respects the provisions of existing title deeds.

Summary of TMS

23. Rule 1 of the TMS sets out the concept of “scheme property”. Rules 2 and 3 of the TMS relate to the procedure for and the matters in respect of which scheme decisions can be made, making provision for majority decision making in most cases. Rules 4 and 5 deal with liability and apportionment of scheme costs, rule 6 with emergency work and rule 7 with enforcement of the scheme. Rule 8 covers some general procedural matters not covered elsewhere.

Scheme property

24. The concept of scheme property reflects the view that some parts of the tenement are so important that, regardless of who owns them, all owners should be responsible for their maintenance. This is a departure from the common law position where ownership and maintenance go together and it has been widely welcomed in the Executive’s consultation.

25. Most witnesses were content with the definition of “scheme property,” but there was some confusion about the apparent exclusion of chimney stacks or flues. The Minister clarified that if a chimney stack serves more than one flat, it would be common property and so fall within the definition of scheme property under rule 1.2(a). It is only chimneys which serve a single flat – and so are not common property – which would be excluded from scheme property under Rule 1.3(c). We note the Property Managers Association view (col 710) that it would be simpler to treat the chimney head as common property. The Committee notes and is content with the Minister’s subsequent letter of 10 May which provides further clarification of the position regarding chimney stacks and flues.

Scheme decisions

26. Rule 3 sets out the circumstances in which scheme decisions can be made. The Property Managers Association Scotland expressed concern about Rule 3.4, which provides that where payments have been collected from owners in advance for maintenance work, an owner can request repayment if the work does not commence within 14 days of the proposed date of commencement. The Property Managers Association noted the difficulties that can arise in trying to collect contributions from all owners, and the unavoidable delays which can arise with contractors, and felt that if a time limit was considered desirable it should be rather more generous.

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5 OR, 27 April 2004, col 752
6 Property Managers Association and RICS, COSLA
27. The Minister noted that the starting point for the 14 day period is within the gift of the owners and could be set once a number of steps, such as obtaining quotes and getting necessary agreements, have taken place. She felt that the 14 day period provided a necessary protection for what may be large sums of money. In a subsequent letter of 18 May, the Executive reiterated that the crucial factor is not the period of 14 days but when that period begins. The Executive expects that owners will set a commencement date sufficiently far in advance as to ensure that all monies have been collected and arrangements put in place. In these circumstances, the Executive is of the view that the Rule as it stands provides protection for those owners who do pay up in the event of others not paying up or the work not going ahead timeously.

28. The Committee considers that, while it is reasonable to specify a planned commencement date in the written notice, this can only be approximate until a contract is signed. We do not think that it is appropriate to link the refund arrangements to what can only be a provisional commencement date which may easily be subject to delay of more than 14 days. We accept the value of giving owners an assurance that their money will be refunded within a reasonable timescale if work does not commence as planned. We propose that the Tenement Management Scheme should make separate provision for a “refund date” (which would be a date chosen by the owners and later than the provisional commencement date). After that date, owners could ask for a refund if work had not commenced.

Apportionment of costs

29. On the issue of apportionment of scheme costs, rule 4.2 proposes that, where the floor area of the largest flat is more than one and a half times that of the smallest flat, each owner is liable to contribute towards cost in proportion to the size of their flat. Where the differential is less than one and half, contributions would be on an equal shares basis. The Committee considered whether it would be simpler to apply equal shares regardless of size differences; or if costs are to be apportioned on size of flat, whether one and a half times was the appropriate differential.

30. In written evidence to the Committee, North Lanarkshire Council told us that a division based on size of flat was “unworkable in practice”. The Property Managers Association Scotland expressed concern about the cost of taking the measurements and RICS told the Committee that “no two surveyors who measure the same room will come up with the same answer.” RICS added that, “Every owner has an interest in the building so one might ask why every owner should not contribute equally…. [but] if people have made up their minds that there should be a size relationship, they have to pick a number and one and a half is a perfectly good number.”

31. We agree with the Minister that any differences in measuring floorspace are unlikely to be so great as to cause difficulties in assessing whether a particular flat is one and a half times bigger than any other. We are content that some formula

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7 OR, 20 April 2004, col 714
8 OR, 20 April 2004, col 715
is required to reflect differences in size and have no difficulty with the formula chosen.

**Issues Raised by Subordinate Legislation Committee**

32. In its report to this Committee the Subordinate Legislation Committee brought two proposed Executive amendments to our attention. Following comments made by the Subordinate Legislation Committee, the Executive intends to bring forward an amendment at Stage 2 to section 4 of the Bill. This will clarify that the power for Scottish Ministers to revise by order the sums specified in rule 3.3 of the TMS (which sets a *de minimis* amount in relation to the rules for collecting maintenance payments in advance) will be made only in order to take account of general inflation and other factors impacting on minor maintenance costs. The full background is set out in the Subordinate Legislation Committee’s report. A parallel amendment is required to section 22 of the Bill which introduces provisions in the Title Conditions (Scotland) Act 2003 which replicate rule 3 of the TMS.

**Resolution of disputes**

33. Sections 5 and 6 provide for the resolution of disputes by way of application to the Sheriff Court. The Law Society was supportive of section 5 of the Bill, which provides for an application to be made to the Sheriff Court to have a majority decision overturned, but was concerned about the provision which requires unanimity where a tenement has 3 or fewer flats. They sought clarification that, in this case, “it should be competent for any one proprietor in a tenement that comprised three or fewer units to apply to the sheriff.” The Law Society also expressed uncertainty about how to interpret section 6, relating to applications to a sheriff for resolving certain disputes, stating “if the section is supposed to provide a mechanism for having disputes resolved by the sheriff…there should be a reference to disputes in the body of that section.”

34. In response to the issue raised by the Law Society regarding disagreement between three owners, the deputy Minister told us that the intention of the unanimity provision was to prevent two owners from colluding to overrule another. The Committee welcomes the Minister’s further letter of 10 May in which she states that the strength of arguments about majorities in small tenements is recognised and that the matter is presently being considered. The Committee welcomes this assurance and awaits the outcome of the Executive’s deliberations on this issue.

**Mediation**

35. A large amount of evidence received voiced support for mediation or a similar more user-friendly mechanism for resolving disputes before they reach the Sheriff Court. Sheriff Court actions were perceived as being expensive and time consuming. The Scottish Consumer Council said “mediation can help to

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9 Annex B
10 OR, 30 March 2004, col 664
11 OR, 30 March 2004, col 663
12 Dr Douglas Robertson, South Lanarkshire Council written submission, Clackmannanshire Council written submission, COSLA OR, 20 April 2004, col 736
maintain relationships while a dispute is resolved". They saw no inconsistency between a requirement for local authorities to secure mediation services in this area and the Executive’s desire to promote cross-sectoral mediation services.

36. The Minister recognised the role that mediation could play in relation to settling disputes and suggested that the issue of mediation needed to be considered more broadly in order to ensure consistency of approach. She said that “we must ensure that the service is of a level standard, so that everybody knows what they can expect from it and is entitled to gain access to it on a fair basis.” Given this, she did not support a specific provision in the bill in relation to mediation for tenement disputes. **The Committee is strongly in support of the principle of mediation but recognises that structures do not currently exist consistently across the country. We welcome the steps the Executive is taking to increase access to mediation.**

**Legal Aid**

37. An issue about eligibility for Legal Aid was raised with us in the written submission from Scottish Legal Aid Board and also by the Finance Committee (who took evidence from SLAB). The issue is that, where tenement owners apply to the Sheriff Court to have disputes resolved, they may be eligible for legal aid. However, given the potential common interest with other flat owners in such a proceeding, SLAB could be required to consider the financial situation of all the flat owners, not just the legal aid applicant. The Minister felt that this situation was unlikely to arise often as she did not expect many cases to come to court but she recognised the potential for the legal aid issue to delay necessary action. **The Committee welcomes the Minister’s undertaking to consider the legal aid position further.**

**Support and Shelter**

38. Sections 7-10 place a duty on owners to maintain any part of the tenement in their ownership which is vital to the shelter or support of the whole building. The sections are a statutory restatement of the existing common law doctrine of common interest.

39. Concern was expressed in some of our evidence about the provision in section 8(2) that an owner is not obliged to maintain any part of tenement building “if it would not be reasonable to do so”. It was suggested that this required further guidance so that owners did not use it as an excuse to delay necessary work. **The Committee agrees that further guidance from the Executive is required on this matter.**

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13 OR, 20 April 2004, col 722
14 Written evidence
15 OR, 27 April 2004, col 747
16 Annex A
17 CIH, Dundee CC
Repairs: costs and access

Section 11: Liability of owner and successors for certain costs

40. Section 11 provides that where there are unpaid debts when a tenement is sold – for example, payment due following a common repair – the buyer should become severally liable with the previous owner. The policy aim is to ensure that tenement maintenance is not discouraged because of doubts about whether payment can be collected.

41. While this is clearly a desirable aim, we heard some significant concerns about the fairness and workability of this provision. The Executive envisages that, in most cases, any outstanding costs of this nature could be paid out of the proceeds of sale. However, this could only happen where the costs were disclosed but there is no obvious means of compelling disclosure from an unscrupulous seller. The Scottish Law Agents Society (SLAS) summarised the position: “a purchaser cannot do anything about it other than ask nicely, and they might be misled”. While there would be a right of action against the seller, they would have to be traceable, and there would be no right of action against the solicitor if they had asked the right questions.

42. SLAS’s suggested solution was for the factor or the other proprietors to register a notice against the property in the Land Register, at a cost of £22 in recording dues. This approach might be limited to more substantial costs with the purchaser only becoming severally liable for smaller amounts. They summarised this as “a solution that does not involve additional cost and which provides an appropriate mix of getting repairs done and protecting the purchaser.”

43. The Committee is of the view that this provision, as it stands, is very unfair to the purchaser. Minister recognised the force of the concerns which had been raised with the Committee and agreed to look further at this issue. The Committee welcomes this assurance.

Insurance

44. Section 15 obliges all tenement owners to insure their flat for the reinstatement value (rather than the market value). Ministers are given powers to prescribe the risks against which an owner must insure. Each owner has the right to inspect any other owner’s insurance policy and to see evidence that the premium has been paid. Each owner also has the right to enforce the general duty to insure against any other owner.

45. We found plenty of support for the policy intention to protect tenement owners from the failure of other owners to insure adequately. However there were significant concerns about the enforceability and practical effect of this section.

46. The Executive estimates that about 10 per cent of home owners are not insured although there is no information about what proportion of the remaining 90 per cent are insured to reinstatement value. The Association of British

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18 OR, 30 March 2004, col 675
19 OR, 30 March 2004, col 677
20 OR, 24 February 2004, col 552
Insurers estimates that about 92% of all privately owned tenement flats are insured and that reinstatement value insurance is the market norm, enforced by the requirements of mortgage lenders. They note that compulsory motor insurance, despite heavy enforcement, achieves only 95% compliance and therefore argue that “it is highly unlikely that an un-enforced statutory requirement would result in additional protection”. They also note that it would be relatively easy to perpetrate fraud by taking out a policy and then cancelling it once the “proof” of insurance had been demonstrated. Their strong preference is therefore for an information and education approach rather than a statutory duty.

47. The Committee considered whether enforcement other than by individual owners was possible. We are inclined to agree with the bill team manager who commented, “who else would carry out enforcement in the absence of a factor”? The Minister’s view was that, although requiring owners to check on each other’s policies clearly has the potential to cause difficulties, the existence of a statutory duty was still likely to have a positive effect in increasing the number of people insured to the right level.

48. The Executive also considered the possibility of making common insurance policies mandatory in new developments. The advantages and disadvantages of common policies are fully set out in paragraphs 75 & 76 of the Policy Memorandum. The Executive decided against this approach because if a single owner defaulted, the entire policy would become invalid. While this might be manageable in a tenement with a factor responsible for managing the insurance policy, it would be a higher risk approach in an owner-managed tenement.

49. The Committee also considered the situation where one person in the tenement was unable to secure insurance. While this might cause difficulties, particularly in relation to a block policy, we note the Minister’s statement that, “It is in people’s interests to have insurance, because they would be obliged to make their contribution even if they did not have insurance” and this would apply equally if they were unable to get insurance.

50. The Committee recognises that the problems with insurance already exist. The Bill does not create them; nor does it solve them. On a smaller technical point, we note that some tenements may combine a low value common policy (to comply with title deeds) with adequate individual policies. We suggest that the Bill should not overturn such an approach if all owners are content with it.

Demolition and abandonment of tenement building

51. Sections 16 to 20 cover the demolition and abandonment of tenement buildings. They clarify how decisions are to be taken and how costs and receipts are to be divided.

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21 Written evidence
22 OR, 24 February 2004, col 551
23 OR, 27 April 2004, col 760
52. The Bill adopts a fairly simple approach whereby demolition costs are generally shared equally between flat owners or, in the case of partial demolition, between owners of the flats actually demolished. (There is also provision for cases where the flats vary considerably in size). The RICS gave examples of cases where a ground floor proprietor might benefit from a partial demolition but not have to contribute to the cost, although they agreed that partial demolition is relatively rare. The Minister accepted that such a benefit was possible but nevertheless concluded that it would be difficult to adopt any other approach than to make demolition the responsibility of the owners whose flats are being demolished.

53. Unless there is unanimous agreement to rebuild (or a real burden requiring rebuilding), the Bill allows any one owner to require the site to be sold. Similarly when a tenement has been abandoned and fallen into disrepair (as defined in section 20), any one owner can require the building to be sold. In both cases, the policy aim is clearly to prevent a neglected building from remaining undeveloped for a long period of time in the absence of agreement between the owners about how to proceed. However, we welcome the Minister’s undertaking to bring forward an amendment at Stage 2 which will provide safeguards for other owners when an abandoned tenement is required to be sold.

54. The Scottish Law Agents Society was concerned that the definition of the site to be sold following demolition only covers the solum and the airspace directly above but does not include any garden grounds (section 18(7)). It might therefore lead to the creation of a “ransom strip” which could be used to block development. We note the Minister’s undertaking to look further at this issue.

Issues not included in bill

Sinking funds

55. The Executive discusses in some detail in the Policy Memorandum (paras 94-99) the option of owner-funded long-term maintenance funds or “sinking funds”. It agrees with the Housing Improvement Task Force’s assessments that, desirable as such funds may be, there are enforcement and regulation issues which make their compulsory establishment undesirable. Instead the Executive proposes to issue good practice guidance on the establishment of such funds.

56. The Committee did not hear much evidence in favour of compulsory sinking funds, except from the Chartered Institute of Housing who suggested rolling out such a system beginning with new residents and new properties. Other witnesses were doubtful about the workability of compulsory funds. However, the Scottish Law Agents Society pointed out that the Executive could increase the likelihood of such funds being established by providing a set of default statutory rules to clarify how such funds, where established, would operate. The Society highlighted as examples provision for the money in such funds to transmit with the flat rather than be reclaimed by the owner, and protection for the fund from attachment by creditors.

OR, 20 April 2004, cols 718-719
OR, 27 April 2004, col 761
OR, 27 April 2004, col 744
57. The Committee does not consider that a sufficient case has been made for compulsory sinking funds. However, given the policy objective of encouraging voluntary sinking funds, the Committee agrees that there needs to be further consideration by the Executive of the regulatory framework required for effective operation of such funds.

**Surveys**
58. The Chartered Institute of Housing have proposed a requirement for tenements to be surveyed every five years. Although they recognise the costs this would impose on owners, they argue that it would have a significant benefit in encouraging owners to plan for long-term maintenance needs. It would also bring private owners more into line with housing associations and other organisations who have good information about the condition of their properties. Dr Douglas Robertson commented on this proposal that “there is a danger in going too far and, in effect, determining how people spend their money”.

59. The Committee is not attracted to this proposal which we consider would be unworkable.

**Support for low income flat owners**
60. The Scottish Consumer Council raised the issue of people on low incomes not being able to meet their obligations to maintain their property. They suggested that there was a need to build upon the existing system of grants to support the policy intentions of the Bill. In subsequent evidence to us, Councillor Gilmore from COSLA agreed that there was benefit in looking at alternatives to the traditional grant, perhaps through Local Authorities having a role in facilitating loans, or by the establishment of an organisation to provide equity loans which could be repaid on resale. **The Committee notes the importance of these issues, which are not appropriate to what is essentially a private law bill, we invite the Executive to consider them in relation to the forthcoming private sector housing bill.**

**CONCLUSION**
61. The Committee recommends that the Parliament agrees to the general principles of the Tenements (Scotland) Bill.

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27 OR, 20 April 2004, col 705
28 OR, 20 April 2004, col 721
ANNEX A – REPORT FROM FINANCE COMMITTEE

Finance Committee

Report on the Financial Memorandum of the Tenements (Scotland) Bill

The Committee reports to the Justice 2 Committee as follows—

Background

1. Under Standing Orders, Rule 9.6, the lead committee in relation to a Bill must consider and report on the Bill’s Financial Memorandum at Stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

2. This report sets out the views of the Finance Committee in relation to the Financial Memorandum published to accompany the Tenements (Scotland) Bill, for which the Justice 2 Committee has been designated by the Parliamentary Bureau as the lead committee at Stage 1.

Introduction

3. At its meeting on 23 March 2004, the Finance Committee took oral evidence on the Financial Memorandum from—

   Philip Shearer, Scottish Legal Aid Board; and

   John Blackwood, Scottish Association of Landlords.

4. At its meeting on 30 March 2004, the Committee took oral evidence from—

   Joyce Lugton and Hamish Goodall, Justice Department; and Edythe Murie, Legal and Parliamentary Services, Scottish Executive.

5. In addition to the oral evidence taken at these meetings, the Committee considered written evidence submitted by the Scottish Court Service and the Scottish Legal Aid Board. These submissions are reproduced at Appendix 1.

6. The Committee would like to express its gratitude to all those who took the time to provide evidence in relation to this Financial Memorandum.

Financial Memorandum

7. The Financial Memorandum published to accompany the Bill sets out the main two objectives of the Bill. First, the Bill seeks to replace the common law rules regarding the management and maintenance of tenements with a more modern and simplified legal framework. Second, the Bill introduces a statutory management system for tenements allowing decisions relating to repair work to be agreed by majority decision, rather than unanimously. It is hoped that this provision will facilitate repair work being carried out on tenement buildings. In addition, the Bill requires that owners of tenement flats insure their property against a set list of risks.

8. The Financial Memorandum states that there will not be significant cost implications associated with the implementation of the Bill, but that any costs that do arise can be accommodated within existing resources. After consideration of the evidence, the Committee is content with the costs allocated to the organisations referred to in the Financial Memorandum, but has some concerns that the Financial Memorandum does not anticipate all the costs that will be associated with the Bill. These concerns are detailed below.

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29 Financial Memorandum, para. 159.
Summary of Evidence

Enforcement of Payment for Repairs

9. The Bill seeks to put in place a framework for facilitating repair work on tenement buildings, allowing for decisions to be based on majority, rather than unanimous, agreement.

10. Whilst welcoming the principle behind this measure, the Committee was interested in whether there is any way by which legislation can provide a workable mechanism to ensure that those flat owners who did not agree to repairs being carried out, but who are still liable to pay a share of those costs, do so. The Committee has not received evidence on this aspect, but hopes that the lead committee can explore whether any such mechanisms exist, other than access to the courts.

11. In response to these concerns, Scottish Executive officials stated:

“If a majority decided to go ahead with a repair, they would demand payment from those who did not agree with it. Eventually, after pursuit through solicitor’s letters and so on, that might lead to a court case, but it is very much to be hoped that things would not go that far”.

12. The Committee suggests that the Justice 2 Committee consider whether any mechanism is available at present to ensure payment by all flat owners and whether this could be incorporated into the Bill.

Applications for Legal Aid

13. The Bill contains two provisions which allow summary applications to be made to the sheriff court: section 5 gives a minority in a tenement dispute a right to apply to the sheriff to reverse a decision to carry out repair work and section 6 allows an owner to seek an order from the sheriff on a wider range of disputes. Legal aid will be available to parties involved in these cases, providing they meet the required criteria.

14. Section 164 of the Financial Memorandum estimates that total costs of £60,000 will fall to the Scottish Legal Aid Board (SLAB) as a result of these provisions. In acknowledging this figure, the Committee recognises the difficulties in calculating any projected costs for legal aid and that any stated costs can only be an approximate best estimate.

15. In its submission, SLAB brought to the Committee’s attention the potential impact of regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 on the number of applications for legal aid which will meet the required criteria. Regulation 15 states that an application for legal aid must be refused if it is deemed that a joint or common interest exists with other persons who can afford to cover the full costs themselves. Thus, where a joint or common interest with other flat owners in a tenement is deemed to exist, an application for legal aid by one flat owner may be considered alongside the financial situation of all other flat owners concerned so that if only one flat owner in a tenement is eligible for legal aid, this may not be granted, and the total costs may fall to the other flat owners.

16. The Committee was concerned that the additional financial burden which this regulation may place on other tenement flat owners might mitigate against flat owners using the provisions of the Bill as a legal remedy, as there may be occasions when flat owners agree not to carry out repairs to avoid paying disproportionate costs. There were also concerns that this situation may increase strained relationships within tenement blocks.

17. When questioned on this point, a Scottish Executive official stated:

“I hope that the possibility of court costs – and legal costs in general – would not act as a disincentive to people using the Bill for its policy purposes. …. it is to be hoped that the

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question whether some people in a tenement might have to pick up the tab if others could not qualify for legal aid would not hinder the Bill’s policy objectives in any way.  \(^{31}\)

18. The Committee remains concerned that these regulations may result in some flat owners being required to pay a disproportionate share of repair costs and recommends that the Justice 2 Committee seek reassurance on this matter from the Minister.

**Enforcement of Insurance Provisions**

19. The Bill requires that owners of tenement flats insure their property against a list of risks set out by the Scottish Executive. The Financial Memorandum estimates that 10% of tenement flats in Scotland are currently uninsured (approximately 80,000 flats\(^{32}\)) and sets a ballpark figure of £190 per annum to insure a property for £100,000 to meet this new requirement\(^{33}\). These costs will fall to any organisations or individuals who own a flat in a tenement block.

20. The Committee is concerned that the Financial Memorandum does not provide adequate information on any costs which will result from this provision. As the Financial Memorandum does not give any indication of the property value of these uninsured flats, it cannot estimate the total costs which will arise from this provision.

21. The Financial Memorandum also does not provide any information on how these insurance requirements will be monitored and enforced, and any penalties which owners may incur as a result of failing to meet these requirements.

22. When questioned, the Scottish Executive stated that enforcement rights will lie with the other tenement flat owners. An official went on to comment that:

“[Although the Scottish Executive] considered other methods of enforcement, we concluded that enforcement should be left with the other owners because it was difficult to conceive of an external body knocking on people’s doors in tenement blocks to demand proof that people had kept their insurance premiums up to date and that they had insured themselves to the right levels”\(^{34}\).

23. The Committee is sceptical that this method of enforcement will be sufficient, as the Convener commented “although it may happen, I find it unlikely that people would begin close meetings by asking to see one another’s insurance policies to find out whether they have been paid for”\(^{35}\). The Committee questions the value of this provision as there is no realistic means of ensuring that it is being adhered to.

**Conclusions and Recommendations**

24. The Committee is broadly content with the estimated number of legal cases and the associated costs which will fall on the Scottish Court Service and Scottish Legal Aid Board as a result from the Bill’s introduction. The Committee, however, is concerned that the Financial Memorandum lacks information on those costs which will fall to the owners of tenement properties themselves.

25. As stated in paragraph 12, the Committee recommends that the Justice 2 Committee consider whether any mechanism is available to ensure payment of repairs by all neighbours and whether this would be workable within the Bill.

26. The Committee recommends that the Justice 2 Committee seek reassurances from the Minister that the Scottish Executive give consideration to the potential affect of regulation 15 of Civil Legal Aid (Scotland) Regulations 2002 on applications for legal aid in relation to tenement disputes.

\(^{33}\) Financial Memorandum, para. 168.
27. The Committee believes that for the insurance provisions contained in the Bill to be meaningful, an enforcement mechanism should be in place and recommends that the Justice 2 Committee investigate this issue with the Minister.
ANNEX B – REPORT FROM SUBORDINATE LEGISLATION COMMITTEE

Report of the Subordinate Legislation Committee

Stage 1

Committee remit
1. Under the terms of its remit, the Committee considers and reports on proposed powers to make subordinate legislation in particular Bills or other proposed legislation and on whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

2. The term “subordinate legislation” carries the same definition in the Standing Orders as in the Interpretation Act 1978. Section 21(1) of that Act defines subordinate legislation as meaning “Orders in Council, orders, rules, regulations, schemes, warrants, bye-laws and other instruments made or to be made under any Act”. “Act” for this purpose includes an Act of the Scottish Parliament. The Committee therefore considers not only powers to make statutory instruments as such contained in a Bill but also all other proposed provisions conferring delegated powers of a legislative nature.

Background
3. The Bill, which forms the third and final part of the Executive’s current programme of property law reform, modernises the law of the tenement in Scotland. For the purposes of the Bill, “tenement” encompasses not only residential blocks in the usual sense of the word but office blocks and large houses that have been divided into flats.

4. Further background to the Bill is provided in the Memorandum supplied by the Executive to assist the Committee in its consideration of the delegated powers in the Bill and in the Bill’s accompanying documents. The Memorandum is reproduced at Appendix 1 to this report. As the Executive points out in the Memorandum, there are many deficiencies in the present law relating to tenements much of which is of some antiquity and consists mainly of common law overlaid by specific provisions in the title deeds to individual properties.

5. As the Executive explains, the Bill will largely implement the recommendations of the Scottish Law Commission Report on the Law of the Tenement (Scot Law No 162), published on 25 March 1998. The existing common law rules which demarcate ownership within a tenement are restated. The common law doctrine of common interest is codified by a restatement of the law. A statutory right of access to property within a tenement is provided for along with compulsory insurance.

6. The Bill also introduces a statutory management scheme called the Tenement Management Scheme (TMS), as set out in the schedule to the Bill, which will act as a default management scheme for all tenements in Scotland. It will provide a structure for the maintenance and management of tenements if this is not provided for in the title deeds.

Delegated powers
7. The Bill contains five delegated powers to make subordinate legislation, including commencement powers. They are: sections 4, 15, 22, 26 and 29. Having considered sections 26 and 29 with the assistance of the Executive’s Memorandum, the Committee approves them without further comment.

Section 4 Application of the Tenement Management Scheme

Background
8. Section 4 deals with the application of the TMS set out in the schedule to the Bill. The Scheme contains eight rules which provide a system of management and maintenance in tenements. Section 4 sets out how each of the rules in the Scheme is to apply.
9. Rule 3.1 of the TMS allows owners to make decisions to instruct or carry out maintenance or to appoint a manager to make arrangements for this purpose. Unless the title deeds set out procedures for making decisions, a majority of owners can therefore make scheme decisions but such decisions are restricted to those matters listed in rule 3.1 and 3.2.

10. Each owner may be required to deposit money in advance by a date which the owners decide. This will be the owner’s apportioned share of a reasonable estimate of the costs of the maintenance in accordance with Rule 4.

11. Rule 3.3 deals with decisions made under rule 3.2(c) which require owners to deposit a sum of money. It sets out specific monetary limits which, when exceeded, will require that written notice is made to each owner and that money is deposited into a maintenance account decided upon by the owners. The two-tier arrangement found in rule 3.3 will allow owners to hand over small sums of money without the safeguards provided for in the Bill applying. If the sum of money required to be deposited is less than £100, then the safeguards found in rule 3.4 will not apply. If, however, the money required together with any other sums of money handed over as a result of maintenance decisions in the preceding 12 months totals £200 or more, the safeguards will come into play.

12. The Executive states in its Memorandum that these figures will need to be updated from time to time to take account of inflation, amongst other things. Section 4(11) accordingly gives the Scottish Ministers the power to substitute new sums in rule 3.3 by order made by statutory instrument subject to negative procedure.

Report

13. The Committee had little difficulty in accepting in principle that section 4(11) is an appropriate use of delegated powers for the reason given by the Executive. The Committee noted, however, that although the power conferred is a power to amend primary legislation for which the Committee normally recommends affirmative procedure, only negative procedure is proposed for orders under the power.

14. While the Executive does not suggest that there is any reason for amending the sums other than changes in the value of money, the Committee notes that section 4(11) is not so limited. As drafted, therefore, it would be open to Ministers to alter the actual effect of the safeguards in the Bill by adjustments to the sums by order that would not require the positive approval by the Parliament. The Committee therefore asked for further explanation of the Executive’s intentions in the exercise of the power and asked whether the Executive would consider either a limitation on the power or its exercise by affirmative procedure.

15. In its reply, reproduced at Appendix 2, the Executive states that the proposed power in section 4(11) to substitute new sums in rule 3.3 of the TMS was simply intended to take into account the effects of inflation over time. The addition of the words “amongst other things” in paragraph 13 of its memorandum to the Committee was unfortunate and superfluous.

16. The Department acknowledges that it is more usual for affirmative procedure to apply to a power to amend primary legislation. Accordingly, the Department proposes to bring forward an amendment at Stage 2 of the Bill’s proceedings before the Parliament to remove the specific sums which are set out in rule 3.3 and which are referred to in section 4(11). The amendment would provide for a power for Scottish Ministers to prescribe the sums of money which, if exceeded, would require written notice to each owner and the deposit of such sums in a maintenance account. This power would be subject to negative procedure and so the Parliament would have an opportunity to comment on the threshold for the safeguards set out in rule 3.3.

17. The Committee noted the Executive’s intention to bring forward a Stage 2 amendment to remove the specific sums set out in rule 3.3 of the TMS and referred to in section 4(11). However, it was not clear to the Committee why the Executive proposed to amend the provision so radically. It is also not clear from the Executive’s response whether the provision to be substituted will oblige the Ministers to make an appropriate order or regulations specifying the threshold or whether it will confer only a discretionary power that Ministers can exercise if they
choose. It seems to the Committee that, if the safeguards are considered to be important, the proposed redrafting of the power could result in their being significantly weakened.

18. It seemed to the Committee that its concerns could be fully met by the insertion of a restriction into the power to the effect that any changes in the specified sums be limited to changes in the value of money. This is also the Executive’s stated policy intention. With that restriction, negative procedure would appear quite sufficient for the power. The Committee therefore asked the Executive for further explanation of its proposed amendment.

19. The Executive replied (see Appendix 3) that rules 3.3 and 3.4 of the TMS in the Tenements Bill contain relatively onerous procedures which are intended to safeguard funds which are required to be deposited by owners in a “maintenance account” following written notice to each owner that a scheme decision has been taken to carry out maintenance. The written notice to owners must contain, or have attached to it, a summary of the nature and extent of the maintenance to be carried out along with an estimate of the cost, a timetable for the work, etc.

20. Following representations by the Royal Institution of Chartered Surveyors and others, the Executive accepted that these procedures were not appropriate when routine or small scale maintenance work was involved, such as stair cleaning or minor repairs. For this reason, the Bill was amended before introduction to propose a power for Scottish Ministers to prescribe sums of money so that the safeguards for collected funds would only apply if the prescribed sums were exceeded. Clearly Scottish Ministers will have a duty to set the limits.

21. As the Executive explained in the letter to the Committee of 25 February, the proposed power was intended to take into account the effects of inflation over time. If the figures are not increased from time to time, there is a risk that the procedures in rules 3.3 and 3.4 would be applied to small repairs and routine cleaning and maintenance which would negate the effect of the provision. In practice, it seems likely that the figures would be increased in line with general inflation, but that the Executive would consult bodies like the Royal Institution of Chartered Surveyors to establish if there were any other factors which might have impacted on minor maintenance costs. It is not proposed, however, that such consultation should be specified on the face of the Bill. The Executive proposes that section 4 should be amended at Stage 2 to make it clear that the substitution of the sums specified in rule 3.3 would take into account general inflation and any other factors impacting on minor maintenance costs.

22. The Executive welcomed the Committee’s suggestion that if the power is restricted, then negative procedure would appear to be sufficient. The Executive would wish to avoid any solution which would involve affirmative resolution simply to raise threshold figures.

23. The Committee noted the Executive’s position and agreed to consider the provision again after Stage 2 of the Bill and in light of the Executive’s proposed amendment at Stage 2. The Committee expressed the hope that the Executive would take on board its concerns in that regard. The Committee therefore draws the Executive’s proposed amendment to the attention of the lead committee for its consideration.

Section 15 Obligation of the owner to insure

Background

24. For the reasons summarised in the Executive’s Memorandum to the Committee, section 15 imposes an obligation on the owners of all flats within a tenement to insure their flats. Subsection (1) imposes the basic obligation to insure and specifies that insurance should be for the reinstatement, rather than market, value.

25. As recommended by the Scottish Law Commission, the Bill does not set out a list of the various risks against which cover should be taken. The Executive suggests instead that Scottish Ministers should have the ability to vary the list of risks. Section 15(3) therefore provides that the Ministers may by order made by statutory instrument subject to negative procedure prescribe the risks against which owners are obliged to insure.
Report
26. The Committee noted that the Executive does not explain in its Memorandum why it considers that it is necessary to prescribe a list of risks at all. As section 15(3) is expressed as a power rather than as a duty to make an order it seemed to the Committee that it may be that the Executive does not intend to exercise the power unless experience proves that statutory provision is necessary. The Committee noted that the Scottish Law Commission recommended against prescribing a list of risks in the Bill as being too inflexible.

27. Without wishing to take issue with this assessment, the Committee observes that it would of course be possible to address this objection by providing in the Bill for any such list to be amended by subordinate legislation. It therefore was unclear whether the Commission’s objections were related only to the inclusion of a list in primary legislation or to the principle of prescription by legislation generally.

28. The Committee therefore asked for clarification of the Executive’s thinking in proposing to prescribe by order the risks against which owners are obliged to insure.

29. The Executive replied (see Appendix 2) that, if a statutory duty to insure tenement flats for reinstatement value is to be imposed on flat owners, it is essential that those owners should be made aware of the minimum standard of cover.

30. Although the Scottish Law Commission commented that “it would be too inflexible to specify, in primary legislation, the risks against which insurance cover should be taken”, it did suggest a list of standard risks which ought to be covered by any scheme of compulsory insurance and which would be prescribed by Ministers. This is set out in paragraph 9.4 of the Commission’s 1998 Report on the Law of the Tenement (Scot Law Com No 162). The Commission also suggested that appropriate interests such as the insurance industry, lending institutions, surveyors and the legal profession should be consulted prior to finalising the list.

31. The Executive believes that it is even more important to carry out such consultation before the compilation of a list of risks given the passage of time since publication of the Commission’s Report. For this reason it would not envisage amending the Bill at Stage 2 to include a list of risks. Rather, the Executive proposes that the list of risks will be prescribed in subordinate legislation as envisaged in the Bill at present.

32. The power for Scottish Ministers to prescribe and vary the list of risks would be subject to negative procedure and so the Parliament would have an opportunity to comment. This is consistent with the proposed action in relation to sections 4 and 22.

33. The Committee considered the Executive’s reply and agreed, in light of the consultation the Executive proposes to undertake before prescribing a list of risks against which owners must insure, that the power is acceptable. The Committee therefore approves the power and the procedure chosen as appropriate.

Section 22 Amendments of the Title Conditions (Scotland) Act 2003

Background
34. Section 22(4)(f) makes changes to section 29 of the Title Conditions (Scotland) Act 2003, which deals with the power of a majority of owners to instruct common maintenance, to replicate the provisions of rule 3 of the TMS. Rule 3.3 (referred to above) provides procedures for the deposit and retention of monies. Similar procedures are found in section 29 of the Title Conditions Act. Section 22(4)(f) of the Bill inserts a new subsection (10) into section 29 of the Act. This new subsection gives the Scottish Ministers the power to substitute new sums in section 29 of the Act by order made by statutory instrument subject to negative procedure.

Report
35. The Committee considered that the same point arose in connection with this power as with section 4 on which the Committee reports above. It seemed to the Committee that there should either be some limitation on the power or that affirmative procedure would be more appropriate as the provision grants a power to amend primary legislation.
36. The Department stated (see Appendix 2) that again it proposes to bring forward an amendment at Stage 2 of the Bill’s proceedings before the Parliament to remove the specific sums which are set out in section 22 and which would be inserted into section 29 of the 2003 Act. The amendment would provide for a power for Scottish Ministers to prescribe the sums of money which, if exceeded, would require written notice to each owner and the deposit of such sums in a maintenance account. This power would be subject to negative procedure and so the Parliament would have an opportunity to comment on the threshold for the safeguards provided in section 22 and which would be inserted into section 29 of the 2003 Act.

37. Although the Committee asked the Executive for further explanation of its proposed amendment, the Executive did not add substantively to its earlier reply (Appendix 3). The Committee therefore again noted the Executive’s proposed Stage 2 amendment and agreed to consider the provision further after Stage 2 in light of that amendment. The Committee draws the Executive’s undertaking to the attention of the lead committee for its own consideration.

38. There are no further subordinate legislation provisions in the Bill of concern to the Committee.
Appendix 1

MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE

TENEMENTS (SCOTLAND) BILL

Provisions Conferring Power to Make Subordinate Legislation

Purpose

1. This Memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions in the Tenements (Scotland) Bill conferring power to make subordinate legislation. It describes the purpose of each such provision, explains why the matter is to be left to subordinate legislation and the reasons for seeking the proposed powers.

Outline and scope of the Bill

2. The Bill forms the third and final part of the Executive’s current programme of property law reform and follows on from the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) and the Title Conditions (Scotland) Act 2003 (asp 9). Both these Acts are expected to be fully commenced on 28 November 2004.

3. Tenements form over a quarter of the housing stock in Scotland and come in all shapes and sizes. Most tenements are residential blocks, but office blocks also fall within the definition. So do large houses which have been divided into flats. This captures a much wider range of properties than is commonly imagined.

4. Common law rules governing the maintenance and management of tenements have developed since the 17th Century, but these are not comprehensive nor without anomaly. The development of the law on real burdens, however, has helped to impose obligations on successive owners to adhere to a detailed regime for management and repair of a tenement. These burdens are drawn up to suit the particular circumstances of the tenement.

5. But not all title deeds are comprehensive and they do not always provide burdens to specify how the owners are to decide on matters of mutual interest. If title deeds make no provision on one matter, the common law will apply on that one matter. The common law acts as a background or default law and most tenements, particularly new tenements will have a detailed system of management provided by the title deeds to the property. The common law will only apply where there is a gap in the title deeds.

6. The Bill will largely implement the recommendations of the Scottish Law Commission Report on the Law of the Tenement (Scot Law No 162), published on 25 March 1998. The Bill is intended to produce greater clarity in the law on tenements. The existing common law rules which demarcate ownership within a tenement are restated. The common law doctrine of common interest is codified by a restatement of the law. A statutory right of access is provided for along with compulsory insurance.

7. The Bill introduces a statutory management scheme called the Tenement Management Scheme which will act as a default management scheme for all tenements in Scotland (this is set out in the schedule to the Bill). It will provide a structure for the maintenance and management of tenements if this is not provided for in the title deeds. Where the title deeds are silent on matters of decision making the Scheme will allow a majority of the owners in a tenement to make decisions by majority vote. The Tenement Management Scheme also introduces the new concept of scheme property. This sets out in statute the main parts of a tenement that are so fundamental to the building as a whole that they should be maintained in common. This will not, however, affect the ownership of the different parts of the building which remains unchanged. The Tenement
Management Scheme also contains default provisions on emergency repairs and the apportionment of costs.

**Delegated powers**

8. The Bill has 5 sections which contain powers to make subordinate legislation (including commencement powers). Section 27 provides that such subordinate legislation is to be made by statutory instrument and prescribes the procedure to be used.

**Section 4** Application of the Tenement Management Scheme

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

9. Section 4 deals with the application of the Tenement Management Scheme which is found in the schedule to the Bill. The Tenement Management Scheme contains 8 rules which provide a system of management and maintenance in tenements. The rules of the Tenement Management Scheme will apply only where the tenement burdens, as defined in section 25(1), do not make provision in respect of the subject matter of the individual rules in the Scheme. Section 4 and the Scheme together provide a default management regime for tenemental property. Section 4 sets out how each of the rules in the Scheme are to apply.

10. Rule 3.1 of the Tenement Management Scheme allows owners to make decisions to instruct or carry out maintenance or to appoint a manager to arrange for this. Unless the title deeds set out procedures for making decisions, a majority of owners can therefore make scheme decisions, but these are restricted to those subjects listed in rule 3.1 and 3.2.

11. Each owner may be required to deposit money in advance by a date which the owners decide. This will be the owner’s apportioned share of a reasonable estimate of the costs of the maintenance in accordance with Rule 4.

12. Rule 3.3 deals with decisions made under rule 3.2(c) which require owners to deposit a sum of money. It sets out specific monetary limits which, when exceeded, will require that written notice is made to each owner and that money is deposited into a maintenance account decided upon by the owners. The two tier arrangement found in rule 3.3 will allow owners to hand over small sums of money without the safeguards applying. If the sum of money required to be deposited is less than £100, then the safeguards found in rule 3.4 will not apply. If, however, the money required together with any other sums of money handed over as a result of maintenance decisions in the preceding 12 months totals £200 or more, the safeguards will come into play.

13. These figures will need to be updated from time to time to take account of inflation, amongst other things. Section 4(11) accordingly gives the Scottish Ministers the power to substitute new sums in rule 3.3 by order.

**Section 15** Obligation of the owner to insure

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

14. Tenement owners are in a unique position in that their properties are vulnerable to the physical condition of neighbouring flats and consequently they are not adequately insured unless neighbours are also insured. Section 15 imposes an obligation on the owners of all flats within a tenement to insure their flats and any pertinent attached. Subsection (1) imposes the basic
obligation to insure and specifies that insurance should be for the reinstatement, rather than market, value.

15. The Bill does not set out a list of the various lists against which cover should be taken. The Scottish Law Commission suggested that this would be too inflexible. It is submitted that Scottish Ministers should therefore have the ability to vary the list of risks. Section 15(3) defines the term ‘prescribed risks’ as the risks against which owners are obliged to insure. These are to be prescribed by the Scottish Ministers by order under section 15(3).

Section 22 Amendments of the Title Conditions (Scotland) Act 2003

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: None

16. Section 22(4)(f) makes changes to section 29 of the Title Conditions (Scotland) Act 2003, which deals with the power of a majority of owners to instruct common maintenance. Section 29 relates to circumstances where the majority own properties in a group of four or more properties all subject to the same or similar burdens (i.e. title conditions) and which can be mutually enforced. The changes will replicate the provisions of rule 3 of the Tenement Management Scheme. Rule 3.3 provides procedures for the deposit and retention of monies. Similar procedures are found in section 29 of the Title Conditions Act. Section 22(4)(f) of the Bill inserts a new subsection (10) into section 29 of the Act. This new subsection gives the Scottish Ministers the power to substitute new sums in section 29 of the Act by order.

Section 26 Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Affirmative and negative resolution of the Scottish Parliament

17. Section 26 gives Scottish Ministers the power to make minor, incidental provisions in consequence of the purposes of the Bill. This will be done by an order made by statutory instrument under section 27. This provides both a safeguard and an opportunity to make additional tidying up measures without primary legislation. Both the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003 contain similar provisions to allow Ministers to make further minor and consequential amendments if necessary. If an order made under section 26 contains provisions to amend any existing primary legislation, then it will be subject to affirmative resolution of the Scottish Parliament.

Section 29 Short title and commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: None

18. Section 29(2) gives Scottish Ministers the power to appoint a day (or different days) on which the Bill will come into force. This will be done by an order made by statutory instrument.
Appendix 2

TENEMENTS (SCOTLAND) BILL

On 24 February 2004 the Committee asked for an explanation of the following matters.

Section 4: Application of the Tenement Management Scheme

The Committee asked:

“The Committee has little difficulty in accepting that section 4(11) is an appropriate use of delegated powers for the reasons given by the Executive. The Committee notes, however, that this is a power to amend primary legislation for which negative procedure is proposed. Whilst the Executive’s memorandum to the Committee does not suggest any other reason for amending the sums involved, the section is not limited in this respect.

As the Executive will be aware, the Committee expects at least affirmative procedure to apply to a power to amend primary legislation unless sufficient justification is provided or there is some clear limitation on the power. The Committee therefore asks for further explanation of the Executive’s intentions in the exercise of this power and asks whether the Executive will consider either a limitation on the power or its exercise by affirmative procedure.”

The Scottish Executive Justice Department responds as follows:

The proposed power in section 4(11) to substitute new sums in rule 3.3 of the Tenement Management Scheme was simply intended to take into account the effects of inflation over time. The addition of the words “amongst other things” in paragraph 13 of the Subordinate Legislation Memorandum was unfortunate and superfluous.

The Department acknowledge that it is more usual for affirmative procedure to apply to a power to amend primary legislation. Accordingly, the Department propose to bring forward an amendment at Stage 2 of the Bill’s proceedings before the Parliament to remove the specific sums which are set out in rule 3.3 and which are referred to in section 4(11). The amendment would provide for a power for Scottish Ministers to prescribe the sums of money which, if exceeded, would require written notice to each owner and the deposit of such sums in a maintenance account. This power would be subject to negative procedure and so the Parliament would have an opportunity to comment on the threshold for the safeguards set out in rule 3.3.

Section 15: Obligation of the owner to insure

The Committee also asked:

“Section 15 imposes an obligation on the owners of all flats within a tenement to insure their flats. As the Scottish Law Commission recommended, the Bill does not set out a list of the various risks against which cover should be taken. The Executive suggests instead that Scottish Ministers should have the ability to vary the list of risks. Section 15(3) therefore provides that the Ministers may by order prescribe the risks against which owners are obliged to insure.

The Committee notes that the Executive does not explain why it considers it necessary to prescribe a list of risks at all. Whilst the Committee does not take issue with the Commission’s recommendation against prescribing a list of risks in the Bill as being too inflexible, it observes that this objection could be addressed by provision in the Bill for any such list to be amended by subordinate legislation. The Committee is therefore unclear whether the recommendation arises only in relation to the inclusion of a list in primary legislation or to the principle of prescription by legislation generally.

The Committee therefore asks for clarification of the Executive’s thinking in proposing to prescribe by order the risks against which owners are obliged to insure.”

The Scottish Executive Justice Department responds as follows:
If a statutory duty to insure tenement flats for reinstatement value is to be imposed on flat owners, it is essential that those owners should be made aware of the minimum standard of cover.

Although the Scottish Law Commission commented that “it would be too inflexible to specify, in primary legislation, the risks against which insurance cover should be taken”, it did suggest a list of standard risks which ought to be covered by any scheme of compulsory insurance and which would be prescribed by Ministers. This is set out in paragraph 9.4 of the Commission’s 1998 Report on the Law of the Tenement (Scot Law Com No 162). The Commission also suggested that appropriate interests such as the insurance industry, lending institutions, surveyors and the legal profession should be consulted prior to finalising the list.

The Department believe it is even more important to carry out such consultation prior to the compilation of a list of risks given the passage of time since publication of the Commission’s Report and for this reason it would not envisage amending the Bill at Stage 2 to include a list of risks. Rather it is proposed that the list of risks will be prescribed in subordinate legislation as envisaged in the Bill at present.

The power for Scottish Ministers to prescribe and vary the list of risks would be subject to negative procedure and so the Parliament would have an opportunity to comment. This is consistent with the proposed action in relation to sections 4 and 22.

**Section 22: Amendments of the Title Conditions (Scotland) Act 2003**

The Committee also asked:

“...The Committee considers that the same point arises as in regard to section 4. Again, the Committee notes that new subsection 22(4)(f) confers a power on the Scottish Ministers to substitute new sums in section 29 of the Title Conditions (Scotland) Act 2003 by order made by statutory instrument subject to negative procedure. The Committee asks for further explanation of the Executive’s intentions in the exercise of this power and whether the Executive will consider either a limitation on the power or its exercise by affirmative procedure.”

The Scottish Executive Justice Department responds as follows:

As with section 4(11), the proposed power in section 22 to substitute new sums in section 29 of the Title Conditions (Scotland) Act 2003 was simply intended to take into account the effects of inflation over time.

The Department again propose to bring forward an amendment at Stage 2 of the Bill’s proceedings before the Parliament to remove the specific sums which are set out in section 22 and which would be inserted into section 29 of the 2003 Act. The amendment would provide for a power for Scottish Ministers to prescribe the sums of money which, if exceeded, would require written notice to each owner and the deposit of such sums in a maintenance account. This power would be subject to negative procedure and so the Parliament would have an opportunity to comment on the threshold for the safeguards provided in section 22 and which would be inserted into section 29 of the 2003 Act.

**Scottish Executive Justice Department**

26th February 2004
Appendix 3

**TENEMENTS (SCOTLAND) BILL**

On 2 March 2004 the Committee asked for an explanation of the following matters.

**Section 4: Application of the Tenement Management Scheme**

The Committee asked:

"The Committee noted the Executive’s intention to bring forward a Stage 2 amendment to remove the specific sums set out in Rule 3.3 of the TMS and referred to in section 4(11). The amendment will give Ministers a power to prescribe the sums of money which, if exceeded, would require written notice to each owner and the deposit of such sums in a maintenance account.

It is not clear to the Committee why the Executive is proposing to amend the provision so radically. It is also not clear from the Executive’s response whether the provision to be substituted will oblige the Ministers to make an appropriate order or regulations specifying the threshold or whether it will confer only a discretionary power that Ministers can exercise if they choose. It seems to the Committee that, if the safeguards are considered to be important, the proposed redrafting of the power could result in their being significantly weakened.

In the Committee’s view, its concerns would be fully met by the insertion of a restriction into the power to the effect that any changes in the specified sums be limited to changes in the value of money. This is also the Executive’s stated policy intention. With that restriction, negative procedure would appear quite sufficient for the power. The Committee therefore asks the Executive for further explanation of its proposed amendment."

The Scottish Executive Justice Department responds as follows:

Rules 3.3 and 3.4 of the Tenement Management Scheme in the Tenements Bill contain relatively onerous procedures which are intended to safeguard funds which are required to be deposited by owners in a “maintenance account” following written notice to each owner that a scheme decision has been taken to carry out maintenance. The written notice to owners must contain or have attached to it a summary of the nature and extent of the maintenance to be carried out, along with an estimate of the cost, a timetable for the work, etc.

Following representations by the Royal Institution of Chartered Surveyors and others, the Executive accepted that these procedures were not appropriate when routine or small scale maintenance work was involved, such as stair cleaning or minor repairs. For this reason the Bill was amended prior to introduction to propose a power for Scottish Ministers to prescribe sums of money so that the safeguards for collected funds would only apply if the prescribed sums were exceeded. Clearly Scottish Ministers will have a duty to set the limits.

As the Executive explained in the letter to the Committee of 25 February, the proposed power was intended to take into account the effects of inflation over time. If the figures are not increased from time to time, there is a risk that the procedures in rules 3.3 and 3.4 would be applied to small repairs and routine cleaning and maintenance which would negate the effect of the provision. In practice, it seems likely that the figures would be increased in line with general inflation, but that the Executive would consult bodies like the Royal Institution of Chartered Surveyors and suchlike to establish if there were any other factors which might have impacted on minor maintenance costs.

It is not proposed, however, that such consultation should be specified on the face of the Bill. The Executive proposes that section 4 should be amended at Stage 2 to make it clear that the substitution of the sums specified in rule 3.3 would take into account general inflation and any other factors impacting on minor maintenance costs.

The Executive welcomes the Committee’s suggestion that if the power is restricted, then negative procedure would appear to be sufficient. The Executive would wish to avoid any solution which would involve affirmative resolution simply to raise threshold figures.

**Section 22: Amendments of the Title Conditions (Scotland) Act 2003**
The Committee also asked:

"The same considerations apply in relation to this section as to section 4. It seems to the Committee that the insertion of the same restriction would be sufficient to meet its concerns. The Committee therefore asks the Executive for further explanation of its proposed amendment to the power."

The Scottish Executive Justice Department responds as follows:

As the same considerations apply in relation to this section as to section 4, the approach set out above would appear to be appropriate. The power to substitute new sums in rule 3.3 would be used to take into account the effect of inflation over time, though the Executive will consult suitable professional bodies to establish whether there are any other factors which might have impacted on minor maintenance costs. A restriction similar to that proposed for section 4 would be inserted into section 22. Negative procedure would then be sufficient.

Scottish Executive Justice Department

4th March 2004
Justice 2 Committee, 5th Report, 2004 (Session 2) - ANNEX C

ANNEX C - EXTRACTS FROM MINUTES

JUSTICE 2 COMMITTEE

EXTRACT FROM MINUTES

6th Meeting, 2004 (Session 2)

Tuesday 24 February 2004

Present:

Jackie Baillie
Annabel Goldie (Convener)
Mike Pringle
Karen Whitefield (Deputy Convener)

Colin Fox
Maureen Macmillan
Nicola Sturgeon

Tenements (Scotland) Bill: The Committee took evidence at Stage 1 from—

Mrs Joyce Lugton, Bill Team Leader, Hamish Goodall, Bill Team, Mrs Edythe Murie, Solicitor and Norman Macleod, Solicitor, the Scottish Executive.
Justice 2 Committee, 5th Report, 2004 (Session 2) - ANNEX C

JUSTICE 2 COMMITTEE

EXTRACT FROM MINUTES

11th Meeting, 2004 (Session 2)

Tuesday 16 March 2004

Present:

Jackie Baillie
Maureen Macmillan
Karen Whitefield (Deputy Convener)

Annabel Goldie (Convener)
Mike Pringle

Apologies were received from Colin Fox and Nicola Sturgeon.

Tenements (Scotland) Bill: The Committee considered written evidence received and agreed who it wished to invite to give oral evidence on the Bill at Stage 1.
Present:

Jackie Baillie  Annabel Goldie (Convener)
Colin Fox      Maureen Macmillan
Mike Pringle   Nicola Sturgeon
Karen Whitefield (Deputy Convener)

Tenements (Scotland) Bill: The Committee took evidence on the general principles of the Bill at Stage 1 from—

John McNeil, member, and Linsey Lewin, secretary, the Conveyancing Committee, the Law Society of Scotland; and

Ken Swinton, the Scottish Law Agents Society.
JUSTICE 2 COMMITTEE

EXTRACT FROM MINUTES

13th Meeting, 2004 (Session 2)

Tuesday 20 April 2004

Present:

Jackie Baillie Maureen Macmillan Nicola Sturgeon
Annabel Goldie (Convener) Mike Pringle Karen Whitefield (Deputy Convener)

Apologies were received from Colin Fox.

Tenements (Scotland) Bill: The Committee took evidence on the general principles of the Bill at Stage 1 from—

Dr Douglas Robertson, University of Stirling, and Alan Ferguson, Director, Chartered Institute of Housing

Jack Fulton, President, and Neil Watt, Past President, Property Managers Association and Ian Donald, Fellow, Royal Institution of Chartered Surveyors in Scotland.

The meeting was suspended from 3.33 pm until 3.38 pm.

The Committee then took evidence from—

Martyn Evans, Director, and Jennifer Wallace, Policy Manager, Scottish Consumer Council; and

Councillor Sheila Gilmore, City of Edinburgh Council and Ron Ashton, Director of Housing, Angus Council, COSLA.
JUSTICE 2 COMMITTEE

EXTRACT FROM MINUTES

15th Meeting, 2004 (Session 2)

Tuesday 27 April 2004

Present:

Jackie Baillie          Colin Fox
Annabel Goldie (Convener) Maureen Macmillan
Mike Pringle           Nicola Sturgeon
Karen Whitefield (Deputy Convener)

Tenements (Scotland) Bill: The Committee took evidence on the general principles of the Bill at Stage 1 from—

Mary Mulligan MSP, Deputy Minister for Communities, Joyce Lugton, Bill Team Manager, Edythe Murie, Solicitor and Norman MacLeod, Solicitor, the Scottish Executive.

Tenements (Scotland) Bill (in private): The Committee reviewed the evidence received and considered its approach to its Stage 1 report.
JUSTICE 2 COMMITTEE

EXTRACT FROM MINUTES

19th Meeting, 2004 (Session 2)

Tuesday 12 May 2004

Present:

Jackie Baillie
Annabel Goldie (Convener)
Mike Pringle
Karen Whitefield (Deputy Convener)

Colin Fox
Maureen Macmillan
Nicola Sturgeon

Tenements (Scotland) Bill (in private): The Committee considered a draft Stage 1 Report.
Present:
Jackie Baillie
Annabel Goldie (Convener)
Mike Pringle
Karen Whitefield (Deputy Convener)

Colin Fox
Maureen Macmillan
Nicola Sturgeon

Tenements (Scotland) Bill (in private): The Committee agreed its Stage 1 Report.
Tenements (Scotland) Bill: Stage 1

14:03

The Convener: It is my pleasant task to welcome the bill team for the Tenements (Scotland) Bill. The team comprises the team leader, Mrs Joyce Lugton; Mrs Edythe Murie, solicitor; Mr Norman Macleod, solicitor; and Mr Hamish Goodall. We are grateful to you for coming before the committee this afternoon and, as you will see, we are desirous of taking initial evidence from you. There are several areas that members of the committee want to discuss.

Before we start, would Mrs Lugton like to make a brief introductory statement?

Joyce Lugton (Scottish Executive Justice Department): Certainly. I have a prepared statement that is approximately 10 minutes long. If anyone wants to interrupt at any time, they should feel free to do so.

The Convener: Please continue.

Joyce Lugton: The Tenements (Scotland) Bill is the third bill in the property law reform programme, all three bills in which have been prepared by the Scottish Law Commission. A member of the committee who is not yet here this afternoon has had the pleasure of dealing with at least one of the bills.

The first piece of legislation in that programme was the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the second was the Title Conditions (Scotland) Act 2003. The third bill is, as the other two were, a law reform measure. It does not start from a blank sheet of paper; rather, it sets out existing common law in statutory form. Where the law is unsatisfactory, it will make some changes. The main purpose of the bill is simply to ensure that all tenements will in future have a system of management and maintenance.

Before I move on to discuss the bill’s contents, I will make a couple of introductory points about it. The bill is about private law, not public law: it is not about the relationships among tenement owners or residents and any public authority. It is not about housing associations providing grants, nor is it about local authorities acting in a regulatory way. The bill is about relationships among individual owners in a tenement. It sets out a framework for regulating responsibilities and duties among private owners who share a building. It provides clarity about who owns what bits of a tenement and who is responsible for what repairs. The idea is that everyone in a tenement should be clear about how the tenement should be managed and maintained. If the roof needs to be fixed, who is to decide that? Who will get estimates and engage
contractors? How are funds to be collected for the repair? Most important, which owners are obliged to pay for the repair?

My second introductory point is a legal and technical one to do with existing law. At the beginning of my statement, I said that the bill is a law reform measure, but it is important to note that two kinds of law affect tenements. The bill is concerned only with one of those types of law. First, there are the title deeds of a tenement. All tenements have title deeds that were written when the tenement was built and have been passed on through the different owners. Most title deeds set out in great detail what the owners are responsible for and the boundaries of ownership. Those deeds are where owners look first if they want to know who must pay for a roof repair.

However, some title deeds are inadequate and because of that there have been several court cases during the past couple of centuries, which have led to a body of common law. That is the second type of law that covers tenements. The common law is the underpinning law that applies when title deeds are silent or imperfect. Unfortunately, that common law is unclear and, in some places, unsatisfactory. The bill is concerned with tidying up and revising that common law.

The bill is not seeking to replace title deeds. The Scottish ministers have deliberately accepted the Scottish Law Commission’s recommendation that title deeds should remain and that there should not be a statutory set of title deeds that cover all tenements. Existing deeds will remain and, in future, house developers will be free to draw up individual deeds to reflect the particular circumstances of particular tenements. That is an important principle, the shorthand term for which is “free variation”. The bill seeks to reform the back-up law—the common law—that lies behind title deeds so that when title deeds are inadequate, the fallback position of the law, as it will be set out in the resulting act, will work properly.

The first sections of the bill set out who owns what. In most cases, title deeds of individual tenements state who owns what, but sometimes they do not; the bill sets out who owns what in such cases. Those sections of the bill mostly restate the common law rather than reform or change it.

Owners will continue to own their flats. However, the bill sets out the boundaries between flats, which are generally the halfway line of a boundary wall. Importantly, the bill also sets out who owns common property. It is worth noting, because it is often a matter of criticism, that under the present common law the owner of a top-floor flat owns the roof unless the title deeds say otherwise. The bill will not change that position and I will come back to that point because it is significant.

Individual owners have a collective interest in many parts of a tenement: the close, the stair, pipes and so on. The bill clarifies ownership of those and provides that, where title deeds are silent, ownership should be on the basis of service. That means, for example, that if a horizontal pipe serves just two flats, or even one, in a tenement, only the flats that are served by the pipe will own it.

Those are the bill’s main provisions on ownership. The Scottish Law Commission recommended that, instead of changing ownership law, the law that relates to maintenance obligations should be changed. Under the current law, responsibility for maintenance goes with ownership; if you own it, you are responsible for its upkeep. That is why the position on ownership of roofs has led to criticism in the past. It is clear that if only one owner owns the roof and has sole responsibility for its maintenance, that can cause difficulties. He or she might be unwilling, or might just be unable, to pay for a necessary repair.

To address that problem, the Law Commission introduced a new idea called scheme property. The principle is that the most important parts of a tenement—which are, broadly speaking, the roof, the external walls and one or two other bits—should be maintained in common. The bill lists the vital parts of a tenement and provides that, in the absence of title deed provision, all the owners will contribute to the upkeep of those parts, which are called scheme property. Again, it is important to repeat—I am sorry for being tedious—that that provision will not supersede title deeds. If the title deeds say that the owner of the top flat is responsible for maintenance of the roof—although that will be rare—it will stay that way.

So much for ownership. The bill’s other main plank is to do with how tenements will be managed. Again, the underlying principle is that if the title deeds set out arrangements for management of a tenement, the bill will not interfere with that. However, if the title deeds are inadequate, the bill will step in. The bill has a schedule that contains the tenement management scheme, which is in the form of eight rules. If the title deeds are silent or inadequate on any of the subjects of the rules, the appropriate individual rule will apply to a tenement. It might be helpful if I give a couple of examples.

First, title deeds sometimes do not say how repair costs are to be apportioned and, oddly, title deeds sometimes allocate costs in such a way that they do not add up to 100 per cent. In such cases, the relevant rule of the tenement management scheme will apply and it will provide, in most cases, that the owners will have to pay equal shares of the cost of repair or maintenance. Secondly, some title deeds do not say how
decisions are to be reached in the management of a tenement. Under the existing common law, that means that owners must reach a unanimous decision before a repair can be carried out. Clearly, such unanimity is difficult, and sometimes impossible, to obtain. In such cases, the rules in the tenement management scheme will apply in order to provide that decisions can be taken by a majority of owners. Once taken, such decisions will be binding on the minority. That is a significant change that should make it much easier for owners to maintain tenements.

Those are the bill’s main provisions. I do not intend to say any more at the moment. Some of the bill’s minor provisions are also important and we can discuss them if the opportunity arises. I will finish as I started by saying that the main purpose of the bill is to ensure that all tenements have a proper management and maintenance scheme.

14:15

The Convener: Thank you for being so helpful. You have made me positively nostalgic for notes on title days.

My first question is a general question. Parliament has passed two other acts that relate to property ownership—the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003. Is there a relationship in a general sense between the Tenements (Scotland) Bill and those two acts?

Joyce Lugton: The short answer is that there is quite a close relationship between the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Bill, but not very much connection between the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Tenements (Scotland) Bill. As I said, the three bills were prepared by the Scottish Law Commission and have been introduced in the running order that the Law Commission suggested. The logic was that the first act—the Abolition of Feudal Tenure etc (Scotland) Act 2000—would get rid of the old system of land tenure and that the Title Conditions (Scotland) Act 2003 would replace it with a new system of property tenure that would apply to all properties. The Tenements (Scotland) Bill is a more specific bill that applies only to a subset of properties—tenements—but it builds on the Title Conditions (Scotland) Act 2003 and, as one would expect, its provisions are compatible with the Title Conditions (Scotland) Act 2003.

The Convener: The private sector housing bill is still to come. How developed is the Executive’s thinking on that bill? How was a decision made about what should be in the Tenements (Scotland) Bill and what should be left for the private sector housing bill?

Joyce Lugton: It is partly an historic matter that the Tenements (Scotland) Bill has been drafted and is ready for introduction whereas the housing bill has yet to be fully developed and will not be ready even as a consultation draft for some time. It was thought to be wrong that the Tenements (Scotland) Bill, which is regarded as helpful, should be held up for the artificial reason that the housing bill is yet to come.

However, there is also a difference in the nature of the two bills. I said at the beginning of my presentation that the Tenements (Scotland) Bill is concerned with the relationships among private owners in a tenement. The housing bill will be more to do with modernisation of local authority powers and the resulting act will be more a piece of public law. The Tenements (Scotland) Bill is more of a piece of private law.

The Convener: That is helpful. Is it envisaged that, with future developments of tenemental property, the legislation could be referred to in title deeds?

Joyce Lugton: It is very much hoped that it will be. My colleague Norman Macleod might like to say something about that.

Norman Macleod (Scottish Executive Legal and Parliamentary Services): The easiest way to look at the matter is to consider that the tenement management scheme provides a default scheme for management of tenemental property whether that property is existing or future property. With a new-build property in which the developer is starting with a clean slate, the developer will have freedom to insert, by way of real burdens, whichever provisions he chooses. However, the proposed legislation will act as an underlying legal default position so that if the developer does not include provision to deal with any element of the tenement management scheme, it will apply automatically by force of law anyway. It would be perfectly possible—and frequently perhaps even desirable—for a developer to use the legislation as a template and to translate the system of rules into a deed of conditions and impose them as a system of real burdens.

Colin Fox (Lothians) (SSP): I understand that the recommendations in the bill come from a report by the housing improvement task force. What has been the relationship between the bill and the task force and what will the relationship be in the future?

Joyce Lugton: It would not be quite right to say that the bill stems from the housing improvement task force, because the bill has been in preparation for some years. The first consultation on a tenements bill was conducted in 1990, which is a very long time ago. Jackie Baillie will probably be able to tell me exactly when the housing

Joyce Lugton:
improvement task force was set up; I think that it was in about 2000.

**Jackie Baillie (Dumbarton) (Lab)**: Yes—it was set up in about 2000.

**Joyce Lugton**: The task force was able to consider the proposals in the bill and its members were broadly supportive of what was in it, although they made one or two suggestions for additions, which the Executive has considered with other matters. The remit of the housing improvement task force went much wider than just the bill, so it also made recommendations on a number of other matters, including those that could lead to the separate private sector housing bill that has been mentioned.

**Colin Fox**: Do you think that the relationship will continue? Will the on-going consultation and the evidence that is given to the committee be passed to the housing improvement task force?

**Joyce Lugton**: No. I do not know whether it would be correct to say that the task force has been wound up, but it has certainly produced its report. I am sure that the individual members of the task force will continue to take a keen interest in the bill, but the task force does not have a continuing life as a separate body.

**Mike Pringle (Edinburgh South) (LD)**: I want to explore the consultation process. Who was consulted, how long did the consultation take and what was the result of it? Did the opinions of the people whom you consulted differ from yours on what should be included in the bill? That is quite a big question.

**Joyce Lugton**: It is a very big question. I will start off and we will see how far we get. There has been a great deal of consultation on the bill. As I mentioned, the original discussion paper that was drawn up by the Scottish Law Commission was published in 1990 and the commission held a couple of seminars on the subject. There was then a hiatus while the other pieces of legislation in the picture were drawn up.

The Executive issued its own consultation paper, along with a draft bill, in March last year. The consultation paper identified 38 specific discussion points on which views were sought. More than 1,000 copies of the consultation document were issued and 69 responses were received. Officials have held a number of meetings with interested organisations to discuss the proposals; the people whom we met are listed in the policy memorandum, on page 22. I think that we met about 15 or so of the core bodies.

As part of the subsequent process, we analysed and considered carefully all the points that were made to us on paper and in person. Some changes were made to the bill as a result of that. That deals with the easy part of Mike Pringle’s questions.

On changes to the bill, I will mention a couple that will give an indication of the sort of things that we did. One example, which is perhaps the main change, is the application of the tenement management scheme. The bill on which we consulted provided that the tenement management scheme would apply to all tenements and that the title deeds would prevail only if they made specific provision on decision making and apportionment of costs. However, during consultation, a considerable body of opinion said that title deeds should, if they are adequate, prevail on all matters—the bill has been changed to reflect that. That is the most important point. A variety of other changes have been made, some of which are described in the policy memorandum. I do not know whether you would like me to go on.

**Mike Pringle**: No, that is fine.

**The Convener**: I have been looking with interest at the definition of a tenement; it is interesting that it seems to have been broadened to include business premises. Traditionally, tenements were defined as flatted dwelling houses. Will the way in which the definition is phrased take in an office block?

**Joyce Lugton**: Yes. The thinking is that people who own commercial premises should not be in a worse position than people who own residential premises. The important point in tenements is not really the use to which they are put but the interdependence, shall we say, of the different properties with each other as far as maintenance and repair are concerned. Many properties are mixed: members need only cast their eyes to the tenements around the Parliament to see a number of tenements in which there are commercial properties on the ground floor and residential properties above. The definition of tenement extends more widely so that it will cover properties that are not mixed but are purely commercial. However, it is probably fair to say that many properties that are purely commercial will be more modern; such properties tend to have title deeds that are more comprehensive and in relation to which the need for a default law may be rather less.

**The Convener**: Did the consultees raise that issue?

**Joyce Lugton**: No. The bill has always provided that commercial properties would be included. We have not made any change in that respect.

**The Convener**: I can see the logic of that provision. You are quite right to say that in the average tenemental dwelling the ground floor is usually made up of commercial premises.
However, I am slightly surprised that the bill intends to cover what could be, according to the definition, a freestanding set of office suites.

Joyce Lugton: Perhaps my colleague would like to speak on that very technical matter.

The Convener: I notice that the definition of tenement in section 23 states that the flats “are divided from each other horizontally”.

I presume, from the way that the section is phrased, that it is also meant to take in converted villas in which there might be not only a horizontal subdivision but a vertical division. Am I right to say that currently a vertical division would be excluded from the definition?

Joyce Lugton: Perhaps my colleague would like to speak on that very technical matter.

Norman Macleod: The convener is right. The fundamental aspect of a tenement is that flats are divided horizontally and are on top of one other. A semi-detached house is not considered to be a tenement in normal parlance. The definition of tenement is designed to work in a wide variety of situations, but the common denominator for them all is that there will always be an element of horizontal division. You are right that if a house was converted and divided into two upper and lower villas it would at that point become a tenement.

If a semi-detached property was converted, the semi-detached house next door would remain a semi-detached house and would not be part of the tenement; the tenement would be defined as just the house that had been flatted.

14:30

The Convener: I have seen villas that have been sub-divided into ground and first-floor conversions, where the ground floor retains an upper storey at one end—the end of the original villa. I do not think that such conversions would be included in the definition, because they would involve a vertical division.

Norman Macleod: The starting point is a building or part of a building; if there are two flats within that building, there will certainly be a tenement. To ascertain the extent of the tenement might present some difficulties. It will depend very much on the facts and circumstances of the case. The definition is intended to allow sufficient flexibility to make it possible to examine an individual building and its title and burdens, to establish what the tenement is in that particular building.

The Convener: This is not the time to get into the nitty-gritty, but I have experience of situations that in every sense conform to what the bill envisages but that would not be included by the specific definition in the bill. I mention that en passant.

Nicola Sturgeon (Glasgow) (SNP): The bill provides for ownership of certain pertinents, such as pipes, to be allocated according to a service test. I note that the majority of people who responded to the consultation—albeit a narrow majority—opposed that provision and said that ownership should be allocated equally among all the flats in the tenement. Why did you opt for the service test, notwithstanding that opposition?

Joyce Lugton: You are right to say that it was a narrow majority of those who responded—which was a fairly small number—who opposed the provision.

Not all the flats in a tenement will use a particular pipe. On the one hand, it is perhaps fair that only the flats that use that pipe should pay if it needs to be repaired. On the other hand, it is simple if everybody has to pay; we do not have to work out who has to pay and how much. The issue is really about balancing fairness against simplicity. The Scottish Law Commission took quite a firm view on the matter which, of course, relates not just to pipes but to pertinents in general. The Law Commission felt that one should not interfere too much with the existing law on ownership, which would be the case if we were to say that everyone owns an equal share of the pertinents. It said:

“this would be unprincipled, unfair, and, in relation to existing tenements, bring about a substantial and unwarranted redistribution of ownership”.

That was quite a strong way of putting it and the Executive decided to accept that advice. In doing so, it agreed with the general principle that it would be wrong to interfere with ownership. It also considered the practical implications of that and took the view that if a pipe needs to be repaired, it is probably quicker and easier if the two people who use the pipe just go ahead with the repair, rather than have a situation in which the pipe is owned by all 12 flat owners in the tenement, a majority of seven must be marshalled before going ahead with the repair and funds must be collected from all 12. That was the thinking behind the provision.

The Convener: Maybe I am being awfully dense. Is a common staircase a pertinent? Would a common staircase be excluded?

Joyce Lugton: It depends on who has access to it. If the common staircase is accessible by all flats, all flats will have a share in it. For instance, it is quite common for the flat at the bottom of the stair not to have a door into the close but to have a front door on to the street. In that case, that flat would not have a share in the close or stair.
The Convener: And if entrance to the ground-floor flat is from a door in the common close?

Joyce Lugton: In that case, the ground-floor flat would have a share.

The Convener: If I live in the bottom-floor flat, I use only the hall to access my flat, whereas the people who live in the top-floor flat make more use of the whole staircase. That seems to be a slight illogicality if we are applying a service test.

Joyce Lugton: I think that you are referring to proportionality of use, which is different and which we considered. We gave the example of a fire escape instead of a stair. Consider a block of eight flats that has a fire escape that serves four of the flats. If maintenance costs were to be allocated on the basis of proportionality of use, the person in the top-floor flat on the side that was served by the fire escape would, I think, have to pay—my arithmetic is not very good—three times what the person on the first floor would pay. Essentially, that seemed excessively complicated. That is why it was decided not to use a proportionality test in addition to the service test.

The policy memorandum explains the issue in some detail. Perhaps it would be helpful to draw the committee’s attention to that. Shall I read out this little bit?

The Convener: Yes. Some of us are struggling a little with the distinction between a service test and a proportionality test. I can understand how such a service test would apply to a pipe that serves my flat and another flat, but I am now slightly confused about how it would apply to a common part that is used by three or four flats more than it is used by the fifth or sixth flat. It seems to me that a service test involves asking who benefits from the feature and to what extent they benefit. Therefore, proportionality is implied. Otherwise, unfairness develops.

Joyce Lugton: The issue is complicated. It is not easy. Perhaps I should read out the section from the policy memorandum. It says:

“This may be demonstrated by using the example of a fire escape. In a four-storey block, the owner of the top flat would be served by the whole fire escape.”

The Convener: Can you point us to the relevant page of the policy memorandum?

Joyce Lugton: I refer to paragraph 30 on page 7. The paragraph continues:

“The second floor owner would only be served by three-quarters of the fire escape, and so on. If each section of the fire escape cost £9 to repair, the top flat would end up with £18.75 of the £36 bill, the second floor flat would pay £9.75, the first £5.25 and the ground floor £2.25.”

Maureen Macmillan (Highlands and Islands) (Lab): But the ground-floor flat does not need a fire escape.

Joyce Lugton: We actually discussed that at some length and we concluded that there were circumstances in which people in the ground-floor flat might wish to use the fire escape. However, we have provided only an illustrative example, which was designed to show the complexity of a proportionality test. We changed the proposal following the consultation exercise because, when people looked at that sort of example, most of them took the view that the proportionality test was just too complicated.

The Convener: On that basis, is a lift a pertinent?

Joyce Lugton: Yes.

The Convener: If I own the ground-floor flat, my visitors and I never use the lift. In conveyancing, one would normally ensure that the ground-floor proprietor was excluded from that responsibility.

Joyce Lugton: The answer to that is that the bill will provide a default law. In conveyancing, people would normally make specific provision for that sort of thing when they were drawing up title deeds. If you are preparing a default set of rules, it is difficult to foresee all sets of circumstances. By attempting to do that, you might well end up creating peculiarities and anomalies. A relatively simple rule, however, has an element of rough justice about it.

The Convener: With its own peculiarities in the long run.

Maureen Macmillan: You talked about the ground-floor residents whose doors opened into the close having to pay for a proportion of the upkeep of the staircase and close. What would happen if the default rules were being applied to a tenement and the ground-floor resident decided to block up the door into the close and—assuming they got planning permission—install French windows that opened out on to the street instead? I am talking hypothetically, obviously, but the situation is not impossible.

Joyce Lugton: Indeed it is. I think that that is a question that my solicitor should reply to.

Norman Macleod: I have not thought about that issue at any great length. I think that the answer would be that if you could carry out the work required—and, as it is your door, I presume that you could—you would no longer be served by the close and, under the default rules, you would no longer have a share. However, I do not know whether you would be able to carry out work of that nature without obtaining consent from the other owners and, therefore, implicitly obtaining their permission to withdraw your liability for, say, the painting of the common stair.

Jackie Baillie: Irrespective of that, if the title deeds say something else, would they stand?
Norman Macleod: If the title deeds say that everyone in the close has a share of ownership of the common close, that is the ruling provision.

Mike Pringle: Including those flats on the ground floor that have no access to the stair?

Norman Macleod: Yes.

The Convener: Have you any other questions about pertinents, Nicola?

Nicola Sturgeon: No, I think that I will let pertinents lie.

Karen Whitefield (Airdrie and Shotts) (Lab): In response to Mike Pringle, you said that the tenement management scheme was an area in which the consultation document proposed something different from what is in the bill because the consultation was based on the tenement management scheme being compulsory irrespective of what the title deeds said. Why has the Executive changed its position on that?

Joyce Lugton: What you have said is not entirely true; there is a qualification to be made to the remark that the tenement management scheme would have been applied on a compulsory basis. The idea was that it would have been applied on a compulsory basis with two exceptions: one being that the title deeds had an adequate provision concerning decision making, which would apply in any case; and the other being that the title deeds had an adequate provision on the apportionment of costs, which would also have applied in any case. The Executive considered the remaining provisions in the tenement management scheme and weighed up whether any of those should prevail over the title deeds or whether the title deeds should prevail over them. It consulted on that issue and found that the overwhelming view of consultees was that the title deeds should prevail in all matters. The Executive accepted that view.

Karen Whitefield: Did all the consultees support that or was it only those consultees who had an interest in the operation of the tenement management scheme who did so?

Joyce Lugton: An overwhelming majority of the consultees supported that idea. Hamish Goodall might be able to be more precise. Was it only three who did not?

Hamish Goodall (Scottish Executive Justice Department): I cannot remember exactly, but well over 75 per cent of those who responded favoured the idea that title deeds would prevail over the tenement management scheme. Those respondents included most of the major consultees, including the Law Society of Scotland, the Royal Institution of Chartered Surveyors, the Scottish Consumer Council and the Scottish Federation of Housing Associations.
Norman Macleod: If their title deeds do not provide them with the benefits of the tenement management scheme, the bill will apply the tenement management scheme to their tenement.

Karen Whitefield: What would happen where the title deeds stated clearly that the owner of the top flat had responsibility for the roof, but the owner did not have the money to undertake the repair or did not believe that they should have to do so and, by failing to do so, not only their own property would be damaged but other properties in the block?

Edythe Murie (Scottish Executive Legal and Parliamentary Services): If the title deeds say that the owner of the top flat is responsible for repairing the roof, they prevail and he is responsible. However, section 8 will replace the common-law duty on providing support and shelter. The section says that the owner of any part of a tenement building must maintain the building so as to provide support and shelter for the other parts of the tenement. If the top-flat owner failed to maintain the roof, he would breach his statutory duty under section 8.

Mike Pringle: I will follow that up, because we have not reached a conclusion. At present, if the person in the top flat refuses to repair the roof, the other owners on the stair can tell their local authority that they want the building to be repaired and the local authority can say that it will repair the building under a statutory notice. However, that means that everybody pays a share. Local authorities used not to follow that practice, but that is what most do now. If the management rules in the bill applied, who would force the owner of the top flat to repair the roof?

Norman Macleod: The answer will always depend on the circumstances. In the situation that has been described, the top-flat owner is liable for repairs to the roof.

Mike Pringle: That is in the title deeds.

Norman Macleod: If that is the case, it is because the top-flat owner owns the roof in its entirety.

Mike Pringle: Because that is what the title deeds say.

Norman Macleod: The title is probably silent on who owns the roof, so the common law provides that the top-flat owner owns the roof and is therefore responsible under current law for it. The bill provides two ways of repairing the roof in the situation that has been described. One is by majority decision. A majority of the owners in a property will be able to decide to undertake works, whose cost will be shared among owners.

Mike Pringle: That is an important point on which I would like to ask a question.

Norman Macleod: The other way to repair the roof arises from section 8, which we have discussed. That section will impose on the owner of the roof a duty to provide shelter. If maintenance of the roof is required to fulfil that duty, section 10 deals with that as if a majority decision has been taken and makes all owners responsible for the cost, even though a majority decision has not been taken.

Mike Pringle: I have experience of the example that you excluded, when the title says that the top-flat owner is responsible for maintaining and repairing the roof. That situation applies to a large number of older tenements in Edinburgh. I suspect that it also applies in Glasgow, Aberdeen and elsewhere, but my experience is in Edinburgh.

Norman Macleod: I suspect that the title would rarely provide by way of real burdens that the top-flat owner would have to pay the full cost of repairing the roof. It is much more likely that by omission—complete silence—no provision would be made on who should maintain the roof, so the common-law position that the top-flat owner has to pay for that would apply.

Mike Pringle: I am sorry to repeat my question, but I am asking about title deeds that say that the top-flat owner is responsible.

Norman Macleod: If the title deeds provide for that, then, as the bill is drafted, real burdens provide primary responsibility for liability, so that owner would be responsible for maintaining the roof.

Edythe Murie: Perhaps I should add that we are not interfering with any of the powers of the local authority to issue statutory notices. That system will continue.

Mike Pringle: So owners will still have the right to go to the local authority.

Edythe Murie: Yes.

Mike Pringle: I will come back on that.

Nicola Sturgeon: I think that the witnesses covered this in their last couple of contributions but, for absolute clarity, the management scheme kicks in only when the title deeds are silent. As long as the title deeds have something to say, no matter how subjectively unreasonable it might be, or whether it provides less stringent protection than the bill seeks to provide, the title deeds will prevail. In other words, the tenement management scheme is a genuine default position and not a minimum standard. Am I right in thinking that?

Joyce Lugton: If the title deeds are silent or inadequate.

Nicola Sturgeon: Or inadequate?

Joyce Lugton: Yes.
Nicola Sturgeon: So to return to the example, if the title deeds say that the tenant on the top floor is responsible for repairing the whole roof—

Joyce Lugton: That is not inadequate.

Nicola Sturgeon: What you mean by “inadequate” is crucial. “Inadequate” does not mean that the protection for all the tenants in the tenement is not as adequate as is envisaged in the bill; it means that the position is not explained properly.

Joyce Lugton: “Inadequate” means that the title deeds do not work: for instance, if they apportion costs but the proportions do not add up to 100 per cent. It is that sort of thing—if the deeds are inoperable.

Nicola Sturgeon: So the deeds are inadequate rather than deficient.

Joyce Lugton: If the title deeds are perceived to be inadequate on a value-judgment basis, they will not be superseded but will remain. In the case that we are discussing—which we think will be rare—where the title deeds specifically say that the roof is to be repaired by the owner of the top flat, and that he is solely responsible, the ultimate enforcement action that the other owners could take would be either through the local authority, as described, or through the courts.

Nicola Sturgeon: So with the bill we are not in any way looking at a set of minimum standards that are to be applied to tenements. The bill kicks in simply when the title deeds are silent.

Joyce Lugton: There is a minimum standard in the sense that the bill will ensure that all tenements have a way of getting to a position where they are maintained and managed properly, but it holds back from interfering with the provisions in existing title deeds, on the ground that, generally speaking, provisions in title deeds are not there by accident.

Nicola Sturgeon: I understand everything that you are saying, but I am trying to get clarity. The bill does not provide a solution to people in a tenement who have title deeds that cause problems—the deeds may not be technically inadequate in the way that you describe, but they cause problems in the management of the tenement. The bill will not deal with title deeds just because they prescribe something stupid.

Joyce Lugton: That is right. It is worth standing back a little bit from the bill and pointing out that the Title Conditions (Scotland) Act 2003 provides some means by which it is easier to vary real burdens that are not satisfactory.

Jackie Baillie: I wish to pursue that, but I will try not to go over the same ground, because it is largely the same point. You say that the Title Conditions (Scotland) Act 2003 applies, but it does not apply retrospectively to existing title deeds, does it?

Norman Macleod: The powers to change real burdens can be used only in the future, once the bill comes into force, but then they can be applied equally to existing real burdens and to burdens created in the future.

Jackie Baillie: That maybe covers the point about minimum standards and extending beyond technical deficiencies.

Norman Macleod: It depends on whether you think that the title conditions that have been deliberately and carefully drawn up, and which provide that certain people will pay for certain costs, are a deficiency or whether they are simply well-drafted legal documentation.

15:00
The Convener: Could I have clarification on an important point that Nicola Sturgeon raised? Let us assume that we have a title that expressly makes the top-flat proprietor liable for the roof. Section 8(1) clearly provides an obligation on the owner of any part of the tenement building to do certain things; that is the creation of a statutory obligation. Our owner of the top flat may have no interest in doing anything about his leaking roof, but the rest of section 8 seems to give to other owners a right of enforcement. Nicola Sturgeon’s question is whether, notwithstanding the title conditions that exist in that imaginary case, section 8 will fortify that right of enforcement. If I own the flat downstairs and have dry rot going round my second-floor flat because Nicola is not attending to the top-floor flat’s roof, can I come in under section 8(3)?

Edythe Murie: Yes—that is in the bill and not in the tenement management scheme in the schedule, so that will be the law as it applies to all tenements. Irrespective of what is in the burdens, every tenement owner has a duty to provide support and shelter; every other owner who is affected can enforce that.

Mike Pringle: At the moment, that is done by the owner going to the local authority and getting the local authority to enforce the work that is to be done.

Edythe Murie: That is one way of doing it. At the moment, the work could also be enforced using the common law. The new provision is a replacement of the common law.

Mike Pringle: In my experience, that has never happened, because it is so expensive for individual owners to get involved. That brings me back to the question about ownership. If there are 10 owners in the stair and six say, “Yes, we’ll go
ahead,” the real problem is to get the other four people in the tenement to pay. The way that that is done at the moment is to get the local authority to do the job—the local authority makes them pay.

**Norman Macleod:** That option will still be open to people.

**The Convener:** I may be wrong about this, but is not there an obligation on a local authority only when a building becomes dangerous, but not in matters of maintenance and repair? I presume that we are talking about section 19 or section 34 notices.

**Mike Pringle:** I was not talking about that particularly; I was talking about situations in which somebody in the stair knows that there is a leak in the roof but nobody is doing anything about it. If that person goes to the local authority to say that they want the problem to be repaired, that does not mean that the building is dangerous.

**The Convener:** The situation is not as simple as that. My understanding is that a local authority cannot do anything without serving a statutory notice on all the proprietors.

**Edythe Murie:** That is correct.

**The Convener:** My understanding is that local authorities are reluctant to do that unless there are the most compelling circumstances that merit their getting involved.

**Edythe Murie:** Several different provisions can be used by local authorities. First, section 108 of the Housing (Scotland) Act 1987 can be used if a local authority is satisfied that a house is in a state of serious disrepair. However, when a local authority uses such a notice, it is obliged to approve an application for a repairs grant in so far as it relates to the execution of works that are required by that notice. The other route is to use section 87 of the Civic Government (Scotland) Act 1982, under which a local authority may require an owner of a building to rectify such defects as are specified in the notice in order to bring the building into a reasonable state of repair. A person who complies with a notice and carries out the work has the same entitlement to loans and grants as if the notice had been served under the Housing (Scotland) Act 1987. In other words, a local authority is obliged to make repairs grants available, which is one reason why some local authorities are reluctant to use those provisions.

A specific situation applies in Edinburgh, where there is a separate local act—the City of Edinburgh District Council Order Confirmation Act 1991. That provision is not tied to grants and loans, which is perhaps why the City of Edinburgh Council has a good record of being proactive with regard to statutory notices. Unfortunately, not all local authorities can take advantage of that type of provision.

**Mike Pringle:** I apologise. My experience is only of Edinburgh—I thought that that was what happened nationally.

**Jackie Baillie:** Before I go on to mediation, I want to be absolutely certain that I understand what you are saying. If the title deeds make provision for everything that is in the tenement management scheme, but at a different standard or a lower value than what is in the tenement management scheme, will default provisions apply automatically, or do the title deeds have primacy?

**Norman Macleod:** The title deeds have primacy. I am not sure that I understand completely the question about standards, especially if you are talking about apportionment of liability. The bill sets out a default provision in situations in which there are no provisions in the real burdens that set out what the liabilities are. The bill sets a baseline for liabilities in the absence of alternative provision, or of provision that works. I refer to provisions that are inadequate in that they do not add up to 100 per cent liability.

That is one aspect of the tenement management scheme. Other aspects include procedures for decision making. There are many different types of procedures that one could use; the one in the bill is designed to be straightforward and easy to use. There will be other provisions in title deeds that are more complex or more basic.

**Jackie Baillie:** If the alternative provision is less favourable or is in some way unfair, people will not have automatic access to the default provision. I want to know what is the connection between the Title Conditions (Scotland) Act 2003 and the bill. We may need more detail on the Title Conditions (Scotland) Act 2003 and how it relates to this element of the bill.

**Norman Macleod:** We are happy to provide more details, if the committee wishes them.

**Nicola Sturgeon:** I will give an example that may help you to understand what members are getting at when we ask about the relationship between the default provision and minimum standards. I asked you earlier about the service test and how it relates to pipes, for example. You gave a very good answer and said that the situation was much easier to deal with when two owners were served by the same pipes. If a pipe is broken, those people agree to fix it and pay for it between them instead of having to get the agreement of, and money from, all 12 owners in the tenement, which might hold up repairs significantly. What would happen if the title deeds dictated that the agreement of all 12 owners was required, so that simple repairs to pipes that served only two properties in the tenement were delayed? That is what we are talking about when we say that such title deeds, which are less fair, simple and practical than the default provision, are inferior to the proposals in the bill. You are saying that title deeds that set out a procedure will prevail automatically.

**Joyce Lugton:** That is right. The way round the
problem would be for the owners to decide that a more practical way forward would be for decisions to be taken by a smaller number of people and to vary the title deeds under the provisions of the Title Conditions (Scotland) Act 2003. We would be happy to provide the committee with a note on the procedures that can be used to do that, if it would be helpful to the committee.

Nicola Sturgeon: It would.

Joyce Lugton: Nicola Sturgeon described a case in which the title deeds say that the agreement of all owners must be obtained before repairs are done. In practice, people would simply go ahead with those. People often find practical solutions.

Nicola Sturgeon: We should not, when we are debating the bill, assume that such will be the case.

Joyce Lugton: I take the member’s point.

The Convener: I seek some technical help for the official report. Mike Pringle raised the issue of statutory notices. I mentioned section 19 and section 34 notices, but Edythe Murie did not comment on them. Perhaps those provisions have been repealed. Such notices used to be issued either under the Building (Scotland) Act 1959 or under one of the Housing (Scotland) Acts.

Edythe Murie: I would need to check that.

The Convener: It would help the official report if you could drop us a note.

Jackie Baillie: I will move on to mediation. Members who stay in their constituencies for any length of time will deal in their surgeries with disputes between owners and owners, between owners and owners associations and between owners and factors. This seems to be an area in which we can all easily fall out.

At one level, communication is part of the solution, but there are more serious issues. I certainly feel that many difficulties that owners have in disputes could be resolved if they were tackled early enough—I think that that is widely acknowledged to be the case. Effective means of dispute resolution, such as mediation, are included in other bills; for example, the Education (Additional Support for Learning) (Scotland) Bill. We wonder why the Executive thought that there should be no formal role for mediation in the Tenements (Scotland) Bill.

Joyce Lugton: There are different ways of approaching the issue, but I will deal first with the more detailed issue to which you referred at the end and consider the position on mediation that is being set out in other bills, particularly the Education (Additional Support for Learning) (Scotland) Bill.

The Executive does not believe that the dispute resolution provisions in the Education (Additional Support for Learning) (Scotland) Bill provide a proper parallel to tenement disputes. That bill will place on every education authority a duty to make appropriate provision for dispute resolution, but the disputes in such cases would be between an education authority and parents. Therefore, a dispute would be between a public authority and private individuals. In the case of tenements, disputes are generally between private individuals. Therefore, it did not seem to be appropriate that public authorities be given a duty in the Tenements (Scotland) Bill to set up a mediation process in the same way as in the Education (Additional Support for Learning) (Scotland) Bill. That is a different sort of scenario.

In moving back from the particular to the general question of mediation, I would say that the Executive would go along with Jackie Baillie’s view that mediation is a good thing. The Executive wants to encourage the use of mediation and is doing so in a number of ways. However, the Executive is keen to ensure that mediation be developed generically rather than in relation to particular initiatives on particular issues. The Executive feels that mediation services, which are sparsely and differentially distributed throughout Scotland, should be developed as a whole so that matters such as training of mediators can be considered in a cross-sectoral way. The Executive would prefer to pursue mediation in that general way, rather than include mediation provision in specific bills, such as the Tenements (Scotland) Bill.

Joyce Lugton: The placing of a dispute-resolution duty on, for example, a local authority does not imply that it cannot be a kind of independent arbiter. I would have thought that such a role would be attractive because independent arbitration could prevent matters from ending up in court. To have reached the court stage means that there has been no early action, and that it is too late amicably to resolve a dispute. The inclusion in the bill of a duty of dispute resolution would not imply the use of a particular type of mediation, so the Executive would still be able to adopt its generic approach to mediation as a skills set that could be used in different settings.

Joyce Lugton: It was considered that, although the final word would probably have to be with sheriffs, it might be possible to place a duty on sheriffs—for example, when awarding costs—to consider whether parties had participated in mediation. For example, if one party to a dispute refused to participate in mediation, it might be possible for that party to be penalised by differential award of costs. The Sheriff Court Rules Council is considering that in a general way and the Executive does not want to pre-empt the council’s discussions by including in the bill the
provision to which I referred.

15:15

Nicola Sturgeon: Section 14 of the bill will allow the owners of flats in a tenement access to other owners’ flats for maintenance purposes, subject to certain safeguards. Some respondents to the consultation expressed concern that that provision is, in theory, open to abuse and they wanted the safeguards to be strengthened. Did you take account of those concerns in the bill and, if so, how?

Joyce Lugton: Yes, we did. The original version of section 14 would have allowed owners to request access to different parts of the tenement to carry out maintenance or other works, or simply to carry out an inspection to determine whether it was necessary to carry out maintenance or other works. We have removed the references to “other works” so that access is restricted to necessary occasions. The view that was taken was that it would be unreasonable to allow access in a case in which someone wanted to make alterations to their flat and it was more convenient to them for their neighbour’s floor to be dug up than for their own ceiling to be disrupted. The change means that access can be required only when necessary.

The Convener: On a technicality about access, there are, in the rules that govern the management scheme, fairly precise directions about giving of notice and the method of sending it. Are those directions also meant to cover access for maintenance purposes?

Joyce Lugton: I do not immediately know the answer to that—I think that we will have to write to you on that point.

The Convener: Such people would be in an even worse position if an individual proprietor was underinsured.

Joyce Lugton: Perhaps we can come back to underinsurance, which relates to Mr Pringle’s question about reinstatement value. However, to return to common insurance, perhaps I have not expressed the point clearly enough. Under a common insurance policy, if one person failed to pay the premiums, the policy for the whole tenement would be vitiating, so nobody would be insured. It is hard to see how any scenario would be worse than that.

Mike Pringle: Section 15 deals with insurance. Some respondents to the consultation suggested that there should be a common insurance policy for an entire block. I wonder why the bill has not gone down that route. My other question is on insuring to the reinstatement value. I am not sure that everybody does that now, so how will the bill make sure that people do so in the future?

Joyce Lugton: To take the question about common insurance first, the idea that everybody in a tenement should be involved in the same insurance policy is attractive, for obvious reasons. However, we discussed the matter with insurance company representatives and there is a difficulty in that if one person does not pay the premium in a common insurance policy, the whole policy is vitiating.

Mike Pringle: Oh—right.

Joyce Lugton: I see your reaction. The effect would be that the other people who were paying up would be in a worse position than if they were paying for policies that covered only their own flats. That is why the Executive chose not to go down the route of common insurance.

The Convener: I am sorry, Mrs Lugton, but I will just interrupt for a moment. Such people would be in an even worse position if an individual proprietor was underinsured.

Joyce Lugton: If everyone pays up and the whole thing is properly managed by a factor, there are certainly advantages in a common insurance policy. However, if there was no factor and people were allowed to slip with payments, the lack of an insurance policy that covered the whole block would be a fatal flaw.

The Convener: I wonder whether section 15 is enforceable, because in my experience common policies have normally been administered by factors for the simple reason that that makes matters visible and accessible and everyone knows at once whether the premium has been paid. In fact, most factors pay such premiums in advance and recover the money from the proprietors. However, what is the enforcement sanction under section 15? It is all very well to provide a duty for “each owner to effect and keep in force a contract of insurance”, but that is meaningless unless everyone runs around the close demanding sight of everyone else’s insurance cover.

Joyce Lugton: The issue of enforcement is different from that of a common policy. The obligation in the bill is simply that proprietors should insure for reinstatement value. However, enforcement of that obligation is left to neighbours. Indeed, who else would carry out enforcement in the absence of a factor? The bill does not provide for a compulsory factor.
If there is no factor, who will enforce the insurance provisions? One option is to assign local authorities or some public body to enforce them. However, that would place a very onerous duty on local authorities; after all, there are 826,000 dwelling houses in tenements in Scotland, so it would not be practical to introduce an external enforcer to ensure that insurance policies were kept up to date. Although the alternative that is outlined in the bill might not be ideal, it is thought to be an advance on the current position, which is that there is no compulsion to insure flats.

The Convener: So far I am with you; I do not disagree with anything that you have said. However, the obligation that is set out in section 15 would be only as good as the benefit that would then be conferred on the other proprietors. How can they find out whether flat proprietor A has discharged his obligations under section 15?

Joyce Lugton: Proprietors have a right to inspect next-door neighbours’ policies and to see evidence that premiums are being paid.

Mike Pringle: That is an improvement on the current position. At the moment, people do not have such a right.

Joyce Lugton: That is right. The bill provides two things: compulsory insurance to reinstatement value and the right to inspect a neighbour’s policy and evidence of payment.

Mike Pringle: While the convener is reading through the bill’s provisions—being a lawyer, she might find the relevant point more quickly than I—I should say that although we will, under the bill, have the right to find out information that we cannot find out at the moment, I am sure that we all know what the response would be if we asked a next-door neighbour whom we very rarely saw whether they had insurance on their property. How will the provisions in the bill make such a right?

Norman Macleod: All rights are enforceable at law through the courts. If the threat of legal action does not cause the duty to be done, the ultimate recourse will always be to go to court to get an order to enforce the duty.

Mike Pringle: I am not sure that that is much of an improvement on the present situation. I suppose that you have answered my question about reinstatement value. I suspect that if huge numbers of tenement owners were asked about insurance, we might be surprised to discover how many of them have no insurance at all. I would be even more surprised if we did not find that many of them have never considered the reinstatement value under their insurance policy.

Joyce Lugton: I think that the information that we have is that probably about 10 per cent of people are not insured.

Mike Pringle: That is a very large number.

Joyce Lugton: What we do not know is the value to which people are insured. People may be insured to a value that is less than reinstatement value. The Executive accepts entirely the points that you make. However, the alternatives are neither attractive nor practical. The provision is a step forward to encourage people to be insured. Once the bill has passed through Parliament, the intention is for there to be quite a large publicity drive to give people information on the changes in the law. The opportunity will be taken at that time to encourage people to adopt good practice, which is what insuring to the right value is.

The Convener: If I understand section 15 correctly, it could work by creating an obligation that entitles the owner to request the owner of any other flat in the tenement to produce evidence of their policy, the sum insured and evidence of payment of the premium. Section 15(6) gives the owner the right to enforce the duty to insure on any other owner.

In other words, let us take the elderly pensioner who is living in a tenement. She has been paying her insurance premium for decades, but is not familiar with terms such as “reinstatement value”. An up-and-thrusting young neighbour arrives and demands to see her contract of insurance. The neighbour finds that the pensioner is underinsured by maybe £150,000 to £200,000. Under the provision, the other owners could in effect compel the pensioner to up her insurance cover. If she could not afford to do that, she would be forced into moving.

Joyce Lugton: Yes. It is always possible to paint scenarios of that kind, but the object of the bill is to try to improve the position of people who live in tenements—people whose properties might not be well maintained and insured.

The Convener: Is it possible that the facility could be abused by a speculative developer?

Joyce Lugton: In what way?

The Convener: Someone might suspect that some of the flat owners are underinsured, buy up a couple of the flats, use this statutory power to demand to see what they are insured for, get their properties insured for the correct reinstatement value and inform on the not insured. If those poor individuals could not pay, in effect that would be them.

Joyce Lugton: That would certainly be a major unintended consequence of the bill. I think that it is a fairly unlikely scenario.
Many modern developments have provision for sinking funds. It is possible that such provision will grow in future but, at this stage, it has not been thought appropriate to include any statutory provision for sinking funds.

Karen Whitefield: Some have said that the legislation is silent on the need for common factoring schemes. The consultation paper proposed common factoring, so why did the Executive decide against it?

Joyce Lugton: The consultation paper did not actually propose common factoring; it was absolutely neutral on that issue, as on others. However, the paper did ask the question and raise the issue. The Executive’s general aim is to encourage owners to establish effective arrangements for managing communal repairs, maintenance and so on. Another, slightly separate, aim is to ensure that good-quality professional property management services are available in Scotland.

The Executive acknowledged that, in some cases, people might prefer to factor themselves. For instance, in many small developments, people are perfectly able to manage the property themselves. Miss Goldie mentioned that the bill would cover divided properties. In such properties, there might be only two or three properties in the tenement. There would not seem to be any need for a property manager in that sort of arrangement.

For the moment, the policy is to facilitate factoring and the bill does some things that will facilitate it. For instance, the bill makes provision for a majority to be able to appoint, or indeed to dismiss, a factor. The Title Conditions (Scotland) Act 2003 made similar provisions, so it is easier for factors to be appointed. At the same time, and slightly separately, there are arrangements in hand to encourage the provision of good factoring services in Scotland and a scheme is under way to introduce a voluntary accreditation scheme for property factors, which should lead to an improvement in standards, or at least to a general recognition of what is an appropriate standard of factoring.

Karen Whitefield: Do you agree that the advantages of having compulsory factoring, so that everybody can enjoy the benefits of it, far outweigh the disadvantages that might be presented to people who can manage their properties? People might be getting on quite well with all their neighbours at the moment and things might be going according to plan, but it only takes one neighbour to move out for things to change. It strikes me that having a common factoring scheme could have greater benefits and liabilities, to ensure that there are funds to carry out repairs as needs arise?

Joyce Lugton: Many modern developments have provision for sinking funds. It is possible that such provision will grow in future but, at this stage, it has not been thought appropriate to include any statutory provision for sinking funds.

Karen Whitefield: During the progress of the Housing (Scotland) Bill in the first session of the Parliament, considerable discussion took place about the need for consideration to be given to establishing sinking funds for properties, which would deal with the problems of owners who do not always have sufficient money to do repairs when they arise. There was also discussion about problems that relate to communal and/or shared areas and to the issue of being underinsured and so not having enough money to undertake joint repairs. The bill is silent on that aspect. What consideration did the Executive give to long-term maintenance funds?

15:30

Joyce Lugton: There has been a lot of consideration of sinking funds. Mr Fox mentioned the housing improvement task force, which gave a lot of thought to the matter but in the end concluded against recommending that sinking funds should be established. The thinking of the housing improvement task force fed into the Executive’s thinking on the bill. The task force concluded that it would not be practical to establish sinking funds in either existing or new developments.

One of the problems was the lack of any means of enforcement. If one had enforcement by local authorities or other public agencies, they would have to keep information on, for example, the size of the funds; they would have to regulate the management of the funds, which would be very onerous; and there would have to be penalties against owners who failed to comply. Generally speaking, the level of bureaucracy would be high.

Another factor was taken into account. One does not know how long this will last but, at the moment, interest rates are historically low. If a major repair comes up, people might well prefer simply to borrow the money and add it to their mortgage, rather than save in advance in a sinking fund. Such a fund would have to be held in a particular regime, with all the attendant problems of management and the rate of interest that might accrue.

Karen Whitefield: We are fortunate to have relatively low interest rates. I could make a political point and say that that is all down to our Labour Government, but I will not. However, we might not always have low interest rates and it might not always be possible for people to add the money to their mortgages. Even if interest rates remain low, people might have other commitments.

It might not be appropriate for inclusion in this legislation, but should there be safeguards for properties with communal areas and shared
advantages than it has disadvantages.

Joyce Lugton: The view that the Executive has taken is that it wants to encourage common factoring, but it does not think that it is appropriate for common factoring to be compulsory. For some of the reasons that have been rehearsed, there are some properties for which it is simply not necessary to have a factor and it would seem to be unduly onerous for them to have one. There are also problems of enforcement. If it was compulsory to have a factor, how would that be enforced? Would that be yet another job for beleaguered local authorities? Having to do that would be an expensive burden. The final problem is that there is currently no proper accreditation scheme for property managers.

Those were the arguments that also led the housing improvement task force not to recommend compulsion. The task force never really considered compulsion for existing tenements, but it did consider compulsion for new tenements. However, it decided against recommending it, because it thought that the arguments against compulsion overruled the arguments that you mentioned.

The Convener: I presume that, in the debate that took place, regard was paid to the fact that the relationship with the factor is a contractual relationship—one of principal and agent—between the owners of the flats and the factor. Was regard paid to the right of individual proprietors to make their own decisions?

Joyce Lugton: Yes.

The Convener: Owners might decide universally that they do not want the expense of a factor and that they are sufficiently clever to do it all themselves.

Joyce Lugton: Absolutely.

Colin Fox: One of the other recommendations that the task force made was that owners associations should be established in new-build tenements with eight or more properties. Is it right that the Executive has decided not to include that?

Joyce Lugton: Not exactly. What the Executive has decided is that it cannot include that at present because it touches on a reserved matter. Mr Macleod will correct me if I am not using the right term, but I think that owners associations are considered to be public bodies. Is that right?

Norman Macleod: No.

Joyce Lugton: No. That is obviously the wrong term. They are considered to be business associations.

Norman Macleod: They are considered to be business associations under the Scotland Act 1998. The creation of an owners association would equate to the creation of a business association, and the creation of such bodies is reserved to the Westminster Parliament.

Joyce Lugton: And so the Executive is discussing with the relevant Whitehall departments the appropriate way forward.

Colin Fox: I thought—because you touched on this in answers to other questions—that the answer was going to be that, in new-build properties, the title deeds tend to be specific and loud and clear, so because the obligations and management are clear, the provisions in the bill, which are a default, would not apply. That is a factor, but you are saying that the issue is because the matter is reserved.

Joyce Lugton: It is certainly because the matter is reserved that it is not possible to put anything in the bill at present. In the policy memorandum, the Executive has not expressed a view on the desirability or otherwise of owners associations, but it can see the arguments about the need for them. The Executive is currently considering the best way forward.

Colin Fox: Okay.

The Convener: Are there any other questions? If there are none, it falls to me to thank Mrs Lugton and her colleagues Mr Macleod, Mrs Murie and Mr Goodall for what has been a riveting session. I am sure that some of us have been overcome with nostalgia, and if not overcome with nostalgia, visited with innovatory zeal to understand the delights of tenemental dwelling and ownership. It has been a helpful session for us. We look forward to receiving clarification on the one or two points that you agreed to clarify for us.

Would members like a brief break for tea, coffee and loo?

Members indicated agreement.

The Convener: We will suspend for five minutes.

15:42

Meeting suspended.
Scottish Parliament
Justice 2 Committee
Tuesday 30 March 2004
(Afternoon)

[THE CONVENER opened the meeting at 14:07]

Tenements (Scotland) Bill: Stage 1

The Convener (Miss Annabel Goldie): I welcome everyone to the 12th meeting in 2004 of the Justice 2 Committee. I have no note of apologies and everyone is here. This afternoon, we propose to start taking evidence on the Tenements (Scotland) Bill. As a matter of propriety, I should declare two interests. I am a member of the Law Society of Scotland and of the Scottish Law Agents Society.

On behalf of the committee, I welcome Mr John McNeil, who is a member of the Law Society of Scotland’s conveyancing committee and Linsey Lewin who is the secretary of the Law Society’s conveyancing committee. We are pleased to have you with us this afternoon. We have received your submission and the committee has various areas of questioning that it would like to pursue with you. If either of you has any brief preliminary comments, please feel free to make them.

John McNeil (Law Society of Scotland): I have one point to make by way of introduction. One of the concerns that we have expressed in both the papers that we submitted to the Executive is what is supposed to happen under the bill when there is an unresolvable or insoluble dispute between or among three or fewer proprietors in a tenement that has only two or three properties. There does not seem to be any provision for resolving disputes in those circumstances.

The Convener: Thank you. That is helpful. One of the bill’s purposes is to deal with boundaries and boundary features of tenements and to define them by reference to the mid-point. I know that, in its response to the Executive’s consultation, the Law Society said that such an approach would cause some practical difficulties. An alternative approach would be to make the boundary features common property. Will you explain why you think that ownership of boundary features to the mid-point is preferable to making them common property?

John McNeil: The short answer to that is yes, we are happy with it. We note that it has been changed from the definition in the draft bill appended to the Scottish Law Commission’s report by the addition of the provision on “related flats”. As I recall, that was not in the draft bill. Section 23(2) contains provisions to determine whether two or more flats are related. It says:

“regard shall be had, among other things, to—
(a) the title to the tenement; and
(b) any tenement burdens,
treating the building or part for that purpose as if it were a tenement.”

The Convener: Is there any possibility of confusion, given that section 23(1)(b) is specific about a horizontal division? At a previous meeting, we discussed the situation that might arise in a divided villa, for example, where there is sometimes an amalgamation of horizontal and vertical divisions. One might find a ground floor and a first storey at one end of the villa, which would produce a horizontal division between a ground-floor flat and the flats above it.

John McNeil: Yes. In some circumstances that could be the case; it might not be clear whether the building was a tenement or not.

The Convener: That might need to be considered. The other backdrop is that, as we understand it, the bill is intended to represent the default position—it is to apply in circumstances in which the deeds are ambiguous or silent. I want to explore why the Law Society supports the principle of free variation. Do you feel that it is important to maintain that freedom among heritable proprietors?

John McNeil: We felt that, as far as the title conditions are concerned, free variation should be permitted because—particularly in the case of converted properties, to which you have referred—there might be changes in circumstances; redevelopments of various kinds might take place. For example, a building might be divided into two flats initially and then, if it was a large house, either of those flats might be divided into another two flats. It is clear that one would not welcome a situation in which the new flats would be governed by the provisions of the Tenements (Scotland) Bill, whereas the original flats would be governed by the terms of the title deeds. An ability to change the burdens in the deeds would achieve the kind of flexibility needed in the situation that I have just outlined.

The Convener: Thank you. That is helpful. One of the bill’s purposes is to deal with boundaries and boundary features of tenements and to define them by reference to the mid-point. I know that, in its response to the Executive’s consultation, the Law Society said that such an approach would cause some practical difficulties. An alternative approach would be to make the boundary features common property. Will you explain why you think that ownership of boundary features to the mid-point is preferable to making them common property?
property? The default rules on that are covered in section 2.

John McNeil: Whether the boundaries that you mentioned should be treated as being mutual or as being owned up to the mid-point is a fine point. The commission and the draft bill provide for the latter—ownership up to the mid-point of the mutual boundary. We did not feel strongly one way or the other about that point. We thought that it was perfectly logical and that we would therefore support what is in the bill and the commission’s draft bill.

14:15

The Convener: An example of where an issue might arise is where the boundary of two flats is the mid-point of a common joist and dry rot is on one side of the mid-point. If we resort to a mid-point definition rather than common ownership, could that affect the right or the ability of the other proprietor to take remedial action?

John McNeil: Irrespective of ownership, that kind of situation could be difficult to deal with practically unless a majority said that the repair had to be carried out. Ownership does not necessarily carry with it willingness to repair at all times. If it did, the bill would not make the provisions that it does for majority decision taking. With respect, I do not think that the issue of ownership is particularly relevant to the kind of situation that you envisage.

The Convener: If we deal with mid-point definitions for boundary points, are you satisfied that the bill will protect a proprietor who might find that his structure was reliant on a piece of the fabric that was half owned by one flat and half owned by him when the half that was owned by the other flat had a problem?

John McNeil: On balance, ownership is not terribly relevant to whether a repair is essential or even urgent.

The Convener: You will be aware that section 3(4) of the bill deals with common parts and applies a service test. That is to say that the costs are reported on the basis of the pertinents that are attached to flats and that serve those flats. The alternative approach, which some respondents to the Executive’s consultation favoured, is that ownership of the pertinents by all flat owners in the tenement, regardless of whether they use the pertinents, is preferable. Does the Law Society support a service test?

John McNeil: Yes, we do. We said that in our original submission in response to the Executive’s consultation paper. We were asked in point 3 of the paper whether we agreed that the service test was the most appropriate apportionment of pertinents in a tenement. We said, “Broadly speaking, yes.”

The Convener: How do you respond to the criticisms of those respondents who thought that the service test could be very complex and lead to disputes?

John McNeil: I agree that that is the case. The question whether the service test or joint ownership of all the pertinents is the more easily workable in practice merits serious consideration.

The Convener: If the bill is to be the default position—

John McNeil: I am sorry to interrupt, but I should add that we had a lengthy debate on the matter before finally coming down on the side of the proposals for the service test in the commission’s paper.

The Convener: If I understand you correctly, you are saying that, although the Law Society favours a service test approach, equally it acknowledges that that approach could lead to difficulties.

John McNeil: Indeed.

Karen Whitefield (Airdrie and Shotts) (Lab): The bill proposes that the tenement management scheme be applied in cases where the title deeds are silent. Some people have suggested that the scheme should always be applied, irrespective of whether the title deeds are silent. Has the Executive got that right, or are those who have commented to the contrary correct? If so, why?

John McNeil: That is another aspect of the bill that we debated long and hard. The whole principle underlying the bill is that the scheme is a fallback provision for when the title deeds are silent or are contradictory as regards the apportionment of liability and so on. The tenement management scheme—and indeed the bill’s provisions in their entirety—will kick in only when that is the case. We thought that, in those circumstances, it was logical that the same conditions should apply to the tenement management scheme as to other provisions: provided that the title deeds of the tenement—and of all the properties or units within it—are absolutely clear and unequivocal about how common repairs are to be dealt with and paid for, and as long as there are provisions for decision taking, so as to avoid an impasse, the provisions of the deeds should prevail.

Karen Whitefield: With your experience in this area, do you believe that there might be a problem with tenements whose title deeds are not entirely silent, but whose provisions would not offer the same protection as the tenement management scheme would offer those people whose deeds
are silent? If so, might that cause some inequity among tenement owners?

John McNeil: In my experience, the situation is often satisfactory—in fact, it is satisfactory in almost 100 per cent of cases, if we are dealing with relatively modern, purpose-built blocks that happen to be tenements according to the definition in the bill. It is in older properties where we come across difficulties.

Believe it or not, the situation in Edinburgh, on the east side of the central belt, is very different from the situation in Glasgow, in the west. In Glasgow, there has been a long tradition of house factors managing tenements and taking decisions on behalf of the owners, with everybody operating on a majority basis. In Edinburgh, the opposite is the case—the situation is a complete shambles. The burdens within the same building are often inconsistent with one another. There is rarely, if ever, any form of management scheme to be gleaned from the older title deeds. With most tenements built before 1920, there is an apportionment of burdens, which are often shared in accordance with the old rateable values. Even worse, there are sometimes feu duties, many of which have now been redeemed. We do not know how much those are and we certainly do not know whom to approach for information on that.

All in all, the picture on this side of the country is very unsatisfactory; it is not too bad in Glasgow, however. That is strange, given that there are only about 40 miles between the two places.

Karen Whitefield: In that case, do you foresee there being problems because of the uneven—

John McNeil: I foresee the tenement management scheme, and the bill as a whole, operating in the majority of cases in Edinburgh, and probably in Dundee and Aberdeen as well.

Karen Whitefield: Perhaps the fact that tenement owners in the west coast have had the services of a factor, either satisfactorily or unsatisfactorily, will offer little protection.

John McNeil: You are saying that, viewed subjectively, although owners may have all the requisite provisions in the title deeds to mirror the provisions of the bill, that arrangement may not have worked terribly well in practice. I am sure that that may well be the case. I suppose that the thrust of your question is whether the title deeds should be tossed out, whether they should cease to be a fallback and whether the new law should apply in every case. Personally, I do not think that that should happen.

Karen Whitefield: What are your reasons for not thinking that that should happen?

John McNeil: In the past 30 or 40 years—in fact, since the second world war—purpose-built blocks have gone up. I should not say this about my long-deceased colleagues, but solicitors are much better nowadays at dealing with burdens than they were 100 years ago. One usually finds that the title deeds to the more modern properties contain detailed provisions, with regard both to the apportionment of liability and to how the building is to be managed. Many of those title deeds—the majority of them, I would say—have provisions for the appointment of a manager of the tenement and for the collection of contributions towards the costs of routine maintenance as well as of repairs and replacements. In a sense, we would be chucking out the baby with the bathwater if all those carefully worked-out title conditions were to be of no further effect, which would be the position in the circumstances that you have described.

Karen Whitefield: Would there perhaps be a case for saying that the TMS should apply where the title deeds are silent or do not offer the same level of protection?

John McNeil: That is precisely what we were saying and that is what we continue to feel.

Karen Whitefield: I have a question about scheme property. Rule 1 introduces the notion of scheme property. That will mean, in effect, that owners in a tenement block will become liable for the repair of a communal space in the building that they do not own. There is a list of what such spaces might be, including the roof and the stairs. Do you agree with the proposals for scheme property and do you think that the list is comprehensive enough?

John McNeil: We certainly accept and welcome the definition of scheme property. I do not think that we considered whether it was comprehensive enough. We thought that there was enough in the various items, particularly in rule 1.2(c), under which scheme property would not necessarily carry with it any implication of ownership but under which the items of property would come within the ambit of the TMS.

Mike Pringle (Edinburgh South) (LD): You talked about the difference between the west and the east. Under the City of Edinburgh District Council Order Confirmation Act 1991, the City of Edinburgh Council has taken the option of requiring everybody to pay an equal share towards fulfilling statutory notices. From the evidence that we have heard, I understand that that system works well in Edinburgh, unlike in other places. It was implied that the factoring schemes in Glasgow do not work as well and probably have not been as well maintained. Since 1991, the council in Edinburgh has been proactive. How will that square with the new scheme?
14:30

John McNeil: That is a very interesting question. I am aware of the statute to which you referred and of the fact that the City of Edinburgh Council enforces it rigorously. However, the council cannot go round every tenement every two or three years to check whether repairs are required. The requirement for a repair is brought to the council’s notice almost always by an aggrieved proprietor who could not persuade his or her co-propietors to do anything about the repair. The result is that a statutory notice is served on all the owners in a building to order them to have repairs undertaken, failing which the local authority owners in a building to order them to have repairs undertaken. The result is that a statutory notice is served on all the owners. That system works well in practice. If the bill becomes law—as I am sure it will—I do not think that it will alter the status quo for that system.

Mike Pringle: So you think that the City of Edinburgh Council will be able to continue with that scheme.


Colin Fox (Lothians) (SSP): I will follow up on a point to which you might have referred in your answer to Karen Whitefield’s question. On the apportionment of costs in a tenement, rule 4 of the tenement management scheme sets out liability for the costs of decisions that flat owners make. The Law Society does not want title deeds to prevail over the tenement management scheme on the apportionment of costs when they refer to rateable value, feu duty or an equitable share. Why is that? Is it because, as you told Karen Whitefield, you feel that the tenement management scheme is more modern and offers greater protection? Is that your consistent answer?

John McNeil: Yes. The ability to refer to extrinsic evidence under the Title Conditions (Scotland) Act 2003 to determine proportionate liability is nonsense in the case of tenements. We adverted to that in both our papers to the Executive. We said that items such as the old valuation roll are not easily accessible. We also mentioned feu duties, which are difficult, because they involve the examination of umpteen sets of title deeds—up to 28 in a large tenement, for example—to determine the pro rata liability.

Using rateable value is a most inequitable way to apportion liability. Some old tenement buildings, such as those in Edinburgh or Glasgow, have shops or other commercial premises on the ground floor, which continue to be liable for business rates. When liability was apportioned for the maintenance of a building of which a ground-floor shop forms part—it might be a comparatively small shop with just one window, a front shop and a back shop—the shop owner would pay up to five or six times more than the flat owners did, although the flats might be three times as valuable as the shop, if not more.

Colin Fox: I understand that you want to keep a sense of being modern, fair and proportionate. However, you will understand that the picture that has been painted by much of the evidence that we have received so far is that title deeds should prevail when they give clear instructions. In the case to which you referred, the title deeds might be clear, but you still think that they should not be referred to. Is that the point that you are making?

John McNeil: Yes, that is precisely the point that I am making. Such situations are not black and white. They are very difficult, as we mentioned in our submission. On balance, we feel that the title deeds should prevail, but there must be a point at which that ceases to be the case and the bill’s provisions come into play. The most obvious situation is one such as I have just outlined, in which apportionment is based on some extrinsic factor or on liability inter se of the proprietors for feu duty, which in 99 cases out of 100 is no longer ascertainable because the feu duty has been redeemed on disposal of the property.

Colin Fox: Rule 4 of the tenement management scheme proposes that the contributions that tenants or flat owners make towards maintenance should be shared equally. That is the default rule, but it would not apply where the floor area of the largest flat was greater than one and a half times the size of the smallest flat. Do you envisage any difficulties flowing from the way in which the rules allocate costs and from variations on the basis of floor area?

John McNeil: Again, our working party debated that issue long and hard. The choice has to be arbitrary one way or the other. If relative floor areas are to be brought into play, I guess that requiring that the largest flat be at least one and a half times the size of the smallest is as equitable an arrangement as can be achieved. However, one could argue for a different figure. I believe that some respondents, including the Royal Institution of Chartered Surveyors in Scotland, suggested that the largest flat should be at least twice the size of the smallest before the unequal sharing provisions would kick in.

Colin Fox: What was behind your arbitrary choice of one and a half times the size?

John McNeil: I think that one and a half times the size is fair enough. Of course, there are additional difficulties in calculation of relative floor areas. Some respondents have adverted to the fact that whether particular areas are included or excluded from the calculation of the floor area might depend on the professional who does the measurement.
Maureen Macmillan (Highlands and Islands) (Lab): It is nice to see John McNeil again. The last time we met in committee was probably during consideration of the Title Conditions (Scotland) Bill, the Abolition of Feudal Tenure etc (Scotland) Bill or some other conveyancing-related legislation.

Your written submission states that the Law Society is content with section 5 of the bill, which will allow people to apply to the sheriff to have a majority decision overturned. However, you have concerns about section 6, which is entitled “Application to sheriff for order resolving certain disputes”. Your concern seems to be that, although “disputes” appears in the title of the section, the rest of the section makes only a vague reference to “any matter” rather than to “disputes”. How would you tighten up the provision and make it less vague without excluding matters that ought to be included? If you were to list every kind of dispute that could be resolved by application to the sheriff, would there be a danger that something might be missed out?

John McNeil: As we said in our paper, there is no reference to “dispute” or “disputes” in the body of section 6. If the section is supposed to provide a mechanism for having disputes resolved by the sheriff, I suggest respectfully that there should be a reference to disputes in the body of that section, rather than only in the section heading. For example, subsection (1) says:

“Any owner may by summary application apply to the sheriff for an order relating to any matter”,

but could be changed to read, “for an order concerning”—or “with respect to”, or whatever—“a dispute”.

Maureen Macmillan: It would be a simple matter of changing a few words in that subsection, so that it referred to “an order relating to any matter”—

John McNeil: “any disputed matter”—

Maureen Macmillan: Yes—something like that. Would you be content if section 6 contained such a reference, or do you want the bill to contain a list of matters that might be disputed? I note that in your evidence you mention that you seek “clarification as to whether or not section 6 would enable an owner of a flat in a formerly self-contained dwellinghouse which has been sub-divided into two flats to apply to the sheriff for an order”.

John McNeil: We would still like to know whether that would be possible under section 6.

Maureen Macmillan: It seems that you are wondering whether that type of building would be a proper tenement for the purposes of section 6. Are you asking whether, for example, a large house that had been divided into four would qualify as a tenement?

John McNeil: No. Such a building would definitely be a tenement, as long as it had been divided horizontally. The convener mentioned that issue at the outset.

Maureen Macmillan: Are you asking for clarification simply about houses that have been divided into two?

John McNeil: Such houses would be classed as tenements. However, the bill provides that there would have to be more than three units in a building—so there would have to be more than three proprietors—before the provisions on majority decision taking would kick in. If there were only two proprietors, the decision would have to be unanimous. That is a recipe for a potential impasse every time—as is the current set-up.

Maureen Macmillan: Is that the matter that you raised with the convener earlier? Would you like such arrangements to be included in section 6?

John McNeil: Yes. Notwithstanding the generality, it should be competent for any one proprietor in a tenement that comprised three or fewer units to apply to the sheriff.

Maureen Macmillan: You suggest that such proprietors should be able to have recourse to the provisions in section 6.

John McNeil: Of course, that would run counter to the general thrust whereby negative orders—in other words, orders that require a person to refrain from doing something—are the order of the day. I am talking about a positive order by the sheriff that says, “Get that repair carried out, chum.”

Maureen Macmillan: We can explore the matter further.

John McNeil: I would be grateful if you would do so.

Nicola Sturgeon (Glasgow) (SNP): Section 11 provides that the buyer of a flat in a tenement would become liable for any unpaid debts that related to the tenement, albeit with a right of relief against the seller of the property. I think that that represents a departure from the current position in common law. Do you have a view on that? Do you foresee any practical difficulties in the operation of section 11, if the bill were to be enacted?

John McNeil: I am afraid that there are always practical difficulties, whatever system is put in place, when one person is unwilling to pay and the others say that they must. In principle, we certainly favour the outgoing seller and the incoming owner being, if you like, jointly and severally liable for the outstanding bills. Of course, such matters would be covered in the contract for sale of the property. There would be, if not a statutory obligation, a
common-law obligation on the solicitor acting for the seller to disclose the position to prospective purchasers, which would then be covered in the missives.

14:45

Nicola Sturgeon: What would happen if the seller did not disclose the fact that there were unpaid costs?

John McNeil: There could well be a nasty shock for the buyer. I suppose that in common law he or she might have a right of recourse against the seller for having deliberately concealed a burden or liability affecting the property.

Nicola Sturgeon: If the seller disappears and cannot be traced, what right of recourse, if any, would the purchaser have? Are you concerned that the new provision is a departure from the current position in conveyancing, which puts a lot of faith in what is disclosed in the property registers? Under the new provision, a purchaser would almost be operating in the dark and would be taking it on good faith that a seller was being honest. If the purchaser later found that the seller had not been honest, there would be a right of recourse against the seller if they could be traced. However, in circumstances in which that is not possible, do you foresee any comeback against a solicitor or the Keeper of the Registers of Scotland?

John McNeil: There certainly would not be any comeback against the keeper. In order for someone to be able to get at the solicitor—the purchaser’s solicitor—that solicitor would have had to have been professionally negligent in dealing with formation of the contract. In other words, we are talking about a matter of confidentiality if he were to make the address known under those circumstances.

Nicola Sturgeon: Is it your view that without even a minor amendment to the section along those lines we might create a situation in which purchasers of properties are—in a rare minority of cases—exposed because they end up being liable for debts that they were not aware of when conveyancing was being done?

John McNeil: That happens now; sometimes the property inquiry certificates that are ordered by the seller’s solicitor and which are exhibited to the purchaser’s solicitor fail to pick up local authority notices, especially if the notice is an old one and has therefore been deleted from the council’s database.

Nicola Sturgeon: I ask you to correct me if I am wrong, but my understanding is that the provision could potentially extend the exposure of the purchaser. If I understand the matter correctly, at the moment, if a seller has an outstanding liability to pay for a roof repair and does not make the payment, the debt stays with the seller; it does not transmit to the purchaser.

John McNeil: That is correct.

Nicola Sturgeon: I accept what you say about statutory notices, which are a different category, but section 11 would extend exposure of the purchaser to debts of which they were not aware at the time of the conveyance.

John McNeil: That is right. What the Executive is really getting at in section 11 is not local authority notices that order repairs but repairs that proprietors have ordered among themselves. In other words, we are talking about a matter of private contract rather than one of authority from above.

Section 11 has the potential to increase the liabilities of an incoming purchaser. It does not in any way, however, erode what exists already; namely, the principle of caveat emptor, or purchaser beware.

Nicola Sturgeon: Under current provisions, such debts would not transfer to the purchaser. Surely the section will therefore extend the principle of caveat emptor?

John McNeil: Yes—I accept that it will.

Nicola Sturgeon: Thank you.

Jackie Baillie (Dumbarton) (Lab): Section 15 of the bill will place on flat owners obligations to insure. Does the Law Society consider that the obligations will be enforceable in practice?

John McNeil: Is the question one of insurance?

Jackie Baillie: It concerns the question of insurance. Under section 15, individual flat owners will be required to take out insurance. Certain caveats are given. I wonder what would happen if
flat owners were unable to obtain insurance. The section also includes a rather strange duty on owners to produce a copy of their insurance policy. Are the provisions of section 15 enforceable in practice?

John McNeil: With respect, one could ask that question about any of the provisions in the bill. The provision would be enforceable in accordance with the general principle that majority decision making will apply. If the majority in the building insist on production of the policy, such production will be required—thetheoretically, at least.

Section 15 goes further; section 15(5) says:

“Any owner may by notice in writing request the owner of any other flat in the tenement to produce … the policy”

The section goes on to say that the owner who is the recipient of the notice “not later than 14 days after that notice is given … shall produce to the owner giving the notice the policy (or a copy of it) and the evidence of payment”

and that the duty to effect and keep in force a contract of insurance “may be enforced by any other owner.”

Let us say that I am one of 16 flat owners in a tenement and Jackie Baillie is another. If you were to tell me that you would not allow me to see your policy, I could go to court to have the requirement to see the policy enforced against you. That is what the section says.

Jackie Baillie: It strikes me that the Executive might be using a hammer to crack a nut.


Jackie Baillie: In respect of the other parts of section 15, will the effect that the Executive seeks be achieved by the provisions of section 15?

John McNeil: There could be different flats in the same building that had entirely different schedules of cover. I accept that every flat owner has to have cover against the risks that are to be prescribed by Scottish ministers.

That said, some flat owners might include cover for risks that are additional to the minimum prescribed risks, whereas other owners will limit their cover to the prescribed risks. There could therefore be a multiplicity of sets of cover within the same building relative only to the particular flats that the policies cover, which is unsatisfactory but is also what happens in most cases at present, with the exception of the type of building about which we were talking a short time ago; namely, modern purpose-built flats, which almost always have provision for a block policy. The Law Society considers that a block policy is highly desirable for all tenements, whether they are old or new, but it would be impractical to make that a statutory requirement, especially for existing buildings, although it could be done for new properties.

Jackie Baillie: I will pursue the block insurance policy idea for a moment, because we have been given examples of somebody who would not qualify for a block policy because of previous activities—perhaps they had a penchant for burning down buildings in a previous existence—and of a claim that was not successful under such circumstances. Does that alter your view of block policies or do you think that, by and large, such provisions work?

John McNeil: In general, they work. Block policies are valuable because there is no inconsistency in cover, everybody pays an equal share of the premium and everybody knows exactly where they stand in regard to the cover.

Jackie Baillie: What would you do for the minority of people?

John McNeil: For the bad boys and girls?

Jackie Baillie: Yes.

John McNeil: I do not know. It had never occurred to me as a possibility, but I suppose that you are right: there must be some people who are uninsurable.

Jackie Baillie: Indeed. Thank you.

John McNeil: Linsey Lewin has just mentioned to me that such a person would not get a mortgage for a property, because it is always a precondion of a mortgage that buildings insurance be enforced.

Jackie Baillie: As Maureen Macmillan said, such a person might have won the lottery.

John McNeil: That is true.

The Convener: I thank Mr McNeil and Ms Lewin for giving evidence to us this afternoon; it has been extremely helpful.

As with the Law Society, members of the committee would like to pursue various lines of questioning. We have received your written submission, which is extremely helpful. I will start off with questions about some of the more technical issues. The Scottish Law Agents Society supports the principle of free variation as
contained in section 1 of the bill. Is it an essential preservation of freedom for the proprietors of flatted properties to have the right to negotiate, agree or vary their title conditions?

Ken Swinton: The bill sets out a series of default rules, which is probably the most appropriate way in which to proceed.

15:00

A set of default rules cannot cover every eventuality; for example, if there were particularly valuable ground-floor commercial premises, it would be right to distort the repair obligations to make the proprietor of those premises responsible for a larger share of repairs. The scheme might be a little awkward for conversions of existing Victorian dwellings because of the way in which conversions have been effected. Free variation would allow people to tailor solutions to particular problems. A set of default rules might not fit every eventuality.

The Convener: So, the flexibility would reflect the different types of property configuration.

Ken Swinton: That would be entirely appropriate.

The Convener: On boundary features, I was exploring with the Law Society the distinction between a mid-point boundary definition and the definition of a feature that is common property. Is that a distinction without a difference or is there anything manifestly diverse between those two situations?

Ken Swinton: The Scottish Law Commission produced a report on boundary walls several years ago. It fixed on the idea of mid-point, which probably does no more than represent the current common law. We are not wedded to any particular scheme with regard to mid-point. That definition has the benefit of maintaining the status quo, but I do not think that it is particularly significant.

The Convener: Does that mean that there is a case for changing the definition, or is there a case for leaving it as it is?

Ken Swinton: It would be more appropriate to maintain the status quo. The definition would also apply to non-tenement situations; the boundary is the mid-point of a wall unless something is done to displace it. If someone does not want that to be the case in the deeds, they can displace the rules of the bill and change them to suit the particular circumstances of any particular building configuration.

The Convener: Do you mean under free variation?

Ken Swinton: Yes.

The Convener: I noticed that you were quite exercised by triangular airspace as mentioned in section 2(7) of the bill.

Ken Swinton: That was an observation rather than a deep point of principle. Under common law—or case law—it is perfectly competent for a top-floor proprietor to throw out a dormer window. The way in which section 2(7) is framed seems to make it slightly easier to form another full storey on a building because the proprietor owns everything up to the apex of the roof. They would therefore be able to develop the whole of that storey rather than just throw out a dormer window from an attic. There is a difference of degree but not of substance.

The Convener: What about the practical possibility that, under the bill, the owner of the top-floor flat could create another habitable storey? Would that create unfairness in relation to the other flat proprietors?

Ken Swinton: They can create another storey only in so far as it does not increase the burden of support on the inferior storeys.

The Convener: The bill does not say that.

Ken Swinton: We still have duties of support under the bill; the burden of support cannot be increased.

The Convener: Such a situation would, however, put the onus of challenge on all the other owners.

Ken Swinton: It certainly would.

The Convener: They would have to say “What are you doing up there?”

Ken Swinton: Yes.

The Convener: The proprietor would be able to say “I’m implementing section 2(7) of the tenements act”.

Ken Swinton: I am convinced that the proposed legislation would make that easier than is the case under existing law.

The Convener: Would all the other proprietors then rush off to the sheriff courts to get interdicts?

Ken Swinton: That is their prerogative, is it not?

The Convener: Okay.

Planning law might have a role to play, because it will still have jurisdiction over what someone does with their airspace, provided that the other flatted proprietors are relaxed about it. Is not planning law really an ancillary regulator that does not interfere with the relationship among flatted proprietors?

Ken Swinton: Planning law must be categorised as a public-law solution, whereas the
bill is a private-law solution to a private-law matter. As I said, there is a difference of degree between the bill and existing law. The question is whether that is appropriate.

**The Convener:** The Scottish Law Agents Society supports the principle of the service test to decide on responsibility for pertinents, but as I said to the witnesses from the Law Society of Scotland, other respondents to the Executive’s consultation thought that the service test would introduce complexity and could lead to disputes. Do you have a view on that?

**Ken Swinton:** The service test is appropriate. If a pipe that goes down the back of a tenement serves one side of the building, all four proprietors on that side will share it as a pertinent. Given that the four proprietors on the other side of the close have no interest in the pipe, a pertinent test that is based on service is entirely appropriate.

Confusion might have arisen as a result of the proportionality test that would have applied under the draft bill that was appended to the Scottish Law Commission’s “Report on the Law of the Tenement”. That test would have made the cost of repairs proportionate to the length of the pipe that the person used. The written responses to the consultation showed how difficult it would become to apportion cost in that way. The current version of the bill gives equal rights to all proprietors who have a right as a result of the service test, which means that they are liable to pay equal shares of the cost of maintenance. That is entirely appropriate and will be far simpler to administer. The bill provides a reasonable solution to a slightly tricky problem.

**The Convener:** On a technical point, if that arrangement is adopted and everyone knows what their pertinents are and what their liability for repair and maintenance is, what will happen if a flat owner makes an alteration to his property as a result of which he is no longer dependent on a pertinent? Will that change the ownership of the pertinent?

**Ken Swinton:** We asked that question in our written submission. I gave the example of a water tank in a common roof void. If each proprietor were to install their own water tank and disconnect from the common supply, who would be responsible for decommissioning and removing the water tank in the roof void? The pertinent may remain a pertinent notwithstanding disconnection, but if a service test applies on more than one occasion or every time that there is a change, the tank would become unowned as the last proprietor disconnected. The bill could be clarified to provide a solution on that issue. It should be clear whether there is to be a single application or a multiple application of the service test. On the other hand, would a person who connected to an existing pipe become liable for it? If there is only a single-step test, that person would not be liable if the test had already been carried out.

**The Convener:** So you are saying that there is a void in drafting that needs to be considered.

**Ken Swinton:** The matter could be clarified.

**Karen Whitefield:** My questions are similar to those that I asked the Law Society of Scotland. Under section 4, the tenement management scheme will be applied if the title deeds are silent. Has the Executive got the balance right or might some tenement owners fall foul of the system?

**Ken Swinton:** To be consistent with the principle of free variation, it is appropriate that the tenement management scheme should be a background or default scheme.

In some tenements, the existing title deeds might be deficient in some way. A proprietor might buy a flat on an intermediate floor knowing that the top-floor proprietor is currently exclusively responsible for the roof. Such proprietors will end up becoming liable for a share of maintenance costs, because the roof will become scheme property. There are bound to be winners and losers when we are changing existing law. We have to determine whether what we are doing is a proportionate response to a problem. I suggest that it is, because where the title deeds provide inadequately or inequitably for repairs, that might result in proprietors not wishing to do repairs because of the cost that they would incur. It seems to me that this is a case in which the swings are worth the roundabouts. The bill will encourage more proprietors to engage actively in repairs to the tenement and surely improving and maintaining the housing stock is one of the bill’s objectives.

**Karen Whitefield:** You said in your submission that you had made representations to the Executive because you did not believe that the list of scheme property was exhaustive. Are you now satisfied that the list that is set out in the bill includes everything that should be included? Are you satisfied with the definition and use of the term “scheme property”?

**Ken Swinton:** Scheme property is defined in rule 1.2. We are pleased that beams or columns that are load-bearing have been added to the list of scheme property, which would accord with more modern building practices.

We are still of the view that there is not a principled approach to definitions of scheme property. The Scottish Law Commission report was clear that the idea was that scheme property would comprise structural elements and those affording shelter to the tenement. A modern tenement building might have an entire glass front,
which is non load-bearing. Is it considered a window or a wall? That makes a difference. If it is a wall, it is part of scheme property; if it is a window, it is part of the individual flat, in which case the maintenance obligations would change. If the court was confronted with such a case, what mechanism would it use to decide whether the glass front was a wall or a window? If we have statements of general principle that say that scheme property relates to the parts of the building that offer support or shelter, the courts can look to those statements and say, “This glass front is a wall and not a window and therefore falls within the definition of scheme property.” We would like statements of principle to be included.

Colin Fox: I will ask you the question that I asked the Law Society of Scotland witness about the apportionment of costs and the exception to the general rule that the bill suggests. Rule 4 of the tenement management scheme proposes that flat owners make an equal contribution to the required maintenance except when the floor area of the largest flat is one and a half times the size of the smallest flat. What do you think of that? What difficulties do you see being caused by the introduction of that exception?

Ken Swinton: We have to remember that the rules will be a set of default rules. I expect that, in most situations, the title deeds will make express provision for the shares of maintenance costs. As John McNeil said, any rule of that nature is bound to be arbitrary. In effect, one and a half is the figure that the Law Commission plucked from the air, and it seems to be just about appropriate.

I suspect that, if the draftsman of deeds—the person who is constructing the tenement—has a view on what the proportions ought to be, they will make provision for that in the title deeds. To answer your question, whatever decision is made, it is bound to be arbitrary. There will be certain practical difficulties about measuring everyone’s floor area, but some solution has to be offered, and the proposed measure seems as good as any other that could be thought out.

15:15

Colin Fox: Am I right in thinking that, if the largest flat is one and a half times the size of the smallest flat, for example—or twice, three times or four times as big—that is the ratio that would apply to the apportionment of costs?

Ken Swinton: It would be based on the proportion of the floor areas, yes.

Colin Fox: It strikes me that it would be uncommon for one flat in a tenement to be three or four times bigger than another flat in the same building. Is that the case?
provisions in section 11 had been in effect, my client would have paid £24,000 and would then have been faced with a further £22,000 of repair costs, which would have been transmitted. That would have been a terribly nasty surprise.

There might be a right of relief against the seller, but people have to be able to trace the seller. If the seller cannot be traced, or if the seller has become bankrupt, then that is the end of the story—the purchaser has no right of relief. The purchaser would have no right of action against their solicitor, because the solicitor would have done everything that they could reasonably do, so the purchaser would be stuck with that cost.

That situation was considered by the Scottish Law Commission, which says in paragraph 8.13 of its report that it is not attracted to real liability. The Executive, in the policy memorandum, suggests that there is some difficulty with regard to registration of title. However, I do not see either of those things as a problem. It is easy to trace the proprietor of a flat by searching the registers—as the policy memorandum says, that can be done for £2 or £4 using the registers direct service—so if the other proprietors have difficulties with an owner, why should they not register a notice against the property of the outstanding repair costs? The recording dues on that would be £22.

If a substantial amount of money was outstanding, the option for other owners to record a notice would be not unattractive and would solve the problem. The purchaser’s agent would find the notice on any search, be alert to the situation and ensure that appropriate arrangements were in hand. At present, purchasers cannot do that. Acting as purchasers’ agents, we cannot guarantee that there will be no nasty surprises.

Nicola Sturgeon: Is it your contention that owners should be obliged to register these matters and that, if they do not and the matter does not appear on the registers, the purchaser who gets the nasty surprise should not be liable for the outstanding amount?

Ken Swinton: Yes. There should be no nasty surprise. The onus should be put on the other proprietors or the factor to register a notice. If a proprietor has to pay substantial outstanding repair costs, another £22 for a notice is not a substantial amount to lay out.

Nicola Sturgeon: So, the obligation would be shifted to the other owners.

Ken Swinton: They could put themselves in a position to do something about it. At the moment, a purchaser cannot do anything about it other than ask nicely, and they might be misled.

The Convener: You raise an important point, Mr Swinton. I infer from your remarks that you feel that the bill should be a little more explicit on this point. You think that there is something inequitable about a seller having a contractual obligation to some contractor somewhere but not having a statutory obligation to tell the purchaser, who has no contractual relationship with the contractor but who finds himself or herself liable, about the repair costs. I also infer from what you have said that you think that a way round that might be to provide that it would be up to the other proprietors to do that. I presume that not every repair would be suitable for recording a notice. If eight proprietors of a tenement have a repair done for £500—

Ken Swinton: It would not be worth while.

The Convener: Exactly. Whereas, if each flat was liable for a bill of £10,000, that would be an entirely different matter. Is your suggestion that the bill should try to incorporate that facility by requiring the owners of the other parts of the tenement to agree to register a notice, if they are so minded and if the repair bill is large enough?

Ken Swinton: Yes. The default position might be to put the onus on the proprietors. For small amounts, as you suggest, it might be different. I do not think that a purchaser would have a problem with paying an eighth share of £500. A compromise could perhaps be reached, whereby the bill would contain the current provision relating to amounts below a certain figure and then a provision that, if the amount went above that figure, a notice would have to be registered.

The Convener: That is helpful. Thank you.

Maureen Macmillan: It strikes me that it would be simple for the purchaser to write to the owners of the other flats in the tenement, asking whether there was outstanding money to be paid before the deal was concluded. Under the Title Conditions (Scotland) Act 2003, something different happens when someone wants to vary the conditions—

The Convener: That is assuming that the purchaser knows who the other owners are.

Maureen Macmillan: I presume that they will know their addresses.

Ken Swinton: But would they get a response from them?

Maureen Macmillan: I do not know, but what has been proposed seems like using a sledgehammer to crack a nut.

The Convener: Flats could be rented.

Maureen Macmillan: Yes, I myself have rented flats.

The procedure in the Title Conditions (Scotland) Act 2003 was that people should get in touch with the owners of the houses around them when they
wanted to have conditions or burdens varied. I do not know why the same thing could not be done in this instance.

Ken Swinton: That provision relates to a situation in which there is an existing owner, not to one in which a purchaser is coming in. No matter what is done, additional work will be placed on a purchaser's agent. They will have to get a picture of how many flats are in the tenement and try to trace all the owners and get a response from them. In effect, the cost of every flat purchase will be increased.

Maureen Macmillan: That is exactly what solicitors argued about the Title Conditions (Scotland) Act 2003.

Ken Swinton: You want to tailor a solution that does not involve additional cost and which provides an appropriate mix of getting repairs done and protecting the purchaser.

Maureen Macmillan: Yes, but I wonder whether people would register the repair.

Ken Swinton: If the repair is substantial enough, people will register it.

Nicola Sturgeon: At the moment, under section 11, the purchaser relies totally on the honest and accurate disclosures of the seller. The weakness of Maureen Macmillan's position is that the purchaser would become reliant on the honest and accurate recollections of a range of owners. It might be that a contractor has done a major repair that has been paid for by seven of the eight owners, none of whom knows that the eighth owner has not paid. They might not have the information to fulfil that responsibility.

If there is a breakdown in the system, where does the responsibility lie? If owners do not register an outstanding repair, it is perhaps more reasonable to say that is their problem than it is to say that an innocent purchaser who has no way of knowing that the money is outstanding should be liable for it.

Ken Swinton: I agree with everything that you have said.

Maureen Macmillan: I am not arguing particularly that that is the way in which it should be done.

The Convener: Have you a further question on that point?

Maureen Macmillan: I am still not sure how the system would work. If there is an outstanding repair, it would be registered. However, if only one of the owners of the flats in the tenement had not paid their share, how would you know which one that was?

Ken Swinton: It would be registered against the title of an individual flat.

Maureen Macmillan: It would be registered against the flat rather than against the tenement?

Ken Swinton: Yes.

Jackie Baillie: Section 18 relates to the use and disposal of the site when a tenement building has been demolished. In your submission, you talk about problems relating to definition, particularly the fact that the bill defines the tenement as simply the solum and the airspace above it but is silent on the garden grounds to the front. What would you change to make that section more effective?

Ken Swinton: The problem is that the definition in the bill results in the creation of a ransom strip—a strip of garden that is owned by the proprietors or former proprietors of the ground floor—that could be used to prevent access to the site. The definition needs to be changed to incorporate the whole building stance on which the tenement was originally erected.

Jackie Baillie: If we did that, would we also have to change the part of section 18 that reflects the sharing of the proceeds of sale? Again, the bill is silent on the issue of garden space.

Ken Swinton: That is assuming that the garden space has a value that is independent of the flats. I like to think that the flats have the value rather than the garden space. If that means that proprietors of ransom strips do not get any premium, that is a positive side effect. We do not want them to have an additional benefit.

Jackie Baillie: Section 20 deals with the sale of abandoned tenement buildings. As I understand it, there are two tests, the first of which is that the property has been unoccupied for a period of six months and the second of which is that it is in such a state of disrepair that it is unlikely that anybody would return to it. I know that you have objections to the use of the word "return". What would you change about those tests to make the system more appropriate and more effective?

Ken Swinton: It is a question of playing with the word "return", omitting it and saying that it is unlikely that anyone would wish to occupy the tenement or any part thereof in the future. That would take care of the current problem.

Jackie Baillie: Are you happy that the test is based on one flat owner rather than on a majority?

Ken Swinton: I could envisage a situation in which someone might buy into a tenement and seek to use section 20 to have the property sold. If other proprietors had been working for some time towards a refurbishment scheme, they could
suddenly find that the property had to be sold because section 20 had come into operation. On the other hand, being locked into a tenement in which the other proprietors are neglecting the building and do not wish to proceed to refurbish is an equally great problem. Again, it is a question of striking an appropriate balance in the bill. Perhaps basing the decision on one flat gives too much power to that proprietor to force the debate and proceed with the sale. I have no solution to that problem, but it is a question of balance.

Jackie Baillie: I have a question on section 15. I understand from its earlier evidence that the Law Society of Scotland came out in favour of block insurance. You cited in your written submission the intriguing case of Hooper v Royal London General Insurance Co Ltd and the case of the arsonist who could not get insurance afterwards. What is your answer? Given that example, what protection would there be in such circumstances if you did not favour block insurance?

Ken Swinton: I know that you have agreed to hear evidence from representatives of the Association of British Insurers in future, so perhaps part of your question should be addressed to them rather than to me. The risks are quite numerous. We already have the problem of the arsonist or fraudster who cannot obtain insurance. He is in the enviable position of being able to force other proprietors to exhibit their policies, but not having to do so himself either because insurance is unavailable to him or because the cost would be unreasonably high. There seems to be something wrong with that formulation. Whether a block policy will help is not clear, because the Hooper case concerned Alliance and Leicester’s block policy, non-disclosure of the conviction in that specific case and no cover being afforded in those circumstances.

A couple of other things occur to me. If a property is vacant for 30 days or more, insurers will apply an endorsement to the policy and remove most of the cover, so most risks are not covered once a flat has been vacant for more than 30 days. I have personal experience of that in an investment property that I own, where a substantial claim was not met because the property had been vacant for more than 30 days. Difficulty might also arise if someone brings a portable gas heating appliance into the premises, and that voids the policy because certain insurance policies do not allow the use of such appliances. Someone might have paid a premium and produced a policy, but it could be void.

Although the sentiments in section 15 are laudable and the section does no harm at all, whether it can be enforced, whether it is workable and whether it produces effective solutions in all cases are clearly matters for considerable debate. I am not convinced that it offers solutions to the problem.

Maureen Macmillan: In your paper, you are quite exercised about sinking funds. At present, it is possible to include a condition in the title deeds of a flat to provide for a sinking fund to meet the costs of future expenditure that would not be dealt with by current repairs. As your submission mentions, expenditure on a lift would be an example of that. Another example might be a tenement in which the close and the stairs were carpeted, where one might want a sinking fund for renewal of the carpet at some future date. However, I cannot think of many other things that would not be kept up by constant maintenance. Why are you concerned that sinking fund burdens will be mentioned only in the Executive’s planned guidance rather than in the bill?

Ken Swinton: The housing improvement task force report came out strongly in favour of the use of sinking fund burdens and the Executive response to the consultation document also came out in favour of them. When the Scottish Law Commission considered the issue, it provided only for traditional repair burdens, which require people to maintain the property as they go along to keep it in good repair.

Sinking fund burdens provide for items that have a limited lifespan by putting away money for the capital cost of their replacement. That is like capital spending as distinct from revenue spending. Under the typical procurement mode, capital expenditure will be paid either from existing cash assets or by borrowing to cover the cost. A sinking fund means that big lumps of money do not need to be found when, for example, a lift needs to be replaced. To that extent, they are an excellent idea.

One gap in the thinking behind the bill is that it is framed in favour of the traditional repairs burden. If we were to go down the sinking fund route, we would need to know whether the money in the fund would transmit automatically when the flat transmits, so that the purchaser would get the benefit of it. Rule 3.4(g) of the tenement management scheme states:

“such sums as are held in the maintenance account by virtue of rule 3.3 are held in trust for all the depositors”.

The rule provides only for traditional repairs burdens because it states that the money belongs to the people who deposit it, rather than to the owners of the flats. Therefore, the money in a traditional repairs burden would not transmit to the new owners.

Another issue to consider is what would happen if an owner became insolvent or had debts. Could creditors attach the debtor’s part of the pool of
money or would that stay with the property to cover future maintenance? If the money could be attached by creditors, that would defeat the object of the exercise because there would then be a gap in the sinking fund.

We would like the bill to provide solutions to those questions. We do not want the bill to require that sinking fund burdens be created but we want it to provide default rules for sinking fund burdens, where those exist, as well as for normal repairs burdens.

Maureen Macmillan: In other words, the bill should give protection to sinking funds.

Ken Swinton: We want the bill to ensure that any sinking fund that exists transmits with the property and is available for the purposes for which it was intended.

The Convener: Before we lose Mr Swinton—whom we shall be very reluctant to lose—I want to return to sections 18 and 21, which deal with the situation in which a tenement building has been demolished. Section 18 will allow any owner of a former flat in such a tenement to be entitled to require that the entire site be sold. The bill provides a similar provision for abandoned tenements and it narrates how the proceeds of such sales are to be divvied up. Are you satisfied about the way in which that statutory right of any owner is linked to the completion of missives and grant of title, or do you think that there are some technical gaps?

Ken Swinton: Initially, we had some concerns about outstanding securities, but on further reflection we are content to leave the provisions as they stand.

The Convener: Who do you anticipate would instruct sale and conclude a missive?

Ken Swinton: A majority of the proprietors would have to be in favour of doing so. No one would accept instructions from anything other than a majority of the proprietors.

The Convener: But there is no specific provision on that in the bill.

Ken Swinton: No, there is not.

The Convener: It is one thing to say that someone has a right to require a property to be sold, but it is another thing to put that right into practice and to proceed to the point of ingathering proceeds of sale and granting a title.

Ken Swinton: I suspect that in such cases it might be appropriate to seek an order from the court to appoint on behalf of all proprietors an agent who will sell the site at the best price.

The Convener: Should the bill be more explicit in that area?

Ken Swinton: It might usefully be made more explicit.

The Convener: I am grateful for your comments on that.

If there are no further questions, on the committee’s behalf I thank Mr Swinton for appearing before us. He has been extremely helpful to us in our consideration of the bill’s provisions and I thank him for being with us this afternoon.

I am minded to suspend the meeting for five minutes.

15:40

Meeting suspended.
12th Meeting, 2004 (Session 2) 30 March 2004

SUBMISSION FROM LAW SOCIETY OF SCOTLAND

Comments by a Working Party of the Conveyancing Committee on the Tenements (Scotland) Bill 2004 as introduced.


The Working Party notes and approves that there are comparatively few substantive changes to the Scottish Law Commission’s draft Bill in the Bill as introduced. In particular the Working Party welcomes Scottish Ministers’ decision to adopt, without alteration, the draft Bill’s restatement of the common law of ownership of the individual sectors within a tenement and the definition and provisions for ownership of the pertinents of a tenement. As indicated in its responses to the Consultation Paper the Working Party welcomes the proposed codification of the law in these respects which will remove any dubiety as to the ownership of the parts of a tenement where the title deeds of the individual flats are either silent on the issue of ownership of any part of the tenement or inconsistent in their terms. In that connection the Working Party notes and agrees with the extension to the definition of “title to the tenement” contained in section 1(2)(b).

The Working Party notes that, presumably in the light of the responses to the Consultation Paper, the Tenement Management Scheme will, in broad terms, only apply where the title deeds do not make specific provision for the management of a tenement and the taking of decisions with regard to maintenance of it. This is in contrast to the provisions of Section 4 of the draft Bill which provided that the TMS would apply automatically “as respects the management of all tenements” except where the Development Management Scheme under the Title Conditions Act applies or where the title deeds of each flat provide procedures for taking decisions (old Rule 3.1) and where the title deeds provide how the costs of repairs and maintenance should be allocated (old Rule 5.2). While the Working Party approves this approach in principle it is disappointed that no cognisance appears to have been taken of its previously expressed opinion that the TMS should apply in all cases where the proportionate sharing of liability for costs can only be ascertained by reference to extrinsic evidence such as the old valuation rolls. The Working Party’s view on this issue remains the same and it also continues to be of the opinion that the calculation of pro rata liability for maintenance costs by reference to feu duties is difficult in practice because of the need to examine the deeds of all the flats in the tenement in order to ascertain the individual owners’ respective liabilities.

With regard to the Tenement Management Scheme itself the Working Party notes and approves the new provisions of Rule 3.1(b), (c) and (d) enabling the owners to arrange for an inspection of scheme property with a view to determining the extent of maintenance required, to appoint or dismiss a manager and to delegate to a manager a decision in respect of maintenance required to scheme property and to instruct the work to be carried out, within the financial parameters set by the owners. The Working Party also welcomes the new provisions at Rule 3.2(c) enabling the owners to make a scheme decision requiring the deposit by each owner of a reasonable estimate of that owner’s liability for the cost of maintenance works in respect of which a decision has been made.

The Working Party notes and approves the new provision at section 5 relating to applications to the sheriff for annulment of certain decisions whereby no steps may be taken to implement a scheme decision (other than a decision relating to work which requires to be carried out urgently) until the period for making an application under the section or the period for appealing against the sheriff’s decision has expired or an appeal has been disposed of.

While all these provisions are clear the Working Party remains unsure of the purpose underlying section 6 (Application to sheriff for order resolving certain disputes). The section is in identical terms to section 6 of the draft Bill and provides that any owner may by summary application apply to the sheriff for an order relating to any matter concerning the operation of either the management scheme which applies to the tenement or any provision of the Act “in its application as respects the tenement.” Beyond these two broad provisions the sheriff is given no guidance as to the kind of order which may...
be sought and in particular there is no reference in the wording of the section itself (as opposed to the heading) of “disputes”. The Working Party therefore seeks clarification as to whether or not section 6 would enable an owner of a flat in a formerly self-contained dwellinghouse which has been subdivided into two flats to apply to the sheriff for an order obliging the other flat owner to join with the applicant in carrying out repairs or maintenance to the tenement and to meet his or her share of the costs.

The Working Party also wishes clarification of the new section 23, which adopts the definition of a tenement in the draft Bill with the addition of the word “related” immediately before “flats”. The new sub-section 2(2) goes on to provide that in determining whether flats comprising a building or part of a building are related “regard shall be had, among other things, to “(a) the title to the tenement; and (b) any tenement burdens, treating the building or part for that purpose as if it were a tenement.”

The Working Party assumes that the purpose of this addition to the definition of a tenement is to make it clear that if part only of a building has been converted into flats only that part will be a tenement for the purposes of the Act and the provisions will not apply to the remainder of the building. The Working Party would, however, welcome confirmation that its understanding is correct.

The Working Party notes the additional amendments to the Title Conditions Act contained in section 22 of the Bill and, assumes that the Bill will be brought into force on the appointed day for the purpose of the 2000 and 2003 Acts, namely 28 November 2004.

SUBMISSION FROM SCOTTISH LAW AGENTS SOCIETY

The Scottish Law Agents Society was established by Royal Charter in 1884. It is the largest voluntary association of Scottish Solicitors from all branches of the profession and from all parts of Scotland. We have some members practising abroad. The Society does not have any responsibility for regulation but its objects include the promotion of legal services in Scotland.

SLAS is active in responding to consultative documents issued by the Scottish Executive, the Scottish Parliament, the Scottish Law Commission and others and is generally interested in the good government of Scotland. The Society has a number of specialist committees including a Conveyancing Committee.

The Society publishes a legal journal called the Scottish Law Gazette published six times a year with articles on professional practice and developments in the law and the Memorandum Book published annually containing valuable information for practitioners.

The Society welcomes the opportunity to give evidence the Justice 2 Committee of the Scottish Parliament on the Tenements (Scotland) Bill. We were pleased to make submissions to the Executive as part of its consultation exercise in 2003 and earlier to the Scottish Law Commission in what follows we draw on that material where appropriate. We are in a position to give oral evidence if required.

General principles of the Bill

The common law

The common law of the tenement has operated since at least the 17th century. The main principles are comparatively well known as are some of the shortcomings. The two most obvious defects in the common are the principle of unanimity required for the instruction of repairs to common property which the Scottish Law Commission in its Report on the Law of the Tenement (No 181) refer to as the lack of a system of management [para 2.19] and the burden of shelter falling on the top floor proprietor with regard to maintenance of the roof which the Commission refers to as unfairness [para 2.16].

It operates as a default code and given these awkward features that default code is routinely contracted out of in practice. We do not agree with the Commission that the system is unduly rigid [para 2.15]. The Commission also commented on the uncertainty within the present system. There are comparatively few decisions dealing with tenement property issues and many of those are 19th century. It is arguable that the infrequency of case law in recent times is attributable to two factors
firstly that the law is sufficiently well known and secondly that the default position is contracted out of in the vast majority of tenement title deeds. It has to be admitted that there are issues on which there is no decision or conflicting authorities. For owners of tenement properties and those engaged in the management of such property a statutory restatement would form a useful point of departure.

The Work of the Housing Improvement Task Force
We also note the work done by the Housing Improvement Task Force in its Final Report: Stewardship and Responsibility, A Policy Framework for Private Housing in Scotland (March 2003). Substantial amounts of public money were invested in the repair and modernisation of existing tenements in private ownership in Scotland throughout the 1970s through to the early 1990s. We therefore fully support the principle of providing a statutory code dealing with tenement properties, particularly of this will assist in the future maintenance of that stock.

A Default Code only
There are dangers with any Code that it deals with the general and when applied to the particular circumstances of a given situation it may not be sufficiently flexible to provide a just solution. 'Tenement' covers a multitude of different types of building from the traditional residential block to office and commercial and mixed blocks and makes up one quarter of the total housing stock [see para 5 Explanatory Notes to the Bill]. For this reason we welcome the introduction of the Code in a similar position to the common law, i.e. a default Code which can be freely adapted to meet the circumstances of any particular tenement. This is the position adopted by the Executive [para 13 Policy Memorandum].

All tenements or future tenements only?
When the Commission originally considered the matter [DP 91 December 1990] their views were that the new law which they were then proposing and which was in many ways more radical than their final report should apply only to new tenements. That would leave the problems and unfairness within the existing law unresolved. In the future it may become difficult to tell whether a building was erected or converted into separate flats before the operative date of the legislation. For these reasons the Commission rejected its earlier approach [para 3.2 of its Report] as does the Executive [para 14 Policy Memorandum]. We agree with those views. Accordingly the default code should apply to tenements irrespective of their date of erection. This has the consequence that it must be as harmonious as possible with the existing law to avoid potential human rights challenges.

The Tenement Management Scheme
We are in general agreement with the provisions of the Tenement Management Scheme as set out in the Bill. We are in agreement with the concept of 'scheme property' which is to be maintained by all the owners of the tenement irrespective of the ownership of particular items of Scheme Property. As is stated in the Policy Memorandum [para 19] there will be some winners and losers for example where the common law currently requires the top floor owner to maintain the roof in the future this will be borne by all owners in the tenement. We agree that the policy gains which are likely to encourage maintenance outweigh other considerations.

The Provisions of the Bill

Section 1: Determination of boundaries and pertinents
We agree with the provisions of this section. We note that the original draft bill annexed to the Commission Report used the term 'unit' which has been replaced by the word 'sector' although the definition of each term is identical. In our view 'unit' would be better understood than 'sector' and the reason for this change is not clear. The explanation given in para 11 of the Explanatory Memorandum that this is a convenient method is not convincing.

Section 2: Tenement Boundaries
We are in general agreement with the propositions set out in s2. However we disagree with the statement in the Explanatory Memorandum [para 13] that this represents a restatement of the common law. While this is generally the case we disagree with regard to the ownership of the space above the pitched roof of a tenement building. There is no doubt that the owner of a top floor can throw out dormer windows Watt v Burgess (1891) 18 R 766 and Sanderson v Yule (1897) 25 R 211 but there general position appears to be that the ownership of the airspace above the roof is owned by the owner of the solum on the basis that each flat comprises only a limited stratum. The provisions
of s2(7) which state that the owner of the top flat owns the roof above as under the current law but also the space above to the line of highest point of the roof. That appears to be an extension of the current limited concession regarding dormers. The Commission seem to have made this change for policy reasons [Report para 4.22]. It would seem to permit the construction of effectively another whole storey provided it did not increase the burden of support [para 4.37]. In our view the Bill is not as neutral as the Commission suggest and this may make it easier for a top floor owner to form another whole storey compared with the common law.

S3 Pertinents
We are pleased to note that Executive have taken account of the comments made by us and others in relation to the service test. This is now based on equal shares for maintenance for all using the pertinent rather than the test originally proposed by the Commission which would have allocated shares of maintenance on the basis of the use made of the pertinent. We refer to our submissions to the Executive on the consultation exercise [page 4] and also the example given in para 30 of the Policy Memorandum. This illustrates that the higher services go in the block then the greater the proportion of the cost that will be borne by the highest proprietor. This will create the same sort of unfairness that the common law imposes on the top floor proprietor in relation to the roof. A block comprises four floors and a pipe serves all four flats. This is repaired at a cost of £100. Under the Commission proposals this would be borne

<table>
<thead>
<tr>
<th>Flat Level</th>
<th>Cost Breakdown</th>
<th>Total Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top Floor</td>
<td>£25.00 + £12.50 + £8.33 + £6.25</td>
<td>£52.08</td>
</tr>
<tr>
<td>Second floor</td>
<td>£12.50 + £8.33 + £6.25</td>
<td>£27.08</td>
</tr>
<tr>
<td>First floor</td>
<td>£8.34 + £6.25</td>
<td>£14.59</td>
</tr>
<tr>
<td>Ground floor</td>
<td>£6.26</td>
<td>£6.25</td>
</tr>
</tbody>
</table>

We agree that the pertinents should be owned equally by the proprietors using them and the expenses shared accordingly.

In our submissions to the Executive we noted one concern about the service test. Where for example a water tank serves all four flats in a block and each flat is connected to it then it will be a pertinent and each flat will have a right of common property to that flat. It is not clear whether the test is applied once and that is then definitive of the rights and obligations of the parties. If one of the owners severs his connection to the tank and installs his own tank does he remain liable to maintain the original common tank (single application of the test, presumably on the date of the Act coming into force or that date of the creation of the tenement if later) or does his severing the connection end his responsibility to repair (multiple application of the test, presumably on every occasion when a change is effected. The latter does not seem fair to the remaining unit owners and the former does not seem fair to the owner opting out in the long term. In our view the Bill should clarify this issue.

We note that while close is used in s3 it is defined in s25 to cover both the common passage and stairs. We note that in s3(2) if a close does not afford a means of access to a flat then no right of common property will vest in that flat. For a ground floor flat which gains access from the common passage this equal share of the stairs and its maintenance as well does not seem equitable. Our preference would be to drop the definition of close and use common passage and stairs and define them separately in s25 which would produce a more precise provision.

S4 Application of the Tenement Management Scheme
We agree with the provisions of s4 in relation to the establishment of the Tenement Management Scheme. In relation to the Scheme itself we have some concerns regarding the definitions. We are pleased to note that our suggestions regarding structural columns and beams [Submissions to the Executive Consultation] are now included within the definitions of scheme property [Policy Memorandum para 43 and Rule 1.2(vi) of the Bill].

Our preference would still be to state the general purposes of structural function and shelter which were set out by the Commission in para 143 of its Report as general principles and the existing terms of Rule 1.2 could then become a non-exhaustive list of examples of the application of those principles. This would permit changes in future construction techniques to be accommodated without any need to amend the legislation. In our submissions to the Executive we commented on the exclusion of 'window' from scheme property. In s25 this is defined to include its frame. In a modern building the exterior walls may not be load bearing at all and serve merely to provide shelter. If the wall is made
exclusively of glass is it a window or a wall? The Bill gives no guidance beyond its terms and a statement of general principles would assist courts in interpretation of difficult cases.

S5 Application to sheriff for annulment of certain decisions
We have no observations.

S6 Application to sheriff for order resolving certain disputes
We have no observations.

S7 Abolition as respects tenements of common law rules of common interest
We have no observations.

S8 Duty to maintain so as to provide support and shelter etc.
We are now content with the statutory restatement of the duty to provide support and shelter. Exactly where the bounds of reasonableness lie in relation to the derogation in respect of age, condition, cost and all other circumstances are not clear. For example the owners of the two ground floor flats are a wealthy shop owner and an impecunious pensioner. Is it reasonable that once should be obliged to support while the other is not?

S9 Prohibition on interference with support or shelter etc.
We have no observations on this statutory restatement of the common law.

S10 Recovery of costs incurred by virtue of section 8
We have no observations.

S11 Liability of owner and successors for certain costs
This section is likely to cause significant problems. In discussions with our members this is the provision in the Bill which has proved most controversial. S11(2) provides that a new owner becomes liable for any costs for which a former owner is liable. It is true that the new owner has a right of relief against the former owner. That of course is dependent on being able to trace the former owner and his having funds to make payment. There are two important public policies in conflict here. One of the objectives of the Bill is to ensure that tenements are maintained in the future. Factors and contractors will be less willing to instruct tenement repairs if there is a prospect that they will be unable to recover costs.

On the other hand the common law rule, established in David Watson Property Management Ltd v Woolwich Equitable Building Society 1992 SLT 430, a case which deals with heritable creditors, but, by analogy, extends to sales, provides that purchaser will be liable to maintain the property in the future but in respect of costs which have already been incurred these were held not to transmit to the purchaser. This is on the basis that if the costs did transmit then they would be a real burden and real burdens for a monetary sum must be for a precise amount which appears in the Property Registers. There is a long established public policy of transacting on the faith of the Registers.

S11 as it is drafted secures the first objective at the expense of the second. The Policy Memorandum states, 'It is envisaged that, in line with current practice, solicitors acting on behalf of a purchaser would ensure that the debts were paid out of the proceeds of the sale'. [para 61]. That current practice is based on the current law - that the burden does not transmit. If s11 is enacted it will be possible to ask the factor for the block, if there is one, as to any outstanding costs. If there is no factor or the unscrupulous seller says there is no factor then there is no-one to ask. Solicitors are willing to undertake work when they are given the right tools but in this event the solicitor acting for the purchaser cannot ensure anything. Contrary to well established and fundamental rules of Scots Property Law what is a personal obligation of the seller will become a real burden and will transmit with the unit to the purchaser. No claim will lie against the solicitor because they have not been negligent and the cost will be borne by the purchaser in the first instance. No doubt that purchaser will have paid a market price for the property which will not have reflected outstanding repairs costs. The title of the property will be registered in the Land Register. Here the Keeper guarantees title and in the event that the purchaser has to pay out the repairs costs then the purchaser will, it appears, have a right to claim indemnity from the Keeper because of the failure by the Keeper to note it on the Title Sheet as any enforceable real right under s6(1)(e). This means that the cost in such cases may actually be borne by the Executive. When repairs are carried out by a local authority under statutory
powers the fact that the work has been done will show up in a local authority property inquiry certificate and in some circumstances a charging order will be recorded in the Land Register against the property. This is consistent with Scottish principles of transacting on the faith of the public registers.

The solution is to require a notice to be recorded in the Land Register before the cost transmits. As is pointed out in the Policy Memorandum the Registers Direct service costs only £2 or £4 to ascertain the owner and a notice can be prepared and registered for a cost of £22. The onus ought to be on the creditor whether that is a factor, contractor or other instructing owner to do so to preserve their right to recover rather than merely making the costs transmit to the purchaser who is unable to take any steps to protect himself. If the creditor takes no steps then the purchaser should not suffer in cases where he is unable to trace the seller or recover from him. If we are correct as outlined above then the costs may in fact fall on the Keeper. The Policy Memorandum refers to difficulties that would have occurred in the system of registration of title [Policy Memorandum para 64]. These are not specified and in any event s11 may cause even greater problems with claims against the Keeper.

S12 Prescriptive period for costs to which section 11 relates
We agree that a prescriptive period of five years is consistent with the Scheme of prescription in the 1973 Prescription and Limitation (Scotland) Act. Nonetheless this is a substantial period of time over which a purchaser must seek assurance regarding repairs. There may be no evidence of these repairs and this is an onerous burden for purchasers. In our view this reinforces the arguments given in relation to s11 regarding the need to register a notice.

S13 Common property: disapplication of common law right of recovery
We have no observations.

S14 Access for maintenance purposes
We understand the policy reasons for this provision.

S15 Obligation of owner to insure
We understand the policy reasons for this provision which we commend. We are not in favour of compulsory block insurance. We wonder about the effectiveness of the provision.

In Hooper v Royal London General Insurance Co Ltd 1993 SLT 679 the owner insured his property through his lender's block policy. Following a fire a claim was avoided on the basis of the failure to disclose a conviction for vandalism. The Commission considered the issue of the arsonist seeking insurance in its Discussion Paper but not in its Report. Under s15(4) such a person would presumably not require to obtain insurance as he was unable to do so or to do so at an uneconomic cost.

In s15 (5) the duty on an owner is to produce the policy or a copy of it when requested to do so. If the subjects are insured through a lender's block policy the owner will not have the policy and may not have a copy. He may have a schedule detailing the cover. The payments of the premium may be monthly as part of the mortgage payment in which an adjoining owner has no interest.

S16 Demolition of tenement building not to affect ownership
We have no observations.

S17 Cost of demolishing tenement building
We have no observations.

S18 Use and disposal of site where tenement building demolished
We note that the site of the tenement is defined to include the footprint of the tenement and airspace above. This definition may exclude garden ground or common areas to the rear and there may be garden ground to the front of the ground floor flats. At common law such ground to the front would be owned by the ground floor owners and this is preserved by s3(3). The former owners of the ground floor will continue to own the former garden ground notwithstanding the sale of the tenement site. This will operate as a ransom strip and the former owners will be able to stymie development. In our view

36 and see submissions of Prof. A.J.McDonald to the Executive consultation at: http://www.scotland.gov.uk/about/JD/CL/00017975/profmacdonald.pdf
the whole of the original building stance should be included in the sale provisions of s18 but with a safeguard of permitting owners of the areas outwith the solum of the original tenement to object to the sheriff against inclusion of the garden or other ground.

S19 Effect of demolition and sale on certain undischarged securities
We have no observations

S20 Sale of abandoned tenement building
We agree with the proposition that an owner should be able to force the sale of a derelict tenement. We consider however that the period of 6 months during which the building is unoccupied is unduly short. We do however note that this is coupled to the test that any other owner or person will be unlikely to return to occupy the building or any part. If the building is repaired then it may be occupied in the future. It is not then unlikely that the building will be reoccupied. In that event can the test ever be satisfied?

The use of the word ‘return’ is perhaps unfortunate. Let us say B buys seven flats in the block with a view to redevelopment but has never occupied any of them. He can never ‘return’ to occupy the flats and neither can new tenants ‘return’. A owns the remaining flat. If A removes for more than 6 months he can then force B to sell his seven flats along with A’s flat when B was already intent on repairing. That seems inequitable. A power which would let B acquire the remaining flat might be preferable but the Bill contains no such provision.

S21 Liability to non-owner for certain damage costs
We have no observations.

S22 Amendments of Title Conditions (Scotland) Act 2003
We have no observations.

S23 Meaning of “tenement”
We have no observations.

S24 Meaning of “owner”, determination of liability etc.
We commented to the Executive that the Bill had been changed from the original draft attached to the Commission’s Report in respect of the concept of owner. In our view the formulation used in s29(3) of that draft makes clear when a person becomes owner. This is omitted from the current s24. For reasons of clarity we prefer the original drafting.

S25 Interpretation
We have noted above our concerns regarding the use of ‘close’ to mean the common entrance passage and stair and our preference would be to use those terms. Again we have commented above on introduction of ‘sector’ when earlier drafts of the Bill used ‘unit’ which we find preferable as it is more readily understood.

S26-30 We have no observations.

Sinking fund burdens.
We note that the Executive support the concept of sinking fund burdens [Policy Memorandum para 99] as did the Housing Improvement Task Force Final Report: Stewardship and Responsibility. We also consider that sinking fund burdens ought to be encouraged.

Sinking fund burdens must not be confused with ordinary repairs and maintenance burdens. Ordinary burdens operate on the basis of recovering costs in respect of repairs previously instructed. In some situations deposits are taken against costs anticipated in the current year. S29 of the Title Conditions (Scotland) Act 2003 makes provision for monies deposited against repairs costs in this way as does the TMS rule 3.3 and rule 3.4 In both cases these refer to costs in respect of maintenance and refer to estimates for the cost of that maintenance. These provisions will not assist where there are sinking fund provisions. The maintenance burdens can be seen as revenue expenditure and the intention is to balance the revenue from owners with the expenditure currently being incurred in respect of maintenance. See rule 3.4(h) sums held in the maintenance account after all sums payable in respect
of maintenance shall be shared among the owners by repaying depositors. In the Title Conditions Act depositors are entitled to demand repayment of unexpended sums.

Sinking fund burdens attempt to do something quite different. Estimates are made of the lifespan of particular components of a building which are known to require replacement in the future. For example a lift might have a lifespan of 30 years. The intention is to provide for the cost of replacement of the component over its likely lifespan. Other components may be assumed to have an indefinite lifespan because they will be kept in good condition by regular maintenance. This might be compared to provision for capital expenditure. In a conventional burden situation such expenditure will be met when it is incurred, often by resort to borrowing where the capital expenditure is significant. Funds are then contributed to the sinking fund annually to build up sufficient resources to meet the likely capital expenditure when it is incurred. The provisions in the TMS and the Title Conditions Act will not apply because the funds are not being accumulated in respect of repairs currently anticipated.

Sinking Funds Burdens have been used for a comparatively short time in title deeds and are not that common [they were found in 10% of modern title deeds; para 264 Housing Improvement Task Force Final Report: Stewardship and Responsibility] There have been no decided cases on such burdens. As a result a number of issues arise relating to ownership of the funds in a sinking fund. These are principally:

1. If they are held for each depositor in the proportions which they have contributed then can each owner demand repayment?
2. When the unit is sold will the proportion of funds held in respect of a unit transmit with the transfer of the property? If not then the object of the sinking fund is defeated
3. If the proportion of funds is held for the owners of units can the funds be attached by creditors? If so then the purpose of the sinking fund can be defeated.

We agree with the Executive that sinking fund burdens should not be made compulsory. The law set out in the Tenement Bill is likely to be in place for many years to come. In our view, if sinking fund burdens are to be encouraged, then making provision for them in the Bill is highly desirable. The absence of any provision for sinking fund burdens means that answers to the questions posed above will only arise by future decided cases. This lack of certainty discourages their more widespread use. It might be argued that if sinking fund burdens can be provided for in the deeds then that is sufficient. That argument might equally be applied to the any normal repairs burden but the Bill is thought necessary. If these points are addressed then it is probable that greater use will be made of sinking fund burdens in the future. We consider this is highly desirable and will encourage higher standards of maintenance in the broad sense in the future.

13th Meeting, 2004 (Session 2) 20 April 2004

SUBMISSION FROM DR DOUGLAS ROBERTSON

Introduction
I welcome the opportunity to offer evidence to the Scottish Parliament's Justice Two Committee in relation to the Stage 1 consideration of the Tenement (Scotland) Bill.

My submission draws on extensive research, which I have undertaken into the current failings of private flat management arrangements, both here in Scotland and in England and Wales. This research was funded by the Joseph Rowntree Foundation, and the Department of the Environment, Transport and the Regions, in relation to supporting leasehold reform and the introduction of commonhold in England and Wales. These various studies involved undertaking comparative studies of property management systems operating in both Australia and the USA, countries that share certain common legal heritage. This work, has built on earlier research for Scottish Homes (now Communities Scotland), which showed that despite substantial public investment in the renewal of Scotland's private tenements, owner occupiers were still failing to undertake regular property

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maintenance, which in time will cause major problems to the fabric of this housing. I have also produced an owners guide to flat management and conducted a literature review on private common repair matters, both for the Scottish Executive.

**Principles**

The principal ambitions set for this Bill, which has been over twenty years in the making, is to provide a basic statutory system that governs both the ownership and management of various elements of a tenement building. In setting about this task the Bill defines the common elements that will become scheme property, and in doing so reforms the principle of common interest. It provides for a basic management scheme to facilitate better decision-making, and sets a legal requirement for building insurance.

What the Bill does illustrate is that ownership within tenement property is individualised, and not collective, as is the case in other jurisdictions. Scheme property signifies shared responsibilities, not shared or common ownership. This is because, within Scots law, commonhold would demand unanimity in decision-making between all owners. The Bill also makes it clear that the statutory default position only applies where the deed provisions are silent. In all other cases the deed provisions will take precedence, and this applies even when the default position would represent a marked improvement on the deed provisions. This is because retrospective legal provisions could fall foul of the ECHR.

As a result, the Tenement Bill will still allow for infinite variety in relation to title deeds. While this is probably unavoidable in relation to existing flatted property, such a situation should not be allowed to happen in relation to future flatted developments, which, within Edinburgh and Glasgow, represent the bulk of new housing development. There is an assumption that the basic provisions in the Bill will be incorporated into future title deeds, but there is no guarantee this will happen. The fact that the Development Management Scheme is deemed to be a reserved matter does not help in this regard, as the provisions it will contain are unknown.

This is something the Committee needs to address. Currently, there are an infinite variety of title deed provisions, which vary depending on when the property was built, where it was built, and what type of tenement property it is, whether purpose built or a conversion. Poor conveyancing practice has also contributed to these problems. As a result of these drafting problems, for large numbers of flats no agreed management system can operate, there are difficulties in making decisions and enforcement and payment issues cannot be enforced on all owners. So as a consequence, individual owners can easily avoid their responsibilities in relation to paying for regular maintenance. The Bill, after all, should help address the problem of disrepair, and the lack of maintenance being undertaken on flatted private property. But to do this effectively, it requires to achieve collective decision-making within an individualised ownership context. The governing principles of the Tenement Bill need to encourage better tenement property governance, that is the management and maintenance of these properties for the benefit of all owners. While there are legal constraints in doing that for existing flatted private properties, it can be achieved for all such property built in the future.

**Uniformity and simplicity**

The approach that should be adopted is to insist that all title deeds for new flatted property require to meet the basic statutory system set down by the Tenement Bill. This would ensure that a basic standard was established from 2005, and sets a benchmark which, over the years, can be improved upon. Having emphasised the need for a degree of uniformity and standardisation, as is the ambition of the Bill, it is important not to set in place a system that would be too inflexible. For new property, the basic statutory arrangements should always be in place, but that should not stop anyone from adding to these by creating better management arrangements, via considered title provisions. With this basic system in place, owners of existing flatted property might then choose to modernise their own deeds, especially if the housing market paid a premium for having the statutory arrangements in

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place. The danger is that if such an amendment does not come to fruition, then we could easily find ourselves back at square one because, while the majority of developers make perfectly acceptable arrangements, there will always be some whose arrangements turn out to be defective. Also given that most modern title deeds apply to recently built property, most of which is less than 20 years of age, the robustness of their management arrangements has yet to be tested in relation to major repair works.

For too long, tenement or flatted property has been viewed by consumers as a second best housing option, when compared to a detached or semi-detached home. The uncertainty about being able to get your neighbours to agree to repair works, because title provisions are often unclear and, therefore inoperable, largely explains this concern. By ensuring that the owners of all new flats have the basic statutory system, as proposed by the Tenement Bill, in place, will resolve this problem, and enhance the reputation of what is a critical part of the Scottish housing market. Such an amendment would, therefore, represent a major advance for all house buying consumers.

There are other benefits that would result from this simple tidying amendment. One of these is to introduce transparency and clarity into the property purchasers, which is the prime ambitions of the entire Feudal Tenure reform package, of which the Tenement Bill is but the last part.

Transparency and Clarity
Having a standardised system of all flats, built after 2005, and for those which had had their deed amended to incorporate what would be the Tenement Act provisions, would introduce transparency and clarity to the operation of a proper management system. Rather than consumers being presented with an infinite variety of title provisions, there would be a standardised package covering the basic features.

Education and advice role
Having such a system would be ideal when developing educational and advice materials. As consumers need to understand the implications and scope of these reforms, there needs to be a commitment to ensuring proper education and advice support is readily available. Having a specific commitment to make this happen within the Tenement Bill should be an integral part of this legislative package. Having ready access to such information will help resolve any misunderstandings and will facilitate wider adoption of these provisions. Ready access to such information, through for example a dedicated web site, could encourage a new culture of flatted property governance to emerge. By ensuring the proposed system is simple to understand, easy to operate and as uniform as possible in its application, across all new flatted property, this education and advice role would be straightforward. This would also reduce the need for legal redress to sort out what are often basic management problems. There exists within Community Scotland the capacity to undertake this work through the excellent work of Homepoint.

Business Development Template
Having the statutory system, as outlined by the Tenement Bill, would also create a business development template for property managers. Given the current diversity of deed provisions, property managers require to first work out from the titles what they can and cannot do, and then decide whether they will be paid for the work. If the statutory system becomes the norm over time, they would then operate within a far more predictable business environment, which will benefit both themselves and the consumer. Further, this would also set down the basic parameters which would allow for the proper regulation of property managers (whether private businesses, housing associations or local authorities), an issue which is currently being examined by the Scottish Executive.

Disputes resolution mechanism
The only real area of weakness in the proposed legislation is in relation to disputes resolution. Evidence from my research indicates most people involved in day-to-day private property management do not consider the Sheriff Court a useful mechanism to deal with title provision disputes. It would be far better if there was a dedicated disputes resolution system in place that dealt with the bulk of these small disputes, similar to the arrangements for title commissioners in certain Australian States. If the powers of such an official in Scotland were linked into the education and advice role, detailed above, then a fast and effective decision-making tool would be put in place. People currently do not use the current Court system to resolve such disputes because it is both
expensive and time consuming. The need for fast inexpensive resolution of what are effectively neighbour disputes cannot be over estimated.

I hope this submission has highlighted the importance of ensuring this basic amendment is adopted. Further consideration needs to be given to the education and advice need of the legislation, and more thought has to be given to establishing a proper disputes resolution mechanism. These changes would ensure that the Bill’s ambitions are fully achieved. I would welcome the opportunity to expand upon any of these issues by giving evidence to the committee in person.

Dr Douglas Robertson
Director
Housing Policy and Practice Unit
University of Stirling

SUBMISSION FROM THE CHARTERED INSTITUTE OF HOUSING IN SCOTLAND

The Chartered Institute of Housing in Scotland welcomes the opportunity to provide written evidence on the Tenements Bill. The Institute is supportive of the Bill’s policy intentions and welcomes the measures contained within.

However, the Institute would urge the Committee to consider the fact that the new system of tenement management proposed in this Bill will not tackle the backlog of serious disrepair in tenement stock unless accompanied by measures to ensure early identification of repairs and methods by which work can be paid.

The evidence below is therefore restricted to the sections of the Bill which the Institute believes need to be strengthened in order to ensure that the policy intentions of the Bill are introduced effectively including:

- Tenement Management Scheme (Section 4)
- Support and Shelter (Section 7-10)
- Insurance (Section 15)
- Long Term Maintenance Funds
- Common Factoring Schemes
- Owners Associations
- Regular Surveys

Tenement Management Scheme (Section 4)
The CIH believes that the Tenement Management Scheme (TMS) should apply to all tenements in Scotland, old and new, except where the Development Management Scheme is adopted.

The Bill sets out the principles of majority voting and equal apportionment of costs, however, if free variation of deeds continues, these principles will still not be applicable to many tenement owners. The Institute believes that these principles should be the foundation of all tenement management and if the TMS does not supersede title deeds then the current infinite variety of provisions will continue.

This is particularly the case in relation to new flatted developments as developers are free to vary from the Bill’s provisions if they see fit to do so. While the title deeds of most new developments are effective, it would be wrong to suppose that all are and that no developer will introduce a defective system of management.

Therefore the Institute believes that, rather than the Bill’s provisions being seen as a form of good practice which may or may not be followed, it should be seen as a basic statutory standard. This could be improved upon by developers by adding further provisions if necessary but would allow the formation of a foundation of standards which all owners of tenemental property have a right to expect.
Support and Shelter (Section 7-10)
The Institute supports the statutory re-statement of the rules on support and shelter. However there is a concern that the fact that an owner will not be obliged to maintain a part of a building if it would not be ‘reasonable’ may allow some owners to use the grounds of unreasonableness to delay necessary work and further guidance on measure is therefore urgently required.

Insurance (Section 15)
The Institute supports the recommendation of the Housing Improvement Task Force (HITF) for compulsory insurance based on a common policy for new flatted developments.

This could be enforced at various stages, for example mortgage providers requiring proof of insurance when setting up a mortgage and the forwarding of up-to-date insurance documents to them on an annual basis. Factors also have a role to play in enforcement and ensuring payment.

Long Term Maintenance Funds
While the Bill will introduce an adequate method of governance, the impact of this important legislation will be greatly lessened if no changes are made to the way repairs are funded. Fundamental changes are required to the culture of owners and their attitude towards funding repair work. This can only be done through far-reaching policies and the Institute therefore supports the introduction of mandatory Building Reserve Funds (BRFs).

The Tenements Bill is an early opportunity to tackle this issue in a pro-active manner. However the Institute recognises that it would be impractical to introduce such funds across the board over night and therefore suggests tying the establishment of such funds to a change in flat ownership. Every new owner entering into an agreement to buy a flat would be required to budget for payments while existing owners could opt into the scheme on a discretionary basis.

The establishment of a BRF should be mandatory in all new-build tenements. Action needs to be taken from such an early stage to ensure that the build-up of expensive repairs faced by existing tenements does not begin within new tenements.

On a voluntary basis the route to establishing the BRF would be as follows:
1. The majority of owners agree to a binding management agreement or the introduction of a clause, establishing a BRF, in the deed of conditions.
2. A suitable investment fund with adequate management provisions and safeguards is established.
3. Those owners who are willing and able to save commence to make regular contributions.
4. When these owners come to sell their properties, the incoming owners pay the property price plus the accumulated value of the BRF for that property.

The Institute is also concerned by the Executive’s case that, as interest rates are low then some owners may prefer to borrow to fund repairs when the arise rather than saving for repairs in advance. While this may currently be true, it is unwise for the repair of our tenemental stock to be dependent on the fluctuations of the wider economy.

Common Factoring Schemes
While the Institute supports the provisions in the Bill to allow a majority of owners to appoint or dismiss a property manager, we also believe that owners in a developments of eight properties over should be required to appoint a property manager. This could of course include the appointment of an owner.

The Institute accepts that in smaller developments owners may prefer to manage their own tenement. However, in larger developments where more complex and costly issues may arise, it is imperative to have an individual to drive the management of the tenement and ensure that repairs and maintenance are carried out to a satisfactory standard.

Owners Associations
The same arguments apply with regards to the establishment of owners associations and as such the Institute supports the HITF recommendation that all new residential developments of eight or more flats should be a required to establish an owners’ association.
Regular Surveys

While the Bill will introduce an adequate method of governance, the CIH believes that there are still inadequate provisions in the Bill to ensure that repair problems are identified at an early stage.

In most cases the need for a repair is not apparent unless a survey is completed while delays in work will usually cause a minor and relatively inexpensive repair to develop into something more serious and costly. That is why, as part of our submission to the HITF, the Institute proposed that five yearly property surveys be introduced for tenements to facilitate common repairs and maintenance. Such a scheme should be introduced as part of the Tenements Bill.

This response has been prepared by:
Shirley-Anne Somerville,
Policy and Public Affairs Officer, the Chartered Institute of Housing in Scotland

SUBMISSION FROM THE PROPERTY MANAGERS ASSOCIATION SCOTLAND LTD

Property Managers Association Scotland Limited (“PMAS”) is pleased to have the opportunity to provide evidence to the Justice 2 Committee on the Tenements (Scotland) Bill (“the Bill”) as introduced to the Scottish Parliament.

PMAS is the trade association of Residential Property Managers and Factors in Scotland, and its members have in excess of 100,000 units of property under management.

PMAS welcomes the introduction of the Bill to the Scottish Parliament, and is largely supportive of the terms of the Bill.

PMAS continues to have certain concerns about the Bill as introduced and these are concerns which have previously been expressed to both the Scottish Law Commission and the Scottish Executive in their consultations on Reform of the Law of Tenement.

PMAS is concerned about the following matters:-

1. Section 3 (5) – PMAS feels that the chimneystack should be regarded as part of the roof and as such should be common to all the flats within the tenement. From a practical point of view the application of the arrangement specified in Section 3 (5) will be difficult to manage.

2. PMAS welcomes Section11 which will go some way towards solving the problem of flats being sold with arrears of common charges for which a new owner has no responsibility. However PMAS considers that the introduction of Section 11 as drafted will lead to two separate classes of common charges. If common charges are due as a result of the implement of the Tenement Management Scheme (which by definition is the default position) then a purchaser will be severally liable with the seller for the outstanding common charges. The anomaly will be that if the Tenement Management Scheme does not apply but the position is regulated by title conditions or burdens a purchaser will not be liable.

   a. The incidence of arrears of common charges and particularly irrecoverable arrears where properties are sold without the Manager being advised of the sale lead to major problems in management. PMAS would respectfully suggest that the definition of “relevant costs” should be extended to be:-

   b. the share of any costs for which the owner is liable by virtue of the Tenement Management Scheme or would be liable if the Tenement Management Scheme applied to the flat; and

   c. any other costs for which the owner is liable by virtue of this Act.

3. With reference to Section 17 of the Bill, the Association disagrees with the proposal that where a tenement is only partially demolished the cost should be borne equally, but only by the owners of the flats which have been demolished. If the load bearing walls, external walls and roof are common parts of the tenement owned by all proprietors of the tenement then alterations to these items should
be common. Even if a building is only partially demolished it will be common parts which are demolished. It follows that any partial demolition cost should be borne by all of the owners, and not only by the owners of those parts of the tenement which will cease to exist after the demolition has taken place. Those owners whose flats have ceased to exist after the partial demolition has taken place will continue to have a pro indiviso share of the solum. It should be borne in mind that partial demolition will benefit those proprietors whose properties are left after the partial demolition has taken place, although these proprietors may well have failed to contribute towards the maintenance of the common parts which has lead to the deterioration necessitating partial demolition.

4. PMAS feels that the timescales specified in the Tenement Management Scheme Rule 3.4 are not long enough to enable practical management to take place. Referring to Sub-Clause (f) (i) it may well be not possible to commence the maintenance by the 14th day after the proposed date for its commencement for a variety of reasons wholly outwith the control of a Manager or a group of owners who have arranged the maintenance. For example adverse weather conditions, material shortages, labour disputes and other reasons may prevent a contractor from commencing the works. PMAS recommends that there should be some leeway or alternatively the period should be considerably longer.

PMAS is prepared for these views to be made available to other consultees and interested parties as well as being available to the Committee.

SUBMISSION FROM THE SCOTTISH CONSUMER COUNCIL

Summary

The need for an information strategy
- The SCC argues that in implementing property reform, the Scottish Executive will need to consider the information needs of tenement owners, taking into account current low levels of awareness of rights and responsibilities in relation to common repairs and maintenance.
- In addition, we argue that the introduction of a sellers information pack could ensure that in future those buying tenement properties are aware of their rights and responsibilities from the outset.

Finance for low-income flat owners
- The SCC is concerned that at present the Executive has not included mechanisms for support for repairs and maintenance to low-income flat owners and calls on the Executive to consider these issues further.

Owners Associations
- While accepting that the statutory duty to create an owners association may indeed be a reserved matter, the SCC reiterates its support for such associations and argues that local authority support will be an important component of their successful development. The Executive is therefore called upon to fund local authorities to undertake development work in this area.

Tenement Management Schemes
- The SCC argues that the rules within Tenement Management Schemes of majority decision making should be extended to all tenements, regardless of the existence of decision making structures in the title deeds. This would create a single, fair and simple system for all tenements in Scotland and reduce delays and disputes over repairs and maintenance.
- There is a lack of clarity over the sanctions that would be imposed if any individual flat owner refused the terms of the Tenement Management Schemes. The Scottish Executive should consider in more detail how the mechanisms will be enforced.

Applications to the Sheriff Court
- The SCC would argue more informal tribunal systems for tenement disputes should be developed.
- The SCC strongly supports the development of mediation services and argues that mediation would prevent many cases from approaching the Sheriff Court and thus reduce both the costs and time involved in such cases. We suggest that the Committee take a similar approach to the
Additional Support for Learning Bill currently going through the Scottish Parliament which places a duty on local authorities to provide mediation services for this particular group without removing the essential voluntary nature of participation in a particular case.

Repairs: Costs and Access
- The SCC is aware that contacting absent owners can lead to delays for repairs and maintenance and supports the Executives continuing interest in developing policy with could ensure contact without breaching the data protection legislation.

Insurance
- The SCC supports the approach taken in the Bill to place a duty on tenement owners to purchase insurance for their property, in addition we would like to see further guidance as to what should be included within this insurance policy.

Introduction
The purpose of the Scottish Consumer Council is to make all consumers in Scotland matter. We do this by putting forward the consumer interest, particularly that of disadvantaged groups in society, and by working with those people who can make a difference to achieve beneficial change.

We very much welcome the Tenements (Scotland) Bill. We have argued, both in response to the Scottish Law Commission’s initial discussion paper and our response to the consultation on the Tenements (Scotland) Bill, that this legislation is long overdue in order to rationalize and clarify the law in this area and to ensure the quality and safety of the tenement housing stock.

The SCC position on the Tenements (Scotland) Bill has been developed from a long history in policy and research relating to repairs and maintenance issues for property owners. In 1984, the SCC published a guide for flat owners in Scotland which arose following research that identified high levels of dissatisfaction with factoring services. The guide dealt with a range of topics covering: owners’ rights and responsibilities; organizing repairs; dealing with problems of payment for common repairs; factoring; insurance and financial help. The SCC interest in the rights and responsibilities of owner occupiers has continued, two research reports in the late 1990s focused on the (often fraught) relationship between right to buy owners and local authorities. These reports highlighted the lack of information provided to Right to Buy purchasers with regards to their ongoing relationship with the local authority as co-owner of common areas and in many cases also as the tenements factor. Following on from this the SCC carried out research into the experiences of house buyers in Scotland which also found an alarming lack of information passed to new purchasers in relation to their rights and responsibilities regarding common property within tenements.

Earlier this year the SCC published a short discussion paper on what motivates owner-occupiers to repair and maintain their properties. It was the conclusion of this research that at present, we have no information on the motivations for repair and maintenance in Scotland. The Scottish Executive may wish to consider this issue in more detail, particularly in relation to grants and financial assistance for home owners who wish to carry out repairs.

We therefore have a considerable interest in housing generally, we begin this report by outlining some general issues relating to the tenements bill. We then go on to consider the specific sections of the Bill in more detail.

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43 SCC (1999) In a Fix: The views and experiences of owner occupiers sharing common repairs responsibilities with the council, Glasgow: SCC
The need for an information strategy
In our response to the consultation on the Tenements (Scotland) Bill, we argued that the Scottish Executive should develop an information strategy to raise public awareness of the changes contained within not only the Tenements (Scotland) Bill, but also the Abolition of Feudal Tenure (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003, which on the current timetable are all to come into force on the 28th November 2004. Taken together, these three pieces of legislation make substantial changes to the housing law for owners and therefore the Scottish Executive should carry out an audit of information needs of flat owners generated by the property law reform.

The Home Truths research (SCC, 2000) referred to above found that only half of those buying a flat had been provided with the appropriate information on the title deeds, while over a third said that their solicitors had not explained the procedures through which common repairs and maintenance were organised. The SCC believes that any information strategy developed will have to take account of the low levels of awareness of the existing position with regards to what their title deeds contain as well as a lack of understanding of their rights and responsibilities.

The SCC supports the development of a sellers information pack. In our response to consultation on the Title Conditions (Scotland) Bill we argued that the pack could include information on title deeds, planning and building consents and guarantees for specialist work carried out. In addition, rights and responsibilities of owners in relation to the common property could be clearly stated within this pack, as could any outstanding costs for repairs.

Finance for low-income flat owners
The SCC has a specific remit to put forward the interest of people who experience disadvantage and therefore is concerned that at present the Bill includes no mechanisms to address the position of low income flat owners and the financing of repairs and maintenance.

The SCC was represented on the Housing Improvement Task Force and all three of the sub-groups, including the groups which considered improvement and maintenance of common repair. We are therefore disappointed that the recommendations in relation to the creation of a scheme of assistance have not been adopted, in particular recommendation 85 which stated:

The Scottish Executive should establish, through legislation if necessary, a national framework of criteria proposed in paragraphs 366 to 370 of this report, and require local authorities to decide their policies and priorities on assistance in the light of those criteria and on the basis that they should use the most cost-effective combination of assistance to achieve their objectives.

The SCC has previously argued\(^{45}\) that local authorities should be encouraged to provide types of support, other than direct grants, such as loan and equity release support, provision of advice and information, DIY classes, home surveys, tool loan schemes and approved builder lists.

In our response to the consultation on the Tenements (Scotland) Bill we argued that the Scottish Executive must dovetail financial resources with legislative change for the Bill’s provisions to be effective. Given that these issues are currently not raised in the Bill, the SCC reiterates its recommendation that there be further examination of such issues during the development of the legislative proposals.

Owners Associations
In the original consultation, the Scottish Executive had asked for views on the requirement for the establishment of an owners’ association in all future developments where there are eight or more units in the development. The SCC had supported the inclusion of this requirement and is therefore disappointed to see that it has been removed from the Bill as introduced to the Scottish Parliament.

The SCC accepts that this may be a reserved matter under the definition of ‘business associations’ in the Scotland Act 1998 but would reiterate that without a mechanism for communication between owners within a tenement, many of the proposed changes may be difficult to implement.

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We also recommended that the Executive should fund local authorities to undertake development work to encourage and support owners who, on a voluntary basis, want to establish an association and the development of a code of guidance for owners seeking to establish associations. In light of the fact that legislating on statutory owner's associations may not be possible, support for voluntary associations becomes increasingly important to ensure that the principles of the Bill are effectively implemented.

**Issues relating to specific sections of the Bill**

The SCC would like to make a number of specific points in relation to sections of the Bill. Where no comment is made on a section, the SCC broadly agrees with the proposals contained within the Bill and has no further comment to make.

**Section 4: Tenement Management Scheme**

The SCC welcomes the introduction of Tenement Management Schemes (TMS) in the Tenements (Scotland) Bill. In relation to apportionment of costs the SCC agrees that it would be unfair to consumers to alter the title deeds in favour of the TMS system of apportioning costs and that therefore the title deeds should prevail in this case.

However, the SCC adopts a different approach in relation to decision making structures. Given that the rules of unanimity contained within many title deeds are known to lead to delays and disputes between owners, the SCC feels that there would be great merit in extending the majority decision making system to all tenements in Scotland. This would create one simple system for decision making across Scotland.

There is currently a lack of clarity over how the Tenement Management Schemes will be enforced. For example, what sanctions will be imposed if individual owners refuse to accept the majority decision or cannot agree on apportionment of costs. The Scottish Executive should consider in more detail how the mechanisms will be enforced.

In relation to Scheme Property, the SCC would recommend that the Scottish Ministers should use their order making power to ensure that legislation is still relevant if and when developments in buildings construction affect what may or may not be considered scheme property.

The SCC would also welcome guidance on what could be considered to be ‘incidental improvements’ as at present this may be open to abuse.

**Sections 5 and 6: Applications to the Sheriff Court**

The SCC has a number of points to make in relation to dispute resolution, appeals and complaints systems are a key area of our work across many different fields. While the SCC welcome the possibility of an owner appealing a decision to the Sheriff Court, we feel that this should be the final stage of a longer dispute resolution process.

In our initial response to the consultation on the Tenements (Scotland) Bill, the SCC argued that this area would benefit from a specialist tribunals system which would operate in a more accessible and informal manner than the courts system. In particular, we felt that the Lands Tribunal offered opportunities for creating such a body, albeit with increased funding to allow for offices in local areas.

The SCC strongly supports the Executive’s interest in developing mediation services and their commitment to developing a more cross-sectoral approach, discussed in the policy memorandum accompanying the Bill. While we appreciate that the Executive is awaiting the Sheriff Court Rules Council report before making any specific provision, we would argue that the Justice 2 Committee could take an approach similar to that of the Additional Support for Learning Bill which is currently going through Parliament. The ASL Bill states that the local authorities will have a duty to provide mediation services, though the voluntary nature of participation remains. This would not pre-empt the Sheriff Court's deliberations, which are likely to focus on situations when the Court can encourage mediation rather than the provision of mediation services themselves. Furthermore, by following the route of the ASL Bill, the Executive could encourage Local Authorities to develop cross-sectoral...
mediation services rather than a stand-alone ASL mediation service, followed at a later date by a tenements mediation service.

Sections 11 – 14: Repairs: Costs and Access
The SCC appreciates that the issues surrounding contacting absent owners are complex and accepts that data protection issues impact on any legislation requiring individuals to provide personal information. We welcome the Executives statement that it continues to look into how the proposal of the Housing Improvement Task Force to place a duty on a non-resident owner who shares common repair and maintenance burdens to provide a contact address. The SCC would like to take this opportunity to reiterate its view that the Tenement Management System should require all owners to provide contact details to either a property manager (where one exists) or a nominated person, to be kept in accordance with data protection legislation. We believe that this is in the best interests of absent owners as well as those present as it is possible for their property to be entered for repair and maintenance purposes if they fail to refuse within a reasonable period of time. A contact address would ensure that they could be contacted quickly in such an event.

Section 15: Insurance
The SCC supports the Executive approach of compulsory insurance for tenement properties. At present the only stipulation is that this insurance is for the reinstatement value of the property rather than its market price. The SCC would like to see further guidance on what the minimum standards of insurance should be and would argue that there must be consumer involvement in the development of the list of risks to be included in any such standards.

SUBMISSION FROM THE CONVENTION OF SCOTTISH LOCAL AUTHORITIES (COSLA)
COSLA warmly welcomes the introduction of a Tenements Bill and is broadly supportive of the provisions it contains. We support the establishment of a legal framework for the management of tenements. This is essential if owners are to be able to have an effective role in property maintenance. COSLA’s response does not go into the detail of the Bill as this is an issue on which individual Councils are better placed to comment but rather focuses on the key principles and provisions.

Our over-riding comment is that the basis for the provisions in the Bill must be that it introduces a system which is easy to understand, simple, effective and makes it easier for all owners in a tenement to reach agreement and ensure that their homes are well maintained. Our comments have been selected on that basis and we would also urge the Committee to consider carefully the comments they have received from our member Councils which will be based on their considerable experience in housing management and setting a clear policy agenda locally.

On the principle of the TMS as a set of default rules, it is simpler for the same rules to apply to all tenements. We are aware, however, that there are a range of views from Councils on this. Some Councils, whilst flagging up the difficulties of retrospective legislation impacting on existing titles, do believe that it is disappointing that new titles and titles of properties not even built can over-ride statute. The view here is that the TMS should be enforced as mandatory for future title deeds. Others pointing out the difficulties of a one size fits all approach indicate that the TMS should not supersede the title deeds on all matters. The view here is that the title deeds should prevail if they make specific provision for specific matters and they should prevail on decision making and apportionment of costs. A further strongly held view is that the majority decision making rules on maintenance and appointing property managers contained in the TMS should take precedence over existing title deeds and that costs for common maintenance should be apportioned equally. Under this scenario, owners could, if they chose to, revert to the deed conditions by applying to the Lands Tribunal.

On the detail of the TMS itself, except where there are large disparities in the size of flats, we agree that the most straightforward approach is for each flat to have equal shares in all parts of the common property and for maintenance costs to be distributed equally.

The Management Scheme includes maintenance but no provision for improvement. The Committee may wish to give consideration to extending the scheme to include necessary improvement works which would lead to the long-term sustainability of the building. The Bill says that all owners have a
duty to maintain their property where it provides “support or shelter” to another part of the tenement. It indicates that the statute should reaffirm and restate the doctrine of common interest and includes a test of reasonableness based on the age of the building, its condition and the likely cost of any future maintenance. This principle could be incorporated into the management of improvement schemes.

The Bill should empower responsible owners and ensure that they have effective powers to take action against other owners who do not sign up to or contribute to decisions reached under the scheme. Consideration should also be given to the best means of providing information and advice to responsible owners and how best they can be assisted in using enforcement powers. Moreover, the provisions do not cover mediation. We have presumed that this is not because it is not felt to be appropriate but rather that it would be regarded as a voluntary option. However, the Committee may wish to clarify this during its consideration of the Bill.

The proposals for insurance are welcomed but it would be useful also if there were powers included in the management scheme for owners to have to exhibit valid insurance documents to ensure that the building is adequately covered.

The principles in respect of demolition and abandonment are accepted. However, our view is that here again there should be a test of long term viability to ensure that an individual owner cannot enforce the demolition of an otherwise viable building against the wishes of the majority.

Effective maintenance could also be improved by requiring owners to have their buildings professionally surveyed on a regular basis.
The Convener: On behalf of the committee, I welcome to our meeting Dr Douglas Robertson, of the University of Stirling, and Mr Alan Ferguson, a director of the Chartered Institute of Housing in Scotland. We are pleased to have them with us. I am sorry about the warm room temperature; it is a bit of a hazard of this venue. If we open the windows, we cannot hear one another. Many would deem that a blessing, but it might obstruct the process of getting through the work of the meeting. We hope that the fan might make a difference to the temperature.

I am happy for either or both of the witnesses to make preliminary comments. However, the bill is fairly technical and we have seen the witnesses' written submissions. Therefore, with the witnesses' agreement, the committee will proceed straight to questions. Karen Whitefield will start the questioning.

Karen Whitefield (Airdrie and Shotts) (Lab): Good afternoon and thank you for your written submissions. Both mention the proposed tenement management scheme—which the committee has touched on in previous evidence-taking sessions—particularly the proposal that the TMS would be a default scheme that would come into operation only when the title deeds of flatted accommodation are silent. The CIHS has a particular view on that, but I wonder whether the witnesses would care to comment on whether they believe that a default scheme is an appropriate road for the Executive to go down.

Alan Ferguson (Chartered Institute of Housing in Scotland): The institute's view is clear from the written submission and other information that we put together, which I hope that members have had a chance to look at. Our view is that what the Executive proposes is not the best way to have done it. I recognise that the majority of respondents to the consultation on the bill were in favour of the TMS. However, our view is that the bill is a missed opportunity to get a more consistent approach across the board, as there would still be a lot of inconsistency with the TMS. For example, a TMS could recognise that a roof is common. However, if it were so recognised, it should be common anyway. Our view is that the scheme property should apply to all. Therefore, the roof should be common to all.

Karen Whitefield: Do you believe that there is an issue around the European convention on human rights in that forcing somebody to be
covered by the TMS might potentially be a breach of the ECHR?

**Alan Ferguson:** There are two points to consider. First, we are already doing what you suggest we might. By accepting that the TMS will exist where the deeds are silent or inadequate, we are already imposing on certain individuals. On the one hand, we are saying that that is okay; on the other hand, we seem to be saying that it is not okay.

The second point is about what is in the public interest. Our view is that the bill is an opportunity to change the culture of owners who do not take responsibility for maintaining their property and for thinking, planning and saving for the long term. It is in the public interest for us to bring about a culture change in how we deal with owner-occupier or private sector property in this country.

**Dr Douglas Robertson (University of Stirling):** It comes back to the issue of free variation, which the committee discussed at its previous meeting. My written submission tried to make the point that basic principles are required so that people buying into tenement properties have a clear understanding of what they are getting into. The committee spent a lot of time considering that at its previous meeting.

If, for all new property, you have a system that incorporates the key elements of the proposed legislation—and it has taken 20 years of public investment to get to this stage—and if that system becomes the cornerstone for all new property, people who have less successful deeds because of drafting or historic problems will be encouraged to update their deeds. For a long time, I have been arguing for more standardisation. The bill seems to suggest more standardisation, but because of the right of free variation, standardisation will be limited and constrained.

I have difficulty with the view that all modern title deeds are great. The majority of new flats are under 20 years old and their deeds have not yet been tested under the circumstances of major repairs. It may be that those deeds will have as many problems as the old ones that we hear so much about. Problems arise constantly with title deeds; people do not know exactly what they are buying into. This bill gives you the opportunity to sort things out, at least for new properties. That would create a template that would allow businesses—property managers and the like—to know what they were going into; would allow solicitors to know exactly what they were doing in the conveyancing context because the broad parameters would be there; and would allow the public to understand things. From my research in other countries I know that that is a pretty standard package and could be so in a Scots law context.

**Karen Whitefield:** That would be very helpful for all new accommodation that is built; my concern is that the vast majority of accommodation in Scotland is older and will not fall into the new category. How can we ensure protection for people who live in properties whose title deeds are not necessarily silent—they say something—but fall short of what is being offered by the tenement management scheme? Those people may be the ones who lose out; they are the people who often come to see their MSPs because they are experiencing difficulties.

**Dr Robertson:** But you would accept the argument that, if we start tomorrow, or in 2005, all new properties would be covered, which might encourage other people to switch. Because of the pace of development in some parts of Glasgow at present, old flats will soon be in the minority.

**Nicola Sturgeon:** I think that you appreciate, Dr Robertson, that we are trying to find out whether the tenement management scheme could be applied not as a default scheme but as a scheme of minimum standard. I take your point that we should start by applying the scheme to new properties.

Can you think of any obstacles to applying the scheme retrospectively—as a scheme of minimum standard rather than as a default position? Leaving aside whether or not that would be desirable, could it be done in practice, or would existing property owners have to do what you are suggesting and voluntarily amend or update their title deeds?

**Dr Robertson:** The problem is whether people will actually use any of the provisions in the bill. What will enforce the use of the tenement management scheme if people choose not to use it? Much in the bill leads back to the sheriff court but, in my research with property managers, owners, local authorities and housing associations, I have not yet found anybody who has ever taken a case to court to solve a problem—because of the time and expense and because things do not get resolved. It is difficult to see how a voluntary scheme would have an impact; and although a statutory scheme might have a bit more clout, I think that the same problem would remain.

**Nicola Sturgeon:** I might be asking you to go beyond your remit, but if the Executive decided to amend this bill to make the tenement management scheme apply as a minimum standard rather than as a default position, and to make it apply retrospectively to existing properties as well as to new properties, is there any reason why it could not do so?

**Alan Ferguson:** Our position is that the scheme should apply to old and new properties, because it
is about setting a standard and about trying to tackle disrepair in housing. Several obstacles exist, and Karen Whitefield mentioned one. I am sure that issues arise from human rights legislation. Owners need to be persuaded that they will not lose out. Some might lose out, but some will lose out even under the proposed scheme. Education will be needed to get across the reason for the scheme. Some opposition would be expressed, but our view is that if the scheme is just a default system, we will not tackle the existing disrepair in the private sector or change the culture to make people recognise that buying a property makes them responsible for its long-term maintenance and is not just a short-term investment.

Karen Whitefield: Will the operation of the scheme as proposed in the bill present difficulties with who is responsible for assessing whether title deeds are insufficient and with amending title deeds? How will we engage with owner-occupiers so that they take up that right? If the scheme applied to everybody, perhaps the situation would be addressed.

Dr Robertson: There are some lawyers in the room who will know that amending title deeds in a tenement block would be nigh on impossible. Obtaining the agreement of all the owners and all the lenders to a new set of conditions or procedures would be a difficult task. The Title Conditions (Scotland) Act 2003 allows some conditions to be left to lapse, which leads to the default situation. That is where the default situation’s strength lies. Amending title deeds in a tenement block after they have been set would be extremely difficult.

Alan Ferguson: Who defines inadequacy, and what an individual can do to deal with that are difficult matters. As Douglas Robertson said, our evidence is that people are not resorting to the sheriff court, so what process will we use? The problem with the proposed system is that it does not go far enough and that it raises many questions about how it will be put into practice and about what an unhappy individual can do.

Karen Whitefield: My final question is about the proposed default rules. Are you confident that they will cover every eventuality?

Dr Robertson: Probably not.

Karen Whitefield: Will the rules cover most likely eventualities?

Alan Ferguson: I will put aside our principled position to say that the rules need to be made to cover those situations.

Maureen Macmillan (Highlands and Islands) (Lab): Could we explore dispute resolution? Dr Robertson has said in his written evidence and today that he does not consider the sheriff court a useful mechanism and that people seldom take cases to the sheriff court because that is expensive and time consuming. You have suggested an Australian system.

Dr Robertson: It involves title commissioners.

Maureen Macmillan: Will you explain how they work?

Dr Robertson: The legal context is slightly different, but the system in Australia is similar to the commonhold system that was recently introduced in England. In Australia, all flats are held in commonhold. If disputes arise between owners or between owners and managers, the commissioner in the states where the system operates, such as New South Wales, has a time limit to deal with those disputes. If a more complex legal dispute is involved, the commissioner will pass that to the court to deal with.

The notion is that if a dispute arises over who is responsible for a repair and water is streaming through the roof, following sheriff court procedures might result in the issuing of a dangerous building statutory order to replace the roof. The Australian mechanism allows disputes to be dealt with rapidly and decisions to be agreed. Similar systems exist in the United States of America. England is going down that road because the leasehold valuation tribunal will amend itself into such a dispute resolution mechanism. It offers a means of dealing with small cases and getting a resolution quickly, as opposed to going through the full legal panoply of the sheriff court. That is not to say that the sheriff court or the Lands Tribunal could not be used in particular cases.

Maureen Macmillan: You would have to ensure that the decisions were followed. How would a decision be enforced?

Dr Robertson: The parties agree to have the decision bound upon them.

Maureen Macmillan: So it is a bit like mediation, is it?

Dr Robertson: Up to a point. Some states in America insist that mediation take place before dispute resolution. I should emphasise that this is not my view; it is based on the evidence. I think that you are to hear from Neil Watt and others later this afternoon. I am sure that, if you ask them whether they have experience of taking people to court to deal with disputes over title provisions, they would say—as did the people to whom I spoke—that they would never contemplate using the courts.
The Convener: There are two matters that I wish to clarify. In tenement title conditions, it was generally a standard provision for there to be an arbitration clause, and an arbiter would usually be appointed. That could be someone from the faculty of procurators or some other recognised individual. It has certainly been known for referrals to arbitration to be made in order to try to resolve things.

Dr Robertson: At the Lands Tribunal for Scotland?

The Convener: No—before that. Many older tenement titles contained arbitration provisions for when there was a dispute.

Dr Robertson: Do you mean in the deed of conditions?

The Convener: It could be in the deed of conditions, and it could be repeated in each individual tenement conveyance, but be binding on all the proprietors. That might explain why we do not necessarily find a great deal of evidence of proprietors invoking sheriff court actions.

Dr Robertson: That is probably why factors have said that people do not use that route.

The Convener: I turn to the second point that I wanted to make to you. There is of course no guarantee that an alternative dispute resolution would be swifter or less expensive than a sheriff court action.

Dr Robertson: No, there is not. The concerns that were expressed to us in the course of our research related to the fact that the expertise of the sheriff in dealing with some of these matters, based on the existing law at the time, meant that decisions were often not what was expected. It was an expensive matter to go the sheriff court, and it took a great deal of time to get to that stage.

The Convener: If nobody ever goes to the sheriff court, how do we know that?

Dr Robertson: Very few people have used the sheriff court recently but, taking into account the build-up of case law, the reason for the proposed legislation is to try to clarify the results of common-law decisions that have been made in the sheriff court. Those have been at variance—which is probably why it has taken 20 years to reach this stage.

The Convener: I am anxious to ascertain exactly why you are supportive of an alternative dispute resolution mechanism. It was a sad fact of life that, in some areas of legal practice, people agreed to resort to arbitration to resolve various disputes, not just in conveyancing but elsewhere, because that was deemed to be cheaper and quicker than going to court. Subsequently, it transpired that, by the time people had paid for the time of the arbiter and of his clerk and for the necessary administrative and secretarial structure to support the arbitration, they had actually ended up with a more expensive alternative than going to court.

Dr Robertson: I can only give you the example of Australia, where there is a time limit for the title commissioner to deal with the matter. The parties are obliged to agree with their decision. If the decision is of a more serious nature, it is passed on to a court to deal with. That is built into the Australian system. As I said earlier, we are effectively dealing with two different legal systems. The issue is to do with getting a decision quickly, with people being comfortable about the decision being resolved within a short time. In most disputes, over who is responsible for a particular repair, if the matter is not resolved within a short time, then the nature of the repair usually becomes bigger and the costs become more problematic to all concerned. There is a case in Edinburgh in which a problem over getting such a matter resolved resulted in somebody trying to murder his neighbour. That person is serving time in prison. That is an extreme example, but it shows that frustration over trying to get decisions made under the existing system can be a problem.

Maureen Macmillan: Are you trying to tell us that, at present, there is no de facto dispute resolution?

Dr Robertson: There is in theory. From what I gather from my research—I can only go on what people have told me—it is very rarely used.

Maureen Macmillan: But you feel that going to the sheriff court should be a last resort, and that a more user-friendly mechanism ought to be in place.

Dr Robertson: As you suggest, mediation may be an excellent way to try to resolve the situation. The issue is situations where neighbours are at each other’s throats, or where one person refuses to pay for work, while eight or 16 others are waiting for that person. It would be more than useful if a mechanism could be found to resolve such situations quickly. From what I was told in conducting the research, I know that the sheriff court is not an option to which most property managers or owners would necessarily resort. They may resort to it in a minority of cases, but that does not mean that some of the longstanding problems are resolved.

Maureen Macmillan: The Executive has not made any provision in the bill.

Dr Robertson: It has stuck with the standard provision, which is to pursue matters through the sheriff court. The issue is whether people feel there should be another mechanism that could allow disputes to be resolved, so that the public
purse does not end up having to serve notice and then carry out work on default, then charge everybody else. There are other ways—as you discussed last week in relation to the City of Edinburgh District Council Order Confirmation Act 1991—to resolve matters, but the cost to the public purse is astronomical.

Maureen Macmillan: We have few mediation services at the moment.

Alan Ferguson: The sheriff court should be the last resort. We should look at a number of different options, such as arbitration and mediation. We should have in place a number of other mechanisms that individuals can use to resolve disputes before going to the sheriff court. It is recognised that mediation can play a role, not just in resolving disputes, but in tackling antisocial behaviour and doing all sorts of things.

The difficulty for people on the outside who are trying to regenerate mixed-tenure estates, and who are dealing with problems day to day, is how to deal with owners who will not pay or who cannot pay. How should disputes be dealt with? It is frustrating that the Executive has just stuck with what is there, rather than exploring some other options. We do not know whether the options would work. They have almost been ruled out by not being explored.

Maureen Macmillan: That is useful.

The Convener: I am conscious of time. I ask members to be as brief as possible. If the witnesses feel that they can, it would be fine for them to speak alternately, instead of duplicating answers. If they have different views to express, we are happy to hear them.

Mike Pringle (Edinburgh South) (LD): Dr Robertson, in your research you refer to disputes and how they seldom go to the sheriff court. Did you find out how often there is a dispute when people are trying to perform a repair in a building? My experience as a local councillor is that that occurs very frequently.

Dr Robertson: The problem with the nature of the research is that we were talking to people who operate the system, as opposed to people who receive the service. However, you are completely right. You could not talk to anybody who has lived in a tenement without hearing about some problem that has had to be resolved one way or another. Often, other neighbours pay the costs of the individual who is not chipping in, just to get the work done. There may appear to be no way of resolving the situation, but it has to be resolved somehow. Most people find a way of doing that. That may be better, but not for the other neighbours.

Mike Pringle: I have a question on insurance. The CIHS submission states that it supports "compulsory insurance based on a common policy for new flatted developments."

Why do you say that?

Alan Ferguson: Because it would be a better way of dealing with the situation. Lenders say that a borrower should have an insurance policy. The difficulty is that there is no policing or monitoring of that. The borrower can say that they have a policy, and they may have to show it once, but they never have to show it again. The issue is how we ensure that property is properly insured. Our view is that block insurance would be a better way of ensuring that. That was also the view of the housing improvement task force.

Mike Pringle: If there is common insurance, everyone will have to pay their share. What happens if one person does not pay their share?

Alan Ferguson: That would be about the policing or the monitoring of the process. How could we ensure that people paid their share? One answer would be for lenders to play a greater role in ensuring that the property that they lend on is insured. Others, such as property managers, could have a role in ensuring that insurance is in place. There is an issue about what we do about an individual who does not come up with the money—but that relates to all the matters that we are discussing.

14:30

Mike Pringle: If there is a common policy and one person does not pay their share, the whole policy is negated.

Alan Ferguson: That is the argument against having such a policy. However, our view is that the housing improvement task force is right to recommend a common policy. Given that we accept that, we must work out how such policies can be enforced.

Another difficulty is that the Executive has just gone with the idea without exploring how it might be made to work.

Mike Pringle: Do you agree that such policies could not apply retrospectively to properties that had already been built, such as old tenements?

Alan Ferguson: We could make a start, in relation to new properties.

Dr Robertson: It would depend on the arrangement. Block insurance policies are standard throughout the United States of America, because of the nature of the system. Owners associations are required to take out a block policy. Such policies might be a mechanism for the
reinforcement of owners associations, which would be required to take out the policy.

The current situation is equally problematic, because some people in a block have individual policies, some are under-insured, as has been noted already, and some have no insurance. In a sense, the block policy would be better, as it would involve more people. Individual policies do not currently seem to operate in a way that meets the requirements of the bill.

Mike Pringle: Tenements are often above shop properties. If a shop property is part of a chain, the chain will have insurance, but the shop will be responsible for repairs to the property. There would obviously be various situations, but in such situations, how would shops be involved in a block policy?

Dr Robertson: I am sure that that would not be beyond the insurance industry, given its commercial ingenuity.

In America and Australia, insurance is the big business that drives a lot of the issues—the insurance money that is generated is fundamental to owners associations, in terms of the deals that they can get. I am sure that if such a requirement existed in Scotland, the insurance industry would be well able to meet it.

Nicola Sturgeon: The submission from the Chartered Institute of Housing in Scotland mentions long-term maintenance funds and suggests that in existing tenements buyers should be obliged to pay into such a fund every time a flat changes hands, but that such payments should be discretionary for existing owners. Would that be equitable in practice? Would such an approach mean that new owners in effect subsidised the existing owners who had opted out of the system? Could the same end be achieved in a different way?

Alan Ferguson: In an ideal world, as we have argued in a number of reports, maintenance or building reserve funds should apply to all properties, old and new. We recognise that there is a mixed response to that view: there is opposition but some people are convinced that the system could be made to work.

In order to make the system work, we suggest that it could apply to new buildings and to new residents. Nicola Sturgeon is right to say that that would mean that an individual would come into a block and pay money that other residents were not paying, but we have to start somewhere. Research indicates that owners do not save for large repairs or improvements. We have to consider how to encourage people to save, so that in the long term, if there is a problem with the roof or whatever else, the resources are there. I suppose that we are saying that it might be difficult to create an ideal world, but that we could start to change the situation by focusing on new properties and on flats that change hands.

Nicola Sturgeon: I take the point that we have to start somewhere and that anomalies will inevitably be thrown up.

One of our previous witnesses—I cannot remember who—said that if maintenance funds were to be established, the bill would have to state expressly how they would operate. Would those funds attach to the property or would they remain the property of each individual owner and then be attached by creditors of that owner in, for example, a bankruptcy? Do you have any views on that?

Alan Ferguson: We have tried to set out in our reports a basic way in which the system would work, but the issue is about working out the detail. The difficulty is that no one has said what would make a building reserve fund or a long-term maintenance fund work. We have tried to say that the resources would stay with the property, so that an individual coming into that property would pay for the property as well as for the individual amount of the building reserve fund, although there might be other ways of doing that.

Dr Robertson: We have had experience of this matter, which is why, up to a point, I disagree with the idea of sinking funds. In theory, they are a great idea, but under the old co-ownership arrangements—one of you might remember those—the difficulty lay in whether the fund was attached to the property or to the individual. As a result, when the fund was attached to an individual, as in co-ownership, people had to put in money to replace what was coming out. That became quite muddy.

In France, people have discovered that it does not take very long for the sinking fund to have a substantial amount of money in it—imagine some of the large blocks in Paris—and that, without proper legal control, the property managers sometimes disappeared. There is no provision to protect people who are being forced to save into a system. How will the property managers invest the money? There is too much working with other people’s money and the notion of sinking funds in the context of the bill is ill thought out: it should be much clearer.

A good system, which operates in America, allows the owners association to become a body corporate. Instead of having a sinking fund, the associations borrow money on the income stream of the fees from the owners. That is a major means of carrying out maintenance work and perhaps we should be considering such a mechanism in the long term.

Jackie Baillie (Dumbarton) (Lab): That takes us neatly on to owners associations. The housing
We suggested those surveys together. As Alan Ferguson said, owners associations result in things getting done. However, they can also result in the most vicious and appalling disputes between people. Anyone who has been involved in any organisation or club—a number of you will have had this experience—will know that forced membership can result in quite a lot of bad feeling, which can become exaggerated. Owners associations are not the be-all and end-all, but they should be encouraged.

Jackie Baillie: That is helpful, thank you. My final question is on surveys. I was slightly nervous when I read that the CIHS was proposing that tenements should be surveyed every five years. What kind of survey did you envisage, given that they vary in scale and scope? Did you consider that there could be a substantial financial impact on home owners in tenements who are perhaps on low incomes?

Alan Ferguson: We suggested those surveys for the same reason as we welcomed the idea of a single survey for buyers, not necessarily because it would deal with those who go after a number of properties and are not successful, but because it would set out the property’s energy efficiency rating and condition and detail what works were required. The owner would therefore be transparent about their property when a prospective buyer came along. They would be able to show that they had surveyed the property and what work was required, what was outstanding and what was being done. The prospective buyer would have a lot more knowledge of the property’s maintenance history.

You are right that the concern is the cost of the surveys. However, housing associations and other organisations will know the condition of their property and will plan for it, which is partly because they have carried out surveys. Why should owners not also regularly inspect their property to know what the problems are and what they need to do so that they can plan for its long-term maintenance and be transparent when someone comes along to buy it?

Jackie Baillie: Would you make those surveys compulsory or would you just encourage them?

Alan Ferguson: In an ideal world, where we were committed not just to tinkering with the legal system but to changing the system of property management and maintenance, we would make them compulsory. On the other hand, we might well try to encourage them. That depends how far we are prepared to go and whether we see the bill as an opportunity to start changing things in this country.

Dr Robertson: The fundamental point is about the owner’s rights and the responsibilities that flow
It is just a valuation for the housing improvement task. The housing improvement task is a valuation survey. It is called a building valuation. People do not get a survey; they get a valuation. A surveyor might be a better option even than a plumber.

The Convener: I have two short questions to ask before we leave the survey aspect. I suppose that it is possible that in two years six out of eight flats could change hands. Purchasers will have had their surveys carried out, so is it reasonable to impose a further cost on them for a whole property survey?

Dr Robertson: Only 5 per cent of purchases in Scotland—less than that within tenement properties—involve that option. In the main, there is a valuation survey. Only 5 per cent of purchases in Scotland—less than that within tenement properties—involve that option. In the main, there is a valuation survey.

Dr Robertson: That is where some elements of legislation could produce a major change in the information that consumers have when they make the most important purchase of their life.
The Convener: As there are no further questions for our witnesses, I thank Dr Robertson and Mr Ferguson for coming to be with us this afternoon.

On behalf of the committee, I now welcome to our meeting Mr Jack Fulton, the president of the Property Managers Association Scotland Ltd; his colleague Mr Neil Watt, who I think is the past president of the association; and Mr Ian Donald, who represents the Royal Institution of Chartered Surveyors in Scotland. I have seen all the witnesses before in a different life and in different guises and it is a personal pleasure to welcome them to the meeting this afternoon.

I know that the committee wants to ask a fairly extensive set of questions. Given that we have already received your submissions, I suggest that, unless you have anything particularly pressing that you want to say, we will proceed straight to questions.

Karen Whitefield: In evidence this afternoon, the Chartered Institute of Housing in Scotland and Professor Douglas Robertson from the University of Stirling both made the case that the tenement management scheme should not necessarily be based on default but should apply to everyone with title deeds. After all, the fact that the deeds might be silent on a matter would not provide the same level of protection as a tenement management scheme. As that point of view differs from your position, I am interested to find out why you think that the CIHS might have got it wrong with title deeds, which I think is the RICS position and which Mr Watt and Mr Fulton have commented on.

Jack Fulton (Property Managers Association Scotland Ltd): There should be a default scheme. The most important thing is to ensure that all properties have a form of management. It is essential that properties are properly maintained. After all, if we do not have a scheme to fall back on, we will end up back in the present situation, in which it is difficult to make repairs to buildings.

Karen Whitefield: Do the other witnesses agree with that?

Neil Watt (Property Managers Association Scotland Ltd): Yes. In fact, I would probably go one stage further and suggest that the existing deeds of conditions for modern properties—by which I mean anything built after about 1985 or the early 1990s—contain a set of management conditions that are superior to the tenement management scheme’s provisions and work very well. However, I, too, think that we should have a default position.

Karen Whitefield: What would you say to owners who have title deeds that are not silent but that perhaps do not offer the owners the same level of protection that they might have enjoyed if their deeds had been silent and the default scheme had been introduced? The tenement management scheme would have been able to offer those people some protection. Might they face problems in that respect? We heard from Dr Robertson that, although title deeds that have been written more recently might be more prescriptive, there is no real evidence that would allow us to assess how effective those title deeds are when it comes to ensuring that any major refurbishment or repairs that might be required to flatted accommodation are undertaken. What is your response to that?

Neil Watt: The tenement management scheme is less about providing protection than about providing an opportunity for proactive maintenance by owners. It is clear that there are grave deficiencies relating to the absence of conditions in deeds and that is stifling maintenance and repair to some extent. However, I am not convinced that what is proposed is protection for owners. My view is that it is the catalyst for owners to move forward.

Karen Whitefield: Surely it is protection for those owners who want to do something about the necessary repairs to their properties but find that other people in the building do not want to have the repairs carried out. The scheme ensures that those repairs can be undertaken. As well as ensuring that there is maintenance of the property, which is good for everyone in that flatted accommodation, it offers some protection for those owner-occupiers who have encountered difficulties.

Neil Watt: There is a danger in thinking that the Tenements (Scotland) Bill and the management scheme are a panacea for problems relating to care and maintenance. You have said that the management scheme will ensure that repairs will be carried out. Clearly, however, that is not the case. The bill will ensure that there is a process by which decisions can be made if those owners choose to make decisions. Further than that, it provides a framework whereby those owners can fund the maintenance of the property should they choose to do so. It would be wrong to assume that what we have before us will ensure that maintenance is carried out. It will enhance an owner’s ability to maintain the property, but I am somewhat sceptical that it will ensure property maintenance to a much greater degree than happens at the moment.

The Convener: Mr Donald, would you like to comment on the two issues that are being explored? What do you think about the principle of free variation of tenement management schemes with the title deeds, which I think is the RICS position and which Mr Watt and Mr Fulton have commented on?
Ian Donald (Royal Institution of Chartered Surveyors in Scotland): It occurred to me that it is always open to the owners to agree among themselves that, in the absence of a proper scheme of regulation in the title, they could write themselves a deed of conditions. That is perhaps to hope for the best rather than to expect the worst of people in a close.

The opportunity to have more information up front seems to be an important point. When someone buys a flat, they are generally short of knowledge about how the affairs of the building are regulated. The information deficit can be quite startling on some occasions. I visit tenement properties almost daily and have found that, frequently, people have no idea who the factor is, what their share of repairs is and what their common obligations are. If people were aware to a greater degree than they are currently of what the titles said before they made an offer for the flat, that might help to prevent them finding themselves in the unfortunate position of being at some disadvantage when compared to people who live in a tenement in which a management scheme is up and running.

The Convener: Mr Watt talked about the nature of a tenement management scheme. Do you agree with his view that, although the scheme might be a mechanism to make decisions, it is not an instrument to deliver repairs?

Ian Donald: I am no longer a property manager, but I am aware that the real problem that faces people who want to do work to their tenement is reaching agreement and, more important, collecting the money that is required to pay for the work. In my view, the management scheme provides a lot of assistance to people who want to look after their buildings, but it does not have any draconian fallback position where the future of the building is definitely assured; there is no mechanism for compelling people to do more than the bare minimum, which is often not enough. The management scheme seems to be a great improvement on the present position. Although I would have liked something that went a bit further than that, there is a limit to what is possible as a change to the existing situation.

15:00

The Convener: Section 3 of the bill deals with pertinents, which are essentially common parts. It provides that pertinents should be owned by the flats that they serve. I know that the RICS felt that flat owners should have an equal share in the pertinents; it preferred that to the formulaic approach of ownership being determined by which bits of the tenement the pertinents serve. Will you expand on why the RICS opposes a service-test approach?

Ian Donald: I have not been the RICS’s main mover in the discussion; I am here as a substitute and my knowledge of the Institution’s thinking on the matter is therefore not complete.

The idea that a pertinent is common property to some flat owners but not to all of them will cause confusion, particularly with items such as chimney heads. A divided villa could have a chimney head with two or more flues in it. If no one has a fireplace any more, who owns the chimney head? There is uncertainty about whether it is a pertinent of one, two or three flats—or no flats. There is a certain simplicity in saying that a feature such as a chimney head should always be regarded as a pertinent of the whole rather than of only a part.

The Convener: If all owners had an equal share in common parts, could there be a difficulty in getting a majority to support repair to a part that served only one flat? Using your chimney stack example, let us assume that one flue to one part of the divided building remained operative and that the other flues were defunct.

Ian Donald: If it was the law that that chimney head was common property, surely it would just be the bad luck of the person or persons who found themselves having to contribute to a repair to an item for which they had no use and the good fortune of the owner who still used the chimney flue.

The Convener: Okay. Would you like there to be any changes to what is included and what is excluded from the definition of scheme property, which is covered by rule 1 of the tenement management scheme?

Ian Donald: I am quite happy with the general thrust of what is common and what is not common. In my view, there does not seem to be much wrong with what is proposed.

Neil Watt: I agree with that.

Jack Fulton: I would say the same—I agree with what Mr Donald says. To use the same example again, in most instances the chimney head, which is built out of the external walls, is part of the structure of the building. The case was mentioned in which there was one remaining flue. Under the proposal in the bill, if all the fireplaces were shut off, no one would own the chimney head. That would not be possible; someone must take responsibility, so the feature should be treated as common property.

Karen Whitefield: Continuing with the theme of the tenement management scheme, we will move on to rule 3.4, about which both organisations expressed concerns in their written submissions. Under that rule, once owners have taken a collective decision to undertake a repair, they will be required to make a payment in advance for it.
They will be asked to contribute their share of the money on the understanding that the repair work will commence within 14 days. If that does not occur, an owner will be able to ask for the money to be repaid to him or her.

In your written evidence, you express general concerns about the operation of rule 3.4. Can you explain to the committee in some detail why you have those concerns and whether you think that any amendments are necessary to make it work effectively once owners have agreed that a repair is necessary?

Jack Fulton: I will deal first with what is required once the decision has been made and look at the actual cost. We are concerned that, if owners decide that a repair of a nominal value—for example, the cleaning of a gutter or the repair of a downpipe—requires to be done, it could be unnecessarily costly and time consuming for them to have to obtain three quotations. The association considers that a limit should be set—for example, £75—as a minimum figure for that requirement for quotations.

As far as the timescale is concerned, we know through our members' practices that 14 days is insufficient. That may well be because of the difficulty in obtaining quotations during a busy period for a particular type of contractor or because people are on holiday. We know through practice that it can sometimes take many months to obtain the funds to deal with the repair. We might end up with people trying to frustrate the matter by holding on until the last minute, and money would end up being returned to owners on a regular basis only for people to have to start the whole process over again.

Karen Whitefield: Do you think that having some deadline is preferable to having no deadline at all? I appreciate the fact that you would not want people constantly to have to start the process again and to give money back; however, although 14 days might be too restrictive, perhaps imposing a deadline of 28 days or six weeks would be better than leaving the process open-ended so that it might never reach a conclusion.

Jack Fulton: I agree that a timescale should be set, but it would need to be a minimum of eight weeks—preferably three months.

Ian Donald: I am not sure that there needs to be a timescale at all. If the money was contributed by all the owners for the purpose and if there was some reason why the work was delayed, all the owners would be aware of that reason. If time went by to an excessive extent, an owner who was aggrieved about that delay and felt that the repair was never going to happen could possibly make some other provision by going to law for the recovery of the money that they had contributed for a repair that was no longer going to take place. I would ask why there should be a time limit on the repair at all. I do not think that a time limit is strictly necessary. Elsewhere, the management scheme allows the sheriff to determine whether money should be returned.

Karen Whitefield: An owner who has entered into an agreement and taken a decision in good faith might want to regain the money that they paid out voluntarily on the understanding that repair work would be undertaken. If the only option open to them is to seek redress in the court, that will incur an additional financial cost. I am sure that they would much rather see the repair undertaken, with the guarantee that they would get their money back if it was not undertaken.

Ian Donald: The position is circular. If the good payer pays in first and the bad payer pays in last, the good payer's patience might be exhausted before the bad payer makes a move. The good payer would wish to give the repair scheme every opportunity of success rather than be worried about the contribution that they have made, but perhaps that depends on the amount of money that is at stake.

The Convener: I ask Mr Fulton and Mr Watt what the procedure is at the moment if a repair scheme is contemplated, raised with the owners and agreed, and contributions are invited. What happens? On what basis are contributions sought?

Neil Watt: I am tempted to say that it is horses for courses, as it depends on the arrangement for the particular property. As a rule of thumb for property managers—although you should bear it in mind that we could be talking about owners who self-factor and owners associations that might also be in control of funds—there would be a limit of something like £50 per flat beyond which the property manager might try to collect funds in advance to safeguard the payment of the invoice to the contractor. Timescales are fully dependent on the wishes and requirements of the owners. Some of them may become frustrated at laying out their £50 or £100 for two or three months and, because property managers are ultimately only custodians of the owners' funds, if owners ask for the funds to be returned at any time during the process, we have an obligation to return them. I am not giving you a clear answer, other than to say that it is at the discretion of the group of co-proprietors.

Jack Fulton: I am inclined to agree with Mr Watt. Trying to obtain funds from non-resident owners can be a major problem, particularly in some larger developments. Although we can get the funds together in the end, that may take several months, and we do not want to end up having to return funds only to find that the money
comes in from the non-resident owner a month or six weeks later.

**The Convener:** Would instruction of the works be delayed until you were in funds for the total cost?

**Jack Fulton:** That would depend very much on the amount of money that was outstanding, because once we contract with a contractor to carry out the work, he expects to be paid for it, and if we do not have the funds, we cannot contract with him.

**Ian Donald:** There may be circumstances beyond anyone’s control—I am thinking of bad weather, for example, such as a big freeze, or a demand for tradesmen with which they cannot possibly cope. The tradesmen may have a date in their diaries to start the work, but circumstances may arise that are beyond anyone’s control. Outside forces could easily cause a delay in a timescale of 14 days and if there was a history of trouble with the collection of funds, the door would be open after 14 days under the current proposals for someone who wanted their money back to ask for it.

**Karen Whitefield:** Rule 4 of the tenement management scheme proposes that contributions to the cost of maintenance and repair should be equal, except in tenements in which the floor area of the largest flat is greater than one and a half times that of the smallest flat, in which case costs should be divided in proportion to floor area. Does the Property Managers Association Scotland agree with the views of local authorities, which have said that the Executive’s approach is bound to lead to disputes between neighbours over access to calculate floor space? From your experience, do you think that such difficulties are likely?

**Jack Fulton:** I can see the potential for difficulty, particularly over getting access to measure floor area, but that is not insurmountable. What concerns me more than anything is the fact that a cost is involved in taking measurements, because a surveyor would have to be employed to measure the building and calculate the floor space. The surveyor would not necessarily need to get access to the flats to work out the floor area, but there would certainly be an additional cost.

**Karen Whitefield:** Who should be responsible for that additional cost?

**Jack Fulton:** At the end of the day, the additional cost will be borne by all the residents in the property.

15:15

**Karen Whitefield:** Is the problem not so much one of access as one of cost, which people will need to be made aware of so that they can factor it in?

**Jack Fulton:** Yes.

**Karen Whitefield:** Does the RICS agree that the one-and-a-half-times rule could cause problems, given that the surveying profession has no agreed method of calculating floor area?

**Ian Donald:** Yes. There is obviously a problem in defining a property’s floor space. The practicalities of measuring a tenement with precision should not be underestimated, particularly if the tenement is at the magic margin, where it has one flat that has one and a half times the floor space of another. I would not like to be the person who, on a regular basis, is responsible for working out the area and being dogmatic about the size relationship.

The method of calculating the area requires three things: the taking of the size, the drawing of the plan and, thereafter, the calculation of the area. Errors and differences can arise in those three areas. No two surveyors who measure the same room will come up with the same answer—I hope that I have not shocked you too much by saying that. Variations will arise from the technique that is used and whether the surveyor rounds up or rounds down. Measuring the size of this committee room might be simple enough, but some tenements have boxed-in cupboards and chimneybreasts that have been plated over to give them a flush finish, which hides the space behind. All those problems could come to the surface when a flat is at the critical margin that was mentioned.

**Karen Whitefield:** How often will that problem affect properties? Is it likely that there will be many cases in which the floor space of one property is one and a half times greater than that of the smallest flat in the tenement block? Have we any idea whether the floor spaces of tenements are generally similar in size?

**Ian Donald:** The traditional tenement building that we all picture is a building of four or five storeys with two or three flats per landing. The one and a half times rule is not likely to be triggered in such a tenement. However, if a house is divided, with a larger flat upstairs and two smaller flats downstairs, that might be a more difficult case. Such non-standard tenements will be in the problem category. By implication, there should not be a huge number of such cases, but there will be some. I do not know how many, so I cannot answer that question.

**Karen Whitefield:** How might the problem be overcome?

**Ian Donald:** Way back when the Scottish Law Commission considered the matter, it was
suggested that it was unnecessary to have any rule. Every owner has an interest in the building, so one might ask why every owner should not contribute equally. However, if one flat is much larger than another, that encourages the belief that it is fairer that a size relationship should kick in at some point. I cannot advise what the appropriate mechanism should be. If people have made up their minds that there should be a size relationship, they have to pick a number and one and a half is a perfectly good number. I cannot say more than that.

Karen Whitefield: Following on from my questions about floor space, I have a question about how attic space is dealt with when floor space is being measured. What impact might attic space have on the frequency with which the one-and-a-half-times rule will be used? How likely is it that attic space will trigger the one-and-a-half-times rule?

Ian Donald: I do not know, nor do I know whether anyone could give a clear answer to that question, but I can picture the kind of building that you are talking about, in which there is a ground-floor flat and a first-floor flat with an attic. There must be many such properties. If they were formed by conversion, one would hope that there would be something in the titles, but I think that we are talking about cases in which there is nothing in the titles. I do not know the answer.

Karen Whitefield: My final question is to both the witnesses from the Property Managers Association Scotland. If you were to pick a figure, would one and a half be the right figure to choose?

Jack Fulton: As Mr Donald said, one must pick a figure, and one and a half times is not an unreasonable figure, considering the traditional nine or 12 flats in a tenement block; however, whether it is the right figure is another question.

Neil Watt: I agree. I would like to add that we believe that the difficulties that will inevitably be encountered with gaining access and with two surveyors coming up with different measurements—to which Mr Donald referred—are worth the risk to ensure that a conclusion can be reached, rather than there simply being an equal share of costs. I think that we all feel quite strongly that an equal share is not entirely right where one flat is larger or a number of flats are larger. The starting point should be that there must be a mechanism to achieve a conclusion. There will be difficulties along the way, but such difficulties and risks are worth taking to achieve the result.

Maureen Macmillan: Would the witnesses from the Property Managers Association Scotland say something about dispute resolution? Previous witnesses thought that straightforward recourse to the sheriff court was perhaps not the best way to solve problems relating to disputes between owners about the cost of repairs and so on, and that there might be a role for mediation. In its evidence, the RICS said that it is quite happy with the use of the sheriff court, but do you have anything further to say about that matter?

Jack Fulton: The use of mediation would be ideal, but, unfortunately, we do not live in an ideal world and there will always be referrals to the sheriff court. As practising property managers, we try as much as is humanly possible to achieve agreement between owners, but there will always be disputes. If we can persuade owners to use mediation and it works, that is fine. The aim is to try to keep costs down, if that is humanly possible. Additional costs do not help when people have to spend their money on repairs and want to keep costs down.

Maureen Macmillan: Do you see your association as a mediator?

Jack Fulton: We try to mediate, as much as is humanly possible. In many ways, we are successful in that respect, as we get many repairs carried out to properties in which there are disputes. However, at the end of the day, there will always be people who will not be prepared to work with us, or even with a mediator.

Neil Watt: I am not as strongly in favour of mediation because I presume that such disputes will arise out of the necessity or obligation to carry out maintenance and repairs and such obligations will be set out clearly in title deeds. More often than not, things will be in black and white and either people will have an obligation to maintain or they will not. If the obligation does not relate to maintenance, it might relate to incidental maintenance or improvement, which is another matter. When an owner signs his or her title deeds, they are agreeing there and then to maintain their property. I am therefore not convinced that mediation is necessary to convince someone that what they have signed up to do is what they should do—they will have already committed themselves to doing that.

The Convener: I would like to clarify something. A previous witness—Dr Robertson—said that in his research he had found that nobody goes to the sheriff court because it is too difficult, time consuming and expensive. What is your experience as property managers of situations in which you have not managed to resolve disputes with owners within the property management structure? What happens? Where do such disputes go at the moment?

Jack Fulton: Let us take a situation in which a repair is required to a building. At the end of the day, there may well be a majority in favour of repair work, with a minority against. In some
instances, the work might go ahead, but then the case is referred to the sheriff court because outstanding money requires to be recovered.

The Convener: Have you had experience of that?

Jack Fulton: We certainly have.

Neil Watt: Yes.

The Convener: If the dispute is because the owners genuinely cannot agree on what should be done, given the title deeds, and you cannot get a decision at all, how is it determined?

Jack Fulton: Regrettably, in a lot of instances it is not a matter of disagreement; it is a matter of parties just not responding—full stop. That is probably the biggest problem. If we cannot get a response from certain owners, at the end of the day we have to go along with the majority.

The Convener: At the moment, if all else fails, the parties go to the sheriff court. In your experience, has that happened?

Jack Fulton: Yes.

Neil Watt: To be clear, we are discussing the payment of charges, and I think that Mr Fulton was talking about a dispute over the property manager’s charges, rather than a dispute between owners as to what maintenance is required, which may have been your point, convener.

The Convener: That was part of my question.

Neil Watt: To return to my earlier point, if the title deeds are adequate or the measures in the Tenements (Scotland) Bill kick in, the issue will be clearly black and white. There should be no grounds for dispute: it is either a repair and maintenance item agreed upon by a majority or it is not. There should not be a case for debate as to whether the work should be carried out. The timing or the extent of the work and the level of specification may be a matter for debate, but not the principle of whether the work should be carried out. I am not often aware of two proprietors or two groups of proprietors taking such a dispute to the sheriff court. Apathy prevails, and the repair falls away and does not get carried out.

Jack Fulton: I agree. People do not generally take disputes to the sheriff court. It is when work has been carried out that the matter is referred to the sheriff court for the recovery of moneys.

The Convener: But you said earlier that usually you can find a path through the difficulties, in terms of getting the proprietors’ agreement to the repairs.

Jack Fulton: There is a path when there is majority agreement, and the minority then has to go along with the majority. As Mr Watt said, in most instances the title deeds lay down that if a repair requires to be carried out, it can be done with majority agreement, in which case the work will go ahead if the funds are available. In some instances, the work will still go ahead even if the funds are not available.

Maureen Macmillan: I want to go back to section 17 and the demolition of a tenement building. That section makes provision for how the costs of partial demolition of a tenement building should be allocated among owners, and provides that the costs should be borne equally, but only by the owners in the part to be demolished. Both sets of witnesses have expressed concern about that. Why are you unhappy about that provision, and how would you like section 17 to be amended?

Ian Donald: The RICS’s evidence is reasonably clear on that point. The proprietor who benefits from a demolition could well be the proprietor who is unaffected by it, if the bit of the tenement that needs to be demolished is the problem. There is an automatic conundrum if the benefiting proprietor does not have to contribute to the cost of removing the problem. The idea of a benefit arising out of a demolition does not seem to have been included as a concept—a demolition is always seen as a catastrophe.

Maureen Macmillan: Could you give us a concrete example of what you are talking about?

The Convener: Demolishable concrete.

Maureen Macmillan: Yes—concrete or brick.

15:30

Ian Donald: When Glasgow was full of tenements with pubs on their ground floors, a proprietor of such a public house would often wish the public house to remain on the site. He was usually willing to pay substantially to have the tenement removed, provided that he could keep the site, because the benefit to him was that his trade would continue. Although the homes would be gone, his property would remain. I was not in practice when that was being done seriously all over the place, but that is an example of how the proprietor of the bit that is left could be the end beneficiary of the process of removing the disrepair in the rest of a tenement.

It is hard to imagine a case today of a tenement of which only part would need to be demolished. We cannot be talking about a conventional close with six, eight or 10 flats. We must be talking about a different sort of tenement from the sort that we usually imagine, such as a divided house with a subsiding wing that needs to be demolished. If the wing was so heavily affected by subsidence that the market value of the remaining flats in the main house was severely depressed
because surveyors saw the settling wing and thought that the building had a problem, those who lived in the main house would benefit from a decision to demolish the wing, because the blight would be removed, yet they would not be expected to pay. That would be completely wrong.

Maureen Macmillan: That is unlikely to happen.

Ian Donald: You asked for an example. I thought of that example in this room this afternoon.

Maureen Macmillan: A tenement is unlikely to be partly demolished.

Ian Donald: Yes.

Maureen Macmillan: I had imagined that a tenement’s top storey might be removed because of some problem. I understand the argument about the benefit to others who live in the tenement; perhaps they should pay part of the cost.

Ian Donald: Is the concept not also one of common property and scheme property? We are talking about what is part of the scheme. Why should everyone not contribute to that cost?

Jack Fulton: I agree with Mr Donald. In the past 10 years, I have encountered a similar situation, in which a fire occurred in a tenement’s upper floors, which had to be demolished because the building was old and refurbishing it would not have been economical and because the upper floors’ structural stability was in question. The commercial people on the ground floor still had the benefit of the existing premises and continued to trade, and they will probably continue to trade for the next 10 to 20 years. They had the benefit and they contributed to maintenance, too. Such owners should have a share in the obligation and the right.

The Convener: As members have no further questions, on the committee’s behalf I thank the three witnesses for giving evidence, which has been extremely helpful.

I declare a short comfort break of five minutes.

15:38

Meeting suspended.

Jackie Baillie: As the Scottish Consumer Council was represented on the housing improvement task force, I am sure that the witnesses will provide us with valuable insights.

On finance for low-income flat owners, the task force made some robust recommendations about what it wanted to be set out in legislation. However, you will acknowledge that providing financial assistance is not necessarily a matter for legislation. If we leave that issue to one side, what type of financial support should local authorities and the Executive provide for low-income flat owners?

Martyn Evans: That is a very wide question. There is a significant problem with disrepair in our private housing, which is partly a product of the current system’s complexities. The bill simplifies those complexities to ensure that making decisions is more straightforward.

That said, even if we had such a system, there would still be occasions when people would not be able to meet their obligations, which would result...
in a clash between private interests and the public interest in maintaining properties. It has been very difficult to achieve such a balance. If we knew more about what motivated owners, we could answer your question more clearly. Indeed, Tony O’Sullivan carried out some background work for us that shows that no evidence about what motivates owners exists. If we do not know what motivates them, we do not know what financial incentives to provide for them.

I cannot answer your question clearly, apart from saying that, according to prior research, if we knew what motivated owners, we might be able to set financial systems in a way that increased the motivation of low-income owners.

Jackie Baillie: Would you change or build on the current system of improvement and repair grants and, if so, how?

Martyn Evans: We would build on the existing system of grants. The housing improvement task force, on which I represented the SCC, made a series of quite complex suggestions about bridging the gap between affordability and obligation.

Jackie Baillie: That is very helpful.

I accept that we cannot legislate for owners associations, as that matter is reserved to Westminster. However, what kind of encouragement and support would you expect local authorities to provide so that such associations can be set up?

Martyn Evans: Communities Scotland might be the more effective vehicle in that respect. In any case, we want to build that capacity in owners associations. For example, we have been seeking to support and find funding for an embryonic group called the Scottish tenements group which, if it could work, would be a national voluntary organisation and would offer necessary services, build the necessary guidance and support local developments where it could do so.

As part of the information strategy that we have suggested, Communities Scotland should be encouraged to tell people how to organise themselves into voluntary associations, how to ensure that they did not expose themselves to unnecessary risks and how to fund their associations through insurance schemes and other requirements that will apply to tenements.

Local authorities have a role to play in this respect, because the issue of owners’ collective interest in property ownership and maintenance has not come through very clearly in, for example, finance debates. As those interests have not been well represented, such debates have been lopsided. However, as members well know, local authorities are already overstretched.

15:45

Karen Whitefield: In the fourth paragraph of the summary in your written submission, you helpfully explain your position on the tenement management scheme. However, in paragraph 18 you suggest that the Executive should consider in more detail how the mechanisms will be enforced to ensure the effective implementation of the tenement management scheme. I am interested to know your views on the application of the TMS. Who should be responsible for its application and, particularly, what sanctions should be imposed on those who do not comply with the TMS?

Martyn Evans: You touch on a very complicated subject. The mechanisms of the scheme set a framework by which owners can better agree to fulfil their collective obligations. If those owners cannot agree or are in dispute in some part, enforcement and sanctions become a moot point because they would be enforcing the sanctions against themselves.

We repeat that we are very much in favour of mediation. There has been much discussion in favour of mediation. The evidence from our research on access and paths to justice shows that a significant number of people have a judicial dispute, but the adversarial system of enforcement does not suit them because they have to maintain a relationship with their neighbours after the process has been undertaken. Mediation can help to maintain relationships while a dispute is resolved.

However, the problem of the small number and highish cost of mediation services remains. We suggest that local authorities could look at mediation in their emerging role of promoting well-being so that people who have such problems with one another can go through a mediation process—we have been very keen on that idea and have written about it.

Our criticisms of the current civil justice system through the sheriff court—about cost, delay and complexity—are well known. We have evidence from other jurisdictions. We went to Maryland last year with a large number of people and found that mediation services can make a significant difference in the area of personal disputes between people who wish to have a continuing relationship.

Karen Whitefield: Do you think that local authorities have the skills and the resources to provide a mediation service? I am slightly concerned that if we go down the road of accepting the proposals for the TMS and introduce legislation, it is possible that local authorities will then be left with the difficulty of trying to provide mediation and not being able to deliver it.
Martyn Evans: I agree. I did not mean that local authorities should provide the service themselves; they should facilitate it.

There are few mediators in Scotland and some of them are rather underemployed because getting the mediator together with those who wish to have mediation is a difficult process. A mediation scheme is attached to the in-court advice project that I helped to set up at Edinburgh sheriff court in a previous job. The local authorities could be the facilitators who bring together the mediation services. Some of the mediators will also do pro bono work to get experience. Building that capacity of mediation, just as one builds the relationships between tenement owners, is something that local authorities can do. I agree that they cannot do it themselves and that it would be a mistake for them to set up their own mediation services.

Karen Whitefield: Section 4 provides that rule 2 of the TMS should apply—that decisions should be taken by a majority. You suggest that, even where title deeds give some owners a greater say in decisions, that should be put to one side, all decisions should be taken on a majority basis and everybody should have an equal right to be part of the decision-making process. Do you think that there are any problems with that breaching the ECHR?

Martyn Evans: We see clearly that there is an argument that that might be the case. In this area, the argument is fairly overwhelming against changing ownership and payment relationships, but we think that there is an argument in favour of considering the balance of interests in decision making. Under the Title Conditions (Scotland) Act 2003, as we understand it, a majority of owners can apply for a change in their title conditions anyway, so if there is an ECHR issue with what we suggest, there must be such an issue under that act already. There is an argument for what is proposed, but our argument is that, as is pointed out in the policy memorandum, the unanimity rule is the fundamental cause of many of our problems of disrepair, and that aspect of the tenement management scheme should therefore apply to all. Of course, there is a counter-argument, and people can make that argument. However, after careful consideration of the balance of interests, we believe that majority decision making should be made a requirement in all cases.

Karen Whitefield: I appreciate that you understand that there is a counter-argument, but it strikes me that when title deeds are not silent on the issue but are explicit, somebody may have a greater say when it comes to the decision because they also have to pick up a greater cost for any repairs, particularly if a commercial property is included in the tenement. How do you address that potential imbalance to ensure that the property owner who might have to bear a larger burden than other property owners does not feel that he or she is being unfairly treated in the decision-making process?

Martyn Evans: They may feel that that is the case, but there are other provisions in the bill—relating to the apportionment of roof space, for example—which change relationships. The bill itself does not take a consistent approach to not changing existing obligations. Somebody could feel aggrieved, but the public policy issue is whether the repair will be done at all in the circumstances that you have described. We are trying to find a reasonable mechanism for such cases, with the caveat that people can appeal against an unfair decision to a judicial body. We suggested that there could be mediation, but the bill says that appeals would be made to the sheriff court. If an owner felt that it was unreasonable to proceed, and if that owner was in a minority, he or she could still take action.

In the specific circumstances that you described, that is more likely to be done by a commercial owner. On balance, however, we believe that the minority interest should be overridden by the public interest of the majority of people living in a common property, who should be able to make decisions on repairs without being held up by one person saying, “No, I don’t want to do that.”

Maureen Macmillan: Quite a lot of the things that I was going to ask about have already been covered in your answers to Karen Whitefield. However, I want to be clear about how you see the role of mediation. Should it be used only when there is a dispute about the management of the tenement and not at the other end of the process, when it comes to the matter of payment once the repairs have been made? Do you think that it would be perfectly appropriate to go to the sheriff court if a repair had been done and six out of eight owners had paid up but the last two had not, or do you see a role for mediation there as well?

Martyn Evans: We see a role for mediation there. Our experience in other jurisdictions and our observations in Maryland in America have shown us that mediation can work. We are not saying that we should cut out the sheriff court. We are saying that mediation, if offered, can often be successful in maintaining relationships between people who live and work in close proximity. People still have to agree either that they will give up their right to go to the sheriff court or that, if they cannot resolve the dispute or are not happy with the resolution, they will take it to a point of decision making where neither party can get out of the result. We would not rule that out at all, because we have seen it operate successfully in complex relationships involving significant amounts of money.
Maureen Macmillan: We heard evidence from previous witnesses who said that, because it was usually perfectly clear in people’s title deeds what their responsibilities were, it would not be extremely complicated to take matters to the sheriff court. They said that decisions could be made quite easily in the sheriff court and they asked what the point of an alternative course would be.

Martyn Evans: Our evidence suggests the opposite. People are fearful of going to the sheriff court because of cost, delay and complexity. Even if those problems do not really arise, there is a perception that that is the case, so people will not go easily to a court—to the sheriff court in particular—to resolve their disputes. The consequence is a high amount of disrepair in properties. The evidence is not to be sought in the number of people who go to the sheriff court, but in whether there is significant disrepair in private homes in Scotland. The housing improvement task force said that they were in a very poor state.

If we had a system that allowed people to have their disputes mediated, they would be able to understand the reasons for decisions that were made and to understand and argue about the costs. Our evidence is that people are much happier about being involved in a slightly less adversarial system, in which they can discuss their views with their opponents or neighbours and reach a reasonable conclusion. That will not happen in all situations—some cases will go to the sheriff court.

Maureen Macmillan: It has been suggested that mediation could be just as time consuming and expensive as going to court.

Martyn Evans: I have heard that that is the case for arbitration. We have evidence that mediation is not as expensive as going to court. Of course, it can be expensive, long, delayed and complex. However, that is very much in the hands of the parties. I can speak only of the evidence that we have published, which indicates that people have found mediation extremely valuable. We can say that with some confidence, because more and more businesses are using mediation to resolve their disputes. If businesses found it more costly to use mediation, they would not do so. They find that mediation helps them to maintain their business relationships and is more efficient. That is not true in every case. I am not saying that mediation is a panacea, but it is an option that should be pursued and supported as a more appropriate way of resolving civil disputes.

Mike Pringle: In your evidence on insurance, you welcome the general position that has been taken in the bill. However, you want the Executive to provide further guidance on what insurance should cover. Can you give us examples of the sorts of things that the Executive should include in further guidance notes on insurance?

Martyn Evans: We are not in favour of common insurance, which was the position of the housing improvement task force. We think that mitigating risk is an individual responsibility. This is a very complicated area. As members well understand, if someone does not mitigate their risk in a common tenement, the risk may be higher. We do not suggest that guidance should be included in the bill, but it should indicate the kind of circumstances in which owners should ask insurance companies to mitigate risk. Such circumstances could include the risk that one of the common owners is not insured or is underinsured or that a co-owner has falsely declared something on their insurance that may invalidate it and increase the risk of other co-owners.

Ordinary consumers who are living busy lives will not be able to work out such risks with an insurance company, but if there is guidance or best practice—which could come from the insurance industry, working with the Executive—people will at least have a template that enables them to determine whether five or 10-point criteria had been met and whether the reasonable risks of living in common property may be mitigated.

We are very much in favour of compulsory insurance. The most worrying situations are when other owners are fraudulent in what they say or when premiums are not paid on time. In those circumstances, people think that they have mitigated their risk, but someone else’s action has increased it considerably. I have set out the kind of framework that we seek.

The Convener: As there are no further questions for the witnesses, on behalf of the committee I thank them for their evidence.

Martyn Evans: I would like to make one quick point, which concerns the issue of costs to owners—the transfer of costs from an existing owner who sells their property to a new owner, when the former has carried out a repair. The committee has discussed that issue. We want to put on record the fact that, on balance, we think that it is right that that provision is included in the bill. It will protect other existing owners who have agreed to have a repair carried out and have paid for it. If there was not joint and several liability, existing owners would have to seek recompense from the departing owner, rather than from both the departing owner and the incoming purchaser. We recognise that there is an element of rough justice in that but, as you raise the point, we would like to say that we agree with what is in the bill.

16:00

The Convener: Thank you for that clarification and, again, thank you for being with us this
The only thing that we would like to say, briefly, is that our focus is on certain parts of the bill rather than all of it. We gladly leave some of the detail on conveyancing and so on for other people to pursue. As local authorities, our main interest is in the organisation and management of common repairs and in how they can be improved. There is not a unanimous view across all authorities, but there are certain common themes that we want to put forward. If you want to ask us about esoteric things such as air space and mid points, we will—

The Convener: Are you going to disappoint us with your taciturnity?

Councillor Gilmore: We will.

The Convener: We shall try to live with that.

You suggest on page 1 of your written evidence that, rather than adopting a service test to determine ownership of pertinents, as the bill suggests, it would be simpler for all the owners in the tenement to have an equal share in them. I want to explore that further; why do you hold that view?

Ron Ashton (Convention of Scottish Local Authorities): We are trying to simplify the entire process as much as possible. We understand that there are difficulties and consequences for whichever scheme is arrived at, but the confusion that reigns in the minds of many owners and people who are involved in the maintenance of tenements is considerable. The end product of the scheme, if it is to be an improvement, should be a simplification of the process that everyone can easily and readily understand.

The Convener: On the relationship between pertinents, as defined in section 3 of the bill, and scheme property, as defined in the schedule, do you think there is a need for equal sharing of pertinents by flat owners? Under the scheme proposals, all flat owners would be liable for major structural repairs.

Ron Ashton: If owners are enjoying the use of the same, it is only fair for owners to pay for them.

Karen Whitefield: In your written submission, you indicate that there is a range of views among local authorities about the tenement management scheme, particularly on when it should apply. The committee has heard varying views on the matter. Earlier today, our witnesses from the Chartered Institute of Housing in Scotland made clear their view that the tenement management scheme should be a minimum scheme that should apply to everyone and which should override title deeds, whether or not the deeds are silent. What is the majority view of local authorities on that point? What are your general views on the tenement management scheme, in particular in relation to situations in which title deeds are silent?

Councillor Gilmore: There are general views on some aspects of the bill. For example, there is a general view that majority decision making should apply to agreements about maintenance and to the appointment of property managers. However, there is no majority view among the authorities that the tenement management scheme should always take precedence over titles. The City of Edinburgh Council and a minority of local authorities took the view that the scheme should take precedence over titles, but that people who want their titles to prevail should be given the opportunity to request that—I suppose that that approach would reverse the presumption in the bill. There is no general view that the whole scheme should take precedence over titles.

There are differences of experience and that, in part, is why we have different viewpoints. Different authorities seem to have encountered many different problems. In Edinburgh, our experience is that a lot of the older titles are not always helpful—they are certainly not well known—and that they add to the problem of getting people together to take action. That is why we took a fairly simple view.

Going beyond the question whether titles are silent, inconsistencies, complexities and contradictions are found in titles, probably because of the way in which flats are sold at different times over the years; the situation is different with flats in new blocks, which have a consistent set of titles that are all produced at the same time. There is general agreement that if such inconsistencies are found in the titles, the opportunity should be taken to use the tenement management scheme, rather than simply try to iron out or find a way round the inconsistencies. Over time, that approach, which COSLA supports, would enable a lot of difficulties to be overcome. If, as some of the submissions to the committee suggest, there are other situations in which people believe that the title deeds are okay and easy to follow, that is fine.

I hope that that is helpful and fair. I do not want to exaggerate the Edinburgh view; we certainly
Ron Ashton is just asking why so many people use the statutory notice system, which can come into play relatively easily. Because the system is not tied to grants, we have not failed to use it because of the expense; we have used it whenever we can. However, people rely on the system, which means that they do not come together collectively to resolve problems. We feel strongly that if we want to make progress, we need a culture in which owners plan for the future and get together to make agreements, rather than simply deal with crises when they arise.

We do not have a factoring tradition in the east of Scotland. Factoring is another way in which people overcome issues with titles. We are not convinced that people understand their titles or find them easy to use. People get round the situation either through good factoring or, in Edinburgh, through statutory notices. However, we would like people to tackle the issues themselves and to use fewer statutory notices.

Karen Whitefield: Is the Executive’s definition of scheme property right or should something be added to it? Angus Council has suggested that chimneys should be included in the definition. Are you content with the definition? If not, what should be added to it and why?

Ron Ashton: The definition is a good starting point, but we must discuss the detail as the bill proceeds and as the regulations under the bill are produced. Angus Council has strong feelings on the issue because we have had many difficulties with chimneys and how they are covered in titles. Many of the definitions require close working in the longer term between local authorities, other parties and the Scottish Executive to ensure that the regulations are clear. We come back to the point that the scheme must be clear so that everybody knows what is going on, what the definitions are, what is covered and what can be done.

16:15

Karen Whitefield: Rule 1.5 of the TMS makes provision for maintenance and incidental improvements of tenement buildings. COSLA and Angus Council have suggested that that provision should be made for improvements that are not incidental. What kind of improvements do you envisage, and what would you like the TMS to cover?

Councillor Gilmore: It is often useful to give specific examples. The example that we have used in this context is installing a door-entry system where there has not been one before. What would normally be regarded as an improvement is now seen as the modern standard for a stair front door. It is not simply a case of replacing the old door to put in a door-entry system, or the repair or maintenance of what is already there. The work has to be done to a standard that would be widely recognised as desirable and—probably—necessary. If it is possible to do that by majority decision making, we think that that would be hugely beneficial to many stairs.
There are other examples. If the roof is being repaired, is insulation an improvement or simply a sensible addition? The distinction is too narrow. There are many issues that people think that the bill will be able to deal with. They think that the bill will resolve their problems, but that will not happen. People will still have the same problems in getting works done. Generally, a majority of people want such works to get done, but they get stuck when one or two people, for whatever reason, are not willing to get involved.

Karen Whitefield: Will there be an issue about getting the balance right? You are right that most people want their properties to be kept up to a good standard, but there might be a situation in which low-income families want to contribute to the improvements, but cannot afford to do so at the time. How would you ensure that any additions to the scheme would not be so draconian that they might disadvantage such people who have just managed to buy their property and no more?

Ron Ashton: One must think about people’s quality of life. A prime example is that one might want to improve the fabric of a building, but not necessarily at huge expense. Local authorities sometimes get a bad name for having grandiose schemes that cost thousands and which people cannot afford. We are not talking about that; we are talking about implementing relatively simple and easy schemes, which will meet housing quality standards that we are all in favour of raising, immaterial of the sector.

We are looking at fuel poverty, insulation, external doors, door-entry systems—things that will add to people’s quality of life, in which a recalcitrant or absent owner might not have any interest. We need to get into the fine detail and get the balance right, as you were correct to say, between grandiose modernisation schemes and things that can make a genuine difference to the people who occupy the block.

Councillor Gilmore: We are sensitive to the possible risk that so-called improvements, as currently defined in the bill, could be imposed on people who cannot afford, do not want and do not see the need for such improvements, particularly when a local authority or registered social landlord is the majority owner.

It ought to be possible, however, to find a form of words that would extend the current definition of an improvement to the point where people could agree that commonsense measures such as security arrangements or dealing with fuel poverty would be genuine improvements that should be included in the TMS, without taking it to the extent that any majority of owners—whether that majority is a council, RSL or just a majority of individual owners—could impose their will on other owners. We are very keen that people should make such decisions as a collective and that a group of owners should come to their own views on what should be done.

A majority of owners imposing their will on the other owners does not necessarily get the best results. Further, it does not encourage people to plan for the future; people who have had a bad experience of something being imposed on them will be reluctant to get together to do anything else, because they will feel that goodness knows what will happen the next time. Part of the process has to relate to shifting the balance back to the owners and away from authority, in whatever form, telling owners what to do. However, the legal position has not made that easy. The easier it is for people to organise repairs, the less they will need someone coming in as Big Brother to impose something on them.

Karen Whitefield: Liability for repairs under the tenement management scheme will normally be apportioned evenly among owners unless a flat has floor space of more than one and a half times the floor space of another property. Do you think that there will be problems with that definition? Is the choice of that differential correct?

Ron Ashton: To be perfectly honest, there will be a problem regardless of what formula is used. There is no panacea. Although the use of a clear-cut differential allows everyone to see what is happening, problems will be caused at the margins in situations involving the calculation of the nearest square foot and so on. There will be all sorts of complications involving questions of who has measured what and in what way the measurements have been taken. However, those problems will arise only where there is disagreement. As Councillor Gilmore said, we need to ensure that people sit down and agree on what is the best way forward and what is in the interests of the block.

Councillor Gilmore: If you try to make laws based on the most unusual situation that you can think of, you will end up with some pretty complex laws. The advantage of the arrangement that we are discussing is that it is relatively easy for most owners to understand. It is not based on some obscure provision from the past that people find baffling. For example, some people’s obligations are expressed in terms of feu obligations and feu duty payments, which are long gone.

The end result of trying to account for every unusual situation will be worse than the end result of our simply trying to get the majority of situations right. If a minority of people still want to litigate, that will be possible, but we believe that the basic tenement management scheme should be as simple and straightforward as it can be. That is where the disagreement arises about whether the scheme should apply to all properties. Some of us
think that it would be simpler if the scheme applied all over.

Our experience has been that, on the whole, people do not find the equal shares to be onerous. We use an equal-share system when we issue statutory notices and we have found that, on the whole, people accept that. One or two people will dig through their title deeds to find a reason why the situation is unfair, but, as they are the people who have let the property get into that condition, it is perhaps not too unfair. The Edinburgh stair partnership that we have started to implement uses that arrangement as well and people seem quite happy with it. When the arrangement is suggested to them, people say that it is easier than the situation that they have had to deal with before, which they might not have fully understood. It has not been difficult to persuade people that the arrangement is the most straightforward one.

There will always be exceptions, but perhaps they do not provide the best point from which to start.

Karen Whitefield: Earlier this afternoon, the Scottish Consumer Council made strong representations to us about the need to enforce the TMS. I think that COSLA has similar concerns. Who should be responsible for enforcing decisions that are made under the TMS? How should such decisions be enforced if there is a need for sanctions against those who fail to comply with a decision that has been taken?

Councillor Gilmore: Is the question how payment by other owners should be enforced?

Karen Whitefield: Yes.

Councillor Gilmore: There must be better systems for that. We are concerned that requiring people to go to court to recover payment from other owners will mean that the process is quite complex. Our local authority has the power to impose a charging order so that those who refuse to pay up are eventually required to do so. It is important that we have a simple system whereby the money can be obtained relatively painlessly once a majority decision has been achieved.

Ron Ashton: I agree. People tend not to go to court because of the cost, complexity and timescales that are involved. Any system must be simple, easy for people to understand and, ultimately, enforceable. The hope is that people will reach agreement initially, as people should get into these situations only where there are real problems. There needs to be mediation and arbitration to move the system forward.

Mike Pringle: I welcome Sheila Gilmore to the committee. It is nice to see you again.

First, you mentioned the statutory notice system—I understand that it is unique to City of Edinburgh Council—and said that you would prefer fewer statutory notices to come to the local authority. Do not those notices often come to the city council because the proprietors in the stair are in dispute and cannot reach agreement, for example because one of them refuses to pay? Is not that why the local authority is asked to impose a charging order to force the person to pay eventually?

Secondly, you mentioned majority decisions. The bill will require that decisions be taken by a majority, but that will apply only to the decisions of tenement management schemes. Should the requirement that decisions be taken by a majority be extended to all schemes that involve people getting together rather than just to tenement management schemes? Clearly, if a majority decision was enforceable, the council would get fewer cases of people asking for a statutory notice to be enforced, as people could go through the process of getting the money via the courts. I understand that the council ends up receiving so many statutory notices because decisions are currently required to be taken unanimously.

Councillor Gilmore: The problem arises from the present state of many of the titles. People either do not know what the titles say, or they cannot fathom what the titles say, or, at best, the titles say that decisions on the property should be unanimous.

Unanimous decisions are often extremely difficult to arrive at. People may not be prepared to take part for all kinds of good reasons. Sometimes, the reason is sheer awkwardness; sometimes it is financial; sometimes, it is just that people take a different view about the phasing and timetabling of repairs. People may simply not come along to a meeting to agree. Letters might be sent round the stair, but if somebody does not reply, the whole thing may fall flat. People have found it difficult to reach agreement. That is why we take the view that the titles are not very clear; if they were, many of those problems would not arise because people would be much clearer about their obligations.

There is a tendency for people to say that they will just go for a statutory notice. One frustrated owner can apply to start the process—not always to their neighbours’ delight and enthusiasm—but once the process has started, it tends to work its way through inexorably. The statutory notice process is quite slow, but because it is available and relatively efficient, people often use it even though it can mean that the gap between when the problem is identified and when it is seen to is longer than is desirable.

The statutory notice system is not a wonderful answer. If a person has a leaking roof that goes on leaking for two years while the statutory notice
wend its way through the system—it can take that sort of time, especially if there are objectors—they will end up with an even bigger and worse problem to deal with. We suggest that, for decisions on maintenance, and on appointing a property manager, the majority decision-making rules should take precedence over existing titles. That would allow a much smoother decision-making process to be put in place.

16:30

Mike Pringle: So, do you think that majority decision-making rules should be extended to all tenements?

Councillor Gilmore: Yes—on those two particular issues that you mention.

Mike Pringle: Do you mean not only for the TMS, but for all tenements?

Councillor Gilmore: Yes.

Maureen Macmillan: On dispute resolution, should the Executive have provided in the bill for referral to mediation services, or do mediation services not exist throughout Scotland? If provision were made in the bill for referral to mediation services, would that be an empty gesture because the mediation services do not exist? Could local authorities have a role in mediation?

Councillor Gilmore: Mediation is often put forward as being the panacea to all ills. We have in Edinburgh a mediation service that conducts the whole range of mediation. The service deals sometimes with disputes over the kind of issues that we have been discussing, but it probably deals much more with neighbour disputes and disputes about noise. In theory, mediation is available as a tool for disputes such as we have been discussing, but I do not know whether existing mediation services could take on a huge amount of such work.

We fund our service to do a certain amount of mediation in respect of neighbour disputes and antisocial behaviour, but we do not necessarily fund it at this stage to do mediation such as has been mentioned. I do not know whether people would be willing to pay for a mediation service to come in—I presume that that could be done. If such mediation is to be an extra burden on local authority funding, there will be matters of staffing and timescales. Not every local authority area has a mediation service, although I think that the intention is to increase provision. I suspect that our service would say that it is funded to do a certain amount of work, that it has a certain number of staff and that it cannot take on a huge case load. There is a financial implication.

Mediation is about people falling out; we are keen to get people to come together regularly. We have introduced the stair partnership; it is relatively new and 70 tenements in the city are currently taking part. That is not mediation, but it is about people getting together and having a proper discussion that is based on clear information. People sign up for it and pay an annual fee and what they have found comforting about it is that they get good advice. Part of their signing up involves their accepting equal shares and majority decision making, but they also get expert assistance to help their understanding of what a survey is telling them and they get help in getting contractors.

People find it difficult to deal with such matters themselves—they are wary of some of the so-called professional advice that they get because they do not think that it is independent enough and they therefore distrust it. Work often collapses because people do not agree—some say that they will not go with a contractor because they think that the contractor is unreliable or does not understand what needs to be done. Part of the problem is about provision of fundamental information; matters are much easier if people have information in front of them.

The Convener: Does that answer your question?

Maureen Macmillan: Yes—to a certain extent. Some people have said that such disputes are neighbour disputes and so should be covered by mediation. Instead of people in a stair applying for a statutory order for a repair, they could apply for mediation.

Ron Ashton: There are various levels of mediation: there is binding mediation as well as voluntary mediation, so there are various ways of dealing with such matters.

We are trying to say that there has to be a stage before a dispute goes to court because the court process can become very complex, lengthy and problematic. We are trying to encourage people to get together to talk through their differences so that a higher percentage of disputes do not go to court because they have been resolved locally. The principle of mediation is the important matter to pursue; how it is carried out can be decided later.

The Convener: Have we covered members’ questions on insurance?

Jackie Baillie: We have covered two questions in particular, but there is one question that I want to ask, on a subject on which COSLA’s written submission is silent. That is the issue of improvement and repair grants. The housing improvement task force made a series of recommendations that covered the financial position of low-income flat owners and called for a range of revised criteria, which is not necessarily a
matter for legislation. Does COSLA or the City of Edinburgh Council have a view on what would be required? Would you build on the improvement and repair grants, or should there be something different?

Councillor Gilmore: There is a need for further legislation and guidance both to empower and, to some extent, to finance that. We are especially interested in looking for alternatives to the traditional grant mechanism and in considering whether local authorities should have a role not only in assisting people in getting loans, but in providing loans or setting up some sort of organisation that can provide them.

When the task force considered the issue, there were some legal obstacles in the way of authorities doing all the things they wanted to do. Some of it is not about law, but about changing or expanding the way in which things are done. The achievement of co-operation is assisted by people being able to get financial assistance. Whether such assistance has always to be in the form of the traditional grant is another matter; that is an expensive method that does not always reflect the advantage that owners get. The problem for many owners is that they cannot afford to carry out repairs immediately. They may have bought their property recently and have a large mortgage, or they may have a low income but a reasonable equity, as is the case for some older owners.

We are interested in exploring authorities’ ability to give people equity loans that could be repaid on resale so that people can have repairs done and properties can be improved. We do not want to revert to the 1980s situation in which very big grants were given, many people benefited directly as individuals but nothing came back. However, equally, if we had not given some such assistance, an awful lot of tenements in the city would have deteriorated to the point of collapse and demolition. We need to strike a balance—there is a need for a bit more legislation, and the private sector housing bill that we have been promised will perhaps allow us to make some progress without going back to past practices.

Mike Pringle: I have a question for COSLA, which represents 32 local authorities. Do you think that there are any omissions from the bill?

Ron Ashton: We represent 31 local authorities at present.

Mike Pringle: I am sorry.

Ron Ashton: The bill is a pretty good piece of legislation that has been a long time coming. I first started to examine the matter with a Scottish Law Commission report in the late 1970s, when I started work. I am glad that we have got to where we are and I want the bill to be delivered.

Mike Pringle: Is there anything missing from it?

Councillor Gilmore: We are disappointed that the encouragement of owners associations, which was discussed in some of the early consultation on the bill, has dropped out of the bill. I understand that that is because it was considered to be outwith the powers of Parliament because it was a reserved matter. However, I would hate to think that that would forever be an obstacle to dealing with the matter. It is a technicality—which has, perhaps, to be overcome—that owners associations are regarded as business organisations, which are a reserved matter.

If owners associations cannot be encouraged in the bill, we would like that to be done in the next piece of legislation so that we can empower and enable groups of owners to set up their own associations, which would allow owners to operate as a collective. That would help with some of the enforcement issues that have been raised.

Our authority—and, I think, a lot of other authorities—were disappointed that the advice was that such encouragement had to be dropped. We hope that an effort can be made to overcome that difficulty. When it comes to what are or are not reserved matters, nothing is insuperable. There may be a way around the difficulty in time for the next piece of legislation in this field.

Jackie Baillie: I have a tiny comment to make rather than a question. Today we have heard about a variety of means that are perfectly within our scope by which we could encourage owners associations. Therefore, I would not be willing to wait for more legislation; we can do something practical now.

The Convener: As there are no further questions, on behalf of the committee I thank Councillor Gilmore and Mr Ashton for being with us this afternoon. Your contribution has been most helpful.
The Convener: The second item is our continuing consideration of the Tenements (Scotland) Bill. Minister, we are happy to hear any introductory comments that you or your advisers care to make. Alternatively, you may wish committee members to proceed with their questions.

The Deputy Minister for Communities (Mrs Mary Mulligan): I am aware that the committee has been taking evidence on the bill for some weeks, so it is probably more useful if we go straight to questions.

The Convener: Without further ado, I have a general question about the definition of tenement. One witness from, I think, the Scottish Law Agents Society expressed concern that the definition of tenement could result in the creation of a ransom strip, because the definition is silent on garden grounds, which might become pertinent if there were a demolition of a tenement. Would you or your advisers care to comment on that?

Mrs Mulligan: We recognise that there may be instances following demolition where an area of land is still available. There are two scenarios for such an area of land. One is that it belongs to the ground-floor properties, and the other is that it is shared among the owners of the demolished flats. We want to examine the specifics of that example, as to who would benefit.

I notice, convener, that you used the phrase “ransom strip”, which brings with it its own connotations. If the land belonged to the people who lived in the flats, to a certain extent they would have some rights to benefit from the sale of the land, or to control what happened to it. We want to examine further the two scenarios, and see how we can ensure that we have the fairest response possible. It may be, in fact, that the tenement is not the only access to the site and that the land therefore does not become a ransom strip as such, and it may be that the preferred option is to develop the site again. There are a number of scenarios within that issue that we need to consider, and I would like to consider the matter further at this stage.

The Convener: That is helpful, minister. Perhaps, at the same time, you could consider another aspect of the definition: the way in which it seeks to define the physical structure of a building. I am possibly being tedious with semantics, but at an early stage in our evidence taking—it may have been when we took evidence from the bill team,
but I cannot remember—we envisaged that the subdivision of a big villa, more than what we understand to be a tenemental structure in an urban setting, might be likely to lead to a configuration that did not conform to the definition in the bill. That is another aspect that you might wish to examine with your advisers.

Mrs Mulligan: Yes, we want it to be clear to people what we mean by a tenement. It is not only the regular sandstone building that people understand to be a tenement, but it could include, as you suggest, a converted villa, a multistorey block or any other variation on what people assume to be a tenement. We are clear what would be included in the definition.

I appreciate that the nature of the bill means that many detailed aspects will be raised during today’s discussion.

Colin Fox (Lothians) (SSP): Will you give us some information on the publicity and information that the Executive intends to use to inform homeowners about the existence of maintenance and management obligations? What kind of publicity programme do you have in mind, when would it start, and how long do you envisage it being rolled out for?

Mrs Mulligan: Mr Fox will be aware that the intention is that, after the bill is passed, it be commenced in conjunction with two other pieces of legislation that have already been passed: the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003. We want to renew awareness of those acts and make people aware of what is available under the bill when the acts are all commenced on 28 November 2004.

It is important that people recognise that the bill is part of a package, and we realise that we need to use a number of avenues to enlighten people about the bill. Publications will be available for stakeholders who might be on a mailing list of ours, for example, but we realise that it is also important that owners themselves be aware of the changes in relation to tenements.

We accept that, under our definition, there are something like 800,000 tenements in Scotland. We want to ensure that as many people as possible are aware of the bill’s introduction, and we will consider a number of avenues for doing that. We will use the usual media outlets, but we recognise that we have to be a bit more innovative about how we approach the matter to ensure that people are aware of the changes that are being introduced.

Colin Fox: Do you have an idea of the amount of time that you will give to the campaign? You say that it will start in late November, but how long do you envisage that it will run for? Do you have in mind a budget that will be used to convey the information through the media outlets? Eight hundred thousand tenements is a lot, but have you considered the possibility of a direct mail shot?

Mrs Mulligan: I do not have a timescale for the length of the campaign. If we were to produce literature, such as a booklet or leaflet, that would be available for as long as it was suitable for the job that it was asked to do. On the budget, we are looking at a figure of about £25,000 at the moment.

14:15

Maureen Macmillan (Highlands and Islands) (Lab): A number of organisations said in evidence that they support a role for mediation in the resolution of disputes about repairs. They said that repairs are often not carried out in good time because the will of the majority of owners in a tenement can be enforced only through the courts. That is expensive, time-consuming—and perhaps a little scary for most people—so people let things slide until the problem becomes more serious and it is much more expensive to carry out the repair. I understand that the Sheriff Court Rules Council is considering whether parties to a dispute should be encouraged or directed to use mediation and that the Executive has stated that it would prefer to await the outcome of those deliberations, rather than include specific recommendations in the bill. Do you envisage a role for mediation?

Mrs Mulligan: There will be a role for mediation in disputes. The bill envisages that settlements will be reached between private individuals, rather than between individuals and public bodies. Mediation would be most appropriate at that stage and would be useful in ensuring that disagreements do not end up in the courts or lead to unacceptable situations in which people take desperate measures—the committee heard an example of such a situation. It is important that we recognise the role that mediation will have to play.

Maureen Macmillan is correct when she says that the Executive’s intention is to review the role of mediation in a number of areas. Members will be aware that I am discussing the Antisocial Behaviour etc (Scotland) Bill with the Communities Committee—I wear a different hat for those discussions—and that there is a role for mediation in the context of that bill. I am sure that other committees can provide examples of areas in which mediation can be used. That is why the Scottish Executive Justice Department is taking the lead in discussions about how mediation can be developed.

There are quite well-developed mediation services in some areas of Scotland, such as Fife, where people use mediation as a matter of course,
but in other areas mediation is almost unheard of. If we are to promote the use of mediation, we must ensure that the service is of a level standard, so that everybody knows what they can expect from it and is entitled to gain access to it on a fair basis. Mediation would be a useful tool for resolving some of the difficulties that might arise in the context of the bill, but it is important that we consider the service more broadly. The Scottish Executive Justice Department is taking that work forward.

Maureen Macmillan: Thank you, minister. It is useful to have your comments on the record.

I raise a slightly different point. Someone might buy a flat in a tenement in good faith for £X, but later discover outstanding bills for repairs. The seller might have disappeared by that time. Currently there seems to be no way of ascertaining whether there are outstanding repair bills. It has been suggested that work that is carried out in a tenement should be registered in an appropriate place, for example in the Register of Sasines, so that when a solicitor carries out a search in relation to a property, they can establish whether there are outstanding bills.

Mrs Mulligan: The bill provides that when a flat is sold, if there is an outstanding liability, for example for a common repair, the other owners can pursue either the buyer or the seller for the money. The provision is identical to one that is in the Title Conditions (Scotland) Act 2003.

However, I recognise that concerns were raised with the committee—at last week’s meeting, I think—about someone finding out unexpectedly that they had a liability to pay for such a repair. Following on from the committee’s evidence session, we would like to take the issue away and consider it in a bit more detail. Maureen Macmillan has asked whether it would be possible to place a notice so that, when a search is done, the prospective buyer would be aware that there was an outstanding bill to be paid. If we were to place a notice at that stage, would there need to be a limit on the sum involved? Would a notice be used only if the sum involved was £500 or more or would it be used for all outstanding debts? There are a number of issues that we would like to pursue further. We were struck by the evidence that the committee heard on the issue and the concerns that someone would find that they had to pay a bill of which they had been unaware. We will need to give the issue thorough consideration before we respond, but we will come back to the committee on it—in the not-too-distant future, I hope.

Maureen Macmillan: Thank you. That is encouraging.

The Convener: That is very helpful. I think that a similar procedure exists for statutory notices under the elusive acts that we talked about at a previous meeting, whereby those notices are registered against a title, which means that they can be disclosed to a purchaser. They are the known and public responsibility of the seller—there is a prior charge on the proceeds of sale. It was helpful to hear your comments on that.

On a slight variation on the theme, section 15 of the bill places an obligation on every owner to insure. Some questions have arisen about the enforcement of that provision and what will happen when there is non-compliance. The end of the section simply states:

“The duty imposed … on an owner may be enforced by any other owner.”

I wonder how that would work in practice.

On a similar tack, what about obligations for payments under a tenement management scheme? What mechanism is there to ensure that flat owners who did not agree to repairs being carried out would pay up? I would like to hear your thoughts on those two matters.

Mrs Mulligan: On insurance, the bill sets out to make it obligatory for each owner within the property to have reinstatement insurance. I acknowledge that it is perhaps not satisfactory for someone to have to knock on their neighbour’s door, ask whether they have insurance and request to check that their policy is up to date. I can imagine some of the difficulties with that but, given that the majority of people are law abiding, the fact that the provision will form part of the bill means that we would expect people to ensure that they had an insurance policy that fulfilled the requirement on reinstatement value.

The Convener: If an owner sought, but was denied, information about another proprietor’s insurance, would the ultimate sanction be for them to raise a civil action under section 15, to require production of the policy or the premium receipt?

Mrs Mulligan: Yes, it would. The policy is necessary if there has been a problem. Should it be found that an owner did not have the insurance policy that they were supposed to have, they would still be liable for their share of the costs of the work. That means that it would be open to the other owners to pursue the payment of that share through the courts. Although we are saying that it is preferable for people to have the insurance that they will be obliged to have so that they do not find themselves in those financial circumstances, we recognise some of the difficulties involved.

The Convener: Do you anticipate that the same approach will be adopted to the payers under a tenement management scheme, when dissenting proprietors do not produce the money? Will the
other proprietors have an ultimate right of civil recovery?

Mrs Mulligan: Yes. Because the legislation is very much about the resolution of difficulties between private individuals, ultimately that would be how such a situation would be resolved.

Nicola Sturgeon (Glasgow) (SNP): Some of the evidence that we have heard, which the minister has no doubt read, raises concerns about the service test. Some people are happy with it, but others suggest that it is overly complex and that it might lead to disputes. In general terms, do you have anything to say in response to that?

Mrs Mulligan: The principle of the service test is that of what is available “at this stage”. For example, if pipes to someone’s property are being used “at this stage”, the person would be obliged to take responsibility for those pipes; they would become part of the person’s property.

Another example is that of chimney and flue. If an owner has access to the chimney, it would be their responsibility. A question was asked about whether it would make a difference if the person bricked the chimney up. It would not, because they would still have access to it. The person may have chosen to brick it up, but they would still have access to it so they would still have responsibility for it.

Before Nicola Sturgeon comes back to me, I know that there was also a question on water tanks and I will respond to it. I say at the outset that the question has caused some consternation. First, we do not completely accept that everybody would suddenly stop using their water tank. However, should they do so there are obviously concerns about maintenance of the tank and how that would be managed. I admit that we need to continue to deliberate on the matter. If everybody opts out of having responsibility for a water tank there will be some difficulties.

Nicola Sturgeon: I appreciate the difficulties; I do not think that anybody finds it easy to say what the right way forward is.

You are right about the question that was posed. If somebody has access to something and they voluntarily cut off access to it, do they still have to share responsibility for it? Your answer seems to be yes, because it is their decision to cut off access to it. What would happen if the person sells the property and a new person comes in? Theoretically, if they chose to tear down a wall they could re-access the chimney, but in reality they are not served by it. Would the new owner still be liable for a share of the costs?

Mrs Mulligan: I think so, because they would still have the ability to use the chimney should they choose to do so.

Nicola Sturgeon: It is not an easy issue, but over the years would that not become increasingly fictional and undermine the service test? After 20 or 30 years the idea that somebody is still served by something would be difficult to sustain in reality. The test might become a bit incredible and people might lose confidence in it.

The Convener: I am sorry, but there seems to be a problem with the sound system.

Nicola Sturgeon: I apologise: it is my mobile phone. I thought that I had switched it off.

The Convener: It is our resident recidivist.

Nicola Sturgeon: There was no need to point that out.

Mrs Mulligan: I recognise the practicalities of what Nicola Sturgeon is getting at. It is not my role to speculate on what might develop, but maybe if I could—

Nicola Sturgeon: It is not your role to speculate on what would develop, but—

The Convener: Would you like to consult your advisers, minister?

Mrs Mulligan: Yes.

Generally, the view is that because there is still the ability to use the chimney it would still be part of what is under their ownership. I understand what Nicola Sturgeon is suggesting. We may need to consider the issue more deeply and to respond to the committee in writing. If someone does not know that they have a chimney, a service test may be impractical.

14:30

Mike Pringle (Edinburgh South) (LD): The hypothetical example of a water tank to which six people have access—three or four of whom decide to cut themselves off from it—was given. The bill implies that the remaining two people would be entirely responsible for the tank.

My question relates to section 2, on tenement boundaries, and such issues as roof spaces. Section 2(7) implies that the person who lives in the top flat would be allowed to extend his flat into the roof space. That provision raises all sorts of serious problems. Would the minister like to comment on it? The issue was raised by the Law Society of Scotland.

Mrs Mulligan: If the roof space belongs to the owner of the top-floor flat, he may have the opportunity to extend into it. However, if the roof space is within the ownership of everyone in the tenement, he would need all the owners to agree to that. Those people might feel that they were giving up part of their ownership and require compensation for doing so. There is nothing in the
I wish to clarify a point in concern. I would still expect there to be Surely boarding up an alcove will not take much would not expect the figures to be very different. permission to carry out the extension. Also need building warrants and planning will know that the owner of the top-floor flat would resolving the issue. As an ex-councillor, Mr Pringle would have to be taken into account when deed or the tenement management scheme said about where responsibility for maintenance of the roof lay would have to be taken into account when resolving the issue. As an ex-councillor, Mr Pringle will know that the owner of the top-floor flat would also need building warrants and planning permission to carry out the extension.

Mike Pringle: Absolutely. However, this is a concern.

Mrs Mulligan: There is a process to be gone through. I have come across examples of people thinking that extending into the roof space is the right thing to do, as well as examples of people thinking that it is the wrong thing to do. We cannot legislate for individual circumstances, but we need to ensure that there is understanding of who owns the roof space and of who is responsible for maintaining the outer roof.

Maureen Macmillan: This debate raises issues of how tenements are changed over the years. Chimneys are bricked up, attics are developed and so on. When we took evidence from surveyors, they made an interesting point. They said that no two surveyors will get the same dimensions when they measure a flat, because they all do things differently. They mentioned that there might be alcoves that had been boarded over—I am sure that other examples could be called to mind.

The point that the surveyors made is relevant to the provision that the cost of repairs should be shared equally among owners, except where the largest flat in the tenement is one and a half times the size of any other flat in the tenement. A flat that may have started out being one and half times bigger than the other flats may through judicious boarding up of alcoves come in under that figure. Perhaps we should always go back to the original dimensions and use of flats when we make calculations. What do you think about that suggestion?

Mrs Mulligan: The choice of the figure of one and a half is a purely practical issue. It is a way of demonstrating that one owner has a bigger liability than others. I am a little puzzled by the assertion that two people could measure the size of a flat and come up with different figures.

Maureen Macmillan: The point was made in evidence to us.

Mike Pringle: We, too, were surprised by it.

Mrs Mulligan: Even where that is the case, I would not expect the figures to be very different. Surely boarding up an alcove will not take much out of a property. I would still expect there to be that general, overall difference in size that would indicate whether the flat was one and a half times bigger. It could be argued that that might not be the case.

Maureen Macmillan: There might be borderline cases, but I take what you say.

The Convener: I wish to clarify a point in connection with the measurement formula. Would any account be taken of attic space?

Mrs Mulligan: The bill’s explanation of that might be clearer than mine. Section 25(2) explains how the floor area is to be calculated. The floor area is the total floor area within the boundaries of the flat. No account is to be taken of any balcony or pertinents attaching to the property. An attic or a basement will be excluded if they are used solely for storage purposes and not as part of the living space. If the attic is used as part of the living space, it would be included in the calculation of the floor space of the flat. I hope that that is helpful.

Karen Whitefield (Airdrie and Shotts) (Lab): If you have been following the committee’s evidence taking, it will probably not come as a surprise that I want to ask about the tenement management scheme. We have had various evidence on the TMS and whether it should be the default position when the title deeds are silent or should apply irrespective of what the title deeds say. I am keen to learn why the Executive has chosen to make it a default scheme and how it will address members’ concerns about owners of tenements whose title deeds do not give them the same protection as they would have under the TMS in relation to repairs.

Mrs Mulligan: I refer to the earlier question, “What is a tenement?” A tenement could be one of the sandstone buildings that we see in cities or it could be a four-in-a-block property, a converted Victorian mansion or a multistorey high rise; in fact, it could even be an office block. There are so many different definitions of tenements that the Executive felt strongly that the most appropriate way to deal with them was by reference to something that is specifically about the buildings, which is the title deeds that come with them. It was felt to be important that, where title deeds exist, we do not seek to remove them and try to provide a one-size-fits-all solution for tenements.

However, the Executive recognises that there are title deeds that are not comprehensive and which do not respond to every aspect of the management and maintenance of a property in a way that enables disputes to be resolved or ensures that the properties are looked after. Therefore, the tenement management scheme will be constructed to resolve the gaps in people’s title deeds. It is not the case that the tenement management scheme will come into operation only
if someone does not have a title deed. The seven rules of the tenement management scheme that are laid out in the schedule will kick in where there is a gap in the title deeds. For example, if the title deeds say, “All the owners are responsible for the roof space,” but do not say what proportion of payment they should make towards the maintenance of the roof space, the tenement management scheme will decide that. It is about filling in the gaps.

From the committee’s evidence sessions, I am aware that there have been varying views on the matter. I am also aware that my former colleague, Councillor Gilmore of the Convention of Scottish Local Authorities, implied that local authorities, particularly in the cities, are of the view that the tenement management scheme should be introduced and title deeds should be done away with. I have to say that I think that that stretches the point, because that is the City of Edinburgh Council’s position but it is not Glasgow City Council’s, Aberdeen City Council’s or Dundee City Council’s position. Other local authorities have a different view. It is important to recognise that they acknowledge that it is important to use the most appropriate mechanism. In the day-to-day management of tenements, that will be the title deeds rather than the tenement management scheme, because they relate specifically to a tenement. However, where necessary, the tenement management scheme will kick in to provide for gaps in the title deeds.

Karen Whitefield: Personally, I am reassured by that, because it is important that any benefits of the TMS are available to as many people as possible. My concern was particularly for people who have title deeds that are not entirely silent, but they will be able to get any benefits of the scheme if their title deeds are considered to be deficient, so that is helpful.

On rule 1, on the scope and interpretation of the TMS, you mentioned chimneys and chimney flues in responding to Nicola Sturgeon. Last week, COSLA raised concerns that chimneys are excluded under the definition of “scheme property”. I have checked rule 1.3(c) and it does say that “any chimney stack or chimney flue” will be excluded from scheme property. Last week, Angus Council made representations to the committee through COSLA, saying that it found that situation problematic. It thought that chimneys and chimney flues should be included in any definition of scheme property. I wondered whether the Executive would be willing to reconsider the matter in the light of those representations.

Mrs Mulligan: I said earlier that I understood that some of the discussions would be very specific. That point is one on which we now have a response. As Karen Whitefield has said, scheme property is defined in rules 1.2 and 1.3 of the tenement management scheme. Rule 1.3 excludes chimney stacks from the definition of scheme property in rule 1.2(c). However, it does not exclude chimneys from the definition of scheme property in rule 1.2(a) or rule 1.2(b). Where a chimney is owned in common by two or more owners, it will be scheme property under rule 1.2(a). What I am trying to say is that, although it looks as if that has been excluded in one part of the bill, it is included.

Karen Whitefield: Thank you for that clarification.

The Convener: I am sorry, but I do not understand that. [Laughter.]

Mrs Mulligan: I can read it again if you want.

The Convener: Going back to first principles, I understand that the scheme will apply only if the deeds are silent or do not apply uniformly to each flat. Is that correct?

Mrs Mulligan: Yes.

The Convener: Before the scheme applies, the deeds must either have full provision for all flats or be inadequate. Is that right?

Mrs Mulligan: If the chimney is not part of common property, it would be the responsibility of only one person anyway.

The Convener: Under the pertinents provision.

Mrs Mulligan: Yes, which is why it is excluded from rule 1.2(c). The effect of the—

The Convener: This is quite important. You see, as I understand it, rules 1.1 and 1.2 do not apply to anything unless we have got a tenement management scheme. However, we will get a tenement management scheme only if our title deeds are silent or deficient, so how could the chimney be common property? If I understood you correctly, you said that the chimney would have to be used in common to be covered, but that takes us back to all the difficulties with flues blocked up and one person using the chimney and other people not using it.

14:45

Mrs Mulligan: If the chimney is not common property in the title deeds, under section 3 it will be the common property of the owners of the flats that it serves. Rule 1.3(c) will exclude only chimneys that serve only one flat. If the chimney serves only one flat, it is not common property. However, if it serves more than one flat, under rules 1.2(a) and 1.2(b), it would be part of the common scheme and so would be covered.
Karen Whitefield: I want to move on to rule 3.4 of the TMS, which is slightly easier to understand than the rule about what is included and what is not included. The rule allows that where owners have decided that a repair needs to be carried out, money to meet the cost of it can be deposited in a bank account to allow for payment. Last week, we took evidence from the Property Managers Association Scotland Ltd, speaking as a landlords organisation, which raised concerns that the rule also allows for money to be repaid to individual owners after 14 days if the repair has not been carried out. The association was particularly concerned that the rule will be unworkable. It understood the principle behind it, but felt that 14 days was too prescriptive a period to allow for the gathering of quotes, for the owners to decide whether the work could be done and for the work to be undertaken. It was slightly concerned that we could have a situation in which, although most owners agree that the repair needs to be done and so pay in the money, someone might not pay in, which would mean that the money would have to be paid back and that the owners would have to try again to get the repair done. Even when everyone pays in, the owners might not be able to get anybody to do the work within the necessary timescale. The association wondered whether the measure was workable.

Mrs Mulligan: The crucial issue is the starting point for the 14 days. Karen Whitefield has outlined a number of steps that might need to be taken to ensure that the work goes ahead. There is nothing to stop that happening prior to the money being deposited. Therefore the starting point for the 14 days could be when a number of steps have already been taken. The starting point is in the gift of the owners; they can decide when the 14 days start, so it would be sensible for them to get quotes and ensure that agreements to the building work are in place before that.

The reason for the establishment of the 14 days is to protect people who might have paid their money, but find it sitting there for months before anything happens, which they might feel insecure about, given that the sums of money in question could be large. That is the reason for restricting the period to 14 days.

Mike Pringle: I want to explore a couple of issues around the TMS. The City of Edinburgh District Council Order Confirmation Act 1991 is restricted to Edinburgh. Edinburgh has a unique way of dealing with property repairs, and I want to be sure that the bill or the TMS rules will not change that.

Mrs Mulligan: The simple answer is that they will not.

Mike Pringle: That is good. My second question is on the rule about majorities. Under the tenement management scheme, a majority will suffice. My concern is that that is not extended to all other common repair schemes. From my experience in Edinburgh, one of the major problems is the requirement to get everybody to agree to something—that is the reason why so many common repair cases go to statutory orders and, as a result, are taken on by the council. If majority decision making was extended to all schemes, that would help.

Mrs Mulligan: As you are aware, when title deeds are silent, unanimity is usually required and the common law would state that there must be unanimous agreement. However, when the tenement management scheme kicks in, it will allow majority ruling on the matter. The service should be no less than at present. If I am right to say that Mr Pringle’s concern is about what happens in relation to statutory notices, particularly in Edinburgh, I reassure him that we do not expect the bill to make the situation worse. Schemes will still be able to operate in the way in which they have been operating.

Mike Pringle: My other question is on a matter that Ken Swinton raised at our meeting on 30 March. He talked about load-bearing walls, particularly in modern tenements that have glass fronts. Is a glass front load bearing? Is it considered to be a window or a wall? I quote from the Official Report:

“If it is a wall, it is part of scheme property; if it is a window, it is part of the individual flat”—[Official Report, Justice 2 Committee, 30 March 2004; c 673.]

That issue needs to be addressed.

Mrs Mulligan: My understanding is that where it is a wall, it will be part of the scheme property and where it is a window, it will be the responsibility of the individual. How one makes that decision when both the wall and the window are glass comes down to the design of the building; it will be clear from the design which parts are walls. A wall does not have to be load bearing to be a wall—that is the point that we need to get across. What is the wall and what is the window is open to interpretation depending on the design.

Mike Pringle: My question about floor area has already been answered.

Jackie Baillie (Dumbarton) (Lab): I turn the minister’s attention to legal aid; I certainly have more understanding of legal aid than of chimneys. The Scottish Legal Aid Board, in its evidence to
both the Justice 2 Committee and the Finance Committee, raised a fundamental concern about regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. In essence, it said that, under the bill, the financial position of all the flat owners is taken together. An owner may be eligible for legal aid, but they could be prohibited from receiving it because of the financial circumstances of the other owners. It is clear that people might not choose that degree of enforcement because of the disproportionate financial burden. Will the Executive address that?

Mrs Mulligan: You will be aware that disputes can end up being resolved in the courts, so people may need to apply for legal aid. It is important to be clear that when someone who is part of a joint action is ineligible for legal aid and so may be assumed to be responsible for payment, concern may be felt about how the other people will be enabled to have legal aid. However, in many such disputes, receiving a letter from a solicitor has an influence on people’s response. We do not expect many cases to end up having to be resolved in court, but we recognise that we must consider all instances and outcomes.

One problem is that some may use the legal aid issue as a reason not to take action. That could create delay. It could be up to some co-owners to proceed without somebody who is seeking or has not been granted legal aid. Negotiation among owners might conclude such a matter. I would like to take the opportunity to consider legal aid further. Although it is not in the gift of the bill to change the position, I recognise the implications for ensuring what we all seek—a satisfactory resolution to the maintenance and care of our tenement stock.

Jackie Baillie: That is helpful.

The Convener: Before we go on to the other aspects of extrinsic evidence for tenement management schemes, I will ask about one matter that I still do not understand—I am sorry to be tedious about it. I understand that the bill’s definition of a tenement envisages a structure with divisions and two or more flats and that its guidance about decision making is that if a tenement has three flats or fewer, unanimity is required before anything can be done. What happens if the trio has a dispute? Would people in a subdivided Victorian villa be permanently locked into discord?

Mrs Mulligan: We said that the majority voting resolution applied only if four or more owners were involved because if two owners were involved, a majority would not be possible, and if the vote were split, resolution would be needed. As we suggested, mediation might be one way to resolve such a difficulty. We must accept that resolution through legal means might be needed when only two owners are involved.

We did not accept a majority decision among three owners because we did not want to allow any individual owner to be continually overruled by two owners who were working together—perhaps colluding—to take decisions that one owner found financially unbearable. It is important to have unanimity in such a situation, to prevent discrimination against one owner. However, we must acknowledge that if unanimity cannot be reached, resolution through the legal process may be needed. That is the reasoning behind making four owners the threshold for resolution through majority voting.

The Convener: What legal process will apply when a building with three flats does not have adequate clarification in the title deeds and so the tenement management scheme operates? What will be the basis for action by the unhappy duo against the third owner?

Mrs Mulligan: I am sorry; I did not quite understand that.

The Convener: If the title deeds for a structure with three flats are silent, under the bill the tenement management scheme will kick in to regulate the position. However, the scheme requires unanimity. If there is no unanimity, repairs will not happen. So, what is the legal basis for a hapless duo, who are in the majority if there are three flats, who want to get repairs done but cannot because they have to work under the statutory tenement management scheme? On what legal basis could action be taken against the third person?

15:00

Mrs Mulligan: I suspect that your concern is over what happens when the minority wants to act but is not able to because it cannot achieve unanimity. In those circumstances—

The Convener: No—my concern is over the majority, when two out of three want to act but cannot because they need unanimity.

Mrs Mulligan: The process in that case would be for people to apply to the sheriff court for the necessary repairs to be carried out. I think that I am right in saying that that has to be part of the bill so that it is possible to ensure that work is carried out.

The Convener: Thank you; that is helpful.

Nicola Sturgeon: We have already covered the fact that the TMS is a default scheme that will apply only when title deeds are silent or inadequate. The Law Society of Scotland has said that the TMS should override the title deeds. On
the apportionment of costs, the society mentions some extrinsic evidence such as feu duty, rateable value and equitable shares. The society’s view was that, in this day and age, it is difficult to decide what costs should be if they are based on those kinds of apportionment. Do you sympathise with that view?

Mrs Mulligan: As I said earlier, our intention was not to override the title deeds because we felt that the deeds were probably the most appropriate way of resolving such matters. When there has been a division of a property, for example, some properties will be bigger than others and the rights in decision making will be apportioned differently. It is appropriate to recognise such divisions within properties.

You mentioned feu duty in the flats in a block as a mechanism to determine payments. Obviously, there are different ways of doing that. We understand that the Keeper of the Registers of Scotland, when making up title sheets for flats as they are registered in the Land Register of Scotland, enters a statement about the feu duties apportioned to the flats. That will continue to be the case even after the abolition of the feudal system, which will happen under other legislation. That will ensure that the apportionments are still applied, so there will still be a way of resolving such issues. Some may think that that is unfair, but it will be understood and would be difficult to change at a later date.

Nicola Sturgeon: I was not aware of that but I accept that it is the case. It is the case for the feu duty, but is it also the case if the reference in the title deeds is to rateable value?

Mrs Mulligan: Yes. The valuation rolls could be consulted so that people would know in advance.

Nicola Sturgeon: What about situations in which the title deeds refer only to equitable shares? How would that be defined?

Mrs Mulligan: If the title deeds refer only to equitable shares, that would be not be clear enough. The TMS would kick in at that stage.

Jackie Baillie: I will be quick, because some of the points about insurance have been covered. Everybody supports the aspiration behind section 15, but there are concerns about enforcement. If I picked you up correctly, essentially it is up to the individual to access and to police insurance, after which they have access to the courts. There are no penalties if people do not comply.

Mrs Mulligan: There are no statutory penalties. People are obliged to have insurance, because that is what the legislation says.

Jackie Baillie: So we are relying on people being decent.
to make insurance obligatory. They felt that that was not the way forward. However, other proprietors can pursue the matter through civil law.

Mike Pringle: Section 17 makes provision for how the cost of partial demolition of a tenement building should be allocated among owners. How would you respond to the view that several people have expressed to us that partial demolition often benefits those units in a tenement that remain, and that therefore the owners of such units should be liable for part of the costs as well?

Mrs Mulligan: I accept that they may benefit, but the demolition is the responsibility of the owners for whom it is taking place. It would be difficult for the situation to be otherwise. I am comfortable with what is proposed.

Mike Pringle: Section 20 deals with the sale of abandoned tenement buildings. The issue exercised Ken Swinton from the Scottish Law Agents Society, who was very unhappy with the word “return” in section 20(1)(b). For example, someone could buy a flat that had just been emptied and, despite the fact that all the other owners might have been working together to repair the building, he or she might decide to use the provisions in section 20 to get rid of all the property.

Mrs Mulligan: We are considering procedures that will protect owners in such circumstances and allow them to lodge objections to one person taking such an action.

Mike Pringle: So you are taking action on that matter.

Mrs Mulligan: We are pursuing it.

Mike Pringle: My final question concerns owners associations, which are not a devolved matter. We have received evidence expressing hope that the Executive might consider the matter, because it seems very unfortunate that such associations should be excluded from the whole process.

Mrs Mulligan: We acknowledge the benefits of owners associations, particularly in bringing owners together to manage properties and to ensure that they are well looked after. We are pursuing the matter with our Westminster colleagues and hope to resolve it fairly soon. Indeed, I hope to be able to return to the committee with that information in the very near future.

Mike Pringle: Great.

The Convener: As you will see from our agenda, minister, we will consider our approach to the stage 1 report on the bill later in the meeting. Although the matter is not germane to that consideration, it might help committee members if you can share any information about what the proposed private sector housing bill might cover.

Mrs Mulligan: As the housing improvement task force made a number of recommendations that will need to be taken forward through other legislation, the Executive has proposed the introduction of another housing bill during this parliamentary session. We should make it clear that while the Tenements (Scotland) Bill focuses on the relationship between individuals, the proposed private sector housing bill will focus on the relationship between individuals and public bodies and between public bodies themselves.

At the moment, the proposed bill is at a very early stage. However, given that some of the provisions will be based on the housing improvement task force’s recommendations, it will not be beyond members’ imagination to see what might need legislation and what might well be included in the forthcoming bill.

The Convener: Thank you for that helpful response.

As members have no further questions, I thank the minister and her advisers on behalf of the committee for attending the meeting. We will let you go and get towels and ice to wrap around your respective advisory heads.
SUPPLEMENTARY LETTER FROM THE SCOTTISH EXECUTIVE IN RELATION TO RULE 3.4 OF THE TENEMENT MANAGEMENT SCHEME

On the 13 May the Committee asked for an explanation of Rule 3.4 of the Tenement Management Scheme.

**Rule 3.4 - Provision supplementary to rule 3.3**

When owners make a decision to instruct maintenance which exceeds the thresholds set out in rule 3.3, they are obliged under rule 3.4 to provide a notice to all owners comprising a summary of the nature and extent of the maintenance to be carried out. This will contain, among other things, details about the overall estimated cost of the work as well as a timetable for the carrying out of maintenance, including the dates by which it is proposed the maintenance will be commenced and completed. Under rule 3.4(f) if maintenance works have not been commenced by the fourteenth day after the proposed date for its commencement (as specified in the notice) then an owner is entitled to demand repayment of the deposit.

The Committee is correct that the date specified in the notice sent (rule 3.4(b)(vi)) is that date which would operate in the application of rule 3.4(f)(i). The Committee has expressed concerns that, until the funds are secure, the owners or manager would not be able to instruct work to go ahead. This would mean that the date in the notice would be provisional and subject to change which could easily go beyond the 14 days. The Committee is also correct in that there are a number of factors which may delay the start of works, for example lack of availability of tradesmen or bad weather.

The crucial factor in the consideration of this rule is not the period of fourteen days itself but when that period begins. The notice sent out under rule 3.3 is done so by the owners themselves or the person organising the maintenance on their behalf. It is therefore open to the owners or the person organising the repairs, to set a commencement date which is sufficiently far in the future that it can be reasonably expected that all payments will have been collected from the owners and that all other arrangements will have been put in place. The start of the fourteenth day period is not being imposed by an outside authority, rather its commencement is in the hands of the owners or their authorised manager. The fourteen day period after which an owner can demand payment of deposited funds will only begin on the date set by the owners or their manager. In practice they will take care to make sure that this date is sensible and set in the future when they are likely to have the money collected and the tradesmen organised.

Rule 3.4 provides safeguards for owners who may be required to hand over considerable amounts of money. While it is always possible that the start of works is delayed beyond even a distant commencement date, the Bill must balance the interests of the owners who have paid money for work which is not taking place. Owners must be able to recover their money and the Bill needs to make provision for this. If a period longer than fourteen days were introduced, it would mean that owners would have to wait longer before they could request that the money be returned.

**MRS EJ LUGTON**
Tenements (Scotland) Bill Team Manager
ANNEX E – OTHER WRITTEN EVIDENCE

WRITTEN SUBMISSION FROM THE ASSOCIATION OF BRITISH INSURERS

The Association of British Insurers (ABI) is the trade association for insurance companies operating in the UK. It represents over 400 members who, between them, account for over 91% of the general insurance business of UK insurance companies. This response focuses on the insurance aspects of the Bill. It answers the two discussion points flagged up in Chapter 6, and offers more detailed comments on specific aspects.

Key facts

- 68% of households in Britain own their homes.
- 62.7% of UK households purchase Household buildings insurance.
- This equates to 92% of homeowners having buildings insurance.
- 50% of those living in poverty are homeowners.
- 50% of those in the lowest income decile do not have basic Household contents insurance, often due to affordability.

Discussion point 28: Do you agree that there should be a minimum standard of statutory insurance based on a duty to insure and a list of risks to be prescribed by Scottish Ministers? Do you have any views on how this duty is to be enforced?

No. Insurers are opposed in principle to the extension of mandatory classes of insurance. In any case, as the Scottish Executive acknowledges that these measures are unenforceable, ABI is of the view that legislation is not the appropriate tool. Insurers consider that better information and education, together with the management tools that enable individual tenements to make decisions on the contractual obligations to which owners should comply, are more measured and appropriate policy responses.

Insurers therefore support the proposals in the Bill that seek to strengthen management arrangements in tenements, but consider that once these are in place owners of tenements should be free to decide their own arrangements.

Discussion point 29: What are your views on a statutory obligation to have a common insurance policy for a tenement? Do you think that these should be made mandatory? Do you agree with the Housing Improvement Task Force that common insurance policies should be mandatory for new developments?

Insurers support the case set out regarding the advantages of common or block policies in many circumstances, but acknowledge the real difficulties in adopting this approach in some situations. ABI considers that the decision should be left to individual tenements, under the strengthened management arrangements proposed elsewhere in the Bill, to make decisions for both existing and new developments. These decisions could be supported by guidance on the advantages and disadvantages. It should be noted that the cost of insurance is unlikely to be reduced under a block policy, and may even be increased for certain consumers.

DETAILED COMMENTS ON THE TEXT OF THE BILL: CHAPTER 6 – INSURANCE

Unique position of tenements

Tenements are not unique with regard to their vulnerability to damage or to suffer losses from damage arising from events in neighbouring properties. All properties with a party wall, including semi-detached houses, are so affected to some degree. ABI is not aware that this has caused widespread hardship or difficulties anywhere in the United Kingdom.

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46 Government statistics quoted in R Burrows, Home-ownership and poverty in Britain
47 Expenditure and Food survey 2001/02
48 R Burrows, University of York, Home-ownership and poverty in Britain, January 2003
49 ABI research into financial exclusion
ABI accepts that tenement owners should have obligations towards their neighbours within a tenement, and that these should be clearly defined and specified. However insurers do not accept that the introduction of a mandatory requirement to insure is the best way to deliver the assurances that other owners and occupiers of tenements may require. Insurance is one way, albeit often the preferred way, of achieving this. ABI believes, as a matter of principle, that individuals and companies should have the right to choose whether to take out insurance, the nature and extent of that insurance, and with whom they wish to insure. Insurers are fundamentally opposed to the imposition of statutory requirements for insurance.

The use of compulsory insurances is much more common in other countries than in the UK where to date there are two principal classes of mandatory insurance (Employers’ liability and Motor Liability) and two specialist areas. Elsewhere in Europe and North America statutory measures have often been used to overcome the effects of the relatively immature or undeveloped nature of the insurance market, or where insurance products are not offered in such a way as to encourage voluntary uptake by consumers. ABI notes that the Bill acknowledges that in Scotland many tenement flats will already be insured whether as a requirement of a mortgage or otherwise. In fact we estimate that around 92% of all privately owned tenement flats will have property insurance in place, based on UK average figures, and would expect that all local authority or housing association stock will either be insured or have other financial backing assured.

In the UK the tradition has been to look to the competitive market, coupled with voluntary decisions or contractual requirements to provide citizens with insurance options for risk transfer that respond to their needs. It is possible for companies and even individuals to chose to retain some or all of the risk, using savings, investments, reserves or other assets on their balance sheets to meet their liabilities. New risk transfer mechanisms are now emerging. Insurers believe that individuals and businesses should be free to decide how they should meet their obligations to others, including making voluntary decisions to take on contractual obligations.

**Reinstatement value**

ABI agrees that the prudent course is to insure for reinstatement value and insurers would always seek to establish these costs at proposal stage, not least because this is a normal contractual requirement of mortgages and other loans secured against property. Standard proposal questions to the prospective policyholder cover the construction type and age of the property and details of any recent valuation surveys giving re-building costs. Insurers apply an index-linked update of re-instatement value as standard on renewal terms. ABI secure re-building costs from the Building Cost Information Service of the Royal Institute of Chartered Surveyors on a monthly and annual basis, giving regional and property type breakdowns. Many insurers base their indices on this information.

Insurers believe that re-instatement value insurance is therefore the de facto market norm and that there is no practical need to introduce a statutory requirement to this effect.

**Scope of cover**

ABI believes that the list of risks and degree of cover are issues that each tenement management arrangement should address, not least due to the flexibility required to meet the type of circumstances illustrated in the Bill. In any event the contractual requirements of the mortgage or other loan secured on the property will set out requirements which do not need to be repeated in legislation.

Insurers would also point out that some individuals, in particular those who have recent criminal records or mental health problems may find it very difficult to obtain insurance, or may have the scope of that insurance limited. These restrictions would apply where any member of the household had such a history. ABI believes there are potential privacy issues that might arise where such individuals are asked by neighbours to explain why they have no insurance in place. We suggest that effective safeguards to protect these individuals privacy need to be put in place.

**Enforcement**

ABI notes the acknowledgement in the Bill that it is difficult to enforce the duty to insure and that no suitable regulatory body exists. Insurers consider that the difficulties in enforcing this legislation are in themselves sufficient reason not to introduce a statutory duty. Insurers note that the Better
Regulation Task Force\(^{50}\) regards regulation as the last resort of a five step approach and that information and education, and self-regulation are two preferable approaches, particularly where regulation may be unenforceable. It advises that the difficulties and costs of enforcement should be considered before any decision to regulate.

Given that the only compliance monitoring proposed is by other owners in the building, insurers consider that decisions on insurance requirements should be taken by those affected, and not imposed through legislation. In addition, given the high degree of penetration of property insurance already achieved (estimated 92%), largely through contractual means, it is highly unlikely that an un-enforced statutory requirement would result in additional protection. The heavily enforced compulsory motor insurance regime only achieves around 95% compliance, it is estimated, despite longstanding road tax administration checks and police activity. The imposition of a statutory duty is therefore disproportionate to the benefit it would achieve.

Regarding evidence of recent payments, insurers would point out that it is possible for an insurance policy to be taken out and premium paid in full on one day, and cancelled with a refund the next. Such evidence would not therefore provide the assurance sought and could impose considerable administrative burdens on insurers through the actions of those seeking to circumvent the regulations.

**Common or block policies**

Insurers support the provision of advice and information for tenement owners on the potential benefits that may derive from taking out a block policy, so long as freedom to choose is maintained. Likewise insurers recognise the difficulties listed in the Bill and particularly note that the likelihood of non-compliance is recognised as a reason for not imposing statutory obligations. ABI believes that this obstacle applies to the whole proposal regarding mandatory insurance for tenements.

ABI strongly supports the proposal that a common or block policy approach should be encouraged but not made mandatory, and that owners should be empowered, within the Tenement Management Scheme, to make a scheme decision to have a common policy. Likewise tenement owners should be empowered to take their own decisions regarding the nature of cover, subject to their contractual obligations eg to the mortgage lenders.

ABI considers that purchasers of new developments should be left to decide the nature of the insurance arrangements that should apply. We believe that proposals elsewhere in the Bill to address the management arrangements for tenement properties should give owners the tools they need to arrive at such decisions in a sensible and proportionate way.

The cost of insurance is driven by risk factors, such as the likelihood of flooding, crime etc, and the re-instatement costs. A block or common policy will not in itself result in cheaper insurance except where substantial duplication of insurance is avoided. Indeed for some tenement owners who have good claims histories or who are able to access low cost insurance through membership of trades union, clubs or other affiliations, individual policies may be available at significantly lower cost than a share of the block policy. Insurers strongly oppose any curtailment of consumer choice.

Association of British Insurers
9 March 2004

**WRITTEN SUBMISSION FROM BARTLEY, ÚNA**

I wish to draw your attention to a matter in relation to the Tenements (Scotland) Bill as a member of the Social Justice 2 Committee. I note that the deadline for the call for evidence for the bill was earlier this month but I hope I can draw your attention to an issue which might be considered at the second stage which would go some way to easing the current housing crisis.

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\(^{50}\) Better Regulation Task Force, “Principles of Good Regulation” and “Alternatives to Regulation”, 2004
I am a member of the public who has a one bedroom flat in the top floor of a Tenement building in Edinburgh. There is a lot of room in the attic space which I am considering building into instead of moving to a larger flat. I understand from common law that because it does not state otherwise in anyone's deeds that space belongs to my flat and this is clarified in the bill currently going through parliament.

However, while I can build up into the space, because the roof is common (we all share repairs) if I want to put a velux window in the roof, one of my neighbours may object although they wouldn't stand to gain or lose anything by this. If one of my neighbours did object to a window I would not be able to build into the space, which would lie empty (and I would thus have to move).

It strikes me that we have a housing crisis across the country yet there is a lot of underutilised space in attics which people should be provided with incentives to use rather than be prevented from doing so on the basis of one or two objections from other people in tenements who have nothing to gain from such an objection. I wonder if this is something that could be drawn to the attention of the committee.

I look forward to hearing your views on this.

Best wishes

Úna Bartley
Social Inclusion Research and Policy Officer
Universities Scotland

WRITTEN SUBMISSION FROM BROWN, GRAEME

I wish to make the following points to the Justice Committee with regard to the Tenements Bill.

I write as Chairman of a Residents Association of 72 flats and I am concerned that there is an important omission in the draft bill.

Problem
The problem affects modern developments without a factor where there are common grounds - i.e. ground held in common by all the blocks of flats - that require maintenance - e.g. communal gardens, paths, walls and car park.

Solution
We need to allow for a simple majority of all owners in all blocks to appoint a factor or arrange maintenance of these common areas, in a similar way as is proposed for the individual tenement.

Graeme Brown

WRITTEN SUBMISSION FROM THE CITY OF EDINBURGH COUNCIL

Introduction
The City of Edinburgh Council welcomes the opportunity to submit written evidence on the Tenements Bill to the Justice 2 Committee of the Scottish Parliament.

Summary of key points
- We broadly welcome the Bill but believe it could be improved to provide a simpler and more effective legislative framework to empower the majority of responsible owners to introduce effective property management arrangements in their tenements.
• The majority decision making rules on maintenance and appointing property managers contained in the Tenement Management Scheme should take precedence over existing deeds of conditions.

• Costs for common maintenance should be determined by the Tenement Management Scheme rather than Deeds of Conditions and apportioned equally between owners.

• Where owners want to revert to the rules contained in the deed of conditions for maintenance decisions or the apportionment of costs an owner could do this by applying to the Lands Tribunal.

• The Tenement Management Scheme should allow owners to repair or replace elements to a modern standard and the Bill should clearly state this.

• Owners should be given more effective powers to take action against those owners who refuse to comply or contribute towards scheme decisions.

• The Scottish Executive should ensure that advice services and professional bodies provide information and advice to owners who want to enforce scheme decisions. This should be incorporated into the development of housing advice standards by HomePoint.

• The Bill should empower the majority of owners to establish an owners association for the purpose of the common management of tenements and include a model framework for an owners association in the Bill.

• Owners should be required to have their building surveyed and inspected by a professional surveyor on a regular basis. This would help owners ensure that they are aware of the condition of their building and highlight any potential danger to public safety. This could be incorporated as a condition of flat insurance.

Background
The Council submitted detailed written evidence on the Title Conditions Bill in August 2002 and appeared before the Justice 1 Committee in September 2002. We have also responded to the Scottish Executive’s consultation on the Tenements Bill in 2003.

The Council has also formally responded to the Scottish Executive’s Housing Improvement Task Force in 2002 and 2003 and played a key role in the development of its agenda for the reform of private sector housing policy.

Our evidence on the Tenement Bill builds on the policy agenda we set out in these responses.

Tenements and common maintenance in Edinburgh
Edinburgh has the second highest proportion of households living in flats in Scotland. These are spread between older pre-war traditional tenements, mixed tenure tenements, many of which now have a majority of individual owners, conversions of older large houses and modern developments.

Despite this, effective property management arrangements between flat owners are largely absent in city tenements, except in modern developments where property management schemes, factoring and owners associations are more common.

In our experience this is not because the majority owners, including both residents and private landlords, do not want to maintain their buildings. It is because the current common law and operation of older deeds of conditions are ineffective in supporting responsible owners put in place effective property management.

The Council currently provides help to owners in two ways. Owners can request that a statutory repairs notice is served on their building. When enforced, the common repairs will be carried out by the Council and the owners charged for the costs. The Council also provides a property management service to tenement owners through the Edinburgh Stair Partnership. The ESP now manages 70 tenements in and around the city centre in close partnership with the owners.
We are also in the process of developing a wider range of advice and assistance we can give to flat owners, including the feasibility of providing loans, in line with the agenda set out by the Scottish Executive's Housing Improvement Task Force.

**Tenements Bill – General Points**

This Council broadly welcomes the Tenement Bill. Changing the common law provisions from unanimous decision making to majority decision making is an important principle to establish and will help many responsible flat owners move forward with common maintenance.

However we believe that the Scottish Executive have missed the opportunity to simplify the legal framework further and take stronger measures to empower the majority of responsible owners who do want to look after their properties.

We believe that a number of key areas in the Bill could be strengthened either by amendment, by the inclusion of new measures in this Bill or the forthcoming Private Sector Housing Bill, or by commitments to further policy initiatives by the Scottish Executive.

Our overriding priority is that the Tenements Bill should create a simplified framework within civil law that allows the majority of responsible owners to effectively maintain their building.

**Tenement Management Scheme**

In our response to the Scottish Executive’s consultation paper we argued strongly that the Tenement Management Scheme should take precedence over existing deeds of conditions in some key areas. The two key areas which are our main concern are:

- Majority decision making on maintenance and the appointment of a property manager.
- Equal apportionment of costs on maintenance and management.

We believe that these arrangements would not conflict with the majority of deeds of conditions in modern developments and would create a straightforward system which owners would find easy to understand and implement. Deeds of conditions in older properties have proved ineffective in Edinburgh in establishing a culture of property maintenance among tenement owners and do not provide an effective basis for property management.

While we believe this would produce a simpler and more effective system to operate in the majority of tenements we recognise that this approach could produce anomalies in some buildings where the current conditions were suitable and effective property management was in place.

We therefore propose that where the Tenement Management Scheme rules were in conflict with reasonable conditions in the deeds of conditions, owners should be given powers to go to the Lands Tribunal or Sheriff Court. The Lands Tribunal or Sheriff Court would be then be empowered to revert to the arrangements contained in the deed of conditions if it was reasonable to do this and would lead to more effective property management of the tenement.

Our experience with the Edinburgh Stair Partnership is that our customers are perfectly happy to adopt majority decision making and equal apportionment of costs as it is a simple and easy to understand system. To date no owner has taken action to revert to provisions of their deeds.

Equally where statutory notices are served owners pay equal shares to the Council. This can create a perceived unfairness among owners in a small number of cases where there is a large commercial premise involved. If owners wish to come to some alternative arrangement or revert to deeds they may do that among themselves but the key point is that this very rarely happens. Majority voting on maintenance and equal apportionment of costs provide a simple and easy to understand framework for common property maintenance.
Definition of maintenance and repairs
The definition of repairs and maintenance is a difficult area. The Tenement Management Scheme should allow owners to repair or replace elements to a modern standard and the Bill should clearly state this.

The Scottish Executive is right to retain the common law to out and out improvement but there is still a need to ensure that “reasonable” improvements which are incidental to a repair, are allowed. In many cases these will save future expense. For example, where a close door is damaged and a close is subject to vandalism replacement with a secure door entry system should not be seen as an out and out improvement. It should be regarded as replacing to a modern standard.

Enforcement powers for owners
Owners should be given effective powers to take action against co-owners who do not comply with or contribute to scheme decisions. We believe that the Bill tends to give too much power to owners who wish to prevent the carrying out of scheme decisions rather than empower responsible owners to take action against those who fail to contribute or abide by scheme decisions.

We have suggested previously that some thought be given to widening the role of the Lands Tribunal in this area rather than the Sheriff Court. Owners, through an owners association or their property manager, should have the power to seek a charging order on the property of a non-contributing owner for the sum required and administrative costs incurred.

However we also need to recognise that taking a neighbour to a sheriff court is not something many owners will welcome even as a last resort. The Bill largely places the responsibility for enforcement on an individual owner. This is one of the reasons we believe that the development of owners associations as corporate bodies could provide the majority of owners with a mechanism.

While we would welcome any strengthening of the enforcement powers of responsible owners the Scottish Executive should consider how best owners should be assisted.

The Scottish Executive should ensure that advice services and professional bodies provide information and advice to owners who want to enforce scheme decisions. This should be incorporated into the development of housing advice standards by HomePoint.

Further consideration should be given to the promotion of mediation as an alternative to the enforcement process set out in the Bill where this would be appropriate and practical.

Owners Associations
In our responses to the Scottish Executive consultations on the Tenements Bill and the Housing Improvement Task Force we argued that establishing owners associations in tenement property would assist owners organise the management of their tenement more effectively. We believe that the Bill could be usefully strengthened to promote owners associations. This could be done by, within the Tenement Management Scheme, giving the majority of owners the power to introduce an owners association in their tenement, membership of which would be an obligation of any future owner.

Research shows that where owners associations exist owners are generally much more satisfied with their buildings and are willing to spend more on their maintenance. They are also the standard forum for co-owners making decisions about maintenance in the rest of Europe and North America.

Responsibilities of owners – regular surveys of buildings
An effect of poor maintenance is clearly that buildings deteriorate. In Edinburgh poor maintenance is compounded by the practice of most homebuyers commissioning valuation surveys when considering bidding for a property. Owners and buyers’ level of awareness of property condition is low. We support the introduction of the single survey and welcome the proposed pilot in North Edinburgh.
However we believe that owners of older tenement buildings should be required to have their buildings regularly inspected and surveyed by a qualified surveyor. This may appear to be an onerous requirement. However the experience of many urban authorities is that many owners are simply unaware of the risks poor maintenance of their building could pose to members of the public and the liability they could incur as a result of any death or injury.

The Bill could usefully include a requirement that owners should be required to have their building surveyed and inspected by a professional surveyor on a regular basis. This would help owners ensure that they are aware of the condition of their building and highlight any potential danger to public safety.

The Scottish Executive should explore with the insurance industry the feasibility if including regular inspections of buildings as a condition of insurance.

Contact details
We believe that all non-resident owners should provide, at the very least day-time contact details to their co-owners. We appreciate that the Scottish Executive is looking at the implications of this for data protection and human rights legislation. However we think this matter should either be considered in this legislation, included in the proposed private sector housing bill or as an amendment to a future bill.

WRITTEN SUBMISSION FROM CLACKMANNANSHERE COUNCIL

I thank you for your letter dated 3 February, 2004 and I am of the view that the Bill largely meets it purpose of producing greater clarity in the law on tenements. It is particularly helpful that there will be free variation of the title deeds. I have had experience of repairs being carried out to tenements and when the cost of same came to be divided the title deeds did not contain a consistent approach as to how this should be done. The resultant split was very unfair and there was nothing that could be done to change this. Consistent drafting would have prevented this situation but when it does not exist there is no need for change but it is reassuring to know that where this is the case owners will not be prejudiced by this fact and have to effectively pay more than their neighbour.

The Tenement Management Scheme, if introduced, will provide a useful underpinning of the title deeds, but should only operate as such when the title deeds are silent or defective. The wide definition of “tenements” in the Bill means that an enormous variety of properties are covered so clear drafting of particular provisions relating to each individual block will always be best to take into account the peculiarities of the property.

I am of the view that improvements should require a unanimous vote. Owners should not be forced to meet the cost of improvements that they do not want or can ill afford. However, it is unfortunate that the proposals requiring unanimous approval of proprietors to improvements could lead to much needed work, for example re-roughcasting of gable ends to be held up or even aborted by the single failure of an owner to agree to these works. To this end it is considered that the meaning of “significant works” requires further clarification.

It is thought helpful that majority decision making can be appealed. I am of the view that potentially expensive methods of appeal such as court or arbitration are unhelpful and also far to frightening and complicated for the ordinary man in the street. Mediation is a much simpler and cheaper method of dispute resolution and could perhaps be more successful in protecting a good neighbour relationship in the future.

With regard to the rule on flats of unequal size I do not consider that the rule should only apply where the floor area of the largest flat is twice the size of the smallest flat. I am of the view that this is too large a differential since an owner of a flat worth considerably more than the neighbouring much smaller flat could end up paying an equal share of repairs. I feel that the use of floor area is always the fairest method.
The question of absent owners is a difficult one for the Bill to adequately address. I have experienced difficulties in the past where title deeds are adequate but an owner has disappeared perhaps abroad after buying the property as an investment for his return. A register of landlords would certainly assist but not of course if the owner disappears or does not let the property. The type of landlord that would be likely to register would be the type likely to maintain his property well. The absent owner also causes additional maintenance concerns for his neighbour and it is imperative that access be obtained where there is a reasonable need. It is thought that “reasonable” notice would need to be defined. The means by which access could be enforced would also have been specified.

With regard to the introduction of compulsory insurance this would be valuable in protecting owners but it is difficult to envisage as to how this could be enforced. An obligation to insure in the title deeds is not sufficient as there is no method of policing this. A common policy is a better option and there is enormous benefit in dealing with only one insurer; quicker and simpler for all. How this could be enforced in practice I think requires greater consideration if the Bill is to provide any meaningful change.

With regard to Section 17 of the Bill this proposal would certainly allow the sale of a derelict site to proceed. Liability should most certainly be calculated always using floor area. It is suggested that prescribed procedures could be laid down for this. The sale of a derelict tenement by any one owner and the division of proceeds should be subject to safeguards to protect owners.

I hope the above comments are of some use and shall hear from you again in the future.

Yours faithfully

Solicitor,
Administration and Legal Services, Clackmannanshire Council

WRITTEN SUBMISSION FROM CRUICKSHANK, GRAEME

I warmly welcome the introduction of this Bill, and would like to comment on its two main objectives, with particular regard to houses of multiple occupation.

1. **To clarify rules governing the ownership of various parts of a tenement**
   a) Using the roof area for recreational purposes, when the title deeds prohibit access except for maintenance and other necessary purposes, which causes damage, the repairs having to be borne communally;
   b) making major alterations to a roof to facilitate its use as outlined above, without building warrant, repairs to the damage caused having to be borne communally;
   c) using the attic space at the top of the tenement for storing items, some flammable, which are privately owned;
   d) using passageways and landings for the storage of items which are privately owned;
   e) damaging shared property (e.g. knocking lumps out of beams to install central heating, when the same beams support the floor of one flat and the ceiling of another).

I may add that I have direct experience, as the owner of the flat above mine has been guilty of all those listed above. It should be noted that Edinburgh Council’s Regulatory Committee recently reversed an earlier decision and awarded the owner in question an house of multiple occupation licence. This illustrates why legislation is essential – it is pointless for the Executive merely to provide Councils with certain powers if they then opt not to use them.

2. **To provide a statutory system for the management of tenements**

This has become essential because of the explosion of houses of multiple occupation towards the end of the 20th century, with particularly high densities in certain areas e.g. Marchmont in Edinburgh. This has been exacerbated by the policy of Edinburgh City Council (unlike Glasgow) of
permitting, even encouraging, the unfettered proliferation of houses of multiple occupation. The Councils serious under-estimate of houses of multiple occupation in this area is the result of their flawed method of gathering their data.

When I moved into this stair in Marchmont twenty-seven years ago, the eight flats contained eight families; for the last five years, I have been the sole resident owner. I gather that some stairs now have 100% house of multiple occupation composition – they can sometimes be recognised by the front door hanging off its hinges, a hole in the wall where the entryphone used to be, and a pile of garbage bags at the foot of the stairwell.

In the early 1980s the residents of the stair formed an Association, with a bank account and a Committee of chairman, secretary and treasurer. This acted efficiently and effectively as a stair management committee, arranging, among other things, for common repairs to be made as necessary. How different things are now. For several years past, I have been acting as an unpaid factor on behalf of seven absentee owners. Not only is this hugely time consuming, but it is becoming increasingly ineffective. In addition to the rogue owner already referred to, who has refused to pay his share of essential matters such as stair cleaning and roof repairs, even when the Council have issued a statutory notice, two agents new to the system are proving uncooperative. This places me under even more strain. Edinburgh Council operates a Stair Partnership which would relieve me of these problems, but it only operates with the agreement of all owners.

The Council’s policy has resulted not just in the collapse of the social fabric of the stair, but in a deterioration of its physical fabric as well. Petty vandalism is a frequent problem (committed, I believe, more often by visitors rather than residents), and I feel in a very vulnerable position, as I am now the only person on the stair likely to complain. A statutory tenement management scheme would therefore be a tremendous boon.

I should add that I see this Bill as part of an ongoing programme of legislation to curb the detrimental effects stemming from the enormous growth of houses of multiple occupation in recent years.

Graeme Cruickshank
18 April 2004

WRITTEN SUBMISSION FROM THE DISABILITY RIGHTS COMMISSION

The Disability Rights Commission (DRC) was established by statute as a non-departmental public body in 1999. Our goal is a ‘society where all disabled people can participate fully as equal citizens’. An accessible and usable built environment – including housing – is central to this vision, and is fundamental to achieving the dignity and self-sufficiency of independent living. Given that tenements represent over a quarter of Scotland’s housing stock, it is doubly important that changes to the law in this area reflect the needs and priorities of Scotland’s 830,000 disabled people.

The Disability Rights Commission supports the general principles of the Tenements (Scotland) Bill and believes that the Bill will help clarify the law around ownership of and responsibilities for various parts of a tenement and, by ensuring that every tenement has a management scheme in place, will help tenants reach agreement on repairs, maintenance and related issues. However, there are issues around adaptations to common parts of a tenement that are of particular relevance to disabled people, and we believe the Bill could potentially play a useful role in clarifying these.

The Current Law on Making Adaptations

The ability to make adaptations which allow independent living in one’s own home is of fundamental importance to the disability equality agenda. As one authority has put it,

Adaptations to housing are a matter of equal opportunities in the most basic aspects of human life. In a well adapted house, a disabled person can move about, cook, or go into the garden, turn on lights, have a shower or bath or put a child to bed – when and how they want to, with minimum help.

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51 Tenements (Scotland) Bill Consultation, Scottish Executive, March 2003
from other people. Without adaptations, these people may be condemned to isolation, frustration and humiliation.  

The law on making adjustments to properties varies by sector. Owner-occupiers are of course free to make such alterations and adjustments as they see fit, planning regulations permitting. Tenants in socially rented housing are now covered by the provisions of the Housing (Scotland) Act 2001. The Act allows for tenants to carry out work on their rented house, providing they receive consent from the registered social landlord. Consent cannot be withheld unreasonably. ‘Work’ extends to alteration, improvement or enlargement of the house or of any fittings or fixtures, addition of new fittings or fixtures and the erection of new structures such as sheds. It does not however include repairs or maintenance of any of these.

The Act also sets out the factors a court can take into account in determining what is reasonable, such as the safety of occupiers, any expenditure which the landlord is likely to incur, and any negative impact on the value of the property. It is perhaps unfortunate that in such new legislation, there is no express right to alterations to accommodate disability. However, it is likely that both the landlord and the court would take the disability of a tenant or family member into account when considering the reasonableness of a decision to refuse consent. While there are a number of cases dealing with disrepair, there is no case law in the area of alterations.

In essence, there is no right to carry out alterations of any kind in private rented accommodation. There has never been a common law right to have repairs carried out or to be permitted to carry out alterations. A statutory right to repairs was introduced in 1962 but no right to make alterations. An individual tenancy may contain the right, if negotiated between landlord and tenant, but there is no other right. The Office of Fair Trading has produced guidance in relation to unfair contract terms in tenancy agreements, but only for England and Wales. There is no Scottish version and no present intention to produce one.

The Housing Improvement Task Force set up by the Executive in 2000 reported in March 2003. The report contains a number of findings relating to disabled people’s housing difficulties, for example they are likely to be in lower socio-economic groups and therefore in worse housing, they have particular difficulties in accessing reliable contractors, and it is particularly difficult to find adapted accommodation. The report recommends that the provisions of the Housing (Scotland) Act 1988 should be amended to allow private sector tenants to carry out adaptations to their home to meet any particular needs arising from a disability. This right should be subject to the consent of the landlord but such consent should not be unreasonably withheld.

### Adaptations to Common Areas of Tenements

The experience of the DRC is that one of the biggest areas of difficulty for a disabled owner-occupier or tenant who requires to make adjustments to common parts – for example installing grab rails at the front step – relates to consent of neighbours. The Commission has had two cases brought to our attention, where landlords had consented to such alterations, but neighbours refused and the alterations could not go ahead.

It is this area that the DRC believes that the Tenements Bill could usefully address. The Bill should allow for anyone wishing to make an adjustment to accommodate a disability, to approach the tenement scheme for permission to carry out the work. The tenement scheme could not then unreasonably withhold consent. In such an instance, the cost of the adjustment would be borne by the individual for whom the adjustment is being made, as would maintenance costs.

For example, under the Bill, consent could not be unreasonably withheld should someone wish to fit handrails to common areas leading to his or her flat. Similarly, a person with a visual impairment

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53 Housing (Scotland) Act 2001, Section 18

54 ibid. Schedule 5

should be able to make adjustments to an entry-phone system to allow him or her to see callers. This type of adjustment could be provided for in the Bill, which would allow for adjustments to common areas to support independent living while relieving other dwellings of liability for the cost or maintenance of such an adjustment.

Disability Rights Commission
March 2004

WRITTEN SUBMISSION FROM DUNDEE CITY COUNCIL

I refer to your letter dated 3 February, 2004 seeking views on the amended draft bill.

Having reviewed the draft bill I would confirm that this Council is in agreement with the main principles of the bill.

I would however make the following comments:-

**Tenement Management Scheme (TMS)**
The application of the TMS is supported only where the existing title deeds do not cover the subject of that individual rule.

**Sinking Funds**
The introduction of mandatory Building Reserve Funds for new flatted developments is supported, as is the issue of good practice guidance to owners within existing flatted developments.

**Owners Association**
We would again reaffirm our position that any requirement to set up an owners association should apply to developments of more than 8 flats.

**Regular Surveys**
The Chartered Institute of Housing’s proposals for five yearly tenement surveys is supported in principle. This proposal would have the effect of informing the owners of the conditions of their tenement and this is seen as a positive move. The issues of enforcing and managing such a requirement are however recognised.

**Support & Shelter**
The proposal that an owner will not be obliged to maintain a part of the building if it would not be “reasonable” as the building had ceased to be worth repairing is supported.

**Repairs Costs & Access**
Section 11: Liability of owner and successor for certain costs.

Clarification of the starting point for prescription, stated as “…the time when the original owner became liable for the cost.” would be helpful. It is suggested that the following addition could be used: “…namely, the date of service of the demand for payment, in line with the leading case of David Watson Property Management v Woolwich Equitable Building Society, SLT 1992, HL p 430”.

**Insurance**
A common policy of insurance should be mandatory in all new builds coupled to the requirement to have a property manager and/or owners association. A separate policy for mixed commercial/residential properties could be developed.

I trust you find these comments helpful.

Yours faithfully

Alex Stephen
Chief Executive
WRITTEN SUBMISSION FROM FALKIRK COUNCIL

The Council broadly welcomes the proposed legislation which is a useful consolidation and clarification of the law of tenement as well as filling a number of gaps in the current law. It is noted that the Bill, as currently drafted, makes no requirement for an association of proprietors under the Tenement Management Scheme to be formally constituted and the original provisions regarding satellite dishes have dropped. These were consultation points made by the Council and the outcomes with regard to them are welcome.

Some further specific comments on the Bill as presently drafted are as follows:-

1. The provisions dealing with majority decision making as regards repair and rebuilding work do not extend to improvement works which will still require unanimity. While the reasons for this are understood, it could impact on the Council’s ability to ensure that all of its properties meet the proposed Scottish Quality Housing Standard which has the provision of a controlled door entry system in a flatted development as an essential requirement. Given the terms on the Bill, the objection of one owner would be sufficient to prevent work progressing.

2. It would be helpful if additional guidance could be made available on the circumstances in which an owner would not be obliged to maintain a part of a tenement where it would not be “reasonable” as the building had ceased to be worth repairing. It is considered that the provisions in this regard are likely to lead to highly subjective interpretations.

3. It is proposed that when a building has been entirely unoccupied for a period of more than 6 months and has deteriorated to such a state of disrepair that it is unlikely anyone will return to occupy it, then any one owner shall be entitled to require that the building be sold.

It would be helpful to have clarification as to how such arrangements may work in practice as there appears to be a contradiction with necessary repairs requiring the approval of the majority of owners.

Yours faithfully

Mary Pitcaithly
Chief Executive

WRITTEN SUBMISSION FROM GARDINER, T.T.

The Law of the Tenement

The first stated purpose of the Bill is “to clarify and restate the common law rules which define and govern the ownership of the various parts of a tenement.”

The common law as stated by Lord Stair and confirmed by the other institutional writers Lord Bell and Lord Erskine defines a flat as including the walls which surround it, and not the walls of neighbouring flats, whereas this new Bill seeks to make the whole external wall common property. Such an innovation may be quite reasonable if the only wear and tear were caused by wind and weather, but such is not the case.

In multiple/occupancy flats in this stair there have been drinking parties of as many as a hundred guests, with only one toilet facility. There has been urination from the windows, and also urination into receptacles, which are then poured out of the window. This urine is death to the sandstone causing accelerated weathering.

Further, with a hundred guests, even non-drinking ones, they breathe out a gallon of water vapour per hour. This can condense on the lintel, and one night’s frost is sufficient crack the masonry. All the windows on the top floor front elevation had suffered from badly cracked lintels, while only one
other lintel was cracked in the whole building, and this was probably due to the original settlement damage.

Top floor landlords complained about roof leakage, even where there were no damaged or missing slates, but water vapour can pass through the ceiling, condense on the underside of the slates and then re-enter the flat at the wall head, with all the appearance of water ingress. The perfect slates at the rear of the building were removed and replaced at the front of the building. Other second hand slates were used to re-slate the rear of the building.

The owners of the top floor flats were not left to pay for their self-inflicted damage and the sometimes unnecessary work in the resultant repair. A quarter of a million pounds was spent on largely avoidable work, and under this new Bill all owners would be financially responsible, without any power to avoid the problem.

If owners were responsible for their own repairs to walls and roof then they may be more circumspect about expensive damage.

T.T. Gardner

WRITTEN SUBMISSION FROM HENDERSON BOYD JACKSON

I am grateful to you for your letter of 3 February 2004 providing a copy of the above Bill as introduced. At this stage I would however simply have to reiterate the comments which I made in my earlier letter of 13 May 2003 dealing with a) apportionment of maintenance costs and b) joint liability for unpaid common repair costs. My view remains that whilst the position as set out in the Bill does have merit, on these two points the implications for conveyancing practice could be both substantial and negative.

Turning to the first point concerning apportionment of costs. This is now set out as rule 4.2b. May I make or indeed repeat the following observations:

1) There is no agreed criteria for determining floor area within the surveying profession. I would submit that some guidance should be sought from the RICS or similar body as to how this provision for measurement of floor area can be clarified.

2) The degree of exactitude of shares should be stipulated e.g. 1, 2 or more decimal points.

3) If resort has to be made to measuring the floor area of possibly a large number of flats this will inevitably incur a substantial cost. There is no provision however for these particular expenses to be met by the co-owners. I would submit that such expenses should be specifically covered within rule 4.1 as another element of possible “scheme costs”.

Turning now to the question of a joint liability for common repair costs (which is now section 11(2) of the Bill). I would have to repeat that I foresee considerable practical difficulty in dealing with this issue. At present common repairs are either in essence voluntary in that they are carried out under the auspices of an agreed common repair scheme entered into as a matter of contract between the co-proprietors or alternatively on an involuntary basis in that they are carried out by the Local Authority under a Statutory Notice procedure. In the latter situation the standard Local Authority Property Enquiry Certificate which is obtained by the vendors at the time of sale will disclose the existence of any such notice (and linked to this the existence of any unpaid account). In the former case the law of contract stipulates that such matters are private between the contracting parties and liability therefore does not automatically fall on an unrelated third party such as a purchaser. In practice therefore a purchaser has the comfort of knowing that subject to a clear Property Enquiry Certificate being obtained that they should not have a liability for outstanding common repair costs.

The provisions of Condition 11 however in effect supersede the current law of contract. This will mean that even although a seller has voluntarily entered into a common repair scheme, liability for this could pass on by virtue of Statute to a subsequent purchaser (or indeed a number of subsequent purchasers if there have been more than one transaction during the proposed five year prescriptive period). A purchaser therefore will now have to address this potential and unknown
liability prior to completion of any transaction. It will of course be possible for contracts to provide that any seller gives a warranty that there are no such outstanding costs. The concern will be however is protection of the purchaser in the event that the seller is in bad faith. A cautious purchaser therefore will have to obtain some form of evidence that there are no unknown costs of a historic nature. Possibly the only way to resolve that would be for a seller to try and obtain a Certificate from every other proprietor in a tenement that there were no outstanding costs. That could be a considerable hurdle to overcome in practice.

There are earlier comments that a purchaser would be expected to deal with unpaid costs by ensuring payment from the purchase price but this assumes that the seller has made full disclosure. The concern remains that a purchaser could be substantially prejudiced through the bad faith, or misrepresentation of a seller.

The standard situation of course also assumes that a seller has been in occupation themselves. There would be substantial concern with the situation where the sale is by executors or trustees or by some other party who has little or no direct knowledge of the property in question. They would not even be able to give any warranty that there were no outstanding costs and would have to put any possible risk onto a purchaser. That would have a substantially negative effect on possibly both the price being paid as also the ability to achieve a sale at all through no fault on the part of either buyer or seller.

I would repeat my view that in order to protect, indeed, both buyer and seller in such situations there has to be some form of public register that a prospective purchaser can examine in order to identify the possibility of outstanding costs. Without the benefit of such a register sellers will be left with the possibility of having to prove a negative which can be very difficult to overcome in practice.

I trust the above observations are of some benefit.

Yours sincerely

Ross A MacKay
Residential Conveyancing Partner

WRITTEN SUBMISSION FROM HIGHLAND COUNCIL

The Highland Council previously submitted comments on the Consultation Paper on the Tenements (Scotland) Bill and I attach a copy of these comments for your information. On the points which we raised at the consultation stage, the Policy Memorandum again confirms that the Bill is subject to the principle of free variation so that the title deeds of individual tenements will still override the statutory law. It states that the new law will be a default law i.e. it will only take effect if the title deeds do not make other arrangements or are defective. Again it confirms that the Tenement Management Scheme is a default management scheme - if existing tenements have defective title deeds or if their titles are silent on a particular matter the rules of the TMS will be applied to it.

There does, however, still seem to be the possibility of problems arising where titles are contradictory rather than silent. For example section 1 deals with boundaries and pertinents and sets out how these are to be determined "except in so far as any different boundaries or pertinents are constituted by virtue of the title to the tenement". Also the TMS rule on splitting costs is to apply unless a tenement burden provides for the full amount of those scheme costs to be met by one or more owner. It is unclear what the position would be if the titles have contradictory provisions re splitting of costs or indeed the shares add up to more than 100%. The TMS rule regarding decision making applies unless the titles have provision for decision making and the same procedures apply for each flat. It would seem better to have a requirement that the same provision must be in the title to each flat before any of the other default rules in the Bill/TMS are excluded for any tenement.
The Highland Council's response to the consultation stated that we did not agree that the definition of maintenance should only include "incidental improvement" and that there should be a facility to carry out more comprehensive modernisation/improvements under the TMS. This has not been incorporated in the Bill. Full scale improvements will, therefore, still require unanimity.

The Bill accepts that it would be impractical to require owners to establish "sinking funds".

The Bill makes it compulsory for each owner to insure their flat for reinstatement value. Individual owners have the right to inspect the policies of their co-owners. Proposals to have a mandatory common policy of insurance for all flats within a building have not appeared in the Bill. We continue to have concerns that enforcement is left up to co-owners.

We note that the Policy Memorandum advises that the Housing Improvement Task Force has made a number of recommendations about common repairs and maintenance which would give local authorities powers to, for example, require owners subject to a maintenance plan to establish a sinking fund, to require common insurance where owners are in receipt of assistance with repairs and maintenance, to establish schemes to encourage owners to establish effective property management schemes and to meet costs to allow repair works to go ahead where some owners have refused to deposit their share of essential repairs and to place a charging order on non-compliant owners.

We hope that many of the remaining concerns we have regarding the Tenements (Scotland) Bill will be addressed by the forthcoming Private Sector Housing Bill.

Yours sincerely

David Goldie
Head of Housing Strategy

WRITTEN SUBMISSION FROM NORTH AYRSHIRE COUNCIL

Following consultation with appropriate services of the Council, I would advise that the Council has a particular interest in the Bill and its implications in terms of the authority’s strategic housing role, its role as a housing landlord, and its role as a provider of support to the private housing sector through grants and other assistance.

One practical difficulty which the Council has in its role as a responsible landlord is obtaining the agreement of owners to participate in major common repairs, normally re-roofing or re-rendering. At first glance the Bill will give the Council powers, where they are the major owner in a block, to carry out these works without the agreement of an individual owner or owners who would be in the minority. Section 1.5 of the schedule to the Bill, however, excludes “improvement” from the definition of ‘maintenance’. In the Policy Memorandum the Executive agrees with the view of the Scottish Law Commission that the common law should still apply i.e. the unanimous agreement of all owners in relation to “significant improvements which are not incidental to maintenance and repair”. The Memorandum goes on to make reference to the resurfacing of a close as an example of an improvement.

As a responsible landlord, the Council does not wait to replace roofs and render until they have totally failed. When the Council identify roofs or render which suffer from significant deterioration, it seeks to carry out full re-roofing or re-rendering work. In this connection, it is interesting to note that the new Scottish Housing Quality Standard which has been recently announced by the Scottish Executive defines failure of such elements as occurring where repair or replacement of more than 20% of the element is required. The incorporation within the Bill of a more detailed definition of ‘maintenance’ along such quantifiable lines would assist local authorities in their duty to ensure all their houses comply with the Standard.

I hope that these comments are of assistance to the Committee in its deliberations on this issue.

Yours faithfully
WRITTEN SUBMISSION FROM NORTH LANARKSHIRE COUNCIL

The Council is one of the largest municipal housing landlords in Scotland. As such the Council fully supports the general principles underlying the Bill and in particular the main policy objectives of clarifying the common law rules relating to tenements and the provision of a statutory system of management for tenements.

One of the major problems facing the Council in relation to the management of its housing stock is persuading owner-occupiers to consent to repairs to common parts and thereafter persuading the owner-occupiers to pay for their share of common repairs. The “unanimity rule” under the current law of the tenement (i.e. the rule which stipulates that all proprietors in a tenement must consent to proposed common repairs before the work can proceed) causes great difficulties to the Council. For example, the title deeds for flats in a tenement frequently oblige all owners to contribute to the cost of common repairs without actually specifying a mechanism by which common repairs can be instructed. In these situations the unanimity rule applies. Accordingly, the proposed replacement of the unanimity rule by a system of majority voting is welcomed by the Council. The Council anticipates that the introduction of a system of majority voting will greatly assist in the execution of repairs and maintenance to the common parts of tenements.

However, the Council feels that an opportunity has been missed by the Executive’s insistence on an unduly restrictive definition of “maintenance”. In terms of the Bill, maintenance specifically excludes non-incidental improvements. As the Council advised the Scottish Executive during the consultation exercise, the Council firmly believes that the definition of maintenance should be expanded to include some element of “value for money” which goes beyond incidental improvements. For example, in the long term it is frequently more economical and therefore better value for money to simply replace an ageing door entry system with a new system rather than continually repairing the old system. The Council also takes the view that some improvements are really simply repairs using a more modern material and that as these improvements represent better value for money than simple repairs they should be enforceable by a majority of owners. In its Policy Memorandum on the Bill the Executive explicitly rejects the suggestion that the provisions of the Bill on majority voting should also apply to improvements as well as maintenance. The Executive believes that minority owners would be confronted by bills for unnecessary work which they did not want and might not be able to afford. However, the Bill does provide that an individual who did not vote in favour of a decision should be entitled to apply to the Sheriff for an annulment of that decision. Accordingly, the Council believes that the Executive’s decision to restrict the definition of maintenance to include only incidental improvements as opposed to full-scale improvements and therefore that other works should still be subject to unanimous agreement should be looked at again during the course of the Bill’s passage through the Scottish Parliament.

In its formal submission to the Executive during the consultation period the Council opposed the introduction of the concept of “scheme property” as it departs from the general principle that ownership and responsibility for maintenance of property go hand-in-hand. However, the Council now recognises that there is some merit in the Scottish Law Commission’s view that there are some parts of the tenement which are so vital (e.g. the roof) that they should be the responsibility of all owners as far as maintenance is concerned. Accordingly the Council now welcomes the introduction of the concept of “scheme property” as the Council believes that this will be beneficial from a housing investment viewpoint. If the expense of potentially expensive repairs to, for example, a tenement roof are to be shared amongst all the proprietors in the tenement then essential repairs are more likely to be instructed and the physical condition of tenements is therefore likely to improve. The introduction of the concept of “scheme property” may also have the added benefit of instilling in proprietors a greater appreciation of the fact that common responsibilities exist when living in a tenement.

The Council notes that chimney stacks and chimney flues are excluded from scheme property in terms of Rule 1.3(c) of the Tenement Management Scheme. However, sometimes chimney stacks
and chimney flues serve more than one flat and accordingly it may be inappropriate to always exclude chimney stacks and chimney flues from scheme property.

The Council believes that Rule 4.2(b) of the Tenement Management Scheme will be unworkable in practice. This rule provides that (where the title deeds are silent) contributions towards the cost of repairs to scheme property will be equal except where the floor area of the largest flat is more than 1 ½ times the floor area of the smallest flat, in which case the costs should be divided in proportion to floor area. In the Council’s view this provision will only lead to uncertainty and confusion as well as providing ample scope for friction between neighbours over access to each other’s flats to “measure up” for the purpose of this rule. Disputes could also arise as to the accuracy of measurements obtained in this way. The Council therefore believes that all flats of whatever size in the tenement should share scheme costs equally. Although equal sharing might be perceived as being inequitable in certain situations it would at least have the virtue of simplicity. In its Policy Memorandum the Executive concedes that there will be some losers if the concept of scheme property is introduced as owners who at present have no liability to contribute to, for example, roof repairs would have to contribute in the future. The same “public interest” argument for introducing scheme property could also be extended to the introduction of equal sharing of scheme costs regardless of the size of individual flats.

The Council notes that in terms of Section 12 of the Bill, an obligation to pay a cost will prescribe (i.e. fall) after five years. At present such an obligation will only prescribe after a period of twenty years. Representations were made to the Executive during consultation on the draft Bill that the proposed prescriptive period of five years might be unrealistic in protracted disputes between owners. Most local authorities have experienced delays exceeding five years when attempting to recover costs from owners incurred where an authority has instructed common repairs in terms of its powers under Section 87 of the Civic Government (Scotland) Act 1982 and Section 108 of the Housing (Scotland) Act 1987. Accordingly a prescriptive period of ten years might be more realistic.

The Council is opposed to the introduction in Section 14 of the Bill of a statutory right of access for owners to other flats in their tenement for maintenance purposes. The Council would re-iterate its view that the attempted exercise of this right of access between proprietors will almost inevitably lead to disputes and discord between owners. Many owners will view the attempted exercise of this right of access by their neighbours as a gross invasion of privacy. The Council would therefore suggest that (except in emergencies) a proprietor should have to obtain a warrant from the sheriff before he is entitled to demand access to his neighbour’s flat unless his neighbour consents. The Council does not consider the safeguard contained in Section 14(5) of the Bill (which entitles the neighbour to refuse access where, having regard to all the circumstances, it is reasonable to refuse access) as being sufficiently robust. Elderly owners may feel bullied or harassed by neighbours demanding access to their flats and may therefore be reluctant to refuse access even in cases where a refusal would be reasonable.

The Council also opposes the introduction of the general duty to insure contained in Section 15 of the Bill. Whilst the general principle that owners should keep their flats adequately insured seems unobjectionable, in practice the Council believes that a statutory duty to insure will be unenforceable and therefore ineffective. The right given to individual owners to demand sight of their neighbour’s insurance policies together with evidence that the premiums have been paid may again sour relations between neighbours. Furthermore, local authorities may experience particular difficulties in fulfilling the duty to insure. Some local authorities presently experience problems in obtaining insurance for their flatted housing stock at reasonable cost. Local authorities are in a different position from private owners as it is reasonable to assume that any claims for rebuilding, etc. would be met by a local authority whether or not a formal insurance policy is in place. Accordingly, representations were made to the Executive during the Executive’s consultation that there should be a specific exemption from the duty to insure for certain public bodies. These bodies could be prescribed by Statutory Instrument and could include central and local government, health boards, etc.

With regard to the provisions of the Bill relating to the sale of derelict and abandoned tenements, the Council recognises the public interest in not allowing abandoned tenements to simply lie derelict. The Council agrees with the view that a share in the proceeds of the sale of the building
seems a reasonable exchange for a share in a derelict building. However, the proposal contained in Section 20 of the Bill that any one owner can sell an abandoned tenement seems fraught with difficulties. For example, how will a prospective purchaser be able to satisfy himself that a tenement has been entirely unoccupied for a period of more than six months? In addition, Section 20(1) provides that an owner can require a tenement to be sold where it is unlikely that an owner or other person will return to occupy any part of it. This seems to be a very subjective test to apply. Accordingly the Council’s view is that the power of sale should only be exercised after the matter has been referred to the Sheriff. Furthermore, there should be a requirement on the owner seeking to sell the tenement to obtain best value for the tenement.

Notwithstanding the foregoing comments on certain detailed aspects of the Bill, the Council fully supports the general objectives underlying the Bill.

Director of Administration
North Lanarkshire Council
March 2004

WRITTEN SUBMISSION FROM ROSEBURN HOUSE RESIDENTS ASSOCIATION

1. There are different methods of property Management Companies controlling the expenditure on property repairs etc.

2. Tenement Properties owned by the companies for rent or lease and properties owned by private owners

3. Sheltered Housing and Retired Flats (which will be classified as Sheltered Housing under the new “Title Conditions (Scotland) Bill.

4. Repairs for rented/leased and private PROPERTY could be controlled under the BANK ACCOUNT of the property management company. This method would enable the management company to transfer monies from one property to another property should this become necessary, if any property had insufficient funds.

5. All sheltered Housing/Retirement Flats should have their own BANK ACCOUNT, so that any under or over recovery on expenditure is attributed to that development. Some management companies do not operate under this method of banking

6. All “DEEDS OF CONDITIONS” for Sheltered Housing/Retirement Flats should be strictly adhered to - (i.e flats were sold by our developer to owners who had not achieved the required age to enable them to purchase a property. Our required age is 60 years).

7. To enforce this minimum age for entry under the “DEEDS OF CONDITIONS” it should be the responsibility of the lawyer acting on behalf of the purchaser to be responsible for ensuring that all condition in the DEEDS OF CONDITIONS are enforced. If there is any dispute then the lawyer should be held responsible.

8. The MANAGEMENT COMPANY SHOULD HAVE THE RIGHT TO ENSURE THAT ANY PURCHASER OF A PROPERTY IN SHELTERED HOUSING/RETIREMENT FLAT DEVELOPMENT MEETS THE REQUIRED DEED OF CONDITIONS BEFORE THE PURCHASE IS COMPLETED.

9. The Property Management Company of Sheltered Housing/Retirement Flat should be required to prepare a Budget for the financial year and inform the residents at a residents meeting of how the budget has been compiled. The Management Charges applicable to each owner for the financial year should also be shown.
10. Within an agreed date after the financial year end it will be necessary for the Management Company to have copies of AUDITED ACCOUNTS FOR THE FINANCIAL YEAR sent to each owner at least two weeks before the Management Company visits the Development to answer any queries which may arise on the final accounts.

W. Scorgie
Secretary
Roseburn House Residents Association

WRITTEN SUBMISSION FROM SCOTTISH BORDERS COUNCIL

There are only a few comments to make regarding the above, as many of the recommendations from the Tenement (Scotland) Bill Consultation Document (March 2003) have been incorporated into the revised Bill:

1. The cost of the TMS (4.1) should be apportioned according to the size of the flats through the use of the rule regarding if the largest flat is 11/2 times larger than the smallest flat as is used with the majority of expenses in the Bill.

2. The TMS should be applied to all tenements (old and new) except where the Development Management Scheme introduced in the Title Conditions Act has been adopted.

3. Insurance (Section 15) for new developments. Despite the reservations of the Executive regarding default, it would seem logical to include an insurance obligation on all new developments, which could be tied into the TMS.

4. The CIH recommendation regarding regular surveys. This would be supported by ourselves and the addition of such a duty would seem worthwhile considering.

5. The agreement with the HITF regarding not requiring the appointment of a property manager for each tenement is supported.

Yours sincerely

Phil Rowsby
Senior Housing Strategy Officer

WRITTEN SUBMISSION FROM THE SCOTTISH CIVIC TRUST

The Scottish Civic Trust was founded in 1967 and is a charity operating across Scotland. It is committed to the improvement of the built environment of Scotland and in furtherance of this, it aims to encourage: well-informed public concern for the environment of both town and country; high quality in planning and new architecture; the conservation and where necessary adaptation for re-use of older buildings of distinction or historic interest; knowledgeable and therefore effective comment in planning matters; and the elimination of ugliness whether resulting from social deprivation, bad design or neglect.

Our interest in this Bill is in relation to our main objectives in encouraging the conservation of buildings of distinction or historic interest, and in the elimination of ugliness resulting, in this case, from neglect.

The Trust manages the Buildings at Risk Service on behalf of Historic Scotland. This service catalogues and monitors properties of all types deemed at risk, and includes tenements. We have substantial experience in dealing with such matters.
The Bill as introduced
The Trust broadly supports the introduction of this Bill, as it will assist in ensuring the proper upkeep and maintenance of a very important form of housing in Scotland. It also regularises the law with regard to tenement maintenance, thereby ensuring greater clarity across the country. It also ensures that tenement owners, as and when they move, can be clear on their duties as owners, and on the duties of their tenemental neighbours.

S.4 Application of the Tenement Management Scheme
Firstly, we welcome the requirement that the scheme “shall” apply as s.4(1) on a proscriptive basis. We offer comments on the scheme as per the schedule separately in these comments.

We welcome the restriction in s.4(4) that existing burdens will apply. In particular, many building preservation trusts operating in Scotland have already imposed “conservation” and maintenance burdens on properties. These are in place to ensure the long-term future of important heritage assets, and it would be disappointing to see these lost.

s.5 Application to Sheriff
Whilst we are generally content with the overall provisions in this section, in practice it might be extremely difficult for a Sheriff to make a ruling on a scheme, as they will most likely not have the technical knowledge to act reasonably. For example, the items outlined in s5(5)(a)(b)(c) and (d) can be very complex in reality. Provision might therefore be made in this section for permitting the Sheriff to seek independent professional advice from a suitably qualified person to assist him arriving at a decision for annulment. In this, it must be recognised that such applications are likely to lie on the grounds of cost and not technical need. Sound knowledge will therefore be required.

s.15 Obligation of owner to insure
The Trust supports the general requirements of this section. However, there are practical difficulties with the variances that one can find with regard to the reinstatement value of a tenemental property. This might depend upon the length of period one has held insurance on a property, the attitude of various insurers on reinstatement value (and the differing advice they might be given), and other imponderable issues. S.15(2) mentions common policies of insurance. The benefit of such common policies to reinstatement value is obvious.

The Trust therefore recommends that this issue of variance with respect to reinstatement costs needs to be formally addressed. This might be addressed through s.15(3) where Scottish Ministers might make on order for a “unified” reinstatement cost to be applied to a tenement. Alternative, an additional process for an owner to request others to have adequate cover is needed.

In any event, there needs to be a process as part of this Bill that ensures that the insurance cover for reinstatement value is adequate for the task.

Tenement Management Scheme – Schedule
Rule 1
The Trust does not agree that 1.3(c) – any chimney stack or chimney flue - should be considered an exception to scheme property as proposed. In most tenemental properties, and especially in properties over 70 years old, stacks and flues are interconnected. A defective flue in one flat will have a consequence for another, and a defective stack, which might serve all flats in a tenement, is a common element of the tenement. As such, rule 1.3(c) should be deleted.

Otherwise, the issues covered in the schedule with regard to the operation of a scheme seem sensible.

Other issues
Firstly, any recourse under this Bill as introduced requires an action to the places before a Sheriff. There is no mention of mediation or arbitration as a means of conflict resolution, which we believe is unfortunate. There is increasing recognition with the Executive of the importance of such process, and they could play an important role within tenement management if so permitted. A mention in the schedule for Tenement Management Schemes would be beneficial.
Secondly, there is no relationship between the requirements of this Bill with regard to maintenance and the provisions of the Civic Government Act or the Building (Scotland) Act, both of which have powers directly relevant to this Bill. Local Authorities are extremely important third parties in regard to tenement management, and tools such as Statutory Repair Notices as very useful when it comes to ensuring the good repair of tenements. If no owner in a tenement chooses to establish a scheme under the Schedule, or seeks to avail themselves of the powers in this Bill, then it will fall to a third party to ensure that s.7 of the Bill is met. These powers should be made into a duty, which would align well with this Bill. Similarly, local authorities should be required to offer themselves as managers under rule 3.1(c). The City of Edinburgh Council already offers such a service.

We hope that these comments prove useful to the Committee in considering the Tenements (Scotland) Bill.

Yours sincerely

Terrence Levinthal, Director

WRITTEN SUBMISSION FROM SCOTTISH FEDERATION OF HOUSING ASSOCIATIONS

The Scottish Federation of Housing Associations (SFHA) is the membership body for housing associations the length and breadth of Scotland. Its 205 members own and manage approximately 12% of the housing stock. SFHA exists to support the work of housing associations by providing a variety of services.

Members of SFHA have a particular interest in the Tenements (Scotland) Bill as this third part of the Land Reform suite will affect all members who have properties in multi-tenure blocks. Many of those members are also factors, who will have further interest in the implications of this reform.

The Executive’s particular objective within this Bill of giving greater importance to collective maintenance needs is welcomed, but SFHA considers the proposals to be not as robust as they might have been. For example, work can still be blocked within a tenement by the majority, even if it is required. Although recognising that majority decision-making is the foundation of the Bill (and supporting this principle), there may be circumstances where the majority will block work, for whatever reason and their actions could compromise the interests of other owners and constrain, for example, their ability to meet obligations to tenants. This could be the case, for example, in respect of a housing association who is a minority owner requiring to bring a tenemental block in multiple ownership up to the new Scottish Housing Quality Standard where the lack of appropriate funds might negate owners within the block from taking responsibility for works necessary to bring the whole tenement up to the Standard, as it applies to common areas or elements. It is to be hoped that this situation will seldom arise, but working towards meeting the Standard will almost certainly depend on the financial circumstances of the owners.

The Tenement Management Scheme (TMS) is also broadly welcomed, but there is still no legal compulsion to ensure owners within a tenement pay their share of common maintenance costs. The issue here is one of compliance with others; of the financial resources of the owners and their willingness to keep the tenement in good repair. The Bill gives no legal compulsion to ‘force’ owners to pay their share, just as the situation is currently. The Federation is concerned that the provisions of the Bill, the principles of which are supported, may not deliver the intended improvements in the management and maintenance of tenemental properties because they are not underpinned by the necessary measures to enable and, where necessary, require, owners to pay their share of the costs incurred. Whilst it is recognised that there is a significant proportion of owners who are unwilling to meet the costs associated with home ownership, it must also be recognised that many home owners, including those who are older and those who have bought

56 The Scottish Housing Quality Standard is a minimum set of quality measures for all houses across tenure.
under the right to buy, are on very limited incomes and are, in many cases, unable to meet the costs of home ownership.

The Bill aims to tackle a wide range of issues relating to the upkeep of tenemental properties across Scotland, and attempts to provide a solution to neighbour disputes in relation to maintenance issues within a tenement. SFHA has a view on an appropriate mechanism to address these issues which could form a useful part of the Bill and this would be in the form of an independent arbitration system (with eventual recourse to the Lands Tribunal). This would provide a method of independent, cross-country redress on both issues, and Parliament might like to explore this proposal further.

General comments

Chapter 1: Ownership of a tenement: who owns what
Existing common law needs to be restated, and applicable to all properties, both old and new.

SFHA agrees that the existing common law should be restated, and should be applicable to all properties, old and new.

Where Titles are silent or unsatisfactory, arbiters and the Scottish Land Court should have powers.

SFHA agrees that rules of ownership should not be capable of free variation in the future unless the tenement is 'unusual' in its set-up (and is new).

S2: Tenement boundaries
The proposal for boundaries made in the Bill is acceptable, but the Executive should take into account that there can (and will) be ambiguous cases.

In general, SFHA agrees with the proposed boundaries of ownership of tenement flats. However it should be noted that in some cases, boundaries do not follow a straight vertical and horizontal positioning, for example, the building might be split into three separate flats, with the top floor flat taking up all of the upper floor area, and the two flats below being sub-divided. Ambiguous cases should be dealt with by arbitration. The proposal made by SFHA (and which is applicable throughout the Bill) is to recommend the introduction of an independent arbiter to deal with a myriad of issues.

S3: Pertinents
SFHA believes that the ‘benefit or service’ suggestion is not the best mechanism to apportion costs. Whilst seeing that it could be one way in which to ensure owners are not overly burdened with the upkeep of the building as a whole, some of the pertinents given as an example e.g. chimney stacks, closes, gardens do affect everyone in the close. Consequently, SFHA believes that an equal right to pertinents is the best proposed method and most equitable way to apportion costs.

However, the ownership of garden ground and what were outbuildings could be of considerable interest in high value areas (such as city centres) where there may be capacity for infill. Paragraph 6 states that the common law is that if Titles are silent, the garden ground is the property of the ground floor flat and if more than one then each owns the garden ground nearest. It might be the case that Titles are silent, but rights of usage have been established. Should the Bill give statutory force to these provisions, as this does not seem to be covered in Sections 1 and 2?

Chapter 2: Tenement Management Scheme
SFHA proposes the introduction of an independent arbitration system to deal with complicated issues from the Titles or the TMS if introduced. The Titles should remain (if they are currently in place) as they would be difficult to over-turn as this is part of the ownership process. Following any appeal to this arbitration, the Lands Tribunal should be the next stage. The main purpose of the Lands Tribunal is to settle land disputes, for example, compensation for compulsory purchase, and varying and discharging Titles. The remit of the Lands Tribunal can be added to, with the example given of the addition of Right to Buy disputes (under the 1987 Act) to go to the Lands Tribunal. As
a precedent has been set, where the functions of the Lands Tribunal can be added to, SFHA recommends that the Lands Tribunal be the final mechanism for appeal from the independent arbiter. The Lands Tribunal needs to be both strengthened and simplified if this mechanism is to be appropriate for this purpose.

SFHA’s view is that the use of Titles is still important, and that it would be difficult to, in effect, overturn Title Conditions which have been conveyed as part of the ownership process. Therefore, Titles should take precedence subject to the arbiter having powers to vary.

**Scheme Property**
Alongside what has been recommended as scheme property, other areas should be included such as chimney stack; close doors and bin stores.

**Maintenance**
As discussed in the introductory paragraph to this submission, there MAY be an issue in blocks where the landlord is a minority owner but required to comply with the Housing Quality Standard and this being hampered by the majority not agreeing. Both maintenance and incidental improvements could be linked to the Quality Standard. Although perhaps an issue that might not arise very often, it should be recognised.

Co-owners should maintain their property and it is the right of an owner to demand this. The definition of maintenance should also be extended, with any disputes going to arbitration.

SFHA strongly supports the definition of maintenance being extended, as far as possible, to include the upgrading of door entry systems, roof improvements e.g. flat to pitched, where it can be shown to improve the amenity, energy efficiency and value of the block (these are examples rather than an exhaustive list). This would be subject to a simple majority agreement, and include annual provision in the Tenement Management Scheme (or Regulations) for the uplift of the sum allowable to be spent in the event of emergency repairs being required. Disputes would go to arbitration (or perhaps mediation if that were more appropriate).

**Flats of Unequal Size**
Cost should be shared equally, except where the floor area of the largest flat is more than one and a half times that of the smallest: in that case, costs should be divided in proportion to floor area.

**Housing Improvement Task Force**
SFHA agrees that an owners’ association be set up for new flats, but disputes the suggestion that it should apply only to 8 flats or more. Rather, the definition of what a tenement is should apply in this instance also.

Sinking funds should be encouraged, but not enforced as their management might prove difficult.

SFHA believes that property managers (where in place) should be accredited and that this accreditation should apply across tenures. SFHA is pleased that it has been invited to be a member of the Advisory Group working on the HITF recommendation that accreditation should be in place.

SFHA supports the provision that social landlords have the right to appoint a property manager for up to 30 years after the first right to buy sale in a particular block. This is an important provision in helping to ensure that landlords retain the ability to maintain their properties to the standards required by both statute and the terms of the tenancy agreement. It is recognised that if, during this time, the landlord becomes the minority owner, owners of two-thirds of the properties may dismiss a property manager.

**S5: Application to the sheriff for the annulment of certain decisions**
SFHA is concerned that, if sheriffs are used, they will not be specialist enough to deal with tenemental matters. There should also be some legal recourse where stalemate is reached, and SFHA suggest that arbitration (with eventual appeal to the Lands Tribunal if necessary) is more of an appropriate measure to deal with disputes. Mediation, too, is an acceptable alternative, but the
only problem with that is that any outcomes of mediation are not enforceable. SFHA has real concerns over the right of the individual to 'block' repairs, and the lack of specialisation amongst sheriffs.

Chapter 4: Support and Shelter
SFHA agrees that the obligation to refrain from alterations interfering with the support or shelter of the building should be supported, but that only negative obligations should be enforced against tenants. Costs should be able to be recovered under positive obligations.

SFHA agrees with the proposal to recover costs from other owners under positive obligations. Arbitration would be the best way of achieving this.

Chapter 5: Repairs: Costs and Access
The sharing of liability for repair costs (after a property has been sold), is not supported by the SFHA.

S12: Prescriptive period for costs
The obligation to pay a cost should prescribe after 5 rather than 20 years. This is consistent with the Title Conditions (Scotland) Act regarding negative prescription.

S13: Common property: disapplication of the common law right of recovery
This should no longer apply where a management scheme is in place.

S14: Access for maintenance purposes
SFHA accepts the fact that access is required to other flats for specific reasons, but should only be by Court Order. There should be limits on how often the owner affected by the request can refuse due to timing being inconvenient, however, and there should be some mechanism to check this. The issue of the person suffering loss choosing whom to sue is a difficult one, as there may be repercussions in choosing the wrong person (if, for instance, they had no money to cover the action). SFHA suggests that, where an owners association is in place, the owners association should be pursued, in the first instance.

Where damage has been caused to the ‘other’ flat, it is recommended by SFHA that the owner’s association (where in place) should be pursued, rather than individuals.

Chapter 6: Insurance
Some form of statutory insurance scheme is supported by SFHA where owners have an obligation to provide for insurance for their property in order to safeguard the interests of all proprietors who have an interest in the building.

Chapter 7: Television aerials, gas and other services
There can be no issue that each flat should have the right to place an aerial for TV purposes on the roof. The issue will arise when one owner, in order to get the best picture from his or her aerial, moves someone else's aerial in order to do so. This will inevitably cause conflict within the tenement. Communal TV aerials are one solution to any dispute.

On the issue of satellite dishes, this is a very contentious issue and simple majority agreement should allow for the provision of a communal system and in so doing prevent the fitting of individual satellite dishes etc.
SFHA agrees with the proposal to treat gas in the same way as electricity – a long overdue alteration to the statutory regulations. Rights of access for maintenance (but not improvement) exist in what is individual property, unless the works are by statutory undertaking. Scottish Water, for instance, might regard the adoption point as being outside the property; hence they would not have statutory rights.
Chapter 8: Demolition and Abandonment of Tenement Buildings
SFHA believes that ownership should not end with demolition, and that all owners remain in ownership of the airspace which was once the tenement, on the same basis of proportionality.

Chapter 9: Liability for certain costs
Non-owners should be treated as owners for the purpose of founding a claim for the recovery of maintenance costs against the person who caused the damage. SFHA agrees that the site can be sold at the behest of one of the owners and proceeds divided equally. Where the ‘property’ is sold (airspace) the sale should be at no less than the market value of the site. Arbitration should be a speedy way forward.

Chapter 10: Amendments to Title Conditions (Scotland) Bill (now Act 2003) and miscellaneous matters
The meaning of owner and determination of liability is acceptable.

Conclusion
SFHA welcomes the opportunity to submit comments on this important Bill. SFHA made extensive comments about the draft Bill in June 2003 informed by SFHA’s members’ views and the Justice 2 Committee may wish to examine that response. A copy is attached for information.

Whilst the Bill will go a long way to dealing with current problems, SFHA remains concerned that many owners are unable to meet the cost associated with home ownership and that, in consequence, the situation may not improve dramatically because failure to secure agreement is replaced by inability to fund as the main reason why repairs are not carried out. Associated with lack of finances for some owners is a need for a broader definition of repairs operating alongside the new Scottish Housing Quality Standard.

Accreditation is imperative for Property Managers to avoid potential problems with factoring, and, while not a Bill matter, if housing associations are to have a potentially wider role to play in factoring, more resources and training should be forthcoming in order to ensure that the housing associations and others involved in the provision of factoring services to owners provide a useful service. SFHA welcomes the invitation to be a part of the advisory group set up by HomePoint to develop such an accreditation scheme.

SFHA broadly welcomes the Tenements (Scotland) Bill, although, as this submission suggests, believes that it would benefit from some refinement. These comments are offered for the Committee’s consideration as a contribution to ensuring that an equitable system is set in place for all tenement dwellers and managers in Scotland that will provide for the effective maintenance of properties to the standards required in the twenty first century.

WRITTEN SUBMISSION FROM SCOTTISH LEGAL AID BOARD

Introduction
The Scottish Legal Aid Board (“the Board”) welcomes the opportunity to provide evidence to the Justice 2 Committee on the Tenements (Scotland) Bill. The Board’s comments are limited to the legal aid implications of the Bill.

Evidence
Sections 5 and 6 of the Bill allow owners of flats to apply to the Sheriff by way of summary application to annul certain decisions and resolve disputes. An appeal would lie to the Court of Session on a point of law. These are civil proceedings for which civil legal aid could be sought.

However, applications to the Sheriff, and any appeal from the Sheriff’s decision, relate to disputes concerning more than one owner of a flat. This raises questions of an applicant for civil legal aid having a joint or common interest with the other proprietors. Joint or common interest could apply to both pursuers and defenders.
Where the Board considers that an applicant for civil legal aid is jointly concerned with or has the same interest as other persons in the matter for which legal aid is sought, the Board is required by regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 to refuse the application if it is satisfied that:

a) the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted; or

b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted.

Since the matters before the court, both at first instance and on appeal, will concern decisions taken by a number of proprietors or disputes over matters such as common repairs, it appears to the Board that applicants for civil legal aid may well fail the test in regulation 15 in which case legal aid will be refused. The Board has no discretion where it is satisfied that the criteria in regulation 15 are met.

Financial Memorandum
The issues discussed above may affect the number of applicants who can be granted civil legal aid. The Scottish Executive estimates that only 10% of the 50 Sheriff Court cases will attract legal aid. Legal aid costs are estimated to be £60,000. That figure appears reasonable.

WRITTEN SUBMISSION FROM SOUTH AYRSHIRE COUNCIL
We note the changes made to the draft Bill following the consultation process and particularly note that a number of issues we raised during this process will be addressed in future legislation. We feel sure we will have the opportunity to comment further on these issues at that time.

However, we remain unclear on whether certain works would be subject to majority decision under this Bill.

South Ayrshire Council has been attempting for a number of years to invest in the fabric of a number of flats in its ownership. This work has been prevented by a minority of owner-occupiers to the detriment of the building and its occupiers. In particular, this is having an adverse effect on the energy efficiency of the building and, therefore, hindering the fight against fuel poverty.

This Council would be happy to make grants available to the owner occupiers in these blocks through Private Sector Housing Grants and further support their rights as set out under ‘Resolution of Disputes’ in the Bill. However, we believe such works as these should be subject to majority decision. Perhaps, in order to help ensure owners receive maximum help in such circumstances, works subject to majority decision could include works eligible for grant under the Housing (Scotland) Act 2001 and Housing (Scotland) Act 1987?

Yours sincerely

Elaine Noad
Director Social Work, Housing and Health

WRITTEN SUBMISSION FROM SOUTH LANARKSHIRE COUNCIL
South Lanarkshire Council welcomes the opportunity to provide further evidence on the Tenements (Scotland) Bill following in addition to the detailed response to the Consultation Paper on 22 September 2003.

The Council generally welcomes the proposals. However there are some areas of concern, both from the point of view of a local authority and generally.
Firstly some further clarification of exactly when and how the Tenement Management Scheme comes into effect would be of assistance. It is clear that the various provisions only come into play if the title deeds are silent, or perhaps defective, on a specific point. However, in practice this is likely to cause a great deal of confusion especially to a lay person and also means that the position regarding common repairs may not be easily ascertainable from the title deeds and this could cause confusion for new owners or owners who are trying to arrange their own common repairs without a management agent or solicitor.

It is hoped that the Executive will consider further the use of mediation to resolve disputes as even though Sections 5 and 6 allow application to the Sheriff by way of Summary Application as a means to resolve disputes this is likely to be time consuming and expensive.

It is noted that the provisions contained in Section 8 concerning the duty on an owner to maintain any part of a tenement which provides support or shelter to any other part does not apply if it would not be reasonable to do so (due to age or condition of building, or cost of the maintenance). Whilst this would appear to be sensible what are the consequences for a building which has reached this stage and how does this fit with statutory obligations to maintain?

Section 15 gives the right to owners to request sight of another owner’s policy of insurance and evidence of payment of the premiums. There is no sanction available for refusal to exhibit these items and many owners may find this intrusive and be unwilling to co-operate.

The provisions relating to demolition and abandonment are likely to apply to the majority of tenement properties as most title deeds would not normally make provision for these eventualities. It is not clear how any one owner could force the sale of a tenement site after the building has been demolished, nor the tenement after abandonment, nor how they could hope to give a good title to a purchaser, particularly in an abandonment situation.

Whilst the scheme for apportionment of demolition or sale costs seems sensible, i.e. where flats of over one and a half times the floor area of others trigger a calculation by proportion of floor area rather than an equal division, it is difficult to see how this will work in practice, particularly after demolition when the flats are no longer in existence and floor area cannot be re-checked in the event of a dispute. Also what about the situation where it becomes difficult after demolition to establish the number of flats in a former tenement due to prior sub-division, amalgamation of two flats into one or simply a complex title? Detailed regulations will be required governing the calculation of floor area, who is to determine this, what happens in the event of a dispute – is a Summary Application to the Sheriff Court the only option? and how any information would be preserved following demolition.

Finally it is assumed that, in terms of Section 4 (1) and (2), that the Tenement Management Scheme (TMS) is to apply after the Development Management Scheme (DMS), in terms of Section 71 of the Title Conditions (Scotland) Act 2003, no longer applies. Given that part of the transitional arrangements for the latter Act are that any management schemes in place prior to 28 November 2004 will continue in force then this could lead to anomalies. For example if a local authority or other body is managing a tenement in terms of title conditions as at 28 November 2003 but the title conditions have already lapsed due to the time limit rules about DMS’s then it is presumed that the transitional provisions will mean that the management arrangements will remain in force (until the dismissal of the manager). However, if the final property owned by the manager in a tenement is sold after 28 November 2004 then the manager burdens fall 90 days later, which seems to preserve that, in the absence of any alternative arrangement by the owners, the TMS will apply. Similarly in any other future cases where the DMS becomes time-barred by the operation of Section 63 of the Title Conditions Act. Further clarity would be welcomed on these points as it seems to introduce potential for confusion into legislation which was designed to remove anomalies and uncertainties.

I trust that these comments are helpful and look forward to the future progress of the Bill.

Yours faithfully,

Robert McIlwain
WRITTEN SUBMISSION FROM WEST PILTON RESIDENTS ACTION GROUP

Deeds of Conditions

The draft bill does not appear to deal with the problems that affect tenement dwellers whose title is burdened by a Deed of Conditions ("DOC") registered by the property developers, be they private developers or local government. These problems arise when the developers fail to enforce the terms of the DOC against those home owners who elect to disregard them. The DOC itself provides no mechanism whereby the home owners can enforce the terms of the Deed against those home owners whose failure to comply with the terms of the Deed adversely affects the home owners’ peaceful enjoyment of their own property. Likewise, the DOC itself provides no mechanism whereby the home owners can force the developers to fulfil their obligations under the Deed. Shortly stated, where home owners fails to comply with the terms of the DOC, those home owners whose interests are adversely affected in consequence are powerless to do anything about it.

This situation is illustrated by the circumstances prevailing following the development of the West Pilton district of Edinburgh in the early 1980s. The district was divided by the (then) City of Edinburgh District Council ("CEDC") into three areas for re-development by three separate firms of contractors. The re-development took the form partly of refurbishment of existing council housing which was then sold off to private home buyers and partly new build housing on the site of open undeveloped ground or on the sites of previously demolished council property. The CEDC recorded a DOC [dated 14 June and recorded in the General Register of Sasines for the County of Midlothian on 15 June 1984] applicable to all of the property within the three areas. It contained two particular features. The first was a series of directions to and constraints upon home owners designed to preserve the amenity of the district. These include the following:

1. maintenance of the dwelling-house;
2. no erection of external aerials without City of Edinburgh Council ("CEC") consent;
3. no alterations to boundary walls or fences, nor any new openings or gates therein without CEC consent;
4. boundary walls and fences to be maintained;
5. garden ground to be maintained in a neat and tidy condition and free from all rubbish and refuse and weeds;
6. no felling or removal of any trees;
7. maintenance of external paintwork and wall rendering;
8. pets restricted to one dog per household.

Examples of numerous violations of these conditions can be found throughout the district. Amongst the worst offenders are private landlords who let out one or more properties and who have steadfastly refused to maintain either the fabric of their buildings or the garden ground in accordance with the DOC. Despite repeated calls on the local authority over the last several years to enforce the terms of their DOC against the offending home owners, they have consistently failed to take any action to enforce them.

So far as this feature of the DOC is concerned, it is unremarkable in its terms which are not dissimilar to those of many such DOCs recorded for the same purpose.

The second feature of this particular DOC is, however, quite singular. It places upon the home owners the responsibility for the maintenance, repair and renewal of all open spaces of any description (including areas of soft and hard landscaping, play areas) including the replacement of trees and shrubs, the cutting of grass etc and each of them is liable in respect of his own property for an equal share along with the other owners for the cost of maintenance, renewal and repair of the areas outwith their own individual properties. The DOC grants to the CEC the option to carry out in whole or in part such maintenance, repair and renewal but only in so far as they in their discretion may decide and always having regard to economy and in such event each of the owners shall be bound to pay to the Council in respect of his own individual property his respective share of the cost incurred by CEC.
So far there is nothing unusual in the obligations narrated. The peculiarity of the Deed lies in three unusual factors. In the first place, none of these open spaces is disclosed on the plans pertaining to the DOC or to individual home owners’ title deeds. In the second place, each home owner is liable equally for all of these open spaces, wherever they may be so that, for example a home owner in West Pilton Crosscauseway is liable for such spaces in Ferry Road Drive, and vice versa, even though they are half a mile from his dwelling-house. In the third place, the title to these open spaces is not held in common by the individual but is reserved to CEC who are empowered to do with them as they will including, for example, to build upon or develop them. In summary, the home owners are saddled with a responsibility for maintenance of ground which does not belong to them but which belongs to the CEC, over which they have no control, and whose location is unknown to them, and most of which lies nowhere near the location of their individual dwellinghouses.

In the normal case, such a condition is enacted in a DOC to preserve the amenity of an area and it is commonplace for home owners, particularly in new build estates, to find that they hold title in common with the other home owners on the estate to small areas of ground which have been set down to lawn, or laid out with shrubs, as amenity ground for the benefit of all the home owners in their immediate vicinity. These areas of ground are normally located within the immediate curtilage of the home owners’ own dwelling-houses and their precise location will be shown on the title deed pertaining to each dwelling-house. The title deed will usually contain a clause requiring such areas of ground to be preserved as amenity ground in all time coming or, alternatively, to provide that such ground cannot be disposed of for sale or development except, for example, by unanimous consent, or the consent of a majority in value. In addition, there will usually be a burden on each home-owner requiring the maintenance work to be carried out at the instance of a factor with a proviso that the cost of such work shall be borne by each home owner equally, or otherwise as the title deed may provide.

In light of these circumstances, the WPRAG would make the following submissions:-

1. It would be in the same spirit of preserving the security, amenity and value of tenement property if the bill were to make provision for the enforcement by home owners of the terms of DOCs where the local authority, private developer, or other third party entrusted with the responsibility for enforcing the terms of such deeds wilfully, or negligently, fails to do so;

2. Any provision of a DOC which purports to burden home owners with an obligation for maintenance of property which neither belongs to them individually, nor in common, and in which no common interest is perceived to exist, and irrespective of whether the location of such property is identified or not, should be treated as contrary to the public interest, or contrary to public policy, and should be proscribed by law.

Responsibility according to floor size
This provision is regarded as virtually unworkable and likely to give rise to challenge under the provisions of the Human Rights Convention. There appears to be no good reason why, if an equal share of financial responsibility is to be departed from, the pre-existing division based on rateable value (or valuation band for Council Tax purposes) could not continue to be used. In the absence of good reason for doing so, it appears to be undesirable to enlarge upon the circumstances in which a home owner is entitled to invade the privacy of his neighbour.

Summary application to the Sheriff Court
It is not clear why it is thought appropriate to make provision for summary application to the Sheriff Court rather than to the Lands Tribunal. The jurisdiction of the Sheriff Court is about to be enormously enlarged. In civil matters, there is a proposal for the Summary Cause jurisdiction of the Sheriff Court to be extended from £ 750 to £ 5,000. This is likely to result in the transfer of a very large number of cases, particularly of the lower value personal injury claims, from the Court of Session to the Sheriff Court. In criminal matters, there is a proposal to increase the sentencing powers of Sheriffs from the current maximum of 3 years’ imprisonment to 5 years’ imprisonment as a consequence of the Lord Bonomy report. The purpose of this proposal is to transfer from the High Court of Justiciary to the Sheriff Court a large number of ‘minor’ drugs offences concerned
with possession, and possession with the intent to supply. These proposals are likely to result in a very large increase in the volume of business currently conducted in the Sheriff Court. Although the Sheriff Court currently deals with many summary applications relating to heritage, the recovery of possession of tenanted property being perhaps the most common, there appear to be many advantages in granting jurisdiction over the issue of whether a proposal to effect repairs to common property is unfairly prejudicial to a home owner, for example, to the Lands Tribunal. There is no reason why the Tribunal cannot be just as effective in disposing of such applications expeditiously, and it is a much less expensive forum in which to resolve any such dispute, and its procedures are not encumbered by the formality of Sheriff Court legal proceedings so that such issues could more readily be disposed of without the need for any legal representation.
FINANCE COMMITTEE

EXTRACT FROM THE MINUTES

10th Meeting, 2004 (Session 2)

Tuesday 23rd March, 2004

Present:

Ms Wendy Alexander
Fergus Ewing (Deputy Convener)
Des McNulty (Convener)
Dr Elaine Murray
John Swinburne

Mr Ted Brocklebank
Kate Maclean
Jim Mather
Jeremy Purvis

Tenements (Scotland) Bill: The Committee took evidence on the Bill’s Financial Memorandum from—

Philip Shearer, Solicitor, Technical Unit, Scottish Legal Aid Board; and
John Blackwood, Director, Scottish Association of Landlords.

The Committee agreed to seek further clarification from the Scottish Legal Aid Board in relation to the application criteria for legal aid, in advance of its next meeting.
Tenements (Scotland) Bill:  
Financial Memorandum

12:43

The Convener: The last item on the agenda is consideration of the financial memorandum to the Tenements (Scotland) Bill. The bill was introduced on 30 January 2004 by Margaret Curran, Minister for Communities. To assist us with our scrutiny, we have with us Philip Shearer, a solicitor from the Scottish Legal Aid Board’s technical unit, and John Blackwood, director of the Scottish Association of Landlords. Members have before them copies of the submissions from SLAB and the Scottish Court Service. They also have a copy of the briefing paper from the Scottish Parliament information centre.

I invite the witnesses to come to the table. I apologise that we are running a bit later than anticipated, but members had several questions to ask during previous agenda items. Do you wish to make a brief statement to the committee?

Philip Shearer (Scottish Legal Aid Board): No—I am happy for the committee to proceed straight to questions.

John Blackwood (Scottish Association of Landlords): Same here, convener.

Kate Maclean (Dundee West) (Lab): On legal aid costs, Mr Shearer, you say in your submission: “That figure appears reasonable.” I assume that what you are saying is that the figure appears reasonable if only 50 new cases are brought a year. Based on my constituency experience, I would have thought that there would be more than 50 cases a year. The very modest figure of £80,000 a year is given for the costs of legal aid, judicial salaries and the Scottish Court Service, but if there were more than 50 new cases a year, the costs could be far in excess of that. In those circumstances, do you think that those figures are reasonable? I hope that we will be able to take evidence at a later date from Scottish Executive witnesses, who might be better able to answer our questions, but I wonder what you think of that estimate of 50 new cases a year. I can certainly think of quite a lot of people who have attended my surgeries who would take advantage of the legislation to deal with their own circumstances, which would give Dundee West a fair proportion of those 50 cases. What is your view?

12:45

Philip Shearer: I am not in a position to challenge the estimate of 50 new cases a year. You will see from the financial memorandum that the Executive estimates that only 10 per cent of those cases might be eligible for legal aid in any event.

The Convener: We are speaking to the Executive next week, when we shall have the opportunity to deal with that question.

Philip Shearer: I can really only go by the figures that have been provided. It may well be that there is a greater constituency of tenement disputes. I hope that, in my own tenement, we will not find ourselves in court as a result of any common repairs. In the wider sense, however, I can offer the committee no picture as to whether there is perhaps a wider pool of applicants who might exceed that potential case load figure.

Kate Maclean: Is the Scottish Executive’s estimate that only 10 per cent of cases will be eligible for legal aid based on information from SLAB? Do you know what it is based on?

Philip Shearer: I do not know anything about the methodology by which that figure was reached. I am certainly not aware that we were asked to provide potential figures.

Fergus Ewing: I suspect that my question is primarily one for the Executive, but today’s witnesses can address it if they wish. As I understand it, the bill will not apply to tenements where there are existing real burdens that specify schemes of repairs and where the majority of residents can require a scheme of common repairs to be carried out. What puzzles me slightly about the bill—I say this as a former practising solicitor—is that I have come across very few tenements that lack a fairly comprehensive scheme. Most title deeds set out such schemes in great, laborious, tedious and mind-numbing detail.

Perhaps it is to do with the area of Scotland in which I practised, but what puzzles me is that, in order to work out what the financial implications may be and how many court actions there may be, the starting point must be to ask how many tenements in Scotland lack an existing scheme, and the vast majority of such schemes—in so far as I have read them over the years—are perfectly acceptable. Can you say, based on your experience, what the proportion of tenements lacking a scheme may be? Do you have any impression as to whether there are more such tenements in some parts of Scotland than in others? The situation seems to me to be wholly vague and I have not found any figures in the explanatory notes, policy memorandum or any other document for the number of tenements that will be affected by the bill. I think that there will be very few indeed.

Philip Shearer: I do not really have any feel for that. My gut instinct would tend to be that the potential for litigation would most probably arise in Glasgow and Edinburgh, simply because of the
number of traditional Victorian tenemented properties. Looking at my own tenement, I feel that I have a very exacting system of burdens, and I think that my personal experience would be replicated by most people living in central Edinburgh and central Glasgow, but I really could not comment on the situation in other parts of the country.

Mr Brocklebank: Mr Blackwood, can you give us any details of how much you were taken into the Executive’s confidence when it was working out some of the figures? Do you feel that you were fully consulted and that you were able to give as much evidence as you wished to give?

John Blackwood: We were certainly consulted on the policy behind the bill. I was a member of the housing improvement task force, which lobbied for the framework of the bill, so we very much support the bill. We have not had a great deal to do with the financial memorandum, but we have no reason to argue against the costings that have been given.

Mr Brocklebank: Do you agree with the Executive’s figures? For example, the financial memorandum states that approximately 10 per cent of tenement flats are uninsured at present.

John Blackwood: We have no figures to substantiate that claim or call it into question. We believe it to be an accurate reflection.

Mr Brocklebank: The financial memorandum gives the ballpark figure of £190 per annum for insuring properties that are worth £100,000. Do you have any other figures on that, or does that figure seem about right?

John Blackwood: We feel that it is about right.

The Convener: This question has probably only a tenuous connection with the financial issue, so it may be a policy issue. The bill proposes to introduce a right of access in the context of repairs and maintenance, but people with disabilities sometimes have issues with getting into their own property. Although the Disability Discrimination Act 1995 confers on disabled people rights of access to public buildings, I am aware of at least one case in which an individual has difficulty accessing the house that they live in because the neighbours will not allow a ramp or other appropriate access facility to be built. Could the bill potentially support that such cases or would that be outside the purview of the bill?

John Blackwood: I think that that would be outside the remit of the bill, which provides access rights for repairs and maintenance rather than for improvements and alterations. That is my understanding.

The Convener: There is an interesting issue about whether the bill should incorporate such measures or whether another bill would be appropriate.

Fergus Ewing: Happily, I have not filled in a legal aid form for several years now, so I have forgotten the capital threshold limits. Would not most people who own a flat fall foul of the capital threshold limits and therefore be ineligible for legal aid? Will Mr Blackwood perhaps remind us of the broad rules governing entitlement to legal aid for actions in respect of liability in property matters?

John Blackwood: I have not necessarily had experience of accessing legal aid myself. From the landlords’ point of view, I cannot imagine that many landlords would even think that they would be entitled to legal aid. Strangely enough, I had a brief conversation earlier about possible entitlement with my colleague Philip Shearer, who would perhaps be better versed in the matter and therefore able to inform you.

Philip Shearer: Given the income eligibility levels for mortgages for properties that are currently on the market in Edinburgh and the west end of Glasgow, I suspect that, for starters, there are serious questions about whether most potential owner-occupiers would be within the income eligibility threshold for legal aid. Whether they are within the capital eligibility threshold really depends on their levels of savings, shares and so on. My gut feeling is that potential owner-occupiers of more recently purchased properties might not be financially eligible for legal aid, but each case will be assessed on its own merits. As we pointed out in our submission, that will interact with the common interest issues that will arise in potential litigation actions under the bill.

Fergus Ewing: Perhaps Mr Blackwood or someone from the Legal Aid Board could send us a note on the entitlement to legal aid for, say, a group of home owners who, having taken a decision to carry out a scheme of common repairs, want to pursue an action to extract payment from a recalcitrant owner who refuses to contribute. That would probably be the common situation. In such cases, who would receive legal aid? If the defender was unsuccessful, would there be a recoupment? Those are standard issues that should be considered in principle. I have no clear idea of how the Executive calculated its figures, but it must have been by reference to an analysis of such a process. We have a short timescale, but if the Legal Aid Board is able to help us with those issues, it would be much appreciated.

The Convener: Rather than give Philip Shearer an opportunity to respond to that question now, as there are probably three or four other technical issues that we want to clarify with both witnesses, I suggest that it might be useful to seek that clarification through an exchange of
correspondence. Obviously, we need to bear in mind our timescale, as we will want answers in time for quizzing the Executive officials next Tuesday.

If there are no further questions, I thank the witnesses for attending today’s meeting. I am sorry that you were kept waiting a wee while, but I thank you very much for your useful evidence.

Meeting closed at 12:55.
FINANCE COMMITTEE

EXTRACT FROM THE MINUTES

11th Meeting, 2004 (Session 2)

Tuesday 30th March, 2004

Present:

Ms Wendy Alexander                              Mr Ted Brocklebank
Fergus Ewing (Deputy Convener)                 Kate Maclean
Des McNulty (Convener)                         Jim Mather
Dr Elaine Murray                                Jeremy Purvis
John Swinburne

Tenements (Scotland) Bill: The Committee took evidence on the Bill’s Financial Memorandum from—

Joyce Lugton and Hamish Goodall, Justice Department; and Edythe Murie, Legal and Parliamentary Services, Scottish Executive
Tenements (Scotland) Bill: Financial Memorandum

10:57

The Convener: Item 2 is further consideration of the Tenements (Scotland) Bill. I welcome Executive officials to the meeting. Joyce Lugton and Hamish Goodall are from the Scottish Executive Justice Department, and Edythe Murie is from Legal and Parliamentary Services.

Members have a copy of additional information that we received from the Scottish Legal Aid Board following its appearance before the committee at the previous meeting. As the officials do not want to make any opening remarks, we will move on to questions.

Fergus Ewing: I used to spend a huge amount of time studying title deeds for tenement flats. In almost all cases, the title deeds stipulated a scheme for common repairs and improvements. I might have missed it but I could not find in the Executive’s papers its estimate of the number of tenements that do not have in their title deeds a scheme governing repairs and their execution.

Joyce Lugton (Scottish Executive): My answer will be fairly lengthy, if the committee will bear with me. There is a wide variety of title deeds and Fergus Ewing is right that most will include some provision for maintenance and management.

Generally speaking, title deeds executed before 1820 or thereabouts will not include any such provision, but any executed after 1820 will have some provision for maintenance. However, Victorian title deeds are unlikely to include provision for management of a tenement, which only started to come in at around the turn of the last century. Therefore, there is a sort of continuum in the development of title deeds.

Victorian title deeds commonly set out schemes for maintenance and say who would be responsible for the maintenance of which common parts and so on, but they do not include provision for decision making. Therefore, although they are clear about who would have to pay, they are not clear about how a decision would be made on whether a repair was necessary.

11:00

The Tenements (Scotland) Bill tries to plug the gaps so that the entire bill, more or less, will apply to tenements that date from before around 1820 and which includes provision for neither maintenance nor management. Where the title deeds for Victorian tenements include provision for maintenance obligations but none for decision
making, that gap will be plugged. In later title deeds, it is less likely that there will be gaps, so the tenement management scheme in the bill will be used less often, but it will plug whatever gaps there are. That is the general background picture.

You also asked for some sort of quantitative answer, and the answer is that we really do not know. The number of tenement flats in Scotland is in excess of 800,000. We do not know how many of them have title deeds that do not cover all of what are regarded as desirable conditions. In a way, the bill is drafted as it is so that it will plug the gaps that exist.

**Fergus Ewing:** I am most grateful for that interesting answer. If I had a clearer recollection of Professor Halliday’s conveyancing notes, I should have remembered much of it anyway.

We are obviously concerned with the financial implications of the bill and I asked my question for the simple reason that I was trying to work out on what assumption the estimates of the financial costs were based. You can correct me if I am wrong, but I thought that they would be based in part on the number of tenements lacking provision for repair and maintenance, which will now become subject to such provision. Was that part of the methodology?

Perhaps you could explain the methodology used in estimating the costs, which are not great and which largely involve court service costs and judicial salaries, as set out in paragraphs 162 and 163 of the financial memorandum, and legal aid costs of £60,000 relating to court actions, as set out in paragraph 164. Perhaps I have fundamentally misunderstood the methodology underlying the allocations in those estimates.

**Joyce Lugton:** At present, there are tenement disputes that may or may not lead to court cases, and the fundamental point is that the bill will not add to their number particularly. Sections 5 and 6 of the bill are about specific court cases that might arise from the bill. Section 5 deals with the situation in which a majority in a tenement has taken a decision and the minority of owners who do not agree with that decision want to challenge it. However, the grounds for the sheriff finding in favour of the minority will be very restricted. There will be two grounds for such a finding. The first ground is that the decision taken by the majority was not in the interests of all the owners of the tenement. The second ground is that the decision taken by the majority was unfairly prejudicial to one or more of the owners. Those are quite high tests and we think that it is quite unlikely that section 5 will lead to many cases.

Section 6 deals with procedural matters and is quite technical. Again, we think that it is unlikely that there would be many cases under that section. However, what you may have in mind is the more general situation of a dispute in which the majority of owners want to pursue a repair but others simply do not agree. We do not think that that will lead to any more court cases arising out of tenement disputes than there are at present. At the committee’s previous meeting, which we attended, Kate Maclean said that the whole allocation that we had suggested was likely to be taken up among her own constituents. We would be interested to hear from Kate Maclean—if that does not tread on anyone’s toes procedurally—which cases she thinks might arise as a result of the bill and why she thinks that there might be a large number of them.

**Kate Maclean (Dundee West) (Lab):** I am not sure that I suggested that my constituency would take up the whole allocation, but it would certainly take up more than its percentage share as one of the 73 constituencies. In a few areas in Dundee, the owners of old tenement properties want works to be carried out, but considerable numbers of absent landlords do not. The bill might result in more court cases than there are at present because it will give people more rights under the law. I would have thought that solicitors might advise their clients that the bill meant that there would be more point in taking a case to court.

**Joyce Lugton:** Essentially, the bill gives the majority in a tenement the right to take decisions. That will replace the common-law position, which requires a unanimous decision. However—this is quite technical stuff—if the title deeds include provision for how decisions should be taken, that provision will take precedence. If we assume that the title deeds do not include such provision, which may be the case in older tenements, a majority will be able to take a decision to go ahead with a repair.

Just because a majority takes such a decision, that does not necessarily mean that there will be a court case. Indeed, it is to be hoped that no court case would result. Under the bill, if a majority decides to go ahead with a repair, the minority will have no defence in law against that decision, unless they want to challenge it under sections 5 or 6, which we discussed.

We are fairly sceptical about there being any cases as a result of the provision. The recalcitrant owner who does not want to pay up will not have a defence. Presumably, there might be an exchange of solicitors’ letters but at some point along the line the recalcitrant owner will receive advice that he has no defence. Therefore, it must be doubtful that the recalcitrant owner would take the matter to court.

**Kate Maclean:** There might be particular local circumstances. For example, if the recalcitrant owners have not just one individual property but
large numbers of properties in a certain area, they might find themselves faced with large bills and so decide that it would be worth spending money to try to fight the cases in court.

Joyce Lugton: Would such owners be majority owners within a tenement?

Kate Maclean: No.

Joyce Lugton: In that case, the fact that they owned a large number of tenement properties would not necessarily persuade them to go to court because each court case would be concerned with an individual tenement. In each case, they would be likely to lose if they went to court.

The Convener: The bill requires all flat owners to insure against a list of risks. How will those insurance requirements be monitored and enforced? What penalties will be applied to people who do not comply with them?

Joyce Lugton: Enforcement rights will lie with the other owners, who will be allowed to ask to see their neighbour’s insurance policies and evidence that the premiums for those have been paid. Although the Executive and the housing improvement task force—which fed in its thoughts as the bill was drawn up—considered other methods of enforcement, we concluded that enforcement should be left with the other owners because it was difficult to conceive of an external body knocking on people’s doors in tenement blocks to demand proof that people had kept their insurance premiums up to date and that they had insured themselves to the right levels. Local authorities would have been an obvious enforcement body, but that would have placed a very onerous duty on them.

The Convener: Although it might happen, I find it unlikely that people would begin close meetings by asking to see one another’s insurance policies to find out whether they have been paid for. On a linked issue, is there any provision in the bill for enforcing payment of repairs by those tenants who were against the repairs being carried out?

Joyce Lugton: Could you repeat the question? I did not quite hear it.

The Convener: Is there any provision in the bill for enforcing payment for repairs by those owners who were against the repairs being carried out, or is that a matter for the other owners?

Joyce Lugton: That is as has been discussed: a crunch decision would have to be made when the funds were gathered for a repair. If a majority decided to go ahead with a repair, they would demand payment from those who did not agree with it. Eventually, after pursuit through solicitors’ letters and so on, that might lead to a court case, but it is very much to be hoped that things would not go that far.

The Convener: Was consideration given to the possibility of some small court dealing with problems in tenements, as opposed to people having to take such issues into the mainstream court system?

Joyce Lugton: Consideration was not given to referring matters to a small court as such. However, consideration was given to the possibilities of arbitration or mediation. The Executive is very much in favour of mediation being used in such disputes. Consideration was given to including a provision on mediation, so as to encourage people to engage in a mediation process before the matter reached the sheriff court.

It has been decided, however, that it would be better to approach mediation in a more generic way. Tenement disputes are only one of a number of types of civil dispute. The intention is to encourage mediation through, for instance, the training and accreditation of mediators, through a cross-sectoral approach. It is hoped that that will be developed, although not through the Tenements (Scotland) Bill. One possibility that is being considered is that of sheriffs, in considering cases, taking into account whether a mediation process has been gone through before making an award of costs.

Jeremy Purvis: Did you consult registered social landlords in advance of the publication of the bill and the financial memorandum?

Joyce Lugton: I do not know that we consulted registered social landlords.

Hamish Goodall (Scottish Executive Justice Department): We consulted local authorities and the Scottish Federation of Housing Associations. We sent consultation papers to most of the people who received the final report of the housing improvement task force. A lot of those people will be registered social landlords.

Jeremy Purvis: There are many tenement properties in my constituency that an RSL might own, although they might form the minority of owners in a tenement. The RSL could be compelled to carry out repairs but, as we know, they have finite resources. One outcome of the bill might be that social landlords, rather than private landlords, may have to contribute to repairs. Such repairs would be separate from landlords’ business plans for the repair and development of their own properties. That is why I asked the question.

Joyce Lugton: The bill contains some safeguards for RSLs. First, the bill defines “maintenance”—it is not just what people might think would be nice to do. Secondly, improvements are specifically excluded from the tenement management scheme. It is more that necessary repairs and maintenance are covered.
We have consulted the Convention of Scottish Local Authorities about the possibility of comprehensive insurance for local authority property of a tenemental nature. We are certainly pursuing the question of comprehensiveness with COSLA. However, as I said, there has not been a complete response. The figure of 10 per cent is based on evidence that we received from the Association of British Insurers.

The Convener: Ted Brocklebank will ask the final question.

Mr Brocklebank: Would you be good enough to guide us through some of the legal aid implications that are involved? I think that the estimated costs were associated with an additional five cases being granted legal aid per year, but in evidence to the committee, the Scottish Legal Aid Board has questioned whether the number of cases would amount even to five. I think that the point that it made is that an application for legal aid may be considered alongside the financial situation of all the others who are concerned in the block. It follows that if only one flat owner in a tenement is eligible for legal aid, that aid might not be granted and the total costs would fall on the other owners in the tenement, which might turn out to be a disincentive for making use of the bill. Extra costs might be involved for the majority of the flat owners.

Joyce Lugton: I am not really qualified to speak about eligibility for legal aid—I think that you have already spoken to the legal aid people. I hope that the possibility of court costs—and legal costs in general—would not act as a disincentive to people using the bill for its policy purposes. If a majority were to decide to go ahead with a repair, the minority would have no defence in law, and that would itself act as a disincentive to the minority taking legal action to pursue the matter.

The bill's intention is to make it easier for repairs to go ahead in tenements, by virtue of majority decision taking. It is not envisaged that it would lead to a great increase in legal actions and it is to be hoped that the question whether some people in a tenement might have to pick up the tab if others could not qualify for legal aid would not hinder the bill's policy objectives in any way.

Mr Brocklebank: My point was that those who initiated legal action but who were not awarded legal aid and would therefore not be responsible for paying for the action might inflict that legal action on the majority, who might decide not to go to law over the matter because of the costs. That might lead to tensions in a block.

Edythe Murie (Scottish Executive Legal and Parliamentary Services): Under the bill, the decision to sue would not be a scheme decision. It
would be for each owner, not the majority, to decide how to pursue the rights and obligations that the bill would confer. Most tenements currently have schemes of burdens that confer rights and obligations which, as far as I am aware, do not generate a huge amount of litigation. We hope that the bill, by clarifying rights and obligations, would in some cases reduce the scope for litigation.

The Convener: On behalf of the committee, I thank the witnesses for coming along to answer our questions.
WRITTEN EVIDENCE SUBMITTED TO THE FINANCE COMMITTEE

SUBMISSION FROM THE SCOTTISH COURT SERVICE (SCS)

Further to your letter of 8 March Inviting Mr Ewing, Chief Executive to give evidence to the Finance Committee this is to confirm that as our interest in the Bill is minimal he declines the invitation.

It is anticipated that approximately 50 applications per annum may be lodged and on this basis we have submitted an estimate of £15K for judicial salaries and £5K for running costs in the financial memorandum.

Patricia Fiddes
Personal Assistant to Chief Executive

SUBMISSION FROM THE SCOTTISH LEGAL AID BOARD

INTRODUCTION

The Scottish Legal Aid Board (“the Board”) welcomes the opportunity to provide evidence to the Finance Committee on the Tenements (Scotland) Bill. The Board’s comments are limited to the legal aid implications of the Bill.

EVIDENCE

Sections 5 and 6 of the Bill allow owners of flats to apply to the Sheriff by way of summary application to annul certain decisions and resolve disputes. An appeal would lie to the Court of Session on a point of law. These are civil proceedings for which civil legal aid could be sought.

However, applications to the Sheriff, and any appeal from the Sheriff’s decision, relate to disputes concerning more than one owner of a flat. This raises questions of an applicant for civil legal aid having a joint or common interest with the other proprietors. Joint or common interest could apply to both pursuers and defenders.

Where the Board considers that an applicant for civil legal aid is jointly concerned with or has the same interest as other persons in the matter for which legal aid is sought, the Board is required by regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 to refuse the application if it is satisfied that:-

(a) the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted; or

(b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted.
Since the matters before the court, both at first instance and on appeal, will concern decisions taken by a number of proprietors or disputes over matters such as common repairs, it appears to the Board that applicants for civil legal aid may well fail the test in regulation 15 in which case legal aid will be refused. The Board has no discretion where it is satisfied that the criteria in regulation 15 are met.

FINANCIAL MEMORANDUM

The issues discussed above may affect the number of applicants who can be granted civil legal aid. The Scottish Executive estimates that only 10% of the 50 Sheriff Court cases will attract legal aid. Legal aid costs are estimated to be £60,000. That figure appears reasonable.

Philip Shearer
Solicitor - Technical Unit

SUBMISSION FROM SCOTTISH LEGAL AID BOARD

In our submission to the Committee, we explained the effect of regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. The financial situation of the other proprietors could be one of a number of factors which might be presented in a joint or common interest situation. If, having looked at the circumstances of a case as a whole, we reach the conclusion that the criteria in regulation 15 are met, we would have to refuse the application for civil legal aid.

If we did so, the cost of the case would fall on the other proprietors. I am afraid that I cannot give an indication of the likely cost of litigation of this nature to privately paying clients. However, I can advise the Committee that the average cost to the Scottish Legal Aid Fund of a legally aided Sheriff Court case was £1,854 in 2002/2003. A privately paying client might well be required to pay significantly more than that sum.

I am afraid that I cannot provide the Committee with any further information regarding the numbers of previous applications for civil legal aid involving a similar subject matter. Equally, I cannot give the Committee any indication of the number of cases where the joint or common interest criteria have been satisfied, although I understand that applications where such factors arise are not particularly common.

I am sorry that I cannot be more helpful on this occasion. However, should the Committee wish any further assistance, I will be happy to oblige.

Philip Shearer
25 March 2004
Tenements (Scotland) Bill – Stage 1: The Minister for Communities (Ms Margaret Curran) moved S2M-848—That the Parliament agrees to the general principles of the Tenements (Scotland) Bill.

After debate, the motion was agreed to (DT).
Tenements (Scotland) Bill: Stage 1

The Deputy Presiding Officer (Murray Tosh): The next item of business is a debate on motion S2M-848, in the name of Margaret Curran, on the general principles of the Tenements (Scotland) Bill.

15:01

The Minister for Communities (Ms Margaret Curran): I am delighted to move the motion to approve the general principles of the Tenements (Scotland) Bill. As there are more than 800,000 tenement flats in Scotland, the bill will affect a very large number of Scots and should improve their lives.

The bill represents the third and final stage in the Executive’s current programme of property law reform and follows the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003. This package of reforms will modernise an outdated and old-fashioned system of land ownership and replace it with a modern and clear system. I know that the Parliament would wish to acknowledge the diligent and exhaustive work of the Scottish Law Commission, which prepared the draft bills on all three property law reforms.

I also take this opportunity to thank the parliamentary committees that have examined the bill during its progress to date. As members will no doubt demonstrate this afternoon, some of the issues are quite technical and I think that all members will agree that the Justice 2 Committee has produced an excellent report.

Michael Matheson (Central Scotland) (SNP): Hear, hear.

Ms Curran: Absolutely. I am delighted that the committee has endorsed the policy behind the bill.

As everyone will know, the bill has two main aims. First, it restates and clarifies the common-law rules on the ownership of the various parts of a tenement. Secondly, it introduces a statutory scheme known as the tenement management scheme for the management and maintenance of tenements. However, the scheme will apply only as a default arrangement. After all, many existing tenements have perfectly good arrangements that are suited to the building’s particular nature. Scotland has an infinite variety of tenements and the deeds that are drawn up take into account the different circumstances of particular tenements.

Similarly, developers in future need not be constrained by a rigid set of rules, but can be comforted by the knowledge that the tenement
management scheme will underpin gaps or deficiencies in titles. The tenement management scheme will complement the title deeds to the property and ensure that any important gaps or inadequacies are plugged. As a result, I am glad that the committee has recognised the importance of free variation of the title deeds as well as the vital role that the tenement management scheme will play in the future maintenance of the tenement stock in Scotland.

I will now refer to some of the detailed observations on certain aspects of the bill made in the committee’s stage 1 report. As I have said, some of the points that were raised are quite technical and it will not be possible for me to comment on all of them this afternoon. However, we will write to the committee on other matters, including those that relate to legal aid regulations and the duty to provide support and shelter.

The committee discussed the service test in great detail. The service test simply means that ownership of the common parts of a tenement will depend on which flats they serve. In that context ownership is important, because someone who owns a share in a part of the tenement is obliged to pay a share of any maintenance costs.

The committee expressed concerns about an owner who might be required to contribute to the upkeep of a part of a tenement even if he or she no longer uses it. For instance, if someone blocks up a fireplace, will they still be obliged to contribute towards the upkeep of the chimney? My advice on the matter is that there is a difference between use and service. If an owner voluntarily chooses not to make use of a part of the tenement, that should not exempt him or her from responsibility for its upkeep, as the flat will still be served by that part.

I turn now to small tenements. In the light of evidence given at stage 1 and the committee’s clear concerns, we have looked again at the provisions that cover the requirement for unanimity under the rules of the tenement management scheme for tenements with three or fewer owners. We accept the argument that the provisions might prevent owners in smaller tenements from getting repairs carried out. We intend to lodge an amendment at stage 2 that will allow a majority of two, in a tenement of three owners, to reach a scheme decision.

The committee has expressed very considerable concerns about section 11 of the bill. The section provides that an incoming owner will be liable, together with the seller, for any costs, for example, of maintenance or repairs. So, if the flat is sold and there is an outstanding liability for work, the owners of the other flats would be able to choose whether to claim the money for the sold flat’s share from the seller or the buyer.

Despite the legal language of the section, the scenario is easy to imagine. The owners in a tenement agree to carry out a repair. The work is done and the bills come in but, in the meantime, one of the owners sells their flat and disappears without leaving a forwarding address. Who is to pay for that share of the repair? At present, the law provides that the seller is responsible. If the other owners cannot trace the seller, they may well have to pay that share. The bill would give them a further option—to pursue the incoming buyer for the costs.

Some members of the committee clearly felt that the purchaser could be faced with a nasty shock if the seller failed to disclose liabilities. They argued that there should be greater protection for the incoming owner. One option that was suggested to the committee was that the other owners should be permitted to place a notice in the Registers of Scotland, which would alert an incoming purchaser to the fact that there was an outstanding repair.

As members will be aware, this is a complex issue. Although the cost of registration is likely to be modest, there would also be associated legal costs, and owners might just not bother with a notice. The other owners in a tenement are perhaps less well placed to pursue the absconding owner than is the new owner, who at least has some bargaining power during the sale process. The option of placing a notice has implications for the Registers of Scotland and might have the effect of cluttering them up.

It may be worth remembering the purpose of this proposed change in the law: it is intended to protect the responsible owners in a tenement who instruct maintenance but are left out of pocket when an owner absconds.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I hear what the minister is saying and I understand that this is a complex issue, but is that complexity not a reason for introducing something that is more simple—such as maintenance funds or building funds—to cover possible problems of changing ownership?

Ms Curran: I will finish the point I was making and then, I hope, address that point directly.

Because of the high turnover of tenement flats, repairs often do not get carried out—partly because some owners fear that they will be faced with a higher proportion of the repair bill when other flat owners sell up and move away without paying their share. Our proposed change has a worthwhile objective that might be threatened by the changes that the committee suggests. However, the matter clearly merits further consideration, so the Executive would like to...
consider it further in the light of the arguments that may be heard during stage 2.

When we consider the different options, we will consider the option that Cathie Craigie has mentioned. This bill may not be the legislative vehicle for that—indeed, legislation may not be required—but I would have to take advice on that. However, if we are to address the challenges that the committee has pointed out, her suggestion might be one option that we would consider with the committee at stage 2. Obviously, we do not want to create further complexities.

In its report, the committee expressed concerns about rule 3 of the tenement management scheme, which provides that, where payments for maintenance work have been collected from owners in advance, an owner can request repayment if the work does not commence within 14 days of the proposed date of commencement. The committee suggested that the tenement management scheme should provide for a “refund date”, which would be chosen by the owners. We think that that is a sensible idea, but we also think that there should be a default position in case the refund date is overlooked when the arrangements are made for a repair. We propose to amend the bill so that owners can request repayment only if the work does not commence before the refund date or within 28 days of the proposed date of commencement.

Those have been the main matters on which we think it will be necessary to amend the bill, but we will also be making a number of technical amendments at stage 2.

There remains one formal matter for me to mention. For the purposes of rule 9.11 of standing orders, I advise the Parliament that Her Majesty, having been informed of the purport of the Tenements (Scotland) Bill, has consented to place her prerogatives and interests, so far as they are affected by the bill, at the disposal of the management scheme for the purposes of the bill.

**Linda Fabiani (Central Scotland) (SNP):** That is okay then.

**Ms Curran:** I move,

That the Parliament agrees to the general principles of the Tenements (Scotland) Bill.

**15:10**

**Nicola Sturgeon (Glasgow) (SNP):** I will resist the temptation to echo the comments of my colleague Linda Fabiani.

As the minister has said, the Tenements (Scotland) Bill is a highly technical bill—although Michael Matheson has just informed me that he has found some juicy bits on which to comment when he sums up. They eluded the Justice 2 Committee in its scrutiny, so I wait to hear what they are.

I would venture to call the bill dry, but I would probably be shouted down by Annabel Goldie who, as a former conveyancer, frequently found herself in raptures of delight and excitement as we considered weighty issues such as whether the ownership and management of a chimney flue should be different from that of a chimney stack. I know that that is something that the minister, with her encyclopaedic knowledge of the bill, will want to comment on at some length during the debate. I look forward to hearing her clarify that important point.

To be serious, the bill is technical, but that should not mask its importance to hundreds of thousands of Scots. The fact that a quarter of all the housing stock in Scotland consists of tenement properties means that a considerable number of people live in them. When most people think of a tenement, they think of the traditional sandstone variety—the kind that was inhabited by the Broons, for example—but tenements come in many shapes and sizes. Most of them are residential properties, but office blocks also fall within the bill’s definition of a tenement.

Tenement properties raise issues of ownership and management that do not arise with other types of property, such as who owns the close stairs and who is responsible for paying for roof repairs. Those questions are familiar to anyone who has owned a flat. At the moment, such matters are governed by common law—which, as always, is open to interpretation and dispute—and the real burdens in title deeds, which are specific to the individual properties. Very often, the title deeds will make it crystal clear what the rules are about who owns what and who is responsible for what when things go wrong. However, it is perhaps more often the case, particularly with old tenement properties, that the rules are anything but clear. That is why I think that the bill is necessary.

The bill is an important step forward in the development of property law in this country. As the minister has said, it seeks to do two things—to clarify the current common-law rules and to set out a set of rules for the maintenance and management of tenements. I want to emphasise a point that the minister touched on. There is nothing in the bill to prevent the continued use of title deeds to determine issues of ownership and management in individual tenements. The bill simply provides a default scheme that will operate in cases in which the title deeds are silent, confused or deficient in some way.

The Justice 2 Committee considered that point in some detail; indeed, we changed our minds on it in the course of our stage 1 scrutiny and...
concluded that such an approach was right, because it will give owners of existing tenements or developers of new tenement buildings the right to frame rules that are appropriate for the property in question. It will also give protection to owners—usually existing owners—in situations in which the title deeds are deficient.

The committee agreed with most of the bill’s key provisions, such as the use of a service test to determine ownership of items such as water tanks, chimney stacks and fire escapes. The basic rule is that such items are owned jointly by all the flats in a tenement that are served by them. That is a sensible approach, although, as the minister has said, an issue arose from that, which I think still bears some clarification. What would happen if, one by one, all the owners in a tenement block disconnected their flats from the water tank so that no one was served by it? Who would then be responsible for the maintenance of the tank? The minister has given some useful clarification today in that she has said that service and use are not necessarily the same thing, but I am still not entirely convinced on that point. It might be useful to have some express clarification of that in the bill, to put the matter beyond doubt. We were also satisfied with the concept of scheme property that is laid out in the tenement management scheme, which the minister has outlined.

As with any bill, there were some issues of concern, most of which were minor. However, I will finish on the one that was a substantial area of concern. It has already been touched on: the joint and several liability for unpaid debts between a seller and a buyer. Situations will arise in which the seller does not advise a buyer of the debts, the buyer buys in blissful ignorance of them, the seller disappears into thin air and cannot be traced and the buyer finds themselves carrying the can. That is unjust and unacceptable. I accept that the answer to it is not easy and that the policy intention to protect responsible owners is sound, but an innocent buyer, who may be a responsible person, should not find themselves in such a situation. I welcome the Executive’s commitment to consider the matter further, and I hope that it is prepared to use some imagination to come up with a solution.

The bill is good and necessary. It is important for many people and I am glad to support it at stage 1.

15:16

Miss Annabel Goldie (West of Scotland) (Con): There is no doubt that, when it comes to political excitement and passion, the Justice 2 Committee lives life in the fast lane and is at the van—the cutting edge—of thrills and political unpredictability. The Tenements (Scotland) Bill helped us to maintain that racy pace. As Nicola Sturgeon indicated, many an afternoon was happily whiled away mulling over the delights of chimney heads, stacks and flues and other riveting integral parts of tenemental property law.

It would be wrong to say that the exercise was one only for the conveyancing anoraks because, as the minister and Nicola Sturgeon have already indicated, the bill is a watershed in conveyancing law in Scotland. I, too, not only thank the minister for her warm words about the committee and its preparation of the stage 1 report, but pay tribute to the early work that the Scottish Law Commission did on drawing up the bill and thank my fellow committee members and our clerks for their robust work on the stage 1 perusal of the bill.

My party supports the principles of the bill and considers it to be an important piece of progress, but I will comment briefly on some specific matters. I am glad that the principle of free variation has been recognised. Some people were nervous that the bill would seek to be prescriptive and didactic and to lay down compulsory measures rather than say that it is sufficient if the title deeds do the job adequately. It is right that, if that principle fails, the bill should step in.

The minister specifically mentioned three points and I am comforted by what she said. I look forward to seeing the amendment on small tenements, but I think that it will remove a possible unfairness and anomaly.

The question of a purchaser’s liability for repairs is perplexing. I noticed that, when the minister referred to the possibility of registering a notice against a title, she said that it was complex, but I argue that it need not be complex. There is a precedent for it: in circumstances in which local authorities have carried out mandatory repairs under statute, notices are recorded against the titles of all the flats, which mean that no seller can give a good title without discharging the debt. It is not rocket science; it is a fairly straightforward procedure, and I urge the minister to consider that carefully.

Cathie Craigie raised a good point about a sinking fund, or what would be more colloquially described in the trade as a float. That is how many factors operate; there is a practice whereby, when somebody purchases a flat in a tenemental property, they are required to contribute a sum up front as a float to deal with on-going repairs without a debt arising or continuing. Therefore, it is possible to contemplate a scenario in which, to protect the hapless purchaser—who is totally dependent on a seller’s honesty—from being led up the garden path and having a bill that has nothing to do with them foisted on them, protection is afforded for repairs over a certain level. The
mechanism for doing that need not be complicated.

I am comforted by the comment that was made about the proposed amendment on the return of moneys. That issue gave rise to interesting discussion among all members of the committee. We saw what the bill was aiming at but felt that in practice it might achieve unfairness. It tends to be the case that no factor will instruct a contractor to carry out repairs until the factor has all the money in his or her hands, so before that point there is no commencement date. There is something of a chicken-and-egg situation—what comes first? Although people may want to talk about a commencement date, they do not have that in their hand until the contract is instructed. That is why the committee thought that it was sensible to distinguish between a commencement date and a genuine refund date by which a proprietor would be entitled to recover moneys if there had been an unacceptable delay. I look forward to seeing the proposed amendment.

I also raised the issue of insurance. The bill seemed to make it mandatory for proprietors to have common insurance when perfectly adequate individual flat insurance might be in place. The committee regarded that as a slightly unwelcome usurping of adequate arrangements and, for that matter, of individual proprietorial rights to make such arrangements. Under the bill, proprietors are required to make arrangements, but there seemed to be an attempt to impose a common insurance policy en bloc, which might not be necessary.

Subject to those comments, I applaud the bill, which represents a significant step forward. I look forward to seeing the amendments that will be lodged at stage 2.

15:21

Margaret Smith (Edinburgh West) (LD): It is a pleasure to follow that well-known danger seeker, Annabel Goldie. Mike Pringle is away being enlightened by the Dalai Lama, while I am here being enlightened on tenement conveyancing by the members of the Justice 2 Committee. I will leave members to make up their minds about who the members of the Justice 2 Committee. I will leave members to make up their minds about who has the best afternoon of it. I am sorry that I will be unable to engage in witty repartee with other members about water tanks and chimney flues, but I will do my best to read Mike Pringle’s speech.

The bill is a long time in coming. The first discussion paper on the law of the tenement was published in 1990 and the Tenements (Scotland) Bill forms the third and final part of the programme of property law reforms that was recommended by the Scottish Law Commission and which the Executive, rightly, has advanced. It will ensure that all tenements, modern flats and high-rise office blocks in Scotland have a proper management and maintenance scheme.

The bill sets out a framework for regulating the responsibilities and duties of private owners who share a building. It does not quite get down to the level of who cleans the stairs, which was always the big issue when I lived in a tenement, but it provides clarity about who owns which parts of a tenement and who is responsible for which repairs. For example, if the roof needs fixed, who will decide what, who will get estimates and engage contractors, and how will funds for the repair be collected? The bill will provide answers to those practical questions. I understand that by the time the final draft of the committee’s stage 1 report came to be considered, there was almost complete agreement among members, which is to be welcomed. The issue is not particularly controversial, but it is important to the many hundreds of thousands of people who live in flatted accommodation in Scotland.

I am sure that there will be a fair amount of agreement about much that has already been or will be said in the debate, so I will highlight just a few points.

During the first meeting on the bill, at which evidence was taken from the bill team, it became apparent that the way in which tenements are dealt with in Edinburgh is different from what happens in the rest of Scotland. Edinburgh is unique in Scotland, in that there is a distinct local act that governs tenements there—the City of Edinburgh District Council Order Confirmation Act 1991. Under the act’s provisions, the City of Edinburgh Council can be proactive about statutory notices and is not tied to grants and/or loans. The former convener of the housing committee of the City of Edinburgh District Council, who is sitting in the front row of the chamber, will remember that only too well. Because of the 1991 act, the City of Edinburgh Council has a good record of being proactive in relation to statutory notices.

Of course, not all local authorities can take advantage of the act. We are pleased that, in her evidence, the Deputy Minister for Communities stated on the record that the passage of the bill will do nothing to change the way in which the City of Edinburgh Council approaches its statutory notice scheme, except in one important way. If the title deeds are silent and an issue comes under the tenement management scheme, in future only a majority decision, rather than a unanimous decision, as at present, will be required for a statutory notice to be pursued.

Edinburgh is different in one other significant way. In old, traditional tenements, factors did not operate. That is different from the situation in Glasgow, where the practice is common. Under
the tenement management scheme, factors will be involved where they do not exist at present. I have already referred to the tenement management scheme. The committee agreed with the approach taken in the bill, which is to make it a default scheme that entirely respects existing title deeds.

As I said, I will not get involved in discussions about water tanks or chimney stacks, but I will address the issue of costs, which is dealt with in section 11. As we have heard, a buyer of a tenement is all too often left with an outstanding bill that the seller failed to disclose. That point was well illustrated by Ken Swinton of the Scottish Law Agents Society. He gave an example from his own experience of buying a flat for £24,000 and finding out following the purchase that there was an outstanding bill for £20,000 on the tenement. In law, the buyer can take action against the seller, but they must know where the seller has gone. There would be no right of action against the solicitor if they had asked the right questions. The committee was rightly concerned about that matter as it is very unfair to the purchaser. We are glad that the minister recognises the force of the concerns that the committee had and that she has agreed to consider the issue further.

As a former Registers of Scotland employee, I was interested in the minister’s comments about the Registers of Scotland. I certainly see some form of registration as being quite an effective option in resolving an unfair situation for the hapless buyer—it certainly was for Edinburgh tenements. A charge would appear on the sasines in respect of orders—I spent several years of my life looking at them. Such registration would be a doable proposition and I ask the minister to take that forward, if she can, with the Registers of Scotland.

I also welcome the fact that the minister has agreed to consider further sections 16 to 20, which cover the demolition and abandonment of tenement buildings. The Scottish Law Agents Society was concerned about the definition of a site to be sold in that it seemed that only the solum and the air space directly above, but not the garden grounds, were included in the section. The result might be the creation of a ransom strip, which could be used to block further development on a site.

The bill is very much a positive step forward. It will help to solve many of the problems that have existed in the past and it will be a positive addition to the Executive’s programme.

15:27

Pauline McNeill (Glasgow Kelvin) (Lab): We have all clearly missed out on the debate that the Justice 2 Committee has had in the past few weeks.

I have a strong interest in the bill as I represent a constituency in which 89 per cent of owners and residents live in flats—that figure includes maisonettes and apartments. That is not very good when it comes to an election: it is good for my fitness, but it is not necessarily good for my health.

A great proportion of constituents in Glasgow Kelvin live in tenement accommodation. I have had my share of leaky roofs and arguing with neighbours about who is responsible for repairs, and I have certainly had my fair share of dry rot. I have a lot of personal experience of the issues involved in living in a common building. It is easy to forget that, although we may own only part of the building, important issues must be dealt with on a common basis.

That is why I welcome what the Executive is doing with this bill on the law of the tenement and what it has done in previous legislation—I believe that the bill is part of a tripartite approach—which included legislation on feudal tenure and title conditions. I welcome the introduction of a framework for tenement management schemes and long-term maintenance funds—those two features of the bill must be welcomed wholeheartedly.

I have never believed that law reform in itself will be enough to address the problems in tenement properties. Many buildings in my constituency are well over 100 years old and I have always believed that many owners of such buildings do not appreciate that they have taken over a building that may have been in disrepair for much of that time.

When we move into a new property, we are probably all guilty of looking at the superficial aspects. When most people move into a property they think about how they will furnish and paint it. A minority look at the state of the window sills or go around seeking dry rot—who would want to do that? There has to be a culture change in our approach to property, in particular common property.

I am a little concerned that, as a result of the reforms, an innocent owner might be caught up in dealing with disrepair that dates back a long time. That is why the housing improvement task force is one of the Executive’s most innovative measures in housing. The bill is part and parcel of the Executive’s work through the task force.

We have all had experiences of good and bad factors. There is no legal requirement to have a factor, but a good one can certainly help to ensure that someone takes responsibility for co-ordinating what needs to be done, in particular common
repairs. It would be worth spending a bit of time considering how we might address the need for quality factoring.

On majority voting, I do not disagree that we should depart from the law as it currently stands, and I agree that we should proceed on the principle of free variation. However, in Anderston, which is another area that I represent, owners complained that, when majority voting took place, they were outvoted by agencies such as the former Scottish Homes, which had large resources. People said that they had to proceed with replacing a roof, for example, although they did not have the resources to do so and said that they were not faced with a straightforward situation in which all the owners in a block would vote. It might be worth thinking about whether majority voting is fair in those circumstances.

Something needs to be done about the duties of absentee landlords, which is an issue in my constituency, where several buildings have had to be compulsorily purchased and demolished by Glasgow City Council because they were in such a state of disrepair. The landlords gain the advantage, particularly when the building is in the west end of Glasgow.

The Executive’s overall approach to tenement law is the right one, although I hope that there is general agreement that the bill on its own will not fix everything. I appreciate the work of the Justice 2 Committee in producing a good report and in taking a straightforward approach to the matter, because if we tried to do things differently there would be too much opposition.

Margaret Curran has mentioned single-seller surveys. I am appalled at the industry’s response to our concerns about the current system, which has exploited so many people. In my constituency in particular, people tend to lose out because market prices are high and they spend thousands of pounds without having a house to show for it. The system must end now and the Parliament must ensure that it continues to challenge the industry until a sensible system is put in place.

I should declare an interest, as I do whenever housing is on the agenda: I am a fellow of the Chartered Institute of Housing.

I laughed when the minister spoke about the service test—I was laughing with the minister, not at her—and whether someone is liable for repairs to a chimney if they have bricked up their fireplace. That reminded me of a time—gosh, it was two decades ago—when Glasgow City Council was pumping lots of money into tenement rehabilitation. I will not say where—

Bill Aitken (Glasgow) (Con): Will the member give way?

Linda Fabiani: No, because the member will just say that it was the Tories who introduced that policy.

Bill Aitken: Thank you.

Linda Fabiani: We know that the Tories spoiled everything later.

At that time, the district valuer would go round tenements to market value them. In the place where I worked, we realised that an awful lot of the properties had valuations that included storage heaters and showers. We got a bit suspicious about that and it turned out that the same storage heater and shower were being shifted up the street into every flat before the district valuer arrived. That is an old problem.

I am a bit disappointed that I am not a member of the Justice 2 Committee, which is considering the bill. In my experience of working in tenement rehabilitation over the years, one of the hardest things to do was to work out who paid for what and how to get money back from people. That was an absolute nightmare. The old tenement law and the default mechanism that was used if the title deeds did not sort out the problem were inadequate, no matter how often people tried to come up with a definitive version in guidance.

The bill is welcome and has been a long time coming. I have moaned about that, but I realise that the matter is complicated. We have now produced a good basis on which to make progress. Some of the aspects of the bill that will be considered at stage 2 have already been raised. The tenement management scheme is super, although I would like to examine it more as the bill progresses. To give my personal view—I have the benefit of a bit of experience—I would like the scheme to be firmed up a bit. I do not know about the legalities of the scheme because I am not a lawyer, but part of me thinks that it would be better if we made the scheme a statutory one that replaced title deed provisions. I am a bit worried that when new tenements come on stream, developers will find ways to sidestep the scheme and make things a bit easier for
themselves, particularly if they also have a factoring role.

It would be better—again, I am speaking in a personal capacity—if we introduced a requirement for common insurance policies to cover tenement properties. I know that such a proposal has difficulties and I have read the committee’s comments on the matter. I do not for one minute presume that I know better than the committee does because I did not hear the evidence. However, although it is difficult to impose a common insurance policy, it is also difficult to ensure that every individual in a tenement has appropriate insurance cover. As there are difficulties with both proposals, I would like the issue to be reconsidered. However, I welcome the fact that the bill insists that insurance must be for the reinstatement value rather than the market value. That is an incredibly important point.

Members have not yet mentioned the mediation scheme and dispute resolution, which are important. I hope that the scheme is robust and I look forward to finding out more at stage 2 about how it will be put in place.

I thank everybody who has given so much time to put together this wonderful bill.

15:38

Sarah Boyack (Edinburgh Central) (Lab): I take a slightly different tack from most members who have spoken. Like Pauline McNeill, most of my constituents live in tenements. I have lived in a series of tenements for most of my life. The absence of legislation on the matter has caused huge problems for thousands of people. Much of my casework as a constituency MSP involves difficulties with people resolving disputes and dealing with the fact that their properties are becoming damaged through lack of maintenance and repair. For me, the test of the bill will be the extent to which it helps to resolve some of those problems. I give a commitment to traipse along to see members to tenements that have problems—take members to tenements that have problems—where it has taken more than five years to resolve matters. I know that the subject is dry and technical, but I can give examples of tenement properties where it has taken more than five years to resolve issues. Even the statutory notice procedure that is used in Edinburgh is not able automatically to resolve some issues. There are major problems in knowing who owns a property. When discussing the Antisocial Behaviour etc (Scotland) Bill with the Communities Committee, ministers referred to a statutory measure to allow people to find out who an owner is. Such a measure is important and I hope that it will be examined in detail at stage 2.

The definition of maintenance is linked to antisocial behaviour, which is one of the core problems in tenements in my constituency. One of the biggest maintenance problems is the lack of control over access to stairwells, which affects new properties, Georgian tenements and even older properties. The lack of control over access can lead to residents being intimidated and attacked and having their stairwells and doors destroyed. It is a serious issue that is difficult to address, because it is not always possible to find out which owners are responsible. In addition, from my reading of the bill it appears that entry phones will not automatically be included in the maintenance provisions. I had a brief discussion about that with the Deputy Minister for Communities, who is conscious that the issue needs to be addressed. If we do not deal with it, owners will be left with the unpalatable choice of letting their stairwell deteriorate or stamping up disproportionately and letting other people off the hook. Often in such situations repeat damage is caused, so there is a link to antisocial behaviour, about which I know Mary Mulligan is aware.

It all comes back to the issue of responsibility. I am keen to see all the issues being tackled. At the moment, some of my constituents’ lives are hell because there is no legal framework. The bill will make a difference to people’s lives, and I very much welcome it. I also welcome the fact that the Justice 2 Committee and ministers recognise that there is no one-size-fits-all solution, because we have lots of different types of tenements. I could take members to tenements that have problems—even when they have management schemes—whether they are in the old town of Edinburgh or new tenements.

I know that the subject is dry and technical, but there is a lot of human misery out there because the bill’s provisions are not in place. My concern is to test at stage 2 exactly what some of the bill’s provisions will mean in practice. I am also keen to determine what is covered by the definitions of tenement and common block. Over the years, I have had experience of different statutory notices with different owners. I know that members have talked about chimney stacks and water tanks, but in Edinburgh we also have statues. I see a lot of wry smiles around the chamber, but replacing a
statue that could fall over and kill somebody is a big public-safety issue. These are technical issues, but they are important if we are to resolve the disputes that are caused by the absence of the provisions that the bill will introduce.

I am also interested in joined-up government. I would like energy efficiency and renewable schemes to be examined to see where the boundaries are. I know that ministers are examining building regulations in which there are—again—issues around the definitions of maintenance and enhancement. In the interests of people who want to get ahead and apply new technologies to their properties, I am keen for those issues to be considered at stage 2. Ministers might want to comment on whether they see such measures appearing in the bill or in another piece of legislation. If the latter, I would be interested to hear from Mary Mulligan which bill she expects the measures to be in.

I welcome the bill. It may seem like a dry subject, but out there in the tenements in my constituency the issues are live. I welcome the fact that the bill will take us into the 21st century.

The Presiding Officer (Mr George Reid): We move to closing speeches. I have to close the debate by 4 o’clock. It would be helpful if members could trim a minute off their speeches, otherwise the minister will get next to no time. I call Robert Brown.

15:44

Robert Brown (Glasgow) (LD): How much time am I allowed, Presiding Officer?

The Presiding Officer: About three minutes, but as you got only a minute’s warning, you can go to four minutes.

Robert Brown: I welcome the bill, which is one of a number that have introduced significant housing reforms. I dare say the minister will feel that I am a little bit like Banquo’s ghost, emerging from the Social Justice Committee to have another shot at the matter. For clarification, I should say that the day I gave up conveyancing practice, was one of the happiest days of my life.

I will make a couple of brief points about issues that are broader than the bill. The minister will not be surprised by what I say. I joined this Parliament, as many others did, with ambitions for housing policy. It is important that we tackle the major housing issues in Scotland. It might not be best for such a bill to have emerged largely from the Scottish Law Commission, as there was little housing input in the genesis of the bill, which goes back over a long time.

Pauline McNeill said that the bill is not enough by itself and I think that that is right. I am keen on sinking funds—in fact, it is probably true to say that I am a sinking fund groupie. One of the key factors that lies behind that is the huge amount of housing disrepair in Scotland, particularly in tenement stock. If that disrepair is not dealt with according to the principle in the policy memorandum—that owners are, in principle, responsible for the maintenance of their buildings—a large bill will land on the public purse in years to come. I cannot remember the precise figure in the housing improvement task force document, but I recall that it was about £12 billion—that is a lot of money, and the public purse will not be able to find it. We need arrangements for dealing with routine repairs, such as broken windows in the close or slates missing from the roof, but we also need arrangements that are capable of dealing with larger issues, such as significant roof repairs and rough casting repairs.

Of course, we cannot go from one system to another just like that. People who have bought their houses have budgets, but there is an underlying economic argument that a lot of investment in housing goes into stimulating higher house prices rather than improving the housing stock. Good though the housing improvement task force’s work is it does not have the right answers; neither do the bill or the Executive.

I ask the minister to say in her winding-up speech whether she is prepared to move forward, not on the issue of compulsory sinking funds—I do not think that that would be the right way forward—but on encouraging sinking funds into place by giving some concessions and support and by encouraging owner associations, which can be arbiters of good practice. I recommend to the minister the interesting suggestion that the Scottish Law Agents Society made, which is referred to in the committee’s report:

“the Executive could increase the likelihood of such funds being established by providing a set of default statutory rules to clarify how such funds, where established, would operate.”

That would be an extremely useful provision. The society was right to highlight as an example the “provision for the money in such funds to transmit with the flat rather than be reclaimed by the owner”.

I am sure that that is the right way to proceed. The society also highlighted the question of how the money is dealt with, invested and attached.

In poorer tenement stock, where people often buy houses in mixed ownership situations at the margins of affordability, we have a major problem. In the past, that problem was largely dealt with by the advance of the housing association movement, but we are not dealing with it at
present. I hope that the minister will reassure me that the bill, important though it is, is not the end of the story and that we will get some movement on these important issues—for example, there are foreign models that we could follow. I support the bill.

15:48

Bill Aitken (Glasgow) (Con): I have often accused the minister of chapping at the right door but up the wrong close. This is not one of those occasions; I think that the bill is worth while, and we support it. As usual, we have certain caveats, which are perhaps worth underlining.

I draw the minister’s attention to the fact that, behind the legislation, there seems to be a wish for common insurance policies to be imposed on property owners. I say from experience that that is a dangerous path to go down. Insurance is taken out at a certain stage and a reinstatement value is put on the property, but no one takes responsibility for ensuring that the sum insured remains adequate as the years pass. From personal and professional experience, I can highlight a number of cases in which that has had disastrous consequences for people, so I think that the matter has to be reconsidered.

The issue that Annabel Goldie highlighted about repairs, which might become a matter for the purchaser, must be addressed. It is clear that the most sensible solution is for the title deed to have a marker against it to the effect that sums are likely to be outstanding—that would prevent any difficulties from arising. There is usually a simple answer to such problems.

As I am talking of simple answers, Pauline McNeill made a valid point about sellers’ surveys, but I suggest to her and others that the situation is not as simple as one might think. Such a system might well work in the easy case, such as that of the Wimpey-type flat in which I live, but it would be difficult to find someone who was prepared to provide an indemnity in relation to a more complex and larger property. Anybody who bought a larger property—even one in a tenement—would be ill advised to accept a seller’s survey, because all sorts of difficulties could arise later. The idea could be considered and adjusted, so I am flagging up that problem. It is superficially attractive but, once it has been examined, the consequences that could arise become apparent.

The bill is welcome. It will ease many of the problems that members have highlighted. We look forward to stage 2 with rapt anticipation.

15:51

Michael Matheson (Central Scotland) (SNP): I thank the Justice 2 Committee for its detailed and considered report on the bill. Like other members who have spoken, I welcome the bill’s general principles.

As Margaret Smith said, the bill has been a long time in the making. The first paper to propose it was published in 1990 and the bill largely implements the recommendations in the report that the Scottish Law Commission published on 25 March 1998. Therefore, the bill has been some 14 years in gestation. I am sure that many tenement owners will welcome the bill’s passage through Parliament now.

As the minister said, this is the third and final bill to deal with property law reform. The other such pieces of legislation were the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003. I had the pleasure of being a member of the Justice and Home Affairs Committee and of the Justice 1 Committee when they considered that equally interesting legislation and I am delighted that my colleagues on the Justice 2 Committee are enjoying considering the Tenements (Scotland) Bill as much as we enjoyed considering those acts. My colleagues on the Justice 1 Committee and I were somewhat disappointed when the bill was passed to the Justice 2 Committee, which prevented us from participating in its consideration.

The bill is largely technical but, as the minister said, it could have a considerable impact, because Scotland has 800,000 tenement flats. As most members said, the bill has two main objectives: to clarify and restate the common law and to provide a default mechanism for a statutory tenement management system. Those two objectives will combine to provide greater clarity and certainty for tenement owners in dealing with repairs and to provide a default position should problems occur.

Sarah Boyack made the important point that the test of the bill will be whether it addresses many of the problems that tenement property owners experience. That has yet to be proved, but I hope that the bill will provide the redress that many people want for their present problems.

Pauline McNeill expressed the important point that we should not consider law to be the only way to reform. There is good cause for examining how the system of factors and factoring operates. A good factor who deals with issues proactively can make a considerable difference.

As Sarah Boyack said, the bill is technical, but it has a human face in the form of the people who suffer chronic problems because repairs have not been undertaken on their properties as a result of the failure to have proper legal provisions in place. If the Executive addresses at stage 2 or stage 3 the recommendations in the Justice 2 Committee’s
report, the bill will deliver what it is meant to deliver.

15:55

The Deputy Minister for Communities (Mrs Mary Mulligan): I would like to add my thanks to the committees that have been involved with the bill and to those members who have taken part in this afternoon’s debate—but I do not have time, so I will move on quickly.

A number of issues have come up this afternoon, many of which were considered thoroughly by the Justice 2 Committee, which has done an excellent job in examining the technical issues that arose on the bill. What was probably the most contentious issue was highlighted by Nicola Sturgeon, Cathie Craigie, Annabel Goldie and others: that of the liability of the incoming purchaser for costs owed. I will make a few brief points on that issue now, although I have no doubt that we will return to it in the course of our stage 2 and stage 3 deliberations.

The bill provides that, if there is an outstanding liability, for example for common repairs, when a flat is sold, owners could pursue either the buyer or the seller for the money. The situation at the moment is that only the seller would be pursued. As I am sure Michael Matheson will know, there is an identical provision in the Title Conditions (Scotland) Act 2003. It might be a shock for a buyer who does not know about the outstanding liability, but the occasions on which the issue will arise will be fairly rare. We need to consider which measures must be put in place to deal with what could be a fairly rare situation, rather than overload the system.

Linda Fabiani rose—

Mrs Mulligan: I really do not have time to take an intervention, but I will come back to Linda Fabiani if I get a chance.

At the moment, tenement owners themselves need to pursue the seller, and if they cannot find the seller, they have to share the cost among themselves. That is why we are extending the law to cover the purchaser too. Having discussed the matter with various bodies, we recognise that there is opposition to our putting in place a marker on the property being sold. The Scottish Law Commission and the Registers of Scotland have told us that that is not the way to go about it, partly because they see that as a solution that is too onerous for the problem. We need to keep the proposal under review, recognising that there is concern about its unfairness, and to address it further in the course of our deliberations.

The issue of identifying and contacting owners was raised. A number of measures are now in place to ensure that we can address that problem. The measures that Cathie Craigie introduced to the Antisocial Behaviour etc (Scotland) Bill at stage 2 to identify landlords will give us another route by which to identify those who own properties. People can also inquire about that through the Registers of Scotland. Section 70 of the 2003 act places a duty on any person who was an owner of property with a common repair and maintenance burden to disclose any helpful information to the person with an interest in that burden. There are already a number of solutions, although we accept that they are not perfect. The problem of identifying owners, which arises frequently, has been highlighted by a number of members this afternoon. We wish to continue to pursue that area.

Robert Brown and Cathie Craigie mentioned the issue of sinking funds. The Executive believes that sinking funds are to be encouraged, but that they should be voluntary. There are a number of problems with making them compulsory, and there are ways in which they would not be of benefit to all owners. We recognise some of the benefits that have arisen where sinking funds have operated, and we would therefore encourage good practice to be established in their use.

Miss Goldie rose—

Mrs Mulligan: I am sorry—I am in my last minute.

If the Parliament agrees to pass the Tenements (Scotland) Bill, it is intended to commence it on the same date on which the provisions of the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003 will be commenced: 28 November. That will be a significant date, as it will be the date of the introduction of a new form of land regulation that is modern, simple and fair.

If enacted, the Tenements (Scotland) Bill will play a vital part in the revamp of property ownership. The law relating to tenements in Scotland is primarily a devolved area. In particular, Scots property law is separate and different from that which applies in the rest of the United Kingdom. I believe that, given this afternoon’s consensus, the proposed reform will be an ideal reform to be taken forward by the Scottish Parliament.

The Presiding Officer: I am grateful to the minister and am sorry to have truncated her speech. I will speak slowly, as I see Mr Henry arriving. He is now here, so we will move on to the next item.
Tenements (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 – 4
Schedule
Sections 5 - 29
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 4

Sarah Boyack

85 In section 4, page 3, line 6, after <apply> insert—
   <(a) whenever any decision relating to the maintenance of scheme property or the
   appointment of a person to manage a tenement is to be made; and
   (b) when any other type of decision is to be made,>}

Mrs Mary Mulligan

1 In section 4, page 3, line 14, leave out <full amount of> and insert <entire liability for>

Mrs Mary Mulligan

2 In section 4, page 3, line 15, leave out <any of that amount> and insert <liability for those costs>

Mrs Mary Mulligan

3 In section 4, page 3, line 17, leave out <Subject to subsection (10) below,>.

Mrs Mary Mulligan

4 In section 4, page 3, line 17, leave out from <, so> to end of line 18 and insert <to the extent that
there is no tenement burden making provision as to the liability of the owners in the
circumstances covered by the provisions of that rule.>

Mrs Mary Mulligan

5 In section 4, page 3, line 27, leave out <rules 5 and> and insert <rule>

Sarah Boyack

86 In section 4, page 3, line 28, at end insert—
   <( ) The Scottish Ministers may by order make further provision about the nature and
   powers of owners’ associations established by virtue of paragraph (da) of rule 3.1.>
Mrs Mary Mulligan

6 In section 4, page 3, line 30, leave out <appropriate> and insert <justified by a change in the
value of money appearing to them to have occurred since the last occasion on which the sums
were fixed>

Schedule

Mrs Mary Mulligan

7 In the schedule, page 15, line 12, leave out from <that> to second <by> and insert <the
maintenance of which, or the cost of maintaining which, is, by virtue of a tenement burden, the
responsibility of>

Mrs Mary Mulligan

8 In the schedule, page 15, line 14, leave out <other>

Mrs Mary Mulligan

9 In the schedule, page 15, line 15, after <building> insert <(so far as not scheme property by virtue
of paragraph (a) or (b) above)>

Sarah Boyack

87 In the schedule, page 16, line 9, after <replacement> insert <to a modern standard>

Mrs Mary Mulligan

10 In the schedule, page 16, line 32, leave out <in accordance with this scheme>

Mrs Mary Mulligan

11 In the schedule, page 17, line 10, leave out <Except as mentioned in rule 2.6,>

Mrs Mary Mulligan

12 In the schedule, page 17, line 12, leave out rule 2.6

Mrs Mary Mulligan

13 In the schedule, page 18, line 5, leave out <sending a notice stating> and insert <giving notice>

Mrs Mary Mulligan

14 In the schedule, page 18, line 8, leave out <sent> and insert <given>

Mrs Mary Mulligan

15 In the schedule, page 18, line 10, leave out <sending the notice>

Sarah Boyack

88 In the schedule, page 18, line 30, at end insert—
(da) to create an owners’ association for the purpose of delegating to that association responsibility for maintaining scheme property,
(db) where an owners’ association has been created as mentioned in paragraph (da), to require each owner to ensure that, where an owner is selling a flat in the tenement, the new owner will become a member of the owners’ association,

Mrs Mary Mulligan
16 In the schedule, page 19, line 2, leave out <decide under rule 3.1(a)> and insert <make a scheme decision>

Mrs Mary Mulligan
17 In the schedule, page 19, line 3, leave out <under rule 3.1(d)>

Mrs Mary Mulligan
18 In the schedule, page 19, line 18, leave out from beginning to <to> and insert <A requirement, in pursuance of a scheme decision under rule 3.2(c), that each owner>

Mrs Mary Mulligan
19 In the schedule, page 19, line 21, after <required> insert <(otherwise than by a previous notice under this rule)>

Mrs Mary Mulligan
20 In the schedule, page 19, line 27, leave out <scheme decision is made under rule 3.2(c)> and insert <requirement is, or is to be, made>

Mrs Mary Mulligan
21 In the schedule, page 20, line 14, at end insert—
   <(  ) the notice to be given under rule 3.3 may specify a date as a refund date for the purposes of paragraph (f)(i) below;>

Mrs Mary Mulligan
22 In the schedule, page 20, line 16, leave out <the fourteenth> and insert <—
   (  ) where the notice under rule 3.3 specifies a refund date, that date, or
   (  ) where that notice does not specify such a date, the twenty-eighth>

Mrs Mary Mulligan
23 In the schedule, page 20, line 19, leave out <the owner> and insert <a depositor>

Mrs Mary Mulligan
24 In the schedule, page 20, line 21, leave out <owner> and insert <person>
Mrs Mary Mulligan
25 In the schedule, page 20, line 23, leave out <owner> and insert <depositor>

Mrs Mary Mulligan
26 In the schedule, page 20, line 31, leave out <owners> and insert <depositors>

Mrs Mary Mulligan
27 In the schedule, page 20, line 35, at end insert—

    <Scheme decisions under rule 3.1(f): votes of persons standing to benefit not to be counted>
    A vote in favour of a scheme decision under rule 3.1(f) is not to be counted if—
    (a) the owner exercising the vote, or
    (b) where the vote is exercised by a person nominated by an owner—
        (i) that person, or
        (ii) the owner who nominated that person,
    is the owner or an owner who, by virtue of the decision, would not be required to pay as mentioned in that rule.>

Mrs Mary Mulligan
28 In the schedule, page 21, line 2, leave out <maintenance by virtue of rule 3.2(a)> and insert <such maintenance as is mentioned in paragraph (a)>

Mrs Mary Mulligan
29 In the schedule, page 21, line 7, leave out <a person by virtue of rule 3.1(c)(i)> and insert <any manager>

Mrs Mary Mulligan
30 In the schedule, page 21, line 8, leave out from <arranged> to end of line 9

Mrs Mary Mulligan
31 In the schedule, page 21, line 9, at end insert—

    <(fa) any costs relating to the calculation of the floor area of any flat, where such calculation is necessary for the purpose of determining the share of any other costs for which each owner is liable,>

Mrs Mary Mulligan
32 In the schedule, page 21, line 14, at the beginning insert <Except as provided in rule 4.3,>

Mrs Mary Mulligan
33 In the schedule, page 21, line 25, leave out rule 4.3 and insert—
4.3 Scheme costs relating to roof over the close

Where—

(a) any scheme costs mentioned in rule 4.1(a) to (d) relate to the roof over the close, and

(b) that roof is common property by virtue of section 3(1)(a) of this Act,

then, despite the fact that the roof is scheme property mentioned in rule 1.2(a), paragraph (b) of rule 4.2 shall apply for the purpose of apportioning liability for those costs.

Mrs Mary Mulligan

34 In the schedule, page 22, line 2, after <flats> insert—

< (a) where the costs relate to common insurance arranged by virtue of rule 3.1(e).>

Mrs Mary Mulligan

35 In the schedule, page 22, line 3, leave out <rule 3.1(e)> and insert <that rule, or

(b) where the costs relate to common insurance arranged by virtue of a tenement burden, equally,>

Mrs Mary Mulligan

36 In the schedule, page 22, line 6, leave out <4.1(g)> and insert <4.1(fa) or (g)>

Mrs Mary Mulligan

37 In the schedule, page 22, line 8, leave out rules 4.7 and 4.8

Mrs Mary Mulligan

38 In the schedule, page 22, line 24, leave out rule 5.1

Mrs Mary Mulligan

39 In the schedule, page 22, line 32, leave out <under rule 3.1(f)>

Mrs Mary Mulligan

40 In the schedule, page 22, leave out line 36 and insert—

< (ii) that owner cannot, by reasonable inquiry, be identified or found,>

Mrs Mary Mulligan

41 In the schedule, page 23, line 1, leave out <in accordance with rule 4>

Mrs Mary Mulligan

42 In the schedule, page 23, line 12, leave out <in accordance with rule 4>
Section 5

Mrs Mary Mulligan

43 In section 5, page 4, line 11, after <owners> insert <taken as a group>

Section 6

Mrs Mary Mulligan

44 In section 6, page 5, line 7, after <tenement> insert <(except where that management scheme is the development management scheme)>

Mrs Mary Mulligan

45 In section 6, page 5, line 9, leave out subsection (2)

Before section 11

Mrs Mary Mulligan

46 Before section 11, insert—

<Determination of when an owner’s liability for certain costs arises>

(1) An owner is liable for any scheme costs (other than accumulating scheme costs) arising from a scheme decision from the date when the scheme decision to incur those costs is made.

(2) For the purposes of subsection (1) above, a scheme decision is, in relation to an owner, taken to be made on—

(a) where the decision is made at a meeting attended by the owner, the date of the meeting; or

(b) in any other case, the date on which notice of the making of the decision is given to the owner.

(3) An owner is liable for the cost of any emergency work from the date on which the work is instructed.

(4) An owner is liable for any scheme costs mentioned in rule 4.1(d) of the Tenement Management Scheme from the date of any statutory notice requiring the carrying out of the work to which those costs relate.

(5) An owner is liable for any accumulating scheme costs (such as the cost of an insurance premium) on a daily basis.

(6) An owner is liable for any scheme costs arising from work instructed by a manager from the date on which the work is instructed.

(7) An owner is liable in accordance with section 10 of this Act for the costs of maintenance carried out by virtue of section 8 of this Act from the date on which the maintenance is completed.

(8) In this section, “emergency work”, “manager”, “scheme costs” and “scheme decision” have the same meanings as they have in the Tenement Management Scheme.>
Miss Annabel Goldie

*89 In section 11, page 6, line 26, leave out subsection (2) and insert—

<(2) The owner of any other flat in the tenement, any factor of the tenement, or the manager (in terms of Rule 1.5 of the tenement management scheme) of the tenement, may register a notice in the Registers of Sasines, or as may be appropriate the Land Register, in or as near as may be in, the form set out in Part 1 of schedule (Liability for relevant costs), such notice being countersigned by at least one witness.

(2A) The Keeper of the Registers shall not register a notice under subsection (2) unless reasonably satisfied that the relevant costs were outstanding at the time of the notice being signed and, without prejudice to the generality, any written communication (including in electronic format) stating that this is the case from the creditor or, as the case may be, creditors dating from no earlier than 7 days before the signing of the notice shall be presumed to be sufficient proof.

(2B) Any notice registered by virtue of subsection (2A) shall—

(a) be discharged if any of the persons referred to in subsection (2) send to the Keeper of the Registers notice signed by them in, or as near as may be in, the form set out in Part 2 of Schedule (Liability for relevant costs), and

(b) otherwise be discharged automatically after five years.>

Nicola Sturgeon

*90 In section 11, page 6, line 28, at end, insert <, provided—

(a) the relevant costs do not exceed £500, or such other amount not less than £500 as the Scottish Ministers may by order specify, or

(b) (subject to subsection (2A)) where the relevant costs exceed the amount provided for by virtue of paragraph (a), there is registered against the flat in the Register of Sasines or, as appropriate, the Land Register a notice in, or as near as may be in, the form set out in Part 1 of schedule (Liability for relevant costs), such notice being signed by—

(i) the owner of any other flat in the tenement,

(ii) any factor of the tenement, or

(iii) the manager of the tenement, in terms of Rule 1.5 of the tenement management scheme;

and such notice must be countersigned by at least one witness.

(2A) The Keeper of the Registers shall not register a notice under subsection (2)(b) unless reasonably satisfied that the relevant costs were outstanding at the time of the notice being signed and, without prejudice to the generality, any written communication (including in electronic format) stating that this is the case from the creditor or, as the case may be, creditors dating from no earlier than 7 days before the signing of the notice shall be presumed to be sufficient proof.

(2B) Any notice registered by virtue of subsection (2A)(b) shall—
(a) be discharged if any of the persons referred to in subsection 2 (b) (i), (ii) or (iii) send to the Keeper of the Registers notice signed by them in, or as near as may be in, the form set out in Part 2 of Schedule (*Liability for relevant costs*), and

(b) otherwise be discharged automatically after five years.>

**Mrs Mary Mulligan**

47 In section 11, page 6, line 33, after *<Scheme;>* insert—

*<( ) the share of any scheme costs (within the meaning of the Tenement Management Scheme) for which the owner is liable by virtue of any tenement burden;>*

**After section 11**

**Mrs Mary Mulligan**

48 After section 11, insert—

*Former owner’s right to recover costs*

An owner who is entitled, by virtue of the Tenement Management Scheme or any other provision of this Act, to recover any costs or a share of any costs from any other owner shall not, by virtue only of ceasing to be an owner, cease to be entitled to recover those costs or that share.>

**After schedule**

**Nicola Sturgeon**

Supported by: Miss Annabel Goldie

*91 After the schedule insert—

*SCHEDULE*

(Introduced by section 11(2) and (2B))

**LIABILITY FOR RELEVANT COSTS**

Part 1

“NOTICE OF LIABILITY FOR RELEVANT COSTS

Notice is hereby given that relevant costs within the meaning of section 11(4) of the Tenements (Scotland) Act 2004 (asp 00) are outstanding in the sum of

*Here insert details of the sum outstanding*

Over the following subjects

*Here insert a description of the subjects over which the sum is outstanding sufficient*

The relevant sums shall be payable for five years from the relevant date which is
Here insert the date on which the obligation first became payable by reference to Rule 4.7 of the Tenement Management Scheme or section 10(4) of the Title Conditions (Scotland) Act 2003 as the case may be.

Signed

Here insert name and address of person serving the notice

Countersigned

Here insert name and address of witness

Date affixed

Here insert date affixed

"Note.
Where the title has been registered in the Land Register the description should be by reference to the Title Number of the subjects. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

Part 2

“NOTICE OF DISCHARGE OF LIABILITY FOR RELEVANT COSTS

Notice is hereby given that the outstanding relevant costs within the meaning of section 11(4) of the Tenements (Scotland) Act 2004 are discharged [in full or to the extent of £*]

Over the following subjects

Here insert a description of the subjects over which the sum is outstanding sufficient

And registered on

Here insert date

In

Insert details of the Register

Signed

Here insert name and address of person granting the discharge

Date affixed:

Here insert date affixed
Where the title has been registered in the Land Register the description should be by reference to the Title Number of the subjects. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

Section 14

Mrs Mary Mulligan

In section 14, page 7, line 16, leave out <the manager of>

Mrs Mary Mulligan

In section 14, page 8, line 1, leave out <or manager who> and insert <who or owners’ association which>

Mrs Mary Mulligan

In section 14, page 8, line 2, leave out <manager> and insert <owners’ association>

Mrs Mary Mulligan

In section 14, page 8, line 2, leave out <in writing>

Mrs Mary Mulligan

In section 14, page 8, line 7, after <who> insert <or owners’ association which>

Mrs Mary Mulligan

In section 14, page 8, line 7, leave out from <or> to end of line 8

Mrs Mary Mulligan

In section 14, page 8, line 11, at end insert—

<(8) Where access is allowed under subsection (1) above for any purpose, the owner who or owners’ association which gave notice that access was required (referred to as the “accessing owner or association”) shall, so far as reasonably practicable, ensure that the part of the tenement to or through which access is allowed is left substantially in no worse a condition than that which it was in when access was taken.

(9) If the accessing owner or association fails to comply with the duty in subsection (8) above, the owner of the part to or through which access is allowed may—

(a) carry out, or arrange for the carrying out of, such work as is reasonably necessary to restore the part so that it is substantially in no worse a condition than that which it was in when access was taken; and

(b) recover from the accessing owner or association any expenses reasonably incurred in doing so.>
After section 14

Sarah Boyack
92 After section 14 insert—

<Obligation of owner to share contact details
It shall be the duty of each owner not resident within the tenement building to provide the address of their main residence or business premise.>

Section 15

Miss Annabel Goldie
93 In section 15, page 8, line 20, at end insert <or,
( ) both a common policy and a policy for each flat, provided the cumulative cover provided for the building by all the policies covers the reinstatement value of the building>

Mrs Mary Mulligan
56 In section 15, page 8, line 31, after <produce> insert <evidence of>

Mrs Mary Mulligan
57 In section 15, page 8, line 34, leave out <evidence of>

Mrs Mary Mulligan
58 In section 15, page 8, line 36, leave out from <policy> to end of line and insert <evidence requested.>

Section 16

Mrs Mary Mulligan
59 In section 16, page 9, line 4, at end insert—

<( ) In particular, the fact that, as a consequence of demolition of a tenement building, any land pertaining to the building no longer serves, or affords access to, any flat or other sector shall not alone effect any change of ownership of the land as a pertinent.>

Section 18

Mrs Mary Mulligan
60 In section 18, page 9, line 39, leave out <require that the entire site be sold> and insert <apply for power to sell the entire site in accordance with schedule (Sale under section 18(3) or 20(1))>

Mrs Mary Mulligan
61 In section 18, page 10, line 1, after <the> insert <net>
Mrs Mary Mulligan

62 In section 18, page 10, line 5, after <Where> insert <—

(a) evidence of the floor area of each of the former flats is readily available; and

(b)>

Mrs Mary Mulligan

63 In section 18, page 10, line 6, after second <the> insert <net>

Mrs Mary Mulligan

64 In section 18, page 10, line 11, at end insert—

<( ) In subsections (4) and (5) above, “net proceeds of any sale” means the proceeds of the
sale less any expenses properly incurred in connection with the sale.>

Mrs Mary Mulligan

65 In section 18, page 10, line 13, leave out <and to> and insert <together with>

Mrs Mary Mulligan

66 In section 18, page 10, line 13, at end insert <and any land pertaining, as a means of access, to the
tenement building immediately before its demolition.>

Section 19

Mrs Mary Mulligan

67 Leave out section 19

Section 20

Mrs Mary Mulligan

68 In section 20, page 10, line 31, leave out <return to>

Mrs Mary Mulligan

69 In section 20, page 10, line 33, leave out <require that the tenement building be sold> and insert
<apply for power to sell the tenement building in accordance with schedule (Sale under section
18(3) or 20(1))>

After schedule

Mrs Mary Mulligan

70 After the schedule insert—

<SCHEDULE

(Introduced by sections 18(3) and 20(1))
SALE UNDER SECTION 18(3) OR 20(1)

Application to sheriff for power to sell

1 (1) Where an owner is entitled to apply—
(a) under section 18(3), for power to sell the site; or
(b) under section 20(1), for power to sell the tenement building,
the owner may make a summary application to the sheriff seeking an order (referred to in this schedule as a “power of sale order”) conferring such power on the owner.

(2) The site or tenement building in relation to which an application or order is made under sub-paragraph (1) is referred to in this schedule as the “sale subjects”.

(3) An owner making an application under sub-paragraph (1) shall give notice of it to each of the other owners of the sale subjects.

(4) The sheriff shall, on an application under sub-paragraph (1)—
(a) grant the power of sale order sought unless satisfied that to do so would—
   (i) not be in the best interests of all (or both) the owners taken as a group; or
   (ii) be unfairly prejudicial to one or more of the owners; and
(b) if a power of sale order has previously been granted in respect of the same sale subjects, revoke that previous order.

(5) A power of sale order shall contain—
(a) the name and address of the owner in whose favour it is granted;
(b) the postal address of each flat or, as the case may be, former flat comprised in the sale subjects to which the order relates; and
(c) a sufficient conveyancing description of each of those flats or former flats.

(6) A description of a flat or former flat is a sufficient conveyancing description for the purposes of sub-paragraph (5)(c) if—
(a) where the interest of the proprietor of the land comprising the flat or former flat has been registered in the Land Register of Scotland, the description refers to the number of the title sheet of that interest; or
(b) in relation to any other flat or former flat, the description is by reference to a deed recorded in the Register of Sasines.

(7) An application under sub-paragraph (1) shall state the applicant’s conclusions as to—
(a) which of subsections (4) and (5) of section 18 applies for the purpose determining how the net proceeds of any sale of the sale subjects in pursuance of a power of sale order are to be shared among the owners of those subjects; and
(b) if subsection (5) of that section is stated as applying for that purpose—
   (i) the floor area of each of the flats or former flats comprised in the sale subjects; and
   (ii) the proportion of the net proceeds of sale allocated to that flat.
Registration and recording of power of sale order

2 A power of sale order has no effect unless and until, within the period of 14 days after the day on which the order is made—

(a) where the interest of the proprietor of the land comprising any flat or former flat comprised in the sale subjects to which the order relates has been registered in the Land Register of Scotland, the order is registered in that Register against that interest; and

(b) where that interest has not been so registered, the order is recorded in the Register of Sasines.

Exercise of power of sale

3 (1) An owner in whose favour a power of sale order is granted may exercise the power conferred by the order by private bargain or by exposure to sale.

(2) However, in either case, the owner shall—

(a) advertise the sale; and

(b) take all reasonable steps to ensure that the price at which the sale subjects are sold is the best that can reasonably be obtained.

Distribution of proceeds of sale

4 (1) An owner selling the sale subjects (referred to in this paragraph as the “selling owner”) shall, within seven days of completion of the sale—

(a) calculate each owner’s share; and

(b) apply that share in accordance with sub-paragraph (2) below.

(2) An owner’s share shall be applied—

(a) first, to repay any amounts due under any heritable security affecting that owner’s flat or former flat;

(b) next, to defray any expenses properly incurred in complying with paragraph (a) above; and

(c) finally, to pay to the owner the remainder (if any) of that owner’s share.

(3) If there is more than one heritable security affecting an owner’s flat or former flat, the owner’s share shall be applied under paragraph (2)(a) above in relation to each security in the order in which they rank.

(4) If any owner cannot by reasonable inquiry be identified or found, the selling owner shall consign the remainder of that owner’s share in the sheriff court.

(5) On paying to another owner the remainder of that owner’s share, the selling owner shall also give to that other owner—

(a) a written statement showing—

(i) the amount of that owner’s share and of the remainder of it; and

(ii) how that share and remainder were calculated; and

(b) evidence of—
(i) the total amount of the proceeds of sale; and
(ii) any expenses properly incurred in connection with the sale and in complying with sub-paragraph (2)(a) above.

(6) In this paragraph—

“remainder”, in relation to an owner’s share, means the amount of that share remaining after complying with sub-paragraph (2)(a) and (b) above;

“share”, in relation to an owner, means the share of the net proceeds of sale to which that owner is entitled in accordance with subsection (4) or, as the case may be, subsection (5) of section 18.

*Automatic discharge of heritable securities*

Where—

(a) an owner—

(i) sells the sale subjects in pursuance of a power of sale order; and

(ii) grants a disposition of those subjects to the purchaser or the purchaser’s nominee; and

(b) that disposition is duly registered in the Land Register of Scotland or recorded in the Register of Sasines,

all heritable securities affecting the sale subjects or any part of them shall, by virtue of this paragraph, be to that extent discharged.

**Section 22**

Nicola Sturgeon

*94 In section 22, page 11, line 19, after <owner)> insert <—

( ) at the end of subsection (2) there shall be added “; but where the relevant obligation gives rise to a liability for relevant costs (as defined in section 11(4) of the Tenements (Scotland) Act 2004 (asp 00) (the “2004 Act”)), the new owner shall not be severally liable unless—

(a) the relevant costs do not exceed £500, or such other amount not less than £500 as the Scottish Ministers may by order specify, or

(b) (subject to subsection (2A)) where the relevant costs exceed the amount provided for by virtue of paragraph (a), there is registered against the flat in the Register of Sasines, or as appropriate, the Land Register a notice in, or as near as may be in, the form set out in Part 1 of schedule (Liability for relevant costs) to the 2004 Act, such notice being signed by—

(i) the owner of any other flat in the tenement,

(ii) any factor of the tenement, or

(iii) the manager of the tenement, in terms of Rule 1.5 of the tenement management scheme

and such notice must be countersigned by at least one witness.
(2A) The Keeper of the Registers shall not register a notice under subsection (2)(b) unless reasonably satisfied that the relevant costs were outstanding at the time of the notice being signed and, without prejudice to the generality, any written communication (including in electronic format) stating that this is the case from the creditor or, as the case may be, creditors dating from no earlier than 7 days before the signing of the notice shall be presumed to be sufficient proof.

(2B) Any notice registered by virtue of subsection (2A)(b) shall—

(a) be discharged if any of the persons referred to in subsection 2 (b) (i), (ii) or (iii) send to the Keeper of the Registers notice signed by them in, or as near as may be, the form set out in Part 2 of Schedule (Liability for relevant costs) to the 2004 Act, and

(b) otherwise be discharged automatically after five years.

Mrs Mary Mulligan
71 In section 22, page 11, line 22, at end insert—

<( ) In section 11 (affirmative burdens: shared liability), after subsection (3) there shall be inserted—

“(3A) For the purposes of subsection (3) above, the floor area of a flat is calculated by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat—

(a) a balcony; and

(b) except where it is used for any purpose other than storage, a loft or basement.”.

( ) In section 25 (definition of the expression “community burdens”), in subsection (1)(a), for “four” there shall be substituted “two”.

Mrs Mary Mulligan
72 In section 22, page 11, line 37, after <required> insert <(otherwise than by a previous notice under this subsection)>

Mrs Mary Mulligan
73 In section 22, page 12, line 3, at end insert—

<( ) after subsection (6) there shall be inserted—

“(6A) The notice given under subsection (2)(b) above may specify a date as a refund date for the purposes of subsection (7)(b)(i) below.”>

Mrs Mary Mulligan
74 In section 22, page 12, line 4, leave out <(7)(b)(ii)> and insert <(7)(b)—

( ) in sub-paragraph (i), for “the fourteenth” there shall be substituted “—

(A) where the notice under subsection (2)(b) above specifies a refund date, that date; or
(B) where that notice does not specify such a date, the twenty-eighth”;

Mrs Mary Mulligan

75 In section 22, page 12, line 4, at end insert—

<( ) after subsection (7) there shall be inserted—

“(7A) A former owner who, before ceasing to be an owner, deposited sums in
compliance with a requirement under subsection (2)(b) above, shall have the
same entitlement as an owner has under subsection (7)(b) above.”;>

Mrs Mary Mulligan

76 In section 22, page 12, line 9, leave out <appropriate> and insert <justified by a change in the
value of money appearing to them to have occurred since the last occasion on which the sums
were fixed>.

Mrs Mary Mulligan

77 In section 22, page 12, line 13, leave out <28> and insert <28(1)(a) and (d) and (2)(a)>.

Mrs Mary Mulligan

78 In section 22, page 12, line 14, at end insert—

<( ) Sections 28(1)(a) and (d) and 31 of this Act shall not apply to a community in
any period during which the development management scheme applies to the
community.>

Mrs Mary Mulligan

79 In section 22, page 12, line 14, at end insert—

<( ) In section 33 (majority etc. variation and discharge of community burdens)—

(a) in subsection (1)(b), the words “where no such provision is made,” shall be
omitted; and

(b) in subsection (2)(a), at the beginning there shall be inserted “where no such
provision as is mentioned in subsection (1)(a) above is made,”

( ) In section 35 (variation and discharge of community burdens by owners of adjacent
units), in subsection (1), the words “in a case where no such provision as is mentioned
in section 33(1)(a) of this Act is made” shall be omitted.

( ) In section 98 (granting certain applications for variation, discharge, renewal or
preservation of title conditions), in paragraph (b)(i), for the words “the owners of all”
there shall be substituted “all the owners (taken as a group) of”.

( ) In section 99 (granting applications as respects development management schemes), in
subsection (4)(a), for the words “the owners” there shall be substituted “all the owners
(taken as a group)”.  

( ) In section 122(1) (interpretation)—

(a) the definition of “flat” shall be omitted; and
(b) for the definition of “tenement” there shall be substituted—

“‘tenement’ has the meaning given by section 23 of the Tenements (Scotland) Act 2004 (asp 00) and references to a flat in a tenement shall be construed accordingly;”.

Section 25

Mrs Mary Mulligan

80 In section 25, page 13, line 20, leave out from <means> to end of line 21 and insert <includes any premises whether or not—

(a) used or intended to be used for residential purposes; or

(b) on the one floor;>

Mrs Mary Mulligan

81 In section 25, page 13, line 22, at end insert—

<“management scheme” means—

(a) the development management scheme;

(b) the Tenement Management Scheme;

(c) any tenement burden relating to the maintenance or management of the tenement or any combination of such tenement burdens; or

(d) any combination of such tenement burdens and any provision of the Tenement Management Scheme;>

Mrs Mary Mulligan

82 In section 25, page 14, line 2, after <area> insert <(including the area occupied by any internal wall or other internal dividing structure)>

Mrs Mary Mulligan

83 In section 25, page 14, line 6, leave out subsection (3)

After section 25

Mrs Mary Mulligan

84 After section 25, insert—

<Giving of notice to owners

(1) Any notice which is to be given to an owner under or in connection with this Act (other than under or in connection with the Tenement Management Scheme) may be given in writing by sending the notice to—

(a) the owner; or

(b) the owner’s agent.

(2) The reference in subsection (1) above to sending a notice is to its being—
(a) posted;
(b) delivered; or
(c) transmitted by electronic means.

(3) Where the name of an owner is not known, a notice shall be taken for the purposes of subsection (1)(a) above to be sent to the owner if it is posted or delivered to the owner’s flat addressed to “The Owner” or using some similar expression such as “The Proprietor”.

(4) For the purposes of this Act—
(a) a notice posted shall be taken to be given on the day of posting; and
(b) a notice transmitted by electronic means shall be taken to be given on the day of transmission.
Tenements (Scotland) Bill

Groupings of Amendments for Stage 2

Circumstances in which decisions to be made under Tenement Management Scheme
85

Circumstances in which liability and apportionment of costs determined under Tenement Management Scheme
1, 2, 3, 4, 5

Owners’ associations
86, 88

Scheme decisions requiring deposits: alteration of amounts
6, 76

Definition of “scheme property”
7, 8, 9

Definition of “maintenance”
87

Tenement Management Scheme: independent operation of certain provisions
10, 16, 17, 28, 29, 30, 39, 41, 42

Scheme decisions: cases where unanimity required
11, 12

Giving of notice etc.
13, 14, 15, 83, 84

Decisions requiring deposits to be paid, certain owners not to pay share of costs etc.
18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 72, 73, 74, 75

Liability and apportionment of scheme costs: general
31, 32, 33, 34, 35, 36

Determination of when liability for certain costs arises
37, 46

Liability for scheme costs where two or more persons own flat
38

Redistribution of share of costs
40

Applications to sheriff
43, 44, 45
Liability of owner and successors for certain costs
89, 90, 91, 94

Liability of owner and successor for certain costs: definition of “relevant costs”
47

Former owner’s right to recover costs
48

Access for maintenance purposes
49, 50, 51, 52, 53, 54, 55

Obligation of owner to share contact details
92

Obligation of owner to insure
93, 56, 57, 58

Demolition and abandonment of tenement building
59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

Definition of floor area etc.
71, 82

Amendments to the Title Conditions (Scotland) Act 2003
77, 78, 79

Interpretation
80, 81
Present:

Jackie Baillie
Miss Annabel Goldie (Convener)
Mike Pringle
Karen Whitefield (Deputy Convener)

Colin Fox
Maureen Macmillan
Nicola Sturgeon

Also present: Mrs Mary Mullingan, Deputy Minister for Communities and Sarah Boyack MSP.

Tenements (Scotland) Bill: The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84.

The following amendments were disagreed to (by division)—

89 (For 1, Against 6, Abstentions 0)
90 (For 3, Against 4, Abstentions 0)

Amendments 85, 86, 87, 92 and 93 were moved and, with the agreement of the Committee, withdrawn.

Other amendments were not moved.

Sections 1, 2, 3, 7, 8, 9, 10, 12, 13, 17, 21, 23, 24, 26, 27, 28 and 29 and the long title were agreed to without amendment.

Section 4, the Schedule, Sections 5, 6, 11, 14, 15, 16, 18, 20, 22 and 25 were agreed to as amended.

The Committee completed Stage 2 Consideration of the Bill.
Scottish Parliament

Justice 2 Committee

Tuesday 15 June 2004

(Afternoon)

[THE CONVENER opened the meeting at 14:03]

Tenements (Scotland) Bill: Stage 2

The Convener (Miss Annabel Goldie): I welcome everybody to the 22nd meeting in 2004 of the Justice 2 Committee. The agenda, item 1 of which is stage 2 of the Tenements (Scotland) Bill, should have been circulated to everyone. Members should have with them the marshalled list of amendments and a list of groupings. The papers look quite voluminous, but I hope that we will get through them all today if members are not too loquacious or inquisitive, although I say that without in any way impugning the necessary work of the committee in discharging its proper responsibilities at stage 2.

I welcome Sarah Boyack to the committee. She has lodged some amendments and we are happy to have her here.

I hope that members have a copy of the bill. We have to go through the whole bill, so we will be considering not only the amendments but the sections of and the schedule to the bill as well. I hope that we can conclude our stage 2 consideration today. If we cannot, we have the option of continuing on 22 June. We will see how we get on. Without further ado, we will get weaving.

Sections 1 to 3 agreed to.

Section 4—Application of the Tenement Management Scheme

The Convener: The first amendment on the marshalled list is amendment 85, in the name of Sarah Boyack, which is in a group on its own.

Sarah Boyack (Edinburgh Central) (Lab): I heard what you said, convener, and will not speak for hours on end. I will say just a few brief words about why I lodged amendment 85.

I have read the committee's stage 1 report and the discussions that members held at stage 1, so I realise that the committee has heard detailed evidence. However, I wanted to hear the minister's interpretation and to tease out exactly how the bill will apply. I have lodged amendment 85 on the basis of lots of casework in my constituency. I know the complexity of the existing private arrangements between different owners in tenements.

The Executive's housing improvement task force identified a key problem: in the management of common repairs and maintenance, owners often have little awareness of what is in their own title deeds, never mind what is in anyone else's. As I understand it, the management scheme applies only when existing deeds are silent.

I know that the committee has decided to accept the principles of the bill, but I am keen for the minister to clarify how the bill will kick in. I think that the bill leaves the potential for owners who want to avoid their responsibilities to try to delay the resolution of any issues through lengthy legal disputes on the interpretation of existing burdens. Will the minister clarify that majority voting will apply when provisions are made on some burdens but not on others? How will the bill apply if there are different burdens—relating to decision making or the appointment of a manager—in different flats in the same tenement? In those circumstances, will the bill kick in?

I know that the committee has decided to accept the principles of the bill, but I am keen for the minister to clarify how the bill will kick in. I think that the bill leaves the potential for owners who want to avoid their responsibilities to try to delay the resolution of any issues through lengthy legal disputes on the interpretation of existing burdens. Will the minister clarify that majority voting will apply when provisions are made on some burdens but not on others? How will the bill apply if there are different burdens—relating to decision making or the appointment of a manager—in different flats in the same tenement? In those circumstances, will the bill kick in?

Another issue is whether people understand how the bill works. I am concerned because I feel that people will not only have to read the bill, but will then have to go to a lawyer to try to work out whether they should use their existing deeds or should apply the bill. Will the minister produce guidelines that are not just written for local authorities and people with a legal background? The guidelines should be written in a way that allows ordinary members of the public to understand how the bill relates to them. That will be very important when the bill becomes law.

Does the minister expect solicitors, when asked by the public, to provide a plain-English explanation of how people's burdens relate to common maintenance? Will she do anything to promote legal services, so that support is available in the community? For example, citizens advice...
bureaux could have clear, helpful guidelines to explain to the public how their existing burdens are interpreted and how they relate to the application of a tenement management scheme. I am keen for the minister to clarify some of those matters.

How does the bill relate to the Title Conditions (Scotland) Act 2003? I am aware that it makes it easier for people to change their titles with the support of the 2003 act, so I would be grateful if the minister explained how that will happen when an ordinary member of the public faces a maintenance issue and they are not sure what is in everybody else’s titles.

I move amendment 85.

The Convener: I shall leave the minister to ponder that; I do not envy her position. Do any committee members wish to comment on the amendment? I will clarify one matter with Sarah Boyack. Would the amendment restrict the application of existing title burdens? Under the bill, if existing title deeds cover procedures for owners to make decisions and the same procedures apply to each flat, the management scheme will not come into play. Would the amendment restrict that?

Sarah Boyack: I think so. That is why I am conscious that the committee may not be over-keen on the amendment, given its views at stage 1. However, I would still like the minister to clarify outstanding issues.

The Deputy Minister for Communities (Mrs Mary Mulligan): I will try to reply to each of Sarah Boyack’s points. If I miss anything, I am sure that she will prompt me.

Paragraph (a) in amendment 85 would make rule 2 of the tenement management scheme apply when owners decided on matters that relate to the maintenance of scheme property and the appointment of a manager. The bill already provides for that. Rule 2 of the tenement management scheme sets out procedures for owners to make decisions when title deeds are silent on decision-making procedures. Rule 3 gives owners the power to make decisions and provides a list of matters on which scheme decisions may be made, which includes carrying out maintenance to scheme property and the appointment or dismissal of a manager. As rule 2 will automatically apply, I suggest that paragraph (a) in the amendment is not needed.

Paragraph (b) in the amendment would make rule 2 apply when any other type of decision is to be made. Any type of decision other than the decisions that are set out in rule 3.1 can be made only under the title deeds. Section 4 of the bill provides that decisions will be made under rule 2 only when title deeds do not set out decision-making procedures. An element of circularity arises. The amendment would work only if paragraphs (a) and (b) of section 4(4) were deleted, but I am not aware of an amendment to do that and I do not think that the committee would be willing to delete those paragraphs.

The committee has expressed, in its stage 1 report and in speeches by committee members in the stage 1 debate, emphatic support for the principle of free variation. Section 4(4) encapsulates that principle for decision making. Section 4 provides that, if title deeds contain procedures for decision making, they should prevail. The amendment would strike at that principle. Paragraph (b) in the amendment would extend rule 2 to any decision that owners were empowered to make under title deeds, but only when the titles failed to provide an adequate procedure. As the purpose of the amendment’s paragraph (a) has been provided for, I hope that Sarah Boyack feels able to withdraw the amendment.

I will pick up the other points that Sarah Boyack made. We intend to ensure adequate publicity of the measures that we seek to enact through the bill. We recognise that not just lawyers or local authorities but owners must be aware of the legislation, as its purpose—as part of the package—is to ensure that owners are supported in their responsibilities. Therefore, we need to let owners know what those responsibilities are. We are already working on that matter.

We want to encourage lawyers to use plain English as much as possible. I am not sure that we can legislate for that, but we will consider seriously supporting that suggestion, because we recognise that using plain English is important if people are to understand the legislation.

Sarah Boyack mentioned the read-across with the Title Conditions (Scotland) Act 2003. The intention of that act was to make it easier to change burdens and it would meet the points that she made. However, I suggest that it is best if we respond in writing on that matter, because it is detailed. Rather than going into it this afternoon, I reassure Sarah Boyack that her points have been taken up and will be followed through. We will write to the convener and the committee on that matter, as well as to Sarah Boyack.
stage, because I want to read the comments that Mary Mulligan has committed to put in writing about the relationship between the bill and the Title Conditions (Scotland) Act 2003.

Amendment 85, by agreement, withdrawn.

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 2 to 5.

Mrs Mulligan: Amendments 1 and 2 are drafting amendments. I am conscious that that phrase might come up frequently this afternoon, but it is important to have the information on the record. The amendments remove references to amounts of scheme costs and replace them with references to “liability for” those costs. That is because it is unlikely that provisions in title deeds will refer to actual amounts of money. If title deeds did so, the amounts specified would quickly bear little relationship to the cost of work to scheme property because of increases in the cost of living. The amendments make the bill consistent with the provisions of section 5 of the Title Conditions (Scotland) Act 2003.

Amendments 3, 4 and 5 disconnect rules 4 and 5 of the tenement management scheme from each other so that the provisions in rule 5 will apply where scheme costs have been apportioned, either according to the burdens in the title deeds of the tenement or where rule 4 of the tenement management scheme applies. Rule 4 covers liability and apportionment of scheme costs; rule 5 covers the redistribution of a share of scheme costs and liability for scheme costs where there has been a procedural irregularity; and rule 5.3 gives some protection to an owner where there has been a procedural irregularity—for example, if he or she is not aware of a scheme decision, he or she might not be liable for any costs that arise from that decision.

The objective of this group of amendments is to extend rule 5 so that it covers liability arising under the burdens in the title deeds. If, however, the title deeds contain equivalent provisions to those set out in rule 5, they would prevail.

Amendment 4 makes changes to section 4(7) to remove the connection between rules 4 and 5. Amendments 3 and 5 are consequential to amendment 4. The reference to rule 5 in section 4(10) is therefore now redundant.

I move amendment 1.

Amendment 1 agreed to.

Amendments 2 to 5 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 86, in the name of Sarah Boyack, is grouped with amendment 88.

Sarah Boyack: I lodged amendments 86 and 88 because I am keen to find out how far the minister has got on promoting the idea of owners associations. In Edinburgh, a pilot association is being developed locally, which I think is a great idea. The pilot is being tried in traditional tenement blocks and in mixed-tenure blocks. The idea of the pilot is to support some of the principles behind the bill, which seeks to change the culture in tenement properties so that people get into the way of regular repair and maintenance. It is important to provide a structure for doing that, whereby people would have to meet up regularly—on an annual basis, for example—to discuss what progress had been made on getting work done on their properties.

We need a clear mechanism and a legal framework for owners and members of community associations to come together to do that, so I seek an indication from the minister of how far she has got with the idea of owners associations. I know that the issue is complex from the point of view of the Parliament’s legal competence. The proposal is not about requiring all tenement owners to be in an owners association; it is about providing a legal framework that enables people to form a group in their tenement that they can see will be beneficial. That would help to change the culture and to provide for much more regular maintenance.

There are many community associations in other parts of the world—in Europe, North America and Australia—in which owners come together to consider how they maintain their properties. I am keen to hear how the minister thinks that such associations might be developed. She might advise me that my amendments are not worded in such a way as to enable me to achieve what I would like to achieve—I know that ministers often use that tactic—or she might tell me that she agrees with my idea but would like to implement it in another manner. I would be keen to hear whether there is another way in which we could achieve what I seek.

I suppose that my key objective is to enable people to establish owners associations without having to reinvent the wheel every time they wish to do so. I want us to have a general approach that can be set out in legislation or in secondary guidance. I am hoping that the minister will tell us whether she is happy to accept my amendments to the bill or whether there is another way of delivering what they propose. For example, would the Title Conditions (Scotland) Act 2003 offer a way of establishing owners associations? I seek clarification of how we can make progress on owners associations and of whether the minister is keen to accept amendments 86 and 88.

I move amendment 86.

The Convener: As no other members have a burning desire to speak, I invite the minister to respond.
Mrs Mulligan: The bill cannot include provision for owners associations because, as members will be aware, that would mean that it would touch on a reserved matter. Under the Scotland Act 1998, the creation, operation, regulation and dissolution of business associations are reserved matters. Business associations are defined as

“any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit; and ‘business’ includes the provision of benefits to the members of an association.”

As an owners association would fall within that definition, it would not be within the Scottish Parliament’s competence to deal with any provision that sought to set up an owners association. A requirement for an owners association would have to be provided for by a section 104 order under the Scotland Act 1998.

I am pleased to be able to tell the committee that we have had discussions with our colleagues at the Department of Trade and Industry and that I have received a letter from Jacqui Smith, who is one of the ministers at the DTI, to confirm that it is happy with the principle of the way in which we intend to proceed. We now need to discuss the details. I appreciate that the committee has been keen to pursue the option of owners associations, so I hope that members will be happy that we are pursuing the matter further. We hope to come back with a satisfactory resolution.

I am aware of the Edinburgh example that Sarah Boyack mentioned—in fact, I met some of her constituents earlier in the year and they were enthusiastic about the way in which the scheme operates. We must learn lessons from that and from the suggestions that Sarah Boyack made. I hope that we will be able to bring the issue to a successful conclusion but, as the amendment deals with a reserved matter, I ask Sarah Boyack to withdraw it at this stage.

Sarah Boyack: I am delighted to hear that progress is being made. The minister did not mention a timescale, but I am keen for the provision to be brought forward as soon as possible. I am happy to withdraw my amendment on the basis that the minister is delivering owners associations by effective means.

Amendment 86, by agreement, withdrawn.

The Convener: Amendment 6, in the name of the minister, is grouped with amendment 76.

Mrs Mulligan: Amendments 6 and 76 follow from correspondence with the Subordinate Legislation Committee. Rules 3.3 and 3.4 in the tenement management scheme contain procedures that are intended to safeguard funds that are required to be deposited by owners in a maintenance account following a written notice to each owner that a scheme decision has been taken to carry out maintenance. The written notice must contain or have attached to it a summary of the nature and extent of the maintenance to be carried out, along with an estimate of the costs and a timetable for the work.

During consultation on the bill, concerns were expressed that those procedures were not appropriate when routine or small-scale maintenance work, such as stair cleaning or minor repairs, were involved. The bill was therefore amended prior to introduction so that the procedures would not apply when the sum involved was less than £100. The bill also gives Scottish ministers the power to vary that figure. That power is intended to take into account the effect of inflation; if the figures are not increased from time to time, there would be a risk that the procedures in rules 3.3 and 3.4 would be applied to small repairs and routine cleaning and maintenance, which would defeat the intention of the provision.

Amendments 6 and 86 make it clear that the power of Scottish ministers will be limited to varying the figure of £100 to take account of changes in the value of money—that addresses the issue that was raised by the Subordinate Legislation Committee, which was concerned that the power to vary the figure was too wide. There are similar provisions in section 29 of the Title Conditions (Scotland) Act 2003, on majority voting on the instruction of common repairs, so it seems appropriate for a similar amendment to be made to section 22 of the Tenements (Scotland) Bill, as that will bring the procedures of the two pieces of legislation into line. The Executive is grateful to the Subordinate Legislation Committee and hopes that the amendments will be supported.

I move amendment 6.

Amendment 6 agreed to.

Section 4, as amended, agreed to.

Schedule

TENEMENT MANAGEMENT SCHEME

The Convener: Amendment 7, in the name of the minister, is grouped with amendments 8 and 9.

14:30

Mrs Mulligan: Rule 1.2(b) of the tenement management scheme refers to property that

“must be maintained by two or more of the owners”.

Amendment 7 makes it clear that that should also include property where the obligation in the title deeds is not to maintain but to pay for maintenance. The point of the amendment is to remove any ambiguity about whether the rule...
includes property where the obligation is to pay rather than to maintain.

Amendments 8 and 9 are technical drafting amendments. They clarify the definition of “scheme property” in rule 1.2 of the tenement management scheme. Rule 1.2(c) lists key parts of a tenement that are to be considered scheme property. Rule 1.2(a) deals with any part of a tenement that is the common property of the owners of two or more flats. Rule 1.2(b) deals with any part of a tenement that the title deeds require to be maintained by the owners of two or more flats. The rule makes it clear that paragraphs (a) and (b) are mutually exclusive. Paragraph (c) is also an exclusive category, as it relates only to other parts of a tenement. Amendments 8 and 9 make the distinction clearer by spelling out that a part is only scheme property under rule 1.2(c) if it is not scheme property under rule 1.2(a) or rule 1.2(b). That matters, as it affects the apportionment of liability for scheme costs under the default rules in rule 4.

I move amendment 7.

Amendment 7 agreed to.

Amendments 8 and 9 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 87, in the name of Sarah Boyack, is in a group on its own.

Sarah Boyack: In amendment 87, I am keen to reflect the situation of many of my constituents, who do not have a secure entry to their tenements and who find it very difficult to get residents to agree to put such an entry in place.

I am aware that the committee has debated the definition of “maintenance” in the bill. It is not my intention to take away the protection that exists in the bill against the majority of residents agreeing to out-and-out improvements that would be too expensive for flat owners or that would be unreasonable. However, there are grey areas concerning the repair or replacement of items that might not be hugely expensive. I would like the minister to clarify whether those will be covered by the bill as it is at the moment. My intention is to make the distinction clearer by spelling out that a part is only scheme property under rule 1.2(c) if it is not scheme property under rule 1.2(a) or rule 1.2(b). That matters, as it affects the apportionment of liability for scheme costs under the default rules in rule 4.

I move amendment 7.

Amendment 7 agreed to.

Amendments 8 and 9 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 87, in the name of Sarah Boyack, is in a group on its own.

Sarah Boyack: In amendment 87, I am keen to reflect the situation of many of my constituents, who do not have a secure entry to their tenements and who find it very difficult to get residents to agree to put such an entry in place.

I am aware that the committee has debated the definition of “maintenance” in the bill. It is not my intention to take away the protection that exists in the bill against the majority of residents agreeing to out-and-out improvements that would be too expensive for flat owners or that would be unreasonable. However, there are grey areas concerning the repair or replacement of items that might not be hugely expensive. I would like the minister to clarify whether those will be covered by the bill as it is at the moment. My intention in seeking to amend the bill by inserting the phrase “to a modern standard” is to ensure that it covers replacing tenement main doors with secure entry doors and phone systems.

I will give the committee an example. Many tenements in Edinburgh have very old door entry systems that are operated by metal wires and pulleys. Many of those systems are broken and have been vandalised over the years. If there is such a system in a tenement, will repairs to it be covered as maintenance? Clearly, adding electricity to the system so that people are let in by a door buzzer would be an improvement. That is a different type of system, but it is based on exactly the same principle. Furthermore, does the bill cover installation of a door entry system in a tenement that previously had no such system and had merely a main-door entrance?

One problem that we have—which is linked to the problem of antisocial behaviour—is that of people breaking down main doors and taking drugs or alcohol on the stairs. We have considerable experience of residents being intimidated. It can take ages to get a door entry system fixed. I hope that the bill will make the process much more straightforward and protect residents who at the moment have to wait ages to get absolutely everyone on board. If there are several council flats in a tenement, the council sometimes takes on the work, but often people have to wait years to take action. I hope that the bill, as amended in the way in which I suggest or as clarified by the minister, will make a difference to problems of vandalism, intimidation and the deterioration of property, which people find very difficult to stop because they have to get all residents to agree to carry out repairs. That is the reason for amendment 87. I have raised the matter with the minister before, and I know that the situation with door entry systems and so on is even more complicated than we might imagine. I hope that she will be able to make some progress on the issue and give me some reassurance about it.

I move amendment 87.

The Convener: Although you have illustrated your amendment with reference to a door entry system, the effect of your amendment would in fact be to extend the phrasing to numerous other matters. Is that correct?

Sarah Boyack: That is correct.

Mrs Mulligan: Amendment 87 seeks to permit the replacement of part of a tenement building “to a modern standard”. That phrase is rather ambiguous. In any case, I believe that the amendment is rather unnecessary, as the provisions of the bill already allow for replacement to a modern standard.

Under rule 1.5 of the tenement management scheme, the definition of “maintenance” includes replacement. It goes on to make it clear that improvement is permissible if it is “reasonably incidental” to that maintenance. Therefore, the definition already allows for replacing and modernising an existing feature using up-to-date materials and technology. That means that replacement improvements can go ahead on a majority vote under the provisions of the tenement management scheme if that is not provided for in the title deeds.
I fully understand Sarah Boyack’s desire that majority voting should be permitted to allow for the installation of entry phones. I am sure that members will agree that they are useful and beneficial for securing tenements. However, amendment 87 deals only with replacement. Although Sarah Boyack’s comments in support of the amendment went further, the amendment itself does not do so.

I recognise Sarah Boyack’s concerns about security, particularly in relation to entry phones, but I do not want to accept her amendment at this stage. As the convener points out, it could bring with it other obligations for owners that we have not discussed. I ask Sarah Boyack to withdraw amendment 87, because those cases where replacement is involved are already covered in the bill and we need to consider further those cases where it is not.

Sarah Boyack: Before winding up, I ask the minister to clarify that she is relaxed about the fact that existing door entry systems that are perhaps a couple of hundred years old, and that have fallen into disrepair, will be covered by the bill.

Mrs Mulligan: The bell-pull systems that many tenements have, even if they are not working, will still be covered by the bill.

Sarah Boyack: I am very glad to hear that. On that basis, I will go away and think about the matter. I would like to read the Official Report of the meeting and consider what the minister has said. I might return to the matter at stage 3.

Amendment 87, by agreement, withdrawn.

The Convener: Amendment 10, in the name of the minister, is grouped with amendment 12.

Mrs Mulligan: The amendments in this group remove the cross-references between the individual rules of the tenement management scheme, which are highly technical. The rules or, in some cases, parts of them, supplement the title deeds, and they need to be independent of one another.

Amendment 10 deals with voting rights for scheme decisions. Rule 2.3 of the scheme is about voting rights in a tenement. The purpose of the rule is to ensure that an owner does not get a vote in relation to maintenance of part of a tenement if he or she is not liable for the cost of maintaining that part. Amendment 10 clarifies that that is the case as long as the owner is not liable. There should not be different rules depending on whether the liability arises from the title deeds or from another management scheme that applies to the tenement.

Amendments 16, 17, 28 and 29 seek to remove the cross-references between rules 4 and 5 to allow them to operate independently.

Amendment 30 deals with the cost of common insurance when the title deeds provide for common insurance but do not apportion a cost. It makes it clear that the cost of common insurance will be a scheme cost under rule 4.1 of the tenement management scheme, whether the common insurance is arranged as a result of a scheme decision under rule 3.1(e) or because of a burden in the title deeds.

Amendments 39, 41 and 42 seek to make changes to section 4(7) and rule 5 of the TMS to remove the connections between rules 4 and 5 and rules 3 and 5, so that the provisions in rule 5 will apply when scheme costs have been apportioned either according to the burdens in the title deeds of the tenement or when rule 4 of the tenement management scheme applies.

I move amendment 10.

Amendment 10 agreed to.

The Convener: Amendment 11, in the name of the minister, is grouped with amendment 12.

Mrs Mulligan: Committee members will recall that witnesses expressed concern that two flat owners in a tenement of three would have no remedy if the remaining owner refused to agree to a repair. The Law Society of Scotland argued that the two owners should not be denied the advantage of majority voting. Amendments 11 and 12 respond to that concern.

At present, the procedures that are set out in rule 2.6 of the TMS require a unanimous vote for scheme decisions where the tenement contains three flats or fewer, because it was originally felt that it was less difficult to achieve unanimity in small tenements and that majority voting was open to abuse—perhaps because of personality clashes—if only two votes were required for the majority. That scenario affects not only small tenements but any block where part of the tenement is owned in common by the owners of only three flats as, under rule 2.3, only three votes would be allocated for a scheme decision related to the maintenance of that property.

The Executive has been persuaded by the arguments on majority voting in tenements of only three flats. Amendment 12 will remove rule 2.6, so that majority voting will apply in all tenements where scheme decisions are made under rule 2. Amendment 11 is consequential. We also intend to make a corresponding amendment to the Title Conditions (Scotland) Act 2003, where we feel that the same arrangements should apply in relation to majority voting in communities.

I move amendment 11.
The Convener: Thank you, minister. The issue was raised with the committee as a matter of some concern. There is appreciation of the note that has been taken of that.

Amendment 11 agreed to.

Amendment 12 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 13, in the name of the minister, is grouped with amendments 14, 15, 83 and 84.

Mrs Mulligan: The group comprises technical amendments relating to the sending of notices. Rules 8.2 to 8.5 of the TMS contain detailed provisions on the giving of notices under the scheme, but there are no provisions on giving notices in the main part of the bill, except for section 25(3). For example, section 5 of the bill includes provision for notices that are not covered by rule 8 of the TMS.

Amendment 84 is the main amendment in the group. It inserts provisions into the bill on the sending of notices. Amendment 46 removes section 25(3), which is now superseded. Amendments 13, 14 and 15 are drafting amendments that make the terminology consistent. As I believe that amendment 13 was made at your suggestion, convener, I am sure that the committee will be pleased to support it.

I move amendment 13.

14:45

The Convener: I am grateful to the minister, but I wish that my recollection was slightly purer than it is.

Amendment 13 agreed to.

Amendments 14 and 15 moved—[Mrs Mary Mulligan]—and agreed to.

Amendment 88 not moved.

Amendments 16 and 17 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 18, in the name of the minister, is grouped with amendments 19 to 27 and 72 to 75.

Mrs Mulligan: Amendments 18, 19 and 20 exclude from the £200 threshold in rule 3.3 of the TMS any sum of money that has been placed in a maintenance account. Rule 3 provides some safeguards for owners who have to pay deposits on repair or maintenance. Rule 3.3 provides that the money will be placed in a maintenance account. Rule 3.3(b) contains a £200 limit so as to ensure that owners do not have to risk handing over more than £200 in any year without the protection of the money being placed in a maintenance account.

However, rule 3.3(b) may kick in when a small sum—perhaps that which is required for stair cleaning—pushes the total amount over the £200 limit. The previous sums that have been demanded in that year may already be held in a maintenance account. In that case, the only sum at risk would be the small amount that is being demanded, which would result in unnecessary complications for the owners. The amendments in the group exclude from the £200 threshold any sums that have been placed in a maintenance account.

Amendment 72 is a consequential amendment that ensures consistency in the Title Conditions (Scotland) Act 2003. Members will be pleased to note that amendments 21, 22, 73 and 74 were lodged as a direct response to the committee's suggestion in its stage 1 report that there should be a refund date for deposited funds.

Rule 3.4(f) provides that an owner who has deposited funds in a maintenance account following a scheme decision to undertake maintenance may demand repayment of the sums deposited if maintenance is not commenced by the 14th day after the date that was proposed for commencement of the work.

Following evidence from witnesses, the committee expressed concerns in its report about the 14-day rule. It said that the rule could result in funds that had been collected having to be repaid even though there were good reasons for the commencement of the work being delayed. The committee suggested that the sums deposited should become payable only after a refund date, which would be chosen by the owners and specified in the notice, had been set. The refund date would be the date after which the money would become repayable.

Although we believe that the idea is sensible, we also think that there should be a default position in case the refund date is overlooked when the arrangements for the repair are made. As we feel that the refund date should be an optional rather than mandatory requirement for the notice, amendment 21 seeks to provide that the notice to be given under rule 3.3 may specify a date on which the sums deposited will be repayable to the depositors if maintenance has not been commenced by that date. If the notice does not state a refund date, the deposited sums will be repayable as under the current provisions, except that, under the terms of amendment 22, the period will be extended to 28 days. Owners will therefore be able to request repayment if the work does not commence before the refund date or within 28 days of the proposed date of commencement.
Amendments 73 and 74 seek to make similar amendments to equivalent provisions in section 29 of the Title Conditions (Scotland) Act 2003. Amendments 23 to 26 and 75 seek to make it clear that the person who has deposited the money will be able to recover it even if he or she has sold the flat. In rule 3.4(h), the money is stated as being repayable to the depositor and amendments 23 to 25 seek to make the same change to rule 3.4(f). Amendment 26 seeks to make the terminology used in rule 3.4(h) consistent by changing the references to “owner” to “depositor”, “depositors” or “person” depending on the sense of the clause. Amendment 75 seeks to make a similar change to section 29 of the 2003 act.

I turn finally to amendment 27. Rule 3.1(f) of the tenement management scheme permits scheme decisions by owners “to determine that an owner is not required to pay a share of … scheme costs”. This rule is intended to protect an owner who for whatever reason is genuinely unable to pay the requisite share of scheme costs. However, if the majority of flats in a tenement were owned by one owner, that person or body could use rule 3.1(f) to exempt themselves from payment. As the bill stands, it would even be possible for a majority of individual owners to place the whole liability for a scheme cost on the minority. To prevent that potential abuse—which I am sure was spotted by everyone—we have lodged amendment 27, which seeks to provide that the vote or votes of an owner should not be counted where that person or body votes to excuse themselves from payment under rule 3.1(f).

I move amendment 18.

The Convener: Thank you, minister. Do other members wish to speak?

I have never known the committee to be so mute. We are perhaps struggling slightly with some of the drafting semantics of the amendments. However, I think that members would want me to express appreciation of the notice that has been taken of our slight concern about the arrangements for recovering moneys that have been paid over. Amendment 21 deals with the matter very satisfactorily.

Maureen Macmillan (Highlands and Islands) (Lab): The use of the term “refund date” makes things clearer.

The Convener: I am grateful to you, minister. The amendments bring considerable clarity and fairness to the matter.

Amendment 18 agreed to.
Amendment 37 removes rules 4.7 and 4.8 from the TMS. Amendment 46 inserts a new provision into the bill before section 11. That determines when an owner’s liability for certain costs arises, and will apply whether that liability arises by virtue of the TMS, the bill or the tenement burdens.

I move amendment 37.

Amendment 37 agreed to.

The Convener: Amendment 38, in the name of the minister, is in a group on its own.

Mrs Mulligan: Amendment 38 simply removes rule 5.1 from the TMS, because it is redundant. It does not add anything to the provisions of section 24(5), which is identical in effect. It provides for liability where two or more persons own a flat in common.

I move amendment 38.

Amendment 38 agreed to.

Amendment 39 moved—[Mrs Mary Mulligan]—and agreed to.

15:00

The Convener: Amendment 40, in the name of the minister, is in a group on its own.

Mrs Mulligan: Rule 5.2(b)(ii) refers to owners who cannot be contacted. Amendment 40 makes it clear that it is not enough only to allege that an owner cannot be contacted and that it is therefore not possible to get from him or her their share of costs. An effort must be made to identify and locate them, and that effort must reasonable. The amendment will change the wording so that it is similar to section 93(2)(a) of the Title Conditions (Scotland) Act 2003, which relates to persons “who cannot, by reasonable inquiry, be identified or found”.

I move amendment 40.

Amendment 40 agreed to.

Amendments 41 and 42 moved—[Mrs Mary Mulligan]—and agreed to.

Schedule, as amended, agreed to.

Section 5—Application to sheriff for annulment of certain decisions

The Convener: Amendment 43, in the name of the minister, is grouped with amendments 44 and 45.

Mrs Mulligan: Members may recall that the development management scheme could not form part of the Title Conditions (Scotland) Act 2003, as the proposed owners association in the scheme was a business association and, as such, was reserved in terms of the Scotland Act 1998. Therefore, the scheme will be set out in the development management scheme order that is to be made under section 104 of the Scotland Act 1998. It is hoped that that order will be progressed as soon as the final form of the Tenements (Scotland) Bill is known.

Amendments 44 and 45 make it clear that the provisions of section 6 on application to the sheriff to resolve certain tenement disputes are not intended to apply to tenements where the development management scheme has been applied. That is consistent with the approach of section 5. It is intended that the development management scheme order that is to be made at Westminster in consequence of the 2003 act will make equivalent provisions to both section 5 and section 6.

Amendment 43 makes it clear that when owners apply to the courts and the courts are considering the best interests of the owners, they must consider the interests of the owners as a whole.

I move amendment 43.

The Convener: For the avoidance of doubt, I presume that you mean that owners should be taken as a total, integral group.

Mrs Mulligan: Yes.

Amendment 43 agreed to.

Section 5, as amended, agreed to.

Section 6—Application to sheriff for order resolving certain disputes

Amendments 44 and 45 moved—[Mrs Mary Mulligan]—and agreed to.

Section 6, as amended, agreed to.

The Convener: Not much sound is coming from one side of the room. Are you all still with us in the remoter branches?

Nicola Sturgeon (Glasgow) (SNP): We are riveted.

Sections 7 to 10 agreed to.

Before section 11

Amendment 46 moved—[Mrs Mary Mulligan]—and agreed to.

Section 11—Liability of owner and successors for certain costs

The Convener: This is where it gets really complicated—I have to move an amendment in my own name. Amendment 89, in my name, is grouped with amendments 90, 91 and 94.

Members will recall that a part of the bill that occasioned some concern was the provision in section 11 that a purchaser could find himself or
herself liable for repair costs that had been the liability of the seller. Committee members had certain reservations about that.

Nicola Sturgeon has lodged a similar amendment to amendment 89. I ask members to bear in mind the fact that the amendments cannot both be agreed to. The difference between our positions is that I remain unhappy at the prospect of any hapless purchaser, having undergone the undoubted expense of purchasing a property, finding himself or herself confronted with a bill. Nicola Sturgeon’s amendment 90 seeks to ensure that such a purchaser would be protected from the liability only if it was more than £500. In other words, a liability of less than £500 would pass to the purchaser.

It seems to me that the liability is properly the legal responsibility of the seller and that the seller and the seller’s co-proprietors will have benefited from whatever the works were. Somehow or other, that should be sorted out. That is why amendment 89 attempts to alter section 11 to protect the purchaser but also to ensure that a mechanism—in the form of a notice—exists to make clear that the amount that has been incurred and which the seller still owes is known about. References are made to the form of notice in proposed subsection (2B).

Although amendment 89 is rather technical, its purpose is to try to ensure that no purchaser of a new property in a tenement situation finds himself or herself saddled with an expense that, even if it were under £500, could be onerous. I want to try to remove that liability from the purchaser and ensure that it is properly dealt with by the seller or the co-proprietors and that protection is afforded by the registering of a notice against the seller’s title.

I move amendment 89.

**Nicola Sturgeon:** This was the most controversial aspect of the bill at stage 1, so it is appropriate that we take some time over it.

The bill will change a fundamental principle of property law. Under current law, the responsibility for payment of repair costs is personal to the seller of the property; it does not transmit to a purchaser. The bill seeks to change that. While the repairs would remain the responsibility of the seller, when the property is sold, the purchaser would become jointly and severally responsible for payment. In effect, that turns the seller’s personal obligation into a real obligation that can transmit against the property to the purchaser. Of course, the purchaser will have a right of relief against the seller, but that will be meaningful only if the seller can be found and if he has the funds to meet the liability.

During the debate on our stage 1 report, it was said that various measures can be taken to trace the seller. Specific reference was made to section 70 of the Title Conditions (Scotland) Act 2003. However, the duty to disclose information that is contained in that section carries no enforcement sanctions, so it does not offer much comfort to a purchaser who might find themselves in that position. In reality, other owners in a tenement would find it much easier to seek to make the purchaser liable than they would find it, in some circumstances, to find the seller and enforce the obligation against the seller.

I appreciate that one of the objectives of the housing improvement task force was the maintenance and improvement of the housing stock, and I accept absolutely that is the right aim and that the Tenements (Scotland) Bill should reflect that. The inability to recover costs under the present law operates as a disincentive to instruct repairs; I accept that. On the other hand, I have deep misgivings about a system in which a purchaser can find themselves facing a bill of which they were completely unaware. That offends some of the basic principles of Scots property law, including the openness and publicity that underpins it.

My amendments seek to strike a balance between those two competing public policy principles—the importance of being able to recover costs on the one hand and, on the other hand, the need to ensure that when someone buys a property, they do so with their eyes wide open. The proposed solution is first to limit the operation of section 11 to sums of £500 or less of outstanding costs. That is £500 per flat, so in a tenement block of eight, the total would be £4,000. Most repair bills are comparatively modest, but when the sum that is outstanding exceeds that limit, my amendments propose that a notice be recorded against the property to warn of the outstanding costs. The cost of a search of the registers direct service for a property is £4 plus VAT, and the cost of registering a notice is £25 plus VAT. Costs are involved, but they are not prohibitive and they would allow a purchaser to be clear about the liabilities that they were taking on when they were buying a property.

The style of notice that is proposed by amendment 90 borrows from the style of notices of payment of repair grants and improvement grants that were use by local authorities in the 1970s and 1980s. Those notices were registered in the property registers without much difficulty and without over-burdening the Registers of Scotland. I propose that they could be used by a factor or any other owner in the block. A purchaser would then be warned and would be able to make further inquiry. The system would allow the purchaser to
pay off the amount by deducting it from the sale price or by requiring the seller to do that.

The forms are pretty simple; they could be completed without legal advice, so I do not think that they would place a huge burden on the other owners or a factor. The fact that there is a cost element will act to ensure that the procedure will be used only when it is economically viable; higher-value repair costs will trigger the procedure.

Amendments 90, 91 and 94 seek to strike a balance between what the bill is trying to achieve and ensuring that purchasers have protection. I hope that the minister and the committee will consider them favourably.

Mike Pringle (Edinburgh South) (LD): Would amendment 90 mean that, if the cost against a flat was more than £500, it would be excluded from the requirement that it be registered?

Nicola Sturgeon: Sorry?

Mike Pringle: For example, if a bill of £100,000 was outstanding against eight flats, would that need to be registered? If a group of flats in a tenement—normally, there are eight or 10 flats—had an outstanding common repair notice with a total cost of £100,000, how would those flats be affected by amendment 90?

Nicola Sturgeon: If the outstanding bill against the flat that was being sold was for less than £500, the joint and several liability provision would kick in regardless of any notice that might be registered in the property registers. However, if the outstanding bill was for more than £500, the purchaser’s liability would kick in only if the purchaser had been given notice of that liability through the registration procedure.

The Convener: Under amendment 90, would the purchaser still be liable if the outstanding bill was for less than £500?

Nicola Sturgeon: Yes.

The Convener: Would the protection that would be afforded by amendment 90 apply only to purchasers who found themselves facing a share that was in excess of £500? Would such purchasers be covered by the registration procedure?

Nicola Sturgeon: Yes.

Maureen Macmillan: All committee members were concerned about the issue. Incoming purchasers should not be liable for a debt of which they had no knowledge because the seller from whom they bought the flat failed to disclose it.

Mike Pringle: For most of us, section 11 exercised us more than any other. In our stage 1 report, we stated:

“The Committee is of the view that this provision, as it stands, is very unfair to the purchaser.”

If I remember rightly, the word “very” was inserted at my request, which the committee was glad to accept. I am pleased that that word was inserted. We need to consider the issue seriously, because the provision as it stands is very unfair. Several times during my years as a councillor, people came to me desperate because they had bought a flat and found themselves facing a serious liability.

When we took evidence on the bill, we heard from one lawyer who had been about to buy a flat in Glasgow for £24,000. The selling solicitor and the seller were being very obstructive about providing information, and the lawyer discovered only days before settlement that there was an outstanding bill of £22,000 on the property. If he had not found out about that bill, the buyer would have suddenly found himself liable for an additional £22,000 on a £24,000 flat. That is wrong.

I think that Nicola Sturgeon’s amendments would address that problem.

The Convener: Let me clarify that amendments 89 and 90 are similar but not identical; it is important that committee members understand that. I will not put words into Nicola Sturgeon’s mouth but, as I understand it, the protection for the purchaser that would be provided by her amendment 90 would kick in only for sums in excess of £500.

Nicola Sturgeon: The effect of amendment 90 would be to limit the joint and several liability in two ways. As it stands, the bill will make owners and sellers jointly and severally liable. Amendment 90 would mean that they would be so liable only if the amount concerned was under £500 or if a notice had been registered in the property registers.

The thinking behind the £500 limit is that the procedure should not be necessary for trivial amounts of money; it recognises that large sums are the big problem. At the best of times—never mind during the current situation with property prices—people stretch themselves to the limit to buy property. If purchasers find that they are faced with an enormous additional bill of not just a couple of hundred pounds but a couple of thousand pounds, that can have catastrophic consequences for individuals. My amendments recognise the difference in those sorts of values.

There is a difference between amendments 89 and 90, but I should point out that amendment 91,
which would provide the form of the notice, could apply to either amendment.

The Convener: I think that that is the intention of the drafting, and I see that the clerks are confirming that it is. It is helpful to distinguish between amendments 89 and 90. The difference is not straightforward but technical, and I think that Nicola Sturgeon has explained where her amendment 90 differs from my amendment 89. Amendment 89 would take the liability of any purchaser out of the equation and, by putting information in the property register, provide a mechanism to ensure that other owners, and the seller, would know what was going on.

Mrs Mulligan: I am aware of the strength of the concerns that members expressed during stage 1. I hope that members will bear with me as I respond to comments that were made then and to comments that have been made this afternoon.

When a major repair has been carried out on a tenement, or is being contemplated by the owners, and one of the flats is then sold, we should ask who is in the best position to protect himself or herself against the possibility that the seller may abscond without paying his or her share of the cost. Our view is that the purchaser of the flat is in the best position to protect himself. His solicitor will be in negotiation with the seller’s solicitor over the conclusion of missives, and he also has the option of retaining part of the purchase price. He will usually have had the property surveyed, and even a valuation report should pick up major repairs that need to be done or, indeed, those that have been recently completed.

By contrast, the other owners in a tenement may be unaware that a flat is being sold. The sale may have been completed and the previous owner may have moved out before they realise that a share of the cost of the repair work is unpaid. The liability for paying that share could fall on the other owners rather than on the new owner of the flat. The new owner will benefit from the work having been done, but will bear no responsibility for the share that applies to the flat that he now owns and occupies.

The best protection for owners will be to collect money in advance. Rule 3.2 of the tenement management scheme enables the owners to collect money in advance of carrying out repair work. That is also a protection for the incoming purchaser, as the seller should already have deposited money into the maintenance account.

As I said, I acknowledge members’ concerns and have listened to their contributions. However, if there is to be protection for incoming purchasers, it will need to be carefully balanced against the need to protect the existing owners. It will also need to avoid discouraging the maintenance of property. The protection should be proportionate to the scale of the potential problem.

Amendment 89, in the name of the convener, would remove section 11(2). That subsection imposes several liability on a seller and an incoming owner, but the amendment does not replace that liability. The notice procedure that is proposed in the amendment’s new section 11(2) is therefore unnecessary, as liability will not transfer to the incoming owner. Amendment 89 would also provide for the discharge of the proposed notices after five years. I suggest that that is too long a period. In the vast majority of cases, the work in question will have been done and paid for long before five years have passed.

Amendment 90, in the name of Nicola Sturgeon, proposes that the existing provisions of section 11 should remain when the costs do not exceed £500 for the burden that properties share. However, the amendment proposes that, when the costs exceed that limit, a notice in the form specified in the schedule that is proposed by amendment 91 would have to be registered or recorded in order for the burden to transfer to the incoming owner. The Executive believes that £500 is too low a threshold for a notice procedure. The notice provision should be regarded as a safety net to deal with unusual cases. The procedure should not be used regularly, and it should seek to protect purchasers only against large liabilities.

It seems that the schedule that is proposed by amendment 91 would cover only those cases in which repair work had been done but the bill was unpaid. That is a possibility and is perhaps the easiest example of a risk to a purchaser, but section 11 covers all scheme costs, including those that have not yet been incurred. A purchaser is therefore liable for costs that arise from a scheme decision that was made before he bought his property, even if notice had been given to the seller. The proposed notice provision would mean that although a purchaser, as a successor, was bound by a scheme decision, he would not be bound to pay for it in some cases.

The buyer’s primary protection against a large and unexpected repair bill is a full and proper survey of the property, which will show up the issues that need to be dealt with. Nicola Sturgeon said that registering a liability should be a straightforward procedure. I caution members and ask them to reflect on what we would be asking the Registers of Scotland to do. That organisation would have the burden of ensuring that such notices were registered, so we must be clear that it can carry that burden satisfactorily. As that has not been discussed with the organisation, the issue would need to be resolved.

I hear members’ concerns, but I ask Annabel Goldie to consider withdrawing amendment 89.
and Nicola Sturgeon to consider not moving amendments 90, 91 and 94. As I said, the amendments contain several details that would make them unacceptable, even if the committee has, in the past, had some sympathy with the principle behind the amendments.

The Convener: As I explained, amendments 89 and 90 cannot both be supported, so I propose to wind up on amendment 89, then to ask Nicola Sturgeon to wind up on her amendments before we vote. Members should have the benefit of hearing both wind-up speeches before they reach a view.

I will deal with three points from the minister’s response. I noticed the emphasis that you placed on a purchaser’s knowledge, which concerns me. In many genuine circumstances, a purchaser will not and cannot have that knowledge. Mr Pringle gave an example that was certainly an exceptional situation, but it was a graphic illustration of what can happen.

An anomaly seems to exist. If the provision is intended to provide a potential financial burden that will fall on the purchaser of a flat, it is anomalous that such a provision will not apply to the purchaser of a semi-detached house or a bungalow. My question is about the general principle. Why should the bill impose on the purchaser of a flat a liability that does not accompany other types of property purchase?

You mentioned the reference to five years. The significance of that period is that a normal debt would prescribe in law after five years and would no longer be recoverable, so that would be a sensible limit to place on the currency of any notice. If the matter had not been dealt with after five years, the liability would discharge.

From my judgment and experience, I remain concerned that a purchaser could be confronted with a liability about which they could genuinely know nothing and could not have had any reliable means of finding out. It is wrong to pass laws that would pass on someone else’s responsibility to a purchaser.

Nicola Sturgeon: I will comment on some of the minister’s points. Her first point was that purchasers are in the best position to protect themselves, but in the circumstances that we are dealing with, that is manifestly not the case, because the purchasers have no means of protecting themselves. They can ask factors for information, but in many cases—especially in Edinburgh—no factor has been appointed.

A purchaser could ask a seller, but they would have to rely completely on a seller’s honesty. When large sums of money are involved, unscrupulous sellers will have a disincentive to tell the truth. That is a fact of life.

A solicitor who acted for a purchaser in such circumstances would fulfil his or her professional duty simply by asking a factor or seller. There would be no claim against the solicitor if it later transpired that large sums were outstanding, because the solicitor—just like the person for whom they are acting—cannot conduct searches to find out the information, because there are no searches that would reliably inform a purchaser. We cannot expect purchasers to protect themselves without giving them the means to do so, and those are lacking at the moment.

15:30

The second point that was made that merits comment is that other owners in a tenement would not necessarily know that a flat was being sold. That is a fair comment. However, the other owners would not have to know that a flat is being sold, because the amendments, taken together with the other provisions, would act to allow another owner or a factor to register a notice whenever a sum of more than £500 is outstanding. A flat would not have to be on the market or to be sold for a notice to be triggered.

Fundamentally, the amendments are about protecting other owners, as well as the purchaser. Under the current law, other owners have no rights against a purchaser—they have rights only against an owner. The amendments retain the objective of the bill, which is to give rights to owners against the purchaser, as well as the seller. Those rights would be limited to cases either in which the sum outstanding was less than £500 or in which the purchaser had been given due notice that the amount was outstanding. In my view, that is fairly equitable. In cases where sums are large—more than £500—it is in the interests of the owner to ensure that the purchaser knows about them. With the amendments, other owners would be in a better position than they are in at the moment, because they would have some right of action against purchasers, albeit a limited one.

The point was made that the figure of £500 is too low. That is simply a matter of opinion—we could argue the point. For me, the important issue is the principle. That is why I will press the amendments. If the minister thinks that the figure of £500 is too low, I am sure that we can debate other amendments at stage 3 that would change it. I would be open to debating the matter, but the principle is too important for me not to press it.

I do not think that the provision would overburden the registers. I made the point that it conforms to the model for repairs, grants and so on that local authorities used to use, which I am not aware placed huge pressure on the registers. The facility would not be overused. I stand by my comment that the majority of repair bills are for
modest sums. The provision is designed to protect people where large sums of money are involved. It is a fundamental principle of property law in Scotland that real burdens appear on the registers, so that people can enter transactions with their eyes open. If the bill is not amended along the lines that I have suggested, that principle will be jeopardised and purchasers will be put at risk. We will also have missed an opportunity to give owners better protection than they currently have.

Mrs Mulligan: I want to clarify a point that was made about the difference between the responsibilities of people in a tenement and those of people who buy a semi-detached house. My advice is that there is no difference, but we will clarify the point at a later stage.

I recognise the committee’s concerns on this issue and the unfairness that is seen to affect a purchaser when they take on a burden of which they are not aware. However, we must balance that concern against the fact that, at the end of the day, someone has to pay the bill. At the moment, the other owners are left with that responsibility. If they do not assume it, the work does not take place. Nicola Sturgeon has already accepted that one consequence of the current situation is that work is delayed because no one wants to commit themselves to carrying out repairs when a house is in the process of being sold.

I still have concerns about overburdening the Keeper of the Registers of Scotland, who now has responsibilities that they did not have in the 1970s and 1980s. We need to bear that in mind. If we decided that this proposal was the most satisfactory way in which to proceed, we would need to consider the issue of overburdening before agreeing to it.

At the end of the day, as I said in my opening comments, the best way to protect a purchaser is through a full and thorough survey, as that will show up the obligations that might arise. We must balance that with the few cases in which that does not happen. From the debates that we had at stage 1, we recognise that the issue is particularly complicated. The implications of the amendments have not necessarily been taken into account, and I want to take more time to consider the matter.

The Convener: Fair enough. Nicola Sturgeon wants to comment, but technically our debate concluded with the minister’s response. Is your point one of clarification?

Nicola Sturgeon: That is not the point. It is one thing for a purchaser to go into a transaction knowing that the flat needs to be repaired, but it is completely different for them to go into a transaction not knowing that the property has been repaired and that the repair has not been paid for, and a survey will not show up the latter.

My second point of clarification is that I agree that somebody has to pay. The amendments are not about letting the purchaser off the hook—they retain the right of the owner to take action against the purchaser. All that they say is that before an owner can take such action—when the costs exceed £500—the liability has to have been out in the open so that the purchaser is aware of it. The procedure for that is not onerous but pretty simple, and it allows us to strike the balance that we have talked about.

The Convener: I was going to clarify that very point. In section 11, we are talking specifically about costs—not about anticipated expense or outstanding repairs but, presumably, about repairs that have been done but for which the seller has not paid. That is an important distinction. A surveyor might look at a flat that has been extensively treated for dry rot and woodworm. When he goes in, all that he finds is that the flat has been freshly painted and is beautifully furnished. It would be extremely difficult for him to know what on earth has been going on; people might just have redecorated. If a surveyor is asked, as he examines a flat, to express an opinion about whether a seller owes money for repairs that have been carried out but not paid for, he is being asked to take on a different task. That is an important point of clarification in relation to the phrasing of section 11.

Mrs Mulligan: In a full survey, a reasonable surveyor should be able to identify where work has been carried out. I recognise the point that Nicola Sturgeon makes; the cost of work that needs to be carried out might not be quantified. However, that shows up the difficulty with the amendments that have been lodged, because they might not clarify the position. That is why we need to step back and think further.

The Convener: I am anxious to make progress. We have had a debate and there has been a full contribution of views. I realise that there is no unanimity of opinion on the matter and I accept that the minister does not feel ready to accept the amendments. I appreciate her position but, in the interest of clarity, we need to press forward and let the committee come to its conclusions on the amendments.

I press my amendment 89. The question is, that amendment 89 be agreed to. Are we agreed?

Members: No.
The Convener: There will be a division.

FOR
Goldie, Miss Annabel (West of Scotland) (Con)

AGAINST
Bailie, Jackie (Dumbarton) (Lab)
Fox, Colin (Lothians) (SSP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Sturgeon, Nicola (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 89 disagreed to.

Amendment 90 moved—[Nicola Sturgeon].

The Convener: The question is, that amendment 90 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Fox, Colin (Lothians) (SSP)
Pringle, Mike (Edinburgh South) (LD)
Sturgeon, Nicola (Glasgow) (SNP)

AGAINST
Bailie, Jackie (Dumbarton) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 90 disagreed to.

Mrs Mulligan: Amendment 47 seeks to change the definition of “relevant costs” in section 11(4), so that it covers liabilities that arise for scheme costs whether they arise under the provisions of the title deeds or under the rules of the TMS.

I move amendment 47.

Amendment 47 agreed to.

Mrs Mulligan: Amendment 48, in the name of the minister, is in a group on its own.

Mr Mulligan: Under certain provisions in the bill and some of the rules of the tenement management scheme, an owner might seek to recover costs or a share of costs from another owner. For example, under section 10, an owner is entitled to carry out work and to recover a share of the cost of maintenance as if the maintenance had been carried out under the terms of the management scheme for that tenement. Under the tenement management scheme, an owner might also seek to recover sums that might have arisen from the operation of rules 4, 5 and 6. At present, those costs can be recovered by owners, but not by former owners. As it does not seem to be fair that an owner should lose the right to recover costs on selling the flat, amendment 48 seeks to allow former owners to retain the right to recover those costs.

I know that members have been interested in the general question of where liability falls between the seller and purchaser—we have just had a debate on the matter—but that general principle seems to differ from the more detailed matters that amendment 48 deals with. I hope that members’ uncertainty about the general issue will not prevent them from supporting the amendment.

I move amendment 48.

Amendment 48 agreed to.

Mrs Mulligan: Amendments 49, 50, 51, 53 and 54 are drafting amendments that will not change the effect of any provisions but will simply clarify some terminology.

On amendment 52, section 14(6) provides that the right of access to parts of a tenement that are individually owned as set out in section 14 may also be exercised by another person—most commonly, a tradesperson—who is authorised in writing by an owner or owners association. Under section 14(7), if an authorised person causes damage to any part of the tenement, the owner or owners association who gave the authorisation will...
be severally liable with the authorised person for any damage that has been caused, but the owner or owners association will have a right of relief against the authorised person. If, however, the person was not authorised in writing, he or she would not qualify as an authorised person and there would be no several liability or right of relief. It therefore seems to be sensible to remove the requirement that the person be authorised in writing, which seems in any case to be overly bureaucratic.

Amendment 55 will tighten up the access provision and clarify a couple of points. An authorised tradesperson taking access might not be liable under the law of damage for all interference caused to the property. If, for example, floorboards or carpets are pulled up for some operation under a floor, it would be a question of contract whether the tradesperson would have to relay them. The owner of the flat might still be left with work or expense to put his flat back to its former state, but as the bill stands no one would be liable. Amendment 55 will place a duty on the owner, or owners association that gained access to the flat, to ensure that the flat is restored to no worse a condition than its previous state. The amendment will also make it absolutely clear that the owners on whose behalf the access is exercised have a statutory duty to reinstate. It would, of course, still be possible for them to pursue any person who had entered the flat on their behalf, such as a tradesman, if he or she had caused damage. If there is a failure to comply with the duty of reinstatement, the owner of the part of the tenement through which access has been gained will be able to carry out the work to restore that part to its former condition. They may then recover the cost of doing so from the relevant owner or owners’ association.

I move amendment 49.

Amendment 49 agreed to.

Amendments 50 to 55 moved—[Mrs Mary Mulligan]—and agreed to.

Section 14, as amended, agreed to.

After section 14

The Convener: Amendment 92, in the name of Sarah Boyack, is in a group on its own.

Sarah Boyack: Amendment 92 concerns an issue that I raised at the stage 1 debate, which arises from the experience of many people in my constituency of being unable to find or contact owners and, therefore, of being unable to progress works. That is an experience that I have had, too.

The objective of amendment 92 is to require owners who do not reside in the tenement building to provide their addresses so that the other owners in the tenement can carry out common repairs. Cathie Craigie has lodged an amendment to the Antisocial Behaviour etc (Scotland) Bill, which will be considered in two days’ time, and I fully support that amendment, which aims to ensure that private landlords are required to register so that they can be found. However, that will not deal with absent landlords who have not formally rented out their flats but are simply not there. I am concerned that the amendment to the Antisocial Behaviour etc (Scotland) Bill, which I will support, will not necessarily address the problem that has been identified in respect of the Tenements (Scotland) Bill.

I would like to know whether the minister is prepared to support amendment 92, which would ensure that people cannot escape their responsibilities. The problem at the moment is that, by being silent and by being unprepared to sign up to agreements that enable works to go ahead, people can escape their obligations. The result can be that building work does not go ahead because other residents are not prepared to risk being left with a bill to pay on behalf of somebody who is not prepared to engage in discussion or to sign up for works to progress. That can lead to years of inactivity when no maintenance whatsoever takes place.

In Edinburgh, the default position has historically been the use of a statutory notice. Where owners cannot be found, the issuing of a statutory notice by the council means that responsibility is removed from existing owners because the council then pursues the absent person. As I read the bill, it will be up to individual owners to chase absent owners and to try to find out who they are, which will lead to lengthy delays and to the position that we have at the moment in parts of Scotland other than Edinburgh. It will mean that works just will not happen. Unless the minister is able to demonstrate that there is an alternative way in which that objective could be met, I will be keen for the committee to agree to amendment 92.

16:00

I do not know whether the minister is considering the provision of guidance to owners on whether they should identify the times at which they are away from their property. If someone is going to be away for any length of time and a leak should occur, it is only common sense for owners to consider that somebody else in the building might want to access their flat.

However, given that we are not talking about a statutory requirement on owners, the issue is one that needs to be addressed. It should be part of a culture in which people are responsible and in which they ensure that they are in touch with other owners. There will always be a small number of
people who will try to avoid that responsibility, so the purpose of amendment 92 is to prevent them from escaping their responsibilities. I hope that the minister will be able either to support the amendment or to tell me how the objective of the amendment can be met.

I move amendment 92.

Mike Pringle: I was somewhat surprised to discover the unique nature of the City of Edinburgh District Council Order Confirmation Act 1991—I think Joyce Lugton will remember the discussion on the subject the first time she came to give evidence. Sarah Boyack may not know about that.

Sarah Boyack: That act is unique.

Mike Pringle: The act gives some rights in Edinburgh for the council to take over and undertake statutory repairs, which does not happen elsewhere. When I read amendment 92, I had a great deal of sympathy with it.

Maureen Macmillan: Amendment 92 says that the resident must provide the address of their main residence. To whom does Sarah Boyack envisage co-owners would provide the information? Would it be to the other flat owners or the local authority?

Sarah Boyack: That question is why I suggested that the Executive might want to consider issuing guidance. Two issues are involved: the duty to provide the information; and the way in which the information is provided, which could be done in different ways. The solution that Cathie Craigie identified in her amendments to the Antisocial Behaviour etc (Scotland) Bill—a formal register of private landlords—might not be the way we have to go on this. If there was an owners association, however, the situation would be straightforward.

If a management scheme was in place, one could also expect that owners would have signed up formally to the scheme and that they would be listed as part of it. To be honest, I am seeking the advice of the minister as to how best to do things.

Mrs Mulligan: I have certain sympathies with Sarah Boyack’s proposals in amendment 92. However, if a flat is not owned by a private individual as their place of residence, amendment 92 could give rise to difficulties. We should keep in mind the fact that the bill covers shops and other commercial, as well as domestic, premises.

For someone to have to give their contact details to their neighbours might turn those neighbours unwittingly—and, I am sure, unwillingly—into data controllers under the Data Protection Act 1998. The difficulty is that the names and addresses of individuals constitute personal data for the purposes of that act. Unless the data are “processed by an individual only for the purposes of that individual’s personal, family or household affairs”, to hold and make use of those data would attract the provisions of the act. Sarah Boyack recognises that that is one of the practical difficulties that could arise from amendment 92. It would mean that individuals could make limited use of the contact details that were given to them by absent neighbours: they could use the details only if they were used in respect of their own household affairs.

However, where a flat is owned by someone other than a private individual—by a trust or business, for example—the holding of such information could have considerable consequences for the holder. Such persons would have to register with the information commissioner, pay the requisite fee and give details of the use to which they would put the information. They would be required to use the data only in accordance with the data protection principles that are set out in schedule 1 of the Data Protection Act 1998.

We cannot therefore accept an amendment that would have such disproportionate and onerous consequences. When introducing any requirement under the law, we have to remember how it would be enforced. The normal process of civil enforcement is through the courts, but in this case—I do not wish to appear flippant—if an owner of a tenement flat refused to give a contact address, how could the courts enforce the matter if they could not trace the person?

As I said, we need to be aware of the practicalities of law enforcement before agreeing to suggestions such as are set out in amendment 92. However, Sarah Boyack has acknowledged that some of her anxieties might be taken into account with proposals under the Antisocial Behaviour etc (Scotland) Bill for a nationwide register of landlords. Much of the difficulty in tenements with absentee owners is caused where flats have been rented out; the register should enable other owners to trace absentee landlords not only when there is antisocial behaviour on the part of tenants, but when landlords do not cooperate on common repairs. However, I appreciate the point that Sarah Boyack made about the matter being not just about landlords, but about people who own properties but who are not present in them and are not contactable.

I do not feel that amendment 92 addresses all the problems that might be thrown up by it. I therefore ask Sarah Boyack to agree to withdraw amendment 92 while we consider how we can deal with the practical issues and address the concerns that she has expressed.

Sarah Boyack: I am a bit disappointed by the minister’s response. In the initial policy
Amendment 93, by agreement, made it clear that it was considering how the proposal to provide a duty to give a contact address would infringe on privacy and data protection legislation, and that it would say later how it proposed to proceed. I would have liked to see a bit more about that by stage 2.

I will seek to withdraw amendment 92. However, I would like the Executive to lodge an amendment on the matter before the stage 3 debate because I think that I have identified a loophole. There are parents who rent out flats who cannot be got hold of. The example that Mary Mulligan gave of a court not being able to find somebody makes me think that the issue needs to be taken on board. It has taken four years for me to be able to go ahead with repairs to my flat precisely because we had the names of owners but could not get their addresses because the property companies that were letting out their flats refused to give us up-to-date contact details. It is a live issue and we need to address it. I am prepared to withdraw the amendment on the understanding that either the minister will lodge an amendment on the matter before stage 3, or I will.

The Convener: Is the committee agreed that amendment 92 can be withdrawn?

The Convener: I will regard that only as a comment, as I am seeking the committee’s agreement that the amendment be withdrawn.

Amendment 92, by agreement, withdrawn.

The Convener: I am sure that the minister will note Sarah Boyack’s comments.

Section 15—Obligation of owner to insure

The Convener: Amendment 93, in my name, is grouped with amendments 56 to 58.

Amendment 93 concerns insurance arrangements in section 15. I applaud the original title deeds provided for. In many cases there may technically be a common policy in existence. It may be an old policy that has long been superseded by the individual insurance arrangements of the flats’ proprietors. It is slightly unfortunate that, if that situation exists, subsection (2) would seem to preclude the right of individual proprietors with adequate existing individual insurance arrangements to have those arrangements. The effect of subsection (2) would be to compel them to have a common insurance policy.

The effect of amendment 93 would be to say at the end of section 15(2) that the contract of insurance shall be “both a common policy and a policy for each flat, provided the cumulative cover provided for the building by all the policies covers the reinstatement value of the building”.

It seems to me that the amendment would acknowledge an existing practical situation.

I move amendment 93.

Mrs Mulligan: This group of amendments relates to the bill’s provisions on insurance. I will deal first with amendments 56, 57 and 58 in my name. Section 15 of the bill provides that there will be compulsory insurance of all flats in a tenement. That is because tenement owners are particularly vulnerable to the physical conditions of neighbouring flats. Essentially, a flat owner is not adequately insured unless his neighbours are also insured. Section 15 will therefore oblige the owners of all flats in a tenement to insure their flats and to do so at reinstatement value.

Section 15(5) deals with enforcement of the obligation. It will give individual owners the right to request to see the insurance policies of other owners in a tenement. Owners will also have a right to see evidence of payment of premiums on other owners’ insurance policies. However, there might be practical difficulties in relation to the production of an insurance policy for inspection. A flat might, for example, be insured through a lender’s block policy. In such circumstances, the owner might have only a schedule of cover in his possession, rather than the policy. Amendment 56 will amend the obligation on owners so that they have simply to produce evidence of the existence of the policy and of payment of premiums. Amendments 57 and 58 are consequential on amendment 56.

Until Annabel Goldie spoke to amendment 93, I was unclear as to how it arose. During the stage 1 debate, I felt that the convener was under the impression that the bill would impose common policies in at least some circumstances, which is not the case. The bill will simply impose a requirement to insure to reinstatement value. Section 15(2) deals with cases in which a common
policy is imposed by the title deeds and provides that, in those cases, the common policy must be to reinstatement value.

The convener might be concerned about a situation in which some tenements have a common policy to cover the common parts of the tenement, but individual owners have policies to cover their own flats. The bill will not interfere with such arrangements, although all the policies together will in the future have to provide insurance to reinstatement value. If that is the issue, I hope that the convener will feel reassured and be able to withdraw her amendment.

On the other hand, if the convener is referring to a situation in which people have a common policy for the whole tenement, but which is restricted to a certain value or certain risks, and individual owners choose to top up the cover with individual policies, I suggest that the matter will be more complicated. In such a case, I am not sure how an insurance company would deal with a claim if, for example, the whole tenement burned down. I am sure, however, that a mixture of cover and company for each property would be a highly complex arrangement.

In short, I am not clear what it is intended amendment 93 should achieve and I am not sure that I can recommend that we accept it at this stage. I am willing to consider the amendment, but I want to discuss its implications further, particularly with the insurance sector in order to see what its view of the arrangements might be.

I therefore hope that Annabel Goldie will feel able to seek to withdraw amendment 93 and allow further discussion to take place on how we might arrive at a satisfactory conclusion.

16:15

The Convener: In practice, the situation in many tenemental properties—certainly in the west of Scotland, although the situation might be different in Edinburgh—is that, when providing for the construction of a tenement, the old title deeds almost invariably provided for a common policy. However, with the passage of time, the common policy tended not to be kept up to date in a realistic sense. It might have covered the entire tenement, but it was usually for an unrealistically small amount of money. In many cases, particularly with the entrance into the property market of heritable creditors—mortgage lenders—it was absolutely insisted on that individual policies be taken out for the security subject, by which I mean the flat that was bought with a loan. Therefore, it is common to find—notwithstanding the original title provisions requiring a common policy—that individual proprietors have, usually under pressure from their lenders, taken out individual insurance to cover their flats.

Under section 15(1), there will be an obligation to ensure that adequate arrangements exist in total for the whole building. The rest of the section will enable proprietors to check that that is the case. My concern relates to the fact that, if there are eight proprietors with perfectly good assurances, each of whom can require sight of the others’ insurance cover—in line with the sensible provisions in section 15—the effect of section 15(2) seems to be not that they may update their common policy, but that their individual arrangements would be precluded. That is what I understand by the section’s saying that, where the title provides for a common policy,

“the contract of insurance ... shall be a common policy of insurance.”

If the minister will concede that that is a point that she would like to explore further, I will be happy to withdraw amendment 93.

Mrs Mulligan: Absolutely. You have made your point well and I believe that it is something that we should clarify further and return to at stage 3.

The Convener: In that case, I seek leave to withdraw my amendment.

Amendment 93, by agreement, withdrawn.

Amendments 56 to 58 moved—[Mrs Mary Mulligan]—and agreed to.

Section 15, as amended, agreed to.

Section 16—Demolition of tenement building not to affect ownership

The Convener: Amendment 59, in the name of the minister, is grouped with amendments 60 to 70.

Mrs Mulligan: The bill makes provision for the sale of abandoned tenements and for the sale of the land on which a demolished tenement stood. The Executive believes that more detailed provision is required in order to protect the interests of the owners. Amendments 60 and 69 make it clear in section 18(3) that the owner of a former flat in a demolished or abandoned tenement will have to apply to the sheriff for the power to sell the site or building and amendment 70 provides a procedure for that. The selling owner will be required to pay the other owners their share of the proceeds. If another owner is not traceable, the funds will be lodged with the sheriff court. The sum payable to each owner will normally be an equal share of the gross proceeds of the sale less an equal share of the expenses incurred by the seller. An owner will receive the share less the cost of discharging any security that the owner might have outstanding over his former flat.
Amendments 61 and 63 are consequential on amendment 64 and amendment 62 provides that, if the proceeds are not to be divided equally, there must be available evidence of the varying floor areas of the flats or former flats.

Amendment 67 will remove section 19 from the bill, which deals with cases in which a tenement building has been demolished and the site has been sold but an outstanding security remains over one or more of the flats. We propose to drop section 19 because, under the new procedures, any heritable securities will be automatically discharged.

Amendment 68 addresses concerns that were expressed in evidence before the committee regarding the use of the phrase “return to” in section 20. It was argued that a new owner or tenant might decide to occupy a flat, but would therefore not be returning and therefore could not prevent a sale. We accept that those words can simply be deleted from the section.

The purpose of amendment 59 is to clarify the position as to who owns what after demolition. Amendments 65 and 66 will extend the provisions of section 18 relating to the sale of demolished tenements to include land that afforded access to the tenement before it was demolished.

Section 16 provides that demolition of a tenement will not alone change ownership of the parts of a tenement. Section 3(4) provides a default rule that allocates ownership of pertinents according to the service test. The question arises whether there is any right of ownership in the pertinents once the building is demolished and the pertinents no longer serve the tenement. That would matter for pertinents such as the path, close and fire escape. In particular, ownership of the path will be important, because it provides access to the site. As members are aware, the value of the site could be seriously reduced if there are doubts over access to it.

Amendment 66 provides that references to the site will also include any pertinents that provided access to the building immediately prior to its demolition. Amendment 65 is a consequential amendment.

I move amendment 59.

Amendment 59 agreed to.

Section 16, as amended, agreed to.

Section 17 agreed to.

Section 18—Use and disposal of site where tenement building demolished

Amendments 60 to 66 moved—[Mrs Mary Mulligan]—and agreed to.

Section 19—Effect of demolition and sale on certain undischarged securities

Amendment 67 moved—[Mrs Mary Mulligan]—and agreed to.

Section 20—Sale of abandoned tenement building

Amendments 68 and 69 moved—[Mrs Mary Mulligan]—and agreed to.

Section 20, as amended, agreed to.

After schedule

Amendment 70 moved—[Mrs Mary Mulligan]—and agreed to.

Section 21 agreed to.

Section 22—Amendments of Title Conditions (Scotland) Act 2003

Amendment 94 not moved.

The Convener: Amendment 71, in the name of the minister, is grouped with amendment 82.

Mrs Mulligan: Amendment 82 provides that, for the purposes of calculating floor area under the bill, internal walls and partitions are to be included. The measurement of the floor area of flats in a tenement is important, as it may determine how costs are apportioned under rule 4 of the tenement management scheme when the title deeds do not set out how costs should be divided. It is also relevant to the provisions on demolition.

Amendment 82 will change the calculation of floor area to clarify that the area occupied by internal walls and partitions is to be measured for the purposes of calculating floor areas. I know that the committee was intrigued when it received evidence that no two surveyors would reach the same result when measuring a flat. I hope that amendment 82 will make the calculation easier and address the committee’s concerns.

Amendment 71 is a technical amendment that will ensure that there is consistency between the bill and the Title Conditions (Scotland) Act 2003.

I move amendment 71.

Amendment 71 agreed to.

Amendments 72 to 76 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 77, in the name of the minister, is grouped with amendments 78 and 79.
Mrs Mulligan: Amendments 77 and 78 are technical amendments to the Title Conditions (Scotland) Act 2003.

Amendment 79 makes it clear that, when the courts are considering the best interests of the owners, they must consider the interests of the owners as a whole. It also makes technical changes to subsections (1) and (2) of section 33 of the Title Conditions (Scotland) Act 2003, which relate to community burdens, to ensure that section 33(2) will apply even where a constitutive deed may both allow specified owners to grant a variation or discharge and authorise managers to grant variations or discharges.

Amendment 79 also amends section 35(1) of the Title Conditions (Scotland) Act 2003, which provides that variation and discharge of community burdens by owners of adjacent units is available only

"where no such provision as is mentioned in section 33(1)(a) ... is made".

The Executive believes that both methods of variation and discharge should be available. In other words, it should be possible for adjacent owners to vary or discharge community burdens by using section 35 or by using provisions in title deeds if they exist.

Finally, the last subsection in amendment 79 changes the definition of “tenement” in section 122 of the 2003 act to bring it into line with the definition in the bill. It will also remove the definition of “flat”, which will then be construed by reference to the bill.

I move amendment 77.

Amendment 77 agreed to.

The Convener: Amendments 78 and 79 were both debated previously and I—[Interruption.] I ask people to watch their noise levels outwith the business of the committee meeting. It is difficult to hear contributions from members and the minister.

Amendments 78 and 79 moved—[Mrs Mary Mulligan]—and agreed to.

Section 22, as amended, agreed to.

Sections 23 and 24 agreed to.

Section 25—Interpretation

16:30

The Convener: Amendment 80, in the name of the minister, is grouped with amendment 81.

Mrs Mulligan: Amendments 80 and 81 clarify some of the terms that are explained in section 25. The definition of “flat” in the bill, when read with the definition of a tenement, results in circularity. A flat is any premises in a tenement and a tenement is a building comprising flats. Amendment 80 removes that circularity and makes it clear that, for the purposes of the bill, a flat may be premises that comprise more than one storey and need not be used for residential purposes.

Amendment 81 defines the term “management scheme”, as it is not apparent from the bill what that term covers. In particular, it is not obvious that it includes the regime provided in the tenement burdens and a mixture of that regime and the tenement management scheme. The definition of “management scheme” that amendment 81 proposes includes the development management scheme, the tenement management scheme alone, the burdens in the title deeds alone and a mixture of the burdens and the tenement management scheme.

I move amendment 80.

Amendment 80 agreed to.

Amendments 81 to 83 moved—[Mrs Mary Mulligan].

The Convener: Does anyone object to a single question being put on amendments 81 to 83?

Members: No.

The Convener: I see that this obedience and compliance has everything to do with the end being in sight. Does any member object to a single question—sorry, I have already asked that. I am getting weary. Battle fatigue is setting in. The question is, that amendments 81 to 83 be agreed to.

Amendments 81 to 83 agreed to.

Section 25, as amended, agreed to.

After section 25

Amendment 84 moved—[Mrs Mary Mulligan]—and agreed to.

Sections 26 to 29 agreed to.

Long title agreed to.

The Convener: I can impart the joyous news that that concludes stage 2 consideration of the Tenements (Scotland) Bill. I thank members for their attendance and co-operation. In particular, I thank the minister and her team for their presence this afternoon. We have got through the bill in slightly swifter order than we had anticipated.
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Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Tenements (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about the boundaries and pertinents of properties comprised in tenements and for the regulation of the rights and duties of the owners of properties comprised in tenements; to make minor amendments of the Title Conditions (Scotland) Act 2003 (asp 9); and for connected purposes.

Boundaries and pertinents

1 Determination of boundaries and pertinents

(1) Except in so far as any different boundaries or pertinents are constituted by virtue of the title to the tenement, or any enactment, the boundaries and pertinents of sectors of a tenement shall be determined in accordance with sections 2 and 3 of this Act.

(2) In this Act, “title to the tenement” means—

(a) any conveyance, or reservation, of property which affects—

(i) the tenement; or

(ii) any sector in the tenement; and

(b) where an interest in—

(i) the tenement; or

(ii) any sector in the tenement,

has been registered in the Land Register of Scotland, the title sheet of that interest.

2 Tenement boundaries

(1) Subject to subsections (3) to (7) below, the boundary between any two contiguous sectors is the median of the structure that separates them; and a sector—

(a) extends in any direction to such a boundary; or

(b) if it does not first meet such a boundary—

(i) extends to and includes the solum or any structure which is an outer surface of the tenement building; or

(ii) extends to the boundary that separates the sector from a contiguous building which is not part of the tenement building.
(2) For the purposes of subsection (1) above, where the structure separating two contiguous sectors is or includes something (as for example, but without prejudice to the generality of this subsection, a door or window) which wholly or mainly serves only one of those sectors, the thing is in its entire thickness part of that sector.

(3) A top flat extends to and includes the roof over that flat.

(4) A bottom flat extends to and includes the solum under that flat.

(5) A close extends to and includes the roof over, and the solum under, the close.

(6) Where a sector includes the solum (or any part of it) the sector shall also include, subject to subsection (7) below, the airspace above the tenement building and directly over the solum (or part).

(7) Where the roof of the tenement building slopes, a sector which includes the roof (or any part of it) shall also include the airspace above the slope of the roof (or part) up to the level of the highest point of the roof.

3 Pertinents

(1) Subject to subsection (2) below, there shall attach to each of the flats, as a pertinent, a right of common property in (and in the whole of) the following parts of a tenement—

(a) a close;

(b) a lift by means of which access can be obtained to more than one of the flats.

(2) If a close or lift does not afford a means of access to a flat then there shall not attach to that flat, as a pertinent, a right of common property in the close or, as the case may be, lift.

(3) Any land (other than the solum of the tenement building) pertaining to a tenement shall attach as a pertinent to the bottom flat most nearly adjacent to the land (or part of the land); but this subsection shall not apply to any part which constitutes a path, outside stair or other way affording access to any sector other than that flat.

(4) If a tenement includes any part (such as, for example, a path, outside stair, fire escape, rhone, pipe, flue, conduit, cable, tank or chimney stack) that does not fall within subsection (1) or (3) above and that part—

(a) wholly serves one flat, then it shall attach as a pertinent to that flat;

(b) serves two or more flats, then there shall attach to each of the flats served, as a pertinent, a right of common property in (and in the whole of) the part.

(5) For the purposes of this section, references to rights of common property being attached to flats as pertinents are references to there attaching to each flat equal rights of common property; except that where the common property is a chimney stack the share allocated to a flat shall be determined in direct accordance with the ratio which the number of flues serving it in the stack bears to the total number of flues in the stack.

Tenement Management Scheme

4 Application of the Tenement Management Scheme

(1) The Tenement Management Scheme (referred to in this section as “the Scheme”), which is set out in the schedule to this Act, shall apply in relation to a tenement to the extent provided by the following provisions of this section.
(2) The Scheme shall not apply in any period during which the development management scheme applies to the tenement by virtue of section 71 of the Title Conditions (Scotland) Act 2003 (asp 9).

(3) The provisions of rule 1 of the Scheme shall apply, so far as relevant, for the purpose of interpreting any other provision of the Scheme which applies to the tenement.

(4) Rule 2 of the Scheme shall apply unless—
   (a) a tenement burden provides procedures for the making of decisions by the owners; and
   (b) the same such procedures apply as respects each flat.

(5) The provisions of rule 3 of the Scheme shall apply to the extent that there is no tenement burden enabling the owners to make scheme decisions on any matter on which a scheme decision may be made by them under that Rule.

(6) Rule 4 of the Scheme shall apply in relation to any scheme costs incurred in relation to any part of the tenement unless a tenement burden provides that the entire liability for those scheme costs (in so far as liability for those costs is not to be met by someone other than an owner) is to be met by one or more of the owners.

(7) The provisions of rule 5 of the Scheme shall apply to the extent that there is no tenement burden making provision as to the liability of the owners in the circumstances covered by the provisions of that rule.

(8) Rule 6 of the Scheme shall apply to the extent that there is no tenement burden making provision for an owner to instruct or carry out any emergency work as defined in that rule.

(9) The provisions of—
   (a) rule 7; and
   (b) subject to subsection (10) below, rule 8,
   of the Scheme shall apply, so far as relevant, for the purpose of supplementing any other provision of the Scheme which applies to the tenement.

(10) The provisions of rule 8 are subject to any different provision in any tenement burden.

(11) The Scottish Ministers may by order substitute for the sums for the time being specified in rule 3.3 of the Scheme such other sums as appear to them to be justified by a change in the value of money appearing to them to have occurred since the last occasion on which the sums were fixed.

(12) Where some but not all of the provisions of the Scheme apply, references in the Scheme to “the scheme” shall be read as references only to those provisions of the Scheme which apply.

(13) In this section, “scheme costs” and “scheme decision” have the same meanings as they have in the Scheme.

Resolution of disputes

5 Application to sheriff for annulment of certain decisions

(1) Where—
   (a) a management scheme other than the development management scheme applies as respects the management of a tenement; and
(b) a decision is made by the owners in accordance with the scheme,

any owner who, at the time the decision was made, was not in favour of the decision
may, by summary application, apply to the sheriff for an order annuling the decision.

(2) For the purposes of any such application, the defender shall be all the other owners.

(3) An application by an owner under subsection (1) above shall be made—

(a) in a case where the decision was made at a meeting attended by the owner, not
later than 28 days after the date of that meeting; or

(b) in any other case, not later than 28 days after the date on which notice of the
making of the decision was sent to the owner for the time being of the flat in
question.

(4) The sheriff may, if satisfied that the decision—

(a) is not in the best interests of all (or both) the owners taken as a group; or

(b) is unfairly prejudicial to one or more of the owners,
make an order annuling the decision (in whole or in part).

(5) Where such an application is made as respects a decision to carry out maintenance,
improvements or alterations, the sheriff shall, in considering whether to make an order
under subsection (4) above, have regard to—

(a) the age of the property which is to be maintained, improved or, as the case may
be, altered;

(b) its condition;

(c) the likely cost of any such maintenance, improvements or alterations; and

(d) the reasonableness of that cost.

(6) Where the sheriff makes an order under subsection (4) above annuling a decision (in
whole or in part), the sheriff may make such other, consequential, order as the sheriff
thinks fit (as, for example, an order as respects the liability of owners for any costs
already incurred).

(7) A party may not later than fourteen days after the date of—

(a) an order under subsection (4) above; or

(b) an interlocutor dismissing such an application,
appeal to the Court of Session on a point of law.

(8) A decision of the Court of Session on an appeal under subsection (7) above shall be
final.

(9) Where an owner is entitled to make an application under subsection (1) above in relation
to any decision, no step shall be taken to implement that decision unless—

(a) the period specified in subsection (3) above within which such an application is to
be made has expired without such an application having been made and notified to
the owners; or

(b) where such an application has been so made and notified—
(i) the application has been disposed of and either the period specified in subsection (7) above within which an appeal against the sheriff’s decision may be made has expired without such an appeal having been made or such an appeal has been made and disposed of; or

(ii) the application has been abandoned.

(10) Subsection (9) above does not apply to a decision relating to work which requires to be carried out urgently.

6 Application to sheriff for order resolving certain disputes

(1) Any owner may by summary application apply to the sheriff for an order relating to any matter concerning the operation of—

(a) the management scheme which applies as respects the tenement (except where that management scheme is the development management scheme); or

(b) any provision of this Act in its application as respects the tenement.

(3) Where an application is made under subsection (1) above the sheriff may, subject to such conditions (if any) as the sheriff thinks fit—

(a) grant the order craved; or

(b) make such other order under this section as the sheriff considers necessary or expedient.

(4) A party may not later than fourteen days after the date of—

(a) an order under subsection (3) above; or

(b) an interlocutor dismissing such an application, appeal to the Court of Session on a point of law.

(5) A decision of the Court of Session on an appeal under subsection (4) above shall be final.

Support and shelter

7 Abolition as respects tenements of common law rules of common interest

Any rule of law relating to common interest shall, to the extent that it applies as respects a tenement, cease to have effect; but nothing in this section shall affect the operation of any such rule of law in its application to a question affecting both a tenement and—

(a) some other building or former building (whether or not a tenement); or

(b) any land not pertaining to the tenement.

8 Duty to maintain so as to provide support and shelter etc.

(1) Subject to subsection (2) below, the owner of any part of a tenement building, being a part that provides, or is intended to provide, support or shelter to any other part, shall maintain the supporting or sheltering part so as to ensure that it provides support or shelter.
(2) An owner shall not by virtue of subsection (1) above be obliged to maintain any part of a tenement building if it would not be reasonable to do so, having regard to all the circumstances (and including, in particular, the age of the tenement building, its condition and the likely cost of any maintenance).

(3) The duty imposed by subsection (1) above on an owner of a part of a tenement building may be enforced by any other such owner who is, or would be, directly affected by any breach of the duty.

9 **Prohibition on interference with support or shelter etc.**

(1) No owner or occupier of any part of a tenement shall be entitled to do anything in relation to that part which would, or would be reasonably likely to, impair to a material extent—

(a) the support or shelter provided to any part of the tenement building; or

(b) the natural light enjoyed by any part of the tenement building.

(2) The prohibition imposed by subsection (1) above on an owner or occupier of a part of a tenement may be enforced by any other such owner who is, or would be, directly affected by any breach of the prohibition.

10 **Recovery of costs incurred by virtue of section 8**

Where—

(a) by virtue of section 8 of this Act an owner carries out maintenance to any part of a tenement; and

(b) the management scheme which applies as respects the tenement provides for the maintenance of that part,

the owner shall be entitled to recover from any other owner any share of the cost of the maintenance for which that other owner would have been liable had the maintenance been carried out by virtue of the management scheme in question.

10A **Determination of when an owner’s liability for certain costs arises**

(1) An owner is liable for any scheme costs (other than accumulating scheme costs) arising from a scheme decision from the date when the scheme decision to incur those costs is made.

(2) For the purposes of subsection (1) above, a scheme decision is, in relation to an owner, taken to be made on—

(a) where the decision is made at a meeting attended by the owner, the date of the meeting; or

(b) in any other case, the date on which notice of the making of the decision is given to the owner.

(3) An owner is liable for the cost of any emergency work from the date on which the work is instructed.
An owner is liable for any scheme costs mentioned in rule 4.1(d) of the Tenement Management Scheme from the date of any statutory notice requiring the carrying out of the work to which those costs relate.

An owner is liable for any accumulating scheme costs (such as the cost of an insurance premium) on a daily basis.

An owner is liable for any scheme costs arising from work instructed by a manager from the date on which the work is instructed.

An owner is liable in accordance with section 10 of this Act for the costs of maintenance carried out by virtue of section 8 of this Act from the date on which the maintenance is completed.

In this section, “emergency work”, “manager”, “scheme costs” and “scheme decision” have the same meanings as they have in the Tenement Management Scheme.

Any owner who is liable for any relevant costs shall not, by virtue only of ceasing to be such an owner, cease to be liable for those costs.

Where a person becomes an owner (any such person being referred to in this section as a “new owner”), that person shall be severally liable with any former owner of the flat for any relevant costs for which the former owner is liable.

Where a new owner pays any relevant costs for which a former owner of the flat is liable, the new owner may recover the amount so paid from the former owner.

For the purposes of this section “relevant costs” means, as respects a flat—

(a) the share of any costs for which the owner is liable by virtue of the Tenement Management Scheme;

(aa) the share of any scheme costs (within the meaning of the Tenement Management Scheme) for which the owner is liable by virtue of any tenement burden; and

(b) any other costs for which the owner is liable by virtue of this Act.

This section applies as respects any relevant costs for which an owner becomes liable on or after the day on which this section comes into force.

An owner who is entitled, by virtue of the Tenement Management Scheme or any other provision of this Act, to recover any costs or a share of any costs from any other owner shall not, by virtue only of ceasing to be an owner, cease to be entitled to recover those costs or that share.

In Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (obligations affected by prescriptive periods of five years to which section 6 of that Act applies)—

(a) after paragraph 1(aa) there shall be inserted—

“(ab) to any obligation to pay a sum of money by way of costs to which section 11 of the Tenements (Scotland) Act 2003 (asp 9) applies;”; and

(b) in paragraph 2(e), for the words “or (aa)” there shall be substituted “, (aa) or (ab)”.
13 **Common property: disapplication of common law right of recovery**

Any rule of law which enables an owner of common property to recover the cost of necessary maintenance from the other owners of the property shall not apply in relation to any common property in a tenement where the maintenance of that property is provided for in the management scheme which applies as respects the tenement.

14 **Access for maintenance purposes**

(1) Where an owner gives reasonable notice to the owner or occupier of any other part of the tenement that access is required to, or through, that part for any of the purposes mentioned in subsection (3) below, the person given notice shall, subject to subsection (5) below, allow access for that purpose.

(2) Without prejudice to subsection (1) above, where the development management scheme applies, notice under that subsection may be given by any owners’ association established by the scheme to the owner or occupier of any part of the tenement.

(3) The purposes are—

(a) carrying out maintenance by virtue of the management scheme which applies as respects the tenement;

(b) carrying out maintenance to any part of the tenement owned (whether solely or in common) by the person requiring access;

(c) carrying out an inspection to determine whether it is necessary to carry out maintenance;

(d) determining whether the owner of the part is fulfilling the duty imposed by section 8(1) of this Act;

(e) determining whether the owner or occupier of the part is complying with the prohibition imposed by section 9(1) of this Act; and

(f) where floor area is relevant for the purposes of determining any liability of owners, measuring floor area.

(4) Reasonable notice need not be given as mentioned in subsection (1) above where access is required for the purpose specified in subsection (3)(a) above and the maintenance requires to be carried out urgently.

(5) An owner or occupier may refuse to allow—

(a) access under subsection (1) above; or

(b) such access at a particular time,

if, having regard to all the circumstances (and, in particular, whether the requirement for access is reasonable), it is reasonable to refuse access.

(6) Where access is allowed under subsection (1) above for any purpose, such right of access may be exercised by—

(a) the owner who or owners’ association which gave notice that access was required; or

(b) such person as the owner or, as the case may be, owners’ association may authorise for the purpose (any such person being referred to in this section as an “authorised person”).
(7) Where an authorised person acting in accordance with subsection (6) above is liable by
virtue of any enactment or rule of law for damage caused to any part of a tenement, the
owner who or owners' association which authorised that person shall be severally liable
with the authorised person for the cost of remedying the damage; but an owner or, as the
case may be, owners' association making any payment as respects that cost shall have a
right of relief against the authorised person.

(8) Where access is allowed under subsection (1) above for any purpose, the owner who or
owners' association which gave notice that access was required (referred to as the
"accessing owner or association") shall, so far as reasonably practicable, ensure that the
part of the tenement to or through which access is allowed is left substantially in no
worse a condition than that which it was in when access was taken.

(9) If the accessing owner or association fails to comply with the duty in subsection (8)
above, the owner of the part to or through which access is allowed may—
(a) carry out, or arrange for the carrying out of, such work as is reasonably necessary
to restore the part so that it is substantially in no worse a condition than that which
it was in when access was taken; and
(b) recover from the accessing owner or association any expenses reasonably incurred
in doing so.

Insurance

15 Obligation of owner to insure

(1) It shall be the duty of each owner to effect and keep in force a contract of insurance
against the prescribed risks for the reinstatement value of that owner’s flat and any part
of the tenement building attaching to that flat as a pertinent.

(2) Where a tenement burden requires each flat to be insured by way of a common policy of
insurance as respects the entire tenement building, then for the purposes of satisfying the
duty imposed on an owner by subsection (1) above, the contract of insurance mentioned
in that subsection shall be a common policy of insurance.

(3) The Scottish Ministers may by order prescribe risks against which an owner shall
require to insure (in this section referred to as the “prescribed risks”).

(4) Where, whether because of the location of the tenement or otherwise, an owner—
(a) having made reasonable efforts to do so, is unable to obtain insurance against a
particular prescribed risk; or
(b) would be able to obtain such insurance but only at a cost which is unreasonably
high,
the duty imposed by subsection (1) above shall not require an owner to insure against
that particular risk.

(5) Any owner may by notice in writing request the owner of any other flat in the tenement
to produce evidence of—
(a) the policy in respect of any contract of insurance which the owner of that other
flat is required to have or to effect; and
(b) payment of the premium for any such policy,
and not later than 14 days after that notice is given the recipient shall produce to the
owner giving the notice the evidence requested.
(6) The duty imposed by subsection (1) above on an owner may be enforced by any other owner.

Demolition and abandonment of tenement building

16 Demolition of tenement building not to affect ownership

5 (1) The demolition of a tenement building shall not alone effect any change as respects any right of ownership.

(2) In particular, the fact that, as a consequence of demolition of a tenement building, any land pertaining to the building no longer serves, or affords access to, any flat or other sector shall not alone effect any change of ownership of the land as a pertinent.

17 Cost of demolishing tenement building

10 (1) Except where a tenement burden otherwise provides, the cost of demolishing a tenement building shall, subject to subsection (2) below, be shared equally among all (or both) the flats in the tenement, and each owner is liable accordingly.

(2) Where the floor area of the largest (or larger) flat in the tenement is more than one and a half times that of the smallest (or smaller) flat the owner of each flat shall be liable to contribute towards the cost of demolition of the tenement building in the proportion which the floor area of that owner’s flat bears to the total floor area of all (or both) the flats.

(3) An owner is liable under this section for the cost of demolishing a tenement building—

(a) in the case where the owner agrees to the proposal that the tenement building be demolished, from the date of the agreement; or

(b) in any other case, from the date on which the carrying out of the demolition is instructed.

(4) This section applies as respects the demolition of part of a tenement building as it applies as respects the demolition of an entire tenement building but with any reference to a flat in the tenement being construed as a reference to a flat in the part.

(5) In this section references to flats in a tenement include references to flats which were comprehended by the tenement before its demolition.

(6) This section is subject to section 123 of the Housing (Scotland) Act 1987 (c.26) (which makes provision as respects demolition of buildings in pursuance of local authority demolition orders and recovery of expenses by local authorities etc.).

18 Use and disposal of site where tenement building demolished

10 (1) This section applies where a tenement building is demolished and after the demolition two or more flats which were comprehended by the tenement building before its demolition (any such flat being referred to in this section as a “former flat”) are owned by different persons.

(2) Except in so far as—

(a) the owners of all (or both) the former flats otherwise agree; or

(b) those owners are subject to a requirement (whether imposed by a tenement burden or otherwise) to erect a building on the site or to rebuild the tenement,
no owner may build on, or otherwise develop, the site.

(3) Except where the owners have agreed, or are required, to build on or develop the site as mentioned in paragraphs (a) and (b) of subsection (2) above, any owner of a former flat shall be entitled to apply for power to sell the entire site in accordance with schedule 2.

(4) Except where a tenement burden otherwise provides, the net proceeds of any sale in pursuance of subsection (3) above shall, subject to subsection (5) below, be shared equally among all (or both) the former flats and the owner of each former flat shall be entitled to the share allocated to that flat.

(5) Where—

(a) evidence of the floor area of each of the former flats is readily available; and

(b) the floor area of the largest (or larger) former flat was more than one and a half times that of the smallest (or smaller) former flat,

the net proceeds of any sale shall be shared among (or between) the flats in the proportion which the floor area of each flat bore to the total floor area of all (or both) the flats and the owner of each former flat shall be entitled to the share allocated to that flat.

(6) The prohibition imposed by subsection (2) above on an owner of a former flat may be enforced by any other such owner.

(6A) In subsections (4) and (5) above, “net proceeds of any sale” means the proceeds of the sale less any expenses properly incurred in connection with the sale.

(7) In this section references to the site are references to the solum of the tenement building that occupied the site together with the airspace that is directly above the solum and any land pertaining, as a means of access, to the tenement building immediately before its demolition.

20 Sale of abandoned tenement building

(1) Where—

(a) because of its poor condition a tenement building has been entirely unoccupied by any owner or person authorised by an owner for a period of more than six months; and

(b) it is unlikely that any such owner or other person will occupy any part of the tenement building,

any owner shall be entitled to apply for power to sell the tenement building in accordance with schedule 2.

(2) Subsections (4) and (5) of section 18 of this Act shall apply as respects a sale in pursuance of subsection (1) above as those subsections apply as respects a sale in pursuance of subsection (3) of that section.

(3) In this section any reference to a tenement building includes a reference to its solum.

21 Liability for certain costs

21 Liability to non-owner for certain damage costs

(1) Where—

(a) any part of a tenement is damaged as the result of the fault of any person (that person being in this subsection referred to as “A”); and
(b) the management scheme which applies as respects the tenement makes provision for the maintenance of that part,

any owner of a flat in the tenement (that owner being in this subsection referred to as “B”) who is required by virtue of that provision to contribute to any extent to the cost of maintenance of the damaged part but who at the time when the damage was done was not an owner of the part shall be treated, for the purpose of determining whether A is liable to B as respects the cost of maintenance arising from the damage, as having been such an owner at that time.

(2) In this section “fault” means any wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages.

Miscellaneous and general

22 Amendments of Title Conditions (Scotland) Act 2003

(1) The Title Conditions (Scotland) Act 2003 (asp 9) shall be amended in accordance with subsections (2) to (5) below.

(2) In section 3(8) (waiver, mitigation and variation of real burdens), for “the holder” there shall be substituted “a holder”.

(3) In section 10 (affirmative burdens: continuing liability of former owner), at the end there shall be added—

“(5) This section does not apply in any case where section 11 of the Tenements (Scotland) Act 2004 (asp 00) applies.”.

(3A) In section 11 (affirmative burdens: shared liability), after subsection (3) there shall be inserted—

“(3A) For the purposes of subsection (3) above, the floor area of a flat is calculated by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat—

(a) a balcony; and
(b) except where it is used for any purpose other than storage, a loft or basement.”.

(3B) In section 25 (definition of the expression “community burdens”), in subsection (1)(a), for “four” there shall be substituted “two”.

(4) In section 29 (power of majority to instruct common maintenance)—

(a) in subsection (2)—

(i) in paragraph (b)—

(A) for the words from the beginning to “that” where it first occurs there shall be substituted “subject to subsection (3A) below, require each”; and

(B) for sub-paragraph (ii) there shall be substituted—

“(ii) with such person as they may nominate for the purpose;”; and

(ii) paragraph (c) shall be omitted;

(b) after subsection (3) there shall be inserted—
“(3A) A requirement under subsection (2)(b) above that each owner deposit a sum of money—

(a) exceeding £100; or

(b) of £100 or less where the aggregate of that sum taken together with any other sum or sums required (otherwise than by a previous notice under this subsection) in the preceding 12 months to be deposited under that subsection by each owner exceeds £200,

shall be made by written notice to each owner and shall require the sum to be deposited into such account (the “maintenance account”) as the owners may nominate for the purpose.

(3B) The owners may authorise persons to operate the maintenance account on their behalf.

(c) in subsection (4), for “(2)(b)” there shall be substituted “(3A)”;

(c) after subsection (6) there shall be inserted—

“(6A) The notice given under subsection (2)(b) above may specify a date as a refund date for the purposes of subsection (7)(b)(i) below.”;

(d) in subsection (7)(b)—

(a) in sub-paragraph (i), for “the fourteenth” there shall be substituted “—

(A) where the notice under subsection (2)(b) above specifies a refund date, that date; or

(B) where that notice does not specify such a date, the twenty-eighth”;

(b) in sub-paragraph (ii), for “(4)(h)” there shall be substituted “(3B)”;

(da) after subsection (7) there shall be inserted—

“(7A) A former owner who, before ceasing to be an owner, deposited sums in compliance with a requirement under subsection (2)(b) above, shall have the same entitlement as an owner has under subsection (7)(b) above.”;

(e) in subsection (8), for “(2)(b)” there shall be substituted “(3A)”;

(f) after subsection (9) there shall be inserted—

“(10) The Scottish Ministers may by order substitute for the sums for the time being specified in subsection (3A) above such other sums as appear to them to be justified by a change in the value of money appearing to them to have occurred since the last occasion on which the sums were fixed.”.

(5) After section 31 there shall be inserted—

“31A Disapplication of provisions of sections 28, 29 and 31 in certain cases

(1) Sections 28(1)(a) and (d) and (2)(a), 29 and 31 of this Act do not apply in relation to a community consisting of one tenement.

(2) Sections 28(1)(a) and (d) and 31 of this Act shall not apply to a community in any period during which the development management scheme applies to the community.”.

(6) In section 33 (majority etc. variation and discharge of community burdens)—
(a) in subsection (1)(b), the words “where no such provision is made,” shall be omitted; and

(b) in subsection (2)(a), at the beginning there shall be inserted “where no such provision as is mentioned in subsection (1)(a) above is made,”.

(7) In section 35 (variation and discharge of community burdens by owners of adjacent units), in subsection (1), the words “in a case where no such provision as is mentioned in section 33(1)(a) of this Act is made” shall be omitted.

(8) In section 98 (granting certain applications for variation, discharge, renewal or preservation of title conditions), in paragraph (b)(i), for the words “the owners of all” there shall be substituted “all the owners (taken as a group) of”.

(9) In section 99 (granting applications as respects development management schemes), in subsection (4)(a), for the words “the owners” there shall be substituted “all the owners (taken as a group)”.

(10) In section 122(1) (interpretation)—

(a) the definition of “flat” shall be omitted; and

(b) for the definition of “tenement” there shall be substituted—

“tenement” has the meaning given by section 23 of the Tenements (Scotland) Act 2004 (asp 00) and references to a flat in a tenement shall be construed accordingly;”.

20 Meaning of “tenement”

(1) In this Act, “tenement” means a building or a part of a building which comprises two related flats which, or more than two such flats at least two of which—

(a) are, or are designed to be, in separate ownership; and

(b) are divided from each other horizontally,

and, except where the context otherwise requires, includes the solum and any other land pertaining to that building or, as the case may be, part of the building; and the expression “tenement building” shall be construed accordingly.

(2) In determining whether flats comprised in a building or part of a building are related for the purposes of subsection (1), regard shall be had, among other things, to—

(a) the title to the tenement; and

(b) any tenement burdens,

treating the building or part for that purpose as if it were a tenement.

24 Meaning of “owner”, determination of liability etc.

(1) Subject to subsection (2) below, in this Act “owner” means a person who has right to a flat whether or not that person has completed title; but if, in relation to the flat (or, if the flat is held pro indiviso, any pro indiviso share in it) more than one person comes within that description of owner, then “owner” means such person as has most recently acquired such right.

(2) Where a heritable security has been granted over a flat and the heritable creditor has entered into lawful possession, “owner” means the heritable creditor in possession of the flat.
(3) Subject to subsection (4) below, if two or more persons own a flat in common, any reference in this Act to an owner is a reference to both or, as the case may be, all of them.

(4) Any reference to an owner in sections 5(1) and (3), 6(1), 8(3), 9, 10, 14(1), (6) and (7), 15(5) and (6), 18, 20 and 21 of this Act shall be construed as a reference to any person who owns a flat either solely or in common with another.

(5) Where two or more persons own a flat in common—

(a) they are severally liable for the performance of any obligation imposed by virtue of this Act on the owner of that flat; and

(b) as between (or among) themselves they are liable in the proportions in which they own the flat.

25 Interpretation

(1) In this Act, unless the content otherwise requires—

“chimney stack” does not include flue or chimney pot;

“close” means a connected passage, stairs and landings within a tenement building which together constitute a common access to two or more of the flats;

“demolition” includes destruction and cognate expressions shall be construed accordingly; and demolition may occur on one occasion or over any period of time;

“the development management scheme” has the meaning given by section 71(3) of the Title Conditions (Scotland) Act 2003 (asp 9);

“door” includes its frame;

“flat” includes any premises whether or not—

(a) used or intended to be used for residential purposes; or

(b) on the one floor;

“lift” includes its shaft and operating machinery;

“management scheme” means—

(a) the development management scheme;

(b) the Tenement Management Scheme;

(c) any tenement burden relating to the maintenance or management of the tenement or any combination of such tenement burdens; or

(d) any combination of such tenement burdens and any provision of the Tenement Management Scheme;

“owner” shall be construed in accordance with section 24 of this Act;

“sector” means—

(a) a flat;

(b) any close or lift; or

(c) any other three-dimensional space not comprehended by a flat, close or lift, and the tenement building shall be taken to be entirely divided into sectors;
“solum” means the ground on which a building is erected;
“tenement” shall be construed in accordance with section 23 of this Act;
“tenement burden” means, in relation to a tenement, any real burden (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) which affects—

(a) the tenement; or
(b) any sector in the tenement;

“Tenement Management Scheme” means the scheme set out in the schedule to this Act;
“title to the tenement” shall be construed in accordance with section 1(2) of this Act; and

“window” includes its frame.

(2) The floor area of a flat is calculated for the purposes of this Act by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat—

(a) a balcony; and
(b) except where it is used for any purpose other than storage, a loft or basement.

25A Giving of notice to owners

(1) Any notice which is to be given to an owner under or in connection with this Act (other than under or in connection with the Tenement Management Scheme) may be given in writing by sending the notice to—

(a) the owner; or
(b) the owner’s agent.

(2) The reference in subsection (1) above to sending a notice is to its being—

(a) posted;
(b) delivered; or
(c) transmitted by electronic means.

(3) Where the name of an owner is not known, a notice shall be taken for the purposes of subsection (1)(a) above to be sent to the owner if it is posted or delivered to the owner’s flat addressed to “The Owner” or using some similar expression such as “The Proprietor”.

(4) For the purposes of this Act—

(a) a notice posted shall be taken to be given on the day of posting; and
(b) a notice transmitted by electronic means shall be taken to be given on the day of transmission.

26 Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of this Act.
(2) An order under this section may modify any enactment (including this Act), instrument or document.

27 Orders

(1) Any power of the Scottish Ministers to make orders under this Act shall be exercisable by statutory instrument.

(2) A statutory instrument containing an order under this Act (except an order under section 29(2) or, where subsection (3) applies, section 26) shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

(3) Where an order under section 26 contains provisions which add to, replace or omit any part of the text of an Act, the order shall not be made unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, the Parliament.

28 Crown application

This Act, except section 15, binds the Crown.

29 Short title and commencement

(1) This Act may be cited as the Tenements (Scotland) Act 2004.

(2) This Act (other than this section) shall come into force on such day as the Scottish Ministers may by order appoint; and different days may be appointed for different purposes.
1.1 Scope of scheme
This scheme provides for the management and maintenance of the scheme property of a tenement.

1.2 Meaning of “scheme property”
For the purposes of this scheme, “scheme property” means—

(a) any part of a tenement that is the common property of two or more of the owners,

(b) any part of a tenement (not being common property of the type mentioned in paragraph (a) above) the maintenance of which, or the cost of maintaining which, is, by virtue of a tenement burden, the responsibility of two or more of the owners, or

(c) with the exceptions mentioned in rule 1.3, the following parts of a tenement building (so far as not scheme property by virtue of paragraph (a) or (b) above)—

(i) the ground on which it is built,

(ii) its foundations,

(iii) its external walls,

(iv) its roof (including any rafter or other structure supporting the roof),

(v) if it is separated from another building by a gable wall, the part of the gable wall that is part of the tenement building, and

(vi) any wall (not being one falling within the preceding sub-paragraphs), beam or column that is load-bearing.

1.3 Parts not included in rule 1.2(c)
The following parts of a tenement building are the exceptions referred to in rule 1.2(c)—

(a) any extension which forms part of only one flat,

(b) any—

(i) door,

(ii) window,

(iii) skylight,

(iv) vent, or

(v) other opening,

which serves only one flat,

(c) any chimney stack or chimney flue.
1.4 Meaning of “scheme decision”
A decision is a “scheme decision” for the purposes of this scheme if it is made in accordance with—
(a) rule 2, or
(b) where that rule does not apply, the tenement burden or burdens providing the procedure for the making of decisions by the owners.

1.5 Other definitions
In this scheme—
“maintenance” includes repairs and replacement, cleaning, painting and other routine works, gardening, the day-to-day running of a tenement and the reinstatement of a part (but not most) of the tenement building, but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance,
“manager” means, in relation to a tenement, a person appointed (whether or not by virtue of rule 3.1(c)(i)) to manage the tenement, and
“scheme costs” has the meaning given by rule 4.1.

1.6 Rights of co-owners
If a flat is owned by two or more persons, then one of them may do anything that the owner is by virtue of this scheme entitled to do.

RULE 2 – PROCEDURE FOR MAKING SCHEME DECISIONS

2.1 Making scheme decisions
Any decision to be made by the owners shall be made in accordance with the following provisions of this rule.

2.2 Allocation and exercise of votes
Except as mentioned in rule 2.3, for the purpose of voting on any proposed scheme decision one vote is allocated as respects each flat, and any right to vote is exercisable by the owner of that flat or by someone nominated by the owner to vote as respects the flat.

2.3 Qualification on allocation of votes
No vote is allocated as respects a flat if—
(a) the scheme decision relates to the maintenance of scheme property, and
(b) the owner of that flat is not liable for maintenance of the property concerned.

2.4 Exercise of vote where two or more persons own flat
If a flat is owned by two or more persons the vote allocated as respects that flat may be exercised in relation to any proposal by either (or any) of them, but if those persons disagree as to how the vote should be cast then the vote is not to be counted unless—
(a) where one of those persons owns more than a half share of the flat, the vote is exercised by that person, or
(b) in any other case, the vote is the agreed vote of those who together own more than a half share of the flat.

2.5 Decision by majority
A scheme decision is made by majority vote of all the votes allocated.

2.7 Notice of meeting
If any owner wishes to call a meeting of the owners with a view to making a scheme decision at that meeting that owner must give the other owners at least 48 hours’ notice of the date and time of the meeting, its purpose and the place where it is to be held.

2.8 Consultation of owners if scheme decision not made at meeting
If an owner wishes to propose that a scheme decision be made but does not wish to call a meeting for the purpose that owner must instead—
(a) unless it is impracticable to do so (whether because of absence of any owner or for other good reason) consult on the proposal each of the other owners of flats as respects which votes are allocated, and
(b) count the votes cast by them.

2.9 Consultation where two or more persons own flat
For the purposes of rule 2.8, the requirement to consult each owner is satisfied as respects any flat which is owned by more than one person if one of those persons is consulted.

2.10 Notification of scheme decisions
A scheme decision must, as soon as practicable, be notified—
(a) if it was made at a meeting, to all the owners who were not present when the decision was made, by such person as may be nominated for the purpose by the persons who made the decision, or
(b) in any other case, to each of the other owners, by the owner who proposed that the decision be made.

2.11 Case where decision may be annulled by notice
Any owner (or owners) who did not vote in favour of a scheme decision to carry out, or authorise, maintenance to scheme property and who would be liable for not less than 75 per cent. of the scheme costs arising from that decision may, within the time mentioned in rule 2.12, annul that decision by giving notice that the decision is annulled to each of the other owners.

2.12 Time limits for rule 2.11
The time within which a notice under rule 2.11 must be given is—
(a) if the scheme decision was made at a meeting attended by the owner (or any of the owners), not later than 21 days after the date of that meeting, or
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(b) in any other case, not later than 21 days after the date on which notification of the making of the decision was sent to the owner or owners (that date being, where notification was sent to owners on different dates, the date on which it was sent to the last of them).

RULE 3 – MATTERS ON WHICH SCHEME DECISIONS MAY BE MADE

3.1 Basic scheme decisions

The owners may make a scheme decision on any of the following matters—

(a) to carry out maintenance to scheme property,
(b) to arrange for an inspection of scheme property to determine whether or to what extent it is necessary to carry out maintenance to the property,
(c) except where a power conferred by a manager burden (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) is exercisable in relation to the tenement—
   (i) to appoint on such terms as they may determine a person (who may be an owner or a firm) to manage the tenement,
   (ii) to dismiss any manager,
(d) to delegate to a manager power to—
   (i) decide that maintenance (costing no more than an amount specified by the owners) needs to be carried out to scheme property and to instruct it, and
   (ii) arrange for an inspection as mentioned in paragraph (b),
(e) to arrange for the tenement a common policy of insurance complying with section 15 of this Act and against such other risks (if any) as the owners may determine and to determine on an equitable basis the liability of each owner to contribute to the premium,
(f) to determine that an owner is not required to pay a share (or some part of a share) of such scheme costs as may be specified by them,
(g) to authorise any maintenance of scheme property already carried out by an owner,
(h) to modify or revoke any scheme decision.

3.2 Scheme decisions relating to maintenance

If the owners make a scheme decision to carry out maintenance to scheme property or if a manager decides, by virtue of a scheme decision, that maintenance needs to be carried out to scheme property, the owners may make a scheme decision on any of the following matters—

(a) to appoint on such terms as they may determine a person (who may be an owner or a firm) to manage the carrying out of the maintenance,
(b) to instruct or arrange for the carrying out of the maintenance,
(c) subject to rule 3.3, to require each owner to deposit—
   (i) by such date as they may decide (being a date not less than 28 days after the requirement is made of that owner), and
   (ii) with such person as they may nominate for the purpose,
a sum of money (being a sum not exceeding that owner’s apportioned share of a reasonable estimate of the cost of the maintenance),

(d) to take such other steps as are necessary to ensure that the maintenance is carried out to a satisfactory standard and completed in good time.

3.3 Scheme decisions under rule 3.2(c) requiring deposits exceeding certain amounts

A requirement, in pursuance of a scheme decision under rule 3.2(c), that each owner deposit a sum of money—

(a) exceeding £100, or

(b) of £100 or less where the aggregate of that sum taken together with any other sum or sums required (otherwise than by a previous notice under this rule) in the preceding 12 months to be deposited by each owner by virtue any scheme decision under rule 3.2(c) exceeds £200,

shall be made by written notice to each owner and shall require the sum to be deposited into such account (the “maintenance account”) as the owners may nominate for the purpose.

3.4 Provision supplementary to rule 3.3

Where a requirement is, or is to be, made in accordance with rule 3.3—

(a) the owners may make a scheme decision authorising persons to operate the maintenance account on behalf of the owners,

(b) there must be contained in or attached to the notice to be given under rule 3.3 a note comprising a summary of the nature and extent of the maintenance to be carried out together with the following information—

(i) the estimated cost of carrying out that maintenance,

(ii) why the estimate is considered a reasonable estimate,

(iii) how the sum required from the owner in question and the apportionment among the owners have been arrived at,

(iv) what the apportioned shares of the other owners are,

(v) the date on which the decision to carry out the maintenance was made and the names of those by whom it was made,

(vi) a timetable for the carrying out of the maintenance, including the dates by which it is proposed the maintenance will be commenced and completed,

(vii) the location and number of the maintenance account, and

(viii) the names and addresses of the persons who will be authorised to operate that account on behalf of the owners,

(c) the maintenance account to be nominated under rule 3.3 must be a bank or building society account which is interest bearing, and the authority of at least two persons or of a manager on whom has been conferred the right to give authority, must be required for any payment from it,

(d) if a modification or revocation under rule 3.1(h) affects the information contained in the notice or the note referred to in paragraph (b) above, the information must be sent again, modified accordingly, to the owners,
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(e) an owner is entitled to inspect, at any reasonable time, any tender received in connection with the maintenance to be carried out,

(ea) the notice to be given under rule 3.3 may specify a date as a refund date for the purposes of paragraph (f)(i) below;

(f) if—

(i) the maintenance is not commenced by—

(A) where the notice under rule 3.3 specifies a refund date, that date, or

(B) where that notice does not specify such a date, the twenty-eighth day after the proposed date for its commencement as specified in the notice by virtue of paragraph (b)(vi) above, and

(ii) a depositor demands, by written notice, from the persons authorised under paragraph (a) above repayment (with accrued interest) of such sum as has been deposited by that person in compliance with the scheme decision under rule 3.2(c),

the depositor is entitled to be repaid accordingly, except that no requirement to make repayment in compliance with a notice under sub-paragraph (ii) arises if the persons so authorised do not receive that notice before the maintenance is commenced,

(g) such sums as are held in the maintenance account by virtue of rule 3.3 are held in trust for all the depositors, for the purpose of being used by the persons authorised to make payments from the account as payment for the maintenance,

(h) any sums held in the maintenance account after all sums payable in respect of the maintenance carried out have been paid shall be shared among the depositors—

(i) by repaying each depositor, with any accrued interest and after deduction of that person’s apportioned share of the actual cost of the maintenance, the sum which the person deposited, or

(ii) in such other way as the depositors agree in writing.

3.5 Scheme decisions under rule 3.1(f): votes of persons standing to benefit not to be counted

A vote in favour of a scheme decision under rule 3.1(f) is not to be counted if—

(a) the owner exercising the vote, or

(b) where the vote is exercised by a person nominated by an owner—

(i) that person, or

(ii) the owner who nominated that person,

is the owner or an owner who, by virtue of the decision, would not be required to pay as mentioned in that rule.

RULE 4 – SCHEME COSTS: LIABILITY AND APPORTIONMENT

4.1 Meaning of “scheme costs”

Except in so far as rule 5 applies, this rule provides for the apportionment of liability among the owners for any of the following costs—
(a) any costs arising from any maintenance or inspection of scheme property where the maintenance or inspection is in pursuance of, or authorised by, a scheme decision,

(b) any remuneration payable to a person appointed to manage the carrying out of such maintenance as is mentioned in paragraph (a),

(c) running costs relating to any scheme property (other than costs incurred solely for the benefit of one flat),

(d) any costs recoverable by a local authority in respect of work relating to any scheme property carried out by them by virtue of any enactment,

(e) any remuneration payable to any manager,

(f) the cost of any common insurance to cover the tenement,

(fa) any costs relating to the calculation of the floor area of any flat, where such calculation is necessary for the purpose of determining the share of any other costs for which each owner is liable,

(g) any other costs relating to the management of scheme property,

and a reference in this scheme to “scheme costs” is a reference to any of the costs mentioned in paragraphs (a) to (g).

4.2 Maintenance and running costs

Except as provided in rule 4.3, if any scheme costs mentioned in rule 4.1(a) to (d) relate to—

(a) the scheme property mentioned in rule 1.2(a), then those costs are shared among the owners in the proportions in which the owners share ownership of that property,

(b) the scheme property mentioned in rule 1.2(b) or (c), then—

(i) in any case where the floor area of the largest (or larger) flat is more than one and a half times that of the smallest (or smaller) flat, each owner is liable to contribute towards those costs in the proportion which the floor area of that owner’s flat bears to the total floor area of all (or both) the flats,

(ii) in any other case, those costs are shared equally among the flats,

and each owner is liable accordingly.

4.3 Scheme costs relating to roof over the close

Where—

(a) any scheme costs mentioned in rule 4.1(a) to (d) relate to the roof over the close, and

(b) that roof is common property by virtue of section 3(1)(a) of this Act,

then, despite the fact that the roof is scheme property mentioned in rule 1.2(a), paragraph (b) of rule 4.2 shall apply for the purpose of apportioning liability for those costs.
4.4 **Remuneration of manager**

Any scheme costs mentioned in rule 4.1(e) are shared equally among the flats, and each owner is liable accordingly.

4.5 **Insurance premium**

Any scheme costs mentioned in rule 4.1(f) are shared among the flats—

(a) where the costs relate to common insurance arranged by virtue of rule 3.1(e), in such proportions as may be determined by the owners by virtue of that rule, or

(b) where the costs relate to common insurance arranged by virtue of a tenement burden, equally,

and each owner is liable accordingly.

4.6 **Management costs**

Any scheme costs mentioned in rule 4.1(fa) or (g) are shared equally among the flats, and each owner is liable accordingly.

**RULE 5 – SCHEME COSTS: SPECIAL CASES**

5.2 **Redistribution of share of costs**

Where an owner is liable for a share of any scheme costs but—

(a) a scheme decision has been made determining that the share (or a portion of it) should not be paid by that owner, or

(b) the share cannot be recovered for some other reason such as that—

(i) the estate of that owner has been sequestrated, or

(ii) that owner cannot, by reasonable inquiry, be identified or found,

then that share must be paid by the other owners as if it were a scheme cost for which they are liable, but where paragraph (b) applies that owner is liable to each of those other owners for the amount paid by each of them.

5.3 **Liability for scheme costs where procedural irregularity**

If any owner is directly affected by a procedural irregularity in the making of a scheme decision and that owner—

(a) was not aware that any scheme costs relating to that decision were being incurred, or

(b) on becoming aware as mentioned in paragraph (a), immediately objected to the incurring of those costs,

that owner is not liable for any such costs (whether incurred before or after the date of objection), and, for the purposes of determining the share of those scheme costs due by each of the other owners, that owner is left out of account.
RULE 6 – EMERGENCY WORK

6.1 Power to instruct or carry out
Any owner may instruct or carry out emergency work.

6.2 Liability for cost
The owners are liable for the cost of any emergency work instructed or carried out under rule 6.1 as if the cost of that work were scheme costs mentioned in rule 4.1(a).

6.3 Meaning of “emergency work”
For the purposes of this rule, “emergency work” means work which, before a scheme decision can be obtained, requires to be carried out to scheme property—
(a) to prevent damage to any part of the tenement, or
(b) in the interests of health or safety.

RULE 7 – ENFORCEMENT

7.1 Scheme binding on owners
This scheme binds the owners.

7.2 Scheme decision to be binding
A scheme decision is binding on the owners and their successors as owners.

7.3 Enforceability of scheme decisions
Any obligation imposed by this scheme or arising from a scheme decision may be enforced by any owner.

7.4 Enforcement by third party
Any person authorised in writing for the purpose by the owner or owners concerned may—
(a) enforce an obligation such as is mentioned in rule 7.3 on behalf of one or more owners, and
(b) in doing so, may bring any claim or action in that person’s own name.

RULE 8 – GENERAL

8.1 Validity of scheme decisions
Any procedural irregularity in the making of a scheme decision does not affect the validity of that decision.

8.2 Giving of notice
Any notice which requires to be given to an owner under or in connection with this scheme may be given in writing by sending the notice to—
(a) the owner, or
(b) the owner’s agent.

8.3 **Methods of “sending” for the purposes of rule 8.2**

The reference in rule 8.2 to sending a notice is to its being—

(a) posted,
(b) delivered, or
(c) transmitted by electronic means.

8.4 **Giving of notice to owner where owner’s name is not known**

Where the name of an owner is not known, a notice shall be taken for the purposes of rule 8.2(a) to be sent to the owner if it is posted or delivered to the owner’s flat addressed to “The Owner” or using some other similar expression such as “The Proprietor”.

8.5 **Day on which notice is to be taken to be given**

For the purposes of this scheme—

(a) a notice posted shall be taken to be given on the day of posting, and
(b) a notice transmitted by electronic means shall be taken to be given on the day of transmission.

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**SCHEDULE 2**

*(introduced by sections 18(3) and 20(1))*

**SALE UNDER SECTION 18(3) OR 20(1)**

1 (1) Where an owner is entitled to apply—

(a) under section 18(3), for power to sell the site; or
(b) under section 20(1), for power to sell the tenement building,

the owner may make a summary application to the sheriff seeking an order (referred to in this schedule as a “power of sale order”) conferring such power on the owner.

(2) The site or tenement building in relation to which an application or order is made under sub-paragraph (1) is referred to in this schedule as the “sale subjects”.

(3) An owner making an application under sub-paragraph (1) shall give notice of it to each of the other owners of the sale subjects.

(4) The sheriff shall, on an application under sub-paragraph (1)—

(a) grant the power of sale order sought unless satisfied that to do so would—

(i) not be in the best interests of all (or both) the owners taken as a group; or
(ii) be unfairly prejudicial to one or more of the owners; and
(b) if a power of sale order has previously been granted in respect of the same sale subjects, revoke that previous order.

(5) A power of sale order shall contain—

(a) the name and address of the owner in whose favour it is granted;

(b) the postal address of each flat or, as the case may be, former flat comprised in the sale subjects to which the order relates; and

(c) a sufficient conveyancing description of each of those flats or former flats.

(6) A description of a flat or former flat is a sufficient conveyancing description for the purposes of sub-paragraph (5)(c) if—

(a) where the interest of the proprietor of the land comprising the flat or former flat has been registered in the Land Register of Scotland, the description refers to the number of the title sheet of that interest; or

(b) in relation to any other flat or former flat, the description is by reference to a deed recorded in the Register of Sasines.

(7) An application under sub-paragraph (1) shall state the applicant’s conclusions as to—

(a) which of subsections (4) and (5) of section 18 applies for the purpose determining how the net proceeds of any sale of the sale subjects in pursuance of a power of sale order are to be shared among the owners of those subjects; and

(b) if subsection (5) of that section is stated as applying for that purpose—

(i) the floor area of each of the flats or former flats comprised in the sale subjects; and

(ii) the proportion of the net proceeds of sale allocated to that flat.

Registration and recording of power of sale order

2 A power of sale order has no effect unless and until, within the period of 14 days after the day on which the order is made—

(a) where the interest of the proprietor of the land comprising any flat or former flat comprised in the sale subjects to which the order relates has been registered in the Land Register of Scotland, the order is registered in that Register against that interest; and

(b) where that interest has not been so registered, the order is recorded in the Register of Sasines.

Exercise of power of sale

3 (1) An owner in whose favour a power of sale order is granted may exercise the power conferred by the order by private bargain or by exposure to sale.

(2) However, in either case, the owner shall—

(a) advertise the sale; and

(b) take all reasonable steps to ensure that the price at which the sale subjects are sold is the best that can reasonably be obtained.
Distribution of proceeds of sale

4 (1) An owner selling the sale subjects (referred to in this paragraph as the “selling owner”) shall, within seven days of completion of the sale—

(a) calculate each owner’s share; and

(b) apply that share in accordance with sub-paragraph (2) below.

5 (2) An owner’s share shall be applied—

(a) first, to repay any amounts due under any heritable security affecting that owner’s flat or former flat;

(b) next, to defray any expenses properly incurred in complying with paragraph (a) above; and

(c) finally, to pay to the owner the remainder (if any) of that owner’s share.

(3) If there is more than one heritable security affecting an owner’s flat or former flat, the owner’s share shall be applied under paragraph (2)(a) above in relation to each security in the order in which they rank.

(4) If any owner cannot by reasonable inquiry be identified or found, the selling owner shall consign the remainder of that owner’s share in the sheriff court.

(5) On paying to another owner the remainder of that owner’s share, the selling owner shall also give to that other owner—

(a) a written statement showing—

(i) the amount of that owner’s share and of the remainder of it; and

(ii) how that share and remainder were calculated; and

(b) evidence of—

(i) the total amount of the proceeds of sale; and

(ii) any expenses properly incurred in connection with the sale and in complying with sub-paragraph (2)(a) above.

(6) In this paragraph—

“remainder”, in relation to an owner’s share, means the amount of that share remaining after complying with sub-paragraph (2)(a) and (b) above;

“share”, in relation to an owner, means the share of the net proceeds of sale to which that owner is entitled in accordance with subsection (4) or, as the case may be, subsection (5) of section 18.

Automatic discharge of heritable securities

5 Where—

(a) an owner—

(i) sells the sale subjects in pursuance of a power of sale order; and

(ii) grants a disposition of those subjects to the purchaser or the purchaser’s nominee; and

(b) that disposition is duly registered in the Land Register of Scotland or recorded in the Register of Sasines,
all heritable securities affecting the sale subjects or any part of them shall, by virtue of
this paragraph, be to that extent discharged.
Tenements (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about the boundaries and pertinent of properties comprised in tenements and for the regulation of the rights and duties of the owners of properties comprised in tenements; to make minor amendments of the Title Conditions (Scotland) Act 2003 (asp 9); and for connected purposes.

Introduced by:  Ms Margaret Curran
On: 30 January 2004
Supported by: Cathy Jamieson, Mrs Mary Mulligan
Bill type: Executive Bill
CORRESPONDENCE FROM DEPUTY MINISTER FOR COMMUNITIES TO CONVENER OF THE JUSTICE 2 COMMITTEE

TENEMENTS (SCOTLAND) BILL

The main purpose of this letter is to let the Committee know that in view of its concerns over section 11 of the Bill (on the liability of incoming purchasers for costs) the Executive is proposing to introduce amendments at Stage 3. This letter also covers a number of points which I promised to write about at Stages 1 and 2.

Section 11: liability of owner and successor for certain costs

I indicated at Stage 2 that the Executive was listening to the strong arguments being advanced in relation to the proposal in section 11 of the Bill that incoming owners should become severally liable with sellers for outstanding liabilities. Although our proposals will not entirely follow the amendments lodged by you and by Nicola Sturgeon we believe that they will meet the spirit of the suggestions made by the Committee which were intended to protect purchasers. In particular, the amendments will provide that owners in a tenement will be able to register notices at Registers of Scotland in relation to outstanding liabilities, and that the liability of purchasers will be limited if there is no notice.

We propose that purchasers will be severally liable with the seller for costs of work already done but only for costs up to a certain limit if there is no notice registered. So the purchaser will be protected and forewarned of significant outstanding costs. The owners will only be protected above the limit if they have registered a notice. Of course many will prefer to collect the money in advance and the Tenement Management Scheme provides some rules as to how that money should be managed.

The Committee was divided as to whether there should be a monetary limit for notices. Your own view was that there should be no limit, and Nicola Sturgeon’s amendment suggested £500. We think that this procedure should be limited to cases where there is a large repair. We believe that even the £500 figure is too low. In addition, the way Nicola’s amendment would have worked would have been that the £500 would have been a threshold, not a limit – in other words, if the cost was £499, the incoming purchaser would be liable for the full amount, but if it was £501, he would be liable for nothing. We think he should pay the costs up to a prescribed limit but that he should not have to pay more than that figure.

I think that the Committee agreed that a critical aspect to this is that the notice procedure should only apply to work already done. If repairs or other work is still to be done in the future, then it should be the responsibility of the purchaser. The need for work should be picked up by the purchaser’s surveyor and it should be reflected in the purchase price or the subsequent negotiations. If the purchaser took entry and was then told that there was a scheme decision to undertake work, the threshold would not operate properly. If the threshold was £1000, for example, it would not work for the purchaser to be liable for up to £1000, but for everyone else to have to pay £2000. The other owners could just revoke the scheme decision and take a new one which would bind the purchaser to pay the same share as everyone else.

We also agree that the notices should be time-limited – this is important because they will not then clutter up the Registers. After a period, they will just stop to have effect. The non-
Executive amendments provided a time-limit of 5 years, but we think that is too long. We are considering with Registers of Scotland what would be the right time-limit.

I should take this opportunity to clarify one point which arose at Stage 2 when it was suggested that this proposal would only apply to tenement flats but not to other kinds of property. In fact there is a similar provision in section 10 of the Title Conditions Act. This section was not commented on when the Title Conditions Bill was being considered by Parliament, but we would intend now to amend it to correspond with the proposals described above.

The legal technicalities of this proposal are still to be worked out in detail, but I hope that this gives the Committee the kind of reassurance they were looking for in relation to the liability of purchasers. I hope to write to you again before the end of the recess to provide more detail of what will be brought forward by amendment at Stage 3.

**Insurance provisions**

If I have understood correctly, the amendment which you laid at Stage 2 on insurance would ensure that tenement flats would be covered by both a common policy of insurance and an individual policy which is likely to be required by a mortgage lender. This is to cover the situation where a common policy might be required by the title deeds. As I said at the Stage 2 debate I am willing to consider the possible amendment of section 15, and I will write to you again on this point.

**Requirement to provide contact details**

It was clear that the Committee was interested in the amendment brought forward by Sarah Boyack which would have required owners who do not reside in a tenement to provide a contact address so that the other owners could contact the non-resident owner if they wish to carry out common repairs.

As members will be aware, it is proposed to introduce a national register of landlords under the Anti-Social Behaviour Bill so that it will become easier for people to contact a landlord. The register will include the landlord’s name and contact details, and those of any agent. It will cover all private lettings in Scotland (around 160,000 properties and possibly up to 40,000 landlords) with some exceptions, and will be administered by each local authority for its area. The Bill excludes some minor categories of houses – principally those regulated by the Care Commission – and provides for Ministers to exclude other categories. We have indicated that we are minded to exclude houses where there is a resident landlord. Because local authorities will already be data controllers this register does not pose the same data protection problems that would have been caused by Sarah’s amendment.

This register will therefore provide a means for the other owners in a tenement to find the contact details of a non-resident owner who is renting out a flat and who is liable for a share of common repairs. It will also deal with the scenario raised by Sarah Boyack where she was unable to proceed with repairs because letting agents refused to disclose up to date contact details of landlords of tenanted flats.

It is of course more difficult to trace an owner where a flat has not been rented out and lies empty. We are considering whether there is anything we can do to help in this situation.
Legal aid

In their Stage 1 Report the Committee noted that where tenement owners apply to the sheriff court to have disputes resolved, they might be eligible for legal aid. They believed that there was an issue here because, in view of the potential common interest with other owners in such circumstances, the Scottish Legal Aid Board could be required to consider the financial situation of all the flat owners, not just the legal aid applicant, and so that person might be unable to get legal aid.

You are of course aware of the effect of regulation 15 of the Legal Aid Regulations, and indeed the Legal Aid board gave evidence on this point to the Finance Committee. It might well turn out that an application for legal aid would be refused if the Board considered that there was a joint or common interest with other persons who could afford to cover the full costs themselves. The Board must of course ensure that owners who could afford to pay for costs should not hide behind legally aided neighbours.

The Tenements Bill is neutral on this matter - actions for payment for the cost of repairs and other disputes relating to a tenement and all other kinds of property can end up in the Sheriff Court at the moment. We hope that the Bill, by clarifying the rights and obligations of owners, will reduce the incidence of litigation.

Support and Shelter

I also undertook to let you have some further information on Section 7 to 10 of the Bill, which provide a statutory restatement of the existing common law doctrine of common interest. Section 8 places a duty on owners to maintain any part of the tenement in their ownership which supports or shelters the building. Under section 8(2), however, an owner is not obliged to maintain a part of the tenement building “if it would not be reasonable to do so”. There was some concern that owners should not use this as an excuse to delay unnecessary work.

The grounds on which it might not be reasonable to maintain a part of a tenement building would be considered in the light of all of the relevant circumstances, including in particular the age of the tenement building, its condition and the likely cost of any maintenance. These factors will be a matter of fact in each different case, but it is not expected that this would normally cause any delay or hinder work being carried out. The presumption will be that the work would proceed. The onus would be on the owner attempting to argue that it would not be reasonable to do the work under section 8(1) to make this case. The courts are, of course, accustomed to determine what constitutes a ‘reasonable’ defence in many different circumstances.

I hope all of this is helpful to the Committee. In view of her interest in some of the amendments I am copying this letter to Sarah Boyack.

Mary Mulligan MSP
Deputy Minister for Communities
July 2004
Present:

Dr Sylvia Jackson (Convener)          Gordon Jackson (Deputy Convener)
Stewart Maxwell                      Christine May
Alasdair Morgan                      Mike Pringle

Delegated powers scrutiny: The Committee considered the delegated powers provisions in the following Bill—

Tenements (Scotland) Bill as amended at Stage 2

and agreed the terms of its report.
The Convener (Dr Sylvia Jackson): I welcome everyone to the 24th meeting in 2004 of the Subordinate Legislation Committee, and to this beautiful new committee room. I gather that the committee might be in another committee room for some meetings, but that room will be equally nice.

I welcome back members. I have received no apologies, so I expect members who are not here yet to appear at some point.

We will hold one minute's silence at 11 o'clock for the tragedy in Beslan, so we shall stop proceedings at that point.

Delegated Powers Scrutiny

Tenements (Scotland) Bill: as amended at Stage 2

10:38

The Convener: Members will remember that we considered the Tenements (Scotland) Bill at an early stage and made recommendations about sections 4(11) and 22(4)(f). Our recommendations are highlighted in paragraph 11 of the legal brief. The Executive has chosen to take up the second one, which is that the power should remain as drafted but should be subject to a restriction to the effect that any changes in the specified sums be limited to changes in the value of money. The power would then be quite specific as to what could happen. In that case, the negative procedure would supply an appropriate level of scrutiny. Is the committee happy with the way in which the Executive has proceeded?

Members indicated agreement.

The Convener: There will be two additional powers in the bill and they will be relevant to the committee. One of those is to do with sale of a property and the second is about issues of access to property. Although it is not possible to give a definitive answer on the proposed powers because we have not been able to examine the amendments, it looks as if there are good reasons for seeking to introduce those powers.

I welcome Gordon Jackson to the meeting.
Subordinate Legislation Committee

32nd Report 2004 (Session 2)

Tenements (Scotland) Bill As Amended at Stage 2
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on

(a) any—

   (i) subordinate legislation laid before the Parliament;

   (ii) Scottish Statutory Instrument not laid before the Parliament but classified
        as general according to its subject matter,

and, in particular, to determine whether the attention of the Parliament should
be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other
proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other
legislation should be expressed as a power to make subordinate legislation.

(Standing Orders of the Scottish Parliament Rule 6.11)

Membership:
Gordon Jackson QC (Deputy Convener)
Sylvia Jackson (Convener)
Stewart Maxwell
Christine May
Alasdair Morgan
Mike Pringle
Murray Tosh

Committee Clerks:
Alasdair Rankin
Bruce Adamson
Subordinate Legislation Committee
32nd Report 2004 (Session 2)

Tenements (Scotland) Bill
As Amended at Stage 2
Delegated Powers Scrutiny

The Committee reports to the Parliament as follows—

1. At its meeting on 14th September the Committee considered the inserted or substantially amended delegated powers provisions in the Tenements (Scotland) Bill as amended at Stage 2. The Committee reports to the Parliament on such provisions under Rule 9.7.9 of Standing Orders.
Local Governance (Scotland) Bill as amended at Stage 2

Report of the Subordinate Legislation Committee


Committee remit
1. Under the terms of its remit, the Committee considers and reports on proposed powers to make subordinate legislation in particular Bills or other proposed legislation and on whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

2. The term “subordinate legislation” carries the same definition in the Standing Orders as in the Interpretation Act 1978. Section 21(1) of that Act defines subordinate legislation as meaning “Orders in Council, orders, rules, regulations, schemes, warrants, bye-laws and other instruments made or to be made under any Act”. “Act” for this purpose includes an Act of the Scottish Parliament. The Committee therefore considers not only powers to make statutory instruments as such contained in a Bill but also all other proposed provisions conferring delegated powers of a legislative nature.

Report

Introduction
3. The Committee recalled that the Bill forms part of the Scottish Executive’s programme of property law reform and modernises the law relating to tenements. The Bill largely implements recommendations of the Scottish Law Commission in its Report on the Law of the Tenement (Scot Law No 162) and is intended to produce greater clarity in this area.

Delegated powers
4. The Bill contains a number of delegated powers. Two of these powers have now been amended and the Bill has therefore returned to the Committee under Rule 9.7.9 of the Standing Orders for consideration of these changes. The Committee had considered and reported to the lead committee on the delegated powers in the Bill at Stage 1.

Background
5. In the course of its consideration of these powers at Stage 1 the Committee indicated that while it was generally content with the delegated powers in the Bill it had some concerns about the powers conferred on the Scottish Ministers to make orders under sections 4(11) and 22(4)(f).

1 The Committee's report on the Bill is incorporated into the Stage 1 report of the lead committee for the Bill. See Justice 2 Committee 5th Report 2004 (Session 2), SP Paper 164, published on 27th May 2004 and available on the Parliament's website at: http://www.scottish.parliament.uk/business/committees/justice2/reports-04/j2r04-05-01.htm
Sections 4(11) and 22(4)(f)

6. Section 4 of the Bill included as part of the new Tenement Management Scheme (TMS) a provision imposing certain conditions that are to apply where owners of tenement property are required to deposit sums of money in excess of a prescribed amount in respect of their share of the estimated costs of maintenance of the tenement.

7. As then drafted, the Bill prescribed a set amount and conferred power on the Scottish Ministers to amend that sum by statutory instrument subject to annulment.

8. The Committee had little difficulty in accepting that section 4(11) was an appropriate use of delegated powers for the reasons given by the Executive but noted that, although this was a power to amend primary legislation, it was proposed that its exercise should be subject only to negative procedure. Furthermore, whilst the Executive’s Memorandum to the Committee did not suggest any reason for amending the sums in question other than the need to take account of changes in the value of money, the section was not limited in this respect.

9. As the Committee expects at least affirmative procedure to apply to a power to amend primary legislation unless sufficient justification is provided or there is some clear limitation on the power, the Committee asked for further explanation of the Executive’s intentions in the exercise of this power and whether the Executive would consider either a limitation on the power or its exercise by affirmative procedure.

10. The Executive confirmed that the proposed power in section 4(11) to substitute new sums in rule 3.3 of the TMS was simply intended to take into account the effects of inflation over time. It also acknowledged that it is more usual for affirmative procedure to apply to a power to amend primary legislation. Accordingly, it indicated that it proposed to bring forward an amendment at Stage 2 of the Bill to remove the specific sums which are set out in rule 3.3 and which are referred to in section 4(11). The amendment would provide for a power for Scottish Ministers to prescribe the sums of money which, if exceeded, would require written notice to each owner and the deposit of such sums in a maintenance account. This power would be subject to negative procedure.

11. The Committee indicated, however, that in its opinion the proposed amendments appeared, if anything, even less acceptable that the original draft.

12. In recasting the power in the way proposed, it seemed to the Committee that it would be open to the Executive to prescribe whatever amount it chose and to alter that amount at will.

13. The Committee therefore suggested that either-

- the power should remain as drafted but its exercise should be subject to affirmative procedure or
• the power should remain as drafted but subject to a restriction to the effect that any changes in the specified sums be limited to changes in the value of money, in which case negative procedure would supply an appropriate level of scrutiny;

14. **Section 22(4)(f)** made changes to section 29 of the Title Conditions (Scotland) Act 2003, which deals with the power of a majority of owners to implement common repairs, similar to section 4 of the Bill raised similar issues.

15. The Executive has responded to the Committee’s concerns by amending both section 4(11) and 22(4)(f) on the lines of the second option proposed in paragraph 13 above namely, that the power of the Scottish Ministers to amend the prescribed sums is limited to changes to reflect changes in the value of money but any order under the power will be subject only to annulment.

**Report**

16. The Committee thanks the Executive for meeting its earlier undertaking. *As the Executive’s amendments appear to meet its concerns, the Committee approves the powers as amended.*

**Additional powers to be inserted at Stage 3 by Executive amendment**

17. In a letter to the Committee, reproduced at Appendix 2, the Executive has indicated that it intends to bring forward amendments at Stage 3 to confer two further new order-making powers on the Scottish Ministers.

18. Details of the new powers are set out in the letter. The first power will amend **section 11**, which deals with the apportionment of liability for repairs between buyer and seller when a flat is sold. New provisions will provide for the registration by an owner of a notice of works carried out or to be carried out on a tenement to alert buyers. The form of the notice is to be prescribed by Ministers by order subject to annulment.

19. The second new power will enable Ministers to prescribe by order again subject to annulment the procedures by which an owner can install services in a flat and the services that may be installed.

**Report**

20. Although the Committee cannot give definite approval to powers where it has not had the opportunity to examine the draft sections themselves, there appears in principle nothing in either of the new proposals that would give the Committee any cause for concern. The Committee is grateful to the Executive for notification of its intention to insert these powers in the Bill.

21. There are no further delegated powers in the Bill on which the Committee sees any need to comment.
Appendix 1

SUPPLEMENTARY MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE
BY THE SCOTTISH EXECUTIVE

Tenements (Scotland) Bill
As amended at Stage 2
Provisions Conferring Power to Make Subordinate Legislation

Purpose

This Memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions in the Tenements (Scotland) Bill conferring power to make subordinate legislation. It describes the purpose of each such provision, explains why the matter is to be left to subordinate legislation and the reasons for seeking the proposed powers.

Outline and scope of the Bill

The Bill forms the third and final part of the Executive’s current programme of property law reform and follows on from the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) and the Title Conditions (Scotland) Act 2003 (asp 9). Both these Acts are expected to be fully commenced on 28 November 2004.

Tenements form over a quarter of the housing stock in Scotland and come in all shapes and sizes. Most tenements are residential blocks, but office blocks also fall within the definition. So do large houses which have been divided into flats. This captures a much wider range of properties than is commonly imagined.

Common law rules governing the maintenance and management of tenements have developed since the 17th Century, but these are not comprehensive nor without anomaly. The development of the law on real burdens, however, has helped to impose obligations on successive owners to adhere to a detailed regime for management and repair of a tenement. These burdens are drawn up to suit the particular circumstances of the tenement.

But not all title deeds are comprehensive and they do not always provide burdens to specify how the owners are to decide on matters of mutual interest. If title deeds make no provision on one matter, the common law will apply on that one matter. The common law acts as a background or default law and most tenements, particularly new tenements will have a detailed system of management provided by the title deeds to the property. The common law will only apply where there is a gap in the title deeds.

The Bill will largely implement the recommendations of the Scottish Law Commission Report on the Law of the Tenement (Scot Law No 162), published on...
25 March 1998. The Bill is intended to produce greater clarity in the law on tenements. The existing common law rules which demarcate ownership within a tenement are restated. The common law doctrine of common interest is codified by a restatement of the law. A statutory right of access is provided for along with compulsory insurance.

The Bill introduces a statutory management scheme called the Tenement Management Scheme which will act as a default management scheme for all tenements in Scotland (this is set out in the schedule to the Bill). It will provide a structure for the maintenance and management of tenements if this is not provided for in the title deeds. Where the title deeds are silent on matters of decision making the Scheme will allow a majority of the owners in a tenement to make decisions by majority vote. The Tenement Management Scheme also introduces the new concept of scheme property. This sets out in statute the main parts of a tenement that are so fundamental to the building as a whole that they should be maintained in common. This will not, however, affect the ownership of the different parts of the building which remains unchanged. The Tenement Management Scheme also contains default provisions on emergency repairs and the apportionment of costs.

Delegated powers

The Bill has 5 sections which contain powers to make subordinate legislation (including commencement powers). Section 27 provides that such subordinate legislation is to be made by statutory instrument and prescribes the procedure to be used.

Section 4 Application of the Tenement Management Scheme

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

Section 4 deals with the application of the Tenement Management Scheme which is found in the schedule to the Bill. The Tenement Management Scheme contains 8 rules which provide a system of management and maintenance in tenements. The rules of the Tenement Management Scheme will apply only where the tenement burdens, as defined in section 25(1), do not make provision in respect of the subject matter of the individual rules in the Scheme. Section 4 and the Scheme together provide a default management regime for tenemental property. Section 4 sets out how each of the rules in the Scheme is to apply.

Rule 3.1 of the Tenement Management Scheme allows owners to make decisions to instruct or carry out maintenance or to appoint a manager to arrange for this. Unless the title deeds set out procedures for making decisions, a majority of owners can therefore make scheme decisions, but these are restricted to those subjects listed in rule 3.1 and 3.2.
Each owner may be required to deposit money in advance by a date which the owners decide. This will be the owner’s apportioned share of a reasonable estimate of the costs of the maintenance in accordance with Rule 4.

Rule 3.3 deals with decisions made under rule 3.2(c) which require owners to deposit a sum of money. It sets out specific monetary limits which, when exceeded, will require that written notice is made to each owner and that money is deposited into a maintenance account decided upon by the owners. The two tier arrangement found in rule 3.3 will allow owners to hand over small sums of money without the safeguards applying. If the sum of money required to be deposited is less than £100, then the safeguards found in rule 3.4 will not apply. If, however, the money required together with any other sums of money handed over as a result of maintenance decisions in the preceding 12 months totals £200 or more, the safeguards will come into play.

These figures will need to be updated from time to time to take account of inflation, amongst other things. Section 4(11) accordingly gives the Scottish Ministers the power to substitute new sums in rule 3.3 by order. This section was amended at Stage 2 to limit the power so that the change in the sums will have to be justified by any change in the value of money since the previous occasion on which the sums were fixed.

Section 15  Obligation of the owner to insure

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

Tenement owners are in a unique position in that their properties are vulnerable to the physical condition of neighbouring flats and consequently they are not adequately insured unless neighbours are also insured. Section 15 imposes an obligation on the owners of all flats within a tenement to insure their flats and any pertinents attached. Subsection (1) imposes the basic obligation to insure and specifies that insurance should be for the reinstatement, rather than market, value.

The Bill does not set out a list of the various lists against which cover should be taken. The Scottish Law Commission suggested that this would be too inflexible. It is submitted that Scottish Ministers should therefore have the ability to vary the list of risks. Section 15(3) defines the term “prescribed risks” as the risks against which owners are obliged to insure. These are to be prescribed by the Scottish Ministers by order under section 15(3).

Section 22  Amendments of the Title Conditions (Scotland) Act 2003

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Section 22(4)(f) makes changes to section 29 of the Title Conditions (Scotland) Act 2003, which deals with the power of a majority of owners to instruct common maintenance. Section 29 relates to circumstances where the majority own properties in a group of four or more properties all subject to the same or similar burdens (i.e. title conditions) and which can be mutually enforced. The changes will replicate the provisions of rule 3 of the Tenement Management Scheme. Rule 3.3 provides procedures for the deposit and retention of monies. Similar procedures are found in section 29 of the Title Conditions Act. Section 22(4)(f) of the Bill inserts a new subsection (10) into section 29 of the Act. This new subsection gives the Scottish Ministers the power to substitute new sums in section 29 of the Act by order. This section was amended at Stage 2 to limit the power so that the change in the sums will have to be justified by any change in the value of money since the previous occasion on which the sums were fixed.

Section 26 Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Affirmative and negative resolution of the Scottish Parliament

Section 26 gives Scottish Ministers the power to make minor, incidental provisions in consequence of the purposes of the Bill. This will be done by an order made by statutory instrument under section 27. This provides both a safeguard and an opportunity to make additional tidying up measures without primary legislation. Both the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003 contain similar provisions to allow Ministers to make further minor and consequential amendments if necessary. If an order made under section 26 contains provisions to amend any existing primary legislation, then it will be subject to affirmative resolution of the Scottish Parliament.

Section 29 Short title and commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: None

Section 29(2) gives Scottish Ministers the power to appoint a day (or different days) on which the Bill will come into force. This will be done by an order made by statutory instrument.
Appendix 2

TENEMENTS (SCOTLAND) BILL

This is to inform you that the Executive intends to take two new powers in the Tenements Bill.

The first intended power is in connection with general changes to section 11 of the Bill.

Section 11 deals with the apportionment of liability for repairs and other costs when a flat is sold. It makes it clear that an owner does not cease to be liable when he or she ceases to own a flat. But section 11 was framed on the basis that incoming owners should become severally liable with the seller for outstanding liabilities in relation to the relevant flat, though the buyer would have a right of relief against the seller.

Concerns were expressed at Stages 1 and 2 that an incoming owner might be exposed to large and unexpected bills for repair work if a seller did not disclose the existence of such a liability and then disappeared without trace. The buyer would then effectively be solely liable for work done before he or she became owner of the flat.

The Executive has therefore agreed to introduce amendments to allow any owner in a tenement to register a notice in the property registers to make public that works have been or may be carried out to the tenement. If there is no notice, the incoming purchaser will not be liable for the costs of any work carried out before he or she became an owner. If there is a notice, he or she will be alerted to the fact that there may be an outstanding liability for repair work. The purchasing solicitor will no doubt ask the seller what this is about, and if necessary, a sum can be retained from the purchase price to cover the liability. So the purchaser will be protected. The notice will also protect the other owners in the tenement because, where a notice is registered, liability will pass to the incoming owner as originally proposed in section 11. The proposals only apply to maintenance work that has already been carried out by the owners.

The notice will be in a specified form, to be introduced in a new section by Amendment 24. The Executive believes it would be useful to have some flexibility in case the form should need to be adjusted for unforeseen reasons, and Subsection (6) of the new section would therefore give Scottish Ministers the power to amend the notice by order. This is an identical power to the power given in section 128(3) of the Title Conditions Act to Scottish Ministers to amend notices under that Act. This power would be exercisable by order made by statutory instrument and would be subject to negative procedure.

The second intended power relates to proposals to allow owners of flats in tenements to have the right to install service pipes, etc. A distinctive feature of tenements is the prevalence of common property – the common close and stair and so on. Under the common law it would not be possible to carry out any
alteration or addition to common property without the consent of all the owners. This would mean that an owner could not install a new service to the flat through the common close without the consent of all his or her neighbours. The Tenement Management Scheme forming part of the Bill provides for majority rule in relation to repair and maintenance but would not assist in these cases. It is therefore particularly important for tenements that there should be a mechanism available to enable new services to be introduced by owners into tenements. It is also important that proper procedures should be followed to ensure that the owner who reasonably wishes to install a service should be able to do so, and to protect the other owners if what he or she proposes is not reasonable.

The original proposals in the draft Bill on which the Executive consulted provided for access for the installation of gas pipes, television aerials and satellite dishes. These proposals were welcomed. They were, however, removed from the Bill prior to introduction because they were outwith legislative competence. It is now intended that equivalent provisions may be brought forward at Westminster by way of a section 104 order under the Scotland Act 1998.

The proposed amendment would, however, provide a more general power for Scottish Ministers to make similar provisions should the need arise for a devolved matter. It is proposed that Scottish Ministers should be able to prescribe a procedure by which an owner can install services, and should be able to prescribe the services which should be permitted. This would be a regime along the lines of that in section 88 of the Civic Government (Scotland) Act 1982. The intention is that rather than setting out a procedure in the Bill and therefore having to apply the same procedure for all services that the Scottish Ministers should be able to prescribe a procedure by which an owner can install services.

The power would be to make orders by statutory instrument and would be subject to negative procedure.

Yours,

Mrs EJ Lugton
Civil Law Division
Scottish Executive Justice Department

12th September 2004
Tenements (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 29
Long Title
Schedules 1 and 2

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 4

Mrs Mary Mulligan

1 In section 4, page 3, line 19, at end insert—

<( ) The provisions of rule 5A of the Scheme shall apply to the extent that there is no tenement burden making provision as to the effect of any procedural irregularity in the making of a scheme decision on—

(a) the validity of the decision; or
(b) the liability of any owner affected by the decision.>

Mrs Mary Mulligan

2 In section 4, page 3, line 22, at end insert <; or

( ) as to the liability of the owners for the cost of any emergency work as so defined.>

Before section 5

Dennis Canavan

79 Before section 5, insert—

<Ombudsman for Tenements

(1) The Scottish Ministers shall by regulations make provision for the establishment of the Office of the Ombudsman for Tenements and for the appointment of an Ombudsman.

(2) The functions of the Ombudsman shall be to resolve disputes between residents of different flats in a tenement, or between a resident of a tenement and any factor or manager of that tenement, as to the management or maintenance of the tenement, or as to any alleged—

(a) breach of the duty set out in section 8(1), or
(b) failure to comply with the prohibitions set out in section 9(1), of this Act.
In this section, “maintenance” and “manager” have the same meaning as in Rule 1.5 of the Tenement Management Scheme.

Regulations made under this section may provide that an application to the sheriff under section 5(1) of this Act may not be made unless the applicant has already sought to have the disagreement resolved though the offices of the Ombudsman.

Section 5

Dennis Canavan

In section 5, page 3, line 40, at beginning insert <Subject to section (Ombudsman for Tenements) (4),>

Mrs Mary Mulligan

In section 5, page 3, leave out lines 41 and 42

Mrs Mary Mulligan

In section 5, page 4, line 1, leave out from <scheme> to second <decision> in line 2 and insert <management scheme which applies as respects the tenement (except where that management scheme is the development management scheme), an owner mentioned in subsection (1A) below>

Mrs Mary Mulligan

In section 5, page 4, line 3, at end insert—

(1A) That owner is—

(a) any owner who, at the time the decision referred to in subsection (1) above was made, was not in favour of the decision; or

(b) any new owner, that is to say, any person who was not an owner at that time but who has since become an owner.

Mrs Mary Mulligan

In section 5, page 4, line 5, leave out <by an owner>

Mrs Mary Mulligan

In section 5, page 4, line 6, after <owner> insert <making the application>

Mrs Mary Mulligan

In section 5, page 4, line 9, leave out <sent> and insert <given>

Section 8

Mrs Mary Mulligan

In section 8, page 6, line 7, at end insert—
Where two or more persons own any such part of a tenement building as is referred to in subsection (1) above in common, any of them may, without the need for the agreement of the others, do anything that is necessary for the purpose of complying with the duty imposed by that subsection.

**Section 10A**

**Mrs Mary Mulligan**

10 In section 10A, page 6, line 28, leave out first <scheme> and insert <relevant>

**Mrs Mary Mulligan**

11 In section 10A, page 6, line 28, leave out second <scheme> and insert <relevant>

**Mrs Mary Mulligan**

12 In section 10A, page 6, line 33, leave out <attended by the owner>

**Mrs Mary Mulligan**

13 In section 10A, page 6, line 37, leave out <the cost of> insert <any relevant costs arising from>

**Mrs Mary Mulligan**

14 In section 10A, page 7, line 1, leave out <scheme costs> and insert <relevant costs of the kind>

**Mrs Mary Mulligan**

15 In section 10A, page 7, line 4, leave out <scheme> and insert <relevant>

**Mrs Mary Mulligan**

16 In section 10A, page 7, line 6, at beginning insert <Except where subsection (1) above applies in relation to the costs,>

**Mrs Mary Mulligan**

17 In section 10A, page 7, line 6, leave out <scheme> and insert <relevant>

**Mrs Mary Mulligan**

18 In section 10A, page 7, line 8, leave out <the costs of> and insert <any relevant costs arising from>

**Mrs Mary Mulligan**

19 In section 10A, page 7, line 10, at end insert—

<( )> An owner is liable for any relevant costs other than those to which subsections (1) to (7) above apply from—

(a) such date; or

(b) the occurrence of such event,
as may be stipulated as the date on, or event in, which the costs become due.

( ) For the purposes of this section and section 11 of this Act, “relevant costs” means, as respects a flat—

(a) the share of any costs for which the owner is liable by virtue of the management scheme which applies as respects the tenement (except where that management scheme is the development management scheme); and

(b) any costs for which the owner is liable by virtue of this Act.

Mrs Mary Mulligan

20 In section 10A, page 7, line 11, leave out <, “scheme costs”>

Section 11

Mrs Mary Mulligan

21 In section 11, page 7, line 16, at beginning insert <Subject to subsection (2A) below,>

Mrs Mary Mulligan

22 In section 11, page 7, line 18, at end insert—

<(2A) A new owner shall be liable as mentioned in subsection (2) above for relevant costs relating to any maintenance or work (other than local authority work) carried out before the acquisition date only if—

5 (a) notice of the maintenance or work—

(i) in, or as near as may be in, the form set out in schedule (Form of notice of potential liability for costs) to this Act; and

(ii) containing the information required by the notes for completion set out in that schedule,

such a notice being referred to in this section and section (Notice of potential liability for costs: further provision) of this Act as a “notice of potential liability for costs”) was registered in relation to the new owner’s flat at least 14 days before the acquisition date; and

(b) the notice had not expired before the acquisition date.

15 (2B) In subsection (2A) above—

“acquisition date” means the date on which the new owner acquired right to the flat; and

“local authority work” means work carried out by a local authority by virtue of any enactment.>

Miss Annabel Goldie

22A As an amendment to amendment 22, line 16, leave out <the new owner acquired right to the flat> and insert <missives were concluded>
In section 11, page 7, line 21, leave out subsection (4)

After section 11

After section 11, insert—

<Notice of potential liability for costs: further provision

(1) A notice of potential liability for costs—

(a) may be registered in relation to a flat only on the application of—

(i) the owner of the flat;

(ii) the owner of any other flat in the same tenement; or

(iii) any manager (within the meaning of the Tenement Management Scheme) of the tenement; and

(b) shall not be registered unless it is signed by or on behalf of the applicant.

(2) A notice of potential liability for costs may be registered—

(a) in relation to more than one flat in respect of the same maintenance or work; and

(b) in relation to any one flat, in respect of different maintenance or work.

(3) A notice of potential liability for costs expires at the end of the period of 3 years beginning with the date of its registration, unless the notice is renewed by being registered again before the end of that period.

(4) This section applies to a renewed notice of potential liability for costs as it applies to any other such notice.

(5) The Keeper of the Registers of Scotland shall not be required to investigate or determine whether the information contained in any notice of potential liability for costs submitted for registration is accurate.

(6) The Scottish Ministers may by order amend schedule (Form of notice of potential liability for costs) to this Act.

(7) In section 12 of the Land Registration (Scotland) Act 1979 (c.33), in subsection (3) (which specifies losses for which there is no entitlement to be indemnified by the Keeper under that section), after paragraph (p) there shall be added—

“(q) the loss arises in consequence of an inaccuracy in any information contained in a notice of potential liability for costs registered in pursuance of—

(i) section 10(2A)(a) or 10A(3) of the Title Conditions (Scotland) Act 2003 (asp 9); or

(ii) section 11(2A)(a) or (Notice of potential liability for costs: further provision)(3) of the Tenements (Scotland) Act 2004 (asp 00).”>
Section 14

Mrs Mary Mulligan
In section 14, page 8, line 15, after <maintenance> insert <or other work>

Mrs Mary Mulligan
In section 14, page 8, line 24, leave out <and> and insert—

< ( ) doing anything which the owner giving notice is entitled to do by virtue of section (Installation of service pipes etc.)(1) of this Act;>

Mrs Mary Mulligan
In section 14, page 8, line 26, at end insert <; and

( ) where a power of sale order has been granted in relation to the tenement building or its site, doing anything necessary for the purpose of or in connection with any sale in pursuance of the order (other than complying with paragraph 3(3) of schedule 2 to this Act).>

Mrs Mary Mulligan
In section 14, page 8, line 28, after <maintenance> insert <or other work>

Section 15

Mrs Mary Mulligan
In section 15, page 9, line 24, leave out subsection (2) and insert—

< ( ) The duty imposed by subsection (1) above may be satisfied, in whole or in part, by way of a common policy of insurance arranged for the entire tenement building.>

After section 15

Mrs Mary Mulligan
After section 15, insert—

<Installation of service pipes etc.

Installation of service pipes etc.

(1) Subject to subsections (2) and (3) below and to section 14 of this Act, an owner shall be entitled—

(a) to lead through any part of the tenement such pipe, cable or other equipment; and

(b) to fix to any part of the tenement, and keep there, such equipment, as is necessary for the provision to that owner’s flat of such service or services as the Scottish Ministers may by regulations prescribe.

(2) The right conferred by subsection (1) above is exercisable only in accordance with such procedure as the Scottish Ministers may by regulations prescribe; and different procedures may be so prescribed in relation to different services.
(3) An owner is not entitled by virtue of subsection (1) above to lead anything through or fix anything to any part which is wholly within another owner’s flat.

(4) This section is without prejudice to any obligation imposed by virtue of any enactment relating to—
   (a) planning;
   (b) building; or
   (c) any service prescribed under subsection (1) above.

Section 20

Mrs Mary Mulligan

31 In section 20, page 11, line 36, at end insert <and any land pertaining, as a means of access, to the tenement building>

Section 22

Mrs Mary Mulligan

32 In section 22, page 12, line 14, leave out from <subsections> to end of line 19 on page 14 and insert <schedule (Amendments of Title Conditions (Scotland) Act 2003)>

After section 23

Mrs Mary Mulligan

33 After section 23, insert—

<Meaning of “management scheme”

References in this Act to the management scheme which applies as respects any tenement are references to—

(a) if the Tenement Management Scheme applies in its entirety as respects the tenement, that Scheme;

(b) if the development management scheme applies as respects the tenement, that scheme; or

(c) in any other case, any tenement burdens relating to maintenance, management or improvement of the tenement together with any provisions of the Tenement Management Scheme which apply as respects the tenement.>

Section 24

Mrs Mary Mulligan

34 In section 24, page 14, line 33, at end insert—

<( ) In this Act, references to “owner” without further qualification are, in relation to any tenement, references to the owner of a flat in the tenement.>
Mrs Mary Mulligan
35 In section 24, page 14, line 34, after <means> insert <, in relation to a flat in a tenement,>

Mrs Mary Mulligan
36 In section 24, page 14, line 34, leave out second <a> and insert <the>

Mrs Mary Mulligan
37 In section 24, page 15, line 4, leave out <(3)> and insert <(1A)>

Mrs Mary Mulligan
38 In section 24, page 15, line 4, after <10,> insert <11 to 11A,>

Mrs Mary Mulligan
39 In section 24, page 15, line 5, after <(6),> insert <(Installation of service pipes etc.),>

Mrs Mary Mulligan
40 In section 24, page 15, line 5, after <of> insert <, and schedule 2 to,>

Mrs Mary Mulligan
41 In section 24, page 15, line 6, at end insert—
<( ) Subsections (1) to (4) above apply to references in this Act to the owner of a part of a tenement as they apply to references to the owner of a flat, but as if references in them to a flat were to the part of the tenement.>

Section 25

Mrs Mary Mulligan
42 In section 25, page 15, line 26, at end insert—
<“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39);>

Mrs Mary Mulligan
43 In section 25, page 15, leave out lines 27 to 33

Mrs Mary Mulligan
44 In section 25, page 15, line 34, at end insert—
<“power of sale order” means an order granted under paragraph 1 of schedule 2 to this Act;>

Mrs Mary Mulligan
45 In section 25, page 15, line 34, at end insert—
“register”, in relation to a notice of potential liability for costs or power of sale order, means register the information contained in the notice or order in the Land Register of Scotland or, as appropriate, record the notice or order in the Register of Sasines, and “registered” and other related expressions shall be construed accordingly;

Section 25A

Mrs Mary Mulligan

46 In section 25A, page 16, line 28, leave out <the name of an owner is not known> and insert <an owner cannot by reasonable inquiry be identified or found>

Section 27

Mrs Mary Mulligan

47 In section 27, page 17, line 4, after <orders> insert <or regulations>

Mrs Mary Mulligan

48 In section 27, page 17, line 6, after first <order> insert <or regulations>

Section 29

Mrs Mary Mulligan

49 In section 29, page 17, line 17, after <section> insert <, section 22 and schedule (Amendments of Title Conditions (Scotland) Act 2003)>

Mrs Mary Mulligan

50 In section 29, page 17, line 19, at end insert—

<(  ) Section 22 and schedule (Amendments of Title Conditions (Scotland) Act 2003) shall come into force on the day after Royal Assent.>

Schedule 1

Mrs Mary Mulligan

51 In schedule 1, page 18, line 9, after <means> insert <, in relation to a tenement, all or any of the following>

Mrs Mary Mulligan

52 In schedule 1, page 18, line 10, leave out <a> and insert <the>

Mrs Mary Mulligan

53 In schedule 1, page 18, line 11, leave out <a> and insert <the>
Mrs Mary Mulligan
54 In schedule 1, page 18, line 14, leave out <or>

Mrs Mary Mulligan
55 In schedule 1, page 18, line 15, leave out <a> and insert <the>

Mrs Mary Mulligan
56 In schedule 1, page 19, line 32, after second <of> insert <, or the cost of maintaining,>

Mrs Mary Mulligan
57 In schedule 1, page 21, line 2, leave out <sent> and insert <given>

Mrs Mary Mulligan
58 In schedule 1, page 21, line 3, leave out first <sent> and insert <given>

Mrs Mary Mulligan
59 In schedule 1, page 21, line 3, leave out second <sent> and insert <given>

Mrs Mary Mulligan
60 In schedule 1, page 21, leave out lines 18 to 20 and insert <exercise such of their powers as they may specify, including, without prejudice to that generality, any power to decide to carry out maintenance and to instruct it,>

Mrs Mary Mulligan
61 In schedule 1, page 21, line 24, at end insert—

<( ) to install a system enabling entry to the tenement to be controlled from each flat,>

Mrs Mary Mulligan
62 In schedule 1, page 21, line 27, leave out <by an owner>

Mrs Mary Mulligan
63 In schedule 1, page 22, line 18, leave out <persons> and insert <a manager or at least two other persons (whether or not owners)>

Mrs Mary Mulligan
64 In schedule 1, page 24, line 11, at end insert—

<(fza)the cost of installing a system enabling entry to the tenement to be controlled from each flat,>

Mrs Mary Mulligan
65 In schedule 1, page 25, line 1, leave out rule 4.4
Mrs Mary Mulligan
66 In schedule 1, page 25, line 12, leave out <4.1(fa)> and insert <4.1(e), (fza), (fa)>.

Mrs Mary Mulligan
67 In schedule 1, page 25, line 22, leave out from <as> to first <liable> in line 23 and insert <who are liable for a share of the same costs (the share being divided equally among the flats of those other owners)>.

Mrs Mary Mulligan
68 In schedule 1, page 25, line 24, at end insert—

RULE 5A – PROCEDURAL IRREGULARITIES

Validity of scheme decisions
Any procedural irregularity in the making of a scheme decision does not affect the validity of the decision.

Mrs Mary Mulligan
69 In schedule 1, page 26, line 5, leave out <under rule 6.1>.

Mrs Mary Mulligan
70 In schedule 1, page 26, line 27, leave out rule 8.1.

Mrs Mary Mulligan
71 In schedule 1, page 27, line 9, leave out <the name of an owner is not known> and insert <an owner cannot by reasonable inquiry be identified or found>.

After schedule 1

Mrs Mary Mulligan
72 After schedule 1, insert—
FORM OF NOTICE OF POTENTIAL LIABILITY FOR COSTS

This notice gives details of certain maintenance or work carried out in relation to the flat specified in the notice. The effect of the notice is that a person may, on becoming the owner of the flat, be liable by virtue of section 11(2A) of the Tenements (Scotland) Act 2004 (asp 00) for any outstanding costs relating to the maintenance or work.

Flat to which notice relates:
(see note 1 below)

Description of the maintenance or work to which notice relates:
(see note 2 below)

Person giving notice:
(see note 3 below)

Signature:
(see note 4 below)

Date of signing:

Notes for completion
(These notes are not part of the notice)

1. Describe the flat in a way that is sufficient to identify it. Where the flat has a postal address, the description must include that address. Where title to the flat has been registered in the Land Register of Scotland, the description must refer to the title number of the flat or of the larger subjects of which it forms part. Otherwise, the description should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

2. Describe the maintenance or work in general terms.

3. Give the name and address of the person applying for registration of the notice (“the applicant”) or the applicant’s name and the name and address of the applicant’s agent.

4. The notice must be signed by or on behalf of the applicant.
Schedule 2

Mrs Mary Mulligan

73 In schedule 2, page 27, line 26, leave out <schedule> and insert <Act>

Mrs Mary Mulligan

74 In schedule 2, page 28, line 16, after <purpose> insert <of>

Mrs Mary Mulligan

75 In schedule 2, page 28, line 22, at end insert—

<Appeal against grant or refusal of power of sale order

1A(1) A party may, not later than 14 days after the date of—

(a) making of a power of sale order; or

(b) an interlocutor refusing an application for such an order,

appeal to the Court of Session on a point of law.

(2) The decision of the Court of Session on any such appeal shall be final.>

Mrs Mary Mulligan

76 In schedule 2, page 28, line 24, leave out from <and> to end of line 31 and insert <it is registered within the period of 14 days after the relevant day; and

( ) until the beginning of the forty-second day after the day on which it is so registered.

( ) In sub-paragraph (1)(a) above, “the relevant day” means, in relation to a power of sale order—

(a) the last day of the period of 14 days within which an appeal against the order may be lodged under paragraph 1A(1) of this schedule; or

(b) if such an appeal is duly lodged, the day on which the appeal is abandoned or determined.>

Mrs Mary Mulligan

77 In schedule 2, page 28, line 38, at end insert—

<(3) In advertising the sale in pursuance of sub-paragraph (2)(a) above, the owner shall, in particular, ensure that there is placed and maintained on the sale subjects a conspicuous sign—

(a) advertising the fact that the sale subjects are for sale; and

(b) giving the name and contact details of the owner or of any agent acting on the owner’s behalf in connection with the sale.

(4) So far as may be necessary for the purpose of complying with sub-paragraph (3) above, the owner or any person authorised by the owner shall be entitled to enter any part of the sale subjects not owned, or not owned exclusively, by that owner.>
After schedule 2

Mrs Mary Mulligan

78 After schedule 2, insert—

<SCHEDULE
(introduced by section 22)

AMENDMENTS OF TITLE CONDITIONS (SCOTLAND) ACT 2003

1 The Title Conditions (Scotland) Act 2003 (asp 9) shall be amended as follows.

2 In section 3(8) (waiver, mitigation and variation of real burdens), for “the holder” there shall be substituted “a holder”.

3 In section 4 (creation of real burdens), in subsection (7), after “sections” there shall be inserted “53(3A),”.

4 In section 10 (affirmative burdens: continuing liability of former owner)—
   (a) in subsection (2), at the beginning there shall be inserted “Subject to subsection (2A) below,”;
   (b) after subsection (2) there shall be inserted—
      “(2A) A new owner shall be liable as mentioned in subsection (2) above for any relevant obligation consisting of an obligation to pay a share of costs relating to maintenance or work (other than local authority work) carried out before the acquisition date only if—
         (a) notice of the maintenance or work—
            (i) in, or as near as may be in, the form set out in schedule 1A to this Act; and
            (ii) containing the information required by the notes for completion set out in that schedule,
            (such a notice being referred to in this section and section 10A of this Act as a “notice of potential liability for costs”) was registered in relation to the burdened property at least 14 days before the acquisition date; and
         (b) the notice had not expired before the acquisition date.
      (2B) In subsection (2A) above—
         “acquisition date” means the date on which the new owner acquired right to the burdened property; and
         “local authority work” means work carried out by a local authority by virtue of any enactment.”; and
   (c) at the end there shall be added—
      “(5) This section does not apply in any case where section 11 of the Tenements (Scotland) Act 2004 (asp 00) applies.”.

5 After section 10 there shall be inserted—

“10A Notice of potential liability for costs: further provision
   (1) A notice of potential liability for costs—
(a) may be registered in relation to burdened property only on the application of—
   (i) an owner of the burdened property;
   (ii) an owner of the benefited property; or
   (iii) any manager; and

(b) shall not be registered unless it is signed by or on behalf of the applicant.

(2) A notice of potential liability for costs may be registered—
   (a) in relation to more than one burdened property in respect of the same maintenance or work; and
   (b) in relation to any one burdened property, in respect of different maintenance or work.

(3) A notice of potential liability for costs expires at the end of the period of 3 years beginning with the date of its registration, unless it is renewed by being registered again before the end of that period.

(4) This section applies to a renewed notice of potential liability for costs as it applies to any other such notice.

(5) The Keeper of the Registers of Scotland shall not be required to investigate or determine whether the information contained in any notice of potential liability for costs submitted for registration is accurate.

(6) The Scottish Ministers may by order amend schedule 1A to this Act.”

6 In section 11 (affirmative burdens: shared liability), after subsection (3) there shall be inserted—

“(3A) For the purposes of subsection (3) above, the floor area of a flat is calculated by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat—

(a) a balcony; and

(b) except where it is used for any purpose other than storage, a loft or basement.”

7 In section 25 (definition of the expression “community burdens”), in subsection (1)(a), for “four” there shall be substituted “two”.

8 In section 29 (power of majority to instruct common maintenance)—
   (a) in subsection (2)—
      (i) in paragraph (b)—
         (A) for the words from the beginning to “that” where it first occurs there shall be substituted “subject to subsection (3A) below, require each”; and
         (B) for sub-paragraph (ii) there shall be substituted—
            “(ii) with such person as they may nominate for the purpose,”; and

   (ii) paragraph (c) shall be omitted;

   (b) after subsection (3) there shall be inserted—
“(3A) A requirement under subsection (2)(b) above that each owner deposit a sum of
money—

(a) exceeding £100; or

(b) of £100 or less where the aggregate of that sum taken together with any
other sum or sums required (otherwise than by a previous notice under
this subsection) in the preceding 12 months to be deposited under that
subsection by each owner exceeds £200,

shall be made by written notice to each owner and shall require the sum to be
deposited into such account (the “maintenance account”) as the owners may
nominate for the purpose.

(3B) The owners may authorise a manager or at least two other persons (whether or
not owners) to operate the maintenance account on their behalf.”;

(c) in subsection (4), for “(2)(b)” there shall be substituted “(3A)”;

(d) after subsection (6) there shall be inserted—

“(6A) The notice given under subsection (2)(b) above may specify a date as a refund
date for the purposes of subsection (7)(b)(i) below.”;

(e) in subsection (7)(b)—

(i) in sub-paragraph (i), for “the fourteenth” there shall be substituted “—

(A) where the notice under subsection (2)(b) above specifies a refund
date, that date; or

(B) where that notice does not specify such a date, the twenty-eighth”;

(ii) in sub-paragraph (ii), for “(4)(h)” there shall be substituted “(3B)”;

(f) after subsection (7) there shall be inserted—

“(7A) A former owner who, before ceasing to be an owner, deposited sums in
compliance with a requirement under subsection (2)(b) above, shall have the
same entitlement as an owner has under subsection (7)(b) above.”;

(g) in subsection (8), for “(2)(b)” there shall be substituted “(3A)”; and

(h) after subsection (9) there shall be inserted—

“(10) The Scottish Ministers may by order substitute for the sums for the time being
specified in subsection (3A) above such other sums as appear to them to be
justified by a change in the value of money appearing to them to have occurred
since the last occasion on which the sums were fixed.”.

After section 31 there shall be inserted—

“31A Disapplication of provisions of sections 28, 29 and 31 in certain cases

(1) Sections 28(1)(a) and (d) and (2)(a), 29 and 31 of this Act shall not apply in
relation to a community consisting of one tenement.

(2) Sections 28(1)(a) and (d) and 31 of this Act shall not apply to a community in
any period during which the development management scheme applies to the
community.”.

In section 33 (majority etc. variation and discharge of community burdens)—

(a) in subsection (1)(b), the words “where no such provision is made,” shall be
omitted; and
(b) in subsection (2)(a), at the beginning there shall be inserted “where no such provision as is mentioned in subsection (1)(a) above is made,”.

11 In section 35 (variation and discharge of community burdens by owners of adjacent units), in subsection (1), the words “in a case where no such provision as is mentioned in section 33(1)(a) of this Act is made” shall be omitted.

12 In section 43 (rural housing burdens)—
(a) in subsection (1), after “burden” where it first occurs there shall be inserted “over rural land”; and
(b) in subsection (6), for “on rural land or to provide rural” there shall be substituted “or”.

13 In section 45 (economic development burdens), subsection (6) shall be omitted.

14 In section 53 (common schemes: related properties), after subsection (3) there shall be inserted—
“(3A) Section 4 of this Act shall apply in relation to any real burden to which subsection (1) above applies as if—
(a) in subsection (2), paragraph (c)(ii);
(b) subsection (4); and
(c) in subsection (5), the words from “and” to the end, were omitted.”

15 In section 90 (powers of Lands Tribunals as respects title conditions), in subsection (8A), for “application” there shall be substituted “disapplication”.

16 In section 98 (granting certain applications for variation, discharge, renewal or preservation of title conditions), in paragraph (b)(i), for the words “the owners of all” there shall be substituted “all the owners (taken as a group) of”.

17 In section 99 (granting applications as respects development management schemes), in subsection (4)(a), for the words “the owners” there shall be substituted “all the owners (taken as a group)”.

18 In section 119 (savings and transitional provision etc.), subsection (9) shall be omitted.

19 In section 122(1) (interpretation)—
(a) the definition of “flat” shall be omitted;
(b) after the definition of “Lands Tribunal” there shall be inserted—
““local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39);”; and
(c) for the definition of “tenement” there shall be substituted—
““tenement” has the meaning given by section 23 of the Tenements (Scotland) Act 2004 (asp 00); and references to a flat in a tenement shall be construed accordingly;”.

20 After schedule 1 there shall be inserted—
“SCHEDULE 1A
(introduced by section 10(2A))
FORM OF NOTICE OF POTENTIAL LIABILITY FOR COSTS

“NOTICE OF POTENTIAL LIABILITY FOR COSTS
This notice gives details of certain maintenance or work carried out in relation the property specified in the notice. The effect of the notice is that a person may, on becoming the owner of the property, be liable by virtue of section 10(2A) of the Title Conditions (Scotland) Act 2003 (asp 9) for any outstanding costs relating to the maintenance or work.

Property to which the notice relates:
(see note 1 below)

Description of the maintenance or work to which notice relates:
(see note 2 below)

Person giving notice:
(see note 3 below)

Signature:
(see note 4 below)
Date of signing:"

Notes for completion
(These notes are not part of the notice)

1 Describe the property in a way that is sufficient to identify it. Where the property has a postal address, the description must include that address. Where title to the property has been registered in the Land Register of Scotland, the description must refer to the title number of the property or of the larger subjects of which it forms part. Otherwise, the description should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

2 Describe the maintenance or work in general terms.

3 Give the name and address of the person applying for registration of the notice (“the applicant”) or the applicant’s name and the name and address of the applicant’s agent.

4 The notice must be signed by or on behalf of the applicant.”
Supplement to the Marshalled List of Amendments selected for Stage 3

The following amendment was lodged as a manuscript amendment under Rule 9.10.6. The Presiding Officer has agreed under that Rule that this amendment may be moved at the meeting of the Parliament on 16 September 2004. Amendment 81 will be debated with the other amendments in Group 9, and will be called immediately after amendment 24 (on page 5 of the Marshalled List).

Section 12

Mrs Mary Mulligan

81 In section 12, page 7, line 39, leave out <2003 (asp 9)> and insert <2004 (asp 00)>
Tenements (Scotland) Bill

Groupings of Amendments for Stage 3

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

Group 1: Procedural irregularities in making of scheme decisions
1, 68, 70

Group 2: Emergency work
2, 69

Group 3: Ombudsman for Tenements
79, 80

Group 4: Application to sheriff for annulment of certain decisions
3, 4, 5, 37

Debate to end no later than 30 minutes after proceedings begin

Group 5: Meaning of “owner”
6, 7, 34, 35, 36, 41

Group 6: Giving of notice etc.
8, 46, 57, 58, 59, 71

Group 7: Support and shelter – maintenance of parts in common ownership
9

Group 8: Determination of when liability for certain costs arises
10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23

Debate to end no later than 45 minutes after proceedings begin

Group 9: Transfer of liability for certain costs to new owner
21, 22, 22A, 24, 38, 42, 45, 72

Group 10: Installation of service pipes etc. and access for other works
25, 26, 28, 30, 39, 47, 48

Group 11: Sale of abandoned and demolished tenements
27, 31, 40, 44, 73, 74, 75, 76, 77
Debate to end no later than 1 hour 15 minutes after proceedings begin

Group 12: Obligation of owner to insure
29

Group 13: Amendments to Title Conditions (Scotland) Act 2003
32, 49, 50, 78

Group 14: Meaning of “management scheme”
33, 43

Group 15: Meaning of “scheme property”
51, 52, 53, 54, 55

Group 16: Scheme decisions and costs
56, 60, 61, 62, 63, 64, 65, 66, 67

Debate to end no later than 1 hour 30 minutes after proceedings begin
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 2, No. 17    Session 2

Meeting of the Parliament

Thursday 16 September 2004

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Patricia Ferguson, on behalf of the Parliamentary Bureau, moved S2M-1702—That the Parliament agrees that, during Stage 3 of the Tenements (Scotland) Bill, debate on each part of the proceedings shall be brought to a conclusion by the time-limits indicated (each time-limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when the meeting of the Parliament is suspended or otherwise not in progress):

Groups 1 to 4 – no later than 30 minutes
Groups 5 to 8 – no later than 45 minutes
Groups 9 to 11 – no later than 1 hour and 15 minutes
Groups 12 to 16 – no later than 1 hour and 30 minutes
Motion to pass the Bill – 2 hours

The motion was agreed to.

Tenements (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to without division: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 and 78.

Amendment 30 was agreed to (by division: For 70, Against 9, Abstentions 0)

The following amendments were disagreed to (by division)—

79    (For 9, Against 93, Abstentions 0)
22A   (For 29, Against 57, Abstentions 0)

The remaining amendment was not moved.

Tenements (Scotland) Bill – Stage 3: The Minister for Communities (Ms Margaret Curran) moved S2M-1493—That the Parliament agrees that the Tenements (Scotland) Bill be passed.
After debate, the motion was agreed to (DT).
The Deputy Presiding Officer (Trish Godman): The next item of business is consideration of business motion S2M-1702, in the name of Patricia Ferguson, on behalf of the Parliamentary Bureau, setting out a timetable for stage 3 consideration of the Tenements (Scotland) Bill. Would any member who wishes to speak against the motion press their request-to-speak button now and would anyone leaving please do so quietly?

Motion moved,

That the Parliament agrees that, during Stage 3 of the Tenements (Scotland) Bill, debate on each part of the proceedings shall be brought to a conclusion by the time-limits indicated (each time-limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when the meeting of the Parliament is suspended or otherwise not in progress):

- Groups 1 to 4 – no later than 30 minutes
- Groups 5 to 8 – no later than 45 minutes
- Groups 9 to 11 – no later than 1 hour and 15 minutes
- Groups 12 to 16 – no later than 1 hour and 30 minutes

Motion to pass the Bill – 2 hours.—[Patricia Ferguson.]

Motion agreed to.
Tenements (Scotland) Bill: Stage 3

15:01

The Deputy Presiding Officer (Murray Tosh):
The next item of business is stage 3 proceedings of the Tenements (Scotland) Bill. For these proceedings, members should have the bill—that is, SP bill 19A, as amended at stage 2—the marshalled list and the groupings of amendments. Members should note that, under rule 9.10.6, I have today decided to allow one manuscript amendment, amendment 81, which is set out in a supplement to the marshalled list, which members should find on their desks. The amendment will be debated as part of group 9.

In relation to the amendments, I will allow a voting period of two minutes for the first division this afternoon. Thereafter, if further divisions are necessary, I will allow a voting period of one minute for the first division after a debate in any group, and 30 seconds for all other divisions.

Section 4—Application of the Tenement Management Scheme

The Deputy Presiding Officer: Group 1 in the marshalled list of amendments is on procedural irregularities in the making of scheme decisions. Amendment 1, in the name of the minister, is grouped with amendments 68 and 70.

The Deputy Minister for Communities (Mrs Mary Mulligan): We intend that a decision made by the owners of a tenement should not be invalidated by a procedural mistake that occurred when the decision was being taken. Amendments 1, 68 and 70 ensure that that principle will cover any decision in respect of a tenement, unless the title deeds themselves make a specific provision on procedural matters.

I move amendment 1.

Amendment 1 agreed to.

The Deputy Presiding Officer: Group 2 is on emergency work. Amendment 2, in the name of the minister, is grouped with amendment 69.

Mrs Mulligan: Amendments 2 and 69 deal with situations in which the title deeds for the tenement provide a way of arranging for emergency work but do not say how the cost of that work should be shared out. The amendments ensure that such shares will be split on the same basis as emergency work carried out under the tenement management scheme.

I move amendment 2.

Amendment 2 agreed to.

Before section 5

The Deputy Presiding Officer: Group 3 is on an ombudsman for tenements. Amendment 79, in the name of Dennis Canavan, is grouped with amendment 80.

Dennis Canavan (Falkirk West) (Ind): The main purpose of amendment 79 is to establish an ombudsman service to try to resolve disputes between residents of different flats in a tenement, or disputes between a resident and the factor, or manager, of the tenement.

At present, if the tenement is owned by a registered social landlord, certain categories of complaint may be referred to the public services ombudsman. However, no such service exists for residents in tenements that are privately owned. Residents can, of course, take legal action through the courts, but such a process can be lengthy and expensive. That was certainly the experience of some of my constituents who live in privately owned, sheltered accommodation at Springbank Gardens in Falkirk. The residents are all owner-occupiers, but a company called Sheltered Housing Management Ltd is the manager and is supposed to provide certain services.

Some of the residents became increasingly dissatisfied with the poor standard of service provided by the manager and with the lack of consultation, lack of transparency and lack of accountability in respect of its decision making and budgeting. Yet the company was imposing service charges that some of the residents considered to be extortionate. From 1985 to 2002, the service charges increased by 86.8 per cent. As a last resort, some of the residents withdrew or withheld their service charges and Sheltered Housing Management Ltd went to Falkirk sheriff court to recover the payment. The sheriff dismissed the action and awarded costs against Sheltered Housing Management Ltd because it had no legal right to impose the charge under the original minute of agreement. However, Sheltered Housing Management Ltd then went to the Court of Session and, in what can only be described as an incredible judgment, Lord Nimmo Smith allowed retrospective amendment of the original minute of agreement and awarded costs against the residents. The expenses totalled £50,000, split between nine residents, all of whom are elderly, retired people.

I submit that such a dispute could, and should, have been settled without the expense of going to court, but Sheltered Housing Management Ltd continues to behave in an arrogant and unaccountable fashion. Following a complaint from a constituent, I wrote to Mr Miller of Sheltered Housing Management Ltd on 3 November last year; I am still awaiting a reply. I realise that, under recent legislation, if a majority of residents...
want to sack the manager and appoint someone else, they can do so, but that should only be a last resort. Even one resident, or a minority group of residents, within a tenement should have the right of redress without having to go to court. Amendment 79 therefore seeks to set up an ombudsman service to try to solve such disputes without court action. As members will see from subsection (4) of the section that amendment 79 would introduce, regulations made under the section may provide that an application to the sheriff may not be made unless the applicant has already sought to have the agreement resolved through the offices of the ombudsman.

I would hope that the Executive will respond positively to my amendment and I hope that the Parliament will accept it in the interests of justice, not just for my constituents but for others who, I am sure, are in a similar situation in many other constituencies throughout Scotland.

I move amendment 79.

Pauline McNeill (Glasgow Kelvin) (Lab): I want to say a few words on amendment 79 because I have a great deal of sympathy for Dennis Canavan’s proposal. In my constituency, there is a high number of landlords, and in particular absentee landlords, some of whom are good landlords but a minority of whom are not and who are not really interested in maintaining or making improvements to their properties. We have even had cases in which that has resulted in the demolition of a building.

There are some issues that might not be dealt with in the spirit of the Tenements (Scotland) Bill and, if things were unclear, it would be useful to be able to take such matters to a third party to be able to talk out the issues. One of the issues of which I am thinking is the fact that, if a social landlord owns more than half the properties in a tenement and there is a minority of owner-occupiers in the block, in a vote, some people would be voting on a financial burden that they would have to pay while others would be voting on a bill that would be picked up by someone else. The decision in such a vote might seem unfair.

Therefore, I support the idea that, in certain circumstances, there should be a third party to whom tenants and owners should be able to go for mediation.

Miss Annabel Goldie (West of Scotland) (Con): I, too, am not unsympathetic to what Mr Canavan seeks to achieve. However, my reservation is twofold. The bill goes a long way towards eradicating many of the difficulties that have plagued tenemental ownership and there are remedies in the bill that might have been relevant to and welcomed by Mr Canavan’s constituents all those months ago. My principal concern is that an ombudsman is not a way to address that issue because I suspect that people in the position of Mr Canavan’s constituents are looking for enforceable solutions. The role of ombudsman does not provide that, whereas the bill contains available remedies.

For that reason, I am unable to support amendment 79, but I am sympathetic to the reasons for its being lodged.

Karen Whitefield (Airdrie and Shotts) (Lab): Like other members who have spoken, I support the intention of amendment 79. Mr Canavan’s constituents’ terrible experiences demonstrate the need for the Executive to take action on mediation. Those are views that many members share and Labour members on the committee raised the issue with the minister. We believe that there is a need for the statutory provision of mediation, not only under the bill, but under other bills and acts, such as the Antisocial Behaviour etc (Scotland) Act 2004. For that reason and because of the assurances that we received from the minister that the Justice Department is carrying out research into mediation, we decided that the bill is not the right vehicle for the inclusion of mediation. However, it is something that the Executive needs to consider and introduce so that people do not always have to have recourse to the courts but are able to sort their disputes out amicably and quickly without too much emotional or financial cost.

Mr Kenny MacAskill (Lothians) (SNP): Like Annabel Goldie, Pauline McNeill and others, the Scottish National Party is sympathetic to what Mr Canavan proposes. There is a significant number of areas, not only in Falkirk, where there are problems.

I am grateful to the minister for taking time to discuss matters with me and for letting me hear the Executive’s position. Our view is that it would be wrong to embark on a parallel course of action to that approach. It appears that ombudsmen are a last court of appeal to some extent; they are involved after mediation has been tried, after litigation has taken place and where there is no other avenue or recourse for an individual. To have a parallel route might simply create more problems.

What is important is that, as the minister has assured me, we will initially attempt to deal with matters by mediation. If that is unsuccessful, there will be the right to litigation, but to have a further right of appeal to an ombudsman after that is not required. If, at some stage in future, it is felt that an ombudsman is required because mediation has been attempted and has failed and litigation has been tried and been unsuccessful, perhaps there should be an ombudsman. The idea that we could justify yet another ombudsman in a small country dealing with a limited number of cases seems to
me to be untenable, but the role could be considered as part of an overall ombudsman for individual rights.

We must take cognisance of the valid points that Mr Canavan made. I am in tune with the Executive’s approach that mediation should initially be tried. If that fails, there is litigation. That is the way to settle disputes, not a twin-track approach that may result in greater difficulties.

15:15

Mike Pringle (Edinburgh South) (LD): I agree with Kenny MacAskill and others. I have much sympathy for Dennis Canavan’s position; it is a pity that he did not raise the issue at stage 1, because that would have given us a full opportunity to debate the situation and we might have asked some of our witnesses what they thought of it. The minister was fairly receptive to the Justice 2 Committee’s views and we might have considered and incorporated the proposal. However, Kenny MacAskill is right: if we feel that the situation is causing a problem in the future, I am sure that we will be more than happy to return to it.

Mrs Mulligan: I will deal first with the amendments on the ombudsman, but I will return to the specific situation that Dennis Canavan described.

The Executive does not believe that an ombudsman for tenement disputes is necessary. The evidence is that few tenement disputes end up in the sheriff court and it is hoped that the bill will make disputes among owners, which are typically over repayment for repair work, become increasingly rare.

Section 6 makes it clear that the sheriff court is the place in which to determine legal issues that relate to the operation of the management scheme for a tenement, such as whether a scheme decision was validly made, whether it related to scheme property and who is liable for the cost of repair.

Section 5 permits an owner to apply to the sheriff for an order to determine whether a scheme decision by a majority of owners in a tenement should be annulled because it was unfairly prejudicial to an owner or not in the best interests of all owners.

I note that amendment 79 would make it necessary for owners to seek the proposed ombudsman’s assistance only in the case that section 5 deals with and not in the section 6 case. I suggest that that makes the amendment incoherent.

The Executive acknowledges the valid argument for making available to tenement dwellers an alternative method to resolve disputes that does not involve the expense and stress of raising an action in the sheriff court. In fact, the housing improvement task force suggested that in some cases groups of owners might find it helpful to obtain outside assistance to resolve disputes about work that needs to be undertaken.

The Executive agrees that people should be encouraged to resolve disputes without going to the court and is keen to raise awareness of alternatives that are already available. There is therefore no need to create an ombudsman for tenements. As Karen Whitefield said, the Executive recently published a booklet that gives information and advice on alternative dispute-resolution methods. That information is also available online.

We are working with organisations such as Scottish Mediation Network to develop awareness of mediation and to support the growth of mediation services throughout all sectors. We already support mediation projects in several areas. For example, at the sheriff court here in Edinburgh, we are considering options for encouraging the greater take-up of mediation and making the link between people who are willing to use mediation and the service providers that are available.

I take issue with Mike Pringle. The matter that Dennis Canavan raises was brought up in committee; my colleague Ken Macintosh asked several questions about it and brought it to our attention. For that reason, we examined the matter, but we decided that the bill deals with ownership in tenement blocks, whereas occupiers of shared-equity properties, for example, which may be what Dennis Canavan speaks about, do not own the properties—they own equity shares in a company. We therefore felt that the bill was not the place to deal with the issue. However, I have heard the concerns that Dennis Canavan and my colleague Ken Macintosh have expressed and we are happy to look further into whether we could resolve the situation. However, it is a complicated matter and one for which it may be difficult to provide answers without creating unwelcome side effects, so we will have to consider it carefully. I do not think that the amendment that is in front of us today addresses that specific, so I ask members not to support amendment 79 because other methods, such as mediation, might be preferable.

In response to Pauline McNeill’s point about an owner who owns the majority of flats within a tenement, we believe that it would be difficult to interfere with the voting process along the lines of who the owners are and to restrict particular owners because they own more than one flat. It is only owners who would vote—it would not be tenants within the properties—so each owner...
would have equal access to voting rights. We think that that is the fairest way to deal with the issue.

The Deputy Presiding Officer: I ask Dennis Canavan to wind up the debate and to indicate whether he will press amendment 79.

Dennis Canavan: I listened carefully to participants in the debate and in particular to what the minister had to say, but I am not convinced.

I welcome the fact that the Executive is at least considering introducing its own measures for mediation in housing disputes, but that should not exclude the acceptance of my amendment. If at some future date it is felt that the powers of my proposed ombudsman should be extended or amended, so be it. The Executive could introduce regulations for parliamentary approval to bring such amendments into effect. I take on board the criticism that we are perhaps in danger of setting up too many ombudspersons, but I would certainly be in favour of there being one ombudsperson for all disputes relating to housing matters. Although amendment 79 aims specifically to set up an ombudsman service for tenements, it could be extended at a later date to include other types of complaints relating to housing.

Annabel Goldie expressed some sympathy for the purpose of my amendment—I am grateful to her for her sympathy—but she argued against the amendment on the grounds that the findings of the ombudsman would not be legally enforceable. However, that is the case with most of the ombudsmen who are in existence, whether in the public sector or the private sector. That is not sufficient reason for not setting up an ombudsman in the first instance. In some cases, the ombudsman might be able to resolve the dispute in a voluntary fashion without it having to go to court, but if the ombudsman’s intervention could not solve the dispute, either party would still have the right to seek legal action through the courts.

For all those reasons, I hope that Parliament will accept amendment 79. I press my amendment to a vote for two reasons: first, I think that it is an excellent amendment and, secondly, I want to test the new-fangled electronic voting system to ensure that it works.

The Deputy Presiding Officer: On that basis, I am sure that we are all obliged to Mr Canavan.

The question is, that amendment 79 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Ballance, Chris (South of Scotland) (Green)
Canavan, Dennis (Falkirk West) (Ind)

Against

Fox, Colin (Lothians) (SSP)
Harvie, Patrick (Glasgow) (Green)
Ruske, Mr Mark (Mid Scotland and Fife) (Green)
Scott, Eleanor (Highlands and Islands) (Green)
Sheridan, Tommy (Glasgow) (SSP)
Swinburne, John (Central Scotland) (SSCUP)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)

AGAINST

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Cunningham, Roseanna (Perth) (SNP)
Curran, Ms Margaret (Glasgow Bellahouston) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eadie, Helen (Dunfermline East) (Lab)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Ferguson, Alex (Galloway and Upper Nithsdale) (Con)
Finnis, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, Mr John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (North East Scotland) (SNP)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Maclennan, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Mundell, David (South of Scotland) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robison, Shona (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (Gordon) (LD)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, lain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

The Deputy Presiding Officer: The result of the division is: For 9, Against 93, Abstentions 0.

Amendment 79 disagreed to.

The Deputy Presiding Officer: The system works.

Section 5—Application to sheriff for annulment of certain decisions

Amendment 80 not moved.

The Deputy Presiding Officer: Group 4 is on applications to the sheriff for annulment of certain decisions. Amendment 3, in the name of the minister, is grouped with amendments 4, 5 and 37.

Mrs Mulligan: I am sure that we are all grateful to Dennis Canavan for that experience. Those who thought that the Tenements (Scotland) Bill was not important have not yet had that experience.

Amendments 5 and 37 will clarify who can apply to the sheriff court under section 5 for annulment of a decision that is taken by a majority of owners under whichever management scheme applies to the tenement. Although the bill ensures that majority voting will become the norm for tenements in Scotland, the power of the majority will not be unfettered, as an individual who did not vote in favour of a decision will have the right to apply to the sheriff for an annulment of a decision of the majority. The sheriff will be able to grant an annulment if he or she is satisfied either that the relevant decision is not in the best interests of all the owners taken as a group, or that it is unfairly prejudicial to one or more of the owners.

Amendment 5 provides that those who can seek to have a majority decision overturned are, first, the owner at the time that the decision was made and, secondly, a new owner. The owner at the time that the decision was made may not have been in favour of the decision or may have expressed no view, perhaps because they were not present. A new owner who was not the owner at the time of the decision must also be included to deal with the situation of a change in ownership because, under section 11, the incoming owner may be severally liable with the former owner.

Amendments 3 and 4 reflect the new definition of a management scheme that will be introduced by amendments 33 and 43, which will be discussed under group 14. Amendments 3 and 4 simply make it clear that all tenements will be subject to a management scheme, whether that be a tenement management scheme, the development management scheme, the burdens in the title deeds or a combination of the burdens and the individual rules of the tenement management scheme.

I move amendment 3.

Amendment 3 agreed to.

Amendments 4 and 5 moved—[Mrs Mary Mulligan]—and agreed to.

The Deputy Presiding Officer: Group 5 is on the meaning of “owner”. Amendment 6, in the name of the minister, is grouped with amendments 7, 34 to 36 and 41.

Amendments 6 and 7 will clarify that if two or more persons own a flat, either or any of them may raise an action in the sheriff court under section 5. The purpose of the amendments is to protect each owner where there are two or more co-owners of a flat. Each owner must have equal rights and the action or inaction of a co-owner must not remove those rights.

The remaining amendments in the group are technical drafting amendments that are designed to ensure that the references to “owner of a flat” and “owner of a part of a tenement” work properly.

I move amendment 6.
Amendment 6 agreed to.

Amendment 7 moved—[Mrs Mary Mulligan]—and agreed to.

The Deputy Presiding Officer: Group 6 is on the giving of notice. Amendment 8, in the name of the minister, is grouped with amendments 46, 57 to 59 and 71.

Mrs Mulligan: Amendments 46 and 71 will make a technical change to the rules for giving notice to owners of decisions that are made under the bill or the tenement management scheme. Section 25A provides that a notice can be sent to the flat in question if the name of the owner is not known, but it is of course possible for the owner’s name to be known while his or her whereabouts are a mystery. Amendments 46 and 71 will provide that, in that case, it will be sufficient for the notice to be sent to the flat. However, the person who sends the notice will have to have made “reasonable inquiry” as to where the owner is.

Amendments 8 and 57 to 59 are technical drafting amendments that will ensure that the language that is used in the bill is consistent.

I move amendment 8.

Amendment 8 agreed to.

Section 8—Duty to maintain so as to provide support and shelter etc

The Deputy Presiding Officer: Group 7 is on support and shelter: maintenance of parts in common ownership. Amendment 9, in the name of the minister, is in a group on its own.

Mrs Mulligan: Section 8(1) provides that the owner of any part of a tenement building is obliged to maintain his property if it provides support or shelter to any other part of the tenement. That is a restatement and replacement of an existing rule under the common-law doctrine of common interest. Section 8(1) imposes a duty on each and all of the owners to look after, for example, the roof, but does not permit any one pro indiviso owner—which to you and me means co-owner—to maintain it. If the roof is common property, the co-owner needs the consent of all the other owners, unless the repair is a necessary one. Amendment 9 will allow a co-owner to carry out maintenance to common property without the consent of the other owners in order to comply with section 8.

I move amendment 9.

Amendment 9 agreed to.

Section 10A—Determination of when an owner’s liability for certain costs arises

The Deputy Presiding Officer: Group 8 is on the determination of when liability for certain costs arises. Amendment 10, in the name of the minister, is grouped with amendments 11 to 20 and 23.

Mrs Mulligan: This group of amendments was prompted by concerns that members of the Justice 2 Committee raised when it considered the bill at stage 2. Section 11 deals with the apportionment of liability for repairs and other costs when a flat is sold and makes it clear that an owner does not cease to be liable when he or she ceases to own a flat. However, section 11 was framed on the basis that incoming owners would become severally liable with the seller for outstanding liabilities in relation to the relevant flat, although the buyer would have a right of relief against the seller. Concerns were expressed at stages 1 and 2 that an incoming owner might be exposed to large and unexpected bills for repair work if a seller did not disclose the existence of such a liability and then disappeared without trace. The buyer would then, in effect, be solely liable for work that was done before he or she became owner of the flat.

The amendments in this group will allow any owner in a tenement to register a notice in the property registers to make it public that works have been or may be carried out to the tenement. If there is no notice, the incoming purchaser will not be liable for the costs of any work carried out before he or she became an owner. If there is a notice, he or she will be alerted to the fact that there might be an outstanding liability for the work. The purchasing solicitor will, no doubt, ask the seller what that is about. If necessary, a sum can be retained from the purchase price to cover the liability, so the purchaser will be protected, which is what the committee asked us to ensure during stage 2. The notice will also protect the other owners in the tenement because, when a notice is registered, liability will pass to the incoming owner in effect, be solely liable for work that was done before he or she became owner of the flat.

I apologise, Deputy Presiding Officer. I believe that I have skipped a grouping and am speaking to group 9 rather than group 8.

The Deputy Presiding Officer: Please continue speaking to the amendments that you are currently dealing with.

Mrs Mulligan: The notice procedure is set out in amendments 22 and 24. To be effective against a new order, the notice will have to be registered at least 14 days before the incoming owner becomes the new owner in order to allow time for the property registers to be searched by solicitors for purchasers. The notice will be in a form specified in amendment 72. Amendment 21 is consequential and amendments 38, 42 and 45 are technical.
At stage 2, Nicola Sturgeon envisaged that there should be a financial limit on liability and the notice procedure should not apply until that limit had been exceeded. Although the Executive was originally attracted to the idea of there being a financial limit, we now feel that that would be undesirable. If a limit of, say, £1,000 were imposed, we suspect that purchasing solicitors would simply retain that sum in every case, which would have the effect of distorting the conveyancing system. The other reason for not having a limit is that the incoming owner might be faced with a number of competing demands for a number of repairs from various owners. If the limit applied to all the various repairs, it would not limit the new owner’s liability. I suggest that all of that would be unnecessarily complicated, which is why we have not agreed to the suggestion at this stage. I hope that that will be acceptable to the committee members.

I also hope that the committee members will feel that the Executive’s proposed amendments to section 11 will provide the kind of protection to incoming owners that they sought and offer an acceptable solution that balances the competing interests of new owners and other owners in a tenement if there is an outstanding liability.

Shall I move amendment 21?

The Deputy Presiding Officer: No, you should not move amendment 21 at this stage. I thought that it would make sense for you to complete your speech for the sake of the coherence of the debate and the Official Report.

I would like you now to address the amendments in group 8. Members who want to speak about the amendments in group 9 will be able to do so when we have disposed of the amendments in group 8. I should not think that it will be necessary for you to repeat any of the points that you have just made.

Mrs Mulligan: Group 8 is a highly technical grouping of amendments. Amendments 10, 11, 13, 15, 17 and 18 amend parts of section 10A so that references to “scheme costs” are changed to “relevant costs”. Members will be aware that rule 4 of the tenement management scheme refers only to “scheme costs” but, in cases in which the management scheme in operation for a tenement is wholly or partly made up of burdens contained in the title deeds of the tenement, it is possible that the burdens might go further than the scheme. At present, burdens that do so would not come within the scope of section 10A and, as a consequence, the rules in that section on determination of liability would not apply. The amendments will alter section 10A so that it will now cover cases in which the burdens in the title deeds are more extensive than the provisions of the tenement management scheme.

Amendment 23 is consequential and amendment 12 relates to the time at which an owner’s liability for certain costs arises. Section 10A(4) is on costs recoverable as a result of statutory notice. Subsection 6 relates to work instructed by a manager and subsection 1 relates to work or other costs that arise from the scheme decision.

I move amendment 10.

The Deputy Presiding Officer: No member has asked to speak on group 8.

Amendment 10 agreed to.

Amendments 11 to 20 moved—[Mrs Mary Mulligan]—and agreed to.

Section 11—Liability of owner and successors for certain costs

The Deputy Presiding Officer: We now come to group 9. Amendment 21, in the name of the minister, is grouped with amendments 22, 22A, 24, 81, 38, 42, 45 and 72. I require the minister to move amendment 21. I do not think that it is necessary for her to say anything further.

Amendment 21 moved—[Mrs Mary Mulligan].

Miss Annabel Goldie (West of Scotland) (Con): I come to the aid of the minister—she is not the first person to become confused by the Tenements (Scotland) Bill. There were many furrowed brows and perspiring heads in the Justice 2 Committee.

The Executive’s amendments to section 11 are welcome, as they acknowledge the concerns of the Justice 2 Committee. As the minister indicated, two amendments were lodged at stage 2 to try to avoid the situation in which a hapless purchaser becomes liable for a seller’s obligations without knowing anything about it. I appreciate the attitude that the minister has adopted, as the amendments that have been lodged in her name accept the full spirit of the concerns that were expressed by the Justice 2 Committee and which I personally advocated as a member of that committee.

The reason why I lodged amendment 22A is that even though the Executive’s amendment 22 is excellent, I am trying to make it a little better. Any purchaser who is buying a property, which is an important financial commitment, wants to know as soon as possible what the likely obligations of acquiring that property will be. Under the Executive’s amendment, the purchaser will be liable but they will at least know about that liability because a notice can be registered until 14 days before the date of settlement. I thought that it might be desirable, for the sake of the purchaser, to make that date a little earlier, so my amendment 22A seeks to bring the date forward to the date of conclusion of missives.
There will be a
15:45
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will work extremely well for purchasers, who were
stage 2, and what we now have is something that
lodged by Annabel Goldie and Nicola Sturgeon at
They are different from the amendments that were
listened and has lodged amendments at stage 3.

Mr MacAskill: I concur with the points that
Annabel Goldie made; the amendments to section
11 are welcome. We can never make the
purchase of property risk free—given the
circumstances and costs involved, there will
always be difficulties—but the law can seek to
make matters as transparent as possible and to
make information readily available so that people
can find out what the factual situation is and can
clear a remedy as quickly as possible. That is
the purpose of section 11, and it is greatly
welcome.

On the points that Annabel Goldie made on her
amendment 22A, I had the opportunity of
discussing matters with the minister, and I will be
supporting the amendment. The minister may be
technically correct in saying that matters are
addressed and clarified in the schedule, but
terminology is important. People do not like to
to have to look at schedules to find out what is being
referred to.

The terminology of missives is quite clear in
Scots law, and it is understood, not just by
practising lawyers but by those who participate in
the process, that there are two aspects to the
purchasing of property: the conclusion of missives
and the creation of the contract and, subsequently,
the handing over of the property and the passing
on of the money. The minister is correct to say that
that is referred to in the schedule, and it could be
argued that the nomenclature change proposed by
Miss Goldie is superfluous, but it is important that
matters are as clear as possible. Section 11
should be as transparent as possible, and we
should make clear the position to which we refer,
without having to flick through several pages.

The minister may be legally correct, but in the
interests of clarity and transparency Miss Goldie’s
amendment 22A is welcome. It will not undermine
the ethos of the bill, but it will make the bill more
accessible to lawyers and other practitioners who
flick through it, by making it clear that risk transfers
when missives are concluded.

Mrs Mulligan: I realise that I am taking my life in
my hands by discussing legal points with two
lawyers, but I will do it anyway.

I acknowledge that Annabel Goldie’s
amendment 22A is meant to be helpful. The
concern is that the bill’s definition, which refers to
the date when the new owner acquired right to the
flat, might give rise to confusion, and that
providing for the date on which “missives were
concluded” might be more certain. However, I do
not share that concern. The phrase “acquisition
date” is the established phrase for the date on
which a purchaser acquires right to a property. It is
familiar to conveyancing solicitors from legislation
such as the Conveyancing and Feudal Reform
(Scotland) Act 1970—with which I am sure all
members are familiar—and it has been used
generally in recent legislation. It is also used
elsewhere in the bill. Essentially, a person has
right to a flat once that person has delivered
disposition for that flat. We would prefer to stick
with the established definition, which is in line with
other statutes.

Moreover, I suggest in the nicest possible way
that amendment 22A is defective, because it deals
only with the normal purchase and sale situation
where there will be missives of sale. Not all
transfers of flats will require missives, for example
transfers of property following the owner’s death. I
ask Annabel Goldie not to move amendment 22A.

Amendment 21 agreed to.

Amendment 22 moved—[Mrs Mary Mulligan].

Amendment 22A moved—[Miss Annabel
Goldie].

The Deputy Presiding Officer: The question is,
that amendment 22A be agreed to. Are we
agreed?

Members: No.

The Deputy Presiding Officer: There will be a
division.

For
Aitken, Bill (Glasgow) (Con)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Davidson, Mr David (North East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Fabiani, Linda (Central Scotland) (SNP)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Fox, Colin (Lothians) (SSP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Miss Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Ingram, Mr Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
MacAskill, Mr Kenny (Lothians) (SNP)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
McFee, Mr Bruce (West of Scotland) (SNP)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Sheridan, Tommy (Glasgow) (SSP)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)

AGAINST
Alexander, Ms Wendy (Paisley North) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Eddie, Helen (Dunfermline East) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, Mr John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (LD)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dunfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peatlie, Cathie (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan ( Roxburgh and Berwickshire) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Swinburne, John (Central Scotland) (SSCUP)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

The Deputy Presiding Officer: The result of the division is: For 29, Against 57, Abstentions 0.

Amendment 22A disagreed to.
Amendment 22 agreed to.
Amendment 23 moved—[Mrs Mary Mulligan]—and agreed to.

After section 11
Amendment 24 moved—[Mrs Mary Mulligan]—and agreed to.

Section 12—Prescriptive period for costs to which section 11 relates
Amendment 81 moved—[Mrs Mary Mulligan]—and agreed to.

Section 14—Access for maintenance purposes

The Deputy Presiding Officer: Amendment 25 is grouped with amendments 26, 28, 30, 39, 47 and 48.

Mrs Mulligan: This group of amendments deals with the installation of new services in tenements. A distinctive feature of tenements is that they have a great deal of common property, such as the common close and the stair. Under the common law, it would not be possible to carry out any alteration or addition to common property without the consent of all the owners. That means that an owner could not install a new service without the consent of all of his or her neighbours. Special legislation is already in place to cover some services such as electricity. Members might recall that in the consultation draft of the bill, there was provision to cover gas pipes and television aerials. We took that out before the introduction of the bill because those matters are reserved, and we hope that provision will soon be made for them at Westminster by a section 104 order under the Scotland Act 1998. However, we think that it is wise to make provision for other devolved services in future.

Amendment 30 proposes that an owner will be able to install services, subject to any of the procedures that can be prescribed by Scottish ministers and as long as the services have been
prescribed. Amendments 47 and 48 are technical amendments. Amendment 26 makes it clear that an owner will be able to access another’s flat for the purpose of installing service pipes and suchlike. Amendment 39 is a technical amendment and amendments 25 and 28 are consequential on the new definition of management scheme introduced by amendment 33.

I move amendment 25.

Miss Goldie: Will the minister clarify a point in relation to amendment 30? I know that the whole spirit of the bill is such that titles deeds should have precedence where they are relevant. Am I correct in interpreting amendment 30 as meaning that its provisions would overrule title deeds?

Mrs Mulligan: The member is correct that the spirit behind the legislation seeks to ensure that where title deeds have something to say on an issue, they will take precedence. However, where there is a gap, the provisions in amendment 30 will fill in that gap.

Amendment 25 agreed to.

Amendment 26 moved—[Mrs Mary Mulligan]—and agreed to.

The Deputy Presiding Officer: Amendment 27 is grouped with amendments 31, 40, 44 and 73 to 77.

Mrs Mulligan: This group of amendments is intended to make the provisions relating to the sale of an abandoned tenement building operate more effectively.

Amendments 27 and 31 will ensure that it is possible to get access to an abandoned tenement. That is to avoid a situation in which the sale of an abandoned tenement might be frustrated because of a lack of access, and the building might then become blighted. Amendments 73 and 74 are drafting amendments. Amendment 75 provides a right of appeal to the Court of Session against a sheriff’s decision to grant or to refuse to grant the power of sale under the schedule 2 procedure.

Amendment 76 provides not only that the power of sale will be of no effect unless it is registered within 14 days, but that it will not take effect until 42 days after it has been registered. The aim of the amendment is to avoid possible problems if more than one owner is trying to sell an abandoned tenement.

Amendment 77 obliges the person to whom a power of sale is granted to erect a for sale sign at the site of the property when advertising the sale. The sign will give the details of the selling agent.

Amendment 40 makes it clear that any reference to an owner in relation to the power of sale provisions in schedule 2 will be construed as a reference to any person who owns a flat either solely or in common with another.

Amendment 44 is a technical drafting amendment that allows “power of sale order” to be used as shorthand for the procedure under schedule 2.

I move amendment 27.

Amendment 27 agreed to.

Amendment 28 moved—[Mrs Mary Mulligan]—and agreed to.

Section 15—Obligation of owner to insure

The Deputy Presiding Officer: Amendment 29, in the name of the minister, is in a group on its own.

Mrs Mulligan: Section 15 of the bill requires each owner in a tenement to insure their flat for reinstatement value, rather than just market value, against the list of risks to be prescribed by Scottish ministers. The bill currently provides that if the title deeds of the tenement require the tenement building to be insured by way of a common policy of insurance, that common policy must be used in order to satisfy the duty to insure under the bill.

Amendment 29 was prompted by discussion of section 15 by the Justice 2 Committee and, in particular, consideration of an amendment that was lodged at stage 2 by the committee’s convener, Annabel Goldie. She wished to allow owners in a tenement to have the flexibility to use a combination of a common policy of insurance and individual policies, provided that the cumulative cover provided by all the policies covered the reinstatement value of the building. That would be the case in circumstances where the relevant title deeds required there to be a common insurance policy for the whole tenement.

The background to Annabel Goldie’s amendment was that common policies are often stipulated in title deeds, but not necessarily for reinstatement value, and are therefore often supplemented by individual policies. I am led to believe that that is the case in the west of Scotland in particular, where properties are more commonly managed by a professional factor.

Amendment 29 would amend section 15(2) of the bill so that the requirement to insure would be fulfilled if the insurance cover were provided in whole or in part by a common policy of insurance. That would allow owners to have a combination of common and individual policies of insurance, regardless of whether the title deeds contained provision for a common policy. I hope that Annabel Goldie will feel able to support this change, because it gives effect to the purpose of the amendment that she lodged at stage 2.
I move amendment 29.

Miss Goldie: I am positively overwhelmed by such uncharacteristic adulation from the Executive. Once again, on behalf of the Justice 2 Committee I extend to the minister my appreciation of the Executive’s willingness to take on board important arguments. In lodging amendment 29, the Executive has done a great deal to remove possible restriction and inflexibility faced by the individual flat owners. I welcome the Executive amendment.

Amendment 29 agreed to.

After section 15

Amendment 30 moved—[Mrs Mary Mulligan].

The Deputy Presiding Officer: The question is, that amendment 30 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

FOR
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Cunningham, Roseanna (Perth) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Fox, Colin (Lothians) (SSP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Harvie, Patrick (Glasgow) (Green)
Home Robertson, Mr John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Kane, Rosie (Glasgow) (SSP)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Leckie, Carolyn (Central Scotland) (SSP)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Maclean, Kate (Dundee West) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Matheson, Michael (Central Scotland) (SNP)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Miss Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peebles, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robson, Euan ( Roxburgh and Berwickshire) (LD)
Scott, Tavish (Shetland) (LD)
Sheridan, Tommy (Glasgow) (SSP)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Swinburne, John (Central Scotland) (SSCUP)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Welsh, Mr Andrew (Angus) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Aitken, Bill (Glasgow) (Con)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Miss Annabel (West of Scotland) (Con)
Johnstone, Alex (North East Scotland) (Con)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)

16:00

The Deputy Presiding Officer: The result of the division is: For 70, Against 9, Abstentions 0.

Amendment 30 agreed to.

Section 20—Sale of abandoned tenement building

Amendment 31 moved—[Mrs Mary Mulligan]—and agreed to.

Section 22—Amendments of Title Conditions (Scotland) Act 2003

The Deputy Presiding Officer: Amendment 32, in the name of the minister, is grouped with amendments 49, 50 and 78.

Mrs Mulligan: Amendments 32, 49, 50 and 78 are technical amendments to the Title Conditions (Scotland) Act 2003. Although amendment 78 is lengthy, most of its provisions were already in the bill after stage 2. They were previously contained in section 22, but it is thought that gathering together all the amendments to the 2003 act in a
schedule would be more convenient. Of the new amendments, some rectify minor drafting errors or omissions in the 2003 act and others ensure consistency with amendments made to the Tenements (Scotland) Bill. The most notable of those is on the liability of incoming owners, as discussed earlier in the context of amendment 22.

Refinements are also made to the 2003 act’s provisions that affect rural housing and housing estates. In relation to rural housing, the 2003 act specifies that rural housing bodies must have as one of their objectives or functions the provision of housing on rural land or rural land for housing. For example, that would exclude a body that, although it provided rural land, did not have that as an objective or function. The amendment will allow bodies with a wider function to be designated as rural housing bodies, although it will only be possible for rural housing burdens to be created in rural areas.

The amendment to section 53 of the Title Conditions (Scotland) Act 2003 is highly technical. Its purpose is to make it clear that, if a developer or local authority, for example, is using section 53 of the act to extend a common scheme of real burdens, it will not be necessary for them to nominate benefited properties as under the general rules set out in section 4 of the act.

I move amendment 32.

Amendment 32 agreed to.

After section 23

The Deputy Presiding Officer (Trish Godman): Amendment 33 is grouped with amendment 43.

Mrs Mulligan: The amendments tighten up the definition of a management scheme and give it more prominence. The concept that every tenement will in future have a management scheme to assist in common decision making is a fundamental aim of the bill. Amendment 33, therefore, moves the definition of management scheme from the interpretation section to a section of its own.

Amendment 43 makes a slight modification to the definition to ensure that any specific provisions that the title deeds of the tenement make on improvements to the tenement are included in the management scheme so that they benefit from the general provisions of the bill.

I move amendment 33.

Amendment 33 agreed to.

Section 25—Interpretation

Amendments 42 to 45 moved—[Mrs Mary Mulligan]—and agreed to.

Section 25A—Giving of notice to owners

Amendment 46 moved—[Mrs Mary Mulligan]—and agreed to.

Section 27—Orders

Amendments 47 and 48 moved—[Mrs Mary Mulligan]—and agreed to.

Section 29—Short title and commencement

Amendments 49 and 50 moved—[Mrs Mary Mulligan]—and agreed to.

Schedule 1

TENEMENT MANAGEMENT SCHEME

The Deputy Presiding Officer: Group 15 is on the meaning of “scheme property.” Amendment 51 is grouped with amendments 52 to 55.

Mrs Mulligan: This group of very technical drafting amendments is intended to clarify the definition of scheme property in the tenement management scheme in schedule 1. The three classes of scheme property, which are set out in paragraphs (a), (b) and (c) of rule 1.2, could all be present in the same building. However, the word “or” tends to infer that the items in the list are alternatives, when they are in fact collective. As a result, amendment 54 seeks to remove the word “or” from rule 1.2(b). Amendments 51, 52, 53 and 55 seek to reflect the fact that reference to scheme property will always relate to a particular tenement.

I move amendment 51.

Amendment 51 agreed to.

Amendments 52 to 55 moved—[Mrs Mary Mulligan]—and agreed to.

The Deputy Presiding Officer: Group 16 is on scheme decisions and costs. Amendment 56 is grouped with amendments 60 to 67.

Mrs Mulligan: These amendments seek to make a range of alterations to the rules of the tenement management scheme. The point of amendment 56 is to remove any ambiguity as to whether rule 2.3 includes cases in which the obligation in the title deeds is to pay rather than to maintain. As the bill stands, if the owner is not liable for the flat’s maintenance, he does not get a vote in a scheme decision. The amendment seeks to make it clear that he or she would be entitled to a vote under rule 2 procedures only if the terms of the burdens are such that he or she is either obliged to maintain or to pay for maintenance.
Amendment 56 seeks to bring the language of rule 2.3(b) into line with rule 1.2(b).

Amendment 60 seeks to allow owners to delegate any of their powers to a manager and to avoid the possibility that a restrictive interpretation will be applied to rule 3.1(d). Nevertheless, it is made clear that such a power could include the power to decide to carry out and instruct maintenance. Amendment 63 is a drafting amendment designed to clarify that, in cases in which a scheme decision gives authority to operate a maintenance account, that authorisation must be given to a manager or to at least two other persons. It seeks to bring the wording of rule 3.4(a) into line with rule 3.4(c).

Amendments 61, 64, 65 and 66 make the most noticeable changes in this group by permitting the owners of a majority of flats in a tenement to decide to install an entry system that can be operated from each flat. Allowing such facilities to be installed has clear security and amenity benefits that outweigh our general policy that improvements, as opposed to repairs, should be subject to the unanimous approval of all owners. I hope that Sarah Boyack, who raised the issue at stage 2, will welcome this amendment, which seeks to permit the installation of entry systems by a majority vote.

Rule 3.1 of the tenement management scheme lists the matters on which the owners in a tenement are permitted to make scheme decisions. Rule 3.1(g) permits owners to make a scheme decision to authorise any maintenance of scheme property that has already been carried out. Amendment 62 seeks to remove the words “by the owner” to avoid any danger that work carried out by a property manager or factor would be excluded from the operation of the rule.

Amendment 67, as I am sure members will be pleased to hear, is the final amendment of the day. It clarifies the redistribution of a share of costs where one owner is sequestrated or cannot be found. As the bill is currently worded, the other owners at the time that the redistributed share is recoverable would have to pay a defaulting owner’s share. Amendment 67 imposes a liability on the owner of a flat and makes it clear that the other owners would only be owners who were together responsible for the rest of the cost of the repairs. That covers the situation that would arise when one of the flats was sold between the time when the owners became liable for the costs and the time when they discover that one of their number cannot pay.

I move amendment 56.

Sarah Boyack (Edinburgh Central) (Lab): I am delighted that the minister has got a fix for us in the bill. The installation of entry systems is a practical issue and something that many of my constituents have problems with, particularly in the old town of Edinburgh and the city centre, where people have lots of amenity problems and where there are security and safety issues. It is a practical problem that people cannot currently get resolved, so I am delighted that amendments 61 and 64 will be made to the bill, if everybody supports them, which I am sure will be the case.

Door entry systems are crucial to improving people’s quality of life as well as their personal security. They are also an important way of maintaining the quality of the tenement and of ensuring that maintenance is not continually interrupted by people doing the most appalling antisocial things in people’s tenements. That is a real problem and something that we can solve today by voting for the minister’s amendments. I am absolutely delighted about that.

Many tenements have multiple owners—not just individual owners, but the City of Edinburgh Council and housing associations—and people have been unable to get progress because at the moment everybody needs to sign up. By moving to a majority system, we are going to improve thousands of people’s lives. I am pleased to support the amendments. There are people who will, in the next few months, achieve a real improvement in their quality of life. That is one of the improvements that we have brought about through the Tenements (Scotland) Bill, which I warmly welcome.

Like other members of Parliament, I went along as an interloper to the committee to plead with committee members to be interested. The committee was supportive and I am delighted that the minister has been able to find a technical solution. Sometimes a technical problem can remain a technical problem. Getting a solution is something that we should be grateful for.

Amendment 56 agreed to.

Amendments 57 to 71 moved—[Mrs Mary Mulligan]—and agreed to.

After schedule 1

Amendment 72 moved—[Mrs Mary Mulligan]—and agreed to.

Schedule 2

Sale under Section 18(3) or 20(1)

Amendments 73 to 77 moved—[Mrs Mary Mulligan]—and agreed to.

After schedule 2

Amendment 78 moved—[Mrs Mary Mulligan]—and agreed to.
The Deputy Presiding Officer: That ends consideration of amendments.

Tenements (Scotland) Bill

The Deputy Presiding Officer (Trish Godman): The next item of business is the debate on motion S2M-1493, in the name of Margaret Curran, that the Tenements (Scotland) Bill be passed.

16:13

The Minister for Communities (Ms Margaret Curran): I am pleased to move the motion this afternoon to pass the Tenements (Scotland) Bill, which, if members agree to it, will be the first piece of legislation to be passed in this magnificent new Parliament building. It seems particularly appropriate that the first piece of legislation to be passed here should concern buildings and should be a bill that affects the lives of many Scots.

I am sure that most of us in this chamber have lived in a tenement at some point in our lives. Some may even, like me, have been born in one. Tenement living has been a feature of Scottish life for hundreds of years and examples of ancient tenement buildings may be seen not far from here in the Royal Mile. In modern times, however, nearly 1.5 million Scots continue to live in tenement properties, so the proper management of tenements is indeed an urgent matter for the attention of Parliament.

The bill does not simply cover the sandstone and granite buildings that we all think of as tenements. Mary Mulligan and I are dutifully informed that the bill covers all property where ownership is divided horizontally. Modern blocks of flats, high rise towers, four-in-a-block properties and converted villas all come within the ambit of the bill. Commercial properties such as office blocks are also included, so it is wide ranging and the measures are of great consequence. The bill is a law reform measure, but it also represents a commonsense modernisation of the law that will improve the daily lives of people who live or work in tenement property.

In the past there has been widespread frustration about the absence in the existing common law of a proper system of management and decision making in cases in which the title deeds of individual tenements make no provision on the matter. The basic common-law rule has been that every owner in a tenement must agree before repairs can be carried out, unless the title deeds stipulate that majority decision making is allowed. As we know, it is difficult to get everyone to agree, so very often nothing gets done. The common-law rule does not help people; it just gets in their way.

The tenement management scheme that the bill proposes will solve that problem. The scheme will
enable a majority of owners to take a decision that will be binding on all owners. All owners will have to contribute their share of the cost of common repairs. Owners will be empowered to take responsibility for the condition of their property. The housing improvement task force was clear in its belief that the responsibility for the upkeep of houses in the private sector lies first and foremost with owners and that there is a need for greater awareness and acceptance of their responsibilities on the part of owners.

Of course, many tenements already have adequate arrangements, which will not be overturned. Similarly, future developers will be able to put in place their own management schemes to suit the individual circumstances. The Justice 2 Committee supported the policy of supplementing and underpinning gaps or deficiencies in title deeds rather than imposing one new set of rules on all tenements.

I am grateful to the Justice 2 Committee for its careful consideration of the bill and to the other interested parties who suggested amendments during either the consultation process or the bill’s passage through Parliament. I am sure that I do not say this for the first or the last time: the committees of the Parliament are often a credit to the legislative process that is enshrined in the Parliament.

Members have acknowledged that the Executive has sought to modify the bill in response to concerns. As we heard, amendments have been made to section 11 to protect incoming owners from outstanding liabilities for repair work that has been carried out but not paid for—a matter that accounted for a substantial part of the stage 1 debate. An amendment was made to section 15 to reflect Annabel Goldie’s concerns about the requirement for compulsory insurance for tenement flats and an amendment has been made to the tenement management scheme to permit a majority of owners to install an entry system, as a result of representations from Sarah Boyack. I am grateful to the members of the Justice 2 Committee for making those suggestions. The amendments clearly improve the bill.

The bill represents the third and final part of the Executive’s programme of property law reform and follows the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003. If the motion is agreed to this afternoon, we intend that the bill will become law on 28 November, at the same time as the other two pieces of legislation. All the reforms have resulted from reports of the Scottish Law Commission and I take this opportunity to pay tribute to the commission’s work. The commission carried out an exhaustive review of Scots property law in recent years, which has led to the imminent abolition—long overdue—of the obsolete feudal system of land tenure and the replacement of that system by a system of simple, outright ownership of property.

It is appropriate that I pay tribute to the work of Mary Mulligan. I think that it is obvious to members that she shouldered the burden of negotiations on the detail of the bill. I heard the many compliments that she received from members about how she conducted her work and it is clear to me that there might be something in that consensual approach to politics—perhaps I should learn something from Mary Mulligan as we conduct our work. That will be a challenge, but I promise to try.

It is also particularly appropriate to thank the team of officials who worked on the bill. There is talk in the press today of the role of the civil service and the need for reform, but I think that Mary Mulligan and I would both say that the team that Joyce Lugton led was extraordinarily professional in its work—unless there is something that we did not ask and do not know about, which might become clear in time. The team produced work of the highest standard, worked well with ministers and made every attempt to meet the needs of the Justice 2 Committee, so the officials’ work deserves tribute.

This bill ensures that every tenement in Scotland will have workable management arrangements. Every tenement will have a mechanism for ensuring that necessary repairs are carried out and that owners can reach decisions on other matters of mutual interest and concern. The bill will allow many outstanding tenement repairs to proceed. It provides a robust framework in law for the management and maintenance of existing and future tenement buildings.

I move,

That the Parliament agrees that the Tenements (Scotland) Bill be passed.

16:20

Mr Kenny MacAskill (Lothians) (SNP): Following on from what Margaret Curran said about the work of civil servants, I want to say that they have, in many instances, been maligned unfairly. I was contemplating the points that were made on amendment 22A and, on reflection, I would say that the advice of officials to the minister was correct and that my political judgment was incorrect. I had forgotten about the scenario of a transfer upon death. It may be unlikely that such a dispute would arise, but I accept that the advice given to the minister was correct and that my political judgment was wrong. We should acknowledge that the civil service does an excellent job.
It may not be a hair-shirt mentality, but we have been making a great deal of the fact that this chamber has been pilloried. However, it is now about moving on and making legislation in Scotland. It may not be earth-shattering stuff, but it is stuff of considerable importance. Without this institution, it is likely that we would only have got round to addressing these matters—in some form of consolidated act—some five or 10 years in the future. We would not have been able to address a matter that is of fundamental importance for many people. It is not earth-shattering to the economy, and it does not knock Scotland and the world off its axis, but it does make a significant improvement for many people and for the general community.

Tenements are an important part of Scottish life. They are not unique to Scotland but they are a distinctive part of life. If it was not for the tenement, our whole culture and society would not necessarily have evolved as it has. However, society has changed, which is why this legislation is necessary. There are now more student flats, not only in Edinburgh but in many places where universities and colleges have grown up. There is also the growth of buying to let. As a result, in many stairs in which a common repair is needed it is not possible for people to meet their neighbours. That is not because society has moved on and people do not interact as we did before, when people lived together; it is because people simply do not know who the other owners are, because they are absentee landlords—they are elsewhere. We have to address that problem. We have to be able to litigate properly, rather than ending up in court because there has been a stairheid rammy and finding it incumbent on them to pay for repairs when members of the drafting team wished that we would all go away for a holiday somewhere and perhaps arrange for the Justice 2 Committee to be bereft of lawyers for a while. The drafting team has taken a very technical issue, has dealt with the views that have been expressed and has done a creditable job in translating those into sensible legislative provisions.

This legislation is important. As I said earlier when we were debating the amendments, it will not necessarily take the risk out of purchasing a property. That risk will always be there. However, we must have transparency and the right to proceed when there are problems.

The minister was right to oppose the points made by Mr Canavan. We should try to resolve matters through mediation, because nobody wishes to go to court. The first stage should be to see whether everybody in the stair can meet together and agree. If that cannot be done, we should see whether there can be some formal mediation system in which some attempt at brokering can be made—with either local or central Government involvement. If that fails, we have to be able to have recourse to litigation, because substantial amounts of money can be involved.

We can never ensure that there will not be a risk of a bill being left outstanding or of absentee landlords or others not paying their share. When that happens, there will have to be litigation. However, we can ensure that people know their rights and have a clear recourse to litigation. That is why we have no hesitation in saying that we fully support this bill. I again put on record my error of judgment and my recognition that the civil servants got it right.

16:24

Miss Annabel Goldie (West of Scotland) (Con): The Tenements (Scotland) Bill probably does not have the people of Partick raising their glasses or the folk in Auchtermuchty jigging in the streets. I did not hear from the public galleries many gasps of delight and excitement as we worked our way through stage 3. However, often what is not in gaudy colours is the substantive fabric of what matters in life.

It is important to recognise that the bill is a significant piece of legislation that, in fairness, it would probably have been difficult to find time in a Westminster timetable to pursue in the detail in which it has been pursued here. Although I may not have been a fan of devolution before 1999, I accept that one of the virtues of the system is that it enables a legislature in Scotland to give detailed attention to such bills.

I pay tribute to my colleagues on the Justice 2 Committee, who have done a commendable job in trying to understand highly technical legislation. In paying tribute to them, I also have to pay tribute to the drafting team. There must have been times when members of the drafting team wished that we would all go away for a holiday somewhere and perhaps arrange for the Justice 2 Committee to be bereft of lawyers for a while. The drafting team has taken a very technical issue, has dealt with the views that have been expressed and has done a creditable job in translating those into sensible legislative provisions.

I thank the minister for her comments about the committee and the drafting team. I certainly would not like to see the Parliament with a passive Margaret Curran in non-feisty guise. That would be a deterioration of the situation. I say to her that she should keep her pecker up and we will look forward to continuing exchanges. This may be a rare occasion on which we are significantly in agreement about a piece of legislation. It is good that we are, as the legislation will make a significant difference to property ownership in Scotland.

The amendment to section 11 was an important recognition by the Executive of something wider than just the position of a purchaser buying a flat and finding it incumbent on them to pay for repairs of which they were completely unaware. It is right
that, whenever possible, the Parliament tries to recognize and uphold good principles of Scots law. There is much in our Scots law and Scottish legal system that is unique and distinctive. Perhaps more important, it works well and has worked well over centuries. The fundamental principle of buying property has been based on our registration of title system that was the envy of the world for many years. One of the cardinal principles of that was transparency—long before devolution was ever heard of—which meant that someone could go to that register and know exactly what burdens, obligations, liabilities and responsibilities went with the property that they proposed to acquire. It has been very important that that principle of Scots law has been recognized and honoured in the bill.

I hope that the bill will make a significant contribution to improving the regulation of arrangements for those who live in tenement properties and properties of the type defined in the bill. It is a good, solid step forward. As Kenny MacAskill said, there may be technical aspects that we have not got right or aspects about which only time and practice will tell. However, one of the features of the Parliament—especially in its committee system—is its review of legislation. That may be a legitimate task for us in future.

I commend the bill, which will certainly have the support of the Conservative group.

16:28

Mike Pringle (Edinburgh South) (LD): I congratulate the civil servants and the drafting people who must have had an extremely difficult time in compiling the bill. It is very technical. As the minister said, it is the third part of the jigsaw, and it is great that it is going to become law as soon as November. It will make a difference.

During committee proceedings, we dealt with things called pertinent. I had never heard of a pertinent before. There was also considerable discussion of such things as chimney stacks, flues and water tanks. At one point, another member of the committee said to me, “I’ve heard enough about chimney stacks, flues and water tanks.” It is technical; however, the bill will allow a modern system of management and maintenance to develop in tenements. In my constituency we have a large number of tenements, and I agree entirely with what Sarah Boyack said. People have approached me many times with problems about door entry systems, not being able to find owners and not being able to proceed with a repair because of the lack of unanimous agreement throughout the stair.

One of the major aspects of the bill is the fact that, if a group of people in a stair forms a majority, they will not need to worry about owners of whom they cannot get a hold. I remember one case in which an owner lived in Ceylon and there was no way in which the stair could get a unanimous decision, so the problem dragged on and on over years and years. I remember another instance in which pretty well everyone in a stair was in agreement about getting repairs done—they were major repairs; underpinning of the property was needed. There were 16 owners and only one owner refused to have anything to do with the repair work. The result was that the council eventually took over the repair works and the matter went on for a number of years. That set of repairs on the tenement was never completed because of the intransigence of one person, but that will simply not happen in future. That is one of the key aspects of the bill, and it will bring huge benefits to many people who live in tenements.

Where title deeds are defective, the bill will address the problem. Again, my experience tells me that that is a very welcome addition. If the title deeds are deficient, the tenement management scheme will rule, and there will be no problem.

The one contentious issue, to which I referred earlier, was purchasers’ liability. When the bill was introduced, perhaps the minister, civil servants and draftsmen had not appreciated the problem. The committee decided unanimously to address it, and the minister listened. The matter involved one or two small technical difficulties at one point, but those have been resolved and the minister has introduced amendments on the matter. I am delighted, because those amendments will have huge benefits to huge numbers of my constituents.

I agree entirely with the comments that Annabel Goldie and Kenny MacAskill have made. I welcome the bill. There is no doubt that, as the minister has said, it will become law quickly, and that is a great advantage to many people who live in tenements.

16:32

Karen Whitefield (Airdrie and Shotts) (Lab): I welcome the passing of the Tenements (Scotland) Bill, which concludes the Executive’s programme of property law reform, following the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003. The bill, which followed from the recommendations of the housing improvement task force, ensures that Scotland now has property law fit for the 21st century.

I, too, add my thanks to all who were involved in the passage of the bill, especially our committee clerks. Not every member of the committee had the detailed conveyancing knowledge that our convener did, and our clerks’ advice was
I welcome the Executive’s amendments to allow tenement owners to install door-entry systems by a majority vote. It is right that improvements should require a unanimous vote of tenement owners, as they are a matter of choice rather than necessity. However, secure entry systems benefit an entire tenement and could protect a building’s fabric. My colleague Sarah Boyack brought that important point to the Justice 2 Committee’s attention and we are all aware of how pleased she is with the Executive’s moves on the matter.

I am pleased that the Executive was able to respond to the concerns that the Justice 2 Committee raised during stage 2. The amendments that the Executive has lodged are reasonable and sensible responses to those concerns. In particular, the amendments on purchaser liability for work that has been done strike the right balance between the need to protect a purchaser’s interest and the need to protect other owners in a tenement. I also welcome Executive amendment 29, which removes the requirement to use a common insurance policy and gives tenement owners greater flexibility. That will ensure that owners are not required to overturn the way in which their tenements are insured.

I concur with other Justice 2 Committee members in thanking the committee clerks for helping us to understand a complicated bill. It remains to be seen how the bill will work in practice, but I hope that it creates benefits for tenement owners throughout Scotland.

I acknowledge that the bill is the third part of the property and land reform legislation that the Parliament has passed. It is a fair point that the bill, along with the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003, would in all likelihood not have been passed in the Westminster Parliament; that underlines this Parliament’s purpose.

I broadly welcome the bill. I was glad that the minister took on board—not only in her remarks today but in her conversations with the committee—many of the amendments that were suggested. However, it is now my belief that the Executive was right not to do that and that the scheme as proposed offers greater protection and flexibility.

I also welcome the tightening of obligations on owners and the clarification of the meanings of many liabilities. As Karen Whitefield said, a big part of the bill is the tenement management scheme, which I welcome.

I also welcome the Executive amendments to allow tenement owners to install door-entry systems by a majority vote. It is right that improvements should require a unanimous vote of tenement owners, as they are a matter of choice rather than necessity. However, secure entry systems benefit an entire tenement and could protect a building’s fabric. My colleague Sarah Boyack brought that important point to the Justice 2 Committee’s attention and we are all aware of how pleased she is with the Executive’s moves on the matter.

Many of the laws and practices that are reformed by the bill, and by the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003, were hundreds of years old. For many of those years, Westminster had neither the time nor the willingness to modernise those practices. Devolution has ensured that Scotland has a set of property and land laws that was created in and designed for life in 21st century Scotland. That is exactly why the Parliament was created. I am pleased to support the bill's passing.

16:37

Colin Fox (Lothians) (SSP): I put on record my support and that of my party for the bill—there goes anybody’s last hope that the cosy consensus would be shattered.

I, too, am a member of the Justice 2 Committee, which scrutinised the bill. I welcome the efforts in the bill to set a uniform, clear standard for title deeds and instructions to tenement owners on common repairs and maintenance. The bill makes several welcome proposals to clarify liability for costs and repairs for tenement owners and especially for new tenement owners.

I also welcome the tightening of obligations on owners and the clarification of the meanings of many liabilities. As Karen Whitefield said, a big part of the bill is the tenement management scheme, which I welcome.

I broadly welcome the bill. I was glad that the minister took on board—not only in her remarks today but in her conversations with the committee—many of the amendments that were produced as a consequence of the committee’s scrutiny of the bill.

I acknowledge that the bill is the third part of the property and land reform legislation that the Parliament has passed. It is a fair point that the bill, along with the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003, would in all likelihood not have been passed in the Westminster Parliament; that underlines this Parliament’s purpose.

I concur with other Justice 2 Committee members in thanking the committee clerks for helping us to understand a complicated bill. It remains to be seen how the bill will work in practice, but I hope that it creates benefits for tenement owners throughout Scotland.

The Deputy Presiding Officer: I would be grateful if members were slightly quieter than they have been.
secondly, to the members who have participated in the Parliament who have scrutinised the bill, and those of other members: first, to the committees of a significant step forward. The reforms have been widely welcomed. Like others, I congratulate the Executive, the Justice 2 Committee and the Scottish Law Commission on their work to bring the bill to its current stage.

The Green group of MSPs supports the policy intentions of the bill and the measures in it. Given that tenements represent more than a quarter of our housing stock—a much higher proportion than in other parts of the United Kingdom—the bill will impact on many people, including those who were mentioned by the minister who live in other types of buildings that we do not usually associate with tenements, and which will be covered. The bill will ensure that they benefit from a system of management and maintenance. I hope that that means that we, as MSPs, hear fewer complaints and calls for help from residents who are having difficulties in resolving issues related to repairs and improvements. In Glasgow, 60 per cent of residents—my good self included—live in tenements and all members will be aware of such issues being brought to us.

Some tenement properties are among the best housing that we have to offer, but others are among the worst. If they are kept in good condition and there is a sense of community and friendship among the residents, tenements offer a terrific way to live and one that probably has a lot to say about the future, not just the past, of housing in Scotland. Such good, cohesive community spirit still exists and there is much that we can do to encourage it.

As I say, the bill has received widespread support and has created a sense of hope for the slightly more ambitious ideas that could perhaps show up in the forthcoming housing bill. I hope that the minister is aware of some of the ideas that it was perhaps inappropriate to include in a tidying-up bill, but which many individuals and organisations hope to see in the housing (Scotland) bill for when we come to consider it.

I end by saying that I am very pleased to support the Tenements (Scotland) Bill today, and that I am very hopeful for an ambitious housing bill in the future.

16:42

The Deputy Minister for Communities (Mrs Mary Mulligan): I start by adding my thanks to those of other members: first, to the committees of the Parliament who have scrutinised the bill, and secondly, to the members who have participated in the debate. I also add my thanks to the bill team who have supported me and responded appropriately to the committee. They supported me even when I changed the order of the amendments—just to check whether anybody was paying attention.

I will pick up on a couple of points that have been made in the closing speeches this afternoon. I recognise that, good though the bill is, other issues still need to be examined. One of the issues that was raised by Kenny MacAskill and others centres on absent owners. Although we have partly addressed that issue through the amendments that Cathie Craigie introduced to the Antisocial Behaviour etc (Scotland) Bill on identifying absent landlords and establishing a register of them, I acknowledge that not every absent owner is a landlord, and so is therefore not necessarily encompassed within the register. We are therefore committed to consulting during the lead-up to the housing bill on how we could identify those who are owners but not landlords, in order to ensure that they have a say in the work that needs to be carried out on the tenements, thereby ensuring that our tenements are properly maintained and managed.

As has been said, the bill has been a model for how Parliament is supposed to operate. A full and detailed consultation process was conducted by the Scottish Law Commission, which produced the original draft of the bill, and the Executive then issued a consultation paper on which a wide variety of people commented. A considerable number of meetings were held with stakeholders and all the points that were raised were thoroughly considered. That was all informed by the work of the housing improvement task force, so the ground was well prepared before the bill was introduced in January.

The main policy issues were then carefully and thoroughly considered by the Justice 2 Committee and the committee’s stage 1 report demonstrated the degree of consensus that exists around the bill. As members will have seen this afternoon, many of the points that were raised by members during consideration at stage 2 have reappeared as Executive amendments at stage 3. We believe that those amendments and the detailed stage 2 discussions have strengthened the bill. Like Mike Pringle, I remember the many details about chimney stacks and water tanks—they will live with me for some time to come.

As many members have said, this afternoon we have been able to appreciate the value of having a Scottish Parliament. Even Kenny MacAskill’s comments about the advantages of having the Parliament show that the work that we do here is making a difference to the people of Scotland. Perhaps that will persuade Kenny MacAskill to rest...
with the will of the Scottish people, which is the Scottish Parliament as we have it today.

Christine Grahame (South of Scotland) (SNP): The minister is pushing her luck.

Mrs Mulligan: Well, I must.

After the bill is passed this afternoon, it will become an act that will make a real difference to the many Scots who have lived, currently live or will live in the tenements. I commend the bill to Parliament.
Tenements (Scotland) Bill

[AS PASSED]

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Tenements (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision about the boundaries and pertinents of properties comprised in tenements and for the regulation of the rights and duties of the owners of properties comprised in tenements; to make minor amendments of the Title Conditions (Scotland) Act 2003 (asp 9); and for connected purposes.

**Boundaries and pertinents**

1 Determination of boundaries and pertinents

(1) Except in so far as any different boundaries or pertinents are constituted by virtue of the title to the tenement, or any enactment, the boundaries and pertinents of sectors of a tenement shall be determined in accordance with sections 2 and 3 of this Act.

(2) In this Act, “title to the tenement” means—

(a) any conveyance, or reservation, of property which affects—

(i) the tenement; or

(ii) any sector in the tenement; and

(b) where an interest in—

(i) the tenement; or

(ii) any sector in the tenement,

has been registered in the Land Register of Scotland, the title sheet of that interest.

2 Tenement boundaries

(1) Subject to subsections (3) to (7) below, the boundary between any two contiguous sectors is the median of the structure that separates them; and a sector—

(a) extends in any direction to such a boundary; or

(b) if it does not first meet such a boundary—

(i) extends to and includes the solum or any structure which is an outer surface of the tenement building; or

(ii) extends to the boundary that separates the sector from a contiguous building which is not part of the tenement building.
(2) For the purposes of subsection (1) above, where the structure separating two contiguous sectors is or includes something (as for example, but without prejudice to the generality of this subsection, a door or window) which wholly or mainly serves only one of those sectors, the thing is in its entire thickness part of that sector.

(3) A top flat extends to and includes the roof over that flat.

(4) A bottom flat extends to and includes the solum under that flat.

(5) A close extends to and includes the roof over, and the solum under, the close.

(6) Where a sector includes the solum (or any part of it) the sector shall also include, subject to subsection (7) below, the airspace above the tenement building and directly over the solum (or part).

(7) Where the roof of the tenement building slopes, a sector which includes the roof (or any part of it) shall also include the airspace above the slope of the roof (or part) up to the level of the highest point of the roof.

3 Pertinents

(1) Subject to subsection (2) below, there shall attach to each of the flats, as a pertinent, a right of common property in (and in the whole of) the following parts of a tenement—

(a) a close;

(b) a lift by means of which access can be obtained to more than one of the flats.

(2) If a close or lift does not afford a means of access to a flat then there shall not attach to that flat, as a pertinent, a right of common property in the close or, as the case may be, lift.

(3) Any land (other than the solum of the tenement building) pertaining to a tenement shall attach as a pertinent to the bottom flat most nearly adjacent to the land (or part of the land); but this subsection shall not apply to any part which constitutes a path, outside stair or other way affording access to any sector other than that flat.

(4) If a tenement includes any part (such as, for example, a path, outside stair, fire escape, rhone, pipe, flue, conduit, cable, tank or chimney stack) that does not fall within subsection (1) or (3) above and that part—

(a) wholly serves one flat, then it shall attach as a pertinent to that flat;

(b) serves two or more flats, then there shall attach to each of the flats served, as a pertinent, a right of common property in (and in the whole of) the part.

(5) For the purposes of this section, references to rights of common property being attached to flats as pertinents are references to there attaching to each flat equal rights of common property; except that where the common property is a chimney stack the share allocated to a flat shall be determined in direct accordance with the ratio which the number of flues serving it in the stack bears to the total number of flues in the stack.

Tenement Management Scheme

4 Application of the Tenement Management Scheme

(1) The Tenement Management Scheme (referred to in this section as “the Scheme”), which is set out in schedule 1 to this Act, shall apply in relation to a tenement to the extent provided by the following provisions of this section.
(2) The Scheme shall not apply in any period during which the development management scheme applies to the tenement by virtue of section 71 of the Title Conditions (Scotland) Act 2003 (asp 9).

(3) The provisions of rule 1 of the Scheme shall apply, so far as relevant, for the purpose of interpreting any other provision of the Scheme which applies to the tenement.

(4) Rule 2 of the Scheme shall apply unless—
   (a) a tenement burden provides procedures for the making of decisions by the owners; and
   (b) the same such procedures apply as respects each flat.

(5) The provisions of Rule 3 of the Scheme shall apply to the extent that there is no tenement burden enabling the owners to make scheme decisions on any matter on which a scheme decision may be made by them under that Rule.

(6) Rule 4 of the Scheme shall apply in relation to any scheme costs incurred in relation to any part of the tenement unless a tenement burden provides that the entire liability for those scheme costs (in so far as liability for those costs is not to be met by someone other than an owner) is to be met by one or more of the owners.

(7) The provisions of rule 5 of the Scheme shall apply to the extent that there is no tenement burden making provision as to the liability of the owners in the circumstances covered by the provisions of that rule.

(7A) The provisions of rule 5A of the Scheme shall apply to the extent that there is no tenement burden making provision as to the effect of any procedural irregularity in the making of a scheme decision on—
   (a) the validity of the decision; or
   (b) the liability of any owner affected by the decision.

(8) Rule 6 of the Scheme shall apply to the extent that there is no tenement burden making provision—
   (a) for an owner to instruct or carry out any emergency work as defined in that rule; or
   (b) as to the liability of the owners for the cost of any emergency work as so defined.

(9) The provisions of—
   (a) rule 7; and
   (b) subject to subsection (10) below, rule 8,

of the Scheme shall apply, so far as relevant, for the purpose of supplementing any other provision of the Scheme which applies to the tenement.

(10) The provisions of rule 8 are subject to any different provision in any tenement burden.

(11) The Scottish Ministers may by order substitute for the sums for the time being specified in rule 3.3 of the Scheme such other sums as appear to them to be justified by a change in the value of money appearing to them to have occurred since the last occasion on which the sums were fixed.

(12) Where some but not all of the provisions of the Scheme apply, references in the Scheme to “the scheme” shall be read as references only to those provisions of the Scheme which apply.
(13) In this section, “scheme costs” and “scheme decision” have the same meanings as they have in the Scheme.

Resolution of disputes

5 Application to sheriff for annulment of certain decisions

(1) Where a decision is made by the owners in accordance with the management scheme which applies as respects the tenement (except where that management scheme is the development management scheme), an owner mentioned in subsection (1A) below may, by summary application, apply to the sheriff for an order annulling the decision.

(1A) That owner is—

(a) any owner who, at the time the decision referred to in subsection (1) above was made, was not in favour of the decision; or

(b) any new owner, that is to say, any person who was not an owner at that time but who has since become an owner.

(2) For the purposes of any such application, the defender shall be all the other owners.

(3) An application under subsection (1) above shall be made—

(a) in a case where the decision was made at a meeting attended by the owner making the application, not later than 28 days after the date of that meeting; or

(b) in any other case, not later than 28 days after the date on which notice of the making of the decision was given to the owner for the time being of the flat in question.

(4) The sheriff may, if satisfied that the decision—

(a) is not in the best interests of all (or both) the owners taken as a group; or

(b) is unfairly prejudicial to one or more of the owners,

make an order annulling the decision (in whole or in part).

(5) Where such an application is made as respects a decision to carry out maintenance, improvements or alterations, the sheriff shall, in considering whether to make an order under subsection (4) above, have regard to—

(a) the age of the property which is to be maintained, improved or, as the case may be, altered;

(b) its condition;

(c) the likely cost of any such maintenance, improvements or alterations; and

(d) the reasonableness of that cost.

(6) Where the sheriff makes an order under subsection (4) above annulling a decision (in whole or in part), the sheriff may make such other, consequential, order as the sheriff thinks fit (as, for example, an order as respects the liability of owners for any costs already incurred).

(7) A party may not later than fourteen days after the date of—

(a) an order under subsection (4) above; or

(b) an interlocutor dismissing such an application,

appeal to the Court of Session on a point of law.
(8) A decision of the Court of Session on an appeal under subsection (7) above shall be final.

(9) Where an owner is entitled to make an application under subsection (1) above in relation to any decision, no step shall be taken to implement that decision unless—

(a) the period specified in subsection (3) above within which such an application is to be made has expired without such an application having been made and notified to the owners; or

(b) where such an application has been so made and notified—

(i) the application has been disposed of and either the period specified in subsection (7) above within which an appeal against the sheriff’s decision may be made has expired without such an appeal having been made or such an appeal has been made and disposed of; or

(ii) the application has been abandoned.

(10) Subsection (9) above does not apply to a decision relating to work which requires to be carried out urgently.

6 Application to sheriff for order resolving certain disputes

(1) Any owner may by summary application apply to the sheriff for an order relating to any matter concerning the operation of—

(a) the management scheme which applies as respects the tenement (except where that management scheme is the development management scheme); or

(b) any provision of this Act in its application as respects the tenement.

(3) Where an application is made under subsection (1) above the sheriff may, subject to such conditions (if any) as the sheriff thinks fit—

(a) grant the order craved; or

(b) make such other order under this section as the sheriff considers necessary or expedient.

(4) A party may not later than fourteen days after the date of—

(a) an order under subsection (3) above; or

(b) an interlocutor dismissing such an application,

appeal to the Court of Session on a point of law.

(5) A decision of the Court of Session on an appeal under subsection (4) above shall be final.

Support and shelter

7 Abolition as respects tenements of common law rules of common interest

Any rule of law relating to common interest shall, to the extent that it applies as respects a tenement, cease to have effect; but nothing in this section shall affect the operation of any such rule of law in its application to a question affecting both a tenement and—

(a) some other building or former building (whether or not a tenement); or

(b) any land not pertaining to the tenement.
8 **Duty to maintain so as to provide support and shelter etc.**

(1) Subject to subsection (2) below, the owner of any part of a tenement building, being a part that provides, or is intended to provide, support or shelter to any other part, shall maintain the supporting or sheltering part so as to ensure that it provides support or shelter.

(2) An owner shall not by virtue of subsection (1) above be obliged to maintain any part of a tenement building if it would not be reasonable to do so, having regard to all the circumstances (and including, in particular, the age of the tenement building, its condition and the likely cost of any maintenance).

(3) The duty imposed by subsection (1) above on an owner of a part of a tenement building may be enforced by any other such owner who is, or would be, directly affected by any breach of the duty.

(4) Where two or more persons own any such part of a tenement building as is referred to in subsection (1) above in common, any of them may, without the need for the agreement of the others, do anything that is necessary for the purpose of complying with the duty imposed by that subsection.

9 **Prohibition on interference with support or shelter etc.**

(1) No owner or occupier of any part of a tenement shall be entitled to do anything in relation to that part which would, or would be reasonably likely to, impair to a material extent—

(a) the support or shelter provided to any part of the tenement building; or

(b) the natural light enjoyed by any part of the tenement building.

(2) The prohibition imposed by subsection (1) above on an owner or occupier of a part of a tenement may be enforced by any other such owner who is, or would be, directly affected by any breach of the prohibition.

10 **Recovery of costs incurred by virtue of section 8**

Where—

(a) by virtue of section 8 of this Act an owner carries out maintenance to any part of a tenement; and

(b) the management scheme which applies as respects the tenement provides for the maintenance of that part,

the owner shall be entitled to recover from any other owner any share of the cost of the maintenance for which that other owner would have been liable had the maintenance been carried out by virtue of the management scheme in question.

**Repairs: costs and access**

10A **Determination of when an owner’s liability for certain costs arises**

(1) An owner is liable for any relevant costs (other than accumulating relevant costs) arising from a scheme decision from the date when the scheme decision to incur those costs is made.
(2) For the purposes of subsection (1) above, a scheme decision is, in relation to an owner, taken to be made on—

(a) where the decision is made at a meeting, the date of the meeting; or

(b) in any other case, the date on which notice of the making of the decision is given to the owner.

(3) An owner is liable for any relevant costs arising from any emergency work from the date on which the work is instructed.

(4) An owner is liable for any relevant costs of the kind mentioned in rule 4.1(d) of the Tenement Management Scheme from the date of any statutory notice requiring the carrying out of the work to which those costs relate.

(5) An owner is liable for any accumulating relevant costs (such as the cost of an insurance premium) on a daily basis.

(6) Except where subsection (1) above applies in relation to the costs, an owner is liable for any relevant costs arising from work instructed by a manager from the date on which the work is instructed.

(7) An owner is liable in accordance with section 10 of this Act for any relevant costs arising from maintenance carried out by virtue of section 8 of this Act from the date on which the maintenance is completed.

(7A) An owner is liable for any relevant costs other than those to which subsections (1) to (7) above apply from—

(a) such date; or

(b) the occurrence of such event,

as may be stipulated as the date on, or event in, which the costs become due.

(7B) For the purposes of this section and section 11 of this Act, “relevant costs” means, as respects a flat—

(a) the share of any costs for which the owner is liable by virtue of the management scheme which applies as respects the tenement (except where that management scheme is the development management scheme); and

(b) any costs for which the owner is liable by virtue of this Act.

(8) In this section, “emergency work”, “manager” and “scheme decision” have the same meanings as they have in the Tenement Management Scheme.

11 Liability of owner and successors for certain costs

(1) Any owner who is liable for any relevant costs shall not, by virtue only of ceasing to be such an owner, cease to be liable for those costs.

(2) Subject to subsection (2A) below, where a person becomes an owner (any such person being referred to in this section as a “new owner”), that person shall be severally liable with any former owner of the flat for any relevant costs for which the former owner is liable.

(2A) A new owner shall be liable as mentioned in subsection (2) above for relevant costs relating to any maintenance or work (other than local authority work) carried out before the acquisition date only if—

(a) notice of the maintenance or work—

11 Liability of owner and successors for certain costs

(1) Any owner who is liable for any relevant costs shall not, by virtue only of ceasing to be such an owner, cease to be liable for those costs.

(2) Subject to subsection (2A) below, where a person becomes an owner (any such person being referred to in this section as a “new owner”), that person shall be severally liable with any former owner of the flat for any relevant costs for which the former owner is liable.

(2A) A new owner shall be liable as mentioned in subsection (2) above for relevant costs relating to any maintenance or work (other than local authority work) carried out before the acquisition date only if—

(a) notice of the maintenance or work—
(i) in, or as near as may be in, the form set out in schedule 1A to this Act; and
(ii) containing the information required by the notes for completion set out in that schedule,
(such a notice being referred to in this section and section 11ZA of this Act as a “notice of potential liability for costs”) was registered in relation to the new owner’s flat at least 14 days before the acquisition date; and

(b) the notice had not expired before the acquisition date.

(2B) In subsection (2A) above—

“acquisition date” means the date on which the new owner acquired right to the flat; and

“local authority work” means work carried out by a local authority by virtue of any enactment.

(3) Where a new owner pays any relevant costs for which a former owner of the flat is liable, the new owner may recover the amount so paid from the former owner.

(5) This section applies as respects any relevant costs for which an owner becomes liable on or after the day on which this section comes into force.

11ZA Notice of potential liability for costs: further provision

(1) A notice of potential liability for costs—

(a) may be registered in relation to a flat only on the application of—

(i) the owner of the flat;

(ii) the owner of any other flat in the same tenement; or

(iii) any manager (within the meaning of the Tenement Management Scheme) of the tenement; and

(b) shall not be registered unless it is signed by or on behalf of the applicant.

(2) A notice of potential liability for costs may be registered—

(a) in relation to more than one flat in respect of the same maintenance or work; and

(b) in relation to any one flat, in respect of different maintenance or work.

(3) A notice of potential liability for costs expires at the end of the period of 3 years beginning with the date of its registration, unless the notice is renewed by being registered again before the end of that period.

(4) This section applies to a renewed notice of potential liability for costs as it applies to any other such notice.

(5) The Keeper of the Registers of Scotland shall not be required to investigate or determine whether the information contained in any notice of potential liability for costs submitted for registration is accurate.

(6) The Scottish Ministers may by order amend schedule 1A to this Act.

(7) In section 12 of the Land Registration (Scotland) Act 1979 (c.33), in subsection (3) (which specifies losses for which there is no entitlement to be indemnified by the Keeper under that section), after paragraph (p) there shall be added—
“(q) the loss arises in consequence of an inaccuracy in any information contained in a notice of potential liability for costs registered in pursuance of—

(i) section 10(2A)(a) or 10A(3) of the Title Conditions (Scotland) Act 2003 (asp 9); or

(ii) section 11(2A)(a) or 11ZA(3) of the Tenements (Scotland) Act 2004 (asp 00).”

11A Former owner’s right to recover costs

An owner who is entitled, by virtue of the Tenement Management Scheme or any other provision of this Act, to recover any costs or a share of any costs from any other owner shall not, by virtue only of ceasing to be an owner, cease to be entitled to recover those costs or that share.

12 Prescriptive period for costs to which section 11 relates

In Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (obligations affected by prescriptive periods of five years to which section 6 of that Act applies)—

(a) after paragraph 1(aa) there shall be inserted—

“(ab) to any obligation to pay a sum of money by way of costs to which section 11 of the Tenements (Scotland) Act 2004 (asp 00) applies;”; and

(b) in paragraph 2(e), for the words “or (aa)” there shall be substituted “, (aa) or (ab)”.

13 Common property: disapplication of common law right of recovery

Any rule of law which enables an owner of common property to recover the cost of necessary maintenance from the other owners of the property shall not apply in relation to any common property in a tenement where the maintenance of that property is provided for in the management scheme which applies as respects the tenement.

14 Access for maintenance and other purposes

(1) Where an owner gives reasonable notice to the owner or occupier of any other part of the tenement that access is required to, or through, that part for any of the purposes mentioned in subsection (3) below, the person given notice shall, subject to subsection (5) below, allow access for that purpose.

(2) Without prejudice to subsection (1) above, where the development management scheme applies, notice under that subsection may be given by any owners’ association established by the scheme to the owner or occupier of any part of the tenement.

(3) The purposes are—

(a) carrying out maintenance or other work by virtue of the management scheme which applies as respects the tenement;

(b) carrying out maintenance to any part of the tenement owned (whether solely or in common) by the person requiring access;

(c) carrying out an inspection to determine whether it is necessary to carry out maintenance;
(d) determining whether the owner of the part is fulfilling the duty imposed by section 8(1) of this Act;

(e) determining whether the owner or occupier of the part is complying with the prohibition imposed by section 9(1) of this Act;

(ea) doing anything which the owner giving notice is entitled to do by virtue of section 15A(1) of this Act;

(f) where floor area is relevant for the purposes of determining any liability of owners, measuring floor area; and

(g) where a power of sale order has been granted in relation to the tenement building or its site, doing anything necessary for the purpose of or in connection with any sale in pursuance of the order (other than complying with paragraph 3(3) of schedule 2 to this Act).

(4) Reasonable notice need not be given as mentioned in subsection (1) above where access is required for the purpose specified in subsection (3)(a) above and the maintenance or other work requires to be carried out urgently.

(5) An owner or occupier may refuse to allow—

(a) access under subsection (1) above; or

(b) such access at a particular time,

if, having regard to all the circumstances (and, in particular, whether the requirement for access is reasonable), it is reasonable to refuse access.

(6) Where access is allowed under subsection (1) above for any purpose, such right of access may be exercised by—

(a) the owner who or owners’ association which gave notice that access was required; or

(b) such person as the owner or, as the case may be, owners’ association may authorise for the purpose (any such person being referred to in this section as an “authorised person”).

(7) Where an authorised person acting in accordance with subsection (6) above is liable by virtue of any enactment or rule of law for damage caused to any part of a tenement, the owner who or owners’ association which authorised that person shall be severally liable with the authorised person for the cost of remedying the damage; but an owner or, as the case may be, owners’ association making any payment as respects that cost shall have a right of relief against the authorised person.

(8) Where access is allowed under subsection (1) above for any purpose, the owner who or owners’ association which gave notice that access was required (referred to as the “accessing owner or association”) shall, so far as reasonably practicable, ensure that the part of the tenement to or through which access is allowed is left substantially in no worse a condition than that which it was in when access was taken.

(9) If the accessing owner or association fails to comply with the duty in subsection (8) above, the owner of the part to or through which access is allowed may—

(a) carry out, or arrange for the carrying out of, such work as is reasonably necessary to restore the part so that it is substantially in no worse a condition than that which it was in when access was taken; and

(b) recover from the accessing owner or association any expenses reasonably incurred in doing so.
Insurance

15 **Obligation of owner to insure**

(1) It shall be the duty of each owner to effect and keep in force a contract of insurance against the prescribed risks for the reinstatement value of that owner’s flat and any part of the tenement building attaching to that flat as a pertinent.

(2) The duty imposed by subsection (1) above may be satisfied, in whole or in part, by way of a common policy of insurance arranged for the entire tenement building.

(3) The Scottish Ministers may by order prescribe risks against which an owner shall require to insure (in this section referred to as the “prescribed risks”).

(4) Where, whether because of the location of the tenement or otherwise, an owner—

   (a) having made reasonable efforts to do so, is unable to obtain insurance against a particular prescribed risk; or
   (b) would be able to obtain such insurance but only at a cost which is unreasonably high,

the duty imposed by subsection (1) above shall not require an owner to insure against that particular risk.

(5) Any owner may by notice in writing request the owner of any other flat in the tenement to produce evidence of—

   (a) the policy in respect of any contract of insurance which the owner of that other flat is required to have or to effect; and
   (b) payment of the premium for any such policy,

and not later than 14 days after that notice is given the recipient shall produce to the owner giving the notice the evidence requested.

(6) The duty imposed by subsection (1) above on an owner may be enforced by any other owner.

15A **Installation of service pipes etc.**

(1) Subject to subsections (2) and (3) below and to section 14 of this Act, an owner shall be entitled—

   (a) to lead through any part of the tenement such pipe, cable or other equipment; and
   (b) to fix to any part of the tenement, and keep there, such equipment,

as is necessary for the provision to that owner’s flat of such service or services as the Scottish Ministers may by regulations prescribe.

(2) The right conferred by subsection (1) above is exercisable only in accordance with such procedure as the Scottish Ministers may by regulations prescribe; and different procedures may be so prescribed in relation to different services.

(3) An owner is not entitled by virtue of subsection (1) above to lead anything through or fix anything to any part which is wholly within another owner’s flat.

(4) This section is without prejudice to any obligation imposed by virtue of any enactment relating to—
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(a) planning;
(b) building; or
(c) any service prescribed under subsection (1) above.

Demolition and abandonment of tenement building

16 Demolition of tenement building not to affect ownership

(1) The demolition of a tenement building shall not alone effect any change as respects any right of ownership.

(2) In particular, the fact that, as a consequence of demolition of a tenement building, any land pertaining to the building no longer serves, or affords access to, any flat or other sector shall not alone effect any change of ownership of the land as a pertinent.

17 Cost of demolishing tenement building

(1) Except where a tenement burden otherwise provides, the cost of demolishing a tenement building shall, subject to subsection (2) below, be shared equally among all (or both) the flats in the tenement, and each owner is liable accordingly.

(2) Where the floor area of the largest (or larger) flat in the tenement is more than one and a half times that of the smallest (or smaller) flat the owner of each flat shall be liable to contribute towards the cost of demolition of the tenement building in the proportion which the floor area of that owner’s flat bears to the total floor area of all (or both) the flats.

(3) An owner is liable under this section for the cost of demolishing a tenement building—

(a) in the case where the owner agrees to the proposal that the tenement building be demolished, from the date of the agreement; or

(b) in any other case, from the date on which the carrying out of the demolition is instructed.

(4) This section applies as respects the demolition of part of a tenement building as it applies as respects the demolition of an entire tenement building but with any reference to a flat in the tenement being construed as a reference to a flat in the part.

(5) In this section references to flats in a tenement include references to flats which were comprehended by the tenement before its demolition.

(6) This section is subject to section 123 of the Housing (Scotland) Act 1987 (c.26) (which makes provision as respects demolition of buildings in pursuance of local authority demolition orders and recovery of expenses by local authorities etc.).

18 Use and disposal of site where tenement building demolished

(1) This section applies where a tenement building is demolished and after the demolition two or more flats which were comprehended by the tenement building before its demolition (any such flat being referred to in this section as a “former flat”) are owned by different persons.

(2) Except in so far as—

(a) the owners of all (or both) the former flats otherwise agree; or
(b) those owners are subject to a requirement (whether imposed by a tenement burden or otherwise) to erect a building on the site or to rebuild the tenement, no owner may build on, or otherwise develop, the site.

(3) Except where the owners have agreed, or are required, to build on or develop the site as mentioned in paragraphs (a) and (b) of subsection (2) above, any owner of a former flat shall be entitled to apply for power to sell the entire site in accordance with schedule 2.

(4) Except where a tenement burden otherwise provides, the net proceeds of any sale in pursuance of subsection (3) above shall, subject to subsection (5) below, be shared equally among all (or both) the former flats and the owner of each former flat shall be entitled to the share allocated to that flat.

(5) Where—
(a) evidence of the floor area of each of the former flats is readily available; and
(b) the floor area of the largest (or larger) former flat was more than one and a half times that of the smallest (or smaller) former flat,
the net proceeds of any sale shall be shared among (or between) the flats in the proportion which the floor area of each flat bore to the total floor area of all (or both) the flats and the owner of each former flat shall be entitled to the share allocated to that flat.

(6) The prohibition imposed by subsection (2) above on an owner of a former flat may be enforced by any other such owner.

(6A) In subsections (4) and (5) above, “net proceeds of any sale” means the proceeds of the sale less any expenses properly incurred in connection with the sale.

(7) In this section references to the site are references to the solum of the tenement building that occupied the site together with the airspace that is directly above the solum and any land pertaining, as a means of access, to the tenement building immediately before its demolition.

### Sale of abandoned tenement building

(1) Where—
(a) because of its poor condition a tenement building has been entirely unoccupied by any owner or person authorised by an owner for a period of more than six months; and
(b) it is unlikely that any such owner or other person will occupy any part of the tenement building,
any owner shall be entitled to apply for power to sell the tenement building in accordance with schedule 2.

(2) Subsections (4) and (5) of section 18 of this Act shall apply as respects a sale in pursuance of subsection (1) above as those subsections apply as respects a sale in pursuance of subsection (3) of that section.

(3) In this section any reference to a tenement building includes a reference to its solum and any land pertaining, as a means of access, to the tenement building.
Liability for certain costs

21 Liability to non-owner for certain damage costs

(1) Where—

(a) any part of a tenement is damaged as the result of the fault of any person (that person being in this subsection referred to as “A”); and

(b) the management scheme which applies as respects the tenement makes provision for the maintenance of that part,

any owner of a flat in the tenement (that owner being in this subsection referred to as “B”) who is required by virtue of that provision to contribute to any extent to the cost of maintenance of the damaged part but who at the time when the damage was done was not an owner of the part shall be treated, for the purpose of determining whether A is liable to B as respects the cost of maintenance arising from the damage, as having been such an owner at that time.

(2) In this section “fault” means any wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages.

Miscellaneous and general

22 Amendments of Title Conditions (Scotland) Act 2003

The Title Conditions (Scotland) Act 2003 (asp 9) shall be amended in accordance with schedule 3.

23 Meaning of “tenement”

(1) In this Act, “tenement” means a building or a part of a building which comprises two related flats which, or more than two such flats at least two of which—

(a) are, or are designed to be, in separate ownership; and

(b) are divided from each other horizontally,

and, except where the context otherwise requires, includes the solum and any other land pertaining to that building or, as the case may be, part of the building; and the expression “tenement building” shall be construed accordingly.

(2) In determining whether flats comprised in a building or part of a building are related for the purposes of subsection (1), regard shall be had, among other things, to—

(a) the title to the tenement; and

(b) any tenement burdens,

treating the building or part for that purpose as if it were a tenement.

23A Meaning of “management scheme”

References in this Act to the management scheme which applies as respects any tenement are references to—

(a) if the Tenement Management Scheme applies in its entirety as respects the tenement, that Scheme;

(b) if the development management scheme applies as respects the tenement, that scheme; or
(c) in any other case, any tenement burdens relating to maintenance, management or improvement of the tenement together with any provisions of the Tenement Management Scheme which apply as respects the tenement.

### 24 Meaning of “owner”, determination of liability etc.

(A1) In this Act, references to “owner” without further qualification are, in relation to any tenement, references to the owner of a flat in the tenement.

(1) Subject to subsection (2) below, in this Act “owner” means, in relation to a flat in a tenement, a person who has right to the flat whether or not that person has completed title; but if, in relation to the flat (or, if the flat is held *pro indiviso*, any *pro indiviso* share in it) more than one person comes within that description of owner, then “owner” means such person as has most recently acquired such right.

(2) Where a heritable security has been granted over a flat and the heritable creditor has entered into lawful possession, “owner” means the heritable creditor in possession of the flat.

(3) Subject to subsection (4) below, if two or more persons own a flat in common, any reference in this Act to an owner is a reference to both or, as the case may be, all of them.

(4) Any reference to an owner in sections 5(1) and (1A), 6(1), 8(3), 9, 10, 11 to 11A, 14(1), (6) and (7), 15(5) and (6), 15A, 18, 20 and 21 of, and schedule 2 to, this Act shall be construed as a reference to any person who owns a flat either solely or in common with another.

(4A) Subsections (1) to (4) above apply to references in this Act to the owner of a part of a tenement as they apply to references to the owner of a flat, but as if references in them to a flat were to the part of the tenement.

(5) Where two or more persons own a flat in common—

(a) they are severally liable for the performance of any obligation imposed by virtue of this Act on the owner of that flat; and

(b) as between (or among) themselves they are liable in the proportions in which they own the flat.

### 25 Interpretation

(1) In this Act, unless the content otherwise requires—

“chimney stack” does not include flue or chimney pot;

“close” means a connected passage, stairs and landings within a tenement building which together constitute a common access to two or more of the flats;

“demolition” includes destruction and cognate expressions shall be construed accordingly; and demolition may occur on one occasion or over any period of time;

“the development management scheme” has the meaning given by section 71(3) of the Title Conditions (Scotland) Act 2003 (asp 9);

“door” includes its frame;

“flat” includes any premises whether or not—

(a) used or intended to be used for residential purposes; or
(b) on the one floor;

“lift” includes its shaft and operating machinery;

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39);

“owner” shall be construed in accordance with section 24 of this Act;

“power of sale order” means an order granted under paragraph 1 of schedule 2 to this Act;

“register”, in relation to a notice of potential liability for costs or power of sale order, means register the information contained in the notice or order in the Land Register of Scotland or, as appropriate, record the notice or order in the Register of Sasines, and “registered” and other related expressions shall be construed accordingly;

“sector” means—

(a) a flat;

(b) any close or lift; or

(c) any other three-dimensional space not comprehended by a flat, close or lift, and the tenement building shall be taken to be entirely divided into sectors;

“solum” means the ground on which a building is erected;

“tenement” shall be construed in accordance with section 23 of this Act;

“tenement burden” means, in relation to a tenement, any real burden (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) which affects—

(a) the tenement; or

(b) any sector in the tenement;

“Tenement Management Scheme” means the scheme set out in schedule 1 to this Act;

“title to the tenement” shall be construed in accordance with section 1(2) of this Act; and

“window” includes its frame.

(2) The floor area of a flat is calculated for the purposes of this Act by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat—

(a) a balcony; and

(b) except where it is used for any purpose other than storage, a loft or basement.

25A Giving of notice to owners

(1) Any notice which is to be given to an owner under or in connection with this Act (other than under or in connection with the Tenement Management Scheme) may be given in writing by sending the notice to—

(a) the owner; or

(b) the owner’s agent.
(2) The reference in subsection (1) above to sending a notice is to its being—
(a) posted;
(b) delivered; or
(c) transmitted by electronic means.

(3) Where an owner cannot by reasonable inquiry be identified or found, a notice shall be taken for the purposes of subsection (1)(a) above to be sent to the owner if it is posted or delivered to the owner’s flat addressed to “The Owner” or using some similar expression such as “The Proprietor”.

(4) For the purposes of this Act—
(a) a notice posted shall be taken to be given on the day of posting; and
(b) a notice transmitted by electronic means shall be taken to be given on the day of transmission.

26 Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of this Act.

(2) An order under this section may modify any enactment (including this Act), instrument or document.

27 Orders and regulations

(1) Any power of the Scottish Ministers to make orders or regulations under this Act shall be exercisable by statutory instrument.

(2) A statutory instrument containing an order or regulations under this Act (except an order under section 29(2) or, where subsection (3) applies, section 26) shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

(3) Where an order under section 26 contains provisions which add to, replace or omit any part of the text of an Act, the order shall not be made unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, the Parliament.

28 Crown application

This Act, except section 15, binds the Crown.

29 Short title and commencement

(1) This Act may be cited as the Tenements (Scotland) Act 2004.

(2) This Act (other than this section, section 22 and schedule 3) shall come into force on such day as the Scottish Ministers may by order appoint; and different days may be appointed for different purposes.

(3) Section 22 and schedule 3 shall come into force on the day after Royal Assent.
SCHEDULE 1
(introduced by section 4)

TENEMENT MANAGEMENT SCHEME

RULE 1 – SCOPE AND INTERPRETATION

1.1 Scope of scheme
This scheme provides for the management and maintenance of the scheme property of a tenement.

1.2 Meaning of “scheme property”
For the purposes of this scheme, “scheme property” means, in relation to a tenement, all or any of the following—

(a) any part of the tenement that is the common property of two or more of the owners,

(b) any part of the tenement (not being common property of the type mentioned in paragraph (a) above) the maintenance of which, or the cost of maintaining which, is, by virtue of a tenement burden, the responsibility of two or more of the owners,

(c) with the exceptions mentioned in rule 1.3, the following parts of the tenement building (so far as not scheme property by virtue of paragraph (a) or (b) above)—

(i) the ground on which it is built,

(ii) its foundations,

(iii) its external walls,

(iv) its roof (including any rafter or other structure supporting the roof),

(v) if it is separated from another building by a gable wall, the part of the gable wall that is part of the tenement building, and

(vi) any wall (not being one falling within the preceding sub-paragraphs), beam or column that is load-bearing.

1.3 Parts not included in rule 1.2(c)
The following parts of a tenement building are the exceptions referred to in rule 1.2(c)—

(a) any extension which forms part of only one flat,

(b) any—

(i) door,

(ii) window,

(iii) skylight,

(iv) vent, or

(v) other opening,

which serves only one flat,

(c) any chimney stack or chimney flue.
1.4 **Meaning of “scheme decision”**

A decision is a “scheme decision” for the purposes of this scheme if it is made in accordance with—

(a) rule 2, or

(b) where that rule does not apply, the tenement burden or burdens providing the procedure for the making of decisions by the owners.

1.5 **Other definitions**

In this scheme—

“maintenance” includes repairs and replacement, cleaning, painting and other routine works, gardening, the day-to-day running of a tenement and the reinstatement of a part (but not most) of the tenement building, but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance,

“manager” means, in relation to a tenement, a person appointed (whether or not by virtue of rule 3.1(c)(i)) to manage the tenement, and

“scheme costs” has the meaning given by rule 4.1.

1.6 **Rights of co-owners**

If a flat is owned by two or more persons, then one of them may do anything that the owner is by virtue of this scheme entitled to do.

**RULE 2 – PROCEDURE FOR MAKING SCHEME DECISIONS**

2.1 **Making scheme decisions**

Any decision to be made by the owners shall be made in accordance with the following provisions of this rule.

2.2 **Allocation and exercise of votes**

Except as mentioned in rule 2.3, for the purpose of voting on any proposed scheme decision one vote is allocated as respects each flat, and any right to vote is exercisable by the owner of that flat or by someone nominated by the owner to vote as respects the flat.

2.3 **Qualification on allocation of votes**

No vote is allocated as respects a flat if—

(a) the scheme decision relates to the maintenance of scheme property, and

(b) the owner of that flat is not liable for maintenance of, or the cost of maintaining, the property concerned.
2.4 Exercise of vote where two or more persons own flat

If a flat is owned by two or more persons the vote allocated as respects that flat may be exercised in relation to any proposal by either (or any) of them, but if those persons disagree as to how the vote should be cast then the vote is not to be counted unless—

(a) where one of those persons owns more than a half share of the flat, the vote is exercised by that person, or

(b) in any other case, the vote is the agreed vote of those who together own more than a half share of the flat.

2.5 Decision by majority

A scheme decision is made by majority vote of all the votes allocated.

2.7 Notice of meeting

If any owner wishes to call a meeting of the owners with a view to making a scheme decision at that meeting that owner must give the other owners at least 48 hours’ notice of the date and time of the meeting, its purpose and the place where it is to be held.

2.8 Consultation of owners if scheme decision not made at meeting

If an owner wishes to propose that a scheme decision be made but does not wish to call a meeting for the purpose that owner must instead—

(a) unless it is impracticable to do so (whether because of absence of any owner or for other good reason) consult on the proposal each of the other owners of flats as respects which votes are allocated, and

(b) count the votes cast by them.

2.9 Consultation where two or more persons own flat

For the purposes of rule 2.8, the requirement to consult each owner is satisfied as respects any flat which is owned by more than one person if one of those persons is consulted.

2.10 Notification of scheme decisions

A scheme decision must, as soon as practicable, be notified—

(a) if it was made at a meeting, to all the owners who were not present when the decision was made, by such person as may be nominated for the purpose by the persons who made the decision, or

(b) in any other case, to each of the other owners, by the owner who proposed that the decision be made.

2.11 Case where decision may be annulled by notice

Any owner (or owners) who did not vote in favour of a scheme decision to carry out, or authorise, maintenance to scheme property and who would be liable for not less than 75 per cent. of the scheme costs arising from that decision may, within the time mentioned in rule 2.12, annul that decision by giving notice that the decision is annulled to each of the other owners.
2.12 Time limits for rule 2.11

The time within which a notice under rule 2.11 must be given is—

(a) if the scheme decision was made at a meeting attended by the owner (or any of the owners), not later than 21 days after the date of that meeting, or

(b) in any other case, not later than 21 days after the date on which notification of the making of the decision was given to the owner or owners (that date being, where notification was given to owners on different dates, the date on which it was given to the last of them).

RULE 3 – MATTERS ON WHICH SCHEME DECISIONS MAY BE MADE

3.1 Basic scheme decisions

The owners may make a scheme decision on any of the following matters—

(a) to carry out maintenance to scheme property,

(b) to arrange for an inspection of scheme property to determine whether or to what extent it is necessary to carry out maintenance to the property,

(c) except where a power conferred by a manager burden (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) is exercisable in relation to the tenement—

(i) to appoint on such terms as they may determine a person (who may be an owner or a firm) to manage the tenement,

(ii) to dismiss any manager,

(d) to delegate to a manager power to exercise such of their powers as they may specify, including, without prejudice to that generality, any power to decide to carry out maintenance and to instruct it,

(e) to arrange for the tenement a common policy of insurance complying with section 15 of this Act and against such other risks (if any) as the owners may determine and to determine on an equitable basis the liability of each owner to contribute to the premium,

(ea) to install a system enabling entry to the tenement to be controlled from each flat,

(f) to determine that an owner is not required to pay a share (or some part of a share) of such scheme costs as may be specified by them,

(g) to authorise any maintenance of scheme property already carried out,

(h) to modify or revoke any scheme decision.

3.2 Scheme decisions relating to maintenance

If the owners make a scheme decision to carry out maintenance to scheme property or if a manager decides, by virtue of a scheme decision, that maintenance needs to be carried out to scheme property, the owners may make a scheme decision on any of the following matters—

(a) to appoint on such terms as they may determine a person (who may be an owner or a firm) to manage the carrying out of the maintenance,
(b) to instruct or arrange for the carrying out of the maintenance,

(c) subject to rule 3.3, to require each owner to deposit—

(i) by such date as they may decide (being a date not less than 28 days after the requirement is made of that owner), and

(ii) with such person as they may nominate for the purpose,

a sum of money (being a sum not exceeding that owner’s apportioned share of a reasonable estimate of the cost of the maintenance),

(d) to take such other steps as are necessary to ensure that the maintenance is carried out to a satisfactory standard and completed in good time.

3.3 Scheme decisions under rule 3.2(c) requiring deposits exceeding certain amounts

A requirement, in pursuance of a scheme decision under rule 3.2(c), that each owner deposit a sum of money—

(a) exceeding £100, or

(b) of £100 or less where the aggregate of that sum taken together with any other sum or sums required (otherwise than by a previous notice under this rule) in the preceding 12 months to be deposited by each owner by virtue any scheme decision under rule 3.2(c) exceeds £200,

shall be made by written notice to each owner and shall require the sum to be deposited into such account (the “maintenance account”) as the owners may nominate for the purpose.

3.4 Provision supplementary to rule 3.3

Where a requirement is, or is to be, made in accordance with rule 3.3—

(a) the owners may make a scheme decision authorising a manager or at least two other persons (whether or not owners) to operate the maintenance account on behalf of the owners,

(b) there must be contained in or attached to the notice to be given under rule 3.3 a note comprising a summary of the nature and extent of the maintenance to be carried out together with the following information—

(i) the estimated cost of carrying out that maintenance,

(ii) why the estimate is considered a reasonable estimate,

(iii) how the sum required from the owner in question and the apportionment among the owners have been arrived at,

(iv) what the apportioned shares of the other owners are,

(v) the date on which the decision to carry out the maintenance was made and the names of those by whom it was made,

(vi) a timetable for the carrying out of the maintenance, including the dates by which it is proposed the maintenance will be commenced and completed,

(vii) the location and number of the maintenance account, and

(viii) the names and addresses of the persons who will be authorised to operate that account on behalf of the owners,
(c) the maintenance account to be nominated under rule 3.3 must be a bank or building society account which is interest bearing, and the authority of at least two persons or of a manager on whom has been conferred the right to give authority, must be required for any payment from it,

5 (d) if a modification or revocation under rule 3.1(h) affects the information contained in the notice or the note referred to in paragraph (b) above, the information must be sent again, modified accordingly, to the owners,

(e) an owner is entitled to inspect, at any reasonable time, any tender received in connection with the maintenance to be carried out,

10 (ea) the notice to be given under rule 3.3 may specify a date as a refund date for the purposes of paragraph (f)(i) below,

(f) if—

(i) the maintenance is not commenced by—

(A) where the notice under rule 3.3 specifies a refund date, that date, or

15 (B) where that notice does not specify such a date, the twenty-eighth day after the proposed date for its commencement as specified in the notice by virtue of paragraph (b)(vi) above, and

(ii) a depositor demands, by written notice, from the persons authorised under paragraph (a) above repayment (with accrued interest) of such sum as has been deposited by that person in compliance with the scheme decision under rule 3.2(c),

the depositor is entitled to be repaid accordingly, except that no requirement to make repayment in compliance with a notice under sub-paragraph (ii) arises if the persons so authorised do not receive that notice before the maintenance is commenced,

(g) such sums as are held in the maintenance account by virtue of rule 3.3 are held in trust for all the depositors, for the purpose of being used by the persons authorised to make payments from the account as payment for the maintenance,

(h) any sums held in the maintenance account after all sums payable in respect of the maintenance carried out have been paid shall be shared among the depositors—

30 (i) by repaying each depositor, with any accrued interest and after deduction of that person’s apportioned share of the actual cost of the maintenance, the sum which the person deposited, or

(ii) in such other way as the depositors agree in writing.

3.5 Scheme decisions under rule 3.1(f): votes of persons standing to benefit not to be counted

A vote in favour of a scheme decision under rule 3.1(f) is not to be counted if—

(a) the owner exercising the vote, or

(b) where the vote is exercised by a person nominated by an owner—

40 (i) that person, or

(ii) the owner who nominated that person,
is the owner or an owner who, by virtue of the decision, would not be required to pay as mentioned in that rule.

**RULE 4 – SCHEME COSTS: LIABILITY AND APPORTIONMENT**

4.1 **Meaning of “scheme costs”**

Except in so far as rule 5 applies, this rule provides for the apportionment of liability among the owners for any of the following costs—

(a) any costs arising from any maintenance or inspection of scheme property where the maintenance or inspection is in pursuance of, or authorised by, a scheme decision,

(b) any remuneration payable to a person appointed to manage the carrying out of such maintenance as is mentioned in paragraph (a),

(c) running costs relating to any scheme property (other than costs incurred solely for the benefit of one flat),

(d) any costs recoverable by a local authority in respect of work relating to any scheme property carried out by them by virtue of any enactment,

(e) any remuneration payable to any manager,

(f) the cost of any common insurance to cover the tenement,

(fza) the cost of installing a system enabling entry to the tenement to be controlled from each flat,

(fa) any costs relating to the calculation of the floor area of any flat, where such calculation is necessary for the purpose of determining the share of any other costs for which each owner is liable,

(g) any other costs relating to the management of scheme property,

and a reference in this scheme to “scheme costs” is a reference to any of the costs mentioned in paragraphs (a) to (g).

4.2 **Maintenance and running costs**

Except as provided in rule 4.3, if any scheme costs mentioned in rule 4.1(a) to (d) relate to—

(a) the scheme property mentioned in rule 1.2(a), then those costs are shared among the owners in the proportions in which the owners share ownership of that property,

(b) the scheme property mentioned in rule 1.2(b) or (c), then—

(i) in any case where the floor area of the largest (or larger) flat is more than one and a half times that of the smallest (or smaller) flat, each owner is liable to contribute towards those costs in the proportion which the floor area of that owner’s flat bears to the total floor area of all (or both) the flats,

(ii) in any other case, those costs are shared equally among the flats,

and each owner is liable accordingly.
4.3 **Scheme costs relating to roof over the close**

Where—

(a) any scheme costs mentioned in rule 4.1(a) to (d) relate to the roof over the close, and

(b) that roof is common property by virtue of section 3(1)(a) of this Act,

then, despite the fact that the roof is scheme property mentioned in rule 1.2(a), paragraph (b) of rule 4.2 shall apply for the purpose of apportioning liability for those costs.

4.5 **Insurance premium**

Any scheme costs mentioned in rule 4.1(f) are shared among the flats—

(a) where the costs relate to common insurance arranged by virtue of rule 3.1(e), in such proportions as may be determined by the owners by virtue of that rule, or

(b) where the costs relate to common insurance arranged by virtue of a tenement burden, equally,

and each owner is liable accordingly.

4.6 **Other scheme costs**

Any scheme costs mentioned in rule 4.1(e), (fza), (fa) or (g) are shared equally among the flats, and each owner is liable accordingly.

**RULE 5 – REDISTRIBUTION OF SHARE OF COSTS**

5.2 **Redistribution of share of costs**

Where an owner is liable for a share of any scheme costs but—

(a) a scheme decision has been made determining that the share (or a portion of it) should not be paid by that owner, or

(b) the share cannot be recovered for some other reason such as that—

(i) the estate of that owner has been sequestrated, or

(ii) that owner cannot, by reasonable inquiry, be identified or found,

then that share must be paid by the other owners who are liable for a share of the same costs (the share being divided equally among the flats of those other owners), but where paragraph (b) applies that owner is liable to each of those other owners for the amount paid by each of them.

**RULE 5A – PROCEDURAL IRREGULARITIES**

5A.1 **Validity of scheme decisions**

Any procedural irregularity in the making of a scheme decision does not affect the validity of the decision.
5.3 Liability for scheme costs where procedural irregularity
If any owner is directly affected by a procedural irregularity in the making of a scheme decision and that owner—

(a) was not aware that any scheme costs relating to that decision were being incurred, or

(b) on becoming aware as mentioned in paragraph (a), immediately objected to the incurring of those costs,

that owner is not liable for any such costs (whether incurred before or after the date of objection), and, for the purposes of determining the share of those scheme costs due by each of the other owners, that owner is left out of account.

RULE 6 – EMERGENCY WORK

6.1 Power to instruct or carry out
Any owner may instruct or carry out emergency work.

6.2 Liability for cost
The owners are liable for the cost of any emergency work instructed or carried out as if the cost of that work were scheme costs mentioned in rule 4.1(a).

6.3 Meaning of “emergency work”
For the purposes of this rule, “emergency work” means work which, before a scheme decision can be obtained, requires to be carried out to scheme property—

(a) to prevent damage to any part of the tenement, or

(b) in the interests of health or safety.

RULE 7 – ENFORCEMENT

7.1 Scheme binding on owners
This scheme binds the owners.

7.2 Scheme decision to be binding
A scheme decision is binding on the owners and their successors as owners.

7.3 Enforceability of scheme decisions
Any obligation imposed by this scheme or arising from a scheme decision may be enforced by any owner.

7.4 Enforcement by third party
Any person authorised in writing for the purpose by the owner or owners concerned may—

(a) enforce an obligation such as is mentioned in rule 7.3 on behalf of one or more owners, and
(b) in doing so, may bring any claim or action in that person’s own name.

RULE 8 – GIVING OF NOTICE

8.2 Giving of notice

Any notice which requires to be given to an owner under or in connection with this scheme may be given in writing by sending the notice to—

(a) the owner, or
(b) the owner’s agent.

8.3 Methods of “sending” for the purposes of rule 8.2

The reference in rule 8.2 to sending a notice is to its being—

(a) posted,
(b) delivered, or
(c) transmitted by electronic means.

8.4 Giving of notice to owner where owner’s name is not known

Where an owner cannot by reasonable inquiry be identified or found, a notice shall be taken for the purposes of rule 8.2(a) to be sent to the owner if it is posted or delivered to the owner’s flat addressed to “The Owner” or using some other similar expression such as “The Proprietor”.

8.5 Day on which notice is to be taken to be given

For the purposes of this scheme—

(a) a notice posted shall be taken to be given on the day of posting, and
(b) a notice transmitted by electronic means shall be taken to be given on the day of transmission.

SCHEDULE 1A

(introduced by section 11(2A))

FORM OF NOTICE OF POTENTIAL LIABILITY FOR COSTS

“Notice of potential liability for costs

This notice gives details of certain maintenance or work carried out in relation to the flat specified in the notice. The effect of the notice is that a person may, on becoming the owner of the flat, be liable by virtue of section 11(2A) of the Tenements (Scotland) Act 2004 (asp 00) for any outstanding costs relating to the maintenance or work.

Flat to which notice relates:

(see note 1 below)
Description of the maintenance or work to which notice relates:
(see note 2 below)

Person giving notice:
(see note 3 below)

Signature:
(see note 4 below)

Date of signing:

Notes for completion

(These notes are not part of the notice)

1 Describe the flat in a way that is sufficient to identify it. Where the flat has a postal address, the description must include that address. Where title to the flat has been registered in the Land Register of Scotland, the description must refer to the title number of the flat or of the larger subjects of which it forms part. Otherwise, the description should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

2 Describe the maintenance or work in general terms.

3 Give the name and address of the person applying for registration of the notice (“the applicant”) or the applicant’s name and the name and address of the applicant’s agent.

4 The notice must be signed by or on behalf of the applicant.

SCHEDULE 2
(introduced by sections 18(3) and 20(1))

SALE UNDER SECTION 18(3) OR 20(1)

Application to sheriff for power to sell

1 (1) Where an owner is entitled to apply—

(a) under section 18(3), for power to sell the site; or

(b) under section 20(1), for power to sell the tenement building,

the owner may make a summary application to the sheriff seeking an order (referred to in this Act as a “power of sale order”) conferring such power on the owner.

(2) The site or tenement building in relation to which an application or order is made under sub-paragraph (1) is referred to in this schedule as the “sale subjects”.

(3) An owner making an application under sub-paragraph (1) shall give notice of it to each of the other owners of the sale subjects.

(4) The sheriff shall, on an application under sub-paragraph (1)—

(a) grant the power of sale order sought unless satisfied that to do so would—
(i) not be in the best interests of all (or both) the owners taken as a group; or
(ii) be unfairly prejudicial to one or more of the owners; and
(b) if a power of sale order has previously been granted in respect of the same sale
subjects, revoke that previous order.

(5) A power of sale order shall contain—
(a) the name and address of the owner in whose favour it is granted;
(b) the postal address of each flat or, as the case may be, former flat comprised in the
sale subjects to which the order relates; and
(c) a sufficient conveyancing description of each of those flats or former flats.

(6) A description of a flat or former flat is a sufficient conveyancing description for the
purposes of sub-paragraph (5)(c) if—
(a) where the interest of the proprietor of the land comprising the flat or former flat
has been registered in the Land Register of Scotland, the description refers to the
number of the title sheet of that interest; or
(b) in relation to any other flat or former flat, the description is by reference to a deed
recorded in the Register of Sasines.

(7) An application under sub-paragraph (1) shall state the applicant’s conclusions as to—
(a) which of subsections (4) and (5) of section 18 applies for the purpose of
determining how the net proceeds of any sale of the sale subjects in pursuance of a
power of sale order are to be shared among the owners of those subjects; and
(b) if subsection (5) of that section is stated as applying for that purpose—
   (i) the floor area of each of the flats or former flats comprised in the sale
       subjects; and
   (ii) the proportion of the net proceeds of sale allocated to that flat.

Appeal against grant or refusal of power of sale order

1A(1) A party may, not later than 14 days after the date of—
   (a) making of a power of sale order; or
   (b) an interlocutor refusing an application for such an order,
   appeal to the Court of Session on a point of law.

(2) The decision of the Court of Session on any such appeal shall be final.

Registration of power of sale order

2 (1) A power of sale order has no effect—
   (a) unless it is registered within the period of 14 days after the relevant day; and
   (b) until the beginning of the forty-second day after the day on which it is so
       registered.

(2) In sub-paragraph (1)(a) above, “the relevant day” means, in relation to a power of sale
order—
Tenements (Scotland) Bill

Schedule 2—Sale under section 18(3) or 20(1)

(a) the last day of the period of 14 days within which an appeal against the order may be lodged under paragraph 1A(1) of this schedule; or
(b) if such an appeal is duly lodged, the day on which the appeal is abandoned or determined.

Exercise of power of sale

3 (1) An owner in whose favour a power of sale order is granted may exercise the power conferred by the order by private bargain or by exposure to sale.

(2) However, in either case, the owner shall—
(a) advertise the sale; and
(b) take all reasonable steps to ensure that the price at which the sale subjects are sold is the best that can reasonably be obtained.

(3) In advertising the sale in pursuance of sub-paragraph (2)(a) above, the owner shall, in particular, ensure that there is placed and maintained on the sale subjects a conspicuous sign—
(a) advertising the fact that the sale subjects are for sale; and
(b) giving the name and contact details of the owner or of any agent acting on the owner’s behalf in connection with the sale.

(4) So far as may be necessary for the purpose of complying with sub-paragraph (3) above, the owner or any person authorised by the owner shall be entitled to enter any part of the sale subjects not owned, or not owned exclusively, by that owner.

Distribution of proceeds of sale

4 (1) An owner selling the sale subjects (referred to in this paragraph as the “selling owner”) shall, within seven days of completion of the sale—
(a) calculate each owner’s share; and
(b) apply that share in accordance with sub-paragraph (2) below.

(2) An owner’s share shall be applied—
(a) first, to repay any amounts due under any heritable security affecting that owner’s flat or former flat;
(b) next, to defray any expenses properly incurred in complying with paragraph (a) above; and
(c) finally, to pay to the owner the remainder (if any) of that owner’s share.

(3) If there is more than one heritable security affecting an owner’s flat or former flat, the owner’s share shall be applied under paragraph (2)(a) above in relation to each security in the order in which they rank.

(4) If any owner cannot by reasonable inquiry be identified or found, the selling owner shall consign the remainder of that owner’s share in the sheriff court.

(5) On paying to another owner the remainder of that owner’s share, the selling owner shall also give to that other owner—
(a) a written statement showing—
(i) the amount of that owner’s share and of the remainder of it; and
(ii) how that share and remainder were calculated; and

(b) evidence of—

(i) the total amount of the proceeds of sale; and

(ii) any expenses properly incurred in connection with the sale and in complying with sub-paragraph (2)(a) above.

(6) In this paragraph—

“remainder”, in relation to an owner’s share, means the amount of that share remaining after complying with sub-paragraph (2)(a) and (b) above;

“share”, in relation to an owner, means the share of the net proceeds of sale to which that owner is entitled in accordance with subsection (4) or, as the case may be, subsection (5) of section 18.

**Automatic discharge of heritable securities**

5 Where—

(a) an owner—

(i) sells the sale subjects in pursuance of a power of sale order; and

(ii) grants a disposition of those subjects to the purchaser or the purchaser’s nominee;

(b) that disposition is duly registered in the Land Register of Scotland or recorded in the Register of Sasines,

all heritable securities affecting the sale subjects or any part of them shall, by virtue of this paragraph, be to that extent discharged.

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**SCHEDULE 3**

*(introduced by section 22)*

**AMENDMENTS OF TITLE CONDITIONS (SCOTLAND) ACT 2003**

1 The Title Conditions (Scotland) Act 2003 (asp 9) shall be amended as follows.

2 In section 3(8) (waiver, mitigation and variation of real burdens), for “the holder” there shall be substituted “a holder”.

3 In section 4 (creation of real burdens), in subsection (7), after “sections” there shall be inserted “53(3A),”.

4 In section 10 (affirmative burdens: continuing liability of former owner)—

(a) in subsection (2), at the beginning there shall be inserted “Subject to subsection (2A) below,”;

(b) after subsection (2) there shall be inserted—

“(2A) A new owner shall be liable as mentioned in subsection (2) above for any relevant obligation consisting of an obligation to pay a share of costs relating to maintenance or work (other than local authority work) carried out before the acquisition date only if—

(a) notice of the maintenance or work—
(i) in, or as near as may be in, the form set out in schedule 1A to this Act; and
(ii) containing the information required by the notes for completion set out in that schedule,

(such a notice being referred to in this section and section 10A of this Act as a “notice of potential liability for costs”) was registered in relation to the burdened property at least 14 days before the acquisition date; and

(b) the notice had not expired before the acquisition date.

(2B) In subsection (2A) above—

“acquisition date” means the date on which the new owner acquired right to the burdened property; and

“local authority work” means work carried out by a local authority by virtue of any enactment.”; and

(c) at the end there shall be added—

“(5) This section does not apply in any case where section 11 of the Tenements (Scotland) Act 2004 (asp 00) applies.”.

After section 10 there shall be inserted—

“10A Notice of potential liability for costs: further provision

(1) A notice of potential liability for costs—

(a) may be registered in relation to burdened property only on the application of—

(i) an owner of the burdened property;

(ii) an owner of the benefited property; or

(iii) any manager; and

(b) shall not be registered unless it is signed by or on behalf of the applicant.

(2) A notice of potential liability for costs may be registered—

(a) in relation to more than one burdened property in respect of the same maintenance or work; and

(b) in relation to any one burdened property, in respect of different maintenance or work.

(3) A notice of potential liability for costs expires at the end of the period of 3 years beginning with the date of its registration, unless it is renewed by being registered again before the end of that period.

(4) This section applies to a renewed notice of potential liability for costs as it applies to any other such notice.

(5) The Keeper of the Registers of Scotland shall not be required to investigate or determine whether the information contained in any notice of potential liability for costs submitted for registration is accurate.

(6) The Scottish Ministers may by order amend schedule 1A to this Act.”

In section 11 (affirmative burdens: shared liability), after subsection (3) there shall be inserted—
“(3A) For the purposes of subsection (3) above, the floor area of a flat is calculated by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat—

(a) a balcony; and

(b) except where it is used for any purpose other than storage, a loft or basement.”.

7 In section 25 (definition of the expression “community burdens”), in subsection (1)(a), for “four” there shall be substituted “two”.

8 In section 29 (power of majority to instruct common maintenance)—

(a) in subsection (2)—

(i) in paragraph (b)—

(A) for the words from the beginning to “that” where it first occurs there shall be substituted “subject to subsection (3A) below, require each”; and

(B) for sub-paragraph (ii) there shall be substituted—

“(ii) with such person as they may nominate for the purpose,”; and

(ii) paragraph (c) shall be omitted;

(b) after subsection (3) there shall be inserted—

“(3A) A requirement under subsection (2)(b) above that each owner deposit a sum of money—

(a) exceeding £100; or

(b) of £100 or less where the aggregate of that sum taken together with any other sum or sums required (otherwise than by a previous notice under this subsection) in the preceding 12 months to be deposited under that subsection by each owner exceeds £200, shall be made by written notice to each owner and shall require the sum to be deposited into such account (the “maintenance account”) as the owners may nominate for the purpose.

(3B) The owners may authorise a manager or at least two other persons (whether or not owners) to operate the maintenance account on their behalf.”;

(c) in subsection (4), for “(2)(b)” there shall be substituted “(3A)”;

(d) after subsection (6) there shall be inserted—

“(6A) The notice given under subsection (2)(b) above may specify a date as a refund date for the purposes of subsection (7)(b)(i) below.”;

(e) in subsection (7)(b)—

(i) in sub-paragraph (i), for “the fourteenth” there shall be substituted “—

(A) where the notice under subsection (2)(b) above specifies a refund date, that date; or

(B) where that notice does not specify such a date, the twenty-eighth”; and

(ii) in sub-paragraph (ii), for “(4)(h)” there shall be substituted “(3B)”;
(f) after subsection (7) there shall be inserted—

“(7A) A former owner who, before ceasing to be an owner, deposited sums in compliance with a requirement under subsection (2)(b) above, shall have the same entitlement as an owner has under subsection (7)(b) above.”;

(g) in subsection (8), for “(2)(b)” there shall be substituted “(3A)”; and

(h) after subsection (9) there shall be inserted—

“(10) The Scottish Ministers may by order substitute for the sums for the time being specified in subsection (3A) above such other sums as appear to them to be justified by a change in the value of money appearing to them to have occurred since the last occasion on which the sums were fixed.”.

9 After section 31 there shall be inserted—

“31A  Disapplication of provisions of sections 28, 29 and 31 in certain cases

(1) Sections 28(1)(a) and (d) and (2)(a), 29 and 31 of this Act shall not apply in relation to a community consisting of one tenement.

(2) Sections 28(1)(a) and (d) and 31 of this Act shall not apply to a community in any period during which the development management scheme applies to the community.”.

10 In section 33 (majority etc. variation and discharge of community burdens)—

(a) in subsection (1)(b), the words “where no such provision is made,” shall be omitted; and

(b) in subsection (2)(a), at the beginning there shall be inserted “where no such provision as is mentioned in subsection (1)(a) above is made,”.

11 In section 35 (variation and discharge of community burdens by owners of adjacent units), in subsection (1), the words “in a case where no such provision as is mentioned in section 33(1)(a) of this Act is made” shall be omitted.

12 In section 43 (rural housing burdens)—

(a) in subsection (1), after “burden” where it first occurs there shall be inserted “over rural land”; and

(b) in subsection (6), for “on rural land or to provide rural” there shall be substituted “or”.

13 In section 45 (economic development burdens), subsection (6) shall be omitted.

14 In section 53 (common schemes: related properties), after subsection (3) there shall be inserted—

“(3A) Section 4 of this Act shall apply in relation to any real burden to which subsection (1) above applies as if—

(a) in subsection (2), paragraph (c)(ii);

(b) subsection (4); and

(c) in subsection (5), the words from “and” to the end, were omitted.”

15 In section 90 (powers of Lands Tribunals as respects title conditions), in subsection (8A), for “application” there shall be substituted “disapplication”.
In section 98 (granting certain applications for variation, discharge, renewal or preservation of title conditions), in paragraph (b)(i), for the words “the owners of all” there shall be substituted “all the owners (taken as a group) of”.

In section 99 (granting applications as respects development management schemes), in subsection (4)(a), for the words “the owners” there shall be substituted “all the owners (taken as a group)”.

In section 119 (savings and transitional provision etc.), subsection (9) shall be omitted.

In section 122(1) (interpretation)—
(a) the definition of “flat” shall be omitted;
(b) after the definition of “Lands Tribunal” there shall be inserted—

“‘local authority’ means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39);”; and

(c) for the definition of “tenement” there shall be substituted—

“‘tenement’ has the meaning given by section 23 of the Tenements (Scotland) Act 2004 (asp 00); and references to a flat in a tenement shall be construed accordingly;”.

After schedule 1 there shall be inserted—

“SCHEDULE 1A
(introduced by section 10(2A))

FORM OF NOTICE OF POTENTIAL LIABILITY FOR COSTS

“NOTICE OF POTENTIAL LIABILITY FOR COSTS

This notice gives details of certain maintenance or work carried out in relation the property specified in the notice. The effect of the notice is that a person may, on becoming the owner of the property, be liable by virtue of section 10(2A) of the Title Conditions (Scotland) Act 2003 (asp 9) for any outstanding costs relating to the maintenance or work.

Property to which the notice relates:
(see note 1 below)

Description of the maintenance or work to which notice relates:
(see note 2 below)

Person giving notice:
(see note 3 below)

Signature:
(see note 4 below)

Date of signing:”
Notes for completion

(These notes are not part of the notice)

1. Describe the property in a way that is sufficient to identify it. Where the property has a postal address, the description must include that address. Where title to the property has been registered in the Land Register of Scotland, the description must refer to the title number of the property or of the larger subjects of which it forms part. Otherwise, the description should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

2. Describe the maintenance or work in general terms.

3. Give the name and address of the person applying for registration of the notice (“the applicant”) or the applicant’s name and the name and address of the applicant’s agent.

4. The notice must be signed by or on behalf of the applicant.”
Tenements (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to make provision about the boundaries and pertinents of properties comprised in tenements and for the regulation of the rights and duties of the owners of properties comprised in tenements; to make minor amendments of the Title Conditions (Scotland) Act 2003 (asp 9); and for connected purposes.

Introduced by:  Ms Margaret Curran
On: 30 January 2004
Supported by: Cathy Jamieson, Mrs Mary Mulligan
Bill type: Executive Bill