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
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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
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
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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
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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.
DEMONLITION AND ABANDONMENT OF TENEMENT BUILDING: SECTIONS 16–20

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.
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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.
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
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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.
TENEMENTS (SCOTLAND) BILL

POLICY MEMORANDUM

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