EXPLANATORY NOTES

(TENEMENTS (SCOTLAND) 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.

COMMENTS 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 pays 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
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:
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- 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 Tenement 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 Tenement Management Scheme.

120. The Tenement 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 Tenement 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
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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.
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SUMMARY OF COSTS

Judicial salaries £15,000 per annum
Scottish Court Service £5000 per annum
Legal aid £60,000 per annum
Insurance Up to £190 per annum to insure a reinstatement sum of £100,000

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.”