Passage of the

Long Leases (Scotland) Bill 2012

SPPB 178
Passage of the

Long Leases (Scotland) Bill 2012

SP Bill 7 (Session 4), subsequently 2012 asp 9

SPPB 178
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Foreword

Purpose of the series

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

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

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected.

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

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

Outline of the legislative process

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

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

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

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

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

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above. It is the second Long Leases (Scotland) Bill that has been put before the Parliament. The first was introduced in November 2010 but had not completed its passage before the Parliament was dissolved in March 2011 prior to the May 2011 Scottish Parliament election, and therefore fell.

None of the Annexes to the Rural Affairs, Climate Change and Environment Committee’s Stage 1 Report were printed in the hard copy but were published on the web only. They are included in this volume.

The Government response to the Subordinate Legislation Committee Report was considered after Stage 1, and was noted by the Committee without debate. The Committee meeting papers (containing the Government response) are included in this volume after Stage 1.

The Bill was not amended at Stage 3, and therefore not reprinted ‘As Passed’.
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Long Leases (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to convert certain long leases into ownership; to provide for the conversion into real burdens of certain rights and obligations under such leases; to provide for payment to former owners of land of compensation for loss of it on conversion; and for connected purposes.

PART 1

CONVERSION OF LONG LEASE TO OWNERSHIP

Determination of “qualifying lease”

1 Meaning of “qualifying lease”

(1) A lease is a “qualifying lease” if it complies with subsection (3).

(2) Subsection (1) is subject to section 3.

(3) A lease complies with this subsection if, immediately before the appointed day, it is a right of lease in land—

(a) which is registered,

(b) granted for a period of more than 175 years, and

(c) in respect of which the unexpired portion of that period is more than 100 years.

(4) But a lease does not so comply if—

(a) the annual rent payable under the lease is over £100,

(b) the subjects of the lease include a harbour (either wholly or partly) in relation to which there is a harbour authority,

(c) it is one granted for the sole purpose of allowing the tenant to install and maintain pipes or cables, or

(d) it is one either—

(i) of minerals, or

(ii) which includes minerals and in respect of which a royalty, lordship or other payment of rent determined by reference to the exploitation of those minerals is or may be payable.
(5) Where a lease is divided (whether as a result of partial assignation or otherwise), each part is treated as a separate lease for the purposes of this Act.

2 Further provision about annual rent

(1) This section applies for the purposes of section 1(4)(a) in determining the annual rent payable under a lease.

(2) Subject to subsections (3) to (5), the rent payable under a lease is the rent as set out in the lease (or as the case may be the assignation of the lease).

(3) Where a cumulo rent is payable in relation to two or more leases, the annual rent payable under each lease is deemed to be nil.

(4) Any rent payable under a lease which is expressed wholly or partly in non-monetary terms is, to the extent that it is so expressed, to be left out of account.

(5) Any rent payable under a lease which is variable from year to year is, to the extent that it is so variable, to be left out of account.

3 Only one lease is qualifying lease

(1) This section applies where land is subject to two or more potential qualifying leases.

(2) Subsections (3) and (4) have effect for the purposes of determining—

(a) which of the leases is the qualifying lease, and

(b) of which land the lease is a qualifying lease.

(3) A potential qualifying lease is not a qualifying lease if all of the land which forms the subjects of the lease forms the subjects of an inferior lease.

(4) In any other case, a potential qualifying lease is the qualifying lease of land that—

(a) forms the subjects of the potential qualifying lease, but

(b) does not form the subjects of an inferior lease.

(5) In this section—

“potential qualifying lease” means a lease that complies with section 1(3),

“inferior lease”, in relation to a potential qualifying lease, means a sublease—

(a) of the whole or part of the subjects of the potential qualifying lease, and

(b) which is itself a potential qualifying lease.

Conversion of right of lease to ownership

4 Conversion of right of lease to right of ownership

(1) On the appointed day—

(a) a qualifying lease becomes the right of ownership of the land in relation to which it is the qualifying lease,

(b) any right of ownership of that land existing immediately before that day is extinguished, and

(c) any superior lease is extinguished.

(2) Subsection (1) is subject to section 62(1) (exempt leases not to convert).
(3) In this Act, a “superior lease” means a lease of land in relation to which, and to the extent that, a qualifying lease is a sublease of that land.

**Consequences of conversion**

5 Extinction of certain rights and obligations

(1) Subject to subsection (2), and sections 6 and 7 and Part 2, all rights and obligations arising (whether expressly or by implication) from—

(a) a qualifying lease, and

(b) any superior lease,

are extinguished on the appointed day.

(2) Subsection (1) does not affect any right or obligation arising from a lease mentioned in that subsection in so far as that right or obligation is, by its nature, enforceable only as a personal right or obligation, that is to say, the right or obligation could not be enforced by or against the successor of a party to the lease.

(3) Despite subsection (1)—

(a) rent continues to be payable for any period before the appointed day, and

(b) if (in so far as so payable) it has not fallen due before that day, it falls due on that day.

(4) Subject to subsection (5)—

(a) on or after the appointed day, no proceedings for enforcement of any such rights or obligations as are mentioned in subsection (1) may be commenced,

(b) any proceedings already commenced for such enforcement are deemed to have been abandoned on that day and may, without further process and without any requirement that full judicial expenses be paid by the pursuer, be dismissed accordingly, and

(c) any decree or interlocutor already pronounced in proceedings for such enforcement is deemed to have been reduced or (as the case may be) recalled on that day.

(5) Subsection (4) does not affect any proceedings, decree or interlocutor in relation to—

(a) a right or obligation which subsists by virtue of section 6,

(b) a right or obligation which is created under section 7,

(c) a right or obligation which is converted under Part 2,

(d) a right to recover damages or to the payment of money (including rent), or

(e) a right of irritancy.

6 Subordinate real rights, reservations and pertinents

(1) This section applies where a right of ownership in land is created by the conversion of a qualifying lease under section 4(1)(a) (such land being referred to in this section as “the converted land”).

(2) The converted land is subject to any subordinate real rights to which the qualifying lease was, immediately before the appointed day, subject.
The converted land is, subject to subsection (4), subject to—

(a) any subordinate real rights (other than any superior lease extinguished by virtue of section 4(1)(c)), and

(b) any other encumbrances,

to which the converted land itself was, immediately before the appointed day, subject.

Any heritable security or proper liferent to which the converted land itself was subject immediately before the appointed day is, on that day and to the extent that the security or liferent affected the land, extinguished.

The converted land—

(a) includes any pertinent (whether express or implied) of the qualifying lease which, by its nature, may be a pertinent of land, and

(b) excludes anything capable of being held as a separate tenement in land (including any right so held by virtue of section 8) which is reserved (whether expressly or by implication) from—

(i) the qualifying lease, or

(ii) any superior lease.

Creation of servitudes on conversion

This section applies where a right of ownership in land is created by the conversion of a qualifying lease under section 4(1)(a) (such land being referred to in this section as “the converted land”).

The converted land includes or (as the case may be) is subject to any servitudes which would have been created (whether expressly, by implication or by positive prescription) had the original grant of—

(a) the qualifying lease,

(b) any superior lease, or

(c) any partial assignation of a lease, where the subjects of that lease include the land which forms the subjects of the qualifying lease,

been a conveyance of land.

Conversion of reserved sporting rights

This section applies where a right of—

(a) game, or

(b) fishing,

is reserved (whether expressly or by implication) from a qualifying lease or superior lease (such a right being referred to in this Act as a “sporting right”).

A landlord may, before the appointed day, execute and register a notice in the prescribed form.

The notice must—

(a) set out the title of the landlord,

(b) identify the land affected by the sporting right,
(c) set out the terms of such right, and
(d) set out the terms of any counter-obligation to the right.

(4) For the purposes of subsection (2)—

(a) a notice is registered only when registered against the land identified in pursuance of subsection (3)(b), and
(b) the notice may be registered against the title of the owner of the land or the tenant under the qualifying lease.

(5) Before submitting a notice for registration under this section, the landlord must swear or affirm before a notary public that to the best of the knowledge and belief of the landlord all the information contained in the notice is true.

(6) For the purposes of subsection (5)—

(a) if the landlord is—

(i) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the landlord may swear or affirm, or
(ii) not an individual, then any person authorised to sign documents on its behalf may swear or affirm, and

(b) any reference in that subsection to the landlord is to be construed in accordance with paragraph (a).

(7) If subsections (2) to (6) are complied with (and immediately before the appointed day the sporting right to which the notice relates is still enforceable), on the appointed day—

(a) that right becomes a separate tenement in land,
(b) in the case of a right of game, the separate tenement comprises—

(i) in a case where the right is expressly reserved, the rights and obligations specified in the lease and, in so far as is consistent with those express rights and obligations, an exclusive right to take hare, pheasant, partridge, grouse, and ptarmigan (any particular type of each where applicable),
(ii) in a case where the right is reserved by implication, an exclusive right to take hare, pheasant, partridge, grouse and ptarmigan (any particular type of each where applicable), and

(c) in the case of a right of fishing, the separate tenement comprises—

(i) in a case where the right is expressly reserved, the rights and obligations specified in the lease and, in so far as is consistent with those express rights and obligations, an exclusive right to fish for freshwater fish,
(ii) in a case where the right is reserved by implication, an exclusive right to fish for freshwater fish.

(8) Any exclusive right conferred by subsection (7)(b) is subject to section 1 of the Ground Game Act 1880 (c.47) (right of occupier to kill and take ground game).

(9) Where a right becomes, under subsection (7)(a), a separate tenement in land—

(a) that right is subject to any counter-obligation enforceable immediately before the appointed day, and
(b) without prejudice to any other way in which such a counter-obligation may be extinguished, any such counter-obligation is extinguished on the extinction of the right.

(10) In this section and section 9, any reference to a “landlord” is a reference—

(a) in a case where there is one superior lease, to the landlord under the superior lease,

(b) in a case where there are two or more superior leases, to the landlord under whichever of those leases is not itself subject to a superior lease.

(11) This section is subject to section 75.

9  Further provision for section 8

(1) Where more than one qualifying lease is affected by the same sporting right, a landlord must, if that landlord wishes to execute and register a notice under section 8(2) in relation to those qualifying leases in respect of that right, do so in relation to each separately.

(2) Where a qualifying lease is affected by more than one sporting right, a landlord may, if that landlord wishes to execute and register a notice under section 8(2), do so by a single notice.

PART 2  
CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS

10  Qualifying conditions

(1) A condition is a “qualifying condition” if—

(a) it is constituted in accordance with subsection (2),

(b) it is enforceable against the tenant (and the successors of the tenant) of—

(i) the qualifying lease, or

(ii) any superior lease,

(c) it complies with subsection (3), and

(d) it is not an excluded condition.

(2) A condition is constituted in accordance with this subsection if it is set out in—

(a) the qualifying lease,

(b) any superior lease which is not a lease granted by virtue of section 17(1) of the Land Tenure Reform (Scotland) Act 1974 (c.38) (interposed leases),

(c) any deed varying a lease mentioned in paragraph (a) or (b), or

(d) any assignation of or other deed relating to a lease mentioned in paragraph (a) or (b) where the assignation or other deed is registered under section 3 of the Registration of Leases (Scotland) Act 1857 (c.26) (assignation of leases).

(3) A condition complies with this subsection if it consists of—
Long Leases (Scotland) Bill
Part 2—Conversion of certain leasehold conditions to real burdens

(a) an obligation to do something (including an obligation to defray, or contribute towards, some cost),

(b) an obligation to refrain from doing something,

(c) a right to enter, or otherwise make use of, property which is for a purpose ancillary to an obligation mentioned in paragraph (a) or (b), or

(d) a provision for management or administration which is for a purpose ancillary to an obligation mentioned in paragraph (a) or (b).

(4) In determining whether a condition complies with subsection (3), regard is to be had to the effect of the condition rather than to the way in which the condition is expressed.

(5) A condition is an “excluded condition” if—

(a) it is an obligation to pay rent,

(b) it confers a right of irritancy,

(c) the provision constituting it states that it is enforceable only by irritancy,

(d) it imposes a restriction on—

   (i) assignation, or

   (ii) subletting,

   that is neither a right of pre-emption, a right of redemption or reversion nor any other type of option to acquire the lease, or

(e) it imposes a monetary penalty which is payable on the failure of the tenant to comply with any of the other conditions under the lease.

11 Restriction on conversion of qualifying conditions

A qualifying condition does not become a real burden by virtue of this Part unless the real burden that would be so created complies with the provisions of section 3 (omitting subsection (5)) of the Title Conditions (Scotland) Act 2003 (asp 9).

12 Meaning of “qualifying land”

In this Act, “qualifying land”, in relation to a qualifying condition, means the land which forms the subjects of the qualifying lease.

13 Determination of who may enforce condition

(1) Subsections (2) and (3) have effect for the purposes of determining in relation to sections 14 to 28 whether a person is entitled to enforce a qualifying condition.

(2) A person having right to property to which the entitlement to enforce a qualifying condition attaches may enforce the qualifying condition whether or not the person has completed title to that right (and where more than one person comes within that description, only the person who most recently acquired that right may enforce the qualifying condition).

(3) Where before the appointed day the tenant under a lease—
(a) assigns the lease in part, and
(b) includes in the assignation or (as the case may be) a deed registered under section 3 of the Registration of Leases (Scotland) Act 1857 (c.26), a qualifying condition,
a person who is a tenant or subtenant of the part of the land that is not so assigned (or a successor as tenant or subtenant of such person) may enforce the qualifying condition.

(4) In sections 14 to 21, a person is an “entitled person” if that person is entitled to enforce a qualifying condition (whether as landlord or otherwise).

(5) Where the entitlement to enforce a qualifying condition is held in pro indiviso shares—
(a) if the entitlement is held as landlord, any reference in sections 14 to 21 to an entitled person is a reference to all of the persons holding such a share, and
(b) if the entitlement is held otherwise than as landlord, any reference in those sections to an entitled person is a reference to any of the persons holding such a share.

Conversion of conditions to burdens

14 Conversion by nomination of benefited property

(1) This section applies to a qualifying condition where—
(a) at least one conversion condition is met, or
(b) the Lands Tribunal makes an order under section 21.

(2) An entitled person may, before the appointed day, prospectively convert a qualifying condition into a real burden by executing and registering a notice.

(3) The notice must—
(a) be in the prescribed form,
(b) set out the title of the entitled person to enforce the qualifying condition,
(c) identify the qualifying land, or any part of it, which the entitled person nominates as the burdened property in relation to the real burden,
(d) identify the land mentioned in subsection (5), or any part of it, which the entitled person nominates as a benefited property in relation to the burden,
(e) in a case where this section applies by virtue of an order under section 21, state that such an order has been made,
(f) in any other case, specify which of the conversion conditions is (or are) met,
(g) set out the terms of the qualifying condition, and
(h) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the entitled person.

(4) The conversion conditions are—
(a) that the land which would by virtue of this section and sections 15 and 16 become a benefited property has on it a permanent building which is in use wholly or mainly as a place of human—
(i) habitation, or
(ii) resort,
and that building is, at some point, within 100 metres (measuring along a horizontal plane) of the land which would by virtue of this section and sections 15 and 16 become the burdened property,

(b) that the qualifying condition comprises a right of pre-emption or of redemption,

(c) that the land which would by virtue of this section and sections 15 and 16 become a benefited property comprises—

(i) minerals, or

(ii) salmon fishings or some other incorporeal property,

and it is apparent from the terms of the qualifying condition that the condition was included in the lease for the benefit of such land.

(5) The land referred to in subsection (3)(d) is land, other than the qualifying land, which—

(a) if the land is not subject to a qualifying or exempt lease, the entitled person is owner of, or

(b) if the land is subject to such a lease, the entitled person is tenant of under that lease.

(6) Where the entitled person holds the entitlement to enforce the qualifying condition otherwise than as landlord—

(a) the land referred to in subsection (5)(a) is the land to which the entitlement to enforce the condition attaches, and

(b) the lease referred to in subsection (5)(b) is the lease to which the entitlement to enforce the condition attaches.

15 Conversion by nomination: registration

(1) For the purposes of section 14(2), a notice is registered only when registered against both the burdened property and the benefited property.

(2) Registration under subsection (1) must—

(a) in the case of the burdened property, be against the title of—

(i) the owner of the property, or

(ii) the tenant under the qualifying lease of the property, and

(b) in the case of a benefited property, be against the title of—

(i) the owner of the property, or

(ii) if the property in question is subject to a qualifying lease or exempt lease, the tenant under such lease.

(3) Before submitting any notice for registration under section 14, the entitled person must swear or affirm before a notary public that to the best of the knowledge and belief of the entitled person all the information contained in the notice is true.

(4) For the purposes of subsection (3), if the entitled person is—

(a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the entitled person may swear or affirm, or
(b) not an individual, then any person authorised to sign documents on its behalf may
swear or affirm,

and any reference in that subsection to an entitled person is to be construed accordingly.

(5) This section and section 14 are subject to sections 36 and 75.

5  Conversion by nomination: effect

(1) This section applies in relation to a qualifying condition where—

(a) an entitled person registers a notice in accordance with sections 14 and 15, and

(b) immediately before the appointed day the qualifying condition is still enforceable
by the entitled person (or that person’s successor).

(2) On the appointed day, the qualifying condition becomes a real burden in relation to
which—

(a) the land identified in pursuance of section 14(3)(c) is the burdened property, and

(b) the land identified in pursuance of section 14(3)(d) is a benefited property.

17  Conversion by agreement

(1) An entitled person may, before the appointed day—

(a) serve notice on the tenant under the qualifying lease, that the entitled person seeks
to enter into an agreement with the tenant under this section—

(i) prospectively converting a qualifying condition into a real burden,

(ii) prospectively nominating the qualifying land, or any part of it, as the
burdened property in relation to such burden, and

(iii) prospectively nominating land mentioned in subsection (2), or any part of
that land, as a benefited property in relation to such burden,

(b) subject to subsection (5), enter into such an agreement with the tenant, and

(c) register that agreement.

(2) The land referred to in subsection (1)(a)(iii) is land, other than the qualifying land,
which—

(a) if the land is not subject to a qualifying or exempt lease, the entitled person is
owner of, or

(b) if the land is subject to such a lease, the entitled person is tenant of under that
lease.

(3) Where the entitled person holds the entitlement to enforce the qualifying condition
otherwise than as landlord—

(a) the land referred to in subsection (2)(a) is the land to which the entitlement to
enforce the condition attaches, and

(b) the lease referred to in subsection (2)(b) is the lease to which the entitlement to
enforce the condition attaches.

(4) The notice referred to in subsection (1) must—

(a) be in the prescribed form,
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(b) set out the title of the entitled person to enforce the qualifying condition,
(c) identify the land nominated as the burdened property,
(d) identify the land nominated as a benefited property,
(e) set out the terms of the qualifying condition, and
(f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the entitled person.

(5) If the entitled person and the tenant think fit they may, by the agreement, modify the qualifying condition or any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the entitled person (or both the qualifying condition and any such counter-obligation).

(6) An agreement mentioned in subsection (1)(b) must be a written agreement which—
   (a) expressly states that it is made under this section, and
   (b) includes all the information, other than that relating to service, required to be set out in completing the notice the form of which is prescribed under subsection (4)(a).

(7) This section is subject to section 36.

18 Conversion by agreement: registration

(1) For the purposes of section 17(1), an agreement is registered only when registered against both the burdened property and the benefited property.

(2) Registration under subsection (1) must—
   (a) in the case of the burdened property, be against the title of—
      (i) the owner of the property, or
      (ii) the tenant under the qualifying lease of the property, and
   (b) in the case of a benefited property, be against the title of—
      (i) the owner of the property, or
      (ii) if the property in question is subject to a qualifying lease or exempt lease, the tenant under such lease.

19 Conversion by agreement: effect

(1) This section applies in relation to a qualifying condition where—
   (a) sections 17(1)(b) and (c) and (6) and 18 are complied with, and
   (b) immediately before the appointed day the qualifying condition is still enforceable by the entitled person (or that person’s successor).

(2) On the appointed day, the qualifying condition becomes a real burden in relation to which—
   (a) the land identified in pursuance of section 17(4)(c) is the burdened property, and
   (b) the land identified in pursuance of section 17(4)(d) is a benefited property.
Conversion by agreement: title not completed

(1) Subsection (2) applies for the purposes of section 17 where—
(a) the entitled person has not completed title to—
   (i) the property by virtue of which such person is entitled to enforce a
       qualifying condition, or
   (ii) the land nominated as a benefited property, and
(b) section 15(3) of the Land Registration (Scotland) Act 1979 (c.33) (circumstances
       where unnecessary to deduce title) does not apply.

(2) The entitled person may enter into an agreement under section 17 only if in the
    agreement the entitled person deduces title from the person who appears in the Register
    of Sasines as having the last recorded title to the interest in question.

(3) Subsection (4) applies for the purposes of section 17 where—
(a) the tenant has not completed title to the qualifying lease, and
(b) section 15(3) of the Land Registration (Scotland) Act 1979 (c.33) (circumstances
    where unnecessary to deduce title) does not apply.

(4) The tenant may enter into an agreement under section 17 only if in the agreement
    the tenant deduces title from the person who appears in the Register of Sasines as having
    the last recorded title to the interest in question.

Applications relating to section 14

Lands Tribunal order

(1) This section applies where an entitled person cannot proceed under section 14(2)
    because none of the conditions set out in subsection (4) (“the conversion conditions”) of
    that section are met.

(2) The entitled person may apply to the Lands Tribunal for an order under subsection (5).

(3) An application may be made under subsection (2) only if the entitled person has first, in
    pursuance of section 17, attempted to reach agreement as respects the qualifying
    condition in question with the tenant under the qualifying lease.

(4) An application under subsection (2)—
(a) must include a description by the entitled person of the requisite attempt to reach
    agreement, and
(b) must be made not later than 1 year after the day on which this section comes into
    force.

(5) The Lands Tribunal may make an order dispensing with the need for any of the
    conversion conditions to be met if satisfied that, were the qualifying condition to be
    extinguished, there would be material detriment to the value or enjoyment of the entitled
    person’s ownership (taking such person to have ownership) of the land which is to be
    identified, in pursuance of section 14(3)(d), as a benefited property.

(6) The decision of the Lands Tribunal on an application under subsection (2) is final.

(7) A person opposing an application made under subsection (2) incurs no liability in
    respect of expenses incurred by the entitled person unless, in the opinion of the Lands
    Tribunal, the actings of the person opposing are vexatious or frivolous.
22  Dealing with application under section 21

(1) This section applies where the Lands Tribunal receives an application under section 21.

(2) The Lands Tribunal must give notice of the application, whether by way of advertisement or otherwise, to—
   (a) the tenant under the qualifying lease, and
   (b) if the Lands Tribunal thinks fit, any other person.

(3) Any person (whether or not the person has received notice under subsection (2)) who—
   (a) is a tenant under the qualifying lease, or
   (b) is affected by that qualifying condition or by its proposed constitution as a real burden,
may oppose or make representations in relation to the application.

(4) The Lands Tribunal—
   (a) must allow any such person as is mentioned in subsection (3), and
   (b) may allow any other person who appears to it to be affected by the qualifying condition to which the application relates or its proposed constitution as a real burden,
to be heard in relation to the application.

23  Conversion to personal pre-emption or redemption burden

(1) Without prejudice to section 14, the person entitled to enforce a qualifying condition mentioned in subsection (2) (whether as landlord or otherwise) may, before the appointed day, prospectively convert that qualifying condition into a personal pre-emption burden or (as the case may be) into a personal redemption burden by executing and registering a notice.

(2) The qualifying condition referred to in subsection (1) is a condition comprising—
   (a) a right of pre-emption, or
   (b) a right of redemption.

(3) The notice referred to in subsection (1) must—
   (a) be in the prescribed form,
   (b) set out the title to enforce the qualifying condition of the person executing and registering the notice,
   (c) identify the qualifying land (or any part of such land),
   (d) set out the terms of the qualifying condition, and
   (e) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice.

(4) For the purposes of subsection (1)—
   (a) a notice is registered only when registered against the land identified in pursuance of subsection (3)(c), and
(b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.

(5) Before submitting any notice for registration under this section, the person entitled to enforce the qualifying condition must swear or affirm before a notary public that to the best of the knowledge and belief of that person all the information contained in the notice is true.

(6) For the purposes of subsection (5), if the person entitled to enforce the qualifying condition is—

(a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of that person may swear or affirm, or

(b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm,

and any reference in that subsection to the person entitled to enforce the qualifying condition is to be construed accordingly.

(7) If subsections (1) to (6) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the person who executed and registered the notice under subsection (1) (or that person’s successor) then, on that day—

(a) the qualifying condition is converted into a real burden in favour of that person, to be known as a “personal pre-emption burden” or (as the case may be) as a “personal redemption burden”, and

(b) the land identified in pursuance of subsection (3)(c) becomes the burdened property.

(8) The right to a personal pre-emption burden or personal redemption burden may be assigned or otherwise transferred to any person.

(9) An assignation or transfer under subsection (8) takes effect on registration.

(10) Where the holder of a personal pre-emption burden or personal redemption burden does not have a completed title—

(a) title may be completed by the holder registering a notice of title, or

(b) without completing title, the holder may grant a deed—

(i) assigning the right to the burden, or

(ii) discharging, in whole or in part, the burden.

(11) The holder must, in a deed granted under subsection (10)(b), deduce title from the person who appears in the Register of Sasines as having the last recorded title to the burden in question unless the deed is one to which section 15(3) of the Land Registration (Scotland) Act 1979 (c.33) (circumstances where unnecessary to deduce title) applies.

(12) This section is subject to sections 36 and 75.

24 Conversion to economic development burden

(1) Where a local authority is, or the Scottish Ministers are, entitled to enforce a qualifying condition which is imposed for the purpose of promoting economic development, it or
they may, before the appointed day, prospectively convert that qualifying condition into an economic development burden by executing and registering a notice.

(2) The notice must—

(a) be in the prescribed form,

(b) set out the title to enforce the qualifying condition of the person executing and registering the notice,

(c) state that such person is a local authority or the Scottish Ministers,

(d) identify the qualifying land (or any part of such land),

(e) set out the terms of the qualifying condition,

(f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice, and

(g) state that the qualifying condition was imposed for the purpose of promoting economic development and provide information in support of that statement.

(3) For the purposes of subsection (1)—

(a) a notice is registered only when registered against the land identified in pursuance of subsection (2)(d), and

(b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.

(4) If subsections (1) to (3) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the local authority or the Scottish Ministers then, on that day, the qualifying condition becomes an economic development burden—

(a) in favour of the local authority or (as the case may be) the Scottish Ministers, and

(b) in relation to which the land identified in pursuance of subsection (2)(d) is the burdened property.

(5) This section is subject to sections 36 and 75.

**Conversion to health care burden**

(1) Where the Scottish Ministers are entitled to enforce a qualifying condition which is imposed for the purpose of promoting the provision of facilities for health care, they may, before the appointed day, prospectively convert that qualifying condition into a health care burden by executing and registering a notice.

(2) The notice must—

(a) be in the prescribed form,

(b) set out the title of the Scottish Ministers to enforce the qualifying condition,

(c) identify the qualifying land (or any part of such land),

(d) set out the terms of the qualifying condition,

(e) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the Scottish Ministers, and
(f) state that the qualifying condition was imposed for the purpose of promoting the
 provision of facilities for health care and provide information in support of that
 statement.

(3) For the purposes of subsection (1)—

(a) a notice is registered only when registered against the land identified in pursuance
 of subsection (2)(c), and

(b) the notice may be registered against the title of the owner of the land or of the
 tenant under the qualifying lease.

(4) If subsections (1) to (3) are complied with and immediately before the appointed day the
 qualifying condition is still enforceable by the Scottish Ministers then, on that day, the
 qualifying condition becomes a health care burden—

(a) in favour of the Scottish Ministers, and

(b) in relation to which the land identified in pursuance of subsection (2)(c) is the
 burdened property.

(5) This section is subject to sections 36 and 75.

26 Conversion to climate change burden

(1) Where a public body or trust is, or the Scottish Ministers are, entitled to enforce a
 qualifying condition which is imposed for the purpose of reducing greenhouse gas
 emissions, it or they may, before the appointed day, prospectively convert that
 qualifying condition into a climate change burden by executing and registering a notice.

(2) The notice must—

(a) be in the prescribed form,

(b) set out the title to enforce the qualifying condition of the person executing and
 registering the notice,

(c) state that such person is a public body, trust or the Scottish Ministers,

(d) identify the qualifying land (or any part of such land),

(e) set out the terms of the qualifying condition,

(f) set out the terms of any counter-obligation to the qualifying condition if it is a
 counter-obligation enforceable against the person executing and registering the
 notice, and

(g) state that the qualifying condition was imposed for the purpose of reducing
 greenhouse gas emissions and provide information in support of that statement.

(3) For the purposes of subsection (1)—

(a) a notice is registered only when registered against the land identified in pursuance
 of subsection (2)(d), and

(b) the notice may be registered against the title of the owner of the land or of the
 tenant under the qualifying lease.

(4) If subsections (1) to (3) are complied with and immediately before the appointed day the
 qualifying condition is still enforceable by the public body, trust or the Scottish
 Ministers then, on that day, the qualifying condition becomes a climate change burden—
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(a) in favour of the public body, the trust or (as the case may be) the Scottish Ministers, and
(b) in relation to which the land identified in pursuance of subsection (2)(d) is the burdened property.

(5) In this section—
“emissions” has the meaning given by section 17(1) of the Climate Change (Scotland) Act 2009 (asp 12),
“greenhouse gas” has the meaning given by section 10(1) of that Act,
“public body” means a body listed in Part I or II of the Schedule to the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003 (SSI 2003/453).

(6) This section is subject to sections 36 and 75.

27 Conversion to conservation burden: rule one

(1) Where a conservation body is, or the Scottish Ministers are, entitled to enforce a qualifying condition of the category described in subsection (2), it or they may, before the appointed day, prospectively convert that qualifying condition into a conservation burden for the benefit of the public by executing and registering a notice.

(2) The category is those qualifying conditions which have the purpose of preserving or protecting—
(a) the architectural or historical characteristics of land, or
(b) any other special characteristics of land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of the land).

(3) The notice referred to in subsection (1) must—
(a) be in the prescribed form,
(b) set out the title to enforce the qualifying condition of the person executing and registering the notice,
(c) state that such person is a conservation body or the Scottish Ministers,
(d) identify the qualifying land (or any part of such land),
(e) set out the terms of the qualifying condition, and
(f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice.

(4) For the purposes of subsection (1)—
(a) a notice is registered only when registered against the land identified in pursuance of subsection (3)(d), and
(b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.

(5) If subsections (1) to (4) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the conservation body or the Scottish Ministers then, on that day, the qualifying condition becomes a conservation burden—
(a) in favour of the conservation body or (as the case may be) the Scottish Ministers, and
(b) in relation to which the land identified in pursuance of subsection (3)(d) is the burdened property.

(6) The references in subsection (5) to—
(a) the conservation body include references to—
   (i) any conservation body which is, or
   (ii) the Scottish Ministers where they are,
       its successor as the person entitled to enforce the qualifying condition, and
(b) the Scottish Ministers include references to a conservation body which is their successor as such person.

(7) This section is subject to sections 36 and 75.

28 Conversion to conservation burden: rule two

(1) The person (not being a conservation body or the Scottish Ministers) entitled to enforce a qualifying condition of the category described in section 27(2) (whether as landlord or otherwise) may before the appointed day—
(a) prospectively convert that condition into a conservation burden for the benefit of the public, and
(b) nominate a conservation body or the Scottish Ministers to have title to enforce that burden,
by executing and registering a notice.

(2) Subsection (1) applies only where the consent of the nominee to being so nominated is obtained—
(a) in a case where sending a copy of the notice, in compliance with section 75(2), is reasonably practicable, before that copy is so sent, and
(b) in any other case, before the notice is executed.

(3) The notice referred to in subsection (1) must—
(a) be in the prescribed form,
(b) set out the title to enforce the qualifying condition of the person executing and registering the notice,
(c) state that the nominee is a specific conservation body or the Scottish Ministers (as the case may be), and
(d) comply with section 27(3)(d) to (f).

(4) For the purposes of subsection (1)—
(a) a notice is registered only when registered against the land identified in pursuance of subsection (3)(d), and
(b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.
(5) If subsections (1) to (4) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the person who executed and registered the notice under subsection (1) (or that person’s successor) then, on that day, the qualifying condition becomes a conservation burden—

(5) (a) in favour of the conservation body or (as the case may be) the Scottish Ministers, and

(b) in relation to which the land identified in pursuance of subsection (3)(d) is the burdened property.

(6) This section is subject to sections 36 and 75 except that, in the application of subsection (3)(b) of section 36 for the purposes of this subsection, such discharge as is mentioned in that subsection is to be taken to require the consent of the nominated person.

Other real burdens

29 Conversion to facility or service burden

(1) Where a qualifying condition regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to land other than the qualifying land then, on the appointed day, such condition becomes a facility burden in relation to which—

(a) the qualifying land is the burdened property, and

(b) the heritable property which constitutes the facility and any land to which the facility is (and is intended to be) of benefit is the benefited property.

(2) Where a qualifying condition relates to the provision of services to land other than the qualifying land, then the qualifying condition, on the appointed day, becomes a service burden in relation to which—

(a) the qualifying land is the burdened property, and

(b) any land to which the services are provided is the benefited property.

(3) Without prejudice to the generality of subsection (1), examples of property which might constitute a facility mentioned in that subsection are—

(a) a common part of a tenement,

(b) a common area for recreation,

(c) a private road,

(d) private sewerage,

(e) a boundary wall.

30 Conversion to manager burden

(1) Where a qualifying condition confers on such person as may be specified in the condition power to—

(a) act as the manager of related properties,

(b) appoint some other person to be such manager, or

(c) dismiss any person appointed by virtue of the power mentioned in paragraph (b),
then, on the appointed day, such condition becomes a real burden in favour of such person and in relation to such burden the qualifying land is the burdened property.

(2) A real burden constituted by virtue of subsection (1) is a manager burden.

(3) For the purposes of subsection (1), whether properties are related properties is to be inferred from all the circumstances.

(4) Without prejudice to the generality of this section, circumstances giving rise to such an inference might include—

(a) the convenience of managing the properties together because they share—

(i) some common feature, or

(ii) an obligation for common maintenance of some facility,

(b) it being evident that the properties constitute a group of properties on which qualifying conditions are imposed under a common scheme, or

(c) there being shared rights to common property.

Conversion where common scheme affects related properties

(1) Where qualifying conditions are imposed under a common scheme on a group of related properties, such conditions, on the appointed day, become real burdens in relation to which each property is a benefited and a burdened property.

(2) For the purposes of subsection (1), whether properties are related properties is to be inferred from all the circumstances.

(3) Without prejudice to the generality of this section, circumstances giving rise to such an inference might include—

(a) the convenience of managing the properties together because they share—

(i) some common feature, or

(ii) an obligation for common maintenance of some facility,

(b) there being shared rights to common property,

(c) the properties being subject to the common scheme by virtue of the same deed of conditions, or

(d) the properties each being a flat in the same tenement.

(4) This section confers no right of pre-emption, redemption or reversion.

Conversion where expressly enforceable by certain third parties

Where a qualifying condition is expressed as being enforceable by—

(a) the owner, or

(b) the tenant,

of land other than the qualifying land then, on the appointed day, such condition becomes a real burden in relation to which the qualifying land is the burdened property and that other land is a benefited property.
Exclusions from conversion

33  **Qualifying condition where obligation assumed by public authority**

Sections 29(1) and 31(1) do not apply to a qualifying condition in so far as such condition constitutes an obligation—

(a) to maintain or reinstate, and

(b) which has been assumed—

(i) by a local or other public authority, or

(ii) by virtue of any enactment, by a successor body to any such authority.

Effect of conversion on counter-obligations

34  **Counter-obligations on conversion**

(1) Where a qualifying condition becomes, by virtue of any of sections 14 to 32, a real burden, the right to enforce the burden is subject to any counter-obligation mentioned in subsection (2).

(2) The counter-obligations are—

(a) in the case of a real burden constituted by virtue of—

   (i) section 14 or 23 to 28, those specified in the notice registered under the section in question,

   (ii) section 17, those specified in the agreement,

   (iii) section 30, those enforceable against the person on whom power is conferred,

   (iv) section 32, those enforceable against the owner or (as the case may be) tenant of the other land, and

(b) in any other case, those enforceable against any person who immediately before the appointed day was entitled to enforce the qualifying condition which was converted into the burden.

Prescription

35  **Prescriptive period for converted conditions**

(1) This section applies where a qualifying condition becomes, by virtue of any of sections 14 to 32, a real burden.

(2) Section 18(5) of the 2003 Act (prescription where breach of burden occurs before the appointed day) applies to any breach of the qualifying condition as it applies to a breach of a real burden.

Notices and agreements under this Part

36  **Further provision for notices and agreements**

(1) Subsections (2) and (3) apply in relation to a qualifying lease where—

   (a) an agreement relating to a qualifying condition has been registered under section 17, or
(b) a notice relating to a qualifying condition has been registered under section 14 or 23 to 28.

(2) It is not competent for the person who registered the agreement or notice (or that person’s successor) to register under any of those sections in relation to the qualifying lease another such agreement or notice relating to the same qualifying condition.

(3) Nothing in subsection (2) prevents registration of an agreement or notice where (as the case may be)—

(a) the discharge of any earlier such agreement has been registered, jointly, by the parties to that agreement (or by their successors), or

(b) the discharge of any earlier such notice has been registered by the person who registered that notice (or by that person’s successor).

(4) Where more than one qualifying lease is affected by the same qualifying condition enforceable by the same person, that person must, if that person wishes to execute and register a notice under this Part in relation to those qualifying leases in respect of that qualifying condition, do so in relation to each separately.

(5) Where a qualifying lease is affected by more than one qualifying condition enforceable by the same person, that person may—

(a) enter into and register a single agreement under section 17 in relation to that qualifying lease in respect of those qualifying conditions, or

(b) execute and register a single notice under section 14 or 23 to 28 in relation to that qualifying lease in respect of those qualifying conditions.

(6) Nothing in this Part requires registration against land prospectively nominated as a benefited property but outwith Scotland.

PART 3

ALLOCATION OF RENTS AND RENEWAL PREMIUMS ETC.

Key terms

Partially continuing leases and renewal obligations etc.

In this Act—

“partially continuing lease” means a lease which, on the appointed day—

(a) is extinguished by virtue of Part 1, in respect of part of the subjects of the lease (such subjects being referred to in this Act as the “converted subjects”), and

(b) whether by exemption under Part 5 or otherwise, continues in respect of any other subjects (such subjects being referred to in this Act as the “continuing subjects”),

“renewal obligation” means an obligation on the landlord under a lease to renew it after a fixed period on payment by the tenant of a premium,

“renewal period” means, in relation to a renewal obligation, the fixed period after which the landlord must renew the lease,

“renewal premium” means, in relation to a renewal obligation, the premium payable.
Long Leases (Scotland) Bill

Part 3—Allocation of rents and renewal premiums etc.

38 Cumulo rent and cumulo renewal premium

(1) In this Act—

“cumulo rent” means, subject to subsection (2), a single rent payable in relation to two or more leases, and

“cumulo renewal premium” means, subject to subsections (2) to (4), a single renewal premium payable in relation to two or more leases.

(2) Where such rent or renewal premium—

(a) has been apportioned between—

(i) those leases, or

(ii) some of those leases, and

(b) the parties to those leases consented (whether expressly or by implication) to the apportionment,

any rent or renewal premium so apportioned is not cumulo rent or (as the case may be) not a cumulo renewal premium and is the rent or renewal premium payable under the lease for the purposes of this Act.

(3) Subsection (4) applies if—

(a) subsection (2) applies to rent payable under two or more leases, and

(b) a single renewal premium is payable under the leases.

(4) For the purposes of this Act—

(a) the renewal premium is to be treated as if it were apportioned between the leases in the same proportion as the apportionment of rent, and

(b) that apportioned renewal premium is the renewal premium payable under the lease.

Allocation of rent

39 Allocation of cumulo rent before appointed day

(1) This section applies where—

(a) a cumulo rent is payable in relation to two or more leases, and

(b) one or more of the leases is a qualifying lease.

(2) The landlord may, at any time before the appointed day, allocate the cumulo rent between the leases mentioned in subsection (1)(a).

(3) The allocation under subsection (2) must be in such proportions as are reasonable in all the circumstances.

(4) For the purposes of subsection (3), the proportions are presumed to be reasonable in so far as they accord with any apportionment of the cumulo rent that was effective immediately before the allocation under (2).

(5) Where the landlord allocates the cumulo rent between two or more leases under subsection (2), the annual rent payable under each lease from the day on which the landlord gives notice to the tenant of the allocation is the annual rent allocated to the lease and such rent is not cumulo rent for the purposes of this Act.
40  **Allocation of *cumulo* rent after appointed day**

(1) This section applies where—

(a) immediately before the appointed day, a *cumulo* rent was payable in relation to two or more leases, and

(b) on that day, one or more of the leases is extinguished by virtue of Part 1 in respect of any subjects of the leases.

(2) The landlord must, before the expiry of the period of 2 years beginning with the appointed day, allocate the *cumulo* rent between the leases mentioned in subsection (1)(a).

(3) The allocation under subsection (2) must be in such proportions as are reasonable in all the circumstances.

(4) For the purposes of subsection (3), the proportions are presumed to be reasonable in so far as they accord with any apportionment of the *cumulo* rent that was effective immediately before the appointed day.

(5) The annual rent payable from the appointed day under a lease which is not wholly extinguished by virtue of Part 1 is (subject to section 41) the annual rent allocated to the lease under subsection (2).

(6) In this section and sections 41, 42 and 43, “landlord” includes former landlord.

41  **Partially continuing leases: allocation of rent**

(1) The landlord in relation to a partially continuing lease must, before the expiry of the period of 2 years beginning with the appointed day, allocate the annual rent between the converted subjects and continuing subjects.

(2) In subsection (1), the annual rent is—

(a) the annual rent payable under the lease immediately before the appointed day, or

(b) where a *cumulo* rent is allocated to the lease under section 40(2), the annual rent so allocated.

(3) The allocation under subsection (1) must be in such proportions as are reasonable in all the circumstances.

(4) The annual rent payable from the appointed day under the partially continuing lease is the annual rent allocated to the continuing subjects under subsection (1).

**Allocation of renewal premium**

42  **Allocation of *cumulo* renewal premium**

(1) This section applies where—

(a) immediately before the appointed day, the renewal premium payable in relation to two or more leases containing a renewal obligation was a *cumulo* renewal premium,

(b) on that day, one or more of the leases is extinguished by virtue of Part 1 in respect of any subjects of the leases, and

(c) a lease mentioned in paragraph (b) complies with section 1(3)(b) and (c) by virtue of section 71(1)(b).
(2) The landlord must, before the expiry of the period of 2 years beginning with the appointed day, allocate the *cumulo* renewal premium between the leases mentioned in subsection (1)(a).

(3) The allocation under subsection (2) must be in such proportions as are reasonable in all the circumstances.

(4) For the purposes of subsection (3)—

   (a) the proportions are presumed to be reasonable in so far as they accord with any apportionment of the *cumulo* renewal premium that was effective immediately before the appointed day,

   (b) where there is no such apportionment, the proportions are presumed to be reasonable in so far as they accord with any allocation of rent under section 40.

(5) The renewal premium payable from the appointed day under a lease which is not wholly extinguished by virtue of Part 1 is (subject to section 43) the renewal premium allocated to the lease under subsection (2).

43 Partially continuing leases: allocation of renewal premium

(1) This section applies to a lease which—

   (a) contains a renewal obligation,

   (b) complies with section 1(3)(b) and (c) by virtue of section 71(1)(b), and

   (c) is a partially continuing lease.

(2) The landlord must, before the expiry of the period of 2 years beginning with the appointed day, allocate the renewal premium between the converted subjects and continuing subjects.

(3) For the purposes of subsection (2), the renewal premium is—

   (a) the renewal premium payable under the lease immediately before the appointed day, or

   (b) where a *cumulo* renewal premium is allocated to the lease under section 42(2), the premium so allocated.

(4) The allocation under subsection (2) must be in such proportions as are reasonable in all the circumstances.

(5) For the purposes of subsection (4), the proportions are presumed to be reasonable in so far as they accord with any allocation of rent under section 41.

(6) The renewal premium payable from the appointed day under the partially continuing lease is the renewal premium allocated to the continuing subjects under subsection (2).

Allocation disputed or not made

44 Allocation disputed or not made: reference to Lands Tribunal

(1) This section applies where—

   (a) a tenant under a lease referred to in section 39(1)(a) disputes the allocation made under section 39(2),

   (b) a tenant under a lease referred to in section 40(5) disputes the allocation made under section 40(2),
(c) a tenant under a lease referred to in section 42(5) disputes the allocation made under section 42(2),

(d) a tenant under a partially continuing lease disputes the allocation made under section 41(1) or section 43(2),

(e) a landlord under a lease referred to in section 40(5) or 42(5) does not, within the period of 2 years beginning with the appointed day, give notice to a tenant of an allocation under section 40(2) or 42(2), or

(f) a landlord under a partially continuing lease does not, within the period of 2 years beginning with the appointed day, give notice to a tenant of—

(i) an allocation under section 41(1), or

(ii) where section 43 applies to the lease, an allocation under subsection (2) of that section.

(2) The tenant may apply to the Lands Tribunal for an order—

(a) where this section applies by virtue of subsection (1)(a), fixing the annual rent payable under the lease from the day the landlord gave notice to the tenant of the allocation,

(b) in any other case, fixing the annual rent or (as the case may be) the renewal premium payable under the lease from the appointed day.

(3) Where this section applies by virtue of subsection (1)(a) to (d), an application under subsection (2) must be made before the expiry of the period of 56 days beginning with the day on which the landlord gives notice to the tenant of the allocation.

PART 4
Compensation for loss of landlord’s rights

Compensatory payment

45 Requiring compensatory payment

(1) This section applies where, on the appointed day, the rights of a landlord under a lease are extinguished by virtue of Part 1.

(2) The former landlord under such a lease may serve on the former tenant a notice in the prescribed form requiring that a compensatory payment be made to the former landlord by the former tenant.

(3) The compensatory payment must be—

(a) calculated in accordance with section 47, and

(b) specified in the notice.

(4) A notice served under subsection (2) must be—

(a) served before the expiry of the period of 2 years beginning with the appointed day, and

(b) accompanied by a copy of the prescribed explanatory note.

(5) Where the compensatory payment required is equal to or greater than £50, the former landlord must, together with the notice served under subsection (2), serve on the former tenant an instalment document.
(6) This section is subject to section 56.

(7) In this Act—

“compensatory payment” means a payment of the kind mentioned in subsection (2),

“instalment document” is to be construed in accordance with section 57(2).

46 Making compensatory payment

(1) This section applies where the former landlord has served notice in accordance with section 45.

(2) The former tenant must, before the expiry of the period of 56 days beginning with the day on which the notice is served, make the compensatory payment to the former landlord.

(3) Subsection (2) is subject to section 57.

Calculation of compensatory payment

47 Calculation of the compensatory payment

The compensatory payment in relation to a lease is calculated as follows—

Step 1
Determine the annual rent (AR) in accordance with section 48.

Step 2
Calculate the notional annual renewal premium (NARP) (if any) in accordance with section 49.

Step 3
Calculate the annual income (AI) according to the following formula—

\[ AI = AR + NARP. \]

Step 4
Calculate the sum of money which would, if invested in 2.5 per cent Consolidated Stock at the middle market price at the close of business last preceding the appointed day, produce an annual sum equal to AI.

The sum calculated is the compensatory payment.

Annual rent

48 Determination of the annual rent

(1) For the purposes of section 47, the annual rent in relation to a lease is—

(a) where the lease is not a partially continuing lease and the rent payable immediately before the appointed day was a cumulo rent, the annual rent allocated to the lease under section 40,

(b) where the lease is a partially continuing lease, the annual rent allocated to the converted subjects under section 41,

(c) in any other case, the annual rent payable under the lease.
(2) Any rent payable under the lease which is expressed wholly or partly in non-monetary terms is, to the extent that it is so expressed, to be left out of account.

(3) Any rent payable under the lease which is variable from year to year is, to the extent that it is so variable, to be left out of account.

Renewal premiums

49 Calculation of notional annual renewal premium

(1) This section applies where—

(a) a lease contains a renewal obligation,

(b) the renewal premium (determined in accordance with subsection (3)) next payable on or after the appointed day is less than or equal to £100, and

(c) the lease complies with section 1(3)(b) and (c) by virtue of section 71(1)(b).

(2) For the purpose of section 47, the notional annual renewal premium is calculated according to the following formula—

\[ \text{NARP} = \frac{\text{RP}}{Y} \]

where—

NARP is the notional annual renewal premium,

RP is the renewal premium (determined in accordance with subsection (3)) next payable on or after the appointed day,

Y is the renewal period (expressed as a number of years).

(3) The renewal premium is—

(a) where the lease is not a partially continuing lease and the renewal premium payable immediately before the appointed day was a cumulo renewal premium, the renewal premium allocated to the lease under section 42,

(b) where the lease is a partially continuing lease, the renewal premium allocated to the converted subjects under section 43,

(c) in any other case, the renewal premium payable under the lease.

Additional payment

50 Claiming additional payment

(1) This section applies where, on the appointed day, a right of a landlord under a lease, being a right mentioned in section 51(1), is extinguished by virtue of Part 1.

(2) The former landlord under the lease may serve on the former tenant a notice claiming that a payment, calculated in accordance with section 52, be made to the former landlord by the former tenant in respect of the extinction of the right (such payment being referred to in this Act as an “additional payment”).

(3) Where—

(a) the lease mentioned in subsection (1) is a superior lease, and

(b) the extinguished right is a right referred to in section 51(1)(e) to (g).
references to the “former tenant” in subsection (2) and sections 52 to 55 and 57 to 59 are to be construed as references to the former tenant under the qualifying lease.

(4) The notice served under subsection (2) must—

(a) be served before the expiry of the period of 2 years beginning with the appointed day,
(b) be in the prescribed form,
(c) be accompanied by a copy of the prescribed explanatory note,
(d) set out the right which has been extinguished and in respect of which the claim is made,
(e) specify the amount of additional payment claimed and the basis on which the amount is calculated, and
(f) where the claim is in respect of a right to development value, set out the basis on which the development value is reserved under the lease.

(5) Where the additional payment claimed is equal to or greater than £50, the former landlord must, together with the notice served under subsection (2), serve on the former tenant an instalment document.

(6) This section is subject to section 56.

51 Extinguished rights

(1) The rights referred to in section 50(1) are—

(a) any right to a rent to the extent that such right is expressed wholly or partly in non-monetary terms,
(b) any right to have the amount payable as rent reviewed or increased from time to time,
(c) any right to a rent to the extent that the amount payable is variable from year to year,
(d) any right to receive a premium (other than a renewal premium which satisfies the condition in section 49(1)(b)) in return for renewing the lease after a fixed period, where, by virtue of section 71(1)(b) such a renewal is required in order for the lease to comply with section 1(3)(b) and (c),
(e) any right to resume natural possession of the land subject to a lease upon expiry of the lease, provided that the lease would expire no later than the end of the period of 200 years beginning with the appointed day,
(f) any right, other than a right of pre-emption, enabling a lease to be terminated earlier than the date on which the lease would otherwise expire, providing that such right—
(i) is exercisable no later than the end of the period of 200 years beginning with the appointed day,
(ii) is not a provision of the lease purporting to terminate the lease, or entitling the landlord to terminate it, in the event of a failure of the tenant to comply with any provision of the lease,
(iii) is not a provision of the lease deeming such a failure to be a material breach of contract, and
(iv) does not become a real burden by virtue of section 16, 19 or 23, and

(g) any right to development value, providing that such right does not become a real burden by virtue of section 16 or 19.

(2) In this Part—

“development value” means any significant increase in the value of a lease arising as a result of the subjects of the lease becoming free to be used, or dealt with, in some way not permitted under the lease, and

any reference to a “right to development value” means a right to the benefit of any development value of a lease where—

(a) the lease was granted subject to a condition, enforceable by the landlord, reserving to the landlord the benefit (whether wholly or in part) of any development value, and

(b) the consideration (including rent) paid for, or payable under, the lease was—

(i) nominal, or

(ii) significantly lower than it would have been had the lease not been subject to the condition.

Calculating additional payment

(1) This section applies for the purpose of calculating the amount of an additional payment.

(2) The extinguished right mentioned in section 51(1) is to be valued as at the appointed day.

(3) In the case of a claim for an additional payment arising from the extinction of the right mentioned in section 51(1)(e), the value mentioned in subsection (2) must represent the value which the right could reasonably be expected to obtain if sold on the open market by a willing seller to a willing buyer.

(4) For the purposes of subsection (3)—

(a) it is to be presumed that the lease will continue until the expiry of the period for which it was granted, and

(b) no account should be taken of—

(i) any factor attributable to the known existence of a person (including the former tenant) who would be willing to buy the right at a price higher than other persons because of a characteristic of the right which relates peculiarly to that person’s interest in buying it, and

(ii) any depreciation in the value of any other land owned by the former landlord.

(5) Any obligations of the former landlord arising from the lease which are, on the appointed day, extinguished by virtue of Part 1 must be taken into account.

(6) But no account is to be taken of any such obligation in so far as it is preserved as a counter-obligation to a real burden.

(7) Any other entitlement (including under this Act) of the former landlord to recover any loss for which the additional payment is claimed must be taken into account.
(8) In the case of a claim for an additional payment arising from the extinction of a right to development value, the additional payment may not exceed such sum as would make up for any effect which the right produced, at the time when the condition reserving the right was imposed, in reducing the consideration (including rent) paid for or payable under the lease.

53 Additional payment: former tenant agrees

(1) This section applies where—
  (a) a former landlord has served on the former tenant a notice in accordance with section 50, and
  (b) the former tenant agrees to make the additional payment specified in the notice to the former landlord.

(2) The former tenant must, before the expiry of the period of 56 days beginning with the day on which the notice is served, make the additional payment to the former landlord.

(3) Subsection (2) is subject to section 57.

54 Additional payment: amount mutually agreed

(1) This section applies where—
  (a) a former landlord has served on the former tenant a notice in accordance with section 50(2), and
  (b) the former tenant and the former landlord agree the amount of the additional payment, being an amount other than that specified in the notice.

(2) The former landlord may, before the expiry of the period of 5 years beginning with the appointed day, serve on the former tenant a notice requiring that the agreed additional payment be made to the former landlord by the former tenant.

(3) The notice referred to in subsection (2) must—
  (a) specify the agreed additional payment,
  (b) be in the prescribed form, and
  (c) be accompanied by a copy of the prescribed explanatory note.

(4) Where the agreed additional payment is equal to or greater than £50, the former landlord must, together with the notice served under subsection (2), serve an instalment document on the former tenant.

(5) The former tenant must, before the expiry of the period of 28 days beginning with the day on which the notice is served under subsection (2), make the additional payment to the former landlord.

(6) Subsection (5) is subject to section 57.

55 Claim for additional payment: reference to Lands Tribunal

(1) If no agreement has been reached under section 53 or 54, the—
  (a) former landlord, or
  (b) former tenant,
may refer any matter arising in relation to a claim for an additional payment under section 50 to the Lands Tribunal.

(2) In determining any such matter, the Lands Tribunal may make such order as it thinks fit (including an order fixing the amount of additional payment).

(3) Where the Lands Tribunal makes an order fixing an additional payment which is equal to or greater than £50 it must provide the former tenant with the option of making the payment in instalments in accordance with section 57 but—

(a) no instalment document is required,

(b) in subsection (3)(b) of that section, for the words “when so returning such document” there is to be substituted “before the expiry of the period of 28 days beginning with the day on which the Lands Tribunal makes the order fixing the additional payment”, and

(c) the reference in subsection (4) of that section to the date on which the instalment document is served is to be construed as a reference to the date on which the Lands Tribunal makes the order.

(4) A reference under subsection (1) must be made before the expiry of the period of 5 years beginning with the appointed day.

Supplementary

56 Claims in excess of £500: preliminary notice

(1) This section applies where a landlord intends, after the appointed day, to require or (as the case may be) claim from the tenant under a qualifying lease—

(a) a compensatory payment which is,

(b) an additional payment which is, or

(c) two or more additional payments which, taken together, are, likely to exceed £500.

(2) The landlord must, not later than 6 months before the appointed day, serve on the person registered as tenant a notice (such notice being referred to in this Act as a “preliminary notice”) stating the landlord’s intention to require or (as the case may be) claim such a payment.

(3) The preliminary notice must—

(a) be in the prescribed form,

(b) state—

(i) the amount of compensatory payment to be required or (as the case may be) additional payment to be claimed, or

(ii) where such amount cannot be determined, the best estimate of such amount, and

(c) be accompanied by a copy of the prescribed explanatory note.

(4) Where a preliminary notice has not been served in accordance with this section—

(a) the amount of compensatory payment required under section 45(2),

(b) the amount of additional payment claimed under section 50(2), or
(c) where two or more additional payments are claimed, the total amount of such payments,
may not exceed £500.

57 Making payment by instalments

(1) This section applies where an instalment document under section 45(5), 50(5) or 54(4) is served on a former tenant.

(2) An instalment document must be—
   (a) a filled out document in the prescribed form, and
   (b) accompanied by a copy of the prescribed explanatory note.

(3) Subject to subsection (4), the former tenant obtains the option of making the compensatory or (as the case may be) additional payment by instalments only if—
   (a) the former tenant signs, dates and returns the instalment document within the period which (but for this section) is allowed for making that payment—
      (i) in the case of a compensatory payment, under section 46, or
      (ii) in the case of an additional payment, under section 53(2) or (as the case may be) 54(5), and
   (b) when so returning such document, the former tenant pays to the former landlord an amount equivalent to one tenth of the payment (such amount being payable in addition to the payment and irrespective of how or when such payment is subsequently made).

(4) If on or after the date on which an instalment document is served on the former tenant under a qualifying lease the former tenant ceases, by virtue of a sale or transfer for valuable consideration, to have right to the land in respect of which the claim for payment has been made or any part of that land then—
   (a) where the former tenant has obtained the option mentioned in subsection (3), the former tenant loses that option and the outstanding balance of the entire payment falls due on the seventh day after the day on which the former tenant ceases to have that right, and
   (b) where the former tenant has not obtained that option, the former tenant loses the right to obtain it and the following apply accordingly—
      (i) in the case of a compensatory payment, section 46(2), or
      (ii) in the case of an additional payment, section 53(2) or (as the case may be) 54(5).

(5) Subsections (6) to (8) apply where the option of making the payment by instalments is obtained.

(6) The instalments are to be equal instalments payable on the term days of Whitsunday and Martinmas which follow the making of the payment under subsection (3)(b).
(7) The number of instalments is set out in the following table—

<table>
<thead>
<tr>
<th>Amount of compensatory or additional payment</th>
<th>Number of instalments</th>
</tr>
</thead>
<tbody>
<tr>
<td>£50 or more than £50 but no more than £500</td>
<td>5</td>
</tr>
<tr>
<td>More than £500 but no more than £1,000</td>
<td>10</td>
</tr>
<tr>
<td>More than £1,000 but no more than £1,500</td>
<td>15</td>
</tr>
<tr>
<td>More than £1,500</td>
<td>20</td>
</tr>
</tbody>
</table>

(8) In a case where any instalment payable by virtue of subsections (6) and (7) remains unpaid for 42 days after falling due, the outstanding balance of the entire payment immediately falls due.

(9) In any other case, the former tenant may pay that outstanding balance at any time.

58 Collecting third party to disclose information

(1) This section applies where a landlord or (as the case may be) former landlord receives or has at any time received from a third party an amount—

(a) collected in respect of rent from, and

(b) remitted to the landlord or former landlord on behalf of, a tenant or (as the case may be) former tenant.

(2) The third party must—

(a) if required by the landlord or (as the case may be) former landlord for the purpose of serving notice under section 45(2),

(b) in so far as it is practicable, and

(c) as soon as is reasonably practicable, disclose to the landlord or former landlord the information mentioned in subsection (3).

(3) The information referred to in subsection (2) is—

(a) the identity and address of the tenant or former tenant, and

(b) in a case where the rent remitted is part of a *cumulo* rent, the amount so collected from the tenant or former tenant.

59 Duty to disclose identity etc. of former tenant

(1) This section applies where—

(a) a former landlord purports to serve notice under section 45(2) or 50(2) on the former tenant, and

(b) the person on whom that notice is served—

(i) was the tenant at some time before the appointed day, but

(ii) is not the former tenant.

(2) The person on whom the notice is served must as soon as is reasonably practicable disclose to the former landlord—

(a) the identity and address of the former tenant, or
Long Leases (Scotland) Bill

Part 5—Exemption from conversion and continuing leases

60 Prescription of requirement to make payment

In Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (which specifies obligations affected by prescriptive periods of 5 years under section 6 of that Act)—

(a) in paragraph 1, after sub-paragraph (ac) there is inserted—

“(ad) to any obligation to make a payment under section 46, 53(2) or 54(5) of the Long Leases (Scotland) Act 2012 (asp 00),”, and

(b) in paragraph 2(e), for the words “, (aa), (ab) or (ac)” substitute “to (ad)”.  

61 Interpretation of Part 4

(1) In this Part—

“former landlord”, in relation to a lease, means the person who was the landlord immediately before the appointed day, and

“former tenant”, in relation to a lease, means the person who was the tenant immediately before the appointed day.

(2) Where, immediately before the appointed day, the right as tenant under a lease is held by two or more persons in common—

(a) they are—

(i) severally liable to make any compensatory or (as the case may be) additional payment,

(ii) as between themselves, liable in the proportions in which they hold the right as tenant, and

(b) subject to section 74, they are together to be treated for the purposes of this Part as being a single tenant.

PART 5

EXEMPTION FROM CONVERSION AND CONTINUING LEASES

Exempt leases

62 Exempt leases

(1) If, immediately before the appointed day, land is subject to an exempt lease—

(a) that lease does not become the right of ownership of the land,

(b) any right of ownership of that land existing immediately before the appointed day and any superior lease is not extinguished, and

(c) the provisions of this Act, in so far as they relate to—

(i) the conversion of a qualifying lease into the right of ownership, or

(ii) the extinction of a right of ownership or (as the case may be) lease, do not apply.
(2) In this Part, “exempt lease” is to be construed in accordance with sections 63 to 66.

Types of exempt lease

63 Exemption of qualifying lease by registration of notice

A lease is an exempt lease if—

(a) it is a qualifying lease, and

(b) the tenant under the lease, not later than 2 months before the appointed day, executes and registers a notice in the prescribed form (referred to in this Act as an “exemption notice”).

64 Exemption of qualifying lease by registration of agreement or order

(1) A lease is an exempt lease if—

(a) it is a qualifying lease,

(b) it is not a lease in relation to which *cumulo* rent is payable, and

(c) the landlord, not later than 2 months before the appointed day, registers against the title of the tenant—

(i) an agreement entered into with the tenant, or

(ii) an order made by the Lands Tribunal under section 69.

(2) The agreement must—

(a) be in the prescribed form,

(b) be signed by or on behalf of the landlord and the tenant,

(c) state either—

(i) that the annual rent payable under the lease immediately before the appointed day will be over £100, or

(ii) that the annual rent paid under the lease was over £100 at any point during the relevant period.

(3) The relevant period is the period of 5 years ending on the day the Bill for this Act received Royal Assent.

65 Certain leases registered near or after the appointed day

A lease is an exempt lease if—

(a) it is not registered on the day falling 1 year before the appointed day,

(b) it would, had it been so registered, have been converted on the appointed day into a right of ownership under section 4(1)(a),

(c) despite not being registered, it constitutes a real right in land, and

(d) it is subsequently registered (whether before, on or after the appointed day).

66 Subleases of exempt leases

A sublease of an exempt lease is an exempt lease if—
Recall of exemption

67 Recall of exemption

(1) This section applies in relation to a lease where—
   (a) the lease is an exempt lease (other than by virtue of section 64), and
   (b) the tenant under the lease executes and registers a notice in the prescribed form
       (referred to in this Act as a “recall notice”).

(2) On the day on which the recall notice is registered (“the registration day”) the lease
    ceases to be an exempt lease.

(3) Where the registration day—
   (a) is less than 6 months before the appointed day,
   (b) is the appointed day, or
   (c) is after the appointed day,

       this Act applies as if the appointed day were the first Whitsunday or (as the case may
       be) Martinmas occurring on or after the day which falls 6 months after the registration
       day.

(4) Section 56 does not apply in relation to the lease.

Supplementary

68 Exemption and recall notices: supplementary

(1) Subsections (2) and (3) apply to a tenant under a lease where—
   (a) the lease is a qualifying lease and the tenant intends to execute and register an
       exemption notice, or
   (b) the lease is an exempt lease and the tenant intends to execute and register a recall
       notice.

(2) Except where it is not reasonably practicable to do so, the tenant must, before the notice
    is executed, send by post to the person registered as landlord under the lease and (as the
    case may be) the person registered as landlord under any superior lease a copy of—
   (a) the notice, and
   (b) the prescribed explanatory note.

(3) Before the notice is executed, the tenant must state in the notice either—
   (a) that a copy of the notice has been sent in accordance with subsection (2), or
   (b) that it was not reasonably practicable for such a copy to be sent (and the reasons
       why that was so).

(4) An exemption notice or (as the case may be) recall notice must be registered against the
    title of the tenant who executed the notice.
69 Application to Lands Tribunal for order confirming rent

(1) A landlord under a lease may apply to the Lands Tribunal for an order confirming either—

(a) that the annual rent payable under the lease immediately before the appointed day will be over £100, or

(b) that the annual rent paid under the lease was over £100 at any point during the relevant period.

(2) The relevant period is the period of 5 years ending on the day the Bill for this Act received Royal Assent.

(3) An application may be made under subsection (1) only if the landlord has first attempted to reach agreement as respects the annual rent with the tenant under the lease.

(4) The application—

(a) must include a description by the landlord of the requisite attempt to reach agreement, and

(b) must be made not later than 1 year after the day on which this section comes into force.

(5) The Lands Tribunal must give notice of the application, whether by way of advertisement or otherwise, to the tenant.

(6) The tenant may oppose or make representations in relation to the application.

(7) The Land Tribunal must allow the tenant to be heard in relation to the application.

(8) The decision of the Lands Tribunal on an application under subsection (1) is final.

(9) A tenant opposing an application made under subsection (1) incurs no liability in respect of expenses incurred by the landlord unless, in the opinion of the Lands Tribunal, the actings of the tenant are vexatious or frivolous.

PART 6

GENERAL AND MISCELLANEOUS

The appointed day

In this Act, the “appointed day” means the first Martinmas occurring on or after the day 2 years after the day on which this section comes into force.

Duration of lease etc.

71 Determining duration of lease

(1) In calculating the period for which a lease is granted for the purposes of any provision of this Act—

(a) any provision of a lease (however expressed) enabling the lease to be terminated earlier than the date on which it would otherwise terminate must be disregarded,
(b) where a lease includes provision (however expressed) requiring the landlord to renew the lease, the period for which any such renewed lease would, were that provision complied with, be granted must be added to the period for which the original lease is granted,

5 (c) where the period for which a lease is granted is expressed (in whole or in part) by reference to the lifetime of a person, the period expressed by reference to that lifetime is—

(i) in a case where such person is deceased and the period beginning on the first day of the period for which the lease was granted and ending on the day that person died can be ascertained, that period,

10 (ii) in a case where such person is identifiable and is not deceased, deemed to be the period of life expectancy as calculated in accordance with the table of life expectancy set out in regulations made by the Scottish Ministers, or

(iii) in any other case, deemed to be a period of 35 years, and

(d) where, before the end of the period for which a lease is granted, the parties to that lease enter into a subsequent lease—

(i) of the same subjects as the original lease, and

(ii) for a period beginning immediately after the end of the period for which such lease is granted,

the period for which the subsequent lease is granted must be added to the period for which the original lease is granted.

20 (2) Subsection (1)(b) to (d) is subject to section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) (prohibition of leases of more than 175 years).

72 Leases continuing on tacit relocation

Part 4 and section 71(1)(b) apply in relation to a lease which is continuing by tacit relocation as if any provision (however expressed)—

(a) included in the lease prior to it so continuing, and

(b) requiring the landlord to renew the lease,

had been complied with.

30 Extinction of right of irritancy in certain leases

73 Extinction of right of irritancy in certain leases

(1) On and after the day on which this section comes into force, it is not competent for a lease to which subsection (2) applies to be terminated by irritancy.

(2) This subsection applies to a lease which, immediately before the day on which this section comes into force, is a right of lease in land which—

(a) complies with section 1(3) or,

(b) had it been registered, would comply with that section.

(3) But subsection (2) does not apply to a lease which, on the day this section comes into force, is an exempt lease by virtue of section 64.
Any proceedings already commenced to enforce any right of irritancy in relation to a lease to which subsection (2) applies are deemed to be abandoned on the day on which this section comes into force and may, without further process and without any requirement that full judicial expenses be paid by the pursuer, be dismissed accordingly.

Subsection (4) does not affect any cause in which final decree (that is to say, any decree or interlocutor which disposes of the cause and is not subject to appeal or review) is granted before the coming into force of this section.

74  Service of notices

Service of a notice on a person under section 17(1)(a) or Part 4 must be effected—

(a) by delivering it to the person,
(b) by sending it to the person at a place mentioned in subsection (2)—
   (i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c.26)), or
   (ii) by a postal service which provides for the delivery of the notice to be recorded,
(c) in a case where a notice sent under paragraph (b) is returned to the person who sent it with an intimation that it could not be delivered—
   (i) by delivering, or
   (ii) by sending it by post,
   with that intimation to the Extractor of the Court of Session.

The place referred to in subsection (1)(b) is—

(a) the person’s place of residence,
(b) the person’s place of business,
(c) a postal address which the person ordinarily uses, or
(d) if none of those places or that address is known at the time of delivery or posting, whatever place is at that time the person’s most recently known—
   (i) place of residence,
   (ii) place of business, or
   (iii) postal address which the person ordinarily used.

For the purposes of this Act, any of the following is sufficient evidence of service of the notice—

(a) an acknowledgement in the prescribed form signed by the person on whom the notice is served,
(b) in the case of a notice sent under subsection (1)(b), a certificate in the prescribed form signed by the sender of the notice and accompanied by the postal receipt,
(c) in the case of a notice delivered or sent under subsection (1)(c), an acknowledgement of receipt by the Extractor on a copy of the notice.
(4) The date on which a notice is served on a person is the date of delivery or (as the case may be) posting of the notice.

(5) In this section, “notice” includes an instalment document.

75  Notices: pre-registration requirements

(1) This section applies in relation to any notice which is to be submitted for registration under section 8 or Part 2.

(2) Except where it is not reasonably practicable to do so, the person who intends to execute the notice must, before so doing, send by post to the tenant under the qualifying lease (addressed to “The Tenant” where the name of that person is not known) a copy of—

(a) the notice, and

(b) the prescribed explanatory note relating to the notice.

(3) The person who executes the notice must, in the notice, state either—

(a) that a copy of the notice has been sent in accordance with subsection (2), or

(b) that it was not reasonably practicable for such a copy to be sent (and the reasons why that was so).

76  Keeper’s duty as regards documents

(1) In relation to any notice submitted for registration under this Act, the Keeper is not required to determine whether the terms of section 68(2) or (as the case may be) 75(2) have been complied with.

(2) In relation to any notice or (as the case may be) agreement submitted for registration under—

(a) section 14, 17, 23, 24, 25, 26, 27 or 28, the Keeper is not required to determine whether, for the purposes of registering the notice or agreement, a qualifying condition is enforceable by the person submitting the notice or agreement for registration,

(b) section 14, the Keeper is not required to determine—

(i) in pursuance of subsection (3)(e) of that section, that an attempt to reach agreement has been made in accordance with section 21(3), or

(ii) where the condition specified under subsection (3)(f) of that section is the condition mentioned in subsection (4)(a) of that section, whether the terms of that condition are satisfied,

(c) section 17, the Keeper is not required to determine whether the requirements of section 17(1)(a) are satisfied, or

(d) section 24 to 26, the Keeper is not required to determine whether—

(i) for the purposes of subsection (1) of the section in question, a qualifying condition is imposed for the reasons mentioned in that subsection, or

(ii) the statement made in pursuance of section 24(2)(g), 25(2)(f) or (as the case may be) 26(2)(g) is correct.

(3) The Keeper is not required to determine for the purposes of section 8(7) whether immediately before the appointed day a sporting right is still enforceable.
(4) The Keeper is not required to determine for the purposes of section 16, 19, 23(7), 24(4), 25(4), 26(4), 27(5) or 28(5) whether immediately before the appointed day a qualifying condition is, or is still, enforceable, or by whom.

(5) In relation to any order submitted for registration under section 64(1)(c)(ii), the Keeper is not required to determine that an attempt to reach agreement has been made in accordance with section 69(3).

77 Disputed notices: reference to Lands Tribunal

(1) A dispute arising in relation to a notice registered under this Act may be referred to the Lands Tribunal.

(2) In determining the dispute, the Lands Tribunal may make such order as it thinks fit discharging or, to such extent as may be specified in the order, restricting the notice in question.

(3) An order under subsection (2) has effect in respect of a third party when an extract of the order is registered.

78 Certain documents registrable despite initial rejection

(1) This section applies where one of the following is rejected by the Keeper—
   (a) a notice submitted before the appointed day for registration under section 8(2) or Part 2,
   (b) an agreement submitted before the appointed day for registration under section 17(1)(c),
   (c) an exemption notice submitted before the day falling 2 months before the appointed day for registration under section 63, or
   (d) an agreement submitted before the day falling 2 months before the appointed day for registration under section 64(1)(c).

(2) Where a court or the Lands Tribunal determines the notice or agreement is registrable, it may be registered not later than the day falling 2 months after the day on which the court or the Lands Tribunal made the determination.

(3) An exemption notice or an agreement mentioned in subsection (1)(d) which is registered under subsection (2) on or after the day falling 2 months before the appointed day is to be treated as if it had been registered before that day.

(4) Any other notice or agreement which is registered under subsection (2) on or after the appointed day is to be treated as if it had been registered before the appointed day.

(5) The Scottish Ministers may by order—
   (a) specify a date after which (or a period after the expiry of which) notices and agreements cannot be registered under subsection (2),
   (b) provide that subsection (2) applies only where the application to the court or to the Lands Tribunal which resulted in the determination is made within such period as the order may specify.

(6) In this section, “court” means Court of Session or sheriff.
79 Amendments to enactments

The schedule makes minor and consequential amendments.

80 Interpretation

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

“the 2003 Act” means the Title Conditions (Scotland) Act 2003 (asp 9),
“additional payment” has the meaning given by section 50,
“appointed day” has the meaning given by section 70,
“compensatory payment” has the meaning given by section 45,
“cumulo renewal premium” has the meaning given by section 38(1),
“cumulo rent” has the meaning given by section 38(1),
“exempt lease” has the meaning given by section 62,
“freshwater fish” means any fish living in fresh water—
  (a) including trout and eels (and the fry of eels),
  (b) excluding salmon and any kind of fish which migrate between the open sea and tidal waters,
“harbour” and “harbour authority” have the meanings given by section 57(1) of the Harbours Act 1964 (c.40),
“Keeper” means Keeper of the Registers of Scotland,
“land” includes anything held or which, by its nature, may be held as a separate tenement,
“landlord”, in relation to a lease, means the person who has right as landlord under the lease whether or not such person has completed title (and, where more than one person comes within that description, the person who most recently acquired that right),
“Lands Tribunal” means Lands Tribunal for Scotland,
“lease” includes a sublease,
“owner”, in relation to any land, means the person who has right to the land whether or not such person has completed title (and, where more than one person comes within that description, the person who most recently acquired that right),
“partially continuing lease” has the meaning given by section 37,
“prescribed” means prescribed by the Scottish Ministers in regulations,
“qualifying lease” has the meaning given by section 1(1),
“qualifying condition” means a condition which qualifies under section 10,
“registering”, in relation to any document, means registering an interest in land or information relating to an interest in land (being an interest or information for which that document provides) in the Land Register of Scotland or (as the case may be) recording the document in the Register of Sasines; and cognate expressions are to be construed accordingly,
“renewal obligation” has the meaning given by section 37,
“renewal period” has the meaning given by section 37,
“renewal premium” has the meaning given by section 37,
“sporting right” has the meaning given by section 8(1),
“superior lease” has the meaning given by section 4, and
“tenant”, in relation to a lease, means the person who has right as tenant under the lease, whether or not such person has completed title (and where more than one person comes within that description, the person who most recently acquired that right).

(2) Subject to the provisions of this Act, expressions used in this Act and in the 2003 Act have the same meaning in this Act as they do in that Act.

81 Ancillary provision
(1) The Scottish Ministers may by order make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.
(2) Subject to subsection (3), an order under subsection (1) is subject to the negative procedure.
(3) An order under subsection (1) which adds to, replaces or omits any part of the text of an Act (including this Act) is subject to the affirmative procedure.

82 Subordinate legislation
(1) Any power of the Scottish Ministers to make an order under section 78(5) or regulations under this Act includes power to make—
(a) such incidental, consequential, supplementary, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient, and
(b) different provision for different purposes.
(2) Orders under section 78(5) and regulations under this Act are subject to the negative procedure.

83 Commencement
(1) Sections 81 and 82, this section and section 84 come into force on the day of Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
(3) An order under subsection (2) may include such transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient in connection with the commencement of this Act.

84 Short title
The short title of this Act is the Long Leases (Scotland) Act 2012.
Long Leases (Scotland) Bill
Schedule—Minor and consequential amendments

SCHEDULE
(introduced by section 79)

MINOR AND CONSEQUENTIAL AMENDMENTS

Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)

1 In section 9(2B) (no standard security over personal pre-emption burden or personal redemption burden) of the Conveyancing and Feudal Reform (Scotland) Act 1970, after the words “Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5)” insert “or as the case may be of section 23 of the Long Leases (Scotland) Act 2012 (asp 00))”.

Tribunals and Inquiries Act 1992 (c.53)

2 In section 11(7) of the Tribunal and Inquiries Act 1992 (which makes provision for Scotland in relation to appeals from certain tribunals), in paragraph (c)—
(a) the words after “under” become sub-paragraph (i), and
(b) after that sub-paragraph insert—
“(ii) section 21 of the Long Leases (Scotland) Act 2012 (asp 00) (applications in relation to the conversion of certain conditions in leases into real burdens); or
(iii) section 69 of that Act (applications in relation to confirmation of rent);”.

Title Conditions (Scotland) Act 2003 (asp 9)

3 (1) The 2003 Act is amended in accordance with this paragraph.
(2) In section 12 (division of a benefited property), in subsection (4)(a), after “Act” insert “or sections 29 or 31 of the Long Leases (Scotland) Act 2012 (asp 00)”.
(3) In section 20 (notice of termination of real burdens), after subsection (6) insert—
“(7) This section applies to a real burden created by the conversion of a qualifying condition under Part 2 of the Long Leases (Scotland) Act 2012 (asp 00) as if the reference to the “constitutive deed” were a reference to the deed setting out the qualifying condition.”.
(4) In section 63 (manager burdens)—
(a) in subsection (4)(d), for “the case mentioned in subsection (6)” substitute “either of the cases mentioned in subsection (6) or (6A)”,
(b) in subsection (5)(a), for “the case” substitute “either of the cases”,
(c) after subsection (6), insert—
“(6A) The case is where—
(a) a leasehold condition is imposed on the disposal, by virtue of section 61 of the Housing (Scotland) Act 1987 as modified by section 84A of that Act (application of right to buy in cases where landlord is lessee), of a landlord’s interest in a property by—
(i) a person such as is mentioned in any of the sub-paragraphs of subsection (2)(a) of section 61; or

(ii) a predecessor of such a person,

to a tenant of such a person; and

(b) that condition is converted into a manager burden under section 30 of the Long Leases (Scotland) Act 2012 (asp 00) (conversion of qualifying conditions into manager burdens).”, and

(d) in subsection (8)(b)—

(i) for “that” substitute “those”, and

(ii) for “subsection (6)” substitute “subsections (6) or (6A)”.

(5) In section 105 (consequential alterations to Land Register)—

(a) in subsection (2), for the words from “section”, where it first occurs, to “Act”, where it second occurs, substitute “—

(a) section 18, 19 or 20 of the 2000 Act;

(b) section 15 or 18 of the Long Leases (Scotland) Act 2012 (asp 00); or

(c) section 4(5), 50, 75 or 80 of this Act,”, and

(b) in subsection (3), after paragraph (a) insert—

“(aa) any—

(i) notice under section 14 of the Long Leases (Scotland) Act 2012; or

(ii) agreement under section 17 of that Act,

which converts a qualifying condition (within the meaning of that Act) into a real burden;”.

(6) In section 122 (interpretation), subsection (1)—

(a) in the definition of “conservation burden” the word “or” immediately following sub-paragraph (a) is repealed and after sub-paragraph (b) insert—

“(c) obtained by virtue of section 27 of the Long Leases (Scotland) Act 2012 (asp 00) (conversion of qualifying condition to conservation burden); or

(d) obtained by virtue of section 28 of that Act (conversion of qualifying condition to conservation burden where conservation body or Scottish Ministers nominated to enforce);”;

(b) in the definition of “economic development burden”, at the end insert “and to a real burden created under section 24 of the Long Leases (Scotland) Act 2012 (asp 00) (conversion of qualifying condition to economic development burden)”,

(c) in the definition of “health care burden”, at the end insert “and to a real burden created under section 25 of the Long Leases (Scotland) Act 2012 (asp 00) (conversion of qualifying condition to health care burden)”,

(d) in the definition of “personal pre-emption burden” and “personal redemption burden” after the word “Act” insert “and section 23(1) of the Long Leases (Scotland) Act 2012 (asp 00)”.

Long Leases (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to convert certain long leases into ownership; to provide for the conversion into real burdens of certain rights and obligations under such leases; to provide for payment to former owners of land of compensation for loss of it on conversion; and for connected purposes.

Introduced by: Richard Lochhead
On: 12 January 2012
Bill type: Executive Bill
Contents

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Long Leases (Scotland) Bill introduced in the Scottish Parliament on 12 January 2012:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 7–PM.
INTRODUCTION

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

SUMMARY AND BACKGROUND

4. The Long Leases (Scotland) Bill converts ultra-long leases into ownership. For the purposes of the Bill, “ultra-long leases” are leases that were let for over 175 years and that have over 100 years left to run from the appointed day laid down in the Bill. Under the Bill, compensatory and additional payments are payable by tenants to landlords. Some leasehold conditions are preserved and become real burdens in the title deeds. Landlords are also able to preserve sporting rights. The traditional name for a lease in Scotland is “tack”.

5. The Bill follows a report by the Scottish Law Commission\(^1\) published in December 2006 and a Scottish Government consultation\(^2\) published in March 2010. The Government introduced a Long Leases (Scotland) Bill in the last session of Parliament\(^3\) but this Bill fell when Parliament was dissolved for the Scottish elections in May 2011.

OVERVIEW OF BILL


7. Part 2 covers conversion of certain leasehold conditions to real burdens.

8. Part 3 covers allocation of rents and renewal premiums.


10. Part 5 covers exemption from conversion and continuing leases.

11. Part 6 covers general and miscellaneous matters.

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\(^3\) The Bill introduced in the last Parliament can be found on the Scottish Parliament’s website at [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx).
PART 1: CONVERSION OF LONG LEASE TO OWNERSHIP

Overview of Part 1 of the Bill

12. Part 1 lays down which leases are eligible for conversion to ownership under the Bill; which rights are extinguished and which continue and contains provisions enabling landlords to preserve sporting rights in relation to game and fishing.

Determination of “qualifying lease”

Section 1: Meaning of “qualifying lease”

13. This section provides a definition of “qualifying lease” for the purposes of converting to ownership. Under subsections (3) and (4), a lease is “qualifying” if:

- it is registered in the Sasines Register or the Land Register maintained by Registers of Scotland; and
- it was granted for more than 175 years and has more than 100 years left to run from the appointed day laid down in the Bill; and
- the annual rent does not exceed £100; and
- it does not include a harbour where there is a harbour authority; and
- it was not granted for the sole purpose of allowing the tenant to install and maintain pipes or cables; and
- it is not a lease of minerals or a lease containing minerals in which some payment is determined in relation to the exploitation of the minerals.

14. Provision is made in section 65 for the registration of unregistered ultra-long leases. These are then treated under the Bill as “exempt leases” and provision is made in section 68 for the tenant to recall the exemption. Such leases then become eligible for conversion to ownership.

15. Subsection (5) provides that leases which have been divided are to be treated as separate leases.

Section 2: Further provision about annual rent

16. This section makes provision relating to section 1(4)(a) to determine whether or not the annual rental under the lease exceeds £100.

17. Subsection (2) provides that the rent for the purposes of section 1(4)(a) is deemed to be the rent as set out in the lease, subject to subsections (3) to (5).

18. Subsection (3) disapplies subsection (2) in relation to cumulo rent. Cumulo rent is defined in section 38 of the Bill and means a single rent payable in relation to two or more leases. Section 39 allows the landlord to allocate cumulo rent to individual leases before the appointed day, when leases covered by the Bill convert to ownership. When cumulo rent is
allocated in this way, it ceases to be *cumulo* rent. After allocation of *cumulo* rent, if the annual rent in a lease is over £100, the lease can be exempted from conversion under section 64.

19. Subsection (4) disapplies subsection (2) in relation to any non-monetary rent. Section 51(1)(a) makes provision for landlords to claim an additional payment in respect of any leases converting to ownership under the Bill where there is any right to any rent expressed wholly or partly in non-monetary terms (such as six fat hens).

20. Subsection (5) disapplies subsection (2) in relation to any variable rent. Section 64 of the Bill makes provision relating to the exemption of leases where the annual rental at any point during the period of 5 years before Royal Assent exceeded £100. Section 64 allows landlords to register an agreement with the tenant or, if agreement cannot be reached, to register an order made by the Lands Tribunal for Scotland.

### Section 3: Only one lease is qualifying lease

21. This section sets out rules where land is subject to two or more leases which satisfy the requirements in section 1.

22. If land has been sublet, the sublease too might fulfil the criteria for conversion. The intention is that the last lease should qualify for conversion. If the sublease affects only part of the land originally leased, conversion would apply to this part and the head lease would be the qualifying lease for the remaining part. For example, if A, the owner of land, leases 10 hectares to B for 999 years and B in turn sublets 4 of these hectares to C for 920 years, C is the qualifying tenant in relation to the 4 hectares and B in relation to the remaining 6 hectares.

### Conversion of right of lease to ownership

#### Section 4: Conversion of right of lease to right of ownership

23. Under this section, the conversion of qualifying leases to ownership is automatic, unless the tenant chooses to opt out under Part 5 of the Bill. Conversion happens on the “appointed day”. The “appointed day” is defined in section 70 although this definition does not apply when a tenant of a lease recalls an exemption from conversion (see section 67(3)).

#### Consequences of conversion

#### Section 5: Extinction of certain rights and obligations

24. Subsection (1) extinguishes all rights and obligations arising from the qualifying lease and any superior lease. The rights and obligations may be set out expressly in a deed or be implied by virtue of the landlord and tenant relationship. There is a saving for any rights or obligations that survive the appointed day in one form or another under sections 6 and 7 and Part 2.

25. Subsection (2) provides an exception for personal rights and obligations.
26. Subsection (3) makes it clear that the obligation to pay rent for any period before the appointed day remains enforceable.

27. Subsection (4) prevents any proceedings being raised or continued after the appointed day for the enforcement of any rights and obligations extinguished by subsection (1). It does not matter that the breach occurred before the appointed day. Any decree or interlocutor already pronounced does not survive the appointed day. For instance, an interdict enforcing a use restriction would cease to apply.

28. Subsection (5) provides that subsection (4) does not apply to rights and obligations which survive the appointed day under sections 6 and 7 and Part 2. It will also remain possible after the appointed day to enforce a right to recover damages or a right to the payment of money (such as unpaid rent due before the appointed day). Subsection (5) further provides that subsection (4) does not apply to a right of irritancy. (“Irritancy” means a landlord’s right to terminate a lease). Section 73 contains specific provision on the extinction of right of irritancy in certain leases.

Section 6: Subordinate real rights, reservations and pertinents

29. This section sets out the subordinate real rights and encumbrances that burden the right of ownership of the converted land from the appointed day. It also makes provision in respect of pertinents (matters belonging to the lease) and reservations (matters excluded from the lease). In this section “converted land” is the land in which a right of ownership is created through the conversion of a qualifying lease under section 4(1)(a).

30. Subsection (2) lays down that on the appointed day subordinate real rights over the qualifying lease (such as a standard security or a mortgage) become subordinate real rights over the right of ownership.

31. Subsections (3) and (4) provide that the right of ownership created under section 4 is subject to any encumbrances and subordinate real rights, other than heritable securities, proper liferents (a right to use and enjoy a thing during life) or any superior leases, which burdened the head landlord’s ownership immediately before the appointed day. Servitudes, real burdens, and public rights of way, for example, will all continue. Subsection (4) does not affect the personal obligation of the debtor under the heritable security.

32. Subsection (5) defines the extent of the converted land by reference to pertinents and reservations of the lease. On the appointed day, a pertinent of the qualifying lease becomes a pertinent of the converted land provided that it is of a type that is recognised as a pertinent of land. Excluded from the converted land is anything reserved from the qualifying lease (or any superior lease), provided that it is capable of being held as a separate tenement in land (i.e. capable of being owned separately). If the reservation is not capable of being held as a separate tenement, it is disregarded on conversion and forms part of the converted land.

33. The main example of a reservation is a minerals reservation. Where the minerals are not already separate tenements, they become separate tenements on the appointed day when ownership of the surface is separated from ownership of the minerals. The reservation clause will
continue to regulate the relationship between the owner of the minerals (the former landlord) and the owner of the surface (the former tenant).

34. Subsection (5) interacts with section 8. Under section 8 a notice may be registered converting reserved sporting rights into a separate tenement. If a notice is registered, the sporting rights will not form part of the converted land. If a notice is not registered, the converted land will include the sporting rights. If such rights have been leased out separately, the lease in question is not affected by conversion of the qualifying lease but there would be a change of landlord.

Section 7: Creation of servitudes on conversion

35. The effect of this section is to create those servitudes (e.g. rights of access over neighbouring land to maintain a water supply or a drainage pipe) which would have been created (whether expressly, impliedly or by positive prescription) had the deeds referred to been a conveyance of land leading to separation of ownership.

36. The deeds referred to are the qualifying lease, any lease higher in the hierarchy of leases (where there is such a hierarchy), or any partial assignation relating to the qualifying lease. The latter, for example, covers the case where a single lease is divided into two by assignation. The assignation may include rights and obligations which affect the part of the lease that is assigned and also the part that is retained.

Section 8: Conversion of reserved sporting rights

37. This section provides for landlords to preserve sporting rights: i.e. rights to game and to fish.

38. Section 8 does not apply to exclusive rights to fish for salmon. Exclusive rights to fish for salmon are separate tenements in land: i.e. they are capable of being owned separately from the land or river in which they subsist. This means that either exclusive rights to fish for salmon are included in the qualifying lease or they are not. Given this, no special provisions are required for exclusive rights to fish salmon.

39. Subsection (2) provides for the execution and registration of a notice by the landlord.

40. Subsection (3) sets out requirements as to the content of the notice. This includes the terms of any counter-obligation to the right.

41. Under subsection (4), registration can be either against the interest of the landlord (i.e. the owner of the land) or the tenant of the qualifying lease.

42. Subsections (5) and (6) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally by the landlord but some exceptions are set out in subsection (6). Subsection (6)(a)(ii) must be read with Schedule 2 to the Requirements...
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of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.

43. Subsection (7) converts the sporting right into a separate tenement on the appointed day provided that the requirements of the section have been complied with and the right is still enforceable. It also prescribes the content of the separate tenement.

44. Where the right has been expressly reserved in the lease, the operation of subsection (7) clarifies the types of game which may be included in the right to take game. First of all, it comprises the rights and obligations set out in the lease in question. Secondly, insofar as consistent with those express rights etc, it comprises, in the case of game, an exclusive right to take hares, pheasants, partridges, grouse and ptarmigan, and, in the case of fishing, an exclusive right to fish for freshwater fish. Freshwater fish is defined in section 80. The definition mirrors that in section 69(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

45. Subsection (8) qualifies subsection (7) by providing that any exclusive right to game is subject to the right of the occupier under the Ground Game Act 1880 to take or kill hares and rabbits.

46. Subsection (9) provides that the separate tenement continues to be subject to any existing counter-obligation. It also provides that a counter-obligation is extinguished on the extinction of the right.

47. Subsection (10), as read with the definition of landlord in section 80, makes clear that only the owner of the land can serve a notice converting the right into a separate tenement. Where the right is held in common each co-owner must sign the notice.

48. The section is subject to section 75 which deals with pre-registration requirements for notices.

Section 9: Further provision for section 8

49. Subsection (1) provides that where a right affects more than one qualifying lease a landlord has to register a separate notice in respect of each lease. However, where the same qualifying lease is affected by different rights subsection (2) allows one notice to be used.

PART 2: CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS

Overview of Part 2 of the Bill

50. Part 2 provides a scheme for the conversion of certain leasehold conditions into real burdens. Once the conditions have been converted they become subject to the law on real burdens. The law on real burdens is primarily contained in the Title Conditions (Scotland) Act 2003. Section 1 of the 2003 Act outlines what real burdens are. Generally, a real burden is an encumbrance on land constituted in favour of the owner of other land in that person’s capacity as
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owner of that other land. However, personal real burdens are burdens constituted in favour of a person other than by reference to the person’s capacity as owner of any land.

**Determination of “qualifying conditions”**

**Section 10: Qualifying conditions**

51. This section identifies the criteria that must be met for a leasehold condition to qualify for conversion to a real burden. The section should be read with section 11. The effect of the two sections is that the leasehold condition must be capable of being constituted as a real burden under the Title Conditions (Scotland) Act 2003.

52. Subsection (1)(a), along with subsection (2), requires the condition to be set out in certain deeds. An interposed lease is specifically excluded from the list of constitutive deeds. An interposed lease may be granted under section 17 of the Land Tenure Reform (Scotland) Act 1974 by the original landlord to another party. The tenants of the original lease then become responsible to the new party, who is their new landlord. Interposed leases may, for example, be granted when the original landlord wishes to retain an interest in the property but does not wish to carry out the day to day management.

53. Subsection (1)(b) requires the condition to be binding on successors.

54. Subsection (1)(c), along with subsection (3), sets out certain requirements as to the content of the condition. Subsection (4) is an aid to interpretation. Whether a leasehold condition complies with subsection (3) will be judged by the effect of the words and not merely by their form.

55. Subsection (5) sets out some exclusions. Obligations to pay rent and restrictions on assignation and subletting are based on the relationship of landlord and tenant and therefore cannot be converted. Rights of irritancy (to terminate a lease) and penalty clauses (monetary penalties if lease conditions are not complied with) are also excluded. However, rights of pre-emption (a right to acquire certain property in preference to any other person), redemption (a right to buy back) or reversion (right to retake possession) may be capable of conversion.

**Section 11: Restriction on conversion of qualifying conditions**

56. The effect of this section is that a condition which becomes a qualifying condition must comply with section 3 of the Title Conditions (Scotland) Act 2003 for it to be validly converted into a real burden. Section 3 of the 2003 Act provides rules as to the content of a real burden. It must, for instance, relate directly or indirectly to the burdened property and it must not be contrary to public policy.

57. Section 3(5) of the 2003 Act which prohibits the creation of new rights of redemption is excluded as it would otherwise prevent the conversion of a qualifying condition having the effect of a redemption or reversion.
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Meaning of “qualifying land”

Section 12: Meaning of “qualifying land”

58. This section defines the term “qualifying land”.

Entitlement to enforce qualifying conditions

Section 13: Determination of who may enforce condition

59. The notice procedure introduced by sections 14 to 28 for converting a qualifying condition into a real burden can only be used by a person who has the right to enforce the qualifying condition. Section 13 sets out some rules on who can enforce a qualifying condition.

60. Subsection (2) provides that a person who has not completed title to the property to which the right to enforce a qualifying condition attaches has the right to enforce the condition. Where more than one person comes within that description then only the person with the latest right to the property may enforce it.

61. Subsection (3) provides that where a lease has been partially assigned, the tenant or subtenant of the retained part of the lease can enforce conditions imposed in the assignation or related deed. Such a person can then serve a notice under sections 14, 17, and 23 to 28. The reference to a deed registered under section 3 of the Registration of Leases (Scotland) Act 1857 includes a deed of conditions registered under the old section 3(5) of the 1857 Act which was repealed and replaced by the Title Conditions (Scotland) Act 2003 (section 128, schedule 14 paragraph 1, and schedule 15).

62. Subsection (4) defines “entitled person” for the purposes of sections 14 to 21. The definition recognises that third parties may have a right to enforce a qualifying condition.

63. Subsection (5) sets out rules, for the purposes of sections 14 to 21, for the situation where a right to enforce is held by more than one person pro indiviso (pro indiviso property or land is owned by several persons in common). If the right to enforce is held in the capacity of landlord, all pro indiviso landlords have to act together. In a section 14 case, for example, they must all be parties to the notice and they must all own the land to be nominated as a benefited property. If the right to enforce is held by a third party, a pro indiviso holder of the right can act alone but the effect is to convert the condition into a real burden for the benefit of all pro indiviso holders.

Conversion of conditions to burdens

Section 14: Conversion by nomination of benefited property

64. This section allows a person with a right to enforce a qualifying condition (the “entitled person”) to convert the condition into a real burden in favour of neighbouring land. “Entitled person” is defined in section 13(4). The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.
65. Subsections (1) and (2) provide that where a conversion condition set out in subsection (4) is met, or the Lands Tribunal for Scotland makes an order under section 21, an entitled person may prospectively convert a qualifying condition into a real burden by executing and registering a notice.

66. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (h)) is made in section 34.

67. Subsections (5) and (6) determine what land may be nominated by an entitled person as a benefited property. In the majority of cases the entitled person is the landlord. In such a case, the land to be nominated as the benefited property is land which either:

- the landlord owns and which is not subject to a qualifying or exempt lease; or
- land which the landlord is tenant of under a qualifying or exempt lease.

68. In the case of third parties, the land which may be nominated as a benefited property is that land to which the right to enforce attaches (whether to the ownership of that land or to the tenant’s interest under a lease of that land). In the latter case the tenancy under an ultra-long lease qualifies as ownership for the purposes of nominating the benefited property.

69. For example, A is the tenant of a qualifying lease and has assigned the lease in part to B, imposing a qualifying condition. Section 13(3) makes it clear that A has the right to enforce that condition and section 13(4) provides that A is an entitled person for the purposes of section 14.

70. To convert the qualifying condition, A has to serve a notice nominating land as the prospective benefited property. The land to be nominated as the benefited property has to satisfy section 14(5) as read with section 14(6) given that A is not a landlord. In other words, if the land to be nominated is subject to a qualifying or exempt lease, the entitled person has not only to be the tenant of that lease (subsection (5)) but also that lease has to be the lease to which the entitlement to enforce the condition attaches (by virtue of subsection (6)).

71. Section 32 deals with cases where a qualifying condition is expressly enforceable by the owner or tenant of land other than the qualifying land.

Section 15: Conversion by nomination: registration

72. Subsection (1) requires dual registration of the notice against both the burdened and the benefited property. Under subsection (2), there is a choice in both cases of registering against the title of the owner or (where applicable) the title of the tenant.

73. Subsection (3) provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (4). Subsection (4)(b) must be read with Schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.
Section 16: Conversion by nomination: effect

74. This section converts the qualifying condition into a real burden on the appointed day provided that the requirements of the section have been complied with and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.

Section 17: Conversion by agreement

75. This section allows the “entitled person” (as defined in section 13(4)) to enter into an agreement with the tenant of the qualifying lease for the purpose of converting a qualifying condition into a real burden in favour of neighbouring land. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour. An attempt to reach agreement is a prerequisite to an application under section 21 for an order from the Lands Tribunal dispensing with the need for any of the conversion conditions set out in section 14(4) to be satisfied.

76. Subsection (1) requires a notice to be served on the tenant under the qualifying lease as a preliminary to the agreement.

77. Subsections (2) and (3) determine what land may be nominated as a benefited property.

78. Subsection (4) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

79. Subsection (5) allows the parties to the agreement to modify the terms of the qualifying condition or any counter-obligation.

80. Subsection (6) regulates the form and content of the agreement.

81. Subsection (7) provides that this section is subject to section 36, which lays down further provision for notices and agreements.

Section 18: Conversion by agreement: registration

82. Subsection (1) requires dual registration of the agreement against both the burdened and the benefited property. Under subsection (2), there is a choice in both cases of registering against the title of the owner or (where applicable) the title of the tenant.

Section 19: Conversion by agreement: effect

83. This section converts the qualifying condition into a real burden on the appointed day if the requirements have been met and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.
Section 20: Conversion by agreement: title not completed

84. This section provides the method for deduction of title in cases where under the general law deduction of title would be required.

Applications relation to section 14

Section 21: Lands Tribunal order

85. This section allows an “entitled person” (as defined in section 13(4)) to apply to the Lands Tribunal for an order dispensing with the need to satisfy any of the conversion conditions set out in section 14(4). The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

86. Subsection (3) prevents an application being made unless there has first been an attempt to reach agreement under section 17.

87. Subsection (4) requires the application to be made within a year of the section coming into force. The application has also to include a description of the attempt to reach agreement.

88. Subsection (5) provides that the Lands Tribunal can make an order if it is satisfied that there would be material detriment to the value or enjoyment of the entitled person’s ownership (taking such person to have ownership) of the prospective benefited property were the qualifying condition in question to be extinguished. If an order is granted, the entitled person can then proceed to register a notice under section 14 converting the qualifying condition into a real burden.

89. Subsection (6) provides that the decision of the Lands Tribunal is final.

90. Subsection (7) makes provision for expenses in the case of a person opposing an application.

Section 22: Dealing with application under section 21

91. This section makes provision for the procedure in the Lands Tribunal in respect of applications under section 21.

92. The Scottish Ministers also already have powers to make rules in respect of Lands Tribunal procedures under section 3 of the Lands Tribunal Act 1949.

Personal real burdens

Section 23: Conversion to personal pre-emption or redemption burden

93. This section allows a person with the right to enforce a qualifying condition which confers a right of pre-emption or redemption to convert that condition into a real burden to be known as a personal pre-emption burden or a personal redemption burden.
94. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

95. Subsection (1) provides for the execution and registration of a notice. This must be done by the person with the right to enforce the qualifying condition. All pro indiviso landlords, for example, have to be parties to the notice.

96. Subsection (2) identifies the type of qualifying condition which may be converted.

97. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (e)) is made in section 34.

98. Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

99. Subsection (5) provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (6).

100. Subsection (6)(b) must be read with Schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.

101. Subsection (7) converts the qualifying condition on the appointed day into a personal pre-emption burden or a personal redemption burden in favour of the person with the right to enforce (or that person’s successor) provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

102. Subsection (8) makes clear that the benefit of the burden in question can be assigned or otherwise transferred to any person. Subsection (9) lays down that the assignation is completed by registration.

103. Subsection (11) provides the method for deduction of title in cases where under the general law deduction of title would be required.

104. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

**Section 24: Conversion to economic development burden**

105. This section allows a local authority, or the Scottish Ministers, with the right to enforce a qualifying condition which was imposed for the purpose of promoting economic development to convert that condition into an economic development burden in their favour. An economic development burden may lay down how the property should be used or may require money to be paid to the local authority or the Scottish Ministers. The relevant provision in the Title Conditions (Scotland) Act 2003 is section 45.
106. Subsection (1) provides for the execution and registration of a notice.

107. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

108. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

109. Subsection (4) converts the qualifying condition on the appointed day into an economic development burden in favour of the local authority or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

110. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

**Section 25: Conversion to health care burden**

111. This section allows the Scottish Ministers when they have the right to enforce a qualifying condition which was imposed for the purpose of promoting the provision of facilities for health care to convert that condition into a health care burden in their favour.

112. Subsection (1) provides for the execution and registration of a notice.

113. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (e)) is made in section 34.

114. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

115. Subsection (4) converts the qualifying condition on the appointed day into a health care burden in favour of the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

116. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

**Section 26: Conversion to climate change burden**

117. This section allows a public body or trust (defined in subsection (5)) or the Scottish Ministers with the right to enforce a qualifying condition which was imposed for the purpose of reducing greenhouse gas emissions (defined in subsection (5)) to convert that condition into a climate change burden in their favour. Climate change burdens were introduced by the Climate Change (Scotland) Act 2009. Section 68 of the 2009 Act inserted section 46A into the Title Conditions (Scotland) Act 2003.
118. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

119. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

120. Subsection (4) converts the qualifying condition on the appointed day into a climate change burden in favour of the public body, trust or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

121. Subsection (5) lays down various definitions. The definitions of “emissions” and “greenhouse gas” are taken from the Climate Change (Scotland) Act 2009. The definition of “public body” is taken from an order made by the Scottish Ministers under section 38(4) of the Title Conditions (Scotland) Act 2003.

122. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

**Section 27: Conversion to conservation burden: rule one**

123. This section allows a conservation body, or the Scottish Ministers, with the right to enforce a qualifying condition which promotes conservation to convert that condition into a conservation burden in their favour. “Conservation burden” is defined in section 38(1) of the Title Conditions (Scotland) Act 2003. “Conservation body” is defined in section 122(1) of the 2003 Act and refers to any body prescribed by an order made by the Scottish Ministers under section 38(4) of the 2003 Act.

124. Subsection (1) provides for the execution and registration of a notice.

125. Subsection (2) identifies the type of qualifying condition which may be converted. This mirrors the definition of conservation burden in section 38(1) of the 2003 Act.

126. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

127. Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

128. Subsection (5) converts the qualifying condition on the appointed day into a conservation burden for the benefit of the public in favour of the conservation body or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

129. Subsection (6) qualifies the reference in subsection (5) to a conservation body or the Scottish Ministers so as to include successors provided that they are either a conservation body
or the Scottish Ministers. In any other case the notice falls and the condition is extinguished on
the appointed day.

130. The section is subject to section 36, which makes further provision in relation to notices,
and section 75, which deals with pre-registration requirements for notices.

Section 28: Conversion to conservation burden: rule two

131. This section allows a person with the right to enforce a qualifying condition which
promotes conservation to convert that condition into a conservation burden in favour of a
conservation body or the Scottish Ministers. The entitled person is usually the landlord (of the
qualifying lease or a superior lease) but in some circumstances is a neighbour. “Conservation
burden” is defined in section 38(1) of the Title Conditions (Scotland) Act 2003. “Conservation
body” is defined in section 122(1) of the 2003 Act and refers to any body prescribed by an order
made by the Scottish Ministers under section 38(4) of the 2003 Act.

132. Subsection (1) provides for the execution and registration of a notice. This must be done
by the person with the right to enforce the qualifying condition. All pro indiviso landlords, for
example, have to be parties to the notice.

133. Subsection (2) requires the consent of the nominee to be obtained before a copy of the
notice is sent to the tenant under the qualifying lease under section 75(2) or in other cases before
the notice is executed. The nominee is required to sign the notice by way of indicating consent.

134. Subsection (3) sets out the content of the notice. Further provision as to counter-
obligations is made in section 34.

135. Subsection (4) provides for registration of the notice against the burdened property.
Registration can be against either the title of the owner or the title of the tenant.

136. Subsection (5) converts the qualifying condition on the appointed day into a conservation
burden for the benefit of the public in favour of the nominated conservation body or Scottish
Ministers provided that the requirements of the section have been complied with and that
immediately before the appointed day the qualifying condition is still enforceable by the person
with the right to enforce or that person’s successor.

137. The section is subject to section 36, which makes further provision in relation to notices,
and section 75, which deals with pre-registration requirements for notices. The adjustment to
section 36(3)(b) makes clear that a discharge of a section 28 notice also requires the consent of
the nominated person.

Other real burdens

Section 29: Conversion to facility or service burden

138. Subsection (1) provides for the automatic conversion of qualifying conditions concerned
with the maintenance, management, reinstatement or use of facilities into facility burdens.
Typical examples of facilities are given in subsection (3). “Facility burden” is defined in section 122(1) of the Title Conditions (Scotland) Act 2003.

139. Obligations to maintain or reinstate which have been taken over by a local or other public authority are excluded (see section 33).

140. Subsection (2) provides for the automatic conversion of qualifying conditions concerned with the provision of services to other land into service burdens. “Service burden” is defined in section 122(1) of the Title Conditions (Scotland) Act 2003.

Section 30: Conversion to manager burden

141. This section provides for the automatic conversion of a qualifying condition which confers a power of management over a group of related properties into a real burden known as a manager burden. “Manager burden” is defined in section 63(1) of the Title Conditions (Scotland) Act 2003. Such burdens are time limited, usually to five years from creation (section 63(4) to (7) of the 2003 Act), which in the case of converted conditions is the date of registration of the qualifying lease or other constitutive deed.

142. Subsections (3) and (4) provide that whether properties are related depends on the circumstances of each case and gives a list of indicators. They are modelled on section 66(1) of the Title Conditions (Scotland) Act 2003.

Section 31: Conversion where common scheme affects related properties

143. This section applies to qualifying conditions the regime provided by section 53 of the Title Conditions (Scotland) Act 2003 for real burdens. It draws on concepts of “common scheme” and “related properties”, used in the 2003 Act. Essentially, qualifying conditions will be imposed under a common scheme insofar as they apply identical or equivalent conditions to each property.

144. The effect of subsection (1) is to convert automatically qualifying conditions which meet the criteria into real burdens in respect of which each property covered by the scheme will be both a benefited and a burdened property. The burdens created will be community burdens. Part 2 of the Title Conditions (Scotland) Act 2003 provides for community burdens and section 25 of the 2003 Act defines “community burdens”.

145. Subsections (2) and (3) provide that whether properties are related depends on the circumstances of each case and gives a list of indicators. A typical example would be flats in the same tenement.

146. Subsection (4) prevents rights of pre-emption, redemption or reversion being conferred by virtue of this section.
Section 32: Conversion where expressly enforceable by certain third parties

147. Sometimes the lease makes clear that, in addition to the landlord, the conditions (or some of them) are to be enforceable by neighbours, i.e. by the owners or tenants of other land. Without express provision the rights fall with the conditions themselves. This section therefore provides for the conversion of such conditions into real burdens.

Exclusions from conversion

Section 33: Qualifying condition where obligation assumed by public authority

148. This section provides that the automatic conversion of qualifying conditions involving roads, sewerage or other facilities into facility or service burdens (section 29) does not extend to obligations which have been taken over by a local or other public authority. Obligations of this kind are spent. The provision also applies to obligations which are part of a common scheme (section 31).

Effect of conversion on counter-obligations

Section 34: Counter-obligations on conversion

149. This section makes clear that an obligation which is the counterpart of a qualifying condition converted into a real burden also survives and is binding on the former landlord or third party enforcer or any replacement enforcer. An example might be where a tenant is under an obligation to pay for maintenance which is then to be carried out by the landlord. The section does not provide a free-standing right to enforce the counter-obligation but it makes the right to enforce the burden subject to performance of the counter-obligation.

150. Subsection (2) sets out the relevant counter-obligations.

Prescription

Section 35: Prescriptive period for converted conditions

151. This is a transitional provision. The period of negative prescription (extinction of obligation) for a leasehold condition is presently twenty years. After conversion to a real burden, the period will be five years under section 18 of the Title Conditions (Scotland) Act 2003. The effect of this section is to make the prescriptive period for a breach of a qualifying condition that occurs before the appointed day for leasehold conversion the same as the period for a breach of a real burden that occurred before the day appointed for feudal abolition. That is to say, the prescriptive period for such a breach will be the shorter of 5 years from the appointed day or 20 years from the breach.

Notices and agreements under this Part

Section 36: Further provision for notices and agreements

152. Subsection (2) provides that the person with a right to enforce (whether landlord or third party) should not be able to preserve that right under separate heads of conversion. It should not, for example, be competent to convert a condition into a neighbour burden under section 14 and a
conservation burden under section 27 or section 28. A choice has to be made but the choice is not final as subsection (3) allows an earlier agreement or notice to be discharged.

153. Subsections (4) and (5) regulate the number of notices that are required. Where the same qualifying condition enforceable by the same person affects more than one qualifying lease, a separate notice must be prepared for each lease but the same notice (or agreement) can be used for more than one condition.

154. Subsection (6) makes clear that there is no requirement of registration where the prospective benefited property is outwith Scotland.

PART 3: ALLOCATION OF RENTS AND RENEWAL PREMIUMS ETC.

Overview of Part 3 of the Bill

155. Part 3 of the Bill makes provision for the allocation of *cumulo* rent and *cumulo* renewal premium. “*Cumulo*” refers to a single payment made in relation to two or more leases.

Key terms

Section 37: Partially continuing leases and renewal obligations etc

156. This section defines certain terms.

Section 38: *Cumulo* rent and *cumulo* renewal premium

157. This section defines *cumulo* rent as a single rent payable under two or more leases and *cumulo* renewal premium as a single renewal premium payable in relation to two or more leases.

158. Subsection (2) qualifies the definitions of *cumulo* rent and *cumulo* renewal premium by providing that where a rent or premium has been apportioned between the leases before the appointed day with the express or implied agreement of the parties the rent or premium apportioned is to be the rent or premium for that lease.

159. The definition of *cumulo* renewal premium is qualified further by subsections (3) and (4). They provide that where a *cumulo* rent has been apportioned with the agreement of the parties but not the *cumulo* premium, the premium is allocated between the leases in the same proportions as the rent.

Allocation of rent

Section 39: Allocation of *cumulo* rent before appointed day

160. This section allows the landlord to allocate *cumulo* rent before the appointed day. This allows landlords to claim an exemption from the Bill, if the annual rental for an individual lease after the *cumulo* rent has been allocated is over £100.
161. Subsection (1) and (2) provide that where two or more leases are subject to *cumulo* rent and one or more of the leases is a qualifying lease (defined in section 1), the landlord may allocate the *cumulo* rent.

162. Subsection (3) provides that the allocation must be reasonable and subsection (4) provides that the allocation is presumed to be reasonable if it is in accord with any apportionment that has already taken place. This presumption is relevant only in cases where an apportionment was made without the consent of the landlord: for example, where the rent is collected by a property manager or other third party and remitted to the landlord in a single sum. Subsection (5) provides that once the allocation by the landlord has taken place the rental for each individual lease is the annual rental and is not to be treated as *cumulo*.

**Section 40: Allocation of *cumulo* rent after appointed day**

163. Where the annual rent payable under the lease is a *cumulo* rent, as defined in section 38, that rent requires to be allocated before the compensatory payment can be calculated under Part 4. This section sets out the rules for doing so.

164. Subsection (2) directs the landlord to allocate the *cumulo* rent between the leases within 2 years of the appointed day. The rent is to be allocated between all of the leases in respect of which *cumulo* rent was payable. The allocation must be in such proportions as are reasonable in the circumstances (subsection (3)).

165. Subsection (4) creates a presumption that the landlord’s allocation is reasonable if it accords with an apportionment made before the appointed day. This presumption is relevant only in cases where an apportionment was made without the consent of the landlord: for example, where the rent is collected by a property manager or other third party and remitted to the landlord in a single sum. To assist the landlord, section 58 requires any third party collector to disclose to the landlord information about the tenants from whom the rent has been collected and the amount collected.

166. Under subsection (5), the sum allocated to a lease that continues after the appointed day is the annual rent payable under that lease from the appointed day, subject to any allocation under section 41 in relation to partially continuing leases.

**Section 41: Partially continuing leases: allocation of rent**

167. Section 41 is concerned with a lease that is partly extinguished and partly continues on and after the appointed day. “Partially continuing lease” is defined in section 37. A lease is a partially continuing lease if, for example, there is a partial sublease further down the leasehold chain which is exempt from conversion under Part 5. Instead of being extinguished in full, the higher lease continues in force in relation to the subjects of the exempt lease.

168. Subsection (1) directs the landlord of a partially continuing lease to allocate the annual rent payable under the lease between the continuing part and the extinguished part (the “continuing subjects” and the “converted subjects”). Subsection (2)(b) provides that if the rent payable under the lease was a *cumulo* rent, as defined in section 38, the landlord must allocate...
the *cumulo* rent between the relevant leases, as outlined in section 40, before carrying out the allocation under this section.

169. Under subsection (4), the sum allocated to the continuing part of the lease is the annual rent payable under that lease from the appointed day.

**Allocation of renewal premium**

**Section 42: Allocation of *cumulo* renewal premium**

170. Where a *cumulo* renewal premium (as defined in section 38) is payable under more than one lease, a landlord, for the purposes of claiming a compensatory payment or an additional payment for the loss of the renewal premium, has first to allocate the premium.

171. If the premium allocated is more than £100, compensation can only be claimed under section 51(1)(d) as an additional payment.

172. The allocation must be in such proportions as are reasonable in the circumstances (subsection (3)). Subsection (4) creates a presumption that an allocation of a premium is reasonable if it accords with an apportionment effective immediately before the appointed day or, if there is no such apportionment, it follows any allocation of *cumulo* rent made under section 40.

173. Under subsection (5), the renewal premium allocated to a lease that continues after the appointed day is the renewal premium payable under that lease from the appointed day, subject to any allocation under section 43 in relation to partially continuing leases.

**Section 43: Partially continuing leases: allocation of renewal premium**

174. Where a renewal premium (as defined in section 37) is payable under a partially continuing lease, a landlord, for the purposes of claiming a compensatory payment or an additional payment for the loss of the renewal premium, must first allocate the premium between the converted subjects and the continuing subjects.

175. Subsection (3) provides that if the renewal premium payable under the lease is a *cumulo* renewal premium, as defined in section 38, the landlord must allocate the *cumulo* renewal premium between the relevant leases, as outlined in section 42, before carrying out the allocation under this section.

176. If the premium allocated is more than £100, compensation can only be claimed under section 51(1)(d) as an additional payment.

177. The allocation must be in such proportions as are reasonable in the circumstances (subsection (4)). Subsection (5) creates a presumption that an allocation of a premium is reasonable if it follows an allocation of rent under section 41.
These documents relate to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

178. Under subsection (6), the sum allocated to the continuing part of the lease is the renewal premium payable under the lease from the appointed day.

_Allocation disputed or not made_

**Section 44: Allocation disputed or not made: reference to Land Tribunal**

179. Under subsection (1), the tenant under a continuing lease or the continuing part of a lease can apply to the Lands Tribunal for Scotland to:

- challenge the allocation of _cumulo_ rent under sections 39 or 40;
- challenge the allocation of _cumulo_ renewal premium under section 42;
- challenge the allocation of rent in relation to partially continuing leases under section 41;
- challenge the allocation of renewal premium in relation to partially continuing leases under section 43;
- seek the allocation of _cumulo_ rent or _cumulo_ renewal premium, if the landlord has failed to carry out an allocation within two years from the appointed day; and
- seek the allocation of rent or renewal premium, where a lease is partially continuing, between the converted subjects and the continuing subjects, where the landlord has failed to do so within 2 years of the appointed day.

180. Where the landlord has made an allocation which is disputed, any application by the tenant to the Lands Tribunal must be made within 56 calendar days, beginning with the day on which notice of the allocation was given to the tenant. Where no allocation is made, the tenant may apply to the Tribunal at any time after the expiry of the two year period running from the appointed day.

181. This section does not give a former tenant of a lease, or part of a lease, extinguished on the appointed day, a right to challenge the amount of compensation claimed by the former landlord where an allocation has been made. However, it is a defence to a claim for compensation that the allocation was unreasonable.

**PART 4: COMPENSATION FOR LOSS OF LANDLORD’S RIGHTS**

**Overview of Part 4 of the Bill**

182. Part 4 sets out a scheme under which the landlord of a lease converting to ownership under Part 1 may claim compensation. A landlord may claim a general payment for the loss of rights. This is termed a compensatory payment and is based on the capitalised value of the rent (see sections 45 to 49).

183. Exceptionally a compensatory payment may not be enough. In certain cases, therefore, a landlord may claim a further payment, termed an “additional payment”, for the loss of the right in question (see sections 50 to 55).
184. Part 4 also contains provisions in relation to the landlord serving a preliminary notice where a claim is likely to exceed £500 (see section 56); the tenant making payments by instalments when the amount due is £50 or more (see section 57) and the disclosure of information (see sections 58 and 59).

**Compensatory payment**

**Section 45: Requiring compensatory payment**

185. To claim a compensatory payment, the former landlord must serve on the former tenant a notice in the prescribed form within 2 years of the appointed day, accompanied by a copy of a prescribed explanatory note (subsection (4)).

186. The sum due by the tenant is calculated in accordance with section 47 and is an ordinary unsecured debt. The claim is against the immediate former tenant of the person making the claim.

187. If the sum being claimed is £50 or more, an instalment document has to be served along with the notice (subsection (5)). This gives the former tenant the option of paying by instalments in accordance with the scheme set out in section 57. If an instalment document is not served the notice has no effect.

188. Subsection (6) provides that the section is subject to section 56, the effect of which is to restrict the amount of compensatory payment to no more than £500 unless a preliminary notice has been served.

**Section 46: Making compensatory payment**

189. If the landlord has followed the notice procedure correctly, the former tenant must, unless entitled to pay by instalments (see sections 45(5) and 57), make the compensatory payment within 56 calendar days beginning with the day on which notice is served.

**Calculation of compensatory payment**

**Section 47: Calculation of the compensatory payment**

190. This section sets out how the compensatory payment by tenants to landlords is to be calculated. The method of calculation is based on the compensation scheme under the Abolition of Feudal Tenure etc. (Scotland) Act 2000, which abolished feudal tenure. The compensation is designed to deliver the same economic benefit to the landlord as the ongoing income from rent paid under the ultra-long lease being converted to ownership. Additional payments may also be due – see sections 50 to 55).

191. The compensatory payment is first calculated by working out the Annual Income (AI). As outlined in Step 1, the AI is calculated by determining the annual rent, in accordance with section 48, and then, as outlined in Step 3, by adding any notional annual renewal premium (NARP) calculated under section 49. Under Step 2 and section 49, the NARP is any renewal premium of £100 or less, divided by the renewal period (RP) (see section 49). Renewal
premiums of over £100 may give rise to a separate claim for an additional payment – see section 51(1)(d).

192. To give an example, if the annual rent is £2.50 and the renewal premium is £2.50, with a renewal period of 99 years, the AI is £2.50 plus 3p (£2.50 divided by 99, rounded to the nearest penny). Therefore, the AI is £2.53.

193. The next step, as outlined in Step 4, is to calculate the sum of money which would, if invested in 2.5% Consolidated Stock, produce an annual sum equal to AI. This sum is the compensatory payment.

194. The price of Consolidated Stock varies. At 25 November 2011, the price was £67.50 (to buy £100 of nominal stock yielding 2.5% interest). Therefore, the compensatory payment is £67.50 (price of stock yielding £2.50 a year) multiplied by £2.53 (AI) divided by £2.50 (annual sum produced by investing £67.50 in 2.5% consolidated stock). This gives a compensatory payment of £68.31.

195. To give another example, if the annual rent is £20 and there is no NARP, the compensatory payment is £67.50 (price of stock) multiplied by £20 (AI) divided by £2.50 (annual income from the stock). This gives a figure of £540.

196. Another way of carrying out the calculation is to use a variable multiplier (variable as the price of 2.5% Consolidated Stock varies). Therefore, if the price of 2.5% Consolidated Stock is £67.50, the variable multiplier is 27 (£67.50 divided by £2.50). This variable multiplier can then be multiplied by the AI to produce the compensatory payment.

Annual rent
Section 48: Determination of the annual rent

197. This section lays down how the annual rent should be determined for the purposes of calculating the compensatory payment. In some cases, rent may be paid on a cumulo basis. Cumulo rent is defined in section 38 and refers to a single rent payable in relation to two or more leases. In these cases, the annual rent is allocated under section 40.

198. In other cases, a lease may be “partially continuing” (a definition of “partially continuing lease” is laid down in section 37). In these cases, the annual rent is allocated under section 41.

199. Where the lease does not involve cumulo rents or partially continuing leases, the annual rent is as laid down in the lease, excluding any non-monetary payments.

200. Subsection (2) provides that any rent expressed in non-monetary terms is to be excluded from the calculation of the compensatory payment. Provision is made for non-monetary rents to be the basis of a claim for an additional payment – see section 51(1)(a).
Renewal premiums

Section 49: Calculation of notional annual renewal premium

201. This section applies if a renewal premium of £100 or less is payable under the lease and it is necessary to include the renewal or more than one renewal in order to meet the durational requirements for conversion.

202. Subsection (2) directs the former landlord to divide the amount of the renewal premium by the number of years between each renewal. This gives a sum which represents the “notional annual renewal premium” or NARP. The NARP is added to the annual rent payable under the lease in order to calculate compensation under section 47.

203. Subsection (3) provides that that where there is a partially continuing lease, the renewal premium for leases converting to ownership is as allocated under section 43. Where there is not a partially continuing lease but there is a cumulo renewal premium, the renewal premium is as allocated under section 42. And in all other cases the renewal premium is the amount payable under the lease.

204. If a renewal premium of more than £100 is payable, the landlord can claim compensation under the additional payments regime set out in sections 50 to 55.

Additional payment

Section 50: Claiming additional payment

205. To claim an additional payment for the loss of a right, the former landlord must serve a notice in the prescribed form on the former tenant within two years of the appointed day (subsections (2) and (4)). The amount claimed is calculated in accordance with section 52. The claim is against the immediate former tenant of the person making the claim except in the circumstances set out in subsection (3).

206. Under subsection (3), where the right lost by the former landlord of a superior lease is one specified in section 51(1)(e) to (g), the former landlord is directed to serve the notice claiming an additional payment on the former tenant of the qualifying lease rather than on the former tenant of the superior lease.

207. Subsection (4) sets out various requirements for the form and content of the notice. The notice must be accompanied by a copy of the explanatory note.

208. Under subsection (5), if the sum being claimed is £50 or more an instalment document has to be served along with the notice. This gives the tenant the option of paying by instalments in accordance with the scheme set out in section 57. If an instalment document is not served the notice has no effect.

209. Subsection (6) provides that the section is subject to section 56 the effect of which, in the case of a qualifying lease, is to restrict the maximum amount that can be claimed by way of additional payment to £500 unless a preliminary notice has been served.
Section 51: Extinguished rights

210. This section identifies the rights the loss of which may found a claim for an additional payment. In the notice making the claim it will be for the landlord to nominate, and to justify, the particular ground of claim (see section 50(4)).

211. Subsection (1)(a) refers to a right to a non-monetary rent. Paragraph 6.29 of the Scottish Law Commission report indicated that in around 1% of the leases it surveyed it found non-monetary rents such as six fat hens, oat farm meal and the services of a labourer for three days to work on the roads in a town.

212. Subsection (1)(b) refers to a right to have the rent reviewed or increased. Paragraph 6.30 of the Scottish Law Commission report indicated that provision for rent reviews was rare in ultra-long leases but the possibility should be acknowledged. Paragraph 6.31 of the report indicated that it is possible for rent to increase by way of a fixed formula rather than by virtue of a review.

213. Subsection (1)(c) refers to a right to a rent to the extent that the amount payable is variable from year to year. This might, for example, be relevant where rent is based on the turnover of a business.

214. Subsection (1)(d) refers to a right to receive a renewal premium of more than £100 (rights to receive lesser amounts can be recovered under the compensatory payment regime (see sections 47 and 49)).

215. Subsection (1)(e) relates to a landlord’s right of reversion, so long as the lease would expire no later than 200 years after the appointed day. Reversionary rights occasionally may have a value over and above the income stream from rent. Rights falling into this category are to be valued in accordance with section 52(3) and (4).

216. Subsection (1)(f) refers to a right to bring a lease to an end before its normal expiry. The right has to be within the full control of the landlord and exercisable within 200 years of the appointed day. A break clause exercisable at regular intervals or a right of redemption or resumption exercisable at the landlord’s discretion would be included but not a right to terminate on breach. A right (such as a right of redemption) which is converted into a real burden under sections 16,19 or 23 is excluded.

217. Subsection (1)(g) refers to a right to development value provided that the right has not been converted into a real burden under sections 16 or 19. “Development value” is defined in subsection (2) as is the expression “right to development value”.

Section 52: Calculating additional payment

218. This section sets out some general and some specific rules for determining the amount of an additional payment. Subsection (2) provides that the right is to be valued as at the appointed day.
219. Subsections (3) and (4) contain specific rules relating to the valuation of a landlord’s reversionary interest in a claim under section 51(1)(c). In particular, the value is deemed to be the value of the right if sold on the open market by a willing seller to a willing buyer, with special buyers and special sellers (i.e. those with a particular interest in the property) disregarded.

220. Subsections (5) to (7) provide that any obligations on the landlord which are extinguished by conversion have to be taken into account (but not insofar as such obligations are preserved as a counter obligation to a real burden) as has any other entitlement of the landlord to recover in respect of the loss. “Any other entitlement” refers primarily to the compensatory payment calculated under section 47.

221. Subsection (8) caps a claim for the loss of the right to development value. In some cases, ultra-long leases may have been granted cheaply on the basis that the property was used for some limited purpose, such as the building of a church or a community hall.

222. Paragraph 6.45 of the Scottish Law Commission report said that if any leasehold conditions preserving development value were discharged by the Lands Tribunal, any compensation would be limited to a sum to make up for the effect the leasehold condition produced in reducing the consideration paid for the interest in the property. No account is taken of inflation. In other words, the loss of the right to development value is limited to the reduction in the price paid for the interest in the property at the time.

Section 53: Additional payment: former tenant agrees

223. This section applies where, following service of an additional payment notice under section 50, the former tenant agrees to make the payment specified in the notice. Unless the former tenant is entitled to pay by instalments (see section 57), payment must be made to the former landlord within 56 calendar days beginning with the day on which the notice was served on the former tenant.

224. There may be cases where the former tenant does not agree to pay the amount specified in the notice. In these cases, the former tenant and the former landlord may agree that a different amount should be paid (see section 54) or where agreement cannot be reached, the matter may be referred to the Lands Tribunal (see section 55).

Section 54: Additional payment: amount mutually agreed

225. Following service of an additional payment notice under section 50, the former landlord and former tenant may agree that a different amount be paid. This section regulates the procedure to be followed.

226. Subsection (2) requires the former landlord to serve a further notice in the prescribed form on the former tenant specifying the agreed amount and requesting payment. The notice must be served within 5 years of the appointed day to be valid. If a notice is not served, the obligation to pay does not arise and the landlord loses the right to collect the payment.
227. Subsection (3) sets out requirements for the form and content of the notice. The notice must be accompanied by a copy of the explanatory note.

228. If the agreed sum is £50 or more, subsection (4) requires that an instalment document is served along with the notice. This gives the tenant the option of paying by instalments in accordance with the scheme set out in section 57. If an instalment document is not served the notice has no effect.

229. Unless entitled to pay by instalments, subsection (5) requires the former tenant to make payment to the former landlord within 28 calendar days, beginning with the day on which the notice is served.

Section 55: Claim for additional payment: reference to Lands Tribunal

230. This section applies in cases where no agreement has been reached under section 53 or section 54.

231. Subsection (1) gives both the former tenant and the former landlord the right to refer any matter relating to a claim for an additional payment to the Lands Tribunal.

232. Subsection (2) gives the Lands Tribunal a wide discretion to determine the matter and make such order as it thinks fit.

233. Subsection (3) requires the Lands Tribunal to provide the former tenant with the option of paying by instalments in accordance with the statutory instalment scheme if the additional payment is fixed at £50 or more. This subsection makes certain amendments to the instalment scheme to take account of the fact that no instalment document will be served on the former tenant in such circumstances.

234. Subsection (4) provides that all references to the Lands Tribunal must be made within 5 years of the appointed day.

Supplementary

Section 56: Claims in excess of £500: preliminary notice

235. A landlord who intends to claim a sum which is likely to exceed £500 by way of compensatory or additional payment from the tenant of the qualifying lease has to serve a preliminary notice. This notice must be served no later than six months before the appointed day on the person who is registered at that time as the tenant. Separate notices have to be served in respect of each type of payment. If a notice is not served the amount of compensatory or additional payment that can be claimed is capped at £500.
Section 57: Making payment by instalments

236. Where the compensatory payment or additional payment is £50 or more the former landlord has to serve an instalment document along with the relevant notice. This section sets out the rules of the instalment scheme.

237. Subsection (2) provides that the instalment document must be completed in the prescribed form and accompanied by a copy of the explanatory note.

238. Subsection (3) requires that to obtain the option to pay by instalments, the former tenant has to sign, date and return the instalment document along with payment of a 10% surcharge. The tenant has to do this within the period allowed for payment of the compensatory or additional payment, which is either 56 or 28 calendar days.

239. Subsection (4) provides that the option of paying by instalments is lost by the former tenant of a qualifying lease in the event of a sale of the whole or part of the land now owned.

240. Subsections (6) and (7) set out the details of the instalment scheme. Whitsunday is 28 May and Martinmas is 28 November.

241. Subsection (8) provides for immediate payment of the balance if an instalment is unpaid for forty two calendar days.

242. Subsection (9) makes clear that in other cases the balance can be repaid at any time.

Section 58: Collecting third party to disclose information

243. This section requires any third party collector of rent (e.g. where rent has been on a cumulo basis) to disclose to the landlord information about the tenants from whom the rent has been collected and, where the rent remitted is part of a cumulo rent, the amount so collected, so far as this is practicable.

Section 59: Duty to disclose identity etc. of former tenant

244. This section requires a person on whom a notice was mistakenly served claiming a compensatory or additional payment to disclose the name and address of the former tenant or, failing that, such other information as will enable the former tenant to be traced.

Section 60: Prescription of requirement to make payment

245. This section provides that the obligation to pay the compensatory or additional payment prescribes (i.e. extinguishes) after 5 years. Prescription starts to run from the date the obligation to pay arises.
Section 61: Interpretation of Part 4

246. Subsection (1) defines former landlord and former tenant for the purposes of Part 4. It has to be read alongside the definitions of landlord and tenant in section 80(1). The definitions include a person who has a right to the interest but who has not completed title. If more than one person comes within the definition the latest such person is treated as the landlord or the tenant.

247. Subsection (2) provides where there are co-tenants their liability is joint and several as regards the compensatory or additional payment in a question with the former landlord and also among themselves. It also makes clear that for the purposes of Part 4 such tenants are to be treated as a single tenant except for the provisions regarding service of a notice.

PART 5: EXEMPTION FROM CONVERSION AND CONTINUING LEASES

Overview of Part 5 of the Bill

248. This Part contains provisions on the landlord being able to exempt a lease, by agreement with the tenant or through an order of the Lands Tribunal, if the annual rental is over £100 either immediately before the appointed day or at any point in the 5 years before Royal Assent. Part 5 also makes provision on the tenant opting out of converting a lease to ownership by exempting the lease and recalling the exemption. It also contains provisions on the registration of unregistered leases. These are then treated as leases which are exempt from conversion but with the tenant having the option of recalling this exemption.

Exempt leases

Section 62: Exempt leases

249. This section sets out the consequences of a lease being an exempt lease when the appointed day arrives. The effect is to suspend the process of conversion in relation to that lease and any superior lease. Existing landlord-tenant relationships continue in force as before. “Exempt leases” are defined by reference to sections 63 to 66.

Types of exempt leases

Section 63: Exemption of qualifying lease by registration of notice

250. This section allows the tenant of a qualifying lease to opt out of conversion so that it becomes an “exempt lease”. The section requires the tenant to register a notice of exemption at least two months before the appointed day.

Section 64: Exemption of qualifying lease by registration of agreement or order

251. This section allows a landlord to claim an exemption in respect of a lease where the annual rental is over £100.

252. Subsection (1) provides that the landlord must register an agreement with the tenant or an order made by the Lands Tribunal no later than 2 months before the appointed day.
253. Subsection (2) makes provision in respect of the form of the agreement with the tenant.

254. Subsection (2)(c)(i) provides that one option is for the agreement to state that the annual rent immediately before the appointed day will be over £100. Such an agreement might be sought, for example, where the landlord allocates *cumulo* rent under section 39 and the allocated rent for an individual lease is over £100.

255. Subsection (2)(c)(ii), as read with subsection (3), provides that another option is for the agreement to state that the annual rent was over £100 at any point in the 5 years before Royal Assent. This reflects that some leases may have variable rent. Variable rent may mean that the rent paid in any one year in the 5 years before Royal Assent exceeds £100 even though the base rent laid down in the lease is under £100.

Section 65: Certain leases registered near or after the appointed day

256. An unregistered lease which otherwise satisfies the requirements for conversion is not a qualifying lease under section 1. This section makes provision for the situation where the lease is subsequently registered.

257. An unregistered lease which is first registered in the year before the appointed day or at any time thereafter is treated as an exempt lease. This enables the lease to be converted into ownership by registering a recall notice under section 67. This procedure gives the landlord of that lease notification of conversion of the lease to ownership and the opportunity to register notices converting conditions into real burdens etc. Where first registration of the lease takes place in the year before the appointed day, section 62 suspends the process of conversion.

Section 66: Subleases of exempt leases

258. The tenant under an exempt lease may grant a sublease which fulfils the criteria for conversion. This section provides that on registration the sublease is to be treated as an exempt lease. The tenant may then register a recall notice.

Section 67: Recall of exemption

259. This section allows the tenant under an exempt lease to register a recall notice, so long as the lease is not exempted under section 64 by the landlord. The tenant may register a recall notice before or after the appointed day.

260. Under subsection (2), on registration of a recall notice the exempt lease ceases to be an exempt lease. It then becomes eligible for conversion so long as it meets the general criteria for conversion. In particular, the unexpired duration of the lease must at the appointed day (see subsection (3)) be more than 100 years.

261. Subsection (3) prescribes the appointed day where the notice of recall is registered in the six months before or on or at any time after the standard appointed day laid down in section 70. The effect of deferring the appointed day is to give a landlord of the qualifying lease or any
superior lease a period of six months in which to consider whether to register notices converting leasehold conditions into real burdens.

262. Subsection (4) removes the requirement for the landlord to serve a preliminary notice in order to claim compensation or additional payments of more than £500. The purpose of such a notice is to invite consideration of opting out but that is no longer relevant where the decision to recall has been made.

Supplementary

Section 68: Exemption and recall notices: supplementary

263. This section sets out rules for the service and registration of a notice of exemption or a notice of recall.

264. Subsections (2) and (3) provide for the sending of a copy of the exemption notice or recall notice to the landlord of the qualifying or exempt lease and any landlord of a superior lease. Service can be on the person who is registered as landlord. Normally service is by post, and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

265. Subsection (4) requires the notice to be registered against the title of the tenant. This allows anyone dealing with the lease to see the position.

Section 69: Application to Lands Tribunal for order confirming rent

266. This section makes provision for the landlord to obtain an order from the Lands Tribunal that the annual rent in relation to a lease exceeds £100. If such an order is granted, the landlord may register the order under section 64 to claim an exemption.

267. Subsection (3) provides that an application can only be made to the Tribunal if an attempt has been made to reach agreement with the tenant. Subsection (4) provides that any application to the Tribunal must outline what had been done to obtain an agreement and must be made within a year of the section coming into force.

268. Subsection (1)(a) provides that the application may be for an order that the annual rent immediately before the appointed day will be over £100. Such an order might be sought, for example, where the landlord allocates *cumulo* rent under section 39 and the allocated rent for an individual lease is over £100.

269. Subsection (1)(b), as read with subsection (2), provides that the application may be for an order that the annual rent was over £100 at any point in the 5 years before Royal Assent. This reflects that some leases may have variable rent. Landlords may wish to claim an exemption as variable rent may mean that the rent paid in any one year in the 5 years before Royal Assent exceeds £100 even though the base rent laid down in the lease is under £100.
PART 6: GENERAL AND MISCELLANEOUS

Overview of Part 6 of the Bill

270. This Part contains provisions on a variety of issues: the appointed day; how to determine the duration of leases; leases continuing on tacit relocation; irritancy; service of notices; registration of notices; matters that the Keeper of the Registers of Scotland is not required to determine; referring disputed notices to the Lands Tribunal; the registration of documents rejected by the Keeper when the courts or the Lands Tribunal determine that they are registrable; amendments to enactments; interpretation; ancillary provisions; subordinate legislation and commencement.

The appointed day

Section 70: The appointed day

271. This section fixes the appointed day, which is the day when qualifying leases are converted into ownership. Martinmas (28 November) is chosen because that is one of the dates on which rent is normally payable. The period of two years between the coming into force of the section under section 70 and the appointed day enables the qualifying leases to be identified ahead of conversion. This in turn enables the statutory notices for conversion of qualifying conditions etc. to be served and registered before the appointed day.

272. The Term and Quarter Days (Scotland) Act 1990 regulates, in Scotland, the date of Martinmas (and Whitsunday, Candlemas and Lammas).

Duration of lease etc

Section 71: Determining duration of lease

273. The provision sets out a number of rules for calculating the period of a lease. The period of a lease is relevant for the purposes of working out whether a lease qualifies for conversion (section 1(3)); whether an additional payment can be claimed for the residual value of the reversionary interest (section 51(1)(e)) and how that value is to be assessed (section 52(3) and (4)); and whether an additional payment can be claimed for the loss of a right to bring a lease to an end early (section 51(1)(f)). In each case the duration of the lease is calculated in the same way.

274. Subsection (1) sets out the rules for break options (which are disregarded), for renewals (which are included), for calculating the lifetime of a tenant (for the exceptional cases where this might be relevant), and for consecutive leases (which are included). A consecutive lease is a lease which is granted during the term of the first lease on essentially the same terms and conditions as the first lease and which is to run from the moment the first lease ends.

275. Subsection (2) makes clear that a calculation of the period of a lease in accordance with the rules in subsection (1) is subject to section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. That provision (with certain exceptions) prohibits the grant of a lease for more than 175 years. The provision has no relevance for break options and so subsection (2) does not apply to such options.
Section 72: Leases continuing on tacit relocation

276. This section relates to leases continuing on tacit relocation (leases continuing on a year by year basis where, for example, a renewal was due to have taken place but did not actually happen). The section provides that Part 4, on compensation, applies to such leases as does section 71, on determining the duration of the lease, as if any provision requiring the landlord to renew the lease had been complied with.

277. To give an example, some leases in Blairgowrie are for 99 years but contain provisions requiring the landlords to renew them in perpetuity for further periods of 99 years. The effect of section 73 is that where such leases have not been renewed but continue on tacit relocation, the renewal is deemed to have taken place, including conditions about further renewals. This means that the durational requirements for leases to convert to ownership are met.

Extinction of right of irritancy in certain leases

Section 73: Extinction of right of irritancy in certain leases

278. This section prevents a lease of land granted for a period of more than 175 years which has an unexpired duration of more than 100 years and is not excluded by section 1(4) or section 64 from being terminated by irritancy. The lease does not have to be registered to be covered by this section.

279. Irritancy is the premature termination of the lease by the landlord, when the tenant has failed to comply with one or more of the tenant’s obligations under the lease. It includes a provision in a lease which deems a failure of the tenant to comply with any provision in the lease to be a material breach of contract. Any proceedings already commenced in relation to irritancy of a lease covered by this section are deemed to be abandoned (subsection (4)). However, any final decree granted is not affected (subsection (5)).

Section 74: Service of notices

280. This section sets out the rules for service of a notice (and preliminary notice) in respect of a compensatory or additional payment and in respect of serving notices to enter into an agreement with a tenant for the purpose of converting a qualifying condition into a real burden in favour of neighbouring land.

281. Liability to pay any compensatory or additional payment depends on service of a notice. The date of service is the starting point for the period allowed for payment or return of the instalment document. The date of service is the date of delivery or posting. When notices are returned undelivered, provision is made for service on the Extractor of the Court of Session.

Section 75: Notices: pre-registration requirements

282. This section applies to notices which require to be submitted for registration under section 8 (sporting rights) or under Part 2.
These documents relate to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

283. The section provides for the sending of a copy of the notice to the tenant under the qualifying lease. Normally service is by post and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

**Section 76: Keeper’s duty as regards documents**

284. This section relieves the Keeper of the Registers of the need to verify certain matters which the Keeper could not reasonably be expected to check.

**Section 77: Disputed notices: reference to Lands Tribunal**

285. This section gives the Lands Tribunal a broad jurisdiction to resolve disputes in relation to notices. The section applies not only to notices converting conditions into real burdens under Part 2 but also to notices converting reserved sporting rights (section 8) and to exemption and recall notices (sections 63, 64 and 67).

**Section 78: Certain documents registrable despite initial rejection**

286. This section allows late registration, within limits, if the initial rejection of a notice or agreement by the Keeper is judicially overturned.

287. Subsection (1) identifies the notices and agreements in question.

288. Subsection (2) provides that a notice or agreement has to be registered within 2 months of the determination by the court (defined in subsection (6) as either the Court of Session or the Sheriff Court) or the Lands Tribunal. Under subsections (3) and (4), a notice which is registered after the appointed day is given retrospective effect.

289. Subsection (5) provides for Scottish Ministers to specify a period of time within which application has to be made to the court or the Lands Tribunal. A different period may be prescribed for exempt leases. An exempt lease can be recalled at any time (other than a lease exempted under section 64) and so the appointed day for that lease is uncertain. In the normal case where the appointed day is certain the period that is set will depend on the progress made with applications to the court or the Lands Tribunal.

**Miscellaneous**

**Section 79: Amendments to enactments**

290. This section gives effect to the minor and consequential amendments in the schedule.

**Section 80: Interpretation**

291. Subsection (1) gives the meaning of certain terms. The majority of the terms have already been discussed in the Notes to the earlier sections.
These documents relate to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

292. Under subsection (2) expressions used in the Title Conditions (Scotland) Act 2003 are to have the same meaning unless otherwise provided. Section 122 of the 2003 Act is the interpretation provision. This technique allows a number of terms to be used without further explanation – for example, benefited property, burdened property, conservation body, conservation burden, economic development burden, enactment, facility burden, service burden, health care burden, manager burden, and notary public.

Section 81: Ancillary provision

293. This section provides ancillary order-making powers for Ministers.

Section 82: Subordinate legislation

294. This section regulates the making of subordinate legislation under the Bill.

Section 83: Commencement

295. This section deals with the date of commencement. Different elements of the Bill may be commenced at different times.

Section 84: Short title

296. This section deals with the short title.

Schedule

297. This makes minor and consequential amendments.

FINANCIAL MEMORANDUM

INTRODUCTION

298. This document relates to the Long Leases (Scotland) Bill, introduced in the Scottish Parliament on 12 January 2012. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

Background

299. The Long Leases (Scotland) Bill implements a report by the Scottish Law Commission (SLC). Under the Bill, ultra-long leases (let for over 175 years and with over 100 years left to run) are eligible to convert to ownership. Compensatory and additional payments are payable to
landlords by tenants. Certain sporting rights can be preserved by landlords and some leasehold conditions can be converted into real burdens in the title deeds.

300. The Scottish Government consulted in 2010 on the proposed Long Leases (Scotland) Bill. This consultation included a partial Regulatory Impact Assessment. A Long Leases (Scotland) Bill was introduced in the last session of the Parliament but fell when Parliament was dissolved for the Scottish elections. Paragraph 5 of the Explanatory Notes provides references to the SLC Report, the Scottish Government consultation and the Bill introduced into the last Parliament.

301. The figures below provide estimates of potential costs. In terms of margins of uncertainty, the figures assume that there are around 9,000 leases eligible for conversion and that very few tenants opt out of conversion. The Government does not have perfect knowledge on the number of ultra-long leases and so costs could go up or down, depending on how many leases convert and how many tenants opt out. Assumptions are also made on the number of notices registered: again, the number could go up or down.

302. There will be costs to Registers of Scotland, as outlined below. Costs are estimated at current (2011/12) prices: the impact of inflation is uncertain. The amount of compensatory payment payable by tenants to landlords depends on the number of leases that convert; whether landlords bother to claim the compensatory payment (which will usually be very low) and the value of 2.5% Consolidated Stock when conversion takes place.

Costs on the Scottish Administration

Registers of Scotland

303. Registers of Scotland is a non-Ministerial Department of the Scottish Administration, headed by the statutory office-holder, the Keeper of the Registers of Scotland. Since 1 April 1996, it has operated as a Trading Fund and is currently regulated by the Public Finance and Accountability (Scotland) Act 2000.

304. As a Trading Fund, Registers of Scotland derives funding solely from the fees it charges for the registration and information services it provides. Registers of Scotland is expected to ensure that income is sufficient to meet its expenditure and that capital reserves are sufficient to meet its liabilities (including latent liabilities). As a consequence of Registers of Scotland’s Trading Fund status, the costs of the Bill falling on Registers of Scotland will not impose any burden on the Scottish Consolidated Fund. The costs of updating title sheets will have a negligible impact on fees. The costs of registering notices and applications under the Bill will be met by those seeking to register the notices and making the applications.

305. Conversion of registered qualifying ultra-long leases to ownership happens automatically (unless the tenant seeks exemption or the landlord registers an agreement or an order stating that the annual rent is over £100). There will be costs to the Keeper of the Registers of Scotland that will require to be met from Registers of Scotland’s Trading Fund and recouped from fees levied on all customers. The work the Keeper will need to carry out includes:

• altering the status of the title sheet from leasehold to ownership;
• updating the burdens sections of the title sheet; and
These documents relate to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the
Scottish Parliament on 12 January 2012

• deleting the title sheet of any intermediate tenants.

306. The administrative costs incurred by Registers of Scotland will relate to:
• redeployment and retention of skilled staff to set up systems, update existing titles
  and ongoing registration;
• the creation of new practices;
• training and customer awareness costs; and
• changes to IT systems.

307. Registers of Scotland estimates additional costs of £75,000. These costs will need to be
recovered by registration fees in the Land and Sasine Registers and so costs will be met by all
customers and not just those benefiting from the conversion of ultra-long leases to ownership.

308. Registers of Scotland has decided not to carry out a specific exercise to update the Land
Register to reflect the conversion of ultra-long leases to ownership under the Bill. Not doing a
specific exercise will keep costs down. Instead, Registers of Scotland will update title sheets
when a property transaction takes place. Owners will be able to request that title sheets be
updated to reflect the change in ownership. A charge would be made by Registers of Scotland
for this service.

309. In addition, there will be a number of cases where applications will be made to Registers
of Scotland, following the enactment of this proposed legislation. These include:
• to register a qualifying lease condition as a real burden;
• to preserve landlord’s rights to take game or to fish for freshwater fish;
• to exempt an ultra-long lease from converting into ownership where the landlord has
  obtained agreement from the tenant or an order from the Lands Tribunal that the
  annual rental immediately before the appointed day or in a period of five years
  before Royal Assent exceeded £100;
• to exempt an ultra-long lease from converting into ownership, if the tenant so wishes;
• to recall an exemption notice; and
• to register an unregistered ultra-long lease, to invoke the procedures so that the ultra-
  long lease could be converted to ownership.

310. Registers of Scotland will charge fees in relation to the applications listed above.

311. At current levels of fees, the fees charged by Registers of Scotland in respect of these
applications will be £60 per Land Register title sheet and/or per deed recorded in the Sasines
Register.

312. We expect the number of applications to the Keeper to be low. Paragraph 8.7 of the SLC
report said “it is true that a small number of those [leasehold] conditions may be converted into
real burdens”. Paragraph 8.14 of the SLC Report said that the “numbers [of unregistered ultra-
These documents relate to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

long leases] are likely to be very small”. If 1,000 applications are made to Registers of Scotland, this suggests a total cost to applicants of £60,000 at current fee levels. As fees are based on cost recovery for registration, additional applications would not offset setup costs.

313. In summary, the estimated cost of the conversion of leases to Registers of Scotland is £75,000. The costs to Registers of Scotland will be met by general registration fees in the Land and Sasine Registers. The generality of Registers of Scotland’s customers will therefore meet the cost.

314. In addition, Registers of Scotland will also need to register notices and agreements. The cost of this registration work should be covered by fees charged for these registrations. At current fee levels, the fees charged could amount to £60,000 (based on 1,000 applications).

Legal aid budget

315. The Bill only has a minimal\(^4\) impact on the legal aid budget, as:

- The number of ultra-long leases qualifying for conversion is low (around 9,000).
- Conversion happens automatically (unless the tenant seeks exemption or the landlord registers an agreement or an order stating that annual rental is over £100).
- The number of cases taken to the Lands Tribunal is expected to be very low.
- The notices which tenants and landlords may need to complete are straightforward, and any legal advice required should not be time-consuming.
- No new criminal offences are created by the Bill.

Publicity

316. The Government will work closely with key bodies (eg Registers of Scotland) to ensure that those affected by the Bill (i.e. tenants and landlords) are aware of it. The Government will raise awareness of the Bill through websites and specialist publications rather than by a formal paid publicity campaign. Therefore, any publicity costs are minimal.

Costs on local authorities

317. The Bill does not impose any new duties on local authorities and there are no specific costs to local authorities. If local authorities happen to be tenants in ultra-long leases, they are liable for compensation and additional payments to landlords in the same way as other tenants. Like other tenants, local authorities are able to opt out of conversion, if they so wished. Local authorities may also be landlords in ultra-long leases. During consideration of the previous Bill in the last Parliament, evidence was taken on ultra-long leases on the common good which had been let by local authorities. A survey by the Scottish Government of local authorities found evidence of 5 ultra-long leases of land held on the common good.

\(^4\) “Minimal” for the purposes of this memorandum is regarded as costs not exceeding £25,000 in total.
Costs on other bodies, individuals and businesses

Applications to the Lands Tribunal for Scotland

318. The Lands Tribunal for Scotland is funded by the Scottish Government and through fees payable by persons making applications to the tribunals. Following the enactment of legislation on long leases, some applications may be made to the Lands Tribunal for Scotland. For example, applications to the Lands Tribunal may be made:

- By landlords seeking to convert a qualifying condition in a lease into a real burden even though the benefited property does not have a permanent building used as a place of human habitation and resort lying within 100 metres of the burdened property; the condition is not a right of pre-emption or redemption and the land is not a separate tenement in land (such as minerals or salmon fishings) and the condition was conceived for the benefit of that land. Applications to the Lands Tribunal can only be made after an attempt by the landlord to reach agreement with the tenant.
- To challenge notices on the grounds of validity.
- To challenge a real burden (converted from a qualifying condition in a lease) or to seek to vary or discharge a real burden. The procedure here is laid down in the Title Conditions (Scotland) Act 2003.
- To fix the amount of additional payment due to the landlord for extinction of rights over the land, if the landlord and tenant cannot agree the amount.
- To obtain an order that the annual rental immediately before the appointed day or in a period of 5 years before Royal Assent exceeded £100.

319. If applications are made to the Lands Tribunal, there are fees payable to the Tribunal by the individuals making the applications and legal expenses payable by the parties to the case.

320. However, given the small number of ultra-long leases, we expect the number of additional cases for the Lands Tribunal in relation to this proposed legislation to be few in number. The SLC noted in paragraph 4.45 of its Report that “the relatively small number of leases eligible for conversion means that applications to the Lands Tribunal should occur in small and manageable numbers”.

321. Given this, any costs arising to applicants or to the Lands Tribunal in respect of applications to the Tribunal can be regarded as minimal.

Compensatory payments payable by tenants to landlords

Incidence of ultra-long leases

322. Under the Bill, compensatory payments are payable by tenants to landlords. Compensatory payments are only payable if claimed by landlords.

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5 The Lands Tribunal receives administrative support through the Scottish Tribunal Service. More information on the Scottish Tribunal Service can be found at http://www.scotland.gov.uk/Topics/Justice/legal/Tribunals
6 More information on fees payable to the Tribunal can be found on their website at http://www.lands-tribunal-scotland.org.uk/fees.html
323. To produce an estimate of the total amount of compensatory payment which may be paid, it is first necessary to produce an estimate of the number of ultra-long leases which may convert to ownership under the Bill. Work was done on this for the partial Regulatory Impact Assessment included in the Government consultation and these estimates of the incidence of ultra-long leases are shown below. These estimates were not challenged by any of the respondents to the consultation.

324. The SLC Report, and a report carried out in 1951 for the Scottish Leases Committee chaired by Lord Guthrie, carried out work on and a previous study on the incidence of long leases. Appendix II to the Guthrie report noted that in 1951 there were 13,151 long leases recorded in the Register of Sasines, of which 8,744 still had over 100 years left to run.

325. The SLC, working with Registers of Scotland, carried out a survey on leases in 2000, for the counties of Ayr, Clackmannan, Lanark and Renfrew. The table below, based on paragraph 4 of Appendix C to the SLC Report, shows the number of long leases examined in each county together with a comparison of the numbers which existed in 1951:

<table>
<thead>
<tr>
<th>County</th>
<th>Number of long leases examined in 2000</th>
<th>Number of long leases in 1951</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ayr</td>
<td>303</td>
<td>1988</td>
</tr>
<tr>
<td>Clackmannan</td>
<td>193</td>
<td>305</td>
</tr>
<tr>
<td>Lanark</td>
<td>1,220</td>
<td>4,153</td>
</tr>
<tr>
<td>Renfrew</td>
<td>963</td>
<td>655</td>
</tr>
<tr>
<td>Totals for the four counties</td>
<td>2,679</td>
<td>7,101</td>
</tr>
</tbody>
</table>

326. However, the SLC indicated that it only examined 25% of the leasehold titles in Lanark and 50% of the leasehold titles in Renfrew. This means that the number of long leases in the counties is as outlined below:

<table>
<thead>
<tr>
<th>County</th>
<th>Number of long leases in 2000</th>
<th>Number of long leases in 1951</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ayr</td>
<td>303</td>
<td>1988</td>
</tr>
<tr>
<td>Clackmannan</td>
<td>193</td>
<td>305</td>
</tr>
<tr>
<td>Lanark</td>
<td>4,880</td>
<td>4,153</td>
</tr>
<tr>
<td>Renfrew</td>
<td>1,926</td>
<td>655</td>
</tr>
<tr>
<td>Totals for the four counties</td>
<td>7,302</td>
<td>7,101</td>
</tr>
</tbody>
</table>
327. This means that in 2000, in the four counties, the number of long leases was 102.8% of the figure in 1951. Extrapolating this to Scotland as a whole suggests that there are now 13,519 long leases (102.8% of 13,151).

328. This apparent increase in registered long leases may be caused by section 2(1)(a)(v) of the Land Registration (Scotland) Act 1979 which introduced a requirement to register in the Land Register any transfer of the tenant’s interest following commencement of the Act in the relevant county.

329. However, some ultra-long leases eligible for conversion under the scheme contained in the Bill may not be covered by the figures above:

- The SLC survey did not include the Register of Sasines.
- There may be unregistered ultra-long leases which would qualify for conversion under the scheme and which may be registered should the Bill be enacted.

330. Therefore, the Scottish Government recognises that the figure of 13,519 given in paragraph 327 above could be questioned: and there may have been further changes since the SLC carried out their survey in the year 2000. However, the figure of 13,519 appears the best available and is used in subsequent calculations below.

331. Paragraph 11 of Appendix C to the SLC report noted that of the long leases they examined in the year 2000, 1,786 had an initial duration of more than 175 years, whilst the remaining 813 had a duration of 175 years or less. (Paragraph 6 of Appendix C noted that the duration of 80 leases was unknown). In percentage terms, therefore, (and excluding the leases of unknown duration), 68.7% of long leases had an initial duration of more than 175 years and 31.2% of leases had an initial duration of less than 175 years.

332. Using these percentages suggests that there are 9,287 long leases in Scotland with an initial duration of more than 175 years (68.7% of 13,519).

333. To qualify for conversion under the Bill, ultra-long leases must have at least 100 years left to run. Table 3 at paragraph 14 of Appendix C to the SLC report showed that at least 97.6% of long leases with an initial duration of more than 175 years still have more than 100 years to run. This suggests that there are 9,064 ultra-long leases (97.6% of 9,287) in Scotland eligible for conversion under the Bill. In round figures, this suggests that around 9,000 ultra-long leases are eligible for conversion under the Bill. This figure of 9,000 is used in the remainder of this Financial Memorandum.

334. Compensatory payments are based on the rent paid. Paragraph 17 of Appendix C to the SLC Report indicated that of the ultra-long leases the SLC examined, the rent was known for around 95% (1,705) of the leases granted for an initial period of more than 175 years.
These documents relate to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

335. The table below, based on information in paragraph 17 of Appendix C to the SLC Report, shows the following rents being paid:

<table>
<thead>
<tr>
<th>Rent paid</th>
<th>Number of leases</th>
<th>% of leases examined</th>
</tr>
</thead>
<tbody>
<tr>
<td>£5 a year, or less</td>
<td>1,160</td>
<td>68.03%</td>
</tr>
<tr>
<td>£5.01 to £30 a year</td>
<td>505</td>
<td>29.62%</td>
</tr>
<tr>
<td>£30.01 to £50 a year</td>
<td>14</td>
<td>0.82%</td>
</tr>
<tr>
<td>£50.01 to £100 a year</td>
<td>19</td>
<td>1.11%</td>
</tr>
<tr>
<td>Over £100 a year</td>
<td>7</td>
<td>0.41%</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>1,705</strong></td>
<td><strong>100% (rounded)</strong></td>
</tr>
</tbody>
</table>

336. The SLC Report recommended in paragraph 6.16 that the compensatory payment for the extinction of the rights of landlord under a lease should be such sum as, if invested in 2.5% Consolidated Stock on the day before the appointed day, would produce an annual sum equal to the annual rent due under the lease.

337. The price of £100 nominal amount of 2.5% Consolidated Stock is £67.50 [checked on 25 November 2011]. Therefore, to redeem a rent of £2.50 you need to spend £67.50. This suggests a (variable) “multiplier” of 27. (£67.50 divided by £2.50, to one decimal place).

338. The table below shows the amount of compensatory payment which could be payable. This is based on the estimated number of qualifying long leases (9,000) and the information in the table above on level of rents. Leases with an annual rent of over £100 are not eligible to convert under the Bill and so for the purposes of the table below leases which fall into this category have been added to the category relating to a rental of £75. This has a small impact on the estimate of the amount payable generally, given that very few ultra-long leases have a rental of more than £100.
These documents relate to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

<table>
<thead>
<tr>
<th>Rent paid</th>
<th>Number of leases</th>
<th>Compensatory payment payable</th>
</tr>
</thead>
<tbody>
<tr>
<td>£2.50</td>
<td>6,123</td>
<td>£413,303</td>
</tr>
<tr>
<td>£17.50</td>
<td>2,666</td>
<td>£1,259,685</td>
</tr>
<tr>
<td>£40</td>
<td>74</td>
<td>£79,920</td>
</tr>
<tr>
<td>£75</td>
<td>137</td>
<td>£277,425</td>
</tr>
<tr>
<td>Totals</td>
<td>9,000</td>
<td>£2,030,333</td>
</tr>
</tbody>
</table>

339. This is rounded in this Financial Memorandum to £2 million. This equates to an average of £220 per lease. It is a higher figure than when the last Bill was considered by the previous Parliament as the price of 2.5% Consolidated Stock has increased over the past year.

340. The precise amount payable depends on the value of 2.5% Consolidated Stock when conversion takes place and how many landlords claim the amounts due.

341. The SLC recommended that any “renewal premiums” (or “grassum”) payable when ultra-long leases are renewed should be taken into account when amounts due to landlords by tenants are calculated (see paragraphs 6.22 to 6.27 of their report). The SLC recommended that where the renewal premium is £100 or less, then, for the purposes of compensation, the rent should be augmented by the amount of the premium divided by the number of years occurring between each renewal. (So if the premium is £100 and the renewal period is 99 years, the rent would be deemed to be augmented by £1.01). Where the renewal premium is over £100, the figure is taken account of in relation to additional payments (see below).

342. The approach taken in Financial Memorandum is to treat as minimal any deemed augmentations of rent where the premium is £100 or less, given that the augmentation is so small.

Additional payments payable by tenants to landlords

343. As well as compensatory payments, the SLC also recommended that some additional payments should be payable in certain circumstances. This section goes through the various heads.

Non-monetary rents

344. The SLC noted in paragraph 6.29 of its report that non-monetary rents were found in around 1% of the long leases in their survey: these non-monetary payments often supplemented

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7 This is based on the percentage split in the previous table, except that leases with a rent over £100 have been added to the category of leases with a rent of £75.

8 Assumes 100% of landlords claims the compensatory payment, which is unlikely.
the monetary rent. Examples quoted by the SLC are six fat hens; four bolls\(^9\) of good and sufficient oat farm meal and the services of a labourer to work on the roads of a particular town.

345. The additional payment due would either be based on an agreed monetary equivalent (in which case the formula for monetary rents based on the price of 2.5% Consolidated Stock would apply) or an amount fixed by order of the Lands Tribunal. Either way, as only 1% of long leases are affected, the approach taken in this Financial Memorandum is to treat any sums involved as minimal.

Rent review

346. Paragraph 6.30 of the SLC Report noted that in “ultra-long leases provision for rent review is rare but probably not unknown”. Given that additional payments for rent review will be rare, the approach taken in this Financial Memorandum is to treat any sums involved as minimal.

Rent increase

347. Paragraph 6.31 of the SLC report noted that rent might increase by way of a fixed formula rather than by way of rent reviews. Again, the approach taken in this Financial Memorandum is to treat any sums involved as minimal.

Variable rents

348. Section 51(1)(c) of the Bill provides that additional payments may be claimed in respect of rent which is variable from year to year, such as rent based on turnover of a business. Rent based on turnover of a business is most likely in leases let on commercial terms, which are likely to be excluded from the Bill given that leases with rent of more than £100 are excluded.

349. In addition, this Bill makes provision for landlords to obtain an exemption if the annual rental of a lease is over £100 at any point during the 5 years leading up to Royal Assent. This is designed to cover cases where the base rental under the lease is under £100 a year but variable rental takes the amount paid over £100 a year. This could exclude from the Bill some leases where landlords do retain a significant interest and additional payment claims in respect of variable rental might have been significant.

350. Given the exclusions from the Bill for leases with an annual rental of over £100, the approach taken in this Financial Memorandum is to treat any additional payments for variable rents as minimal.

Renewal premiums exceeding £100

351. Paragraph 6.32 of the SLC Report suggested that additional payments should be payable where renewal premiums over £100 would be payable in order to make the long lease a qualifying lease. The specific example quoted in the SLC Report is of a renewal premium of

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\(^9\) A “boll” is defined in Chambers Twentieth Century Dictionary as “a measure of capacity for grain, etc., used in Scotland and the north of England – in Scotland usually = 6 imperial bushels….also a measure of weight, containing, for flour 140 lb”. 
£1,000 payable in 30 years time after the appointed day. However, paragraph 6.23 of the SLC report noted that “where, as usually, the renewal premium (grassum) is tied to the ground rent, it is likely to be very small - less than £1 in the example quoted above [Blairgowrie leases]. Occasionally the amount due is larger”. Given that the number of cases is likely to be small, the approach taken in this Financial Memorandum is to treat any sums involved as minimal.

Residual value of reversionary interest

352. Paragraph 6.33 of the SLC Report suggested that additional payments might be paid to reflect the value a landlord might attach to land which is due to revert to the landlord no later than 200 years from the appointed day.

353. The SLC Report noted that “the numbers involved are small. Our survey found only 50 leases granted for more than 175 years and with an unexpired duration of less than 200 years - less than 3% of the total of ultra-long leases. And of these small numbers there will be many instances in which the residual interest is valueless.” Given this, the approach taken in this Financial Memorandum is to treat any sums involved as minimal.

Early termination

354. Paragraph 6.34 of the SLC Report noted that a landlord’s right to terminate an ultra-long lease early may be of value and in principle should be capable of founding a claim for an additional payment. However, the SLC Report then added a number of caveats:

- The value may turn out to be negligible if, as often, the right to terminate early can only be exercised against payment.
- An additional payment should be available only for rights within the full control of the landlord.
- A right to terminate on breach should not be included, nor should a right of pre-emption.

355. Given these caveats, the approach taken in this Financial Memorandum is to treat any sums involved as minimal.

Right to development value

356. Paragraphs 6.36 and 6.37 of the SLC report noted that additional payments should be payable if land was leased cheaply because of restrictions on the use of the property and the possibility remained that the restrictions could have been discharged in the Lands Tribunal, with money being paid by the tenant to the landlord.

357. The SLC Report went on to suggest, in paragraph 6.45, that there should be a ceiling on payments under this head so that compensation would be limited to “a sum to make up for any effect which the title condition produced, at the time it was created, in reducing the consideration then paid or payable for the burdened property”. The SLC also proposed that inflation be disregarded. SLC figures indicated (see paragraph 16 of Appendix C) that few long leases have been granted in recent times. Given that, and given that development value payments are based
on the original value of the property, with no account taken of inflation, the approach taken in this Financial Memorandum is to treat any sums involved as minimal.

Other costs

Legal advice

358. Landlords and tenants seeking to register preservation or exemption notices may also incur costs when obtaining their legal advice. However, as the notices are straightforward and we do not expect many to be served, the costs should be minimal.

Stamp Duty Land Tax

359. The SLC considered Stamp Duty Land Tax\(^\text{10}\) (SDLT) in paragraphs 8.19 to 8.26 of its Report. It noted that there could be some debate as to whether conversion of a lease to ownership was a chargeable consideration but concluded that it was. The SLC went on to recommend that long leases which convert to ownership should be treated as a land transaction which is exempt from SDLT.

360. However, there have been changes to UK legislation since the SLC wrote its report. The current versions of sections 77 and 77A of the Finance Act 2003 were inserted by section 94(2) of the Finance Act 2008. Among other matters, sections 77 and 77A provide that an acquisition of ownership where the chargeable consideration is less than £40,000 does not have to be notified for SDLT purposes. (Any obligation to pay SDLT would fall at a higher figure).

361. The number of qualifying ultra-long leases is low and the number of cases where notification will be required will be very low and we doubt if any would actually have to pay SDLT. In the light of this, we are not proposing any specific exemption from SDLT for ultra-long leases which convert to ownership and any SDLT obligations which do arise are likely to be so small they can be regarded as minimal.

\(^{10}\) More information on Stamp Duty Land Tax can be found at [http://www.hmrc.gov.uk/sdlt/intro/basics.htm](http://www.hmrc.gov.uk/sdlt/intro/basics.htm)
Summary of costs

362. The table below provides a summary of costs:

<table>
<thead>
<tr>
<th>Nature of cost</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Costs to Registers of Scotland of converting ultra-long leases. (As Registers of Scotland receives no subsidy from the Scottish Government, set-up costs must be met from all customers’ general registration fees not specific to ultra-long leases).</td>
<td>75,000</td>
</tr>
<tr>
<td>Fees paid by applicants to Registers of Scotland for registering notices and agreements relating to ultra-long leases. (These fees cover the costs of these registrations but would not cover the £75,000 costs to Registers of Scotland of conversion).</td>
<td>60,000</td>
</tr>
<tr>
<td>Costs to legal aid budget</td>
<td>Minimal</td>
</tr>
<tr>
<td>Costs to Government of publicity campaign</td>
<td>Minimal</td>
</tr>
<tr>
<td>Costs to Local authorities</td>
<td>None</td>
</tr>
<tr>
<td>Costs to Lands Tribunal</td>
<td>Minimal</td>
</tr>
<tr>
<td>Compensatory payments (total) payable by tenants to landlords</td>
<td>2,000,000 (or average of £220 per lease)</td>
</tr>
<tr>
<td>Additional payments (total) payable by tenants to landlords</td>
<td>Minimal</td>
</tr>
<tr>
<td>Costs to applicants of legal advice when registering preservation or exemption notices</td>
<td>Minimal</td>
</tr>
<tr>
<td>Stamp Duty Land Tax</td>
<td>Minimal</td>
</tr>
</tbody>
</table>

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

363. On 12 January 2012, the Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead MSP) made the following statement:

“In my view, the provisions of the Long Leases (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
364. On 11 January 2012, the Presiding Officer (Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Long Leases (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
This document relates to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

LONG LEASES (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Long Leases (Scotland) Bill introduced in the Scottish Parliament on 12 January 2012. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 7 EN.

POLICY OBJECTIVES OF THE BILL

2. The Bill converts ultra-long leases into ownership. An ultra-long lease qualifies if it has been granted for more than 175 years and has more than 100 years left to run immediately before the appointed day laid down in the Bill. On the appointed day, all qualifying ultra-long leases will convert automatically into ownership, unless the tenant chooses to opt out. In some cases, compensatory and additional payments will be payable to the landlord by the tenant and some leasehold conditions will be preserved as real burdens in the title deeds.

3. There are exceptions from the Bill for some leases, as outlined in paragraphs 31 to 51 below.

4. The key rationale behind this Bill is that the granting of a lease of more than 175 years effectively amounts to a transfer of ownership.

5. The Government estimates there could be around 9,000 ultra-long leases in Scotland. These leases were generally granted by large estates from about 1750 to around 1930. Ultra-long leases were often granted to encourage the industrialisation of Scotland. Most ultra-long leases are for 999 years and tend to be concentrated in particular parts of the country.

6. The Government introduced a Long Leases (Scotland) Bill in the last session of the Parliament\(^1\). This Bill fell when the Parliament was dissolved for the Scottish elections in May 2011. This current Bill is along similar lines to the Bill introduced in the last session of the Parliament with a number of amendments, as outlined below, to reflect the evidence taken during the Stage 1 inquiry and the Stage 1 report produced by the Justice Committee on that Bill.

\(^1\) This previous Bill can be found on the Scottish Parliament’s website at [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx)
THE WORK OF THE SCOTTISH LAW COMMISSION

7. The Bill is based on the draft Bill produced by the Scottish Law Commission (SLC) and published within its Report on Conversion of Long Leases (Scot Law Com No 204) in December 2006.2

8. The SLC carried out a major review of the structure of land law in Scotland resulting in the Abolition of Feudal Tenure etc. (Scotland) Act 2000, the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. The report on conversion of long leases marked the final stage of this review.

9. The SLC report sought to apply to ultra-long leases the principle of conversion already applied to feus by the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Under that Act, all feus were converted into ownership, on a day known as the “appointed day”. On that day feudal vassals became outright owners. The SLC report extended that approach to tenants holding ultra-long leases.

CURRENT LAW

10. Section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 prevents, with some exceptions, leases granted since 9 June 2000 continuing for more than 175 years.

ALTERNATIVE APPROACHES

11. Two alternative approaches to this Long Leases (Scotland) Bill were considered.

12. First of all, the SLC noted, in paragraph 2.12 of its report, an alternative approach put forward by the Royal Institution of Chartered Surveyors in Scotland (RICS). The SLC noted that the RICS argued that “consistency with the 175-year limit on new leases contained in the 2000 Act was better achieved by reducing the length of all existing leases to 175 years”. The SLC went on to note that the RICS indicated this would do away with the need for notices and exemptions and that compensation would not be required as the difference in value between 175 years and 999 years would be negligible.

13. The SLC stated that “we doubt whether a tenant who holds on a 999-year lease with an unexpired duration of 893 years would regard it as acceptable for the duration to be reduced to 175 years, with or without compensation”. The Government agreed with the SLC. Ultra-long leases are akin to ownership. Reducing their length would reduce the value of the lease to the tenant and increase the value of the lease to the landlord. There does not seem to be any good reason for taking this step.

14. Secondly, another alternative considered was to take no action. Landlords and tenants of ultra-long leases have, in some cases, reached private agreements under which the tenant buys out the landlord’s interest and the property converts to full ownership. Given that, as indicated at

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2 The report by the Scottish Law Commission can be found at http://www.scotlawcom.gov.uk/download_file/view/251/
paragraph 10, ultra-long leases (over 175 years long) can no longer be created, private agreements may well, in time, eliminate all ultra-long leases.

15. The obvious difficulty with this approach is that there is no guarantee how quickly private agreements would be reached and how many ultra-long leases would remain. Without legislation, there would continue to be a significant incidence of ultra-long leases for the foreseeable future and the benefits of the Bill outlined at paragraph 63 would not accrue or would accrue more slowly.

INCIDENCE OF ULTRA-LONG LEASES


17. Paragraph 43 of the Guthrie Report said the following in relation to the reasons for granting leases:

“The use of ground leases, so far as it became general in certain parts of Scotland in the eighteenth and nineteenth centuries, can be attributed primarily to some prohibition in the titles under which the land was held…These prohibitions were in force when the industrial development of Scotland was taking place and houses for the workers were required in the vicinity of the new mines and mills, and those landowners who could not grant feu found in ground leases an expedient whereby building development in their districts could take place in much the same way as if they had been free to grant feu rights of their land”.

18. Appendix C to the SLC report recorded the results of a survey of long leases carried out by the SLC in the year 2000.

19. Key results of this survey, which was based on information from the Land Register of Scotland for the counties of Ayr, Clackmannan, Lanark and Renfrew were:

- The most popular length of lease was 999 years (table 2 at paragraph 12 of Annex C).
- 999 year leases were popular from around 1750 until about 1930 (paragraph 16 of Annex C).
- Rent in the vast majority of ultra-long leases was very low, with 68% having a rent of £5 or less per year (paragraph 17 of Annex C).

20. The Scottish Government consulted on a draft Long Leases (Scotland) Bill in 20104. This included a partial Regulatory Impact Assessment (RIA). Paragraphs 2.4 to 2.14 of this partial RIA included calculations, based on the previous work, on how many ultra-long leases

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4 This consultation can be found at http://www.scotland.gov.uk/Publications/2010/03/26131302/0
might be extant in Scotland and suggested that there might still be around 9,000 left. These calculations are shown again in the Financial Memorandum attached to the Explanatory Notes for this Bill.

21. When the previous Long Leases (Scotland) Bill introduced in the last Parliament was considered by the Justice Committee, evidence was taken about long leases held on the Common Good. A short survey of local authorities by the Scottish Government suggested that there were five leases of common good property which would be covered by the Bill.

CONSULTATION

22. The SLC consulted widely on its Discussion Paper on Conversion of Long Leases (Scot Law Com DP No 112), which was published in 2001. Twenty eight organisations and individuals responded to the discussion paper. Views were also obtained at two separate meetings of the SLC’s advisory group on leasehold conversion. A survey of long leases was carried out by the SLC to investigate the incidence and use of long leases in Scotland. All of this fed into the SLC’s final report and draft Bill on the Conversion of Long Leases.

23. The Scottish Government issued a consultation paper and a draft Bill in March 2010. This sought views on the Government’s proposed approach to implementing the SLC Report. There were 17 responses to the consultation.

24. During the consultation, the Government held a seminar to discuss the legislative proposals with the following organisations and individuals: the Royal Institution of Chartered Surveyors, Registers of Scotland, the Clerk to the Lands Tribunal for Scotland and Professor Robert Rennie.

25. A copy of the responses to the consultation (other than those given in confidence) has been made available on the Scottish Government’s website.

26. As already indicated, a Long Leases (Scotland) Bill was introduced in the last Parliament and fell when the Parliament was dissolved for the Scottish elections in May 2011. The Bill was considered at Stage 1 and the Justice Committee produced a Stage 1 report. However, there was no Stage 1 debate at a meeting of the Parliament.

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5 This document has contextual information on the Common Good: [Link no longer operates]

6 The consultation paper can be found on the Scottish Government’s website at http://www.scotland.gov.uk/Publications/2010/03/26131302/0

7 The non-confidential consultation responses can be found on the Scottish Government’s website at http://scotland.gov.uk/Publications/2010/07/15143717/0
THE BILL

General

27. The Bill is in six parts. It closely follows the recommendations in the SLC report. A table showing sections in this Bill and their equivalents in the previous Bill and in the SLC Bill is attached at Annex A to this Policy Memorandum.

Part 1

Conversion

28. Part 1 of the Bill contains provisions on converting long leases to ownership. In particular, section 1 lays down which leases can be regarded as ultra-long leases qualifying for conversion.

29. Leases must be registered in the Register of Sasines or the Land Register to be eligible for conversion.

30. Paragraph 8.14 of the SLC report noted that “the statutory facility to register leases dates only from 1857; and while most leases granted before that year have found their way on to the register there may be some cases in which an ultra-long lease remains unregistered. If so, the numbers are likely to be very small”. However, Part 5 of the Bill makes provision for unregistered ultra-long leases to be registered and then converted to ownership, if the tenant so wishes.

Exemptions

31. Section 1 also excludes a number of leases from the Bill.

32. Section 1(4)(a) exempts leases where the annual rent is over £100. An exemption along these lines was first introduced following the Scottish Government consultation. Consultees suggested that the policy behind the Bill was not to convert to ownership leases where the landlord retains a significant interest. The intention is to convert to ownership ultra-long leases where the tenant is in a very similar position to an owner and the landlord has little real interest. The rent in these types of leases is very low: paragraph 18 of Appendix C to the SLC report indicated that the rent in over two thirds of ultra-long leases is under £5 a year.

33. In leases where the landlord retains a significant interest, the rent can be expected to be at a higher level. Excluding leases with a rental of over £100 will exclude very few leases (as shown by paragraph 18 of Appendix C to the SLC report) but will exclude leases where the rent is at a higher, more commercial level.

34. The Government considered two alternatives to the £100 cut-off. One option was to have a cut-off based on the date a lease was granted. This option was rejected as a date may have been arbitrary and could have excluded leases where the landlord had little remaining interest.
35. Another option was to exclude from the Bill all leases relating to commercial property. This was rejected. Paragraph 2.33 of the SLC report argued against the exclusion of commercial property from the Bill. The SLC noted that this could lead to shops on a ground floor being treated differently from the flats above. The SLC also noted that commercial property could be the subject of an ultra-long lease in much the same way as residential property.

36. The Government agreed with the points made by the SLC and also noted that property might have changed its use since the lease was first let and so it might not always be clear whether a lease was of residential property or of commercial property. There might also be leases of mixed property.

37. Section 2 of the Bill makes provision about annual rental for the purposes of section 1(4)(a). Section 2(5) provides that any variable rental is to be excluded.

38. However, the Bill makes provision subsequently to reflect the evidence taken by the Justice Committee that some leases where the landlords retains a significant interest may have a low base rental (not exceeding £100 a year) but will have a variable rental of some importance. Section 64 of the Bill allows a landlord to register an agreement with the tenant, or an order made by the Lands Tribunal under section 69, that the annual rent paid under the lease, including any variable rental, was over £100 at any point in the 5 years before Royal Assent. If such an agreement or order is registered, the lease does not convert to ownership under the Bill.

39. No exemption has been added for cases where a significant grannum or premium was paid up front and the annual rental is then very low and below £100 a year. It appears to the Government that in these cases the on-going interest of the land is low and there is no case for exemption: such leases look closer to traditional ultra-long leases, which are akin to ownership. Provision is made in the Bill for certain leasehold conditions to convert to real burdens.

40. This Bill clarifies the position in relation to leases subject to *cumulo* rent. *Cumulo* rent is defined in section 38 and means a single rent payable in relation to two or more leases.

41. Section 2(3) of the Bill has the effect of providing that leases subject to *cumulo* rent are not covered by the exemption at section 1(4)(a). However, section 39 contains provisions allowing the landlord to allocate *cumulo* rent to individual leases before the appointed day. If the rental allocated to an individual lease is over £100, the landlord may again use section 64 to register an agreement with the tenant or a Lands Tribunal order to exempt the lease from conversion. Section 64(2)(c)(i) refers specifically to the annual rent payable under the lease immediately before the appointed day being over £100: the scenario if *cumulo* rent has been allocated and one or more of the leases then has an individual annual rental of more than £100.

42. The new provisions relating to *cumulo* rent have been added to make the position clear. In practice, *cumulo* rent is a feature of traditional ultra-long leases where rental is normally very low. Therefore, the Government does not expect there to be many cases of leases subject to *cumulo* rent being exempted from the Bill because once the rent is allocated to individual leases the individual annual rental is over £100.
43. Section 1(4)(b) exempts leases which include a harbour, either wholly or partly, where there is a statutory harbour authority. This follows evidence in the Justice Committee on the last Bill on behalf of Peterhead Port Authority. This evidence suggested the Bill could impact adversely on the operation of Peterhead harbour. The Government accepts the point made. The Government wrote to other bodies with an interest in harbours. No other specific examples of potential problems were found although one body noted that there could be other similar issues in other harbours.

44. Section 1(4)(c) exempts leases granted solely to allow the installation and maintenance of pipes and cables. This exclusion was added after some consultees responding to the Government consultation indicated that they were aware of ultra-long leases granted in favour of utility and telecom companies for strips of land for cables and pipes. The specific examples mentioned were granted for exactly 175 years (and so would not be covered by the Bill, which only covers leases which exceed 175 years).

45. However, it was suggested there could be examples of such leases which are longer than 175 years. Consultees argued, and the Government agreed, that the policy behind the Bill was not to convert to ownership leases which just relate to pipes and cables. Evidence was taken on pipes and cables during Stage 1 on the previous Bill. There was some discussion about whether leases just for pipes and cables were leases which would be caught by the Bill in any event, or were simply arrangements rather than leases.

46. The Government considers it best to include the exemption to put the matter beyond doubt. The wording of the exemption has been clarified. It remains the intention that ultra-long leases of other property which happened to include pipes or cables would not be excluded.

47. Section 1(4)(d) exempts mineral leases, as rental payments in this area tend to be on a different basis to most leases and relate to the extraction of the minerals. This exemption was included in the original report by the SLC.

48. The previous Stage 1 inquiry also considered non-exclusive “leases” over private access roads. No exemption has been added to the Bill for this. The Government considers that arrangements of this nature are not covered by the Bill in the first place as there has to be some degree of exclusivity for an arrangement to be regarded formally as a “lease”.

49. One consultee also suggested that leases of substations and other public facilities should be specifically excluded. However, the Government did not follow this suggestion as no compelling evidence was put forward for the proposed exclusion.

50. Evidence was taken in the Justice Committee on long leases held on the Common Good. The Committee did not recommend that leases of common good property should be excluded from the Bill but said that any compensation received by local authorities where such leases are converted to ownership should be paid into the local authority’s common good fund.

51. The Scottish Government has written to local authorities on this point. We indicated that if the Bill should be passed by Parliament, the Scottish Government would intend to write
This document relates to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

again to local authorities. In this further letter, we would suggest that any compensatory or additional payments paid to local authorities as a result of ultra-long leases of common good land converting to ownership should be allocated to common good funds or accounts.

Other matters in Part 1

52. By virtue of section 3, conversion to ownership of a qualifying ultra-long lease is automatic. Registers of Scotland will not be automatically updating title sheets when conversion takes place under the Bill. Instead, title sheets will be updated when a property transaction happens. If they wish, former tenants who become owners under the Bill will be able to apply to Registers of Scotland for the title sheets to be amended to reflect their change of status, without a property transaction taking place. A charge will be made for dealing with any such applications.

53. Section 8 allows landlords to preserve rights to game or fishing. This follows similar provisions in the legislation abolishing feudal tenure.

Part 2

54. Part 2 of the Bill provides for the conversion of certain leasehold conditions into real burdens in the title deeds. “Real burdens” are defined in section 1 of the Title Conditions (Scotland) Act 2003 and, in essence, are an encumbrance on land.

Part 3

55. Part 3 of the Bill makes provision in respect of the allocation of cumulo rent and cumulo renewal premium and the allocation of rent and renewal premium where there is a partially continuing lease.

Part 4

56. Part 4 of the Bill contains provisions on compensation for loss of landlords’ rights. Compensatory and additional payments may be payable by tenants. The compensatory payments are based on the rent paid and are calculated by reference to 2.5% Consolidated Stock. This follows the system established when feu duty was abolished by the Abolition of Feudal Tenure etc. (Scotland) Act 2000. The aim is that the landlord should be entitled to claim a sum which, if invested in 2.5% Consolidated Stock, would produce an annual sum equal to the rent. In the vast majority of cases, the compensatory payments payable in respect of each lease will be low, given that the rent is low.

57. Part 4 also makes provision for additional payments, on top of the compensatory payments, in areas such as:

- non-monetary rents (e.g. six fat hens);
- rent reviews;

Footnote 22 of the SLC report, on page 64, notes that “Section 65A of the 2000 Act allows sporting rights to be preserved as a separate tenement. According to the Registers of Scotland 65 notices were registered under s 65A”
rent increases;
- rights to rent where the amount payable is variable (e.g. when rent is based on the turnover of a business);
- renewal premiums exceeding £100 (renewal premiums under £100 are covered in the provisions relating to compensatory payments);
- residual value of reversionary interest;
- early termination; and
- right to development value.

58. Paragraph 6.28 of the SLC report noted that “Occasionally the compensatory payment will not be a sufficient measure of the landlord’s loss. Such cases are likely to be rare; but except where the difference is too slight to be worthy of separate compensation, the landlord should be able to seek an additional payment from the tenant”.

Part 5

59. Part 5 of the Bill covers exempt leases. A tenant (but not a landlord) may choose to opt out of converting to ownership. A tenant may choose to do so, for example, if the tenant decides the compensation payable outweighs the benefits of converting the lease to ownership. An exemption notice may be recalled at any time. Part 5 also now contains the provisions on landlords being able to register an agreement with the tenant or an order from the Lands Tribunal to exempt the lease if the annual rental is over £100.

Part 6

60. Part 6 of the Bill covers miscellaneous matters. In particular, section 71 contains provisions on how the duration of leases is to be calculated. Renewals that the landlord is obliged to grant are included. Section 72 contains specific provision relating to renewals which the landlord was obliged to grant but which failed to take place (e.g. because the parties to the lease forgot about the need to renew)\(^9\). This provision was added following the Government consultation.

Interaction with the Land Registration etc. (Scotland) Bill

61. Finally, this Bill will interact with the Land Registration etc. (Scotland) Bill which has recently been introduced\(^10\). In line with the usual approach it is not considered appropriate to refer in the Long Leases (Scotland) Bill to detailed provisions of the Land Registration etc. (Scotland) Bill pending approval of its general principles by the Parliament at Stage 1.

62. Accordingly, some consequential and transitional provision will need to be amended into the Long Leases (Scotland) Bill at a later stage, or put in place by ancillary order under the Bill.

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\(^9\) This has been an issue in Blairgowrie and Rattray where leases were let for 99 years, perpetually renewable.

\(^10\) [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/44469.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/44469.aspx)
This document relates to the Long Leases (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

In the meantime, the references to the Land Registration (Scotland) Act 1979 which were in the Schedule to the previous Long Leases (Scotland) Bill have been removed.

**BENEFITS OF THE BILL**

63. The Government considers that the benefits of the Bill are:

- Ultra-long leases amount to virtual ownership. It would simplify property law in Scotland to convert them to ownership.
- There is an argument that ultra-long leases are feus in disguise (e.g. where feus could not be granted, mainly because the land was entailed). Therefore, converting ultra-long leases to ownership would be in line with the earlier conversion of feus into ownership.
- The hierarchical structure of ultra-long leases and subleases is needlessly complex in circumstances where the only real value is that held by the ultimate tenant.
- Some ultra-long leases may be vulnerable to irritancy (i.e. unilateral termination by the landlord, without compensation) in the event of non-payment of rent or a failure to observe one of the conditions of the lease. This is not appropriate in a lease which amounts to virtual ownership by the tenant.
- The conditions in an ultra-long lease may verge on the unacceptable, given that the land is in virtual ownership.
- The conditions in an ultra-long lease may allow an inappropriate degree of control by a person who, unless a close neighbour, has little or no interest in the land.
- The conditions may also provide an opportunity for the landlord to charge the tenant for the conditions to be waived - this may make the landlord’s interest attractive to title raiders.
- Because ultra-long leases are relatively rare, are concentrated within small geographical areas, and can no longer be granted, they are unfamiliar to many legal practitioners. This may cause problems when a transaction involving a property with an ultra-long lease takes place and may increase the costs of the transaction. Pro-forma missives may not provide for the title being held on an ultra-long lease and if they are not appropriately adjusted can lead in extreme cases to property transactions falling through.
- A tenant with an ultra-long lease may encounter difficulties in relation to secured financing. A small number of lenders may not advance money on the security of an ultra-long lease. Others are wary of potential problems, such as premature termination as a result of irritancy or of confusion (“confusion” in this context occurs where the same person is both landlord and tenant). There may be particular problems in relation to renewable ultra-long leases.
- The law on tenements assumes ownership but some flats in tenements may be held on ultra-long leases.
- Not to convert ultra-long leases now would be to store up problems in the long term, when such ultra-long leases come to an end and the tenant loses the property without compensation, including compensation for any improvements.
EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT

Equal Opportunities

64. The provisions of the Bill are not discriminatory on the basis of gender, race, age, disability, religion or sexual orientation. The Scottish Government included an Equalities Impact Assessment in its consultation and received no comments on it.

Human Rights

65. The provisions of the Bill are not prejudicial to human rights.

66. Article 1 of Protocol 1 (A1P1) of the European Convention of Human Rights provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law...”

“The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

67. The Government considered the compatibility of the Bill with A1P1. In particular:

- The Bill extinguishes landlords’ rights of ownership. However, landlords may claim compensatory payments and additional payments for the loss of their rights. (Part 4 of the Bill refers). In addition, landlords can preserve rights to game and fishing (section 8 of the Bill refers).
- Leasehold conditions are also being extinguished. However, the Bill makes provision for some conditions to be converted automatically to real burdens in the title deeds (e.g. see section 29 of the Bill on conversion to facility or service burden) and for other conditions to be converted to real burdens after a process is followed.

68. Given the provisions in place in relation to compensation and converting leasehold conditions to real burdens, the Government considered that the Bill is compatible with A1P1.

69. The Government also considered the compatibility of the Bill with other aspects of the European Convention on Human Rights, particularly Article 14. Article 14 provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

70. Key issues in relation to Article 14 are outlined below.
To qualify for conversion under the Bill, leases must be over 175 years long and have over 100 years left to run. These periods were chosen for good reasons. Work carried out by the SLC (see the discussion in their report at paragraphs 2.13 to 2.15 and Appendix C paragraphs 11 and 12 and charts 2 and 3) indicated that most leases have been granted for around 999 years or for 125 years or less, with little in between. On the basis of those figures, the dividing line between the two types of leases would seem to be 125 years.

However, using 125 years as the criteria would be inconsistent with section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, which prohibited the grant of new leases with a duration in excess of 175 years: this would have meant leases allowed by a recent Act of the Scottish Parliament would have been eligible to convert to ownership. (In any event, the survey carried out by the SLC suggested that there would be little difference in practice between a limit of 125 years and 175).

The Justice Committee took some evidence on whether the over 175 year requirement in the Bill should be changed to a different period. The Committee’s Stage 1 report did not recommend any changes to this period.

On the requirement that the lease has more than 100 years left to run, the SLC obtained advice from the Royal Institution of Chartered Surveyors in Scotland (RICS) on when the value of a landlord’s interest in a long lease can be treated as negligible. The RICS suggested that the appropriate figure in most cases was an unexpired duration of 100 years (paragraph 2.17 of the SLC report refers).

Therefore, the Government considered there was a justification for choosing the periods of 175 years and 100 years and that Article 14 was complied with.

The Government also considered the position in relation to the cut-off of a rental of over £100 to exclude leases let on commercial terms. The reasons for choosing this figure are outlined at paragraphs 32 to 42 above. Given these reasons, the Government considered that Article 14 was complied with.

Finally, the Government considered the terms of section 72 of the Bill. This provides that renewal obligations in leases continuing on tacit relocation should be included for the purposes of calculating the duration of the lease even if the renewal did not actually happen. This provision is aimed at perpetually renewable leases where the landlord and tenant have forgotten about the renewal. The aim of the provision is to provide clarity and certainty: to do otherwise could lead to undue problems for the tenant. Given this, the Government considered that Article 14 was complied with.

Island Communities

The provisions of the Bill have no specific effect on island communities. Any ultra-long leases on the islands will be eligible to convert to ownership in the usual way. However, there has been no evidence presented to suggest that ultra-long leases are a significant feature of land tenure in island communities.
Local Government

79. The Bill does not introduce any new functions for local authorities. Local authorities may be tenants of ultra-long leases or landlords and will be covered by the Bill in the same way as other tenants or landlords. As indicated above, evidence was taken at Stage 1 in the last Parliament on leases of common good property. As stated above, we have written to local authorities about the Committee’s recommendation that any compensation received by local authorities in respect of leases of common good property should be paid into the common good fund.

Sustainable development

80. The Bill has no negative impact on sustainable development. The Scottish Government consultation included a Strategic Environmental Assessment pre-screening report. No comments were received on this pre-screening report.
### Annex A

**Long Leases (Scotland) Bill**

**Table of equivalence**

<table>
<thead>
<tr>
<th>Section name</th>
<th>Section no. in current Bill</th>
<th>Section no. in previous Bill</th>
<th>Section no. in SLC Bill</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part 1 CONVERSION OF LONG LEASE TO OWNERSHIP</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Determination of “qualifying lease”</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Meaning of “qualifying lease”</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>Section 1(4)(a) of the Bill exempts leases where the annual rental is over £100. This was not in the Scottish Law Commission Bill but was in the Bill in the last Parliament, following comments from consultees responding to the Scottish Government consultation. Section 1(4)(b) on harbours has been added following evidence at the previous Stage 1. Section 1(4)(c), on pipes and cables, has been clarified following evidence at the previous Stage 1.</td>
</tr>
<tr>
<td>Further provision about annual rent</td>
<td>2</td>
<td>None</td>
<td>None</td>
<td>New section containing provision on annual rent. Subsection (3) provides that where there is <em>cumulo</em> rent, this shall be treated as NIL for the purposes of section 1(4)(a). However, section 39 now provides that the landlord may allocate <em>cumulo</em> rent before the appointed day. If, after this allocation has taken place, the annual rental in an individual lease is over £100, the landlord may then register an exemption under section 64 (following an agreement with the tenant or an order by the Lands Tribunal).</td>
</tr>
</tbody>
</table>
Subsections (4) and (5) were previously part of section 1 in the Bill in the last Parliament. Subsection (5) provides that for the purposes of section 1(4)(a), variable rental is to be left out of account. However, section 64 now provides that a landlord may register an exemption (following an agreement with the tenant or an order by the Lands Tribunal) where the annual rental was over £100 at any point in the 5 years before Royal Assent.

<table>
<thead>
<tr>
<th>Only one lease is qualifying lease</th>
<th>3</th>
<th>2</th>
<th>2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conversion of right of lease to ownership</strong></td>
<td></td>
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<tr>
<td>Conversion of right of lease to ownership</td>
<td>4</td>
<td>3</td>
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</tr>
<tr>
<td><strong>Consequences of conversion</strong></td>
<td></td>
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</tr>
<tr>
<td>Extinction of certain rights and obligations</td>
<td>5</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Subordinate real rights, reservations and pertinents</td>
<td>6</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Creation of servitudes on conversion</td>
<td>7</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>Creation of reserved sporting rights</td>
<td>8</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Further provision for section 8</td>
<td>9</td>
<td>8</td>
<td>8</td>
</tr>
</tbody>
</table>

**Part 2  CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS**

**Determination of “qualifying conditions”**

<table>
<thead>
<tr>
<th>Qualifying conditions</th>
<th>10</th>
<th>9</th>
<th>9</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restriction of conversion of qualifying conditions</td>
<td>11</td>
<td>10</td>
<td>10</td>
</tr>
</tbody>
</table>

**Meaning of “qualifying land”**

| Meaning of “qualifying land” | 12 | 11 | 11 |

**Entitlement to enforce qualifying conditions**

| Determination of who may enforce conditions | 13 | 12 | 12 |
### Conversion of conditions to burdens

<table>
<thead>
<tr>
<th>Conversion by nomination of benefited property</th>
<th>14</th>
<th>13</th>
<th>13(1) to (5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conversion by nomination: registration</td>
<td>15</td>
<td>14</td>
<td>13 (6) to (9) and (11)</td>
</tr>
<tr>
<td>Conversion by nomination: effect</td>
<td>16</td>
<td>15</td>
<td>13(10)</td>
</tr>
<tr>
<td>Conversion by agreement</td>
<td>17</td>
<td>16</td>
<td>14(1) to (6) and (11)</td>
</tr>
<tr>
<td>Conversion by agreement: registration</td>
<td>18</td>
<td>17</td>
<td>14 (7)</td>
</tr>
<tr>
<td>Conversion by agreement: effect</td>
<td>19</td>
<td>18</td>
<td>14(9)</td>
</tr>
<tr>
<td>Conversion by agreement: title not completed</td>
<td>20</td>
<td>19</td>
<td>14(10)</td>
</tr>
</tbody>
</table>

### Applications relating to section 14

<table>
<thead>
<tr>
<th>Lands Tribunal order</th>
<th>21</th>
<th>20</th>
<th>15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dealing with application under section 21</td>
<td>22</td>
<td>21</td>
<td>16</td>
</tr>
</tbody>
</table>

Section 22(3) of the current Bill has been amended when compared with section 21(4) of the Bill in the last Parliament. Section 22(3) does not now contain provision allowing Ministers to prescribe a time for opposing an application or making representations. If needed, rules for the Lands Tribunal may already be made by Ministers under the Lands Tribunal Act 1949.

Section 22 of the Bill in the last Parliament (the section heading was “Amendment of Tribunals and Inquiries Act 1992”) now forms part of paragraph 2 of the Schedule to the current Bill. (The section number in the Scottish Law Commission Bill was 17).

Paragraph 2 of the Schedule to the current Bill also takes account of the new section 69.
<table>
<thead>
<tr>
<th>Personal real burdens</th>
<th>23</th>
<th>24</th>
<th>25</th>
<th>26</th>
<th>27</th>
<th>28</th>
<th>29</th>
<th>30</th>
<th>31</th>
<th>32</th>
<th>33</th>
<th>34</th>
<th>35</th>
<th>36</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conversion to personal pre-emption or redemption burden</td>
<td>23</td>
<td>23</td>
<td>18</td>
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<tr>
<td>Conversion to economic development burden</td>
<td>24</td>
<td>24</td>
<td>19</td>
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<tr>
<td>Conversion to health care burden</td>
<td>25</td>
<td>25</td>
<td>20</td>
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<tr>
<td>Conversion to climate change burden</td>
<td>26</td>
<td>26</td>
<td>None</td>
<td>Climate change burdens were introduced by section 68 of the Climate Change (Scotland) Act 2009, after the Scottish Law Commission reported.</td>
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<tr>
<td>Conversion to conservation burden: rule one</td>
<td>27</td>
<td>27</td>
<td>21</td>
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<tr>
<td>Conversion to conservation burden: rule two</td>
<td>28</td>
<td>28</td>
<td>22</td>
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<tr>
<td>Other real burdens</td>
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<tr>
<td>Conversion to facility or service burden</td>
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<tr>
<td>Conversion to manager burden</td>
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<tr>
<td>Conversion where common scheme affects related properties</td>
<td>31</td>
<td>31</td>
<td>25</td>
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<tr>
<td>Conversion where expressly enforceable by certain third parties</td>
<td>32</td>
<td>32</td>
<td>26</td>
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<tr>
<td>Exclusions from conversion</td>
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<tr>
<td>Qualifying condition where obligation assumed by public authority</td>
<td>33</td>
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<tr>
<td>Effect of conversion on counter-obligations</td>
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<tr>
<td>Counter-obligations on conversion</td>
<td>34</td>
<td>34</td>
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<tr>
<td>Prescription</td>
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<tr>
<td>Prescriptive period for converted conditions</td>
<td>35</td>
<td>35</td>
<td>29</td>
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<tr>
<td>Notices and agreements under this Part</td>
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<tr>
<td>Further provision for notices and agreements</td>
<td>36</td>
<td>36</td>
<td>30</td>
<td></td>
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</tbody>
</table>
## Part 3. ALLOCATION OF RENTS AND RENEWAL PREMIUMS ETC

### Key terms

<table>
<thead>
<tr>
<th></th>
<th>37</th>
<th>39</th>
<th>35(1) and 33(1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partially continuing leases and renewal obligations etc.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Cumulo rent and cumulo renewal premium</strong></td>
<td>38</td>
<td>59</td>
<td>51</td>
</tr>
</tbody>
</table>

### Allocation of rent

<table>
<thead>
<tr>
<th>Allocation of cumulo rent before appointed day</th>
<th>39</th>
<th>None</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>This provision has been introduced to clarify that the landlord can allocate <em>cumulo</em> rent before the appointed day. When such allocation takes place and the annual rental for an individual lease is over £100, the landlord can then register an exemption under section 64 of the current Bill.</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Allocation of cumulo rent after appointed day</th>
<th>40</th>
<th>42</th>
<th>36</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section title in the previous Bill was “Allocation of <em>cumulo</em> rent”</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Partially continuing leases: allocation of rent | 41 | 43 | 35 |

### Allocation of renewal premium

<table>
<thead>
<tr>
<th>Allocation of cumulo renewal premium</th>
<th>42</th>
<th>45</th>
<th>38</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partially continuing leases: allocation of renewal premium</td>
<td>43</td>
<td>46</td>
<td>38</td>
</tr>
</tbody>
</table>

### Allocation disputed or not made

<table>
<thead>
<tr>
<th>Allocation disputed or not made: reference to Lands Tribunal</th>
<th>44</th>
<th>47</th>
<th>37</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 44(1)(a) of the current Bill has been added to reflect the addition of section 39.</td>
<td></td>
<td></td>
<td></td>
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</tbody>
</table>

## Part 4. COMPENSATION FOR LOSS OF LANDLORD’S RIGHTS

### Compensatory payment

<table>
<thead>
<tr>
<th>Requiring compensatory payment</th>
<th>45</th>
<th>37</th>
<th>31</th>
</tr>
</thead>
<tbody>
<tr>
<td>Making compensatory payment</td>
<td>46</td>
<td>38</td>
<td>34</td>
</tr>
</tbody>
</table>

### Calculation of compensatory payment

<p>| Calculation of the compensatory payment | 47 | 40 | 32 |</p>
<table>
<thead>
<tr>
<th>Annual rent</th>
<th>Determination of the annual rent</th>
<th>Renewal premiums</th>
<th>Calculation of notional annual renewal</th>
<th>Premium</th>
<th>Additional payment</th>
<th>Renewal premium</th>
<th>Additional payment: former tenant</th>
</tr>
</thead>
<tbody>
<tr>
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<tr>
<td>Additional payment</td>
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<tr>
<td>Claiming additional payment</td>
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<tr>
<td>Extinguished rights</td>
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<tr>
<td>Calculating additional payment</td>
<td></td>
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<tr>
<td>Additional payment: amount mutually agreeing</td>
<td></td>
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<tr>
<td>Claim for additional payment: reference to Lands Tribunal</td>
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</tbody>
</table>

**Supplementary Clauses**

<table>
<thead>
<tr>
<th>Claims in excess of £500: preliminary notice</th>
<th>Making payments by instalments</th>
<th>Collecting third party to disclose information</th>
<th>Duty to disclose identity etc. of former tenant</th>
<th>Prescription of requirement to make payment</th>
<th>Interpretation of Part 4</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

**Exempt Leases**

<table>
<thead>
<tr>
<th>Types of exempt lease</th>
<th>Exemption of qualifying lease by...</th>
<th>Exemption registration notice</th>
</tr>
</thead>
</table>
Exemption of qualifying lease by registration of agreement or order  | 64 | None | None | This is a new provision, reflecting evidence at Stage 1 last time round. The provision allows the landlord to register an exemption where the annual rental payable under the lease immediately before the appointed day will be over £100 or where the annual rental paid under the lease was over £100 at any point in the 5 years immediately before the Bill received Royal Assent. The provision relating to any point in the 5 years before Royal Assent reflects the evidence at Stage 1 that some rentals may be variable (e.g. may be based on turnover). The provision allowing an exemption to be registered immediately before the appointed day reflects that once the landlord has allocated cumulo rental under section 39, it is possible that the annual rental in an individual lease may be over £100. An exemption may be registered by the landlord under section 64 after reaching an agreement with the tenant or after obtaining an order from the Lands Tribunal under section 69.

| Certain leases registered near or after the appointed day | 65 | 63 | 55 |
| Subleases of exempt leases | 66 | 64 | 56 |
| Recall of exemption | 67 | 65 | 57 |
| Supplementary | 
| Exemption and recall notices: supplementary | 68 | 66 | 58 |
| Application to Lands Tribunal for order confirming rent | 69 | None | None | This is a new provision allowing applications to the Lands Tribunal for an order that the annual rental immediately before the appointed day will be over £100 or that the annual rental at any point in the 5 years before Royal Assent was over £100. An application may only be made to the Tribunal after an attempt has been made by the
landlord to reach agreement with the tenant.

### Part 6. GENERAL AND MISCELLANEOUS

#### The appointed day

| The appointed day | 70 | 67 | 59 | The definition now just refers to Martinmas only (rather than Whitsunday as well). |

#### Duration of lease etc.

| Determining duration of lease | 71 | 68 | 60 | |
| Leases continuing on tacit relocation | 72 | 69 | None | Provision was added to the previous Bill and is included again in this Bill to reflect the fact that some renewable leases may not have been renewed formally and, instead, may be continuing on tacit relocation. |

#### Extinction of right of irritancy in certain leases

| Extinction of right of irritancy in certain leases | 73 | 70 | 61 | No longer commences on Royal Assent. |

#### Notices etc.

| Service of notices | 74 | 71 | 47 | |
| Notices: pre-registration requirements | 75 | 72 | 62 | |
| Keeper's duty as regards documents | 76 | 73 | 63 | Minor amendments have been made to section 76 to reflect that some of the provisions of the Bill relate to notices and some to agreements. Consequential changes have also been made (see section 76(5)) to reflect new sections 64 and 69. |

#### Miscellaneous

<p>| Amendments to enactments | 79 | 76 | 67 | |
| Interpretation | 80 | 77 | 68 | |
| Ancillary provision | 81 | 78 | None | |
| Subordinate legislation | 82 | 79 | 69 | |
| Commencement | 83 | 80 | 70 | |
| Short title | 84 | 80 | 70 | |</p>
<table>
<thead>
<tr>
<th>Minor and consequential amendments</th>
<th>SCHEDULE</th>
<th>SCHEDULE</th>
<th>SCHEDULE 21</th>
</tr>
</thead>
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The Scottish Law Commission Bill had schedules of forms and a table of life expectancy. The Government considers it preferable to prescribe the forms and the table of life expectancy by SSI.

Amendments to the Land Registration (Scotland) Act 1979 have been removed. A Land Registration (Scotland) Bill has recently been introduced and, as a result, the Government expects to have to make consequential amendments to the Long Leases (Scotland) Bill at Stage 2.

What was section 23 in the Bill introduced into the last Parliament now forms part of paragraph 2 of the Schedule.
LONG LEASES ETC. (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Long Leases (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Bill is divided into 6 parts and has 84 sections. There is also one schedule. The Bill is based on a report by the Scottish Law Commission (SLC)\(^1\) and follows a consultation by the Scottish Government.\(^2\) A similar Bill was introduced in the last Parliament but ran out of time.\(^3\) The Bill converts ultra-long leases (more than 175 years long and with more than 100 years left to run) to ownership, subject to some exceptions. Tenants may opt out, if they wish. Landlords can claim compensation for the loss of their rights. Some leasehold conditions will convert to real burdens in the title deeds. Landlords can preserve some sporting rights in relation to game and fishing.

Part 1: Conversion of long lease to ownership (sections 1 to 9)

4. Part 1 lays down which leases are eligible for conversion to ownership under the Bill; which rights are extinguished and which continue; and contains provisions enabling landlords to preserve sporting rights in relation to game and fishing.

Part 2: Conversion of certain leasehold conditions to real burdens (sections 10 to 36)

5. Part 2 provides a scheme for the conversion of certain leasehold conditions into real burdens. Once the conditions have been converted they become subject to the law on real

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\(^1\) The SLC report is at [http://www.scotlawcom.gov.uk/download_file/view/251/](http://www.scotlawcom.gov.uk/download_file/view/251/)

\(^2\) The consultation by the Scottish Government is at [http://www.scotland.gov.uk/Publications/2010/03/26131302/0](http://www.scotland.gov.uk/Publications/2010/03/26131302/0)

\(^3\) The Bill as introduced in the last Parliament is at [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx)
This document relates to the Long Leases etc. (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

burdens. The law on real burdens is primarily contained in the Title Conditions (Scotland) Act 2003. Section 1 of the 2003 Act outlines what real burdens are.

Part 3: Allocation of rents and renewal premiums etc. (sections 37 to 44)

6. Part 3 makes provision for the allocation of *cumulo* rent and *cumulo* renewal premium. *Cumulo* rent is defined in section 38 and refers to a single rent payable in relation to two or more leases. *Cumulo* renewal premium is also defined in section 38 and refers to a single renewal premium payable in relation to two or more leases. Part 3 also makes provision in respect of the allocation of rent and renewal premium where the lease is partially continuing.

Part 4: Compensation for loss of landlord’s rights (sections 45 to 61)

7. Part 4 sets out a scheme under which the landlord of a lease converting to ownership under Part 1 may claim compensation. A landlord may claim a general payment for the loss of rights. This is termed a compensatory payment and is based on the capitalised value of the rent (see sections 45 to 49).

8. Exceptionally a payment based on the capitalised value of the rent may not be enough to fully compensate the landlord. In certain cases, therefore, a landlord may claim a further payment, termed an “additional payment”, for the loss of the right in question (see sections 50 to 55).

9. Part 4 also contains provisions in relation to the landlord serving a preliminary notice on the tenant where a compensatory claim (which could include an additional payment) is likely to exceed £500 (see section 56); the tenant making payments by instalments when the amount due is £50 or more (see section 57) and the disclosure of information by third parties who have collected rental from a tenant or former tenant (see sections 58 and 59).

Part 5: Exemption from conversion and continuing leases (sections 62 to 69)

10. This Part contains provisions on the tenant opting out of converting a lease to ownership by exempting the lease and on recalling an exemption (which makes a lease eligible for conversion so long as it meets the general criteria for conversion). This Part also contains provision on the landlord registering an exemption where the annual rental is over £100 in specified circumstances. This Part also contains provisions on the registration of unregistered leases. These are then treated as leases which are exempt from conversion but with the tenant having the option of recalling this exemption.

Part 6: General and miscellaneous (sections 70 to 84)

11. This Part contains provisions on a variety of issues: the appointed day; how to determine the duration of leases; leases continuing on tacit relocation; irritancy; service of notices; registration of notices; matters the Keeper of the Registers is not required to determine; referring disputed notices to the Lands Tribunal; the registration of documents rejected by the Keeper when the courts or the Lands Tribunal determine that they are registrable; amendments to...
This document relates to the Long Leases etc. (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

enactments; interpretation; ancillary provisions; subordinate legislation; commencement and short title.

APPROACH TO USE OF DELEGATED POWERS

12. The Government has had regard, when deciding whether provision should be made in subordinate legislation rather than in primary legislation to the need to make proper use of Parliamentary time and the need for flexibility in some circumstances to respond to changing circumstances.

13. In particular, there is one significant difference in approach between the Bill prepared by the SLC (which can be found at the back of their report) and the Bill prepared by the Government. The SLC report contained 20 schedules. 19 of these schedules were forms to be used when leases are converting to ownership. The other schedule related to a table of life expectancy, which may be used in a small number of cases to help determine the length of a lease and whether or not it is eligible for conversion under the Bill.

14. The Government has decided that it is preferable for the forms and the table of life expectancy to be prescribed by Scottish statutory instrument, instead of including them on the face of the Bill. This shortens the length of the Bill and provides more flexibility if any of the forms should need to be changed. The Government expects the forms will be along similar lines to the forms contained in the schedules to the Scottish Law Commission Bill, although there will need to be two further forms. One to reflect the creation of climate change burdens by section 68 of the Climate Change (Scotland) Act 2009 and another to reflect that landlords may now register an agreement with a tenant that a lease is exempt as the annual rent is over £100 in specified circumstances. The Government will seek views from key parties, such as Registers of Scotland, on the SSI which will contain the draft forms before the SSI is made.

15. The delegated power provisions are listed below, with a short explanation of what the powers allow and why the selected form of Parliamentary procedure has been considered appropriate. Where appropriate, powers have been grouped as a number of the powers in the Bill (eg in relation to the forms) are of a similar nature.

COMMENTARY ON POWERS IN THE BILL

Forms

16. Commentary on delegated powers in the Bill relating to notices is below:

*Part 1 of the Bill*

Section 8(2) – Power to prescribe a notice which a landlord can execute and register to conserve sporting rights

*Part 2 of the Bill*
Section 14(3)(a) – Power to prescribe a notice which an entitled person can execute and register to prospectively convert a qualifying leasehold condition into a real burden

Section 17(4)(a) – Power to prescribe a notice which an entitled person may serve on a tenant to enter into an agreement to prospectively convert a qualifying condition into a real burden

Section 23(3)(a) – Power to prescribe a notice which a person entitled to enforce a condition comprising a right of pre-emption or a right of redemption may execute and register to convert the condition into a personal pre-emption burden or a personal redemption burden

Section 24(2)(a) – Power to prescribe a notice which a local authority or the Scottish Ministers, when entitled to enforce a leasehold condition for the purpose of promoting economic development, may execute and register to prospectively convert the condition into an economic development burden

Section 25(2)(a) – Power to prescribe a notice which the Scottish Ministers, when entitled to enforce a leasehold condition for the purpose of promoting the provision of facilities for health care, may execute and register to prospectively convert the condition into a health care burden

Section 26(2)(a) – Power to prescribe a notice which a public body or trust or the Scottish Ministers, when entitled to enforce a leasehold condition for the purpose of reducing greenhouse gas emissions, may execute and register to prospectively convert the condition into a climate change burden

Section 27(3)(a) – Power to prescribe a notice which a conservation body or the Scottish Ministers, when entitled to enforce a leasehold condition for the purpose of preserving the architectural or historical characteristics of land or any other special characteristics of land, may execute and register to prospectively convert the condition into a conservation burden

Section 28(3)(a) – Power to prescribe a notice which a person other than a conservation body or the Scottish Ministers, when entitled to enforce a leasehold condition for the purpose of preserving the architectural or historical characteristics of land or any other special characteristics of land, may execute and register to prospectively convert the condition into a conservation burden and nominate a conservation body or the Scottish Ministers to enforce the burden

Part 4 of the Bill

Section 45(2) – Power to prescribe a notice which a former landlord may serve on a former tenant requiring a compensatory payment be made

Section 45(4)(b) – Power to prescribe an explanatory note for the notice which a former landlord may serve on a former tenant requiring a compensatory payment be made
This document relates to the Long Leases etc. (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

Section 50(4)(b) and (c) – Power to prescribe a notice and explanatory note which a former landlord may serve on a former tenant claiming an additional payment

Section 54(3)(b) and (c) – Power to prescribe a notice and explanatory note which a former landlord may serve on a former tenant where they have agreed the amount of the additional payment (and this amount is different to what was originally claimed)

Section 56(3)(a) and (c) – Power to prescribe a preliminary notice and explanatory note which a landlord may serve on a tenant stating the landlord’s intention to require a compensatory payment likely to exceed £500 or an additional payment (or additional payments) likely to exceed £500

Section 57(2)(a) and (b) – Power to prescribe an instalment document and explanatory note which a former landlord must serve on a former tenant in relation to a compensatory payment or additional payment exceeding £50

Part 5 of the Bill

Section 63(b) – Power to prescribe a notice which a tenant may execute and register so that the tenant’s lease is treated as exempt and so is not converted

Section 64(2)(a) – Power to prescribe the form of agreement which the landlord may register to exempt a lease where the landlord and tenant have agreed the annual rental is over £100

Section 67(1)(b) – Power to prescribe a notice which a tenant may execute and register to recall an exemption (so the lease can then convert)

Section 68(2)(b) – Power to prescribe explanatory notes for notices which a tenant may execute and register to exempt a lease from conversion and to recall an exemption

Part 6 of the Bill

Section 74(3)(a) and (b) – Power to prescribe an acknowledgement of the receipt of a notice under section 17(1)(a) or Part 4 and a certificate showing a notice was sent

Section 75(2)(b) – Power to prescribe the explanatory note for notices under section 8 (conversion of reserved sporting rights) and Part 2 (conversion of certain leasehold conditions to real burdens)

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provisions

17. These provisions relate to powers to prescribe notices and explanatory notes. “Prescribed” is defined in section 80(1) as “prescribed by the Scottish Ministers in regulations”. In detail:

- Section 8(2). Where a landlord executes and registers a notice in accordance with section 8(2) to (6), section 8(7) converts a sporting right into a separate tenement (i.e. rights which can be owned separately from the physical land to which they relate). In this way, landlords can preserve rights to game and fishing. Section 8(2) provides a power to prescribe a form of notice for landlords to use. [The form in the SLC Bill is at Schedule 1].

- Section 14(3)(a). Section 14(3)(a) provides a power to prescribe the form of notice which an entitled person may use when prospectively converting a qualifying leasehold condition to a real burden. Qualifying leasehold conditions may only be converted if at least one of the conversion conditions laid down in section 14(4) is met or the Lands Tribunal for Scotland has made an order under section 21 dispensing with the need for any of the conversion conditions to be met. (Section 21(3) provides that an application may only be made to the Lands Tribunal for Scotland after an attempt has been made to reach agreement with the tenant under section 17). [The form in the SLC Bill is at Schedule 2].

- Section 17(4)(a). Section 17 allows an entitled person to seek to enter into an agreement with the tenant of the qualifying lease for the purpose of converting a qualifying condition into a real burden in favour of neighbouring land. Section 17(4)(a) provides a power to prescribe the form of notice which an entitled person may use when trying to reach an agreement with the tenant. [The form in the SLC Bill is at Schedule 3].

- Section 23(3)(a). Section 23 provides for the conversion of qualifying leasehold conditions into personal pre-emption burdens (right of first refusal to purchase property) or personal redemption burdens (right where the tenant’s interest reverts to the landlord on the occasion of a specified event or on a specific date). Subsection 23(3)(a) provides a power to prescribe the form of notice for an entitled person to use when converting qualifying leasehold conditions into personal pre-emption burdens or personal redemption burdens. [The form in the SLC Bill is at Schedule 4].

- Sections 24(2)(a); 25(2)(a); 26(2)(a); 27(3)(a) and 28(3)(a). Sections 24, 25, 26, 27 and 28 provide for the conversion by certain bodies of leasehold conditions into the following personal real burdens: economic development; health care; climate change and conservation. Sections 24(2)(a); 25(2)(a); 26(2)(a); 27(3)(a) and 28(3)(a) provide powers to prescribe forms of notice to be used by those bodies. [The forms in the SLC Bill are at Schedule 5 (economic development burden); Schedule 6 (health care burden); Schedule 7 (conservation burden where the enforcement body is a conservation body or the Scottish Ministers) and Schedule 8 (conservation burden where the enforcement body is not a conservation body or the Scottish Ministers). There was no form in the SLC Bill for
This document relates to the Long Leases etc. (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

climate change burdens as these burdens were introduced by the Climate Change (Scotland) Act 2009 and the SLC report is from 2006.

• Section 45(2). Landlords must claim any compensatory payment. Section 45(2) provides a power to prescribe the form of notice for landlords to use in doing so. The notice must be accompanied by an explanatory note. Section 45(4)(b) provides a power to prescribe the form of the explanatory note. (Compensatory payments are calculated in accordance with section 47 and are based on the rent payable under the lease. If a landlord considers that the compensatory payment is insufficient for the loss of rights, the landlord may claim additional payments under sections 50 to 55). [The forms in the SLC Bill are at Schedules 9, 10 and 11].

• Section 50(4)(b) and (c). Landlords may also claim that an additional payment (calculated in accordance with section 52) be made by the former tenant in respect of the extinction of certain rights mentioned in section 51(1). Section 50(4)(b) provides a power to prescribe the form of notice for landlords to use in doing so. The notice must be accompanied by an explanatory note. Section 50(4)(c) provides a power to prescribe the form of the explanatory note. [The form in the SLC Bill is at Schedule 12].

• Section 54(3)(b) and (c). Following service of an additional payment notice under section 50, former landlords and former tenants may agree that a different amount be paid. In such a case, section 54(2) requires that a landlord serve a further notice on the tenant. Section 54(3)(b) provides a power to prescribe the form of that notice and section 54(3)(c) provides a power to prescribe the form of explanatory note that must accompany the notice. [The form in the SLC Bill is at Schedule 13].

• Section 56(3)(a) and (c). A landlord must serve a preliminary notice on the tenant if the landlord is seeking a compensatory payment or an additional payment (or additional payments) exceeding £500. If a preliminary notice is not served, the compensatory payment may not exceed £500 and, similarly, an additional payment (or additional payments) may not exceed £500 (section 56(4) refers). Section 56(3)(a) provides a power to prescribe the form of that notice and section 56(3)(c) provides a power to prescribe the form of the explanatory note that must accompany the notice. [The forms in the SLC Bill are at Schedules 14 and 15].

• Section 57(2)(a) and (b). Where the compensatory payment or additional payment is £50 or more, the former landlord must serve an instalment document along with the relevant notice. The instalment document allows the tenant to make compensatory or additional payments by instalments. The instalment document must be served when requiring a compensatory payment equal to or greater than £50 (section 45(5) refers) or claiming an additional payment equal to or greater than £50 (section 50(5) refers) or requiring an agreed additional payment equal to or greater than £50 (section 54(4) refers). Section 57(2)(a) provides a power to prescribe the form of the instalment document and section 57(2)(b) provides a power to prescribe the form of the explanatory note that must accompany the notice. [The form in the SLC Bill is at Schedule 16].

• Section 63(b). Section 63 allows the tenant of a qualifying lease to opt out of conversion so that it becomes an exempt lease. Section 63(b) provides a power to prescribe the form
This document relates to the Long Leases etc. (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

of exemption notice to be executed and registered by the tenant under the lease. [The form in the SLC Bill is at Schedule 18].

- Section 64(2)(a). Section 64 makes provision for the landlord to exempt a lease by registering an agreement with the tenant, or a Lands Tribunal order, that the annual rental is over £100 immediately before the appointed day or at any point during the 5 years leading up to Royal Assent. Section 64(2)(a) provides a power to prescribe the form of agreement which the landlord may register to exempt a lease where the landlord and tenant have agreed the annual rental is over £100. [There was no equivalent provision in the SLC Bill and so there was no equivalent form in the SLC Bill].

- Section 67(1)(b). Section 67 allows the tenant under an exempt lease to register a notice of recall so the lease can then become eligible for conversion so long as it meets the general criteria for conversion. Section 67(1)(b) provides a power to prescribe a form of the recall notice. [The form in the SLC Bill is at Schedule 19].

- Section 68(2)(b). Section 68 sets out the rules for the service and registration of a notice of exemption or a notice of recall. Section 68(2) requires that the tenant must send to the landlord a copy of the notice and an explanatory note. Section 68(2)(b) provides a power to prescribe the form of explanatory note for exemption and recall notices. [In the SLC Bill, this would relate to the forms at Schedules 18 and 19].

- Section 74(3)(a) and (b). Section 74 sets out rules for service of notice under section 17(1)(a) or Part 4. Section 74(3)(a) and (b) provide powers to prescribe the form of acknowledgement that a notice has been served and certificate of posting. These are sufficient evidence of service of a notice. [The forms in the SLC Bill are at Schedule 17].

- Section 75(2)(b). Section 75 provides that a person who intends to execute a notice which is to be submitted for registration under section 8 or Part 2 must send the tenant, by post, a copy of that notice together with an explanatory note. Section 75(2)(b) provides a power to prescribe the form of explanatory note relating to notices served under section 7 or Part 2. [The relevant forms in the SLC Bill are at Schedules 1 to 8].

Reasons for taking powers

18. The notices are an integral part of the conversion of ultra-long leases to ownership. They provide the mechanics for:

- allowing landlords to preserve sporting rights;
- allowing landlords and other entitled persons to convert leasehold conditions to real burdens;
- allowing landlords to require or claim compensatory and additional payments;
This document relates to the Long Leases etc. (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

- ensuring landlords can serve preliminary notices for payments exceeding £500 and can serve instalment documents where the payment is over £50;

- acknowledging service of notices and providing proof of posting of notices;

- allowing tenants to opt out of conversion;

- allowing landlords to exempt a lease by registering an agreement with the tenant that the annual rental is over £100; and

- allowing tenants to recall exemption notices.

19. The notices are, therefore, required to implement successfully the conversion of leases to ownership under the Bill. They could have been included as Schedules to the Bill (as in the SLC Bill). However, this would have increased the size of the Bill and made it harder to make any changes to the forms should these be required. Although the Scottish Law Commission Bill did include the forms (and the table of life expectancy) as Schedules, there was also a provision (section 66 of the SLC Bill) to prescribe forms to replace those in the schedules (and to amend the table of life expectancy). Scottish Ministers consider this level of detail is more appropriate for secondary legislation.

**Choice of procedure**

20. By virtue of section 82(2), regulations made under all of the powers listed above are subject to annulment in pursuance of a resolution of the Scottish Parliament. It is considered that the powers here relate to straightforward matters and, as a result, that negative resolution procedure provides an appropriate balance between expedition and convenience on the one hand and, on the other hand, the need for scrutiny of a provision of this nature.

**Powers at section 71(1)(c)(ii)**

21. Commentary on the delegated powers in the Bill at section 71(1)(c)(ii) is below:

**Section 71(1)(c)(ii): Power to lay down a table of life expectancy to be used to help determine the period of a lease.**

- **Power conferred on:** Scottish Ministers
- **Power exercisable by:** regulations made by Scottish statutory instrument
- **Parliamentary procedure:** negative procedure

**Provision**
22. Section 71(1)(c)(ii) creates a power for Scottish Ministers to set out in regulations a table of life expectancy.

**Reasons for taking powers**

23. The Scottish Law Commission note (in paragraph 2.29 of their Report) that a small number of leases have been granted for the life of the first tenant plus a further period of years. The survey carried out by the SLC indicated that the leases which they had looked at containing conditions of this nature would qualify for conversion (as the further period of years in the leases they looked at were well above the durational requirements that leases are let for more than 175 years and have more than 100 years left to run).

24. However, in case there should be leases with conditions of this nature where it is not so clear-cut that the leases meet the durational requirements under the Bill, section 71(1)(c) of the Government’s Bill makes provision to calculate references to the lifetime of a tenant. Where the tenant is dead, the period he or she held the lease is used, if it can be calculated. If it cannot be calculated, a period of 35 years is used. Where the tenant is identifiable and not deceased, the table of life expectancy will be used. This was Schedule 20 in the SLC Bill. The Government expects that the table of life expectancy prescribed in regulations would be based on data available from the National Records of Scotland.4

**Choice of procedure**

25. By virtue of section 82(2), regulations made under this power are subject to annulment in pursuance of a resolution of the Scottish Parliament. It is considered that the powers here relate to straightforward matters and, as a result, that negative resolution procedure provides an appropriate balance between expedition and convenience on the one hand and, on the other hand, the need for scrutiny of a provision of this nature.

**Powers at section 78(5)**

26. Commentary on the delegated powers in the Bill at section 78(5) is below:

**Section 78(5): Power to prescribe a date or period after which notices and agreements determined registrable by the courts or the Lands Tribunal cannot be registered and to provide that applications to the courts or the Tribunal must be made within a specified period for the notices and agreements to be registrable**

- **Power conferred on:** Scottish Ministers
- **Power exercisable by:** order made by Scottish statutory instrument
- **Parliamentary procedure:** negative procedure

Provision

27. Section 78(5) creates a power for Scottish Ministers to make an order:

- specifying a date or period after which notices and agreements determined as registrable by the court or the Lands Tribunal could not be registered; and

- laying down a period during which applications to the court or the Lands Tribunal have to be made for notices to be registrable.

Reasons for taking powers

28. Section 78 of the Bill makes provision about the courts or the Lands Tribunal determining that notices or agreements rejected by the Keeper of the Registers may be registered.

29. Section 78(5)(a) allows Ministers to specify by order a date or period after which notices and agreements deemed registrable by the courts or the Lands Tribunal could not be registered. This follows an SLC recommendation (paragraph 8.12 of their report) that there should be a long-stop provision of this nature to increase long-term certainty for parties relying on the register. The power relates to a period as well as a date as an exemptions notice to stop a lease from converting may be recalled at any time. In these cases, a specific date might be inappropriate as the recall of the exemption (and any subsequent notices or agreements) might occur after the specific date.

30. The effect of Section 78(5)(b) is that registrations of notices or agreements determined registrable by the court or the Lands Tribunal may only take place if the application to the court or the Lands Tribunal was made during a period specified by order made by the Scottish Ministers. Again, the purpose of this provision is to provide longer-term certainty.

31. The Government considers it preferable to lay down these dates or periods by SSI rather than on the face of the Bill as laying them down by SSI would enable the Government to consult on what provision should be made.

Choice of procedure

32. By virtue of section 82(2), orders made under this power are subject to annulment in pursuance of a resolution of the Scottish Parliament. It is considered that the powers here relate to straightforward matters and, as a result, that negative resolution procedure provides an appropriate balance between expedition and convenience on the one hand and, on the other hand, the need for scrutiny of a provision of this nature.

Powers at section 81

33. Commentary on the delegated powers in the Bill at section 81 is below:
Section 81(1): Power to make supplementary, incidental, consequential, transitional, transitory or saving provision

**Power conferred on:** Scottish Ministers

**Power exercisable by:** order made by Scottish statutory instrument

**Parliamentary procedure:** Negative/affirmative

Provision

34. Section 81(1) creates a power for Scottish Ministers to make by order such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

Reasons for taking powers

35. The reason for the need for supplementary, incidental and consequential provision is the nature of this Bill: it is considered necessary to allow flexibility if further changes are found to be necessary as a result of provision in the Bill. This Bill is dealing with a complex area of property law. It is one of a series of law reform bills. As well as legislation passed by the Scottish Parliament (eg the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003), the Bill also interacts with older legislation passed before devolution such as the Land Tenure Reform (Scotland) Act 1974. The Bill will need to work with this previous legislation.

36. Transitional provisions may be required to ensure, for example, that the conversion of leases to ownership (which involves a change in registration status) can work smoothly.

37. Transitory provisions may be required to ensure, for example, that changes to land registration made by the Land Registration (Scotland) Bill currently going through Parliament work effectively with the Long Leases (Scotland) Bill.

38. Savings provision may be required as tenants who choose to opt out of conversion can recall that exemption at any time (section 67 of the Bill refers – this follows the Scottish Law Commission report at paragraphs 7.10 to 7.15). Given the potential long shelf-life of the Bill, savings provisions might be needed so that leases converting some time after the appointed day can convert in accordance with the Bill.

Choice of procedure

39. By virtue of section 81 itself, orders made under this power are subject to annulment in pursuance of a resolution of the Scottish Parliament unless the order adds to, replaces or omits any part of the text of an Act. In these cases, a draft of the instrument would need to be laid
This document relates to the Long Leases etc. (Scotland) Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 January 2012

before, and approved by resolution of, the Scottish Parliament. This reflects the need for a high level of Parliamentary scrutiny when amendments to primary legislation are proposed.

40. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred as it will provide the appropriate degree of parliamentary scrutiny where primary legislation is being amended but will strike the appropriate balance between expedition and convenience on the one hand and, on the other hand, the need for parliamentary scrutiny where subordinate legislation is being amended.

Powers at section 83(2)

41. Commentary on the delegated powers in the Bill at section 83(2) is below:

Section 83(2): Power in relation to commencement

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<th>Power conferred on:</th>
<th>Scottish Ministers</th>
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<tr>
<td>Power exercisable by:</td>
<td>order made by Scottish statutory instrument</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>to be laid before the Scottish Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.</td>
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Provision

42. Section 83(2) allows Scottish Ministers, by order, to appoint a day when provisions of the Bill should come into force. By virtue of section 8 of the Interpretation and Legislative Reform (Scotland) Act 2010, this power may be exercised so as to appoint different days for different purposes (including different days for different provisions).

Reasons for taking powers

43. The power is taken so that provisions can be commenced to implement the Bill.

Choice of procedure

44. The order is laid before Parliament following the procedures under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Subordinate Legislation Committee will, in terms of its remit, have the opportunity to consider the Order.
Rural Affairs, Climate Change and Environment Committee

4th Report, 2012 (Session 4)

Stage 1 Report on Long Leases (Scotland) Bill

Published by the Scottish Parliament on 26 March 2012
Rural Affairs, Climate Change and Environment Committee

Remit and membership

Remit:

To consider and report on agriculture, fisheries, rural development, climate change, the environment and other matters falling within the responsibility of the Cabinet Secretary for Rural Affairs & the Environment.

Membership:

Claudia Beamish
Graeme Dey
Annabelle Ewing (Deputy Convener)
Rob Gibson (Convener)
Jim Hume
John Lamont
Richard Lyle
Margaret McDougall
Dennis Robertson

Committee Clerking Team:

Clerk to the Committee
Lynn Tullis

Senior Assistant Clerk
Nick Hawthorne

Assistant Clerk
Clare O'Neill

Committee Assistant
Ross Fairbairn
The Committee reports to the Parliament as follows—

INTRODUCTION

Procedure

1. The Long Leases (Scotland) Bill\(^1\) was introduced in the Scottish Parliament on 12 January 2012 by the Cabinet Secretary for Rural Affairs and the Environment. The Bill was accompanied by explanatory notes (SP Bill 7-EN), which included a Financial Memorandum, a Delegated Powers Memorandum (SP Bill 7 – DPM) and a Policy Memorandum (SP Bill 7-PM), as required by the Parliament’s Standing Orders\(^2\).

2. At its meeting on the 18 January, the Parliament agreed that the Rural Affairs, Climate Change and Environment Committee be designated as the lead committee for Stage 1 scrutiny. The Delegated Powers Memorandum has been considered by the Subordinate Legislation Committee. The Finance Committee sought views on the Financial Memorandum and wrote to this Committee with the responses received. The Committee notes the consideration undertaken by both the Subordinate Legislation Committee and the Finance Committee which is discussed later in this report.

Rural Affairs, Climate Change and Environment Committee scrutiny

3. The Bill is the same Bill, with some amendments, as the Long Leases (Scotland) Bill (SP Bill 61) introduced on 10 November 2010 in Session 3.

4. The Committee agreed to take account of the evidence taken by the former Justice Committee and its Stage 1 Report on the Long Leases (Scotland) Bill (SP Bill 61)\(^3\) (“the Session 3 Bill”). In addition, the Committee agreed that its scrutiny

\(^{1}\) Long Leases (Scotland) Bill. All documents available at: [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/45695.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/45695.aspx)


\(^{3}\) [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx)
should focus on new aspects of the Bill which have been introduced as a result of previous scrutiny.

5. This Committee issued a call for views on the changes made to the Bill, compared to the previous Bill, and the recommendations made by the previous Justice Committee’s Stage 1 report. 14 written submissions were received (including supplementary written submissions).

6. The Committee took evidence in public session over four meetings from the following witnesses—

8 February 2012

Simon Stockwell, Bill Team Leader, Sandra Jack, Policy Officer, Family and Property Law, Law Reform Division and Graham Fisher, Head of Branch, Constitutional and Civil Law Division, Scottish Government.

22 February 2012

Dale Strachan, Partner, Brodies LLP; Lionel Most, Member, Conveyancing Committee, Law Society of Scotland; Richard Blake, Legal Adviser, Scottish Land and Estates; and Alan Cook, Chair, Commercial Committee, Scottish Property Federation.

29 February 2012

Andy Wightman, independent researcher; Andrew Ferguson, President, Society of Local Authority Lawyers and Administrators in Scotland (SOLAR); Andy Young, Head of Asset Management, City of Glasgow Council; Iain Strachan, Legal and Administrative Services, and Bill Miller, City Development Department, City of Edinburgh Council; and John Gahagan, Estates Manager, Aberdeenshire Council.

7 March 2012

Stewart Stevenson, Minister for Environment and Climate Change, Annalee Murphy, Solicitor, Legal Services Directorate, and Simon Stockwell, Bill Team Leader, Scottish Government.

7. The Report from the Subordinate Legislation Committee on the Delegated Powers Memorandum is reproduced at Annexe A to this report. The submissions received by the Finance Committee on the Financial Memorandum are contained in Annexe B. Extracts from the minutes of all the meetings at which the Bill was considered are reproduced at Annexe C. Written submissions made in support of evidence given at meetings and supplementary to the evidence given, together with extracts from the Official Report from those meetings are contained in Annexe D. All written submissions received in response to the Committee’s call for views are reproduced at Annexe E. All Annexes are available as web-only publications.
8. The Committee thanks all those who gave evidence and is grateful to the work done by the previous Justice Committee on the Session 3 Bill which has greatly assisted this Committee in its scrutiny of the Bill.

BACKGROUND TO AND PURPOSE OF THE BILL

Development of the current Long Leases (Scotland) Bill

9. The Policy Memorandum which accompanies the Bill outlines the policy objectives of the Bill. It states that—“The Bill converts ultra-long leases into ownership. An ultra-long lease qualifies if it has been granted for more than 175 years and has more than 100 years left to run immediately before the appointed day laid down in the Bill. On the appointed day, all qualifying ultra-long leases will convert automatically into ownership, unless the tenant chooses to opt out. In some cases, compensatory and additional payments will be payable to the landlord by the tenant and some leasehold conditions will be preserved as real burdens in the title deeds.”

10. The Bill is in six parts and, most noteworthy, is the same Bill, with some modifications, as the Long Leases (Scotland) Bill (SP Bill 61) (which was in five parts) introduced on 10 November 2010 in Session 3.

11. The Session 3 Bill was scrutinised at Stage 1 by the Justice Committee which recommended in its Stage 1 Report that the general principles of the Bill be approved. Due to lack of time, the Bill fell at the end of the session. This Bill has been amended to take account of some of the recommendations made by the Justice Committee in its Stage 1 Report.

12. In Annex A to the Policy Memorandum, the Scottish Government provides a table of equivalence which shows how the sections in this Bill relate to previous sections in the Session 3 Bill and the draft Scottish Law Commission’s (SLC) bill, and provides comments on the changes.

13. The Bill is based on a draft bill contained in the SLC’s 2006 report Conversion of Long Leases. The draft bill was prepared as the final part of the SLC’s review of the structure of land law in Scotland. Previous reviews led to the Abolition of Feudal Tenure etc (Scotland) Act 2000, the Leasehold Casualties

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6 The Long Leases (Scotland) Bill. Policy Memorandum Annex A.
8 Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5).
(Scotland) Act 2001\(^9\), the Title Conditions (Scotland) Act 2003\(^{10}\) and the Tenements (Scotland) Act 2004.\(^{11}\)

14. The rationale behind the draft bill was that granting leases for very long periods was akin to ownership, therefore, leases which were let for more than 175 years and have more than 100 years left to run should be converted to ownership.

15. The Scottish Government estimates that there are around 9,000 ultra-long leases in Scotland, most of which are for 999 years.\(^{12}\)

16. The Scottish Government launched a consultation on the SLC’s proposals in March 2010 and thirteen of the fifteen publicly available responses were in favour of the proposal for conversion of ultra-long leases. The responses are available to read on the Scottish Government’s website.\(^{13}\)

17. The Scottish Government then introduced the Session 3 Bill on 10 November 2010. It differed from the SLC draft bill in three areas—

- the exclusion of leases with a rent of over £100, to exclude commercial leases;
- the exclusion of leases let solely to allow access for pipes and cables; and
- any provision in a lease continuing on a year-to-year basis, requiring the landlord to renew the lease, would be regarded as having been complied with.

How the current Bill compares to the Session 3 Bill

Additional harbours exemption

18. Following representations made to the Justice Committee on the Session 3 Bill from Peterhead Port Authority, the Scottish Government has now included an exemption, section 1(4)(b), where the subjects of the lease include a harbour for which there is a harbour authority. (“Harbour” and “harbour authority” are then defined in section 80).\(^{14}\)

19. The view put forward by Peterhead Port Authority was that the south breakwater has been leased for 999 years and converting it to ownership could impact adversely on the operation of the harbour.

Pipes and cables exemption

20. Section 1(4)(c) exempts leases granted solely to allow the installation and maintenance of pipes and cables. This exemption was in the Session 3 Bill, however, the Justice Committee recommended that the Government revisit this area as some argued that this exemption was too limited in scope in terms of the

\(^{9}\) The Leasehold Casualties (Scotland) Act 2001 (asp 5).
\(^{10}\) The Title Conditions (Scotland) Act 2003 (asp 9).
\(^{11}\) Tenements (Scotland) Act 2004 (asp 11).
\(^{12}\) The Long Leases (Scotland) Bill. Policy Memorandum page 1, paragraph 4.
\(^{13}\) Responses to the Scottish Government’s consultation on long leases. [Accessed March 2012]
\(^{14}\) Scottish Government Bill team. Written evidence.
types of leases it included. The wording of the section has been amended to provide further clarification.

Commercial leases exemption
21. The Bill, as did the Session 3 Bill, excludes leases with an annual rent of over £100 with the aim of excluding commercial leases. Concerns were raised previously regarding the commercial lease exemptions and whether the exemption as drafted met the Scottish Government’s policy intention.

22. The Justice Committee also drew the attention of the Scottish Government to the issue of variable rent and the arguments made to the Committee in favour of this being taken into account when setting the criteria for this exemption.15

23. Section 2 of the Bill (a new section which had no equivalent in the Session 3 Bill) provides that, for the purposes of this exemption, any element of variable rent is to be left out of account. However, section 64 of the Bill (another new section) provides that a landlord may register an exemption where the annual rental was over £100 at any point in the five years before Royal Assent, reflecting the fact that some leases have variable rent.

24. Registration of the exemption follows either an agreement entered into with the tenant in question, or an order being made by the Lands Tribunal under section 69. Section 69 is also a new section and permits, among other things, confirmation by the Lands Tribunal that there was variable rent over the relevant period for the purposes of the exemption.16

25. There are also further provisions related to cumulo rent where a single rent is payable in relation to two or more leases.

26. Issues raised during this Committee’s scrutiny which relate to these provisions in the Bill were—

- compensation and additional payments for landlords on conversion to ownership;
- commercial leases in respect of variable rents;
- standard securities;
- registration issues; and
- the exemption of pipes and cables and time limits provisions.

27. Further detailed information on the Session 3 Bill can be found in the SPICe briefing17 published in January 2011. SPICe also produced a briefing18 on the current Bill in February 2012. It summarises the ways in which the Bill varies from

18 http://www.scottish.parliament.uk/parliamentarybusiness/46603.aspx
the Session 3 Bill and provides an overview of the law of leases and the Bill’s proposals.

Related policy issues not directly referred to in the Bill

Common good
28. The common good is a fund of money and assets owned and administered by each local authority in respect of each former burgh within the area of that local authority. This policy issue was a major focus of the previous Justice Committee’s Report, which recommended that any compensation received regarding the transfer of common good land should be paid back into the local authority’s common good land fund, however no modifications have been made to the Bill in respect of common good.

29. The issue of to what extent common good land and buildings will be affected by the proposed conversion scheme for ultra-long leases was discussed and whether that this was desirable in policy terms or whether the bill should contain a common good exemption.

30. Questions arose as to how local councils collated information on the number of ultra-long leases which are held under common good and how robust this information is. This is discussed later in the report.

Edinburgh’s Waverley Market
31. Evidence to the Committee raised questions in relation to the site of Edinburgh’s Waverley Market and the question as to whether it was, or was not, part of the common good of Edinburgh. The Committee also heard evidence that an exemption for this specific site should be included in the Bill. This issue is discussed in more depth later on in this report.

Policy Memorandum
32. The Committee found the Policy Memorandum which accompanied the Bill to be helpful in clearly setting out the policy objectives and development of the Bill. Setting out the amendments to the Bill to reflect the evidence taken by the previous Justice Committee on the Session 3 Bill (including a table of equivalence) was particularly useful to this Committee’s Stage 1 scrutiny.

Delegated powers
33. The Committee considered the delegated powers of the Bill in relation to setting time limits. The Subordinate Legislation Committee considered the delegated powers contained in the Delegated Powers Memorandum. This is discussed later in the report.

GENERAL PRINCIPLES OF THE BILL

34. The Committee will comment on certain specific provisions of the Bill and the wider policy issues considered as part of its scrutiny later in this report. However, the Committee, in endorsing the Justice Committee’s 6th Report, 2011 (Session 3): Stage 1 Report on the Long Leases (Scotland) Bill,
recommends that the Scottish Parliament supports the general principles of the Bill at Stage 1, to allow the Bill to pass to Stage 2.

PROVISIONS IN THE BILL

Commercial leases

Variable rent provisions

35. When considering the Session 3 Bill, the Justice Committee agreed that there should be an exemption for commercial leases but heard conflicting views as to whether the £100 rent cut-off was the correct approach. It welcomed the Scottish Government’s undertaking to consider how the commercial leases exemption was formulated and drew to the attention of the Scottish Government the issue of variable rent and the arguments in favour of taking this into account when formulating the exemption.19

36. In written evidence to the Committee, the current Bill team confirmed that the £100 cut-off point was still the approach taken in this Bill, however, additional provisions have been included to take into account variable rents. It stated—

“The current Bill still has an exemption for leases where the annual rental exceeds £100 (see section 1(4)(a) as read with section 2). Variable rental is not taken into account when considering if this exemption applies (see section 2(5)). However, the Bill now contains a provision (section 64) which allows the landlord to register an exemption if the annual rental in the 5 years before the Bill receives Royal Assent exceeds £100. This is designed to take account of variable rental.”20

37. Section 64 allows a landlord to register an agreement with the tenant, or an order to be made by the Lands Tribunal under section 69, that the annual rent paid under the lease was over £100 at any point in the five years before Royal Assent. This is to take into account the fact that some leases may have a low base annual rental below £100, yet the landlord retains a significant interest in variable rental.

38. In written evidence to this Committee, Brodies LLP expressed concern about the commercial leases exemption in respect of variable rents. While it was pleased that additional provisions contained in sections 64 and 69 allow for variable rent to be taken into account, it recommended further clarity is provided so as to avoid any misinterpretation with section 2(5).21

39. When asked about this during oral evidence, Dale Strachan from Brodies LLP called for amendments in order to avoid confusion regarding the variable rent provisions in the Bill. He said—

“My specific concern about the bill is that section 2(5) has not been disappplied from any other section. Therefore, under the remedial sections—sections 64 and 69—you are still required to disregard the variable element

20 Scottish Government Bill team. Written evidence.
21 Brodies LLP. Written evidence.
of rent. Although the explanatory notes clarify what the law is intended to be, that is not yet reflected in the bill.\textsuperscript{22}

40. The Bill team, who supported the Minister for Environment and Climate Change on the Bill, was aware of the submission calling for clarification and told the Committee—

“We think that we are okay on that and that there is sufficient clarity. The interpretation that Brodies gave of the provision is in line with ours. However, we will double-check that and make certain that the provision captures what it needs to capture. There is an important point. The main point that Brodies and others have raised on the £100 exemption is that we need to be absolutely certain that, if there are variable rentals as a result of turnover, the leases can be exempted when the landlord has a significant interest. As I said, we think that we have got it right, but we will double-check that and report back to the committee.”\textsuperscript{23}

41. Dundas and Wilson CS LLP also agreed with the concerns regarding sections 64 and 69 stating—

“We are also of the view that sections 64 and 69 could be clarified to put beyond doubt what could be included in ‘annual rent’ for these sections. Although it is clearly intended that variable rent will be included, the Bill does not expressly state this.”\textsuperscript{24}

\textbf{Variable rents not reflected in the original lease}

42. Concerns were also raised regarding section 2 of the Bill and the fact that the rent payable is that as set out in the lease (or any assignation of the lease). The Committee heard that there are a number of occasions where the terms of a lease are amended but not necessarily then amended in the original lease or assignation of lease. Dundas and Wilson CS LLP in its written submission said—

“Where you have a lease and the original rent reserved is less than £100 but the lease has been varied so that the rent is now greater than £100, would this qualify for automatic exemption? In our opinion it is not clear whether s1(4)(a) covers the rent as originally reserved or the rent as varied. The reference to the assignation is in our view particularly unhelpful as it could lead to an interpretation that it is only those two documents (the original lease and the assignation of it) that you would be permitted to look at. The draft provisions do not seem to take into account that a lease can be varied other than in gremio of an assignation.”\textsuperscript{25}

43. Dale Strachan explained his concerns with the Bill as currently drafted by telling the Committee—

\begin{footnotes}
\footnotetext[22]{Scottish Parliament Rural Affairs, Climate Change and Environment Committee, \textit{Official Report}, 22 February 2012, Col 619.}
\footnotetext[23]{Scottish Parliament Rural Affairs, Climate Change and Environment Committee, \textit{Official Report}, 8 February 2012, Col 600.}
\footnotetext[24]{Dundas and Wilson CS LLP. Written submission.}
\footnotetext[25]{Dundas and Wilson CS LLP. Written submission.}
\end{footnotes}
“I refer you to section 2(2), which does not assist that conclusion because it says: “the rent payable under a lease is the rent as set out in the lease (or as the case may be the assignation of the lease).” The practice is that, when rents change with time, they are recorded neither in the lease nor in an assignation but in a separate memorandum. If you confine yourself to the documentation that may be referred to, you do a disservice to the legislation.”

44. The Scottish Property Federation (SPF) and Brodies LLP agreed with the concerns raised by Dundas and Wilson CS LLP.

45. Concerns regarding the restrictive nature of these new provisions were put to the Minister who told the Committee that the issue will be considered again in more depth, although he believed that this was not the case. He pointed out to the Committee—

“[...] section 2(1) limits the scope of section 2 to section 1(4)(a), so it is less restrictive than it might seem. The issue is also covered in section 64, particularly in subsection (1), which covers the issue in a different way. We will consider the matter further, but we believe that we have covered the necessary bases through section 2(1), which limits the scope of section 2, and hence of 2(5), to only section 1(4)(a), and through section 64, which is on “Exemption of qualifying lease by registration of agreement or order.”

46. The Bill team acknowledged the fact that by referring to the rent payable under a lease as the rent as set out in the lease, this may not always reflect the correct rent payable. The Bill team agreed to look again at this provision to ensure that changes which may have been made to the lease and updated in other documents are captured by the provision. Simon Stockwell told the Committee—

“[...] there is an argument in relation to section 2(2) that we should perhaps cover other cases in which the rent has been varied and where that is clear. We think that there might be a bit more in that than there is in the first point. We will come back to the committee to let you know precisely what we are thinking.”

Grassum

47. Discussions took place at committee meetings on the commercial leases exemption and the fact that it did not take into account grassum having been paid prior to agreeing annual rents for ultra-long leases. The thrust of the argument was that the rents for certain leases of a commercial nature are set below the £100 cut-off point set in the Bill as a grassum was paid. In these cases...
is a lease of a commercial nature and the low annual rent does not reflect the true nature of the lease.

48. This was discussed with particular reference to Waverley Market where a lump sum of £6.25 million was paid to Edinburgh City Council when the terms of the current lease were agreed in 1989. The ultra-long lease granted by the Council in 1983 seems to qualify for conversion under the scheme proposed in the Bill, as the annual rent payable is very low. This means that ownership of Waverley Market could pass from the City of Edinburgh Council to the current owner of the tenant’s interest under the lease (a private developer) under the proposals in the Bill.31

49. During oral evidence, Iain Strachan from City of Edinburgh Council, outlined the Council’s concerns regarding transfer of ownership of Waverley Market. One point made was the extent to which the commercial lease exemption, as currently drafted, only takes into account the £100 per annum rental threshold which may not be the only way of identifying leases of commercial interest. He told the Committee—

“If the bill seeks to exclude those properties where the landlord, through their heritable interest, retains a significant interest in the site but focuses on a purely monetary test—and if it does not take account of where grassums have been paid—the question is whether that gives a fully rounded picture.”32

50. However, he went on to say—

“I admit that our suggestion is in some respects rather simplistic but, in essence, the grassum is the rental income capitalised on a day 1 basis.”33

51. Bill Miller from the Council also added—

“It is common for grassums to be paid for leases for particular reasons—for example, when a landlord sees fit to take a large lump sum of money at a certain time and grant a longer lease at £1 per annum or for a peppercorn rent. In such circumstances, they take a lump sum of money equivalent to the rent over the period of the lease. That is quite common in commercial leases. It means that the landlord still has control over the land or property. They have not sold the land so they do not lose control and can still influence what happens during the period of the lease and thereafter. That is what the City of Edinburgh Council did with Waverley market: it did not want to lose ownership of the site for many reasons, including its location.”34

34 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 29 February 2012, Col 663.
52. The Minister was asked whether he would consider taking into account grassums when considering the issue of exempting leases of a commercial nature. The Minister did not agree that this was appropriate and told the Committee—

“A grassum is therefore not to be interoperated with the rent; it is a different issue and not a substitute for rent. To take a grassum and then, post hoc, apply it over the period of the lease to, in effect, take the payment above the £100 per annum limit is to misapply what a grassum is.”

53. The Committee welcomes the new provisions in the Bill to take into account variable rents for the purposes of exempting commercial leases from the Bill.

54. The Committee notes the concerns raised during evidence regarding the clarity of these new provisions and the extent to which they capture all circumstances where rents are variable and welcomes the Scottish Government’s commitment to consider these issues further before Stage 2.

55. The Committee notes the conflicting evidence received on taking into account grassum when considering leases of a commercial nature.

Standard securities

56. The Committee was told of the concerns regarding the conversion of ultra-long leases and retaining standard securities. A standard security, in simplest terms, is the legal mechanism by which lenders can collect monies relating to mortgages on the leases once converted to ownership. The evidence heard by the Committee related not only to the tenants’ interest and standard securities but to the landlords’ interest also. Under the Bill, the policy intention is that the standard securities over the tenants’ interests continue after the appointed day. Section 6(4) makes provision for the landlords’ standard security interest to be extinguished on the appointed day, given the landlords’ interest in the property itself disappears on the appointed day.

Landlords’ interests

57. The Council of Mortgage Lenders (CML) highlighted that the value of any standard security held by a lender over a tenant’s interest in a long lease could be impacted by the Bill and raised concerns regarding landlords’ interests. The written submission stated—

“In section 6(2) of the Bill it effectively says that on conversion any real right which the qualifying lease was subject to the converted land is now subject to. This would therefore appear to allow a Standard Security over the lease to remain in force.

Our interest in this matter is restricted to residential mortgages but we note in terms of Section 6(4) any Standard Security granted by the landlord over the land subject to the long lease will be extinguished when the Bill

becomes law although the landlord would remain personally liable to the creditor under the Standard Security.

What we are not sure of is whether there could be any situations where lenders had lent on a commercial basis to a landlord and held a Standard Security from the landlord over the land subject to the lease. It may be worth obtaining the views of the British Bankers Association on this aspect of the Bill if you have not already done so.  

58. On the point raised by CML regarding landlords’ interests, the Bill team noted—

“The point has also been raised that the landlord might have granted a standard security. What would happen to that, come the appointed day? In most cases, the landlord’s interest in these leases will be very low. The typical rental for an ultra-long lease, as shown by the survey that was carried out by the Scottish Law Commission, is less than £5 a year, on which the landlord would probably not be able to raise much of a loan or advance. We have already excluded from the bill cases in which the landlord has a significant interest by excluding leases for which the rental is more than £100 a year. We do not think that there is an issue.”

59. The Bill team also confirmed that, as suggested by the Council of Mortgage Lenders, it would seek the views of the British Bankers Association (BBA) on these provisions.

60. The issue was raised with the Minister who reiterated the point that the effect of section 6(4), to extinguish standard security on the appointed day, is deliberate as it would not be appropriate for a standard security of a former landlord to affect the title of a former tenant, the new owner. However, the personal debt that the former landlord owes is not extinguished. The Minster also confirmed that the BBA is content that the current provisions are appropriate.

Tenants’ interests

61. Morton Fraser LLP expressed concerns regarding section 6 of the Bill and whether it was sufficiently clear. It indicated that it would appear that the intention is that the customer’s standard security survives conversion but the Bill or Explanatory Notes do not make this clear. It states that it—

“[…] would strongly suggest that if this is the desired intention, then section 6 is re-worded to make it a bit clearer.”

62. Alan Cook, representing the Scottish Property Federation, said to the Committee—

36 Council of Mortgage Lenders. Written submission.
37 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 8 February 2012, Col 600.
39 Morton Fraser LLP. Written submission.
“As I understand it, section 6(2) of the bill is intended to preserve the standard security interest over the leasehold interest so that it will continue to exist as a standard security interest over the converted ownership interest. I guess that you have to understand the language of that subsection to know that that is its purpose, as it does not use the phrase “standard security”. The very fact that we are having a discussion about how solidly the bill picks up the standard securities point suggests that it could be strengthened by making it clear, for the avoidance of any doubt, that that point is covered by section 6(2).”

63. Brodies LLP agreed that there was ambiguity and said the Bill could be clarified quite simply to make clear the intent. Lionel Most from the Law Society of Scotland appeared less concerned, but told the Committee—

“My understanding of the law as it stands is that where there is an absorption, as the keeper calls it, the standard security continues; it continues to be attached to the interest that acquires the old interest. I do not see that the bill has changed that position. If it is felt that there is a need to clarify the position, so as to maintain the status quo, the Law Society would not have an objection to that.”

64. The concerns raised regarding preserving the tenants interests were raised with the Bill team who told the Committee that they were content with the provisions as currently drafted. Simon Stockwell told the Committee—

“[…] we think that the answer to the point that was raised by Morton Fraser is that the relevant provision is in section 6(2) rather than sections 6(3) and 6(4). Section 6(2) states: “The converted land is subject to any subordinate real rights to which the qualifying lease was, immediately before the appointed day, subject.” That is certainly the intention. If the tenant is granted a standard security, it should transfer to his new right of ownership under section 6(2).”

65. The Committee notes the concerns raised by witnesses regarding the clarity of these provisions, however accepts the response that the relevant provisions contained in section 6(2) protect the tenants interests.

Compensation for loss of landlords’ rights

66. Part 4 of the Bill sets out the scheme under which the landlord of a lease which would convert to ownership under the Bill may claim compensation in respect of loss of rights. Compensation payments are based on the annual rent payable (sections 45 to 49) and, as a consequence, will be expected to be very

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41 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 22 February 2012, Col 620.
43 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 8 February 2012, Col 600.
low. No concerns were raised about these provisions during consideration of the Session 3 Bill, however this Committee’s consideration involved discussion on the level of additional payment provision on the conversion of ownership and the role of the Lands Tribunal in determining the level of such payments.

67. During evidence, there were discussions around the compensation provided for under the Bill upon conversion. Iain Strachan, representing the City of Edinburgh Council, was of the belief that the amounts would be minimal, telling the Committee—

“Yes, the bill entitles landlords to a level of compensation; however, as has been commented on, in the case of Princes mall such compensation would be minimal.”

68. However, additional payments on top of the compensation payments are provided for (sections 50 to 55) on various grounds as set out in the policy memorandum. Where no agreement can be reached on the amount of additional payment to be made, section 55 allows it to be referred to the Lands Tribunal for Scotland which will determine the matter.

69. When asked about the additional payment provision contained in section 50 of the Bill, Iain Strachan replied—

“We accept that under the current compensation provisions the compensation for the loss would be minimal. As you correctly say, landlords can claim additional payments, based on the loss of residual heritable interest and potential development value, but I think it is fair to say that given that you are talking about a lease that expires in a significant period of time, its value, as assessed by the Royal Institution of Chartered Surveyors in Scotland, would be minimal. We should look at this not purely on the basis of the asset’s monetary value, but its non-monetary value to the city.”

70. The Minister explained the provisions in part 4 of the Bill in relation to compensation and additional payments. He said—

“We have the provisions for the conversion of the lease payments into a one-off payment. Given that we are talking about leases of no more than £100 per annum, the finance that is associated with that is comparatively modest. Section 51 of the bill discusses extinguished rights and also provides ways in which rights that are extinguished by the conversion from a lease to ownership can be agreed by the Lands Tribunal for Scotland and otherwise. Section 51 seeks to address the issues of loss of rights and financial compensation.”

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71. Section 47 provides a formula for calculating the compensation payment and section 50(2) provides guidance for the Lands Tribunal on how to calculate the additional payment.

72. The Minister was asked for clarification on the additional payment provisions. He said to the Committee—

“The relevant bit of section 52 states that the value is the value "which the right could reasonably be expected to obtain if sold on the open market by a willing seller to a willing buyer." In considering the matter under section 55, I suspect that the Lands Tribunal would consider matters such as grassum, which is an exchange of value. I imagine that the Lands Tribunal would wish to look at timing. In other words, if the grassum that was paid in the past is discounted with an appropriate rate of interest to the point at which the decision is being made, would that grassum adequately reflect the value, scaled up because the council has had it for many years?"

The best approach is for a body such as the Lands Tribunal, which is used to dealing with debates about value, to be part of the process for dealing with such issues. Section 54 deals with situations when additional amounts are mutually agreed and section 55 deals with cases when there is a reference to the Lands Tribunal. The bill has all the provisions necessary to cover loss of value when there is transfer of ownership from the current owner to the leaseholder.”

73. The Committee notes the compensation provisions in the Bill and the provision of an additional payment. The Committee notes the role of the Lands Tribunal in determining the level of additional payment.

Registration

74. The Committee considered how this Bill relates to the Land Registration etc. (Scotland) Bill (SP Bill 6), which is currently being scrutinised at Stage 1 by the Economy, Energy and Tourism Committee.

75. The Policy Memorandum acknowledges that, as both bills progress through their parliamentary scrutiny, some consequential and transitional provision will need to be amended into this Bill at a later stage, or put in place by ancillary order under the Bill.

76. On a related matter, in written evidence to the Committee, the Bill team confirmed that Registers of Scotland has decided not to carry out a specific exercise to update the Land Register to reflect the conversion of ultra-long leases to ownership under the Bill.

77. Brodies LLP expressed concern regarding the decision not to carry out the exercise to update the Land Register. Dale Strachan told the Committee—

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48 The Long Leases (Scotland) Bill. Policy Memorandum, page 9, paragraph 62.
“I was slightly concerned to read in recent evidence to the committee that Registers of Scotland does not intend to update the registers. It is a key feature of Scottish property law that the registers may be relied on for accuracy and correctness in relation to all matters disclosed. Although I may be straying from the agenda here, I urge the committee to look again at a system whereby those registers would not record the true position.”

78. Dale Strachan went on to say—

“I would have thought that Registers of Scotland would wish its registers to reflect an accurate position. This legislation was not invited by Registers of Scotland or by those who hold the interests. It seems that either matters could be rectified on the keeper’s own initiative over time and with appropriate budgeting, or there could be a mechanism whereby the registers could be corrected on application for a fee.”

79. The question of whether the registration provisions within the Bill should be strengthened was pursued. Richard Blake of Scottish Land and Estates said—

“That is a very valid point. I recently gave evidence on the Land Registration (Scotland) Bill; … That bill contains a lot of detail on completing the register and under one particular section—which I might well have flagged up to this committee during its consideration of the Agricultural Holdings (Amendment) (Scotland) Bill—any paperwork to do with a registered lease must be put on the land register. I do not think that that sits comfortably with your point about a possible lack of facility to register converted leases. If Government policy is to try to ensure that land registration covers the whole of Scotland, which is something that we support, this would seem to be a very good opportunity to catch some land that might otherwise stay under the same ownership for a long enough time before it triggered first registration.”

80. Scottish Property Federation (SPF) said in oral evidence to the Committee—

“If the Long Leases (Scotland) Bill presents another opportunity to take a step towards that and if the objective can be met—indeed, it seems that that is the case, given that the Registers of Scotland was ready to undertake a process in relation to it—we will support it. However, policy on how the Registers of Scotland should approach these matters should be driven by the Government.”

81. However, Richard Blake representing Scottish Land and Estates made the point—

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“What the committee is driving at here is to get the land registered rather than to ensure that title conditions on the register are 100 per cent up to date following changes in legislation. I think that there is a fundamental difference in that respect.”

82. The Minister was asked about the compatibility of this Bill with the Land Registration etc. (Scotland) Bill. He replied stating—

“The question is whether it is necessary to update the registers at one point in time, and it is proposed that the updating take place the next time it is necessary to update the land register in respect of ownership. That method is more economical and, indeed, more effective, particularly given that the Registers of Scotland will be heavily engaged in implementing the Land Registration (Scotland) Bill, should it be passed by Parliament.”

83. On the processes of updating the land register, the Minister said—

“This bill is not the place to address that issue; it should be dealt with in the Land Registration (Scotland) Bill.”

84. The Committee notes the concern raised by witnesses regarding the decision by the Registers of Scotland not to carry out a specific exercise to update the Land Register to reflect the conversion of ultra-long leases to ownership under the Bill. The Committee considers the Land Register should be updated to accurately reflect ownership and requests that the Scottish Government responds to the concerns expressed to this Committee, in advance of consideration of the Bill at Stage 2.

85. The Committee notes the evidence it heard on updating the land register and further notes the potential issues of compatibility in relation to the Land Registration etc. (Scotland) Bill and anticipates the Scottish Government may, in response, bring forward amendments if required.

Pipes and cables

86. Section 1(4)(c) exempts leases granted solely to allow the installation and maintenance of pipes and cables. The Policy Memorandum explains that this provision was added after responses to the Scottish Government’s consultation indicated that they were aware of ultra-long leases granted in favour of utility and telecom companies for strips of land for cables and pipes.

87. During consideration of the Session 3 Bill, the Justice Committee heard evidence on the legal complexities surrounding this exemption and welcomed the

commitment made by the Scottish Government that it would give further consideration to the issue.\(^{56}\)

88. In written evidence to the Committee, the Bill team confirmed that this exemption had been retained and clarified, stating “the Government considers it best to include the exemption to put the matter beyond doubt.”\(^{57}\)

89. The Minister confirmed that he is content with these provisions, telling the Committee, “In practical terms, we think that the bill covers the needs that exist.”\(^{58}\)

90. The Committee notes the previous Justice Committee’s scrutiny of these provisions and the Scottish Government’s reconsideration of the issue. The Committee notes the Scottish Government’s view that such an exemption should be contained in the Bill and that the exemption has been appropriately clarified following the Justice Committee’s scrutiny of the Session 3 Bill.

OTHER ISSUES OUTWITH THE PROVISIONS OF THE BILL

Common good

91. This Bill, and the Session 3 Bill, contains no specific provisions relating to common good, however, as was the case with the Justice Committee’s scrutiny, the policy issue of how such land will be affected by this Bill and whether there should be an exemption in the Bill has been a major focus of the evidence presented to this Committee. Further background information on common good can be found in the SPICe briefing prepared for the Justice Committee.\(^{59}\)

92. In December 2007, guidance was published requiring local authorities to establish registers of common good assets held by 31 March 2009.\(^{60}\) In February 2010, Audit Scotland found that councils had generally taken reasonable steps to comply with the guidance but that some of the registers were incomplete.\(^{61}\)

93. In its Stage 1 report on the Session 3 Bill, the Justice Committee stated—

“The Committee is disappointed that there is still not an accurate and complete record of the common good property held by local authorities across Scotland.”\(^{62}\)


\(^{57}\) Scottish Government Bill team. Written evidence.


\(^{60}\) Local Authority (Scotland) Accounts Advisory Committee (LASAAC), *Accounting for the Common Good Fund: A Guidance Note for Practitioners (2007)*.


94. In 2011, the Scottish Government carried out a survey of local councils to ascertain the number of leases of common good property which would convert to ownership under the Bill. The results of the survey suggested there were five leases of common good property which would be covered by the Bill. Eight councils did not respond to the survey.

Records of common good property held by local councils

Council responses

95. The Policy Memorandum stated that there are an estimated 9,000 ultra-long leases in Scotland, five of which relate to common good property which would be covered by the Bill. The Committee was subsequently informed that the figure was actually four as incorrect information had been supplied to the Scottish Government by Fife Council.

96. The Bill team wrote again to the eight councils in February 2012, requesting that they supply this information. During evidence to the Committee, the Bill team was asked about the eight councils who had not responded to the consultation. Simon Stockwell told the Committee—

“We had no power to compel local authorities to respond to the survey, which was voluntary. When we wrote to ask them to complete the information, we cited no statutory powers.”

97. The information provided to the Committee on common good land throughout its scrutiny was revised a number of times, with councils providing late information, amending the information already provided to the Bill team, and the identification of discrepancies in what was said in oral evidence to this Committee compared with what was heard by the previous Justice Committee.

98. The Bill team provided an update immediately prior to the final evidence session with the Minister. The final total number of leases identified by all 32 local authorities had now been revised to nine.

99. The Committee asked about the robustness of the data supplied, to which the Bill team responded that the information supplied is taken on trust stating “we have no way of checking whether properties are part of the common good.”

Compiling information related to common good

100. The Committee heard from witnesses on the complexities involved in ascertaining whether land is part of a council’s common good assets and how the
law relating to common good is a complex mixture of case law and statute law. Dale Strachan of Brodies LLP described common good law as “one of the most confused laws in Scotland.” The City of Edinburgh Council echoed this and pointed to the fact there is little statutory and judicial guidance on the matter.

101. Given the uncertainty surrounding the robustness of the information received, the Committee explored with witnesses whether the figure of four ultra-long leases of common good was an accurate one. Alan Cook of the Scottish Property Federation agreed that the numbers affected would be small. Dale Strachan of Brodies LLP told the Committee—

“It is worth clarifying that the registers of common good land that are held by public authorities are not conclusive about the common good that they hold. They are merely the administrative registers that they have maintained to date. Some may be haphazard, some may not be being maintained at present, while others may be being kept more assiduously. I do not think that the specific allocation for common good has been given high priority by some authorities, particularly after two batches of local government reorganisation, but the law remains the law until it is changed.”

102. The Minister was asked to comment on the difficulties the Bill team has had in obtaining accurate information for the local councils. He said—

“More fundamentally, what has emerged from the bill process is that it is probably not possible to have 100 per cent accuracy, however much effort is made, and there will continue to be areas of uncertainty. It is clear that a large amount of work is involved in getting even relatively close to 100 per cent certainty. Councils, ultimately, will have to deal with the consequences of the bill and it is up to them to make a judgment on how much effort they want to expend.”

### Register of common good properties

103. The Committee explored further with witnesses the accuracy of common good registers and the difficulties in compiling such registers. The City of Edinburgh Council outlined the processes involved when Bill Miller told the Committee—

“For properties in the old town, we had to go back to the 12th century and work our way forward to see why properties were in what ownership when and to see what their uses had been over the years. That took an inordinate
time and cost. We took senior counsel’s opinion on all the properties before we made up our mind.”  

104. Glasgow City Council explained that its current register could not be guaranteed to be 100 per cent accurate, however, whenever any piece of land for which sale of lease is being proposed, an investigation is carried out as to whether it should be on the common good register. To compile an accurate register of common good land, Andy Young said—

“It might not be completely impractical, but it would be extremely costly to deal with it all, and it would take a long time. However, most of the significant common good properties in Glasgow are on the common good register. Issues arise only when the use of land is to be changed. That is what triggers interest, and that is when action is required.”

105. Aberdeenshire Council confirmed that the quality of its records varies and that developing the register is an on-going process. John Gahagan explained—

“We are developing our register as we go along. When something comes up for a possible transfer, we investigate at that stage whether it is common good.”

106. Andrew Ferguson gave evidence to the Committee on behalf of the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR), but was able to confirm that Fife Council’s register is around 95 per cent accurate. He added that—

“I do not know that we will ever reach a stage at which we can all say, “Yes—we know absolutely and definitely what is common good throughout Scotland.”

107. Brodies LLP, on compiling a register of common good, said—

“It seems to me that common good has been an issue for a few hundred years and is a matter that is not going to resolve itself. If it were to receive the attentions of the Parliament, that may be a favour to all concerned with it.”

108. The Minister was asked his views on the inconsistencies in information provided to this Committee and the previous Justice Committee by local councils, regarding ultra-long leases which fall under common good, to which he replied—

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75 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 29 February 2012, Col 652.
76 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 29 February 2012, Col 653.
“The bill has certainly thrown up a wider issue about how accurate information about common good is in the generality and not just in the context of leases. In many ways, that is a matter for another day. Ultimately it is a matter for councils rather than the Government—it is a creature of councils.”

109. However, the Minister reiterated the fact that the Bill is not about common good and, while it has raised issues in relation to records held on local authority land which may fall under common good, a small number which would convert under this Bill, the Bill as drafted is not directly affected by this discussion.

110. The Committee acknowledges that common good is an extremely complex area and understands that to compile an accurate register of all common good property under an ultra-long lease would be an expensive and time-consuming exercise and may not result in the identification of a significant number of leases which would convert to ownership under this Bill.

111. The Committee notes that the total number of ultra-long leases on common good land held by local councils identified, although small, has more than doubled during the scrutiny of this Bill. The Committee is concerned about the robustness of the information held by local councils in relation to common good.

112. The Committee believes, however, that despite evidence that relatively few numbers would be involved, such leases could be of significant importance to the public interest of the people of Scotland. The Committee recommends that the Scottish Government works together with local councils and relevant professionals to identify better ways in which this information could be gathered, verified, recorded and maintained.

Exemption for common good

113. In response to its call for evidence on the Session 3 Bill, 19 of the 26 submissions received by the Justice Committee expressed concerns about common good land or assets that might be subject to an ultra-long lease and thus be caught by the provisions of the Bill.

114. In evidence to the previous Justice Committee, the Minister for Community Safety set out the reasons why the Scottish Government was not in favour of an exemption for common good leases: the numbers involved were low; there were adequate compensation provisions in the Bill; and that exempting common good

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could give rise to litigation whenever a council tried to dispose of property and where a question arose as to the status of the property.\textsuperscript{83}

115. The Justice Committee considered the arguments for and against creating an exemption for common good and concluded that it was not persuaded at that time that there was a compelling case for exempting leases of common good from the Bill.\textsuperscript{84}

116. At the outset of the Committee’s evidence taking, the Bill team told the Committee the reason why the Scottish Government was not in favour of including an exemption for common good land, when other exemptions, such as harbours, had been included. Simon Stockwell said—

“Unlike the situation with Peterhead, where concerns were raised about the fact that the harbour might not be able to continue to operate, the arguments that were made with regard to common good property and other areas that have not been exempted from the bill did not concern whether the land could continue to be used; they were more to do with the benefits to the people of the burgh.”\textsuperscript{85}

117. Andy Wightman explained to the Committee why he thought there should be an exemption for common good—

“I think that common good land should be exempted because, in general, such land is held for the common good of the citizens of burghs […]”\textsuperscript{86}

118. He went on to say—

“The rationale for my suggestion that we exclude common good land is that it was never intended to pass from the ownership of the burgh or council to private interests; it was let out on a lease because that was a way of getting round the legal obligation to go to court if one wanted to sell it…The reason why I seek an exemption for common good land is to protect the public interest in that land.”\textsuperscript{87}

119. Andrew Fergusson, representing SOLAR, and Andy Young, representing Glasgow City Council, were also in favour of such an exemption.\textsuperscript{88} \textsuperscript{89}

\textsuperscript{83} Scottish Parliament Justice Committee. \textit{Stage 1 Report on the Long Leases (Scotland) Bill}. Paragraph 54, 6\textsuperscript{th} Report, 2011, (Session 3).

\textsuperscript{84} Scottish Parliament Justice Committee. \textit{Stage 1 Report on the Long Leases (Scotland) Bill}. Paragraph 61, 6\textsuperscript{th} Report, 2011, (Session 3).


120. Despite the complexities involved in identifying common good properties which may convert under this Bill, the Committee heard that providing an exemption in the Bill would be fairly straightforward as common good is a recognised legal concept in Scotland.\textsuperscript{90}

121. Given the lack of confidence expressed in the accuracy of what is and what is not a common good asset, and the possibility that such land could convert to ownership under the Bill, Glasgow City Council said—

“The justification for excluding common good property from the bill is to cover exactly that point as transactions occur, and as we investigate the land or buildings whose purpose will change when they are sold, leased or transferred to community ownership. Although it is unlikely that there is anything significant of which we are not aware, if the bill can provide a failsafe, Glasgow City Council would encourage the committee to consider that.”\textsuperscript{91}

122. The Minister told the Committee that he believed that the cost of establishing where the leases were and ensuring that they were exempted would outweigh the benefit of doing so.\textsuperscript{92}

123. An interesting point was made to the Committee by Andrew Fergusson on how to overcome any uncertainty surrounding the exact numbers of local authority ultra-long leases of common good, he said—

“As my colleagues have said, knowing what is covered by an ultra-long lease is a lot easier than knowing what is covered by common good. If I may be mischievous, perhaps the easiest way for the bill to cover the matter would be to exclude all local authority ultra-long leases. That would cover Waverley market, but perhaps the committee would not like to go that far.”\textsuperscript{93}

124. The Committee asked the Minister whether a case existed for exempting ultra-long leases of local authority land from the Bill to which he replied—

“Yes, but the point is that what we are looking at is the use by and the availability of an asset—in this case, land—for the community. As I said in my opening remarks, the bill is about converting leasehold conditions to real burdens, so the test is not whether an asset is a common good; the test is whether the asset and its availability for public good would be affected by what is in the bill. Under the bill, I do not believe that that test would be failed. That is the important question.”\textsuperscript{94}


125. The Minister went on to tell the Committee that—

“I cannot see any systematic way that we could make an exception that
would not exempt everything, if you see what I mean.”

126. The Committee notes that the number of leases relating to common
good land which would convert to ownership under the Bill is very small.
Given the concerns expressed by this Committee on the lack of reliable and
robust information in relation to common good assets, the Committee
acknowledges the legal and administrative complexities which would arise
should an exemption for common good land be included in the Bill.

127. The Committee acknowledges the arguments made to the previous
Justice Committee and its conclusion not to support an exemption for common
good land. The Committee is not persuaded by the arguments made thus far to exempt ultra-long leases on common good land, however, neither is the case against this exemption been a clear and compelling one.

Treatment of compensation received on conversion of common good land

128. The Previous Justice Committee noted that the Session 3 Bill provided
compensation where leases converted to ownership. In the case of disposal of a
common good asset, it was the strong view of the Justice Committee that
compensation received should be paid back into the local authority’s common
good fund.

129. The Policy Memorandum confirms that the Scottish Government has written
to local authorities on this point. It states—

“We indicated that if the Bill should be passed by Parliament, the Scottish
Government would intend to write again to local authorities. In this further
letter, we would suggest that any compensatory or additional payments paid
to local authorities as a result of ultra-long leases of common good land
converting to ownership should be allocated to common good funds or
accounts.”

130. The Bill team confirmed in evidence to the Committee that if a lease on land
held for the common good converts to ownership under the Bill, it would
recommend that any moneys that accrue from that should be allocated to common
good funds and if no common good funds exist ‘we would tell local authorities that
they should consider the best way of allocating the money so it can continue to
benefit the people of burgh or local authority area.”

97 The Long Leases (Scotland) Bill. Policy Memorandum page 7, paragraph 51.
98 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 8 February 2012, Col 596.
131. In addition, the Bill team confirmed that if there are scenarios that are similar to common good; if land is held in trust in a similar arrangement, that would be reflected in the guidance issued to local authorities.  

132. The Minister was asked why the Scottish Government has opted for non-statutory guidance in relation to the treatment of compensation received for ultra-long leases of common good land. He replied—

“Because common good covers such an enormous range of options and because of the different legal heritage of many items in the common good, it would be nigh on impossible for us to provide statutory guidance that tied councils’ hands. It is better to have non-statutory guidance, which lays down principles and allows councils to work out their own salvation according to local circumstances.”

133. The Committee notes the Scottish Government’s position that additional compensation is provided for in section 50 of the Bill. However, the Committee believes, with respect to leases of land held under the common good, financial compensation on transfer of ownership is not necessarily adequate compensation for the loss of that land and the loss of greater public benefit.

134. The Committee agrees with the previous Justice Committee’s recommendation that any compensation or additional payments received by local councils on the conversion of ultra-long leases of common good should be directed to relevant common good funds.

135. The Committee notes the Scottish Government’s comments regarding its reluctance to impose statutory guidance on local authorities but welcomes the Scottish Government’s intention to write to local authorities recommending that the proceeds of any compensation should be directed to its common good fund.

**Edinburgh Waverley Market**

*The status of the site*

136. The issue of the status of Edinburgh’s Waverley Market site, at present the site of the Waverley shopping centre (also known as Princes Mall), was raised by witnesses. The ground was originally leased by the City of Edinburgh Council to a private developer in 1983, who then built Waverley shopping centre. In 1989 the Council received a payment of £6.25 million from the developer, which was deemed to represent the market value of the Council’s interest at the time. As the annual rent for this lease is less than £100 it would not qualify for the commercial lease exemption provided for in the Bill and would therefore convert to ownership should the Bill pass as currently drafted.

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137. The City of Edinburgh Council told this Committee and the previous Justice Committee that it does not believe that Waverley Market is part of the Council’s common good. In its 2008 review of common good assets in Edinburgh, it stated that when the fruit and vegetable market transferred from Waverley Market to premises in East Market Street through Acts of the Council in 1937 and 1938, the common good status transferred also. Waverley Market’s inclusion as a common good asset in 2005 was an error according to the Council.  

138. The main focus of discussion in relation to Waverley Market was the issue of whether or not this site is part of the common good and also, if not, whether an exemption for this site specifically could be provided for in the Bill.  

139. The Committee also explored the extent to which the Bill provides compensation which would be paid to landlords on conversion. Discussions around whether or not Waverley Market was common good land focussed on the function of land deemed to be part of the common good and the status of such land should the functions transfer to another site.  

140. Andy Wightman confirmed to the Committee that he believed that the Edinburgh Waverley Market site was indeed part of the common good of Edinburgh and made reference to correspondence he had received from the City of Edinburgh Council.  

141. Iain Strachan acknowledged that the correspondence between council officials and Mr Wightman had stated that Waverley Market had common good status but explained that was “probably just an unfortunate and confusing mistake.”  

142. Speaking to this Committee, Andy Wightman refuted the claim made by the City of Edinburgh Council that the common good status of Waverley Market was lost when the site of the fruit and vegetable market transferred to East Market Street. He said—  

“The other straightforward evidence that runs counter to the council’s view that Waverley market disappeared in 1938 is section 70 of the Edinburgh Corporation Order Confirmation Act 1950, which states:  

“the Corporation may as part of the common good erect and maintain new buildings on the site”.

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103 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 29 February 2012, Col 638.  
104 Written submission. The Cockburn Association  
105 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 29 February 2012, Col 647.
In other words, there was statutory authority that it was common good land in 1950, which runs counter to the council’s view that that flew off in 1938. That view is derived from the Edinburgh Corporation Order Confirmation Act 1933, which merely says that the market was losing its market rights and functions. In other words, if a citizen of Edinburgh wished to go there and sell cabbages, they would not have the legal right to do so. That has no bearing at all on the common good status of the land.”

143. In oral evidence, the City of Edinburgh Council set out the main reasons why it felt that Waverley Market was not part of its common good assets by explaining—

“If we are incorrect, and Waverley market retained its common good status post-1938, it would seem odd that that status should remain post-1967 when all the remaining markets lost their common good status, especially given that the site in question had long since ceased to be a market. Even if we are wrong in that, and Waverley market still had common good status post-1967, that common good status would not continue because the public has not had use of the site. As I understand it, the market closed in the late 1930s or early 1940s. The roof-level gardens were closed in the 1950s and the market was demolished in the 1970s, following which it was used as a car park until redevelopment took place. As Mr Wightman acknowledged in his evidence to the Justice Committee of 18 January last year, the loss of common good status through such non-use is also legally possible. For a number of reasons, the council does not believe that it is common good land.”

144. Andy Wightman suggested to the Committee that prior to any lease of local authority owned land passing into ownership, a declarator from the courts should be obtained to confirm that it was not land which is part of the common good.

145. This suggestion was put to the City of Edinburgh Council, Iain Strachan responded by saying—

“It is not for me to decide, but I am not sure whether spending additional time, resources and public money on seeking a declarator from the court on the alleged common good status would be the most appropriate use of council time and money, when we have already reached a view. That is my thinking.”

146. The Minster was asked his opinion on the status of the site and in response he stated—

\[\text{References}\]

“I do not think that I would add anything to the discussion by commenting on the matter, because whether the Waverley market site is common good land does not touch on the bill….I am not a lawyer and I will not express a view on the validity of what, essentially, are legal arguments.”

147. The Committee has heard conflicting views as to the common good status of the Waverley Market site and in addition, has noted previously the lack of robust information related to identifying leases which fall under common good more generally. It is not for the Committee to reach a view on what is and what is not an asset held under the common good.

Specific Waverley Market exemption
148. The City of Edinburgh Council told the Committee quite clearly and repeatedly that it does not believe that Waverley Market is part of Edinburgh’s common good assets. In light of this and its desire that the site should not convert to ownership under this Bill, they argued for a specific exemption to be provided for in the Bill. Iain Strachan told the Committee—

“[…] earlier this month a full meeting of the council passed a motion seeking a specific exemption for Princes mall from the scope of the bill, and that is one of the reasons why we are here today. Although we recognise that it is not wise to legislate by exception, we feel that there are good reasons why Princes mall should be exempted, leaving aside the common good issue.”

149. Alison Johnstone MSP, in her written submission to the Committee, also referred to the motion passed by the Council to seek a specific exemption for Waverley Market. She argued that the case for exempting common good land from the provisions of the Bill remained strong however, she said—

“[…] if in reconsidering these arguments the committee is minded not to exempt common good land, I propose the RACCE committee recommend an exemption specifically for Waverley Market in Edinburgh.”

Grassum
150. An argument was made for providing a specific exemption for Waverley Market to make allowances for situations where the landlord has chosen to receive an upfront premium or grassum on the granting of the lease. This exemption was also discussed in the commercial leases exemption section of this report.

151. Andy Wightman questioned whether such an exemption would assist the Council in relation to Waverley Market. He suggested that the Council had wrongly identified its ‘qualifying lease’ in the Waverley Markey transactions, having regard to section 3 of the Bill. He argued that the lease under which a large grassum had been paid had been extinguished due to the legal doctrine of ‘confusio’ which

111 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 29 February 2012, Col 663.
112 Alison Johnstone MSP. Written submission.
provides that a lease is extinguished when the landlord and tenant become the same individual.\textsuperscript{113}

152. The City of Edinburgh Council did not respond to this point raised by Andy Wightman.

\textit{Location of site}

153. Iain Strachan also told the Committee that the Council would not want to lose ownership of the Waverley Market site due to its location, explaining—

“It is a unique site of special significance to the capital city, located as it is beside Princes Street gardens and adjacent to Waverley station, which is itself a landmark destination. It is close to the transport hub at St Andrew Square and is in a United Nations Educational, Scientific and Cultural Organization world heritage site. We all know the vision of the city that gets beamed around the world at hogmanay. Given the site’s significance, the council, as guardian of the city, should have an involvement in it and so should retain its heritable interest going forward.”\textsuperscript{114}

154. Bill Miller expressed concerns about the Council’s ability to control the future use of the site. He said—

“By retaining ownership of the whole site, the council can maintain any conditions it wishes, either through a lease or ownership, but if it loses sight of both the lease and the ownership it loses control over the future use of the site.

Future Parliaments might decide to do away with the 1991 act, and planning legislation might change to allow a future owner to do something totally different with the site. However, while the council remains the owner—or as a landlord—it is in control of the site, no matter what the planners or an act of Parliament say.”\textsuperscript{115}

155. The Minister acknowledged that in future Parliaments may change the laws which could affect council’s interests, however, in relation to the Council’s particular argument he referred to the existing planning system and told the Committee—

“It is interesting that the council does not appear to have identified any specific change over which it feels that it would lose control. It is the planning authority so, within the planning system, it has the ability to control the appearance and development of the Waverley market and all other properties on Princes Street, which are equally important to world heritage status and most of which the council does not own or lease out.


The distinction between the council’s ability to influence what happens to the Waverley market and its ability to do that in relation to every other building on Princes Street is unclear. That boils down to saying that I wait for the examples.”

156. In response to an invitation by this Committee to provide further evidence in support of exempting Edinburgh Waverley Market, the City of Edinburgh Council provided an additional written submission to the Committee immediately prior to the final oral evidence with the Minister. The submission referred to previous evidence supplied to the Committee. It stated—

“The Council’s concern is that should this long lease be converted to ownership, then it will effectively remove the Council’s ability to be involved in the site going forward. While the Council may still have an interest through its statutory functions, including as Planning Authority, this would not allow the Council the same level of direct involvement in, for instance, any future redevelopment plans, which may in turn affect the views of the Castle which can be enjoyed from other parts of the City.

As this property is within an UNESCO World Heritage Site, the Council has a particular interest in ensuring that its future use and development is in-keeping with this much prized World Heritage status, particularly given the location’s prominence on the global stage during the Festival and Hogmanay celebrations. In connection with this, it is worth highlighting that the Old and New Towns of Edinburgh have had this World Heritage status since 1995, and they are together 1 of only 4 such sites in Scotland, and 28 in the UK (including 3 in overseas territories). While ownership alone will not safeguard this status, it will provide the Council with a greater ability to protect it, and preserve it for future generations.”

157. The evidence on providing a specific exemption was put to the Minister who was asked directly if he would be minded to provide a specific exemption for Waverley Market to which he responded—

“I am still entirely unclear about why Waverley market is different from the Balmoral hotel, which is adjacent to it, Marks and Spencer on Princes Street, and every other building in the area that is covered by planning law and a range of other laws. Until and unless there is something distinct, it is difficult to identify why, when we look at the policy as a whole, one building should be treated differently in primary legislation in a relatively arbitrary way. I await further information on what the distinct difference might be.”

158. The Committee is aware that this is a contentious area and has heard conflicting views from witnesses. The Committee believes that the case for

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117 City of Edinburgh Council. Supplementary written evidence.
exempting the Edinburgh Waverley Market site from the Bill has still to be made.

159. **It is not for this Committee to make such a case and therefore the Committee notes the evidence that it has received on the matter and will consider any further information provided to it should the Bill progress to Stage 2.**

**SUBORDINATE LEGISLATION**

Subordinate Legislation Committee

160. At its meetings on 7 and 21 February 2012, the Subordinate Legislation Committee (SLC) considered the delegated powers provisions of the Bill. The SLC wrote to the Scottish Government on issues raised in the Delegated Powers Memorandum (DPM).

161. In its report the SLC made comments in relation to sections (as listed in the DPM) 78(5), 81(1) and 82. The report, and the correspondence with the Scottish Government, is reproduced at Annexe A to this report.

**Time limits**

162. The Faculty of Advocates, in its written submission, referred to its previous comments on the subordinate legislation provisions in the Session 3 Bill. The submission also provided additional comments in relation to section 78 of the Bill on prescribing time limits within which applications have to be made to the court or Lands Tribunal. It argued that these time limits should appear on the face of the Bill rather than being left to Scottish Ministers to prescribe them by secondary legislation.

163. The point made by the Faculty of Advocates was endorsed by the Law Society of Scotland which takes the view that legislation should be as explicit as possible and so it would be preferable to have these time limits in the Bill rather than in delegated legislation.\(^{119}\)

164. The Bill team was asked for its view on the concerns raised by the Faculty of Advocates, and said–

“Our view tends to be that it would be better to consult on time limits so that everybody can see the proposals and has a chance to comment on them. There is a lot of technical detail there […]

[...] It will take time to implement the bill. Therefore, rather than put something in the bill now that we might need to change later if we discover that people have different views from ours, it is preferable to leave the bill as it is and to carry out a consultation on the time limits so that the key bodies

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165. The Minister also reiterated the Scottish Government’s desire to be able to consult further on the time limits telling the Committee—

“It would be better to do the consultation and seek views on a potential time limit. I am not clear on what the advantage of incorporating the limit into the bill at this stage would be, and think that it would cause difficulties. Parliament will have to consider a suitable timetable when secondary legislation is proposed. When the bill reaches its final stage—assuming that Parliament consents to that—we will seek views and consult on the time limit. We would prefer to take that approach.”

166. The Committee notes the views expressed regarding setting the time limits through subordinate legislation and accepts the Scottish Government’s view that it would be advantageous to consult further on this.

167. The Committee welcomes the Report by the Subordinate Legislation Committee and has no further issues to raise with regard to the Delegated Powers Memorandum.

FINANCIAL MEMORANDUM

168. The Finance Committee considered its approach to the Bill’s Financial Memorandum (FM) at its meeting on the 25 January 2012 and agreed to adopt level 1 scrutiny. This level of scrutiny is applied where there appears to be minimal additional costs as a result of the legislation. Applying this level of scrutiny means that the Committee did not take oral evidence, nor did it produce a report. The Finance Committee’s approach was to seek written comments from relevant organisations through its agreed questionnaire and then pass these comments on to the lead committee.

169. Eight responses were received, from Aberdeen City Council, Dumfries and Galloway Council, East Ayrshire Council, Fife Council, Glasgow City Council, North Ayrshire Council, North Lanarkshire Council and West Lothian Council. Most of the responses were content that the financial implications for their respective authorities had been accurately reflected in the FM. North Lanarkshire Council did not, however, believe the FM accurately reflected the cost to the organisation, but had yet to ascertain the level of costs that might be incurred. Both Fife Council and Glasgow City Council reiterated their view that assets falling under the law of common good should be excluded from the Bill. All responses are attached at Annexe B to this report.

170. The Committee thanks the Finance Committee for the scrutiny it conducted and has no further issues to raise with regard to the Financial Memorandum.

120 Scottish Parliament Rural Affairs, Climate Change and Environment Committee, Official Report, 8 February 2012, Col 601.
Subordinate Legislation Committee

9th Report, 2012 (Session 4)

Long Leases (Scotland) Bill

Published by the Scottish Parliament on 23 February 2012
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Chic Brodie
Nigel Don (Convener)
Subordinate Legislation Committee

9th Report, 2012 (Session 4)

Long Leases (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 7 and 21 February 2012, the Subordinate Legislation Committee considered the delegated powers provisions in the Long Leases (Scotland) Bill at Stage 1. The Committee submits this report to the Rural Affairs, Climate Change and Environment Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Long Leases (Scotland) Bill was introduced on 12 January 2012. It is a Government Bill. A Bill in similar terms was introduced in the final year of Session 3 but fell due to lack of time.

3. The Bill provides for the conversion of the right of lease in relation to certain ultra-long leases into a right of ownership. For the purposes of the Bill, “ultra-long leases” were let for over 175 years and have over 100 years to run from the appointed day laid down in the Bill. The Bill does not apply to leases which are considered to be let on commercial terms. Leases with a rent of £100 per year or more are therefore excluded. Under the Bill, compensatory and additional payments are payable by tenants to landlords upon conversion of the tenant’s interest into ownership. Some leasehold conditions will be preserved and will become real burdens in the title deeds. Landlords will also be able to preserve sporting rights.

4. The accompanying documents provided along with the Bill at introduction describe it as representing the last element in the systematic programme of land reform which, over recent years, has resulted in the Abolition of Feudal Tenure etc. (Scotland) Act 2000, the Title Conditions (Scotland) Act 2003, and the Tenements (Scotland) Act 2004. It is stated that “the underlying ethos of the Bill is that property held on ultra-long leases is akin to ownership in practical terms and
the (outdated) property law is being reformed to convert such leases to ownership."

5. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill ("the DPM")¹.

6. In the consideration of the memorandum at its meeting on 7 February, the Committee agreed to write to the Scottish Government to raise questions on a number of the delegated powers.

7. This correspondence is reproduced in the Annex.

8. The report considers each of the delegated powers on which questions were raised in turn, and provides the Committee's conclusions on these matters.

9. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers contained in the following sections (as they are listed in the DPM)—section 8(2), 14(3)(a), 17(4)(a), 23(3)(a), 24(2)(a), 25(2)(a), 26(2)(a), 27(3)(a), 28(3)(a), 45(2), 45(4)(b), 50(4)(b) and (c), 54(3)(b) and (c), 56(3)(a) and (c), 57(2)(a) and (b), 63(b), 64(2)(a), 67(1)(b), 68(2)(b), 74(3)(a) and (b), 75(2)(b), 71(1)(c)(ii), and 83(2).

Delegated powers provisions

Section 78(5) – Power to prescribe a date or period after which notices and agreements determined registrable by the courts or the Lands Tribunal cannot be registered and to provide that applications to the courts or the Tribunal must be made within a specified period for the notices and agreements to be registrable

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by SSI
Parliamentary procedure: Negative procedure

10. Section 78 allows the late registration of documents which had been rejected by the Keeper where a court rules that they were in fact registrable. Section 78(5) enables the Scottish Ministers to specify a date or period after which notices and agreements which the courts rule as competent can no longer be registered. The power also allows the Scottish Ministers to provide that the registration of such notices and agreements could only take place if the application to the court or Lands Tribunal had been made during a period specified in the order.

11. The Scottish Government considers that a time limit for registration of notices and agreements which have been referred to the court is required in the interests of longer-term certainty and to underpin reliance on the land registers as definitive of ownership rights. It describes this arrangement as procedural and on this basis recommends the negative procedure as a suitable level of scrutiny. However, as the Government recognises in its response to the Committee, the exercise of the power can also impact on the exercise of individual rights. The Committee

¹ Long Leases (Scotland) Bill. Delegated Powers Memorandum. Available at: http://www.scottish.parliament.uk/S4_Bills/Long%20Leases%20(Scotland)%20Bill/DPM.pdf
therefore considers it important that there is full consultation prior to the setting of any time limits to ensure that the practical effect on individuals is considered carefully. The Committee also considers it necessary for there to be sufficient opportunity for parliamentary scrutiny of the instrument before it takes effect.

12. The Scottish Government outlines the manner in which it proposes to consult before making an order under this section. It does not consider that anything would be added by placing a legal requirement to consult in the Bill itself. The Committee acknowledges the commitment made by the Scottish Government to following best practice in relation to consultation prior to making this order. However, the Committee observes that through such a commitment the Scottish Government cannot bind future administrations and how they might approach the issue were there to be a change of administration prior to the power being exercised. The way in which to ensure similar adherence to good practice by any future administration is, of course, to provide a requirement to consult in the Bill itself.

13. Nevertheless, the Committee recognises that this is not a power intended to be exercised repeatedly and accepts that it is likely that this power will be exercised prior to the end of this Session of the Parliament. On that basis it accepts the Scottish Government’s undertaking to follow best practice when consulting on its subject matter. The Committee would expect the same approach to be adopted in the event of a change in administration prior to that point.

14. The Committee considers the subject matter of this power to be of more importance than other procedural matters given the effect of its exercise is to prevent individuals from enforcing notice and agreements which the courts have declared to be registrable under the Bill. Whether this is considered sufficiently important in policy terms is ultimately a matter for the lead committee to consider.

15. However, the Committee accepts that the negative procedure provides sufficient opportunity for the Parliament to object to the Scottish Government’s proposals provided that the instrument is laid at least 40 days in advance of the date on which it is proposed that it come into force. While the Committee understands that the Scottish Government’s aims to afford the full 40 days scrutiny prior to the commencement of negative instruments, this is not universally what happens in practice. If the lead committee considers that the negative procedure is appropriate, then the Committee gives notice to the Scottish Government that it would expect the full 40 days to be observed in this case.

Section 81(1) – Power to make supplementary, incidental, consequential, transitional, transitory or saving provision

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<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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<td>Power exercisable by:</td>
<td>Order made by SSI</td>
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<td>Parliamentary procedure:</td>
<td>Affirmative where making textual amendments to primary legislation, otherwise negative</td>
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Section 82 – Bolt on powers to make ancillary provision in relation to the exercise of all powers to make regulations and the power under section 78(5)

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by SSI  
**Parliamentary procedure:** Laid only

16. The Committee acknowledges that it is frequently considered appropriate to confer power on the Scottish Ministers to make ancillary provision of this nature. At the time the Bill is being considered it may already be clear that further provisions will be required in order to implement the Bill once it is enacted. The precise detail may quite properly be left to subordinate legislation subject to an appropriate level of parliamentary scrutiny. In some cases it will also be desirable to have such a mechanism available to deal with any additional provisions which are subsequently found to be necessary to give proper effect to the Bill but which were not foreseen.

17. Nevertheless the Committee considers it should examine whether the particular scheme of ancillary powers proposed in any Bill is appropriate to the particular circumstances. In particular, the Committee considers carefully what level of scrutiny is to be applied to the exercise of the powers and whether different options for the exercise of ancillary powers are proposed.

18. In this Bill there are three separate mechanisms by which ancillary powers can be exercised. Section 81 contains a freestanding power to make supplementary, incidental, consequential, transitional, transitory or saving provision necessary or expedient for the purposes of or in connection with the Act. The exercise of this freestanding power will be subject to the negative procedure unless the order makes textual amendments to primary legislation. Such orders are subject to the affirmative procedure. Section 83(2) provides a power to make transitional, transitory or saving provision in a commencement order provided it is necessary or expedient in connection with the provisions being commenced. Such orders are not subject to parliamentary control but will be laid before the Parliament. Finally, section 82(1) allows any other instrument made under the Act to include incidental, consequential, supplementary, transitional, transitory or saving provision which is necessary or expedient in connection with the provision being made in the instrument.

19. The Committee sought further information from the Scottish Government about the intended use of these powers, further justification for the use of the negative procedure in all cases under section 81 which do not make textual amendments to primary legislation and why it was considered necessary to provide for all three means by which ancillary provision could be made.

20. The Scottish Government has identified that consequential amendments and transitional provision will be required to integrate the Bill with alterations being made to the functions of the Keeper of the Registers of Scotland proposed to be made by the Land Registration (Scotland) Bill currently before the Parliament. It may be possible to include these in the Bill by amendment at a later stage but that
will depend on the parliamentary timetable. Flexibility is required should it not be possible to do so or to deal with incidental matters which arise in the course of consideration of how the two bills operate in practice.

21. The Government considers that any ancillary provision which is required is likely to be of a technical nature, describing the bill as “raising a number of detailed technical issues.” The Committee agrees that there are very technical aspects to the Bill but the central premise is the adjustment of the balance of interests between tenants and landlords of ultra-long leases. The effect of the technical scheme is determinative of property rights: to ownership on the one hand and to compensatory measures on the other. The Committee therefore considers that given the potential scope of ancillary powers available, particularly to make incidental and supplementary provision, it can be foreseen that there is the potential for such provision to materially affect those property rights.

22. The Committee must have regard to all the foreseeable effects of the exercise of the power when considering whether the power is appropriate in the circumstances and whether the appropriate level of parliamentary scrutiny is applied. However, the Committee also accepts the Scottish Government’s assertion that the exercise of ancillary powers would be strictly construed and could not undermine any provision in the Bill.

23. The Scottish Government considers that all three mechanisms for making ancillary provision are appropriate because it considers including ancillary provision and the relative substantive provision in the same instrument “provides greater transparency and ease of use for the users of legislation”. The Committee is supportive of drafting which improves transparency and clarity for the end user and agrees that this is another matter which should be taken into account. However, this factor should not of itself dictate the appropriate level of parliamentary scrutiny to be applied.

24. Taking all of these factors into account the Committee finds the scheme proposed under the Bill acceptable in principle and the parliamentary procedure applied appropriate.

25. However, where there is a choice available to the Scottish Government as to which of the three mechanisms to use to make a particular provision it should have regard to the complexity and effect of the provision proposed and should afford the Parliament the opportunity for a higher level of parliamentary scrutiny in complex cases or where the exercise of the power affects individual rights. Given the importance attached to amendments made to primary legislation the Committee would also expect such provision to be made under section 81 rather than under the other ancillary powers.
Correspondence with the Scottish Government

Section 78(5) – Power to prescribe a date or period after which notices and agreements determined registrable by the courts or the Lands Tribunal cannot be registered and to provide that applications to the courts or the Tribunal must be made within a specified period for the notices and agreements to be registrable

The Committee asks the Scottish Government—

The Government states that it considers the powers relate to “straightforward matters” and that therefore the negative procedure provides “an appropriate balance”.

The Committee therefore asks the Scottish Government, in regard to the delegated powers in section 78(5)—

(a) Can the Government give further justification for the negative procedure being an appropriate level of scrutiny given that the effect of the power is to specify deadlines for the exercise of rights under the Bill?

(b) Will the Government clarify how it would propose to consult on any order that is to be made under the power? In particular, would it consider providing that consultation must be undertaken before such an order is made?

The Scottish Government responds as follows—

You asked about how we would intend to consult on any proposed order to be made under this power. When carrying out consultations, the Government follows its consultation good practice guidance: http://www.scotland.gov.uk/About/FOI/19260/18512. In line with the consultation good practice, we would on this issue:

- Draw up a list of consultees and send the consultation to them. (We would expect to send the consultation to the Keeper of the Registers of Scotland, the Clerk to the Lands Tribunal for Scotland, the Law Society of Scotland, and bodies representing property law interests);
- Publish the consultation on the Scottish Government website;
- Allow consultees at least 12 weeks to respond;
- Publish responses, subject to any requests for confidentiality and, in line with usual practice, redacting any comments which may be defamatory; and
- Publish an analysis of the responses and the Government response to the consultation.

You asked whether we would consider providing that consultation must be undertaken before such an order is made. We have considered this and do not
consider such provision is necessary. The Government would intend to consult on any order and, in light of the Government’s consistent practice on consultation and the existence of good practice guidance, we do not consider that there is anything to be gained by adding a specific consultation requirement on the face of the Bill.

You also asked about the use of the negative procedure. The Bill allows individuals to apply to the court or Lands Tribunal to overturn a refusal by the Keeper of the Registers of Scotland of certain applications for registration. It is in the interests of longer-term certainty and those relying upon the land registers to prescribe a final time limit before which these judicial applications and any subsequent registration must be made. As indicated above, before making any order prescribing this time limit (or period), the Government will consult key bodies on the provision to be made. This will ensure that relevant bodies are given information about these deadlines, which are procedural but which can also impact on the exercise of individual rights. We consider that negative procedure provides the appropriate degree of Parliamentary scrutiny against this background and it would, of course, still be possible for any Member of the Parliament to lay a motion proposing that a negative SSI should be annulled.

Section 81(1) – Power to make supplementary, incidental, consequential, transitional, transitory or saving provision

The Committee asks the Scottish Government—

Exercise of this power is subject to the negative procedure except where it is used to amend any part of the text of an Act, which can include the new Act, in which case the affirmative procedure applies.

The Committee therefore asks the Scottish Government—

(a) Will the Government explain what further incidental or supplemental provision might be required?

(b) Given that such provision is likely to affect substantive property rights and so involve important questions of social policy, why is the negative procedure considered to be a sufficient level of parliamentary scrutiny of the exercise of such powers?

(c) Could the examples of transitional, transitory and saving provision given in the Delegated Powers Memorandum also fall within the scope of the power in section 83(3)? If so, why is the further power in section 83(3) required?

The Scottish Government responds as follows—

You asked what further incidental or supplemental provision might be required.

Paragraph 35 of the Delegated Powers Memorandum notes that this Bill will need to interact with existing legislation. In addition, paragraph 62 of the Policy Memorandum notes that some consequential and transitional provision will need
to be amended into this Bill at a later stage or put in place by ancillary order as a consequence of the Land Registration etc. (Scotland) Bill which is currently before the Parliament. While it is intended to put these provisions in this Bill by amendment, it is possible that incidental or supplemental provision could be required to provide flexibility, given that the Bills on long leases and land registration both impact on the functions of the Keeper of the Registers of Scotland and will need to work together operationally.

The Government considers that the negative procedure provides the appropriate degree of Parliamentary scrutiny of ancillary provision which does not amend primary legislation. The Government expects that any orders making supplementary, incidental, consequential, transitional, transitory or saving provision are likely to be of a technical nature, given that the Bill raises a number of detailed technical issues. Furthermore, any exercise of this power would be strictly construed and could not undermine any provisions in the Bill. Clearly, as provided for in the Bill, any statutory instruments which amend primary legislation will be subject to the affirmative procedure.

The Government does not consider that all of the examples of transitional, transitory and saving provision covered by section 81, including those given in the Delegated Powers Memorandum, necessarily fall within the scope of the power of section 83(3). Section 83(3) is specifically limited to transitional, transitory or saving provisions in connection with the commencement of the Bill provisions. The power in section 81(1) is broader. The Government will consider in each case whether section 81 or 83 is the appropriate power to be exercised depending upon the nature of the transitional, transitory or saving provision that is required and the link that the particular provision has with commencement of the Act – see also below.

The power in section 83(3) is required for this Bill because, having regard to the nature of the Bill, it is almost certain that there will require to be a range of transitional and saving provisions associated with commencement and the Government takes the view that it is generally appropriate for such provision to be included in the relevant commencement order.

**Section 82 – “bolt on” powers to make ancillary provision in relation to the exercise of all powers to make regulations and the power under section 78(5)**

The Committee asks the Scottish Government—

*This provision is not treated separately in the DPM, and no commentary is provided on the need for the power in relation to the individual powers to which the “bolt-on” provision applies.*

*The Committee ask the Scottish Government for an explanation as to why the power in section 82(1)(a) is required in addition to a separate stand-alone power to make ancillary provision provided in section 81 and the further power to make transitional, transitory or saving provision in connection with commencement provided in section 83(3)?*
The Scottish Government responds as follows—

The Committee seeks an explanation of why this “bolt-on” power is justified. This power enables ancillary provision (incidental, consequential, supplementary, transitional, transitory or saving provision) to be made in an order under section 78(5) or any regulations under the Bill if the Scottish Ministers are satisfied that it is necessary or expedient to make this provision in making that order or those regulations.

It is considered that this power is justified, in addition to the powers in section 81(1)(a) (a free-standing ancillary provision power) and section 83(3) (power to make transitional, transitory or saving provision on commencement, to which section 82(1)(a) does not apply) as it enables the Scottish Ministers to make provision ancillary to the exercise of a specific delegated power in the Bill. Each use of the “bolt-on” ancillary provision must be ancillary to the exercise of a specific delegated power.

For example, when notices and explanatory notes are prescribed under the delegated powers in the Bill, it may, depending on views from consultees, be appropriate to include reference to other matters such as information on fees payable which would go beyond prescribing the content of any notice or explanatory note.

This will allow the instrument to be made under one of the specific delegated powers conferred by the Bill without in some cases having to make a separate instrument (it will not be possible to combine regulations and orders under the Interpretation and Legislative Reform (Scotland) Act 2010). It is considered that the ability to make any necessary ancillary provision in an instrument, rather than having to make a separate order to make ancillary provision, provides greater transparency and ease of use for the users of legislation. Any order under section 78(5) or any regulations under the Bill using this “bolt-on” ancillary provision will attract the negative procedure.
FINANCIAL MEMORANDUM TO LONG LEASES (SCOTLAND) BILL
SUBMISSION FROM ABERDEEN CITY COUNCIL

Consultation

1. Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

Response – Aberdeen City Council did not take part in the consultation exercise.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Response – Not applicable.

3. Did you have sufficient time to contribute to the consultation exercise?

Response – Not applicable.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Response - Yes.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Based on our analysis of currently held long leases to which Aberdeen City Council is party either as landlord or tenant, the financial costs associated with the Bill will be minimal and therefore met by the Council.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Response - Yes.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Response – No comment.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Response – No comment.
FINANCIAL MEMORANDUM TO LONG LEASES (SCOTLAND) BILL
SUBMISSION FROM DUMFRIES AND GALLOWAY COUNCIL

Consultation
1. Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

Made no comment.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

N/A

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Yes.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Yes.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Yes.

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Yes.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

No.
FINANCIAL MEMORANDUM TO LONG LEASES (SCOTLAND) BILL
SUBMISSION FROM EAST AYRSHIRE COUNCIL

Having considered the Long Leases (Scotland) Bill and the associated Financial Memorandum I can confirm that East Ayrshire Council would be able to meet the compensation costs, as detailed in the Bill, for our leasehold, if required.

I would therefore confirm that East Ayrshire Council is content that it could meet any future cost obligations arising from the Bill.

The uncertainty of the cost of elements of the transaction (e.g. registration dues) is true of any property related transaction. The Financial Memorandum has commented on these as far as is possible.

Thank you for the opportunity to comment on the Financial Memorandum associated with this bill.

FINANCIAL MEMORANDUM TO LONG LEASES (SCOTLAND) BILL
SUBMISSION FROM FIFE COUNCIL

Consultations
1. Yes, commented Common Good would ideally be excluded from the Bill
2. Yes
3. Yes

Costs
4. Uncertain as the Common good would gain the proceeds of any sale however if the compensation is based on rent which in some cases is set at nil or peppercorn this may not adequately compensate for loss of value as equally would a valuation that did not take cognisance of the reduced value through splitting or disaggregation of a building where the whole was worth more than the parts.
5. As these are not fully known and could be subject to potential litigation on whether an agreement qualifies under the bill it is difficult to say what the costs are and if we could meet them when a potential issue could arise on whether an ultra long lease actually exists.

Wider issues
7. No response
8. No response.
Consultation

1. Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

Yes, we took part in the consultation and representatives attended the Justice Committee to give evidence. We made no specific comment on the financial assumptions.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

The Financial Memorandum indicates there would be nil cost to local authorities. There is a chance that local authorities may have to pay compensation on transfer of ownership (albeit this is likely to be minimal in value). It is also possible that local authorities are obliged to transfer ownership of a property (with a potential future sale value) to a third party for nil (or minimal) consideration. The financial impact on local authorities may therefore be more accurately described as “minimal”.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes, although the nature of ultra long leases means that it is possible a lease falling under the new legislation may be identified prospectively, meaning a definitive impact assessment is not possible.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

We would only reiterate our view that assets falling under the law of common good, and potentially all public space / amenities, should be excluded from the Bill.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Based on information currently available, the cost of the Bill is likely to be minimal. We therefore do not currently foresee a problem in meeting any such costs.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

No specific comment
Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

No specific comment

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Future costs may arise if more long leases are identified.

The Long Leases (Scotland) Bill – Motion approved.

The Council subsequently approved the Motion below—

Bailie Dr Baker, seconded by Councillor Wardrop, moved that

“Council notes the publication of the Long Leases (Scotland) Bill in the Scottish Parliament. This will allow properties currently on leases of 175 years or more, with 100 years or more to run, to become the property of the tenants. We believe that it would be against the public interest for this to apply to properties in public ownership, particularly where the properties are common good. Council further notes that the public consultation period ended on 3rd February.

Council therefore instructs the Chief Executive to write to the relevant Minister of the Scottish Government to the effect that the Council requests that the Bill be amended to protect publicly-owned properties and, in particular, Common Good Fund assets.”

The Council approved unanimously.

FINANCIAL MEMORANDUM TO LONG LEASES (SCOTLAND) BILL

SUBMISSION FROM NORTH AYRSHIRE COUNCIL

North Ayrshire Council welcomes the opportunity of responding to the questionnaire on the Financial Memorandum to the Long Leases (Scotland) Bill.

In response to the questions our answers are as follows:


2. Not applicable.

3. Not applicable.
4. It is recognised that ultra long leases may often be held by local authorities having inherited these from former Burgh Councils pre 1975. The exact number of such leases in North Ayrshire is not known at the present time, however the estimate is that there are few which would fall within the definition in the Bill. The Bill makes suitable provision for situations where a local authority may be either tenant or landlord and the further option to opt out given in the Bill extends the scope of the public body to act in the best interests of its community.

5. Given the limited values which may be attributed to the local authorities it is felt that this should not impose an undue burden on the public purse. The value of compensation which would, in the majority of cases, be calculated using the formula, is acceptable to this authority.

6. The point is agreed. Given the limited number of qualifying leases within this area, this should not present any difficulties to the authority.

7. The degree of uncertainty in the exact number of ultra long leases still existing in Scotland and the corresponding issue as to value of rental, suggests that it does appear that if the appetite for compensation grows the overall cost of implementing conversion may increase significantly. More work needs to be done in identifying the full extent of long leases in Scotland and to achieve this, the views of those proprietors who now hold landlord interests in many historic feudal leaseholds should be sought.

8. We feel this answer is reflected in the answer to 7 above.

FINANCIAL MEMORANDUM TO LONG LEASES (SCOTLAND) BILL
SUBMISSION FROM NORTH LANARKSHIRE COUNCIL

Consultation

1. Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

No.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not Applicable

3 Did you have sufficient time to contribute to the consultation exercise?
Not Applicable

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

- My organisation, North Lanarkshire Council ("NLC") is a Local Authority with a significant number of properties held on ultra long leases recorded or registered in the Register for the County of Lanark. NLC holds the landlord's interest in some leases, the tenant's interest in others and in certain properties holds both landlord's and tenant's interest, the leases not having been consolidated. Paragraph 317 of the Financial Memorandum states that the Bill does not impose any new duties on local authorities and that there are no specific costs to local authorities and the Table at Paragraph 362 of the Memorandum provides that the costs to local authorities will be nil. I consider that despite the terms of Paragraphs 317 and 362, there well may be financial implications for NLC resulting from duties which may be incumbent on NLC in terms of the legislation.

- The Memorandum at Paragraphs 325 and 326 makes reference to the large number of ultra long leases held in Lanark County. Given, the terms of Paragraph 362 of the Memorandum, is an assumption perhaps being made that most of these relate to privately owned properties?

- It may be necessary for NLC's officers to identify the properties held on ultra long leases and examine the leases for their terms and conditions potentially resulting both in a considerable administrative cost and legal expenses for any advice given on lease terms and conditions to the relevant NLC client service.

- Should NLC decide to seek compensation from any tenants under ultra long leases in which NLC holds the landlord's interest, administrative costs will be incurred in the calculations of the amounts due and in the making of the claims.

- While I am unable to quantify this at present, it is likely that NLC will wish to convert lease conditions to real burdens thereby incurring legal expenses and registration dues.

- Should NLC receive any demands for compensation in respect of ultra long leases where NLC is tenant, such demands will require to be assessed and dealt with, again incurring administrative and possibly also legal costs.

- Paragraph 307 of the Memorandum appears to indicate that there will be an in increase in Land Registration and recording dues for all Registers of Scotland customers. Given the high level of involvement of NLC in property transactions, this would have financial implications for NLC.

In view of the above, I do not believe that the potential financial implications for my organisation have been accurately reflected in the Financial Memorandum.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?
I have yet to ascertain what the level of the costs which may be incurred by NLC and am therefore unable to answer this question at the present time.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

The Financial Memorandum provides that the costs to local authorities will be nil. Accordingly, it cannot be said to reflect accurately such margins of uncertainty and timescales.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

It does not appear that this question is relevant to my organisation.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

I believe that it is possible that there may be such future costs, including a Registers of Scotland Fees Amendment Order in view of what has been stated at Paragraph 307, but I am not in a position to quantify what the costs might be.

FINANCIAL MEMORANDUM TO LONG LEASES (SCOTLAND) BILL

SUBMISSION FROM WEST LOTHIAN COUNCIL

Consultation

1. Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made? No

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum? Not applicable

3. Did you have sufficient time to contribute to the consultation exercise? Not applicable

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details. Yes

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met? Yes
6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise? **Not known**

**Wider Issues**

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum? **Not known**

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs? **Yes; not known but an example of this might be incurring costs as a result of a legal action/test case**.
RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

EXTRACT FROM THE MINUTES

2nd Meeting 2012 (Session 4)
Wednesday 18 January 2012

Long Leases (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1.

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

EXTRACT FROM THE MINUTES

4th Meeting 2012 (Session 4)
Wednesday 08 February 2012

Long Leases (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Simon Stockwell, Bill Team Leader, and Graham Fisher, Head of Branch, Constitutional and Civil Law Division, Scottish Government.

Long Leases (Scotland) Bill (in private): The Committee considered the evidence heard earlier in the meeting.

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

EXTRACT FROM THE MINUTES

5th Meeting 2012 (Session 4)
Wednesday 22 February 2012

Long Leases (Scotland) Bill: The Committee took evidence from—

Dale Strachan, Partner, Brodies LLP;
Lionel Most, Member, Conveyancing Committee, Law Society of Scotland;
Richard Blake, Legal Adviser, Scottish Land and Estates Ltd;
Alan Cook, Chair, Commercial Committee, Scottish Property Federation.

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

EXTRACT FROM THE MINUTES

6th Meeting 2012 (Session 4)
Wednesday 29 February 2012

Long Leases (Scotland) Bill: The Committee took evidence from—

Andy Wightman, independent researcher;
Andrew Ferguson, President, Society of Local Authority Lawyers and Administrators in Scotland (SOLAR);
Andy Young, Head of Asset Management, City of Glasgow Council;
Iain Strachan, Legal and Administrative Services, and Bill Miller, City Development Department, City of Edinburgh Council; John Gahagan, Estates Manager, Aberdeenshire Council.

**Long Leases (Scotland) Bill (in private)**: The Committee considered the evidence heard earlier in the meeting.

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

**EXTRACT FROM THE MINUTES**

7th Meeting 2012 (Session 4)

Wednesday 07 March 2012

**Long Leases (Scotland) Bill**: The Committee took evidence from—

Stewart Stevenson, Minister for Environment and Climate Change, Annalee Murphy, Solicitor, Legal Services Directorate, and Simon Stockwell, Bill Team Leader, Scottish Government.

**Long Leases (Scotland) Bill (in private)**: The Committee considered the evidence heard earlier in the meeting.

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

**EXTRACT FROM THE MINUTES**

9th Meeting 2012 (Session 4)

Wednesday 21 March 2012

**Long Leases (Scotland) Bill (in private)**: The Committee agreed a draft Stage 1 report subject to minor amendments.
ANNEXE D: ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

4th Meeting 2012 (Session 4), Wednesday 08 February 2012

WRITTEN EVIDENCE

Scottish Government Bill team

ORAL EVIDENCE ............................................................................................................

Simon Stockwell, Bill Team Leader, and Graham Fisher, Head of Branch Constitutional and Civil Law Division, Scottish Government

SUPPLEMENTARY WRITTEN EVIDENCE .................................................................

Scottish Government Bill team

5th Meeting 2012 (Session 4), Wednesday 22 February 2012

ORAL EVIDENCE ............................................................................................................

Dale Strachan, Partner, Brodies LLP
Lionel Most, Member, Conveyancing Committee, Law Society of Scotland
Richard Blake, Legal Adviser, Scottish Land and Estates Ltd
Alan Cook, Chair, Commercial Committee, Scottish Property Federation

6th Meeting 2012 (Session 4), Wednesday 29 February 2012

ORAL EVIDENCE ............................................................................................................

Andy Wightman, independent researcher
Andrew Ferguson, President, Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)
Andy Young, Head of Asset Management, City of Glasgow Council
Iain Strachan, Legal and Administrative Services, and Bill Miller, City Development Department, City of Edinburgh Council
John Gahagan, Estates Manager, Aberdeenshire Council

SUPPLEMENTARY WRITTEN EVIDENCE .................................................................

Andy Wightman
City of Edinburgh Council

7th Meeting 2012 (Session 4), Wednesday 07 March 2012

ORAL EVIDENCE ............................................................................................................

Stewart Stevenson, Minister for Environment and Climate Change
Annalee Murphy, Solicitor, Legal Services Directorate, Scottish Government
Simon Stockwell, Bill Team Leader, Scottish Government
Written evidence from the Scottish Government Bill team

STAGE 1 CONSIDERATION OF THE LONG LEASES (SCOTLAND) BILL

I attach a submission. This covers the following points:

- Changes to the Bill following the report by the Justice Committee on the previous Bill.
- Other changes from the previous Bill.
- Areas where a decision was taken not to amend the Bill.

Changes to the Bill following the report by the Justice Committee

Leases where the landlord retains a significant interest

1. The previous Bill excluded leases where the annual rental exceeded £100. Paragraph 91 of the Justice Committee’s report said: “The Committee draws the Minister’s attention to the issue of variable rent and the arguments made in favour of this being taken account of when setting the criteria for the exemption”. Variable rental might apply if, for example, rental is based on the turnover of the business leasing the property.

2. The current Bill still has an exemption for leases where the annual rental exceeds £100 (see section 1(4)(a) as read with section 2). Variable rental is not taken into account when considering if this exemption applies (see section 2(5)). However, the Bill now contains a provision (section 64) which allows the landlord to register an exemption if the annual rental in the 5 years before the Bill receives Royal Assent exceeds £100. This is designed to take account of variable rental.

Pipes and cables

3. Paragraph 104 of the Justice Committee's report said on pipes and cables: “Given that this is a legally complex area, the Committee again welcomes the Minister’s commitment to further consider the evidence received and to seek to reach agreement on the way ahead”. The exemption (at section 1(4)(c)) has been retained and clarified. The Government considers it best to include the exemption to put the matter beyond doubt.

Harbours

4. The Justice Committee received written evidence on behalf of Peterhead Port Authority and the Government subsequently discussed the issues with those representing Peterhead Port Authority and other bodies representing ports. The particular point at Peterhead is that the south
breakwater has been leased for 999 years and converting it to ownership could impact adversely on the operation of the harbour.

5. Section 1(4)(b) now has an exemption where “the subjects of the lease include a harbour (either wholly or partly) in relation to which there is a harbour authority”. (“Harbour” and “harbour authority” are then defined in section 80).

Point raised by the Subordinate Legislation Committee: section 22 of the current Bill

6. Paragraphs 129 and 130 of the Justice Committee report noted a point raised by the Subordinate Legislation Committee on section 21 of the previous Bill, which related to applications to the Lands Tribunal. This is section 22 of the current Bill. Section 22 does not now contain provision allowing Ministers to prescribe a time period for opposing an application to the Lands Tribunal.

Other changes from the previous Bill (not as a direct consequence of comments by the Justice Committee).

Cumulo rental

7. Cumulo rent is a single rent payable in relation to two or more leases. Cumulo rent is not covered by the exemption at section 1(4)(a) for leases where the rental is over £100 (see section 2(3)). However, section 39 of the Bill now makes provision for cumulo rent to be allocated before the appointed day. When such allocation takes place and the annual rental for an individual lease is over £100, the landlord can then register an exemption under section 64.

Section 70: the appointed day

8. The definition now just refers to Martinmas only, rather than Whitsunday as well.

Section 73: Extinction of right of irritancy in certain leases.

9. This no longer commences on Royal Assent.

Section 76: Keeper’s duty as regards documents

10. Minor amendments have been made to section 76 to reflect that some of the provisions of the Bill relate to notices and some to agreements. Consequential changes have also been made (see section 76(5)) to reflect new sections 64 and 69.
Section 78: Certain documents registrable despite initial rejection

11. Provision has been added to reflect the new section 64.

Schedule: minor and consequential amendments

12. Amendments to the Land Registration (Scotland) Act 1979 have been removed. The Land Registration (Scotland) Bill is currently going through Parliament and the Government expects to have to make consequential amendments to the Long Leases (Scotland) Bill at Stage 2.

Updating of the Land Register

13. This is not an amendment to the text of the Bill. However, Registers of Scotland has decided not to carry out a specific exercise to update the Land Register to reflect the conversion of ultra-long leases to ownership under the Bill.

Areas where the Bill has not been amended.

Common good

14. Paragraphs 60 and 61 of the Justice Committee’s Stage 1 report said: “In the case of disposal of a common good asset, it is the strong view of the Committee that the compensation received should be paid back in to the local authority’s common good land. The desirability for certainty from this legislation and the provisions for compensation provided in the Bill have led the Committee to conclude that it is not persuaded, at this time, that there is a compelling case for exempting leases of common good property from this Bill”.

15. No amendments have been made to the Bill. However, we have written to local authorities indicating that if the Bill should be passed by Parliament, we would intend to write again to authorities. This further letter would suggest that any compensatory or additional payments paid to local authorities as a result of ultra-long leases of common good funds converting to ownership should be allocated to common good funds or accounts.

Non-exclusive leases over private access roads

16. Paragraph 107 of the Justice Committee’s report said: “The Committee notes again that the Minister has undertaken to explore this issue further with the SRPBA and looks forward to hearing back from the Scottish Government in due course”. The Bill has not been amended. The Government considers that arrangements of this nature are not covered by the Bill as generally there has to be exclusive possession for a lease to exist.
Section 78: certain documents registrable despite initial rejection

17. This was section 75. Paragraphs 135 and 136 of the Justice Committee’s report said: “section 75(5) provides that the Scottish Ministers can by order specify a cut-off date after which notices and agreements cannot be registered. The Committee notes the recommendation of the Subordinate Legislation Committee that the Scottish Government should give further consideration to amending the Bill to prescribe the date or period on the face of the Bill. The Committee draws this to the attention of the Minister.”

18. The Bill has not been amended. The Government considers it preferable to lay down these dates or periods by SSI rather than on the face of the Bill as laying them down by SSI would enable the Government to consult on what provision should be made.

Justice Directorate
Scottish Government

February 2012
Long Leases (Scotland) Bill: Stage 1

10:32

The Convener: Agenda item 4 is our first evidence session on the Long Leases (Scotland) Bill. We will hear from Scottish Government officials on the content of the bill and the associated documents. It is not for officials to answer questions on policy decisions, but they can offer clarification on the content of the bill and the associated documents. Discussions on the policy aspects should be left for the minister. We expect to hear from stakeholders at our meetings following the recess on 22 and 29 February and from the minister on 7 March.

I welcome the Scottish Government officials: Simon Stockwell is bill team leader, family and property law, in the law reform division; Sandra Jack is policy officer, family and property law, also in the law reform division; and Graham Fisher is head of branch in the constitutional and civil law division.

Thank you for providing written evidence in advance of your appearance. I invite questions from members.

Graeme Dey: I have questions on two matters, which both concern common good. First, which eight councils did not respond to the consultation? Does the Scottish Government have any powers to compel them to provide the information?

Secondly, is the Scottish Government taking on trust the figure of four possible cases that might be affected by the bill? There is, for example, a degree of dispute over whether the land on which the Waverley shopping centre stands could be included, and at least one council initially indicated that it had a case but then changed its mind.

Simon Stockwell (Scottish Government): The councils that do not seem to have responded to the survey are Angus Council, Western Isles Council, Dumfries and Galloway Council, Moray Council, North Ayrshire Council, Perth and Kinross Council, Scottish Borders Council and South Ayrshire Council. It is possible—although I cannot say for certain—that some councils take the position that they have no common good property. Some local authorities have suggested that to us. We had no power to compel local authorities to respond to the survey, which was voluntary. When we wrote to ask them to complete the information, we cited no statutory powers.

We are taking on trust the figures that councils have provided to us. We have no way of checking whether properties are part of the common good. I asked Registers of Scotland whether it had any way of knowing that and it said that it did not, and the Government has no way of knowing that.

Fife Council changed its initial view after it looked further at the titles and at what the occupants had the power to do. I recollect that the council said that the tenants have the right to use the hall occasionally over the next 1,000 years but do not have exclusive occupation of the property.

Graeme Dey: Why is the Scottish Government minded only to recommend to local authorities—rather than instruct them, if you can do that—that any compensatory or additional payments that are received through the conversion of common good land to ownership should be allocated to common good accounts? Is it feasible that there could be an impact on common good land in, for example, a rural burgh that no longer has a functioning common good fund? If so, what would happen to any payments?

Simon Stockwell: I am not sure about your last point. We propose to make a suggestion to local authorities rather than put a provision in the bill because that is in line with our general approach to working with them under the concordat. We work in co-operation with local authorities rather than give them too much instruction through legislation or statutory guidance.

We sent local authorities an initial letter in which we said what we planned to do. We have had two or three replies, but we have not had significant responses that said that we should do something different.

We have said that, if a lease on the common good converts to ownership under the bill, we recommend that any moneys that accrue from that should be allocated to common good funds. If no common good fund exists, I suppose that we would tell local authorities that they should consider the best way of allocating the money so that it can continue to benefit the people of the burgh or local authority area.

In general, we do not expect the compensation to be all that much, given that most of the leases involved are ultra long. As the rental is quite low, we would expect the compensation that is payable to be quite low in most cases.

Jim Hume: I declare an interest, as I am still a member of Scottish Borders Council. I am well aware that that council has quite a large amount of common good property. You said that the survey was voluntary, so that lets the council off the hook, if you like.

I do not know whether Scottish Borders Council is unusual in having large tracts of agricultural land that is leased to tenants—I can point to Selkirk and, I think, Hawick. Has the Government thought about any implications for agricultural tenants?
Simon Stockwell: Nobody has raised with us agricultural tenancies in the common good context. The survey took place some time ago, when the previous bill was considered by the previous Justice Committee, and we chased up the local authorities that did not respond, but we can certainly chase them up again to see whether we can have to hand any more information that would help this committee. If you think that issues could arise in Scottish Borders Council’s area, we will chase up that council after the meeting.

Jim Hume: There will be issues, so that would be appreciated.

Margaret McDougall: Perhaps I should declare an interest as well, as I am still a councillor in North Ayrshire, where there are common good assets and a common good fund. I am disappointed that the council did not respond.

Simon Stockwell: North Ayrshire is also one of the areas in which there are ultra-long leases.

Margaret McDougall: I will look into the matter.

What would happen if a local authority retrospectively discovered that it had common good land or some common good assets? Registers are not always up to date and people do not always have access to the records that they should have.

Simon Stockwell: I know that local authorities are constantly trying to improve their common good registers. Audit Scotland and others have put pressure on them to try to update them. To reflect the situation that you raise, when we write to local authorities—if and when the bill is passed—we will have to include something to say that, if an authority discovers that a piece of land was, after all, part of its common good assets, it should look to see whether the compensation can be moved into its common good fund. We would also emphasise, again, that authorities should be making every effort to try to identify common good property. That is in line with the general guidance that they are getting at the moment.

Annabelle Ewing: Concerns have been raised about the fact that, although Peterhead harbour has been excluded from the revised bill, common good property has not been. Will you comment on the reasoning behind that? I am not suggesting that the two are analogous but it would be good to know the reasons behind the non-exclusion of common good property from the revised bill.

Simon Stockwell: The point that was raised by Peterhead harbour was reflected in representations that agents acting for the harbour made to the previous Justice Committee. They said that, if the bill proceeded without an exemption for harbours, that could have an adverse impact on the operation of the harbour at Peterhead, because the south breakwater has been leased for 999 years.

One of the questions that we considered in that regard was whether the leasehold conditions could convert under the bill as well. The arrangements at Peterhead are that, although the breakwater has been leased for 999 years, there are leasehold conditions that allow the harbour authority to continue to exercise functions in relation to the south breakwater, to ensure that the harbour can continue to operate safely.

When we considered the issue, we thought that it would be difficult to ensure that the leasehold conditions could convert under the bill, and we also asked some other ports and harbour bodies whether they had particular concerns about the potential implications of the bill for the operation of ports and harbours. Most of them said that they did not, but one said that they did. It could not point to any particular examples, other than Peterhead, but it thought that the issue that Peterhead raised about the possibility that the leasehold conditions might not be able to convert might have negative implications.

The conclusion was that, as we did not want the bill to impact adversely on the operation of ports and harbours, we would exempt harbour authorities. Of course, the exemption is not just for Peterhead; it is for harbours generally.

Unlike the situation with Peterhead, where concerns were raised about the fact that the harbour might not be able to continue to operate, the arguments that were made with regard to common good property and other areas that have not been exempted from the bill did not concern whether the land could continue to be used; they were more to do with the benefits to the people of the burgh.

Margaret McDougall: Many local authorities are trustees for funds. What happens in that respect? Will they be bound by the conditions of the trusts? I imagine that they would be, but what happens if land is involved in that?

Graham Fisher (Scottish Government): Do you mean land that is owned by the local authority?

Margaret McDougall: No, the land could be owned by a trust, but managed by the local authority.

10:45

Simon Stockwell: An arm’s-length trust?

Margaret McDougall: No. If somebody has left land to the local community and it is managed by the local authority, any leases on that land are managed through the local authority.
Graham Fisher: The bill generally affects the owner of the land that is let when the leasehold interest converts into ownership in the hands of the tenants. Generally, that owner will be affected in the same way as any other landlord.

Simon Stockwell: As a principle, if local authorities get any compensation as a result of common good land converting to ownership, we would say that they should allocate that to the common good fund. Your point is that, if a local authority owns land in trust that would convert to ownership under the bill, the compensation should benefit the people of the burgh or local authority rather than go into the local authority’s coffers. We can certainly reflect on that point when we write to local authorities once the bill is enacted. We were initially talking about common good. If there are other scenarios that are similar to common good but are not called common good—if land is held in trust in a similar arrangement—we could reflect that in the advice that we give local authorities.

Margaret McDougall: There are bequeathments that are set up as trusts.

Simon Stockwell: Yes. We could reflect that when we give advice to local authorities after the bill is enacted.

Claudia Beamish: Good morning. I have a question on a different point. Is there any concern about the preservation of sporting rights under section 8 when a tenancy moves to ownership? For instance, if there was a change of use of the land and the person who took on the ownership did not want the former landlord to have the right to come on to the land, what would happen?

Simon Stockwell: That point has not been raised specifically with us during the consultation or the scrutiny of the bill. I thought that we might get more comments about the preservation of sporting rights, but we have not had any so far. If a new owner discovered that someone had sporting rights and they were unhappy about that, we would probably have to leave it up to a private arrangement between the new owner and the holder of the sporting rights—for example, if the new owner wanted to buy out the holder of the sporting rights. The principle behind the bill is that a landlord who has sporting rights at the moment will be allowed to maintain those sporting rights—his or her rights will continue to be protected under the bill. If somebody was unhappy with that, they would have to buy out the holder of the sporting rights through a private agreement.

Annabelle Ewing: I have some more technical questions further to concerns that have been raised by different bodies. The first concerns the need to preserve the standard security on conversion. From a very legalistic perspective, concern has been expressed that the language in section 6 may not be sufficiently clear. Will you comment on that?

Simon Stockwell: Yes. Over the past couple of days, we have looked at the points that have been raised by the various consultees. I have a lawyer—Graham Fisher—sitting to my left, so I hope that I get this right. We think that the answer to the point that was raised by Morton Fraser is that the relevant provision is in section 6(2) rather than sections 6(3) and 6(4). Section 6(2) states:

“The converted land is subject to any subordinate real rights to which the qualifying lease was, immediately before the appointed day, subject.”

That is certainly the intention. If the tenant is granted a standard security, it should transfer to his new right of ownership under section 6(2).

The point has also been raised that the landlord might have granted a standard security. What would happen to that, come the appointed day? In most cases, the landlord’s interest in these leases will be very low. The typical rental for an ultra-long lease, as shown by the survey that was carried out by the Scottish Law Commission, is less than £5 a year, on which the landlord would probably not be able to raise much of a loan or advance. We have already excluded from the bill cases in which the landlord has a significant interest by excluding leases for which the rental is more than £100 a year. We do not think that there is an issue. It has been suggested that we should write to the British Bankers Association just to check that it is content. We will do that later this week.

Annabelle Ewing: I have another technical question on the concerns that consultees have raised about variable rent. There is a question in the submissions about whether there is sufficient clarity on how variable rent is to be calculated so that, where appropriate, the figure goes beyond the £100 threshold and therefore outwith the scope of the bill. It would be helpful if you could clarify the position.

Simon Stockwell: We think that we are okay on that and that there is sufficient clarity. The interpretation that Brodies gave of the provision is in line with ours. However, we will double-check that and make certain that the provision captures what it needs to capture. There is an important point. The main point that Brodies and others have raised on the £100 exemption is that we need to be absolutely certain that, if there are variable rentals as a result of turnover, the leases can be exempted when the landlord has a significant interest. As I said, we think that we have got it right, but we will double-check that and report back to the committee.

Annabelle Ewing: I have one final technical point, which I think was raised by the Faculty of Advocates. The faculty is concerned that certain
time limits will be prescribed by way of subordinate legislation, after the bill is passed, and suggests that it might be more helpful to have the provisions set forth in the bill. Will you comment on that?

Simon Stockwell: To be honest, we think the reverse of that. Our view tends to be that it would be better to consult on time limits so that everybody can see the proposals and has a chance to comment on them. There is a lot of technical detail there. Before we came into the meeting, we were discussing what would happen if, for example, a case is appealed. It might be difficult to lay down precise provisions in the primary legislation.

We will have to consult on various issues, anyway, once the bill is passed, such as the draft forms of notices. It will take time to implement the bill. Therefore, rather than put something in the bill now that we might need to change later if we discover that people have different views from ours, it is preferable to leave the bill as it is and to carry out a consultation on the time limits so that the key bodies such as the Faculty of Advocates, the Law Society of Scotland and the keeper can comment on what is proposed.

The Convener: I have a question on cumulo rental, which is mentioned in paragraph 7 of your submission. Can you give us more detail on the number of cases in which a single rent is payable for two or more leases? Are there many such cases and, if so, are they the kind of thing that should get in the way of attempts to deal with rentals that are under £100?

Simon Stockwell: There are quite a lot of cumulo rentals. The Scottish Law Commission report gives a figure but, unfortunately, I cannot remember it off the top of my head. However, they are common in traditional ultra-long leases, so they will be a feature.

On the second part of the question, we suspect that the provisions will not have much direct impact because, in the vast majority of cases, rentals in ultra-long leases, particularly traditional ultra-long leases, are very low. Once the cumulo rental has been allocated, we will probably find that, in many cases, we are talking about rental of well under £5 a year, so there will not be much of a practical impact. However, this time round, we amended the previous bill because it is at least theoretically possible that there could be cumulo rental that, once it has been allocated, comes to more than £100. Those landlords would still have a legitimate interest in the property and should be given the right to seek an exemption in the same way as other landlords with a rental of more than £100. In practice, we do not think that there will be many such cases, given that, in traditional ultra-long leases, the rental is very low.

The Convener: Do members have any further questions for the bill team?

Annabelle Ewing: I have a final question about a point that the Scottish Law Agents Society raised in its submission. The society felt that it would be useful for the committee to explore European convention on human rights compliance. I note that the Scottish Government feels confident that there is no compliance issue, but will you comment on that, in the light of the fact that the bill interferes in principle with property rights, albeit that the tangible value that is involved seems to be low?

Simon Stockwell: We provide some information on ECHR compliance in one of the accompanying documents, which summarises our in-house analysis. The Scottish Law Commission considered ECHR compliance when it produced its report and we have had subsequently to look at it as well because some of the issues that have arisen have led to an increased number of exemptions in the bill, which raises the question whether we can justify an exemption for lease X but not for lease Y. We have gone into that in some detail and, because we have come up with justifications for the various exemptions that we have added, we have concluded that we are in line with the ECHR.

On the ECHR generally, the issue is not just about converting the leases to ownership but about providing appropriate compensation and additional payments to landlords. The main compensation is likely to come from the rental; in other words, from asking the landlord how much rent they are getting at the moment, which converts to a capital sum. However, there is also potential for additional payments if a landlord thinks that other rights would disappear. As we mentioned earlier, in the new world there will also be the right for landlords to convert certain things into burdens in the title deeds, including sporting rights.

We have gone through the ECHR implications in some detail. To be honest, it has been the bane of my life at times. Given the various provisions in the bill—the fact that there is compensation, potential for additional payments and the right to preserve certain rights—we think that the bill complies with the ECHR.

Margaret McDougall: You mentioned “certain rights”. Can you give me an example?

Simon Stockwell: Sporting rights are one example; those rights could convert under the bill.

Margaret McDougall: Do you mean sporting as in gaming or fishing?

Simon Stockwell: Yes. I mean fishing rights or the right to shoot certain types of bird.
Margaret McDougall: What about rights of way?

Simon Stockwell: They, too, could potentially convert.

The Convener: There are no further comments from members. We have—remarkably—taken less time than I had expected. It is an interesting bill for the committee, and we thank the bill team for its input. I am sure that our witnesses at the next two meetings will come up with many more conundrums for us to juggle with.
Supplementary written evidence from the Scottish Government Bill team

LONG LEASES (SCOTLAND) BILL: LOCAL AUTHORITIES: COMMON GOOD

Following the evidence session attended by officials on 08 February 2012 we issued further letters to the outstanding local authorities who had not responded to our survey on the number of ultralong leases held on the Common Good.

The letters issued on 15 February 2012 to the following Councils requested a response by 29 February 2012:-

- Angus
- Comhairle nan Eilean Siar
- Dumfries and Galloway
- Moray
- North Ayrshire
- Perth & Kinross
- Scottish Borders
- South Ayrshire

The following Councils responded:

Dumfries and Galloway

“*I would advise that the only Common Good property which the Council is aware of that is let on a long lease is land at Sanquhar leased via the McNab leases to the Buccleuch Estates.*

The local authority/the common good fund are the landlord. There were 3 leases created for 999 years in 1805, 1806 and 1808. They were originally with Mr. Archibald McNab but the tenant’s interest was acquired by the Duke of Buccleuch and Queensberry in 1821. The total rent for the 3 leases is £18.50.”

Moray Council

“We don’t have any such leases.”

North Ayrshire Council

“I can confirm that our records show that none of the assets held on the various town Common Goods within North Ayrshire are Long Leases.”
Perth & Kinross Council

“We can confirm that Perth and Kinross Council has no common good land which has been the subject of an ultra-long lease and which, therefore, might convert to ownership under the Bill.”

A reminder to the remaining four outstanding Local Authorities was issued on Monday 27 February 2012 again to respond by 29 February

Angus

Comhairle nan Eilean Siar

Scottish Borders

South Ayrshire

We have now received all remaining responses:

Angus Council

“We are not aware of any leases of common good or other property where Angus Council has granted ultra-long leases (i.e. in excess of 175 years).”

Scottish Borders Council

“With reference to your letter of the 13th February I can confirm that the Council’s records show that its common good does not have any ultra long leases (over 175 years with over 100 years unexpired). Consequently it seems that the common good in the Scottish Borders would be unaffected by the bill.”

Comhairle nan Eilean Siar

“I have ascertained that the Comhairle’s position is that there is no Common Good land in Na h-Eileanan an lár (the Western Isles) which is subject to ultra-long lease. Quite simply, this is not a form of tenure which was ever commonly used in these islands, and has not been utilised in the case of any Common Good land.”

South Ayrshire

“I refer to the attached request and would advise that we are not yet able to complete a detailed analysis of all Common Good assets and titles.

It is our view, however, that we are unlikely to identify any leases which would meet the criteria you have established.”
The number of properties/land identified by all Councils is eight. This figure takes into account the four already reported; one in Aberdeenshire, one in Edinburgh and two in Glasgow. This figure had been five but Fife Council has recently advised that the property they had identified is not subject to an ultra long lease.

Glasgow City Council when providing evidence to the Committee on 29 February stated that they had identified two ground leases on common good, Rouken Glen Park and Balloch Country Park. This is in addition to the two areas of parkland already identified at Pollock Park. Glasgow has confirmed today that Rouken Glen Park lease is not subject to an ultra long lease. Therefore Glasgow’s revised figure stands at three. The additional one identified by Glasgow along with the three identified by Dumfries & Galloway to the four previously identified gives a total of eight.

Further supplementary evidence from the Bill Team, March 5

Further to my letter dated 02 March I can confirm that I have received confirmation from South Ayrshire Council that they have found an ultra-long lease held on the Common Good.

It relates part of Rozelle House, Monument Road, Ayr.

The lease is from Ayr Common Good to the Maclaurin Trust for a period of 999 years from 15th May 1975.

I can confirm that the current number of leases identified by all 32 local authorities to be nine.
The Convener: Agenda item 2 is the Long Leases (Scotland) Bill. This is our second evidence session on the bill and we will hear from two panels. I welcome the first of those: Dale Strachan, a partner in Brodies LLP, and Lionel Most, a member of the conveyancing committee of the Law Society of Scotland. Good morning, gentlemen.

Lionel Most (Law Society of Scotland): Good morning.

Dale Strachan (Brodies LLP): Good morning.

The Convener: I invite committee members to ask questions.

Graeme Dey (Angus South) (SNP): Good morning, gentlemen. I wonder whether you can offer your legal opinion with regard to common good. Do you accept that there are likely to be—as the evidence from local authorities suggests—only four common good cases covered by the bill? I seek your opinion because we were told in evidence last week that neither the Government nor Registers of Scotland can substantiate that one way or the other.

Dale Strachan: I am not a specialist in common good but have encountered it on many occasions. Common good law is one of the most confused laws in Scotland and there is a very low level of awareness of it in the profession, never mind among local authorities. It is extremely difficult to interrogate, and I cannot answer your question any better than those who are better placed will have tried to do before.

There are well-publicised examples of subject matter in dispute, and it would take much greater research to give an honest answer to your question. Princes mall, which was formerly known as Waverley market, is a case in point. It would be unwise of me to reach any rapid conclusion on that. Much historical evidence will require to be carefully analysed. At the moment, evidence tends to point in the direction of it being common good; I will say no more than that.

Lionel Most: Could you clarify your question? Are you seeking to clarify whether there is a great deal of common good in Scotland?

Graeme Dey: No, my question is specific to the bill. The responses to the survey that the bill team carried out with local authorities suggest that the bill might cover only four cases in the whole of Scotland. I am simply looking for your opinion on whether that is an accurate number or whether
there could be more. Last week, we received evidence that there is no way for the Government to verify that.

**Lionel Most:** First, I will couch my answer by saying that the Law Society of Scotland’s conveyancing committee does not give legal advice. From my 35 years of experience as a commercial property legal practitioner, I find that statement to be quite surprising. I would have thought that there are a lot more than four cases. I am not an expert or specialist in the common good, and I have not practised in every geographical area of Scotland, but I have come across three or four situations in which we thought that the land was common good.

**Dale Strachan:** I believed that your question was purely about land that is likely to be caught by the conversion. That is very hard. According to the only available textbook on common good, which I am sure that some of you are familiar with, one prominent city on the east coast of Scotland reported that it held no common good, which is less than believable.

**The Convener:** Are there any further questions on common good?

**Jim Hume (South Scotland) (LD):** In the Scottish Borders in particular, some common good land is contracted out to tenant farmers. From your experience and expertise, do you think that the bill will affect in any way tenants who are in such a situation in the Borders?

**Dale Strachan:** I do not think that either of us could claim to be an expert on common good, particularly in rural property. I should have explained that I am a commercial property lawyer and do not hold myself up as a specialist in rural or residential property. Beyond that which I have read in the papers that have been given to the committee already, I cannot add anything but, on the basis that landholdings evolved through burghs historically, it would not surprise me to find that quite extensive tracts of land are potentially common good but have never been investigated properly as such.

**Lionel Most:** If I understood the question properly, I would have thought that the bill will apply to common good in the same way as it will apply to any other tract of land. In the scenario that you propose, I expect that it will apply to the farmland in question.

**Margaret McDougall (West Scotland) (Lab):** Good morning, gentlemen. Perhaps I should establish with you that I am still a councillor for North Ayrshire Council.

You have both said that you do not have a great deal of expertise in common good. Council registers of common good land and assets are not always up to date, so what will happen in relation to the bill if councils discover retrospectively that they have common good land?

**Dale Strachan:** It is worth clarifying that the registers of common good land that are held by public authorities are not conclusive about the common good that they hold. They are merely the administrative registers that they have maintained to date. Some may be haphazard, some may not be being maintained at present, while others may be being kept more assiduously. I do not think that the specific allocation for common good has been given high priority by some authorities, particularly after two batches of local government reorganisation, but the law remains the law until it is changed.

**Margaret McDougall:** What would happen if it was discovered retrospectively?

**Dale Strachan:** The common good would not have been recharacterised by neglect or misunderstanding. A mixture of legal and financial analysis would need to be carried out. Ultimately, what matters is that the common good account, whether that be assets or the cash equivalent, is restored.

**Lionel Most:** Dale Strachan makes a good point about land and the cash equivalent. I am not an expert on common good either—like Dale, I am a commercial property lawyer. I have been on the Law Society of Scotland’s conveyancing committee for 20-odd years, and I have been in private practice, dealing with land—I first did residential work, then commercial work and have done some rural work—over the past 35 years. That is my background.

My understanding is that the common good fund can apply to both land and non-land. I am not an expert, but I would have thought from first principles that if the bill applies to common good land, the idea that compensation would go into the common good fund is perfectly consistent with it. Given the way in which the compensation provisions are drafted in the bill, I would not have thought that, just because land happens to be in the common good fund, that is inconsistent with putting the proceeds of that land into the fund.

**The Convener:** Thank you, gentlemen. We will address this point with other witnesses in due course, but your help on the common good background is useful.

**John Lamont (Ettrick, Roxburgh and Berwickshire) (Con):** I remind members of my entry in the register of members’ interests. I used to be an employee of Brodies before I was elected—I like to think that I am now a reformed character.
I want to focus on Brodies’ written evidence, particularly its concern that commercial leases could be caught by the bill because their annual rent is less than £100 per annum and any variable element in relation to a share of turnover or rents is not taken into account. Has the revised version of the bill helped address your concerns?

Dale Strachan: Thank you for allowing me to talk about this. I prepared a written note in advance of this meeting, highlighting my belief that the evidence given to the Justice Committee addressed the mischief, as I perceived it. By commercial leases, we mean leases on commercial terms. I would make a distinction and say that a lease on commercial terms is one for more than £100 annual rent.

My concerns, which are included in the note, have been partially addressed. My specific concern about the bill is that section 2(5) has not been disapproved from any other section. Therefore, under the remedial sections—sections 64 and 69—you are still required to disregard the variable element of rent. Although the explanatory notes clarify what the law is intended to be, that is not yet reflected in the bill. However, as I have identified, simple amendments could make it conform.

John Lamont: Your note is helpful. To clarify and for absolute certainty, you want the information from the explanatory notes to be included in the bill.

10:15

Dale Strachan: I believe that the bill requires clarification, through minor drafting changes, to give effect to the provision such that variable rents may be taken into account when assessing for the purposes of sections 64 or 69.

Annabelle Ewing (Mid Scotland and Fife) (SNP): Good morning, gentlemen. I, too, wish to record for the committee’s benefit that I have an interest as I am a current member of the Law Society of Scotland.

I will ask about the position on standard securities. Concern has been expressed, at least in one submission, from Morton Fraser, that the bill contains an ambiguity as it is not absolutely crystal clear whether standard securities, to the extent relevant, would be preserved on conversion. Can you comment on that concern?

Lionel Most: My understanding of the law as it stands is that where there is an absorption, as the keeper calls it, the standard security continues; it continues to be attached to the interest that acquires the old interest. I do not see that the bill has changed that position. If it is felt that there is a need to clarify the position, so as to maintain the status quo, the Law Society would not have an objection to that.

Dale Strachan: I, too, observed the ambiguity, but I did not make representations on it. I believed that others had.

I believe that the bill could be clarified quite simply to make clear the intent. I do not believe that the intent is clear now. Curiously, as I read the bill, it is not the qualifying lease that becomes converted land that is extinguished but merely the rights and obligations that flow from it. That may be deliberate. A standard security over a lease that is converted is therefore still there, but it has little purposive effect. If the intent is that the standard security migrates up the chain to cover the converted land, I believe that amplified wording in the bill would be desirable.

Annabelle Ewing: At the committee’s evidence session with the bill team last week, they said that they felt that it was clear that the standard security would be preserved by section 6(2), but your comments will be helpful when the committee decides what it needs to highlight in its draft report.

I have one other technical question, which is on a concern that the Faculty of Advocates raises in its written submission about the prescription of time limits. The faculty felt that it would be much more helpful to have those prescribed in the bill rather than leaving them to be implemented by the Scottish Government in subsequent measures. It would be helpful to have your comments on the concerns that the faculty raises.

Lionel Most: The Law Society’s view is generally that legislation should be as explicit as possible, so if it is possible to have something in the bill rather than in delegated legislation, we would prefer it to be in the bill. That is the stated position of the Law Society’s conveyancing committee—or property committee as it is now called.

Dale Strachan: I did not have a view, but I see no reason not to adhere to Lionel Most’s view.

John Lamont: Dundas and Wilson raised concerns about whether a lease for which the annual rent was less than £100 per annum when the lease was originally granted, but the rent was subsequently varied to be greater than £100, would qualify for automatic exemption under section 1(4)(a). Do you have an opinion about that?

Lionel Most: This is my personal view as a practitioner, but I would have thought that, where the bill says, “the annual rent payable under the lease is over £100”, ...
it must be referring to the appointed day. If the committee feels that there is a need for clarification, it could add that, but it is implied.

Dale Strachan: I refer you to section 2(2), which does not assist that conclusion because it says:

“the rent payable under a lease is the rent as set out in the lease (or as the case may be the assignation of the lease).”

The practice is that, when rents change with time, they are recorded neither in the lease nor in an assignation but in a separate memorandum. If you confine yourself to the documentation that may be referred to, you do a disservice to the legislation. A better expression is “the rent payable under the lease” because it can be assessed in whatever way is open.

John Lamont: So, although the bill talks about the lease and the assignation as the vehicles by which the lease or the rent may be varied, we should interpret that as referring to any document that has validly or legally varied the lease. Dundas and Wilson also had concerns about the fact that there are other mechanisms—more than simply an assignation or the original lease—by which a lease or rent could be varied. Is your view that we should not interpret the provision in the bill literally?

Dale Strachan: I support the view of Dundas and Wilson that, although the mechanisms for identifying the rent at review may be contained in a lease or an assignation, the evidence by which a rent may be assessed or recorded is unlikely to be recorded in those documents. It is likely to be recorded in separate documents—if, indeed, it is documented at all. There are occasions when the rent is simply agreed and paid. That may not be best practice, but it happens.

Lionel Most: Mr Strachan made a good point when he said that, for the purposes of section 2(2), the rent payable under the lease is the rent payable under the lease. That makes it clear that that is the rent, howsoever it may have been agreed. As he pointed out, it may have been agreed in a separate memorandum. It may also have been agreed in an assignation, although that is less likely in my experience. It may also still be the rent that is payable under the original lease or there may be some other kind of documentation or agreement that documents the rent.

Aileen McLeod (South Scotland) (SNP): My question revolves around a different issue: the bill’s compliance with the European convention on human rights. That matter is raised in the submission from the Scottish Law Agents Society, which has some concerns about it. The society considers that, because the bill involves varying the property rights of landlords, it could engage article 1 of protocol 1 of the ECHR. The SLAS was keen for the committee to consider that point.

We took evidence from the Scottish Government’s bill team on 8 February. The officials underlined the extent to which they had considered the ECHR implications and seemed to be content that there was no issue with compliance.

Would the witnesses like to add any comments on that?

Lionel Most: We had the same discussion in relation to the Abolition of Feudal Tenure (Scotland) Act 2000 and in relation to the variation of title conditions under the Tenements (Scotland) Act 2004. I do not consider the position with the bill to be any different. Nothing in it is materially different from the processes that took place for the previous legislation.

Dale Strachan: I am sorry, but I do not feel qualified to answer that question.

The Convener: I thank you both. I see that members have no further questions.

Gentlemen, would you like to make any general comments or points that we may have missed that are germane to the development of our discussion on the bill?

Lionel Most: My colleague from the Law Society property committee John Scott sent in a written submission previously on the definition of pipes and drains, on substations and public facilities and on the ultimate right to go to the Lands Tribunal for Scotland. We would be grateful if the committee would consider Mr Scott’s points.

Dale Strachan: I have two comments, convener, since you ask.

First, where the bill provides for an amount of compensation to be agreed between the parties or, failing that, to be determined on application by the Lands Tribunal, I have concerns that the tribunal is given no guidance about the basis on which it is to assess the compensation payable. The Lands Tribunal may have members who are qualified in property valuation, but I am unaware at present of what guidance it would seek from this legislation. It is a key feature of the legislation—and possibly also of ECHR compliance—that appropriate compensation is paid.

Secondly, I was slightly concerned to read in recent evidence to the committee that Registers of Scotland does not intend to update the registers. It is a key feature of Scottish property law that the registers may be relied on for accuracy and correctness in relation to all matters disclosed. Although I may be straying from the agenda here, I urge the committee to look again at a system
whereby those registers would not record the true position.

The Convener: Thank you very much for those comments. We will have an opportunity to ask further witnesses and the minister about those issues.

Annabelle Ewing: On Mr Strachan’s last point about registration, what does he advocate should be included in the bill to deal with that concern?

Dale Strachan: I may regret having raised that point. If it is a matter of budgetary restraint, it would be unfortunate if that was to be the guiding principle for reform. The bill involves quite a serious reform of land law; we are talking about cutting a very long story short with regard to very long leases.

I would have thought that Registers of Scotland would wish its registers to reflect an accurate position. This legislation was not invited by Registers of Scotland or by those who hold the interests. It seems that either matters could be rectified on the keeper’s own initiative over time and with appropriate budgeting, or there could be a mechanism whereby the registers could be corrected on application for a fee. Forgive me—I have not examined the issue in detail; I was not anticipating that question.

Annabelle Ewing: Thank you. That is an important point. Is it your understanding—I am asking both of you gentlemen—from your practical experience over the years that a considerable amount of land will be affected by the bill with regard to the consequential issue of whether the registers show the true picture?

10:30

Lionel Most: I do not think that a material amount of land will be involved. From our point of view, there are other pieces of legislation that can transmit land from one party to another in Scotland—for example, in relation to compulsory purchase and so on. There is a precedent in those pieces of legislation, and the bill can provide for an obligation to register or an obligation on the keeper on application to register. The registers are not always up to date. For example, the keeper does not know when someone dies—it is up to the beneficiary to register a notice of title or whatever. There is a precedent for being able to update the register in that respect. It may be appropriate to have something in the bill—I have not checked; there may already be something there—to allow the registers to be updated at the request of the tenant who acquires the land or, indeed, the heritable creditor in the case of a standard security.

Dale Strachan: The registers are public registers of land and are held in high esteem on account of their accuracy. It would be unfortunate to compromise that by leaving unfinished business in this matter.

The Convener: It would be interesting to see the map-based register cover all the land of Scotland. There are far greater tracts that have never been registered except in the register of sasines, which may well be the bodies of land that have the long leases on them. Perhaps the transfer of long leases under the bill might be a means to getting further registration.

Graeme Dey: On the subject of registration, would you gentlemen consider it wise to pursue the creation of a detailed register of common good assets throughout the country?

Lionel Most: That might be difficult, given that we are not even sure what common good is. That would need to be looked into further. It has been apparent from this discussion that there is concern about common good generally, which may be the subject of a whole discussion in itself. Perhaps this is not the forum to discuss that issue.

Dale Strachan: It seems to me that common good has been an issue for a few hundred years and is a matter that is not going to resolve itself. If it were to receive the attentions of the Parliament, that may be a favour to all concerned with it.

The Convener: Thank you for those remarks, which we will take on board in the context of the bill and beyond. Our report will reflect the evidence that we have heard. Thank you both for your contributions, which have been most helpful. The subject is a vexed area, given that it involves common good and many other things, but we hope that the bill will simplify the law in due course.

10:33

Meeting suspended.

10:35

On resuming—

The Convener: We recommence with our second panel. I welcome Richard Blake, legal adviser to Scottish Land and Estates Ltd, and Alan Cook, the chair of the commercial committee of the Scottish Property Federation. Good morning.

Members have an opportunity to question the witnesses. I invite those who wish to do so to indicate their desire to me.

Annabelle Ewing: Good morning, gentlemen, and thank you for coming along.
We have just taken evidence from representatives of Brodies and the Law Society of Scotland. I asked a few technical questions that reflected concerns that have been raised within the legal profession. I appreciate that it may not be within your bailiwick to comment, but you may wish to do so nevertheless. There is concern about whether the language of the bill is clear and unambiguous with respect to the need to preserve the continuity of any relevant standard security on conversion. Do you have any comments to make about that?

Alan Cook (Scottish Property Federation): Good morning.

I have just a brief comment. As I understand it, section 6(2) of the bill is intended to preserve the standard security interest over the leasehold interest so that it will continue to exist as a standard security interest over the converted ownership interest. I guess that you have to understand the language of that subsection to know that that is its purpose, as it does not use the phrase “standard security”. The very fact that we are having a discussion about how solidly the bill picks up the standard securities point suggests that it could be strengthened by making it clear, for the avoidance of any doubt, that that point is covered by section 6(2).

Richard Blake (Scottish Land and Estates Ltd): I have no comment, other than to say that I agree with the comments that were made in the previous evidence session. I have no particular experience of the matter.

The Convener: Do members have further questions on that or any other point?

Graeme Dey: I have a brief question, which, again, you may feel unable to answer. From your experience, do you believe the evidence from local authorities that suggests that, across the whole of Scotland, the number of common good cases that the bill will cover might be in single figures?

Richard Blake: I have limited experience in common good land. Before we sat down, I explained to Alan Cook that I practised as a solicitor in Perth before I took up my current position. Perth has quite a lot of common good land that comes from the time of King James VI, for which the records are reasonably good. As it happened, that land included the salmon fishings on the River Tay. I was involved in acting for a trust that wanted to buy out the netting rights. We took a long lease but, from memory, it was for only 99 years. I think that we did that simply for convenience.

I have no experience to tell me whether more than four cases will be covered by the bill but, given that much of this is lost in the mists of time, I suspect that four seems a very small number.

Alan Cook: I agree that four seems a very small number. At the same time, I doubt that the actual number is terribly big. We are not talking about the extent of common good land in Scotland; we are talking about the extent of common good land in Scotland that is held under a lease of more than 175 years and where the rent is at the relevant level. If we think about the issue in that context, it seems that we are talking about quite a small subset, even of common good land.

John Lamont: I put this question to the previous panel. Concerns have been expressed about leases where the annual rent is less than £100 but there are commercial terms in so far as there is a variable aspect. Can the revised bill and guidance notes address those concerns? Do you have anything to add to what the previous witnesses said?

Richard Blake: I have nothing to add. We rarely get involved in commercial property leases. From our point of view, the bill reflects the concern that we expressed in evidence when the session 3 bill was being considered in detail. We are comfortable with the provisions, but I have no experience on the commercial nature of leases.

Alan Cook: The SPF endorses the comments that Brodies made, and I am aware of the point that Dundas and Wilson made about section 2. There is an opportunity, as the bill goes through the Parliament, to ensure that everyone is comfortable with the language that is used in the legislation that is enacted, so it would be useful if the points that have been made were picked up.

Aileen McLeod: I, too, want to ask a question that I put to the previous panel. Are you concerned about the bill’s compliance with ECHR?

Alan Cook: I profess no particular expertise in ECHR compliance with regard to legislation. I tend to agree with what Lionel Most said on behalf of the Law Society. There does not seem to be anything in the bill that is particularly different from what has been in previous legislation, which has not given rise to sustained concern about ECHR compliance.

Richard Blake: From the rural property angle, we have no particular concerns, because compensation is dealt with, as is the right to preserve the rights to game or fishing, if there are such. I think that I said in evidence on the session 3 bill that the issue was not hugely significant. The ability to convert important lease conditions, whatever they are, into servitudes of some sort covers most of the bases for rural property owners.

I am not an expert in ECHR, but I think that the committee knows that we would be jumping up and down if we thought that there was an ECHR...
issue for rural landowners. I do not think that there is a particular issue.

The Convener: I could not have put it better myself.

John Lamont: I think that Mr Strachan, from Brodies, expressed concern about the lack of guidance on how compensation will be worked out. Do the witnesses share his concern?

Richard Blake: Clarity is the best way forward, and guidance, if it can be given, certainly makes it easier for the professions to get to grips with the situation at an early stage.

Alan Cook: The SPF agrees.

Annabelle Ewing: Mr Strachan also expressed concern about registration potentially not being taken up to the full, through the bill being used to facilitate that, such that the land register will not show the true picture of landholding in Scotland.

For various reasons, that issue is of interest to many committee members. The committee will have to reflect on whether to suggest that the registration provisions be strengthened, and I wonder whether either of our witnesses will comment on the desire to make the land register of Scotland reflect landholdings of whatever kind relevant to registration. The committee might be well disposed to considering such a proposal as it reflects on the bill.

10:45

Richard Blake: That is a very valid point. I recently gave evidence on the Land Registration (Scotland) Bill; indeed, I believe that the committee scrutinising it is just about to consider its stage 1 report. That bill contains a lot of detail on completing the register and under one particular section—which I might well have flagged up to this committee during its consideration of the Agricultural Holdings (Amendment) (Scotland) Bill—any paperwork to do with a registered lease must be put on the land register. I do not think that that sits comfortably with your point about a possible lack of facility to register converted leases. If Government policy is to try to ensure that land registration covers the whole of Scotland, which is something that we support, this would seem to be a very good opportunity to catch some land that might otherwise stay under the same ownership for a long enough time before it triggered first registration. I certainly think that the committee should consider the move that has been suggested.

Alan Cook: I forget where it was, but I saw in the papers for this meeting that the Registers of Scotland was changing its view on whether it would proactively update the register. I might be surmising unfairly, but such a move seems to be budget driven.

There are examples in which, as a result of other legislation, the registers do not reflect the exact legal position. Although the Abolition of Feudal Tenure etc (Scotland) Act 2000 abolished feudal interests and superiorities, the registers still contain references to title conditions that refer to superiors and lawyers have to use the legislation to determine the extent to which those title conditions remain relevant. The fact is that the register is not an accurate reflection of existing title conditions.

However, despite those precedents for mismatches between the register and legal reality, the SPF supports the general policy objective of completing the land register. If the Long Leases (Scotland) Bill presents another opportunity to take a step towards that and if the objective can be met—indeed, it seems that that is the case, given that the Registers of Scotland was ready to undertake a process in relation to it—we will support it. However, policy on how the Registers of Scotland should approach these matters should be driven by the Government.

Richard Blake: Speaking as a lawyer, I can perhaps clarify Alan Cook’s point. What the committee is driving at here is to get the land registered rather than to ensure that title conditions on the register are 100 per cent up to date following changes in legislation. I think that there is a fundamental difference in that respect.

Claudia Beamish (South Scotland) (Lab): I simply seek some clarification and assurance that neither witness has any concerns about section 8, which relates to sporting rights.

Richard Blake: My understanding is that section 8 is pretty consistent with provisions in the preceding Abolition of Feudal Tenure etc (Scotland) Act 2000 and, in so far as that is the case, it will be very helpful. As I might have mentioned earlier—and as I certainly mentioned when I gave evidence on the session 3 Long Leases (Scotland) Bill—I do not think that it will be a huge issue. In my practising career, I have not come across any examples of long leases in which sporting rights have been reserved.

Alan Cook: The SPF has no view on the issue.

Margaret McDougall: This question is for my own personal information. I hate to raise again the subject of common good land, but does the land register cover such land or is there a separate register for that?

Richard Blake: In view of the previous panel’s discussion of whether there would be any benefit in considering a register of common good, I rather assume that there is no public register of common
good land at the moment. However, I believe that the local authorities are meant to have a register of such land.

**The Convener:** Members have no further questions. If the witnesses think that we have missed anything about the bill, we will be glad to hear their comments just now.

As neither Mr Cook nor Mr Blake has any further comment to make, I thank them for their evidence. We are proceeding at a good pace and I believe that sufficient comments have been made to extend our consideration of the bill and deal with the next group of witnesses.

I suspend the meeting briefly to allow the witnesses to leave.

10:51

*Meeting suspended.*
Decision on Taking Business in Private

10:01

The Convener: Under agenda item 2, I seek the committee’s agreement to take in private item 5 and future consideration of evidence on the Long Leases (Scotland) Bill. Are we agreed?

Members indicated agreement.

Long Leases (Scotland) Bill: Stage 1

The Convener: Agenda item 3 is our third evidence session on the Long Leases (Scotland) Bill. We will hear from two panels. Following today’s meeting, we will conclude our evidence sessions on the bill by hearing from the minister at our meeting on 7 March.

I welcome the first witness, Andy Wightman, who is an independent researcher. Good morning, Mr Wightman.

Andy Wightman: Good morning.

The Convener: I invite members to ask questions.

Annabelle Ewing (Mid Scotland and Fife) (SNP): I suggest that we invite Mr Wightman to make a few introductory remarks on the backdrop to this evidence session and on where we are with the Long Leases (Scotland) Bill in the Parliament.

The Convener: We can easily do that. Mr Wightman is looking at a particular aspect of the bill with regard to the situation in Edinburgh. If he wishes to make a short introductory statement, we would be happy for him to do so.

Andy Wightman: I do not have much to say, other than that I did not submit written evidence to this committee because the invitation was extended, as I understand it, merely to look at changes to the bill as it has been presented this session as opposed to the bill that was introduced in the previous session. My particular interest is in the common good, and no changes have been made in that regard, so I did not submit any written evidence.

I stand by my previous evidence, which I am sure members have read, and I have some observations about the representations that have been made to the committee.

The Convener: Thank you. I will kick off by asking you to tell us why you think that the Waverley market area is part of the common good of Edinburgh.

Andy Wightman: Specifically why I think that the Waverley market is part of the common good of Edinburgh is a long story and perhaps need not detain the committee. I will cite just two sources of evidence, one of which is extensive documentation from the early 1980s, when the deal over the development of the shopping centre that stands there was being negotiated. I have a letter here from the council’s director of finance, for example. There is extensive written evidence and there are legal views on the fact that the Waverley market was part of the common good
and that it had long been accepted as common good.

The other straightforward evidence that runs counter to the council’s view that Waverley market disappeared in 1938 is section 70 of the Edinburgh Corporation Order Confirmation Act 1950, which states:

“the Corporation may as part of the common good erect and maintain new buildings on the site”.

In other words, there was statutory authority that it was common good land in 1950, which runs counter to the council’s view that that flew off in 1938. That view is derived from the Edinburgh Corporation Order Confirmation Act 1933, which merely says that the market was losing its market rights and functions. In other words, if a citizen of Edinburgh wished to go there and sell cabbages, they would not have the legal right to do so. That has no bearing at all on the common good status of the land.

On my wider concerns, I think that common good land should be exempted because, in general, such land is held for the common good of the citizens of burghs. In many cases, land has been leased for long periods specifically, in the view of councils, to avoid the necessity of going to court. If a council wanted to dispose of or sell common good land, that would often necessitate its going to court. In fact, if it wants to grant a long lease, that will necessitate its going to court as well, but many councils took the view that that was a route to avoiding the need to seek court approval. I should add that I think that the original deal that was done with respect to Waverley market was ultra vires. I do not think that it was legally competent.

**The Convener:** We will follow up those matters in detail. First, I will look at common good status. On page 228 of your book “The Poor Had No Lawyers”, you state:

“It was intriguing to note that, in a survey of common good assets I undertook in 2009, the City of Edinburgh Council provided me with a spreadsheet containing the details of 120 parcels of land and property in the Common Good Fund. Imagine my surprise when there, in line 95, are the words ‘Waverley Bridge—1.68 acres—value £1’. So it is part of the Common Good Fund after all! In which case, what’s happened to all the money?”

I quote that because the dispute about whether the Waverley market area is in the common good is germane to today’s hearing.

**Andy Wightman:** Yes. The council told me in 2005 and 2009 that it was part of the common good. Waverley market is specifically germane to the committee’s considerations, but there is a more general point about the common good. One of my concerns is that, in its work on the Long Leases (Scotland) Bill, the Scottish Law Commission proposed to exclude everything—there were no exceptions. That is a perfectly understandable way of proceeding. The minute one opens up consideration of any bill to people arguing for exemptions, one does not know where it will end, but I have become keener on an exemption for the common good since the Government minister in the previous session conceded that long leases of commercial properties for which the rent was more than £100 a year should be exempted. If commercial interests can successfully lobby for an exemption in their own private financial interest, I fail to understand why, where land that is held for the common good of the people is concerned, we cannot have an exemption in the public interest. We do not know how many properties would be involved: a number have been identified and although there are almost certainly far more than that, it is probable that there are not a lot.

**The Convener:** Do members wish to follow up the points that have been made?

**Annabelle Ewing:** Good morning, Mr Wightman, and thank you for coming to the meeting.

Obviously, we are dealing with a complex matter, and I expect that we will explore the Waverley market issue in detail this morning with our two panels.

I am looking at a City of Edinburgh Council position paper that says that Waverley market does not form part of the common good, which raises a big question. The City of Edinburgh Council told you in 2009 that Waverley market formed part of the common good, but it is now saying that it does not, although the council is still seeking an exemption under a mechanism that is proposed in the bill.

On common good in general, you feel that few areas of land would be affected, but if the motivation is to exclude common good land, how could that be done while factoring legal certainty into the scenario, which is the purpose of any legislation? I am sure that the committee would be interested in your thoughts on that.

**Andy Wightman:** That is a very good question, and you are correct. The bill suggests that there should be automatic extinguishment of ultra-long leases on an appointed day. It contains provisions to allow leaseholders to be exempted—or is it landlords? Forgive me. There is a procedure in the bill by which people who hold long leases—landlords or tenants—will have to identify that before the appointed day. That will be straightforward in most cases. If a landlord or tenant fails to realise that they are party to a long lease, tough.

With the common good, however, because the law is so complex, because it is of such antiquity,
and because local government records are so appalling, extinction could take place without anyone knowing that the land was common good. If the bill proceeds to become an act that exempts common good, you would need a procedure to make sure that common good is not extinguished in situations in which it was not known that a piece of land that was subject to a long lease was common good land.

In the evidence session that I attended with the previous committee, we explored the idea that, before a lease on a piece of land for which the title was held by a local authority could be subject to conversion, there would have to be a court declarator to the effect that it was not common good. That might be bit onerous—actually, it would not be onerous because local authorities do not have a lot of land under ultra-long leases. Requiring a court declarator would mean putting a little bit of a hurdle before automatic extinction in the way of those qualifying leases when the landlord was a local authority. The hurdle would be a procedure that would require a declaration that the land was not common good before the lease was extinguished.

Annabelle Ewing: Thank you for your interesting response. Would that mean flushing out of the identification of common good land in Scotland that is under a lease? The broader issue is that there is uncertainty around the extent of common good land in Scotland.

Andy Wightman: The procedure would only assist in flushing out common good land that is subject to an ultra-long lease. There are potential problems with the idea. If Parliament exempts common good land, that could cause difficulty. I can only really conceive of a process whereby the legislation would state explicitly that conversion of leases affecting properties that are held by local authorities will not take place until a certain process has been followed. That would mean that, in 100 years, we could still have common good property subject to ultra-long leases that have not converted because the process has not been followed. You would have to find some way of exempting the common good land that has been identified—the common good land that we know about—as well as the unknown common good land, I guess. I do not think that that is a particular problem. The process could be crafted in a relatively straightforward way.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I am slightly concerned that the basis of your evidence and of the discussion so far is that ascertaining what is common good land is a black-and-white affair. Is it not correct to say that, because of the difficulty of ascertaining what is common good land from title documents and other related documents, it is not always possible for a council—or anyone else, for that matter—to answer that question clearly? Is it not also the case that, through usage and the passage of time, some land that was originally common good can cease to be so?

Do you accept that analysis and that it is not always the fault of councils that they cannot determine what is common good land? Do you accept that they have had difficulties in compiling registers of common good land not because they are simply sloppy, but because it is a difficult legal task?

10:15

Andy Wightman: In many cases, councils have been sloppy, but I accept the point and agree entirely. There is no black-and-white definition of common good land. There is case law, which is relatively clear but, as evidence from throughout the country right now shows, councils can get a range of legal opinions arguing a range of conclusions on whether land is common good. That is partly a reflection of the fact that Parliament—not just this Parliament, but previous Parliaments over the decades and centuries—has failed to keep common good law under review.

At the end of the day, a declaration whether something is common good is a matter for the courts. That is why I agree that the matter is not black and white, that it is not possible simply to look at the title of a property and ascertain automatically whether it is common good, and that there would need to be some judicial process.

John Lamont: Does that not confirm my point? The fact that you argue that one must go to court for the matter to be determined suggests to me that it is not possible for Parliament or anyone else to set out a clear set of rules for ascertaining exactly what the position is. The matter must go to court for the best legal minds in the country to ascertain what the position is.

Andy Wightman: Yes, but that is what I am arguing. I do not suggest that the Long Leases (Scotland) Bill should contain a legal test for what is common good land; I suggest that it should contain a procedure whereby the courts can determine that question. I think that we are in agreement.

The Convener: Does that mean that there is no accepted procedure at present?

Andy Wightman: There are the courts. I am a citizen of Edinburgh and, if I had the money, I would go to the sheriff court and seek a declarator that Waverley market forms part of the common good. To be frank, I wish that the citizens of Edinburgh would dig into their pockets and do that.
If they had done, we might not be in this sorry impasse.

That is the procedure. One must seek a declarator.

The Convener: If we were to put something into the bill about the procedure, we would repeat the current procedure.

Andy Wightman: Well, the specific procedure that you put into the bill would be up to you. I am not legally qualified, but my understanding is that the simple and straightforward way of seeking to determine whether a piece of land is common good is to go to the court and seek a declarator from the sheriff. People who wished to do that would present their evidence as to why it was or was not common good land. They would seek answers from those who had an opposing view and the sheriff would rule.

Annabelle Ewing: I will stick with the issue of the common good but come at it from a slightly different perspective.

We took evidence on 8 February from the Scottish Government bill team. I asked why, given that a specific exemption is now provided for in respect of Peterhead harbour—for the record, I do not think that anybody contests that exemption—other exemptions are not provided for. In response, Mr Stockwell said:

“Unlike the situation with Peterhead, where concerns were raised about the fact that the harbour might not be able to continue to operate, the arguments that were made with regard to common good property and other areas that have not been exempted from the bill did not concern whether the land could continue to be used”—that was his main point. Rather,

“they were more to do with the benefits to the people of the burgh.”—[Official Report, Rural Affairs and Climate Change Committee, 8 February; c 598.]

It seems that the approach has been to consider whether the bill’s provisions would impinge upon the use of land for its intended purpose, rather than the monetary benefit that may be derived. Would you care to comment on that apparent rationale for not excluding common good land from the bill?

Andy Wightman: As I understand it, that is a rationale for excluding Peterhead harbour and other harbours, which is fair enough—I agree. The rationale for excluding common good is not based on the ability to put it to beneficial use. However, if one were to extend that to commercial leases, the same argument would apply. There is no argument for exempting commercial leases of more than £100 a year because the land cannot be put to proper use. My understanding is that that was a straightforward lobbying exercise that was successful. I do not know what the rationale for excluding such leases is, although there might be one.

To be clear, the rationale for my suggestion that we exclude common good land is that it was never intended to pass from the ownership of the burgh or council to private interests; it was let out on a lease because that was a way of getting round the legal obligation to go to court if one wanted to sell it. I argue that, even when property goes on a long lease, the council should still go to court, and there is plenty precedent for that. However, that is why that was done. The reason why I seek an exemption for common good land is to protect the public interest in that land.

Graeme Dey (Angus South) (SNP): I have a more general question. Can we take it from what you say that, although it might be desirable to have a full and accurate common good register compiled throughout Scotland, in reality, it would be impractical if not impossible to achieve that?

Andy Wightman: No—I do not think that that would be impractical or impossible to achieve.

Graeme Dey: How do you suggest that we go about doing it?

Andy Wightman: We would do it by examining the historical records, which are extensive, and identifying all the land that was acquired by burghs over the years that satisfies the common good test.

Graeme Dey: If we were to pursue that, should we leave the process to the local authorities, or should it be centrally driven?

Andy Wightman: That is an existing responsibility of local authorities, because they took over the responsibilities of the former district councils and town councils. Local authorities are under a legal obligation to secure the interests of the common good for the benefit of the residents of the burghs. They have long been under that legal obligation, but they have failed in that legal duty over the years and, as a consequence, tens of millions of pounds that belongs to the people of the burghs has been lost. Indeed, as I understand it, local authorities were meant to have compiled a list by 31 March 2009. I did a survey of that. I am afraid that I have not had time to publish the results, but I will endeavour to do so soon.

Graeme Dey: It would be useful to see the results.

The Convener: Were the remarks from the City of Edinburgh Council part of that survey?

Andy Wightman: Yes, my latest information from the City of Edinburgh Council is that the Waverley market forms part of the common good.

I should add that I have an issue with the City of Edinburgh Council’s written evidence on the bill,
which I think is germane. The council seeks to
exempt Waverley market, which I welcome, but it
has sought to do so by a request to extend the
commercial lease exemptions to long lease
situations in which a grasssum has been paid that,
if divided by the unexpired portion of the lease,
would be more than £100. As members who have
taken a close interest in the Waverley market
situation might be aware, it was originally let on a
lease to a developer who built the market. It was
then sublet to the council as part of a leaseback
and the council then did further sublets to the
shops. In 1989, a new developer came along and
acquired the main lease and the sublease.

Therefore, since 1989, the council has been left
with only the head lease, for a penny a year. That
means that, since 1989, one party has been in
possession of the main lease and the sublease.
The council’s argument is that, in this case, under
section 3(3) of the bill, the qualifying lease will be
that sublease for which there was an up-front
payment of £6 million. However, I do not think that
the council is correct in its legal understanding,
because any one party cannot simultaneously be
the landlord and tenant of the same piece of land.
That leads to the legal doctrine of confusio. The
esteemed, late, lamented Lord Hope made that
very point in a 1997 House of Lords judgment—I
have it in my possession and am happy for the
committee to see it—on Clydesdale Bank v
Davidson.

In other words, the qualifying lease for Waverley
market is not the sublease, because it has
disappeared and merged into the main lease. My
contention is that the qualifying lease for Waverley
market is the main lease for 1p a year, which,
were the provisions of the bill to remain unaltered,
would convert, according to the formula, to 40p.

John Lamont: What are your views on the
compensation provisions for common good land
under the bill? Do you think they are sufficient?
How do they fit into your analysis?

Andy Wightman: The compensation provisions
appear, in general terms, to be fair. I support the
general thrust of the bill, which is to convert long
leases. A policy decision has been made that we
do not want ultra-long leases of more than 175
years. Indeed, it is now incompetent to grant such
a lease.

Although the compensation provisions appear to
be fair, it is inevitable that, in some instances, the
relevant parties will not regard them as such. I
think not only that leases of common good land
should not be converted, but that the specific issue
of the qualifying lease for Waverley market results
in a rather odd situation whereby someone can get
their hands on part of one of Scotland’s most
valuable pieces of land for 40p.

There is no way that a bill’s compensation
provisions can be deemed fair in relation to every
single instance, because we do not know every
single instance. That would be impossible. There
will be some unfairness, no doubt.

Jim Hume (South Scotland) (LD): Good
morning. I understand your point on exempting
common good land, but there is a huge amount of
confusion about what constitutes common good
land. Many people do not know what common
good land is. Can the bill progress without a
definition?

Andy Wightman: In answer to a previous
question, I indicated that it is not for the bill to do
that. If one were to amend it and include an
exemption for common good, the phrase “common
good” would be well understood in legal terms
and the parties undertaking any proposed procedure
under the bill—councils and leaseholders—would
follow the bill’s provisions.

The definition does not need to concern the bill,
because it has changed entirely over time as a
consequence of legal judgments. You will hear
evidence later from Andrew Ferguson, who has
written a legal textbook that outlines the issue in
detail. We have 19th century and 20th century
judgments. The latest position was articulated
some years ago by a Scottish Government
minister, Tom McCabe, who said that common
good land was all land that a burgh held that has
not been acquired using statutory powers or which
it held in a special trust. That followed an opinion
of the inner house of the Court of Session by Lord
Drummond Young on Wilson v Inverclyde Council,
which, in turn, upheld an observation made by
Lord Wark in Magistrates of Bariff v Ruthin Castle.
That is the current accepted broad definition of
common good—it is everything a burgh owned
until 1975 that was not acquired using statutory
powers or held under special trust. Any declaration
in a sheriff court and any judgment in a higher
court as to whether something is or is not common
good turns on, or should turn on, those cases.

The Convener: As there are no more
questions, I thank you for coming along and for
your helpful evidence. You have opened up areas
of the bill that we must scrutinise carefully.

10:30

Meeting suspended.

10:32

On resuming—

The Convener: I welcome our second panel.
Will you introduce yourselves, for the benefit of the
committee?
Andrew Ferguson (Society of Local Authority Lawyers and Administrators in Scotland): Thanks, convener. My day job is committee manager with Fife Council; I am also president of the Society of Local Authority Lawyers and Administrators in Scotland.

Bill Miller (City of Edinburgh Council): I am property management and development manager for the City of Edinburgh Council.

Iain Strachan (City of Edinburgh Council): I am principal solicitor at City of Edinburgh Council. I head up the property and commercial law teams at the council.

Andy Young (Glasgow City Council): I am head of asset management for Glasgow City Council.


The Convener: Thank you. We will ask general questions in a minute but, first, the situation with regard to the Princes mall shopping centre is intriguing. It is contended that a sublease and lease, which appear to have been amalgamated, are central to the City of Edinburgh Council’s interpretation of the status of the land. Will Mr Strachan or Mr Miller explain the situation as the council understands it?

Iain Strachan: That is probably a question for me. Mr Wightman might have raised a particular issue to do with the legal status of the interests of the Premier Property Group, the current owner or tenant of Princes mall; there is also a separate question about the alleged common good status. Perhaps I may take the latter issue first. We gave evidence to the Justice Committee on 1 February 2011, so to some extent I will refer to that. However, the make-up of the committees has changed since then, so it might help if I explain the council’s position again.

Waverley market was initially used as the city’s fruit and vegetable market and, as such, was held on the common good account. Acts of council in 1937 and 1938, being resolutions approved at council meetings, dealt with the transfer of the fruit and vegetable market at Waverley market to a covered-in marketplace that was to be constructed at the corner of Cranston Street and East Market Street—a site that is now held on the common good account.

As has been reported in the press and mentioned in previous responses in connection with the Long Leases (Scotland) Bill, and as the council reported to its finance and resources committee in January 2008, the council’s opinion is that the transfer of the fruit and vegetable market in 1938 included the transfer of the common good status that the site held.

The transfer of the location of the market in 1938 was envisaged in the Edinburgh Corporation Order Confirmation Act 1933, which allowed the corporation to alter places at which markets were held and to establish and hold new markets. The act also allowed the corporation to alter and reconstruct Waverley market and to use it for any purpose that the corporation saw fit. If and when the market was moved to a new location, Waverley market would be freed and discharged of all market rights. Those statutory provisions were specifically referred to in the 1937 and 1938 acts of council.

As I understand it, there are even more historical byelaws of the city that enabled the corporation to regulate the operation of markets and even to transfer them to alternative sites.

Taken together, those things demonstrate the special significance that market sites had in the city at the time, and that the status of those sites was subject to the power of the then corporation to move the market sites and to use them for alternative purposes. All that happened in 1937 and 1938 was that that power was exercised. The council at the time substituted the East Market Street site for the Waverley market site and, with that, the special legal status of the market moved to the alternative site. The council’s view is that the special status that it transferred included the market’s common good status, as the market should at that time have been part of the common good. As such, Waverley market ceased to be part of the common good at the time of its transfer to East Market Street.

The correspondence to which Mr Wightman referred shows that certain council officials felt that Waverley market had common good status, but I think that that was probably just an unfortunate and confusing mistake. As Mr Wightman and others have acknowledged, common good is an obscure area of law that is not well known. There is little statutory guidance and little judicial guidance, most of which is quite old, which makes the identification of common good assets extremely difficult for lawyers, let alone non-lawyers. Awareness of the issue among the public is much less than it perhaps should be, although it is fair to say that it was a lot less a few years ago. Although one would expect that council officials in the past should have known whether an asset such as the Waverley market was held on the common good account, they may not, regrettably, have been sufficiently aware of all the facts and issues.

Section 75 of the Local Government (Scotland) Act 1973 envisages the possibility that common good land can be substituted into the common good account if another property that was held on the account comes out. In essence, that is the
council’s position. Mr Wightman referred to other acts that appeared to show that Waverley market still held common good status post-1938. Although that might be the case, I cannot recollect those particular things myself.

The Edinburgh Corporation Order Confirmation Act 1958 and the Edinburgh Corporation Order Confirmation Act 1964 specifically refer to Waverley market as a public hall that is capable of being let out and used for any purposes that the corporation sanctions, which is generally recognised as being inconsistent with common good status. Those acts make no reference to Waverley market having common good status.

Further, section 145 of the Edinburgh Corporation Order Confirmation Act 1967 provides that all the markets of Edinburgh cease to form part of the common good. It is clear that, following practical changes, the need for such markets had dramatically reduced since the 1930s. Parliament evidently felt by the late 1960s that such markets no longer merited common good status, and so removed it in 1967.

If we are incorrect, and Waverley market retained its common good status post-1938, it would seem odd that that status should remain post-1967 when all the remaining markets lost their common good status, especially given that the site in question had long since ceased to be a market.

Even if we are wrong in that, and Waverley market still had common good status post-1967, that common good status would not continue because the public has not had use of the site. As I understand it, the market closed in the late 1930s or early 1940s. The roof-level gardens were closed in the 1950s and the market was demolished in the 1970s, following which it was used as a car park until redevelopment took place. As Mr Wightman acknowledged in his evidence to the Justice Committee of 18 January last year, the loss of common good status through such non-use is also legally possible. For a number of reasons, the council does not believe that it is common good land.

I do not know whether the committee wants to reflect on that or to ask any questions but, in essence, that is the council’s position. Any common good status that the site had was transferred to East Market Street, so it is no longer part of the common good account.

The Convener: The first thing that we want to establish is whether it is your understanding that the purpose for which land is used is the reason for its being deemed common good land or whether, if land is common good land, it does not matter whether it is used for a particular purpose — in other words, markets can be transferred from one place to another, but that does not alter the status of the land from which they are removed.

Iain Strachan: As I understand it, such transfers can alter the status of the land, but I would defer to Andrew Ferguson’s legal analysis of common good law.

The Convener: I am interested in your analysis of it, first.

Iain Strachan: As I understand it, if a function that could be said to give land common good status is transferred elsewhere, there should be no reason why the land where that function was originally carried out should continue to have common good status. In addition, if land is used by the public for a particular function and then it is no longer used by the public for a long period of time, there is no legal reason for it to retain common good status. In practical terms, why should it? We cannot have land that is sterilised and which cannot be used for anything else when its original purpose no longer applies. I believe that there is case law to that effect.

The Convener: You are telling me that you think that the use of land that is deemed to be common good land could change —

Iain Strachan: Yes.

The Convener: You are suggesting that, because of such a change, the land’s common good status could be removed and that the council would not have an interest in ensuring that it was still a part of the common good of Edinburgh.

Iain Strachan: As I understand it, for a site — of a market, say — to lose its common good status through non-use, there would have to be a fairly long period of time over which it was not put to that use. It is not something that would happen overnight. It is probably fair to say that, for the most part, such instances are quite historical. When that happened, people were probably a lot less aware of the issues.

You are right that the council is a custodian of the common good, so we should have a good handle on our common good assets and be aware of all the issues, but one of the difficulties of common good law is that the status of a site can change over time, which means that what is common good land at any given moment is almost like a snapshot. There are some black-and-white cases. The Meadows and Princes Street gardens clearly have common good status. I am sure that there are plenty of other examples around the country but, unfortunately, we operate in large shades of grey the majority of the time, which means that things are not so cut and dried.

The Convener: You say that you operate in “shades of grey”, but it should be fundamental that
land that belongs to the city remains part of the city’s assets.

Iain Strachan: Yes. Bill Miller might comment further on this, but I think that we have a good handle on what our register of common good assets is.

The Convener: Thank you.

Jim Hume: Good morning. Andy Wightman said that if he had the resources, or if the people of Edinburgh could get the resources together, he would like a declarator to be obtained. You said that you thought that the site was no longer common good land, but you also said, “If we are incorrect”, and talked about “shades of grey”. Given that, would it be good governance for the council to find out the legal position through the court and to get a declarator? You could then draw a line under the matter.

10:45

Iain Strachan: The issue was looked into in some detail before I came to the council. I have given the legal opinion that we reached. It is not for me to decide, but I am not sure whether spending additional time, resources and public money on seeking a declarator from the court on the alleged common good status would be the most appropriate use of council time and money, when we have already reached a view. That is my thinking.

Jim Hume: You will wait for someone else to make a legal challenge and then react.

Iain Strachan: Our position is that we have looked at the question. Officers have spent time, effort and money and we do not think that the land is common good. We hear Mr Wightman’s considered views. If we genuinely felt that the land was common good, it would be on the common good register.

Bill Miller: As part of his research, Mr Wightman wrote to ask all councils in Scotland for details of all their common good properties. The City of Edinburgh Council replied, but I admit that we replied with very poor information on what we had in the common good. Mr Wightman replied to us and said, “But what about” and listed a number of properties that he felt should be common good and which were not on our register. At that point, we carried out a major exercise to look at those properties and at common good status. We agreed that a number of the properties that he suggested should be common good, and they were added to the register. We did not agree that other properties that he suggested were common good, so they were not added.

We have a fairly good register of all the common good properties in Edinburgh, but there is a “however”. As the committee has heard this morning, the subject is extremely difficult. The statutory law and case law are very limited. We took a long time to look at the properties and we did a lot of research. For properties in the old town, we had to go back to the 12th century and work our way forward to see why properties were in what ownership when and to see what their uses had been over the years. That took an inordinate time and cost. We took senior counsel’s opinion on all the properties before we made up our mind.

As the committee sees today, the result is that the council thinks that Waverley market is not common good. We may have said that it was common good in various pieces of correspondence over the years, as Mr Wightman suggested, but that was probably through ignorance more than anything, because the situation is complicated. Unless the research that I described is done, it cannot be said definitively that everything has been captured. That goes for every council in Scotland.

Through its finance and resources committee, the City of Edinburgh Council agreed that, when we were approached by somebody who wished to lease or buy land that we thought had a common good interest, we would investigate. However, investigating every council record would take far too much effort and be extremely costly, as the council has approximately 4,000 legal property interests. We did not feel that that would have any benefit, but we agreed to look at each site as it came along and to add it to the register at that time, if we felt that it was common good.

The Convener: Before we turn to Andrew Ferguson and others, Graeme Dey wishes to ask a supplementary question.

Graeme Dey: Thank you, convener, and good morning, gentlemen. I want to develop this point, so I would ask the other witnesses whether their local authorities are confident in the accuracy of their common good registers.

Andy Young: Our council has a common good register that contains a number of property assets. Like Bill Miller, I could not guarantee that the register is 100 per cent accurate. However, just as in Edinburgh, Glasgow City Council will carry out an investigation of any piece of land for which sale or lease is being proposed, and we will decide whether it should be designated as common good and be on the register. If there were still a requirement to sell or lease the piece of land, we would then have to go through the normal procedure to have it removed from the register or have a judgment made on whether we could remove it.
The council in Glasgow has similar property portfolios to Edinburgh, if not larger. It might not be completely impractical, but it would be extremely costly to deal with it all, and it would take a long time. However, most of the significant common good properties in Glasgow are on the common good register. Issues arise only when the use of land is to be changed. That is what triggers interest, and that is when action is required.

Andrew Ferguson: In Fife Council, we are pretty confident that our common good register is now perhaps 95 per cent accurate. We are at the stage of zeroing in on properties that are particularly difficult. I will give a brief example. A bit of links in a fishing village in Fife was acquired by the burgh in the 1930s. It was held on the leisure and recreation account, not on the common good account. We had some doubts about it but, when we did a sift, nothing in the title for the land gave a clue as to whether it was common good. In the 1930s, there were statutory powers to acquire for recreational purposes, so the land may have been acquired under such powers. At some point since then, the land became a caravan park—although none of us has a long enough memory to know exactly when. Some income went into the common good fund, and some went into the general fund. We then sent somebody off to St Andrews, where we hold the minutes for this particular burgh, and had her spend time—I think that it has been two mornings so far—looking through the minutes to find out why the burgh bought the piece of links. There are all sorts of interesting historical documents—for example, concerning disputes with a farmer grazing animals. We are not yet able to say definitely why the land was acquired, whether it was to be on the common good account, and, if so, whether we can treat it as common good.

Such processes take a long time. However, in Fife we are now down to the very few anomalies. For the most part, we are fairly confident about the register. However, that is not to say that, in a few years’ time, we will not receive queries about properties that we had never thought were common good, or about properties that we had thought were common good but which a successor of mine may think are not common good. That would be all in the nature of these things. Community councils were consulted when we carried out the initial sift, but we still receive queries from those community councils—whose personnel may have changed, or which may have suddenly taken an interest in a particular property—about things that we thought we had sorted out. However, to give an answer to help the committee’s investigation into the bill, I do not know that we will ever reach a stage at which we can all say, “Yes—we know absolutely and definitely what is common good throughout Scotland.”

I think that I speak for my colleagues as well when I say that we would be happy enough with an exemption for common good in the bill. That was our previous position, and we are generally pretty happy with it. Questions over what is common good will remain up for conjecture. We are getting much closer to answering such questions, but we will never reach the end of discussions and learned debates with our community representatives and campaigners.

John Gahagan: I would mirror the responses that have been made. We have a common good register. Aberdeenshire Council is the successor to a number of previous councils, and the records kept by those councils varied. Some were extremely good but others were not so good. We are developing our register as we go along. When something comes up for a possible transfer, we investigate at that stage whether it is common good.

Claudia Beamish (South Scotland) (Lab): Good morning. I am certainly not a lawyer and the issue is extremely complex. I stay near the burgh of Lanark, which has its own common good fund, with its own complexities. There are many reasons why common good land might not be in public use at a particular point in time. Can Iain Strachan or any of the other witnesses comment on that? My understanding of what Mr Strachan said is that, over time, that might cause the land to cease to be common good, but perhaps I misunderstood that remark.

Iain Strachan: That is my understanding of the situation. For example, if council officials used a building for administrative purposes some time ago and then, for whatever reason, that use ceased, it would be arguable that, although it might originally have been on the common good account, after a period of time it was no longer so. As such, the council would be entitled to sell it without reference to the court, because its common good status had been lost.

Claudia Beamish: Is there not an understanding that common good land should be protected by those who hold it in trust—“in trust” is perhaps the wrong legal term—or have an obligation to look after it for the people of the burgh? Do you or other witnesses want to comment on that?

Iain Strachan: That is right. As I said, instances of use changing over time probably tend to be historical, although it is difficult to generalise about an entire country. There is now a greater awareness of common good. The officers who report to me and Bill Miller’s team are all aware that common good is an issue that we should
always be alive to when we deal with council assets. That is certainly the case now, but I cannot comment on what happened in the past. As a legal concept, what you suggest is right and it is something that could happen, so we need to be alive to these things.

Andrew Ferguson: In response to Ms Beamish’s initial question, I stress that disuse of a common good asset for public use does not always mean that it falls out of the common good altogether. When it is disposed of, the usual convention is that the proceeds of the sale go into common good. Common good assets cover a multitude of sins. The one that we have looked at most during the meeting is Waverley market, which clearly had a public use. There are other public buildings such as town halls and so on. If a common good asset is sold on, it does not necessarily mean that there is not a return to the common good.

Bill Miller: The City of Edinburgh Council is going through a number of cases at the sheriff court for the leasing out of common good assets. I can give you an example that you will know about.

James Craig house, which is at the top of Calton hill, was lying empty for a long time. The council is trying to improve the whole of Calton hill, so we upgraded the house and it is now a holiday let. It was done up, but we have not sold it and have instead leased it. We are waiting for the sheriff court to decide whether we can give a long lease. There is an organisation in there and money has been spent, but the idea is that it is a commercial let and that the council will get money back, which will go into the common good account eventually, once all the costs have been recovered. We are going through the sheriff court when there is a common good issue and, for good reason, we want to lease out land or property.

Another recent example was Inch park in Edinburgh, where a community sports facility is part of the park. The community group has agreed to take on a longer lease. We have had permission from the sheriff court for that one, and it is a case in point. We are looking at our cases very carefully and following the letter of law as much as we can.

11:00

Andy Young: I echo what Bill Miller said. The fact that assets are listed as common good does not necessarily mean that they are set in aspic. What happens to them and what is the best management for them for the common good might be to, for example, lease out a building that has a history of neglect or has become uninhabitable or unusable in its current form. The best way of preserving that building might be to lease it to a community or to a commercial organisation.

It is often easy to lose focus. I am from the other side of the country and, although the Waverley market case is of interest, it is not directly reflected in Glasgow. We have issues to do with the potential use of parks and so on. We have to think about what is most important in terms of the use of common good for the community. We in Glasgow think that significant buildings or parks have to be available for public use and they have to be managed.

The properties that we have on the common good register in Glasgow include two shops in Byres Road. Why they are there or how they got there is lost in the mists of time. What happens to that kind of property is of less interest to the public as long as the income from them goes back into the common good fund. That is more important than identifying every common good asset and keeping it in its current form.

Annabelle Ewing: Good morning, gentlemen. I have two questions. One is specifically about the position of the Waverley market, but I am sure that we will get back to that. On the more general issue, I have listened with interest to the discussion about the definition of “common good” and the suggestion that it is a bit of a moveable feast because it is not fixed at any given point in time and is quite difficult to identify. It is costly in man-hours for a council to conduct a full audit of what it owns and how it owns it, particularly in times of tight budgets.

It is suggested that common good land should be exempt. In light of the discussion and given that it seems to be difficult to come up with a general definition of “common good”, if the suggestion is that the committee should consider proposing an exemption, how do you propose that the exemption should be framed?

Andrew Ferguson: You are right. Probably we have told you all about the complications of common good rather than its simplicities, if there are any. Andy Wightman said, quite fairly, that common good is a recognised legal concept in Scotland. The fact that three lawyers in a room will argue from three different points of view about whether a property is common good does not alter that fact. Existing legislation, particularly the Local Government (Scotland) Act 1973, talks about land forming part of the common good. Therefore, an exemption would use the same phraseology and leave the difficult cases—and I stress that there are difficult cases as well as pretty straightforward ones—to be argued out.

Richard Lyle (Central Scotland) (SNP): Good morning, gentlemen. Since the 1930s, we have had several changes in councils. In my area there
were six district councils; we have had the regions; we went from burghs to districts; and now we have unitary authorities. Have we lost quite a lot of the knowledge about what is common good in that time?

Common good land itself that was gifted to burghs, areas or individuals has been lost because, with the greatest respect to some of our witnesses, you sold them—and knowingly so, because you put them to the council to sell. Do you agree with that comment?

We are coming to the issue of Princes mall shopping centre. Would it not be better to agree that that area is common good land and that it should not be included in the bill?

Bill Miller: That would be an easy way out but, after carrying out all the investigations and receiving advice, we in the council have quite clearly deemed it not to be common good. I do not see how we can go back on that decision.

Richard Lyle: So in 1937 you sold it, moved it on or whatever. Basically, you are asking the committee to use the bill to dig you out of a hole because under its provisions the area would be sold off or given away to the person leasing it. After all, according to evidence that we heard earlier, it is worth only 40p, 60p or whatever—in other words, a penny a year.

Bill Miller: I should clarify that the council still owns the ground on which the shopping centre sits. We are talking about a long ground lease; the shopping centre itself was built by a developer. If the bill as it stands were to be passed, the council would lose ownership of the ground, which would mean that we would have to look at the bill’s provisions to find out whether this particular case would be covered and what compensation, if any, would be paid.

As it has transpired, the council leased out the ground but took what is called a grassum—a lump-sum capital payment—in advance of taking annual rental. That commonly happens, but for different reasons. Given that the rental is peanuts and that the compensation mentioned in the bill would be based on that, the money side of things is not so relevant.

Richard Lyle: I want to return to the issue of common good land. Such land is supposed to be held for the good of the people of the surrounding areas, districts, burghs or whatever but, even if it is held on a central register, it can be sold off at any time unless someone objects. I know from my 30-odd years’ experience in councils what can happen to land gifted to a local area. Land in New Stevenston was gifted to the people but the council decided to extend the curtilage of the local school into it and the people in the area were no longer allowed even to walk on it. Do you agree that councils can make such rulings?

Andrew Ferguson: Perhaps I can answer that question. You are right that the council has to make an initial judgment on the matter. As you say, land might have been gifted for a particular purpose or dedicated for recreational or whatever use; indeed, it might have had that use for centuries. Initially, the council has to make the sometimes difficult decision whether some or any of that land should retain that use because, for example, the land itself might have fallen into disuse or it might be put to better use that will bring in money. I stress again that money from disposals of common good land and property goes into the common good fund to be used for common good purposes. After the council makes that initial decision, if there is any suggestion that the common good land is what is called inalienable—in other words, it is not meant to be sold—the courts have to decide what is in the best interests of the people of the burgh.

The council must balance the benefits that a proposed development would bring, which could be just a financial benefit from the sale price, and the benefit that the locals get from the area at present. It could be a park, for example. There is fairly recent case law on that subject, from the 1980s, when land was being sold for a supermarket car park. The development was to bring a good amount of money for the common good, but a bit of the park would be lost. Ultimately, the court had to make a judgment.

However, you are quite right. Initially, the council has to decide what it wants to do. Does that help?

Richard Lyle: Yes, but I will press the point. We have witnesses from the councils in Edinburgh, Glasgow and other areas. My local government experience is that, although land has been gifted to local areas with the intention that it should be used by people and therefore any money that is raised from the sale of the land should be used for the benefit of those areas, most of the money goes into the central fund or pot and is used for other things. Do you agree?

Andrew Ferguson: I am not aware of that having happened in Fife—of common good land having been sold and the money having been used outwith the burgh. I am not saying that it has not happened.

Mr Wightman touched on the point that it is left to locals to campaign and so on, so that what happens might well depend on how organised and articulate the community is. That might determine how much of a battle the council has in doing what it wants to do. That is a fair point.

Richard Lyle: Just to finish, convener, if you will allow me—
The Convener: I will.

Richard Lyle: As Mr Wightman rightly says, he needs money, or people to give him money, to fund legal challenges. At the end of the day, councils hope that people will not come back to them with such challenges. You only really wait for people to come to your door. You do not go out and ask them.

Andrew Ferguson: The practice in Fife is that, where there is a proposal, there is consultation with the local community and the matter is considered by the local area committee first, before it is taken to the policy, finance and asset management committee. However, practices might vary.

John Lamont: This morning’s discussions have highlighted the general difficulties with how we define common good land and the problems therefrom. I want to bring us back to the bill. When the previous bill was before the Parliament in the previous session, the minister who was responsible said that there are probably five parcels of common good land that could be affected by the bill because they are subject to ultra-long leases. I think he said that there are two in Glasgow, one in Edinburgh, one in Fife and one in Aberdeenshire.

We have discussed Princes mall this morning, but otherwise we have discussed things in the abstract. Will you give us a brief summary of the pieces of land in each of those areas so that we can understand what we are talking about? What common good land do you have that would be affected by the bill if it is enacted?

Andy Young: Peculiarly, both of our long leases are for areas that are outwith the city boundary. The two long ground leases on common good land are on Rouken Glen park, which we lease to East Renfrewshire Council, and Balloch country park, which we lease to West Dunbartonshire Council.

We support the proposal but, from the point of view of the citizens of Glasgow, it is likely to be fairly irrelevant, irrespective of what happens. We believe that common good land should be excluded as a general principle, but the bill’s impact on Glasgow City Council is likely to be minimal. It might be of advantage to East Renfrewshire Council and West Dunbartonshire Council, who would inherit the title to those parks.

John Lamont: Thank you.

11:15

John Gahagan: The case in Aberdeenshire is an area of recreation ground in Stonehaven, which was let on a 999-year lease to a trust that was set up by Parliament to manage the ground. The consequences for the area of transferring the land to the trust are not financial. A term of the lease is that the land should always be used for recreational purposes and the lease gives that protection. If there was an intention to use the land for another purpose, the landlord’s consent would be needed. Of course if the ownership transfers, that consent will no longer be required. There might be other protections—the act that set up the trust might require that the land be protected for recreational use, for example. However, Aberdeenshire Council is not the trustee, so we are not certain about that. The requirement in the lease that the land be used only for recreational purposes adds a level of protection.

Bill Miller: There is one case in Edinburgh; it is a very small area of ground on Stevenlaw’s Close, off the High Street. A long lease was granted, which runs until 2191. A corner of an office block has been built on the land and eats into the close. The land is still held on the common good account, but it is really part of a building. That is the only case that we have that falls within the terms of the bill.

The Convener: I understand that the Fife example is no longer an example.

Andrew Ferguson: The Fife example is no longer an example, not because we do not think that it is common good land but because we do not think that there is an ultra-long lease.

John Lamont: Notwithstanding the discussion about Princes mall, is it fair to say that we are talking about a very academic point? Given the limited amount of property that would potentially be affected by the bill, are the financial implications for councils minimal?

Bill Miller: Yes, in relation to the cases that have been mentioned. However, we do not know what cases other authorities have. I understand that a number of authorities have not provided information—they might not necessarily know about cases. The issue is not a big one for the City of Edinburgh Council. It would be a different matter if Waverley market were included, but it is not.

Andy Young: We have been talking about the identification of common good land. We think that such land should be exempt in principle, because it is held for the people. There might be examples out there that we have not captured, some of which might be more significant than the ones that we have talked about. It is unlikely that that is the case, but there might be cases that we have yet to discover. There should be a safety net, in case something significant comes up as the process rolls forward. However, from Glasgow City Council’s point of view, the ultra-long leases are such that the issue is relatively insignificant.
John Gahagan: The lease in Stonehaven was entered into in 1932—I was not around then and did not negotiate it. The purpose of doing the transaction by way of lease rather than sale is not entirely clear, but one reason might have been to include the protection on the use of the land. The consequences of doing away with long leases are not only financial.

Dennis Robertson: I acknowledge that other members might have a greater grasp of some of the issues than I do at the moment. At the time of the transfer of the Waverley market to the East Market Street site, was the East Market Street site deemed to be common good land, or was it given common good status at the transfer?

Bill Miller: It was not deemed to be common good at the time. That is why the status was moved from the Princes mall site to East Market Street.

Dennis Robertson: I thought that that was the case. That meant that, in the act, everything was transferred from the Waverley market site to the East Market Street site. Is that your understanding?

Bill Miller: My understanding is that the common good status—indeed, the whole market—was transferred to that site.

Iain Strachan: Yes, and the common good status went to the then new site at Cranston Street.

Dennis Robertson: So, one area became common good and one stopped being common good.

Iain Strachan: Yes.

Dennis Robertson: Okay. Thank you.

I will continue with questions to Mr Gahagan. Thank you for your explanation about the common good land in Stonehaven. Are there any other common good areas under dispute in Aberdeenshire, or are there any issues before the council at the moment?

John Gahagan: That is a difficult question for me to answer. We are continually looking at whether land in some areas forms part of the common good. There are areas where we believe that the land is common good and we are considering going to court to have the common good status removed. However, none of those areas involves an ultra-long lease.

Dennis Robertson: Is the council going to court to have the common good status removed so that the ground can be sold on?

John Gahagan: The reason varies, but that is one possibility.

Jim Hume: I think that my question is for the City of Edinburgh Council, but it may be relevant to all our witnesses. It has been pointed out that no allowance is being made for a grassum having been paid—a large, up-front payment with peppercorn rent being paid thereafter. Do you see many circumstances in which that might occur within your local authorities? Does the situation relate only to common good, or could it relate to some commercial properties that local authorities own?

Iain Strachan: My understanding—Bill Miller will correct me if I am wrong—is that only two properties in Edinburgh would potentially come under the scope of the bill.

Bill Miller indicated agreement.

Iain Strachan: Those are Stevenlaw’s Close and Princes mall, and the grassum issue probably applies only to Princes mall. There may be instances of ultra-long leases elsewhere around the country.

We make the point in our most recent written submission—we also raised the matter previously—and it seems to me from other evidence that the committee has been given that there does not appear to be a consensus that the £100 per annum rental threshold and the 175-year cut-off period are the best way to achieve an appropriate exemption for commercial leases. Professor Gretton said that the cut-off might as well be 225 years. Professor Rennie felt that £100 was probably not the best figure and that the figure should perhaps be linked to a capital value.

The exclusion that we are talking about is extremely important. When parties have chosen voluntarily to have their contractual connection to land governed by the law of landlord and tenant, there will be implications if that is then taken away by retrospective legislation. Although the bill enables a tenant to opt out and not acquire the ownership, the landlord is unable to opt out and the transfer is forced upon them. If the bill seeks to exclude those properties where the landlord, through their heritable interest, retains a significant interest in the site but focuses on a purely monetary test—and if it does not take account of where grassums have been paid—the question is whether that gives a fully rounded picture.

Andrew Ferguson: In the excellent briefing on the bill from the Scottish Parliament information centre, mention is made of Brodies LLP having previously given evidence on variable rents, whereby the base rent is very low and the real rent is linked to, for example, how well a shopping centre is doing and the incomes of the individual shops. It is not really for me to comment, but I imagine that that may be an area for the bill’s draftspersons to look at.
Bill Miller: It is common for grassums to be paid for leases for particular reasons—for example, when a landlord sees fit to take a large lump sum of money at a certain time and grant a longer lease at £1 per annum or for a peppercorn rent. In such circumstances, they take a lump sum of money equivalent to the rent over the period of the lease. That is quite common in commercial leases. It means that the landlord still has control over the land or property. They have not sold the land so they do not lose control and can still influence what happens during the period of the lease and thereafter. That is what the City of Edinburgh Council did with Waverley market: it did not want to lose ownership of the site for many reasons, including its location. Perhaps Mr Strachan can comment further, but that is the commercial position.

Iain Strachan: I will make some comments by way of background to Princes mall. As my colleague has said, the council would never have knowingly sold the site and completely given up all interest in it. It is a unique site of special significance to the capital city, located as it is beside Princes Street gardens and adjacent to Waverley station, which is itself a landmark destination. It is close to the transport hub at St Andrew Square and is in a United Nations Educational, Scientific and Cultural Organization world heritage site. We all know the vision of the city that gets beamed around the world at hogmanay. Given the site’s significance, the council, as guardian of the city, should have an involvement in it and so should retain its heritable interest going forward.

Yes, the bill entitles landlords to a level of compensation; however, as has been commented on, in the case of Princes mall such compensation would be minimal. If the bill’s intention is to exclude leases where the landlord has a significant interest, I am not sure that a purely monetary test does that in the case of Princes mall, the site of which, because of its special significance to the council, the council feels should be preserved for future generations. In recognition of that, earlier this month a full meeting of the council passed a motion seeking a specific exemption for Princes mall from the scope of the bill, and that is one of the reasons why we are here today. Although we recognise that it is not wise to legislate by exception, we feel that there are good reasons why Princes mall should be exempted, leaving aside the common good issue.

Annabelle Ewing: I have a question on that point. It seems that your failsafe position for Princes mall at this stage—notwithstanding that the bill was around in the previous session of Parliament—is to include a specific exemption for it. Do you feel that the Princes mall scenario is unique and that, therefore, an exemption for Princes mall would not impinge in any way on circumstances that may pertain elsewhere? As Mr Strachan said, statute by exemption is not how things are normally done, but it can be done for specific cogent reasons. Having considered the issue, does the City of Edinburgh Council believe that the case has been made for such a specific exemption?

Iain Strachan: I am not aware of any other such case. We have talked about common good in the abstract, but when it comes down to the nuts and bolts, there are maybe only a handful of cases that would, in practice, be affected by the bill.

Annabelle Ewing: With respect, you are now saying that the land is not common good, so we are into a completely different set of arguments.

Iain Strachan: Yes, but—equally—I am not aware of evidence that there are other properties throughout the country that have special significance and might also be caught. Elected members in the City of Edinburgh Council clearly feel that a case can be made that the property in question should be exempted, given its location and the comments that I made earlier.

11:30

Annabelle Ewing: I appreciate that it is not necessarily for you to know the situation throughout Scotland, but it is for the legislators to have an idea of the concrete impact of providing for one specific exemption along the failsafe lines that you suggest.

Your other proposal for a possible way to deal with the scenario relates to the grassum. However, your written submission makes the point that, in the light of the structure of very long leases and peppercorn rents, grassums might have been agreed at a lower rate than the total value of the rental. How do you propose that that be taken into account?

Iain Strachan: I admit that our suggestion is in some respects rather simplistic but, in essence, the grassum is the rental income capitalised on a day 1 basis. The amount of money might be lower, but that is because the landlord has decided that because they get all that money up front, they are prepared to take a slightly lower amount than they would get from rental that was spread over the lifetime of the lease. However, given that the bill seeks to exclude commercial leases on the basis of a monetary test, if we accept that a grassum is akin to the rental over the lifetime of the lease and then treat it as rental income and bring it into the calculation of the annual rent, we might get a truer reflection of the monetary value of the property. That is where I was coming from on that point.
**Annabelle Ewing:** Do you feel that, if we were starting again today, some councils might structure their property dealings differently? You talked about the council being the guardian of the land that it owns, whether or not it is under common good. Might it now be felt that the way in which some deals were structured was perhaps not in the best interests of the citizens?

**Iain Strachan:** If we had known at the time that we might lose Princes mall through the bill, which was not at that time under consideration, we might have thought that we should take a certain level of grassum but retain the £100 rent to ensure that we had on-going involvement in the property. With a landlord-tenant relationship, there is an on-going contract. Title conditions are notoriously difficult to enforce, so from a landlord's perspective, if we seek to have involvement in or control over use, potential development and the like, it is often easier to have a landlord-tenant relationship than a relationship that is based purely on title conditions. Therefore, the answer to your question is, "Possibly."

**Margaret McDougall (West Scotland) (Lab):** From listening to the evidence, there seems to be agreement that there is uncertainty around the accuracy of the common good register, but you all seem to be positive that what you know of long leases is accurate and correct. That is certainly what has come across to me.

**Bill Miller:** From an Edinburgh point of view, it is easier to identify leases, because there is legal documentation, whereas the title for a common good property does not actually say that it is common good land.

**Margaret McDougall:** I see that the other witnesses are of the same mind—they are nodding.

How should we legislate to deal retrospectively with the discovery of more long leases or common good properties that are not on the register?

**Andy Young:** That relates to the point that I made earlier. The justification for excluding common good property from the bill is to cover exactly that point as transactions occur, and as we investigate the land or buildings whose purpose will change when they are sold, leased or transferred to community ownership. Although it is unlikely that there is anything significant of which we are not aware, if the bill can provide a failsafe, Glasgow City Council would encourage the committee to consider that.

**Bill Miller:** From an Edinburgh point of view, I am 100 per cent certain that only two long leases come under the bill. We have a good property register of what we own, but whether land is common good land is a grey area: we think we know what we have in the common good account. There may be odd ones out, but they are not on leases. We know what long leases we have: the only two are for Waverley market and Stevenlaw's Close, which have been mentioned. I would be amazed if anything else were to come out; our records, which have been gathered over many years, do not show anything else.

**Andrew Ferguson:** The SPICe briefing says that eight councils have not yet reported back, so there are some known unknowns about how many ultra-long leases there are. As my colleagues have said, knowing what is covered by an ultra-long lease is a lot easier than knowing what is covered by common good. If I may be mischievous, perhaps the easiest way for the bill to cover the matter would be to exclude all local authority ultra-long leases. That would cover Waverley market, but perhaps the committee would not like to go that far.

**The Convener:** For the record, today is the final day for submissions from the eight councils. We have received responses from four of them, so we will know after today what they have to say about their common good registers.

**Richard Lyle:** I will return to Princes mall. I say again that if we took Mr Wightman's advice, the property would be put in a common good fund. I have experience over the years of sitting on property committees—Mr Young used to work for my authority many years ago—so I know how many leases, solums and other things you guys have had to deal with since the 1980s. Basically, you were forced into that because of costs and trying to bring money in to councils.

I could go through all the situations that you faced in order to get money for Princes mall. I can see why the council went into the deal. What would be the final plea to this committee in relation to Princes mall? Would I be right in saying that you went into the deal because, in those days, every council was trying to be innovative in trying to get money, and that had you known what was going to happen—which no one did—you would not have entered into that long lease?

**Bill Miller:** Yes—that is right. If we, as a council, had known that there was a chance that the lease would be removed without our being able to do anything about it, we would not have entered into a lease of such length, but would probably have gone for a lease of lesser length. It is also right to say that, over the years, councils have leased out property and taken grassums because they needed capital for capital investment programmes.

If we are finishing now, I will say that what is causing us a problem is the bill's suggestion that every commercial lease should be exempt and that it has set a cut-off point of £100 per annum. There may be good reason for rent being less than...
that; there may, for example, be a turnover rent. For example, as has been suggested, the rent may be £1 per annum, but the rental may be based on further income coming in from the property. In the case of Princes mall, there is a peppercorn rent of less than £100 per annum.

We should consider what—based on the knowledge that we have—the rent would be if the property were leased at this point in time. If what was paid was spread over 200-odd years, it would amount to about £30,000, per annum, although the rent would actually be a lot more than that; that is just how it works out doing an easy division of what we sold it for back in 1989 and the number of years of the lease. We sold the centre, not the ground. One of our main arguments is that we have been caught because we took money up front; we never wanted to lose ownership.

Richard Lyle: I suggest that you were encouraged by various Governments over the years to do that.

I am not a lawyer. If the committee or Parliament decides to make an exception for Princes mall, and the person who owns it now makes millions of pounds out of it, what will the legal position be if we are taken to court? Mr Ferguson, could you answer that? You look like you do not want to answer.

Andrew Ferguson: I do not. You are going into the area of human rights and rights to property and so on. The Government’s legal advisers will advise on that, but I do not see a huge risk of legal action against the Scottish Parliament or Scottish Government for making such an exception. Don’t quote me.

Annabelle Ewing: We are pleased that you were all able to come today. Your information has been helpful.

On Princes mall, Mr Strachan referred to the fact that the site is, or is near, or is relevant to a UNESCO heritage site. An interesting argument could be made along those lines by leaving the technical issues aside and considering from all different perspectives the situation that makes the scenario unique in Scotland. It might be interesting to explore that further as a matter of overriding public interest. Do either of you have any comment to make on that? You might want to reflect on that further. I am sure that the clerks can still receive further written submissions. They are nodding.

Iain Strachan: The rent was greater than £940,000 and 76 per cent of the rental income.

Bill Miller: A substantial rent was being brought in at that time, because although the council paid the rent, it sublet, or sub-sublet, all the shop units. So, when we were approached by the centre’s owner to extend the lease, there was a good income. For various reasons, including monetary ones and perhaps the one that Mr Lyle suggested, the council negotiated the extension of the lease and stepped back from being party to the tenancies. I think that the lease became a straight ground lease—am I right? I just cannot get my mind back there.

Iain Strachan: It was a ground lease originally, but the council and the developer sold their respective interests together, because the marriage value made greater financial sense. The council could have bought the developer out, and probably considered doing so but did not have the capital resources. The whole thing was sold for £23.5 million, of which the council received £6.25 million at the time.

Bill Miller: The answer is that we still wanted to hold on to the lease agreement, even though the rental was up. We took a lump sum in lieu of rental.

There was a question earlier on legislation; Waverley market is specifically mentioned in the City of Edinburgh District Council Order Confirmation Act 1991, which places height restrictions on the property, which is why we can look right out over the castle and the old town. By retaining ownership of the whole site, the council can maintain any conditions it wishes, either through a lease or ownership, but if it loses sight of both the lease and the ownership it loses control over the future use of the site.

Future Parliaments might decide to do away with the 1991 act, and planning legislation might
change to allow a future owner to do something totally different with the site. However, while the council remains the owner—or as a landlord—it is in control of the site, no matter what the planners or an act of Parliament say.

The Convener: It is useful to have this on the record, for our next meeting and beyond.

Section 50 of the bill is on claiming additional payments. You suggest that if the bill were passed the peppercorn rent would lead to your losing a lot of money ultimately, because of the ownership question. What is your view of that section?

Iain Strachan: There are two points to make. We accept that under the current compensation provisions the compensation for the loss would be minimal. As you correctly say, landlords can claim additional payments, based on the loss of residual heritable interest and potential development value, but I think it is fair to say that given that you are talking about a lease that expires in a significant period of time, its value, as assessed by the Royal Institution of Chartered Surveyors in Scotland, would be minimal. We should look at this not purely on the basis of the asset's monetary value, but its non-monetary value to the city. Does that answer your question?

The Convener: That is useful, as we gather evidence before considering it. Does anyone else have final points to make?

Bill Miller: At the end of the lease, the whole site would revert to the council. Although the council took a grassum, as was said earlier that does not necessarily mean it took the full, open-market price for the property in a market where there is a willing buyer and seller. However, the whole site will revert back in couple of hundred years or whatever is left of the lease. There might be a requirement for something other than a shopping centre or mall, but we do not know. There might also be a value beyond that period, but we cannot tell at this time what it will be, because it is too far away. As Mr Strachan said, the RICS looks at the valuation of a reversion. We cannot look ahead 200 years, and the amount would be peanuts, really. Under the compensation provision in the bill, the council would get no monetary compensation.

Rob Gibson: Thank you.

John Gahagan: You might think that there is no connection between Waverley market and the recreation grounds in Stonehaven, but the connection is that there is more to a lease than rent. The main concern that I pick up from Edinburgh is that, as part of a leasing arrangement rather than a sale, they are looking to have some control over the asset in the future. In respect of many ultra-long leases it is possible that the terms of the lease, other than the rent, are of more concern. Once a grassum is accepted, the owner will get only a peppercorn rent, but it is not the peppercorn that the owner is interested in, but what the other terms of the lease give. That is the connection between the two cases that I referred to and, probably, others, including cases that may not have been picked up yet.

The Convener: Thank you, gentlemen. We have been talking about peanuts and peppercorn and irritating common good matters, which probably needed to be stirred up so that we can consider in more detail what has been proposed. I thank you for your evidence. If there are additional matters on which you wish to write to us, please feel free to do so.

11:51

Meeting suspended.
Supplementary Submission from Andy Wightman

INTRODUCTION

Following my oral evidence earlier today, I would like to submit this brief written evidence both in support of what I said this morning and to clarify certain matters.

BACKGROUND

I took an interest in the Long Leases Bill in the last session as a consequence of being concerned that the lease over the Waverley Market in Edinburgh would qualify for conversion. My investigations had concluded that this was common good land and, given that common good land is held for the benefit of the residents of Scotland’s burghs, I took the view that it would be wrong for the City of Edinburgh and other burghs to lose their ownership of such land in this manner without at least appropriate scrutiny of such an implication by Parliament. In particular, the conversion of the Waverley Market lease would, as I have outlined in previous written evidence, be for a consideration of around 40p and this gave me moral offence.

At the time of consideration of the Bill in the last session, I sought an exemption for all land held as part of the common good. Subsequent enquiries by the Scottish Government revealed that there were very few reported cases of ultra-long leases in existence. During the consideration of the Bill, the City of Edinburgh Council submitted evidence that the Waverley Market was not common good, that all long leases of common good land should be exempted and that leases where a grassum had been paid should be exempted on equivalent grounds to the exemption granted to commercial leases of over £100 annual rent. They did not make clear whether this would, in effect, exempt Waverley Market nor whether such was their desired outcome.

I continue to disagree with the case made by the Council in relation to its common good status and stand by my written evidence provided to the previous committee. Nothing in the 1933 Edinburgh Corporation Order Confirmation Act provides any statutory powers to transfer the common good status of the market. In particular, Section 278 merely deals with market rights. Section 280 makes clear that the accounts of the market are to form part of the common good account but, again, say nothing about the legal status of the land. It is this section which I think the Council are (wrongly) relying on as authority for their view that the site is no longer common good. If they are relying on some other facts or evidence, perhaps the Committee might like to inquire as to what they are.

The Council’s reliance on this Act to make the case for the 1938 transfer is undermined by, among other considerations, Section 70 of the 1950 Edinburgh Corporation Order Confirmation Act which makes clear that the Council may “as part
of the common good erect and maintain new buildings on the site of the Waverley Market." This section was repealed in the 1958 Confirmation Act in which same Act the site is included in the section relating to “Public Halls”, where it remained in the 1967 Act in which Section 145 removed all markets and slaughterhouses from the common good. As Waverley Market had for some time been a “Public Hall” it was not affected and in the early 1980s voluminous correspondence notes the status of the land as forming part of the common good. In 2005 and 2009, the Council confirmed to me that it formed part of the Common Good.

THE CURRENT BILL

The current bill changes nothing in relation to the common good. The City of Edinburgh Council have, however, changed their view on the question of the Waverley Market and are now seeking a specific exemption for the site from the provisions of the Bill. I welcome their view on this matter.

They propose to secure this by way of their proposals relating to extending the £100commercial rent provisions to cover leases where grassums have been paid. Failing this, they seek a specific exemption for the Waverley Market.

In their evidence, the Council claim that the grassum amendment would address “ourspecific concerns over the possible loss of the ownership of Princes Mall” (1). The grassum they refer to, however, is a £6,250,000 payment made by Reeds to Edinburgh District Council in 1989 in consideration of the acquisition of the sub-lease that the Council held. (2) Subsequent to that acquisition, Reeds, the new tenant under the main 1982 head lease, was also the new tenant of the sub-lease (and landlord of that sub-lease). Reeds were therefore simultaneously the landlord and tenant of the same piece of ground.

In the House of Lords case of Clydesdale Bank vs Davidson reported on 16 December 1997, Lord Hope makes clear that for one party to enter into a lease with the self-same party is a “legal impossibility” and that "it is not possible for a person to have two real rights in the same property at the same time. This is because of the principle of confusio, by which the lesser right is absorbed into the greater right and is extinguished." (3)

Thus, the sub-lease for which a grassum was indeed paid is now extinguished. Had they not been, then Section 3(3) of the Bill would come into play. There is thus now only one leasehold interest - the original 1982 lease for which no grassum was paid and which has a rental payment of one penny per year (if asked).
EXEMPTION OF COMMON GOOD

Were the Committee to be minded to grant an exemption to all common good land or to the Waverley Market there are three main options that I can envisage.

1. Exempt Common Good Land.

This is feasible and it does not require the Bill to define common good (it being a well-recognised legal concept). It would, however, require a process to be developed and incorporated into the Bill to provide for the identification of common good property which would, were such a process not to be in place, convert automatically on the appointed day. This could be along the lines of requiring a court declarator to accompany all conversions to the effect that the land is not common good. Conversion would not take place until such a declarator had been issued. This approach leaves the fate of the Waverley Market uncertain due to the dispute over its common good status.

2. Exempt leases of specified lands The Bill could be amended to exempt the known and specified properties held on qualifying leases that have been brought to the attention of the Scottish Government by a specified date. This would be straightforward but would allow other, as yet unidentified, common good leases to convert.

3. Exempt the Waverley Market The Waverley Market could be the sole subject of such an exemption given its extraordinary prominence and value in the centre of Scotland’s capital city and its previous history as the subject of statutory provisions in a number of Edinburgh Corporation Acts (it is thus considered a site of sufficient importance that the Council has sought statutory powers to govern its use).

At this stage I am not advocating any particular route given that further thought needs to be given as to the legislative implications. I do, however, remain of the view that the Scottish Parliament should, at the very least, exempt the site of the Waverley Market. Furthermore, the approach suggested by the City of Edinburgh Council appears to me not to succeed in this objective.

(1) Evidence at Annexe A RACCE/S4/12/6/1 Papers for RACCE Committee 29 February 2012.

(2) I should add that the £ 6.25 million was not paid into the common good account and I am of the view that this should be rectified.

(3) [http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd971216/clyd01.htm](http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd971216/clyd01.htm)
Supplementary written evidence from City of Edinburgh Council

I refer to the Long Leases (Scotland) Bill, and the submissions that Council officers have previously given the Rural Affairs, Climate Change and Environment Committee, and prior to that the Justice Committee. This message is addressed to you, since I am told that you are the relevant minister, with copies for information to Annabelle (who is a member of the Committee) and to Willie as my party leader, as well as to the Committee Clerk.

As you will be aware, the Council’s position is that the site of Princes Mall (formerly the Waverley Market Shopping Centre) should benefit from a specific exemption from the ambit of the Bill, should the ultra-long lease currently registered over the site not otherwise be excluded.

At the recent evidence session on 29 February, I understand that Annabelle suggested that the Council might wish to make an additional submission to the Committee exploring further the proposed exclusion of the site for reasons of public policy, and not simply for reasons related to how the Bill might be better drafted so as to exclude commercial leases. It is in connection with this that I am contacting you.

Yourself and the Committee will naturally be well acquainted with the significance of this site both nationally and internationally, lying adjacent as it does to both Princes Street Gardens and Waverley Station. From the evidence which has been given to the Committee, and the Justice Committee before that, in connection with the Bill, the Council is not aware of any other local authority owned property in Scotland which is potentially subject to the provisions of the Bill and has a location of such distinctive importance.

The Council’s concern is that should this long lease be converted to ownership, then it will effectively remove the Council’s ability to be involved in the site going forward. While the Council may still have an interest through its statutory functions, including as Planning Authority, this would not allow the Council the same level of direct involvement in, for instance, any future redevelopment plans, which may in turn affect the views of the Castle which can be enjoyed from other parts of the City.

As this property is within an UNESCO World Heritage Site, the Council has a particular interest in ensuring that its future use and development is in-keeping with this much prized World Heritage status, particularly given the location’s prominence on the global stage during the Festival and Hogmanay celebrations. In connection with this, it is worth highlighting that the Old and New Towns of Edinburgh have had this World Heritage status since 1995, and they are together 1 of only 4 such sites in Scotland, and 28 in the UK (including 3 in overseas territories). While ownership alone will not safeguard this status, it will provide the Council with a greater ability to protect it, and preserve it for future generations.
As mentioned by Council officers in their previous submission, the Bill’s provisions entitling a landlord to compensation in the event of a lease being converted to ownership are, I would respectively submit, unlikely to give the Council and the City’s residents appropriate recompense for the loss of the property, as they do not recognise an important non-financial interest such as this, let alone one of such special cultural significance.

In conclusion, the Council understands and supports the policy reasons behind the Bill. However, I have a concern that if the Bill is enacted in its current form, it would result in the Council being divested of its ownership of this important property without having resolved to do so, and so removing a large element of control over its future use and development. As such, I would urge the Committee to consider a specific exclusion of Princes Mall from the ambit of the Bill, if it is not otherwise excluded.
10:03

The Convener: Agenda item 2 is our last evidence session on the Long Leases (Scotland) Bill. I welcome the Minister for Environment and Climate Change, Stewart Stevenson, and his team of officials to the meeting. Good morning, Mr Stevenson. Could you introduce your cohort?

Stewart Stevenson: Yes. I have with me Simon Stockwell and Annalee Murphy. The bill is essentially quite a technical one, so I have the necessary technical support, particularly if Richard Lyle is feeling frisky again.

The Convener: Everyone will be aware that time is tight and that we must cover a range of subjects, so I would like short questions and answers. I invite the minister to make briefly any points that he thinks it necessary to make before we ask questions.

Stewart Stevenson: I will be a master of brevity, if I can.

The bill will convert ultra-long leases to ownership. There are complexities, but at its heart the bill is straightforward and it implements a report by the Scottish Law Commission.

The key proposals in the bill include the conversion of ultra-long leases—that is, leases of more than 175 years and with more than 100 years left to run—to ownership; provision for compensatory and additional payments to landlords; allowing some leasehold conditions to become real burdens in the title deeds; allowing landlords to preserve sporting rights in relation to game and fishing; and allowing tenants to opt out of converting to ownership if they want to do so.

I have followed the evidence that the committee has heard in previous meetings and I look forward to trying to answer your questions.

The Convener: Thank you. We will start with the number of ultra-long leases on common good land.

Alex Fergusson (Galloway and West Dumfries) (Con): Minister, as you heard, I am substituting for a colleague this morning so, given that the bill deals with a very technical issue, I am at a huge disadvantage.

However, when I read the committee papers I picked up the variation in accuracy of the information that has been brought to the committee, which concerned me. It appears that there are recognised difficulties in the identification
of common good land, largely because of the complexity of the legal situation in that regard. Some stakeholders, including the Law Society of Scotland, think that the number of ultra-long leases that have been brought to our attention is somewhat lower than they would have expected it to be, which also calls into question the accuracy of the information that we have been given.

Will you comment on the inconsistency of the information that has been brought to this committee and its predecessor? How can we have faith that, if the bill is passed, the legislation will be robust?

Stewart Stevenson: The bill is blind to the matter of common good. In other words, the ownership of the land is not considered at all in the bill. Uncertainty has emerged about the categorisation of leases as common good, but, for the bill’s purposes, that is of no consequence. The real issue is whether all the relevant leases are identifiable, whether or not they relate to common good land. In that respect, there is quite good information.

The bill has certainly thrown up a wider issue about how accurate information about common good is in the generality and not just in the context of leases. In many ways, that is a matter for another day. Ultimately it is a matter for councils rather than the Government—it is a creature of councils.

Alex Fergusson: Are you saying that, even if the information that councils are providing is inconsistent, that will not unduly affect the robustness of the legislation?

Stewart Stevenson: Yes. I have observed what the committee has been doing, and the inconsistencies appear to relate to how easy or difficult it is for councils to ascertain whether land is in the common good.

In relation to common good generally, it has emerged that it is often only when a council is considering disposal or change of use of a bit of land that it is discovered that the land is covered by common good provisions. On my journey to the Parliament today I happened to travel with someone who has extensive knowledge of the subject and who, informally, gave me practical examples from his professional experience of unexpectedly finding that land was not common good and was covered by other provisions or discovering that land was common good, when it came to disposal or a change of use.

The issue is simply part and parcel of managing councils’ assets—common good and otherwise—and does not touch directly on the bill. I am not saying that the bill will not bring into focus issues to do with the common good, but in itself it is not concerned with the matter.

Annabelle Ewing (Mid Scotland and Fife) (SNP): Minister, if you have had time to review Official Reports of the committee’s meetings during past weeks, you will have seen that there has been debate about the status of the Waverley market as common good land, with differing views put forward. The City of Edinburgh Council currently takes the view that the land is not common good; others take the view that it probably is common good. Will you talk about your understanding of the position?

Stewart Stevenson: I do not think that I would add anything to the discussion by commenting on the matter, because whether the Waverley market site is common good land does not touch on the bill. I have followed the committee’s discussions with interest. In particular, I read the council officials’ statement that they believed that the issue was covered by acts of council in 1937 and 1938, when the market was transferred to another location. However, I am not a lawyer and I will not express a view on the validity of what, essentially, are legal arguments.

Annabelle Ewing: Thank you.

To maintain the flow of questions, I would prefer to come back to wider issues concerning the Waverley market in a wee while.

The Convener: Given that this has a bearing on future questions, do you have a view on the suggestion that whether land has common good status—on which the bill is neutral—does not necessarily rest on the use to which it is put?

Stewart Stevenson: That opens up an interesting legal debate. There appears to be a view that, if land is held in the common good, it must be used for a community purpose or deliver a community benefit. A case that springs to mind involved Fife Council having a 1,000-year lease for roof space. The council could not work out what the benefit of that was but ultimately decided that it was not a common good anyway, so it did not have to bother.

It is often the case that when councils look at individual assets that they own, whether common good or otherwise, they discover that the passage of time has made it difficult to work out the answers to some of the questions that they might want answers to and to establish whether a public benefit has been derived from them. That just reflects the fact that hundreds of years of history are often involved in property in Scotland.

Graeme Dey (Angus South) (SNP): Good morning, minister.

To get to the nub of the issue, does a case exist for excluding common good ultra-long leases from the terms of the bill, given the nature of some of the examples that have come to light? I am
thinking of the likes of Balloch country park and the case in Aberdeenshire involving pieces of land that are in community use.

Stewart Stevenson: Yes, but the point is that what we are looking at is the use by and the availability of an asset—in this case, land—for the community. As I said in my opening remarks, the bill is about converting leasehold conditions to real burdens, so the test is not whether an asset is a common good; the test is whether the asset and its availability for public good would be affected by what is in the bill. Under the bill, I do not believe that that test would be failed. That is the important question.

The issue of how ownership is accounted for and whether an item is accounted for as a common good in council bookkeeping is a separate issue. In many councils, an asset may not necessarily be a common good for the whole council area. Councils have a variety of common good funds that are associated with historical communities that go back a long way, so they have made a variety of decisions about how to do things.

Graeme Dey: To be clear, you would not be minded to exclude common good land from the terms of the bill.

Stewart Stevenson: I have asked, and I cannot see any systematic way that we could make an exception that would not except everything, if you see what I mean. In other words, the fact that something is common good does not touch on the question of what the structure of ownership or leaseholdship should be. It is just an accounting entry on one page of a council’s books or an accounting entry on a different page of the council’s books.

10:15

The Convener: Is the question about compensation sufficient to address the loss of a landlord’s rights when an ultra-long lease is of common good land?

Stewart Stevenson: If I may say so, that is the important question that covers the whole issue of whether the land is common good or not. We have the provisions for the conversion of the lease payments into a one-off payment. Given that we are talking about leases of no more than £100 per annum, the finance that is associated with that is comparatively modest. Section 51 of the bill discusses extinguished rights and also provides ways in which rights that are extinguished by the conversion from a lease to ownership can be agreed by the Lands Tribunal for Scotland and otherwise. Section 51 seeks to address the issues of loss of rights and financial compensation.

The Convener: Indeed, but it could be argued that a public interest is associated with the council retaining the rights to that land in cases such as the ones that we have been discussing.

Stewart Stevenson: The public interest will be exercised in different ways. One of the arguments about the Waverley market is that it is in a world heritage site and we could not allow things to be built that would destroy the skyline there, but that is precisely why we have a planning system, over which the City of Edinburgh Council has control. I just use that as an example, picking up on something that was said in evidence in relation to one specific property.

The process of converting from a lease to ownership is, in part, about converting the conditions that are associated with the lease into real burdens. That is difficult to do in some circumstances. Harbours were excluded—that was done before I came to the bill—because there are some specifics relating to harbours that would have made it impossible to convert conditions into real burdens, given the way in which real burdens work.

The Convener: Thank you. We will come back to the subject of the Waverley market in a while. We move on to talk about exemptions from ultra-long leases in which a grassum is paid.

Jim Hume (South Scotland) (LD): Good morning, minister.

Sometimes people will pay a grassum up front. I am sorry to use Edinburgh’s Waverley market as an example again, but there are many other examples. The council received a £6.25 million grassum in 1989 and the rent is less than £100 per annum. Has the minister considered taking grassums into account? For example, if a 200-year lease costs £6 million, we divide the £6 million by the 200 years so that the grassum can be taken into account rather than just taking the annual rent into account.

Stewart Stevenson: Yes, but grassum is not a substitute for rent. I will read out the definition of grassum:

“A single payment made in addition to a periodic payment such as rent”.

In other words, it is not a substitute for a periodic payment. A grassum can also mean “any payment made to a landlord by a person wanting to obtain a tenancy.”

A grassum is therefore not to be interopereated with the rent; it is a different issue and not a substitute for rent. To take a grassum and then, post hoc, apply it over the period of the lease to, in effect, take the payment above the £100 per annum limit is to misapply what a grassum is.
Jim Hume: Do you expect legal challenges if we go ahead with only the existing exemption?

Stewart Stevenson: Everything that we in the Parliament do is capable of being challenged legally.

The Convener: The Society of Local Authority Lawyers and Administrators in Scotland has suggested that an alternative approach would be to exempt from the bill all ultra-long leases on common good land. Do you have a view on the policy merits of such an exemption?

Stewart Stevenson: I really have no idea what benefit such an exemption would deliver. Given the uncertainty to which Mr Fergusson referred—nine leases appear to be affected, and the number might be more—the cost of establishing where the leases were and ensuring that they were exempted would be likely to be disproportionate to any benefit that was delivered.

I will give one example—I do not remember whether it is in the public domain or was simply in a briefing that I received. Someone was at a loose end, so they were sent to try to find out about a single site. After two days of continuous, unremitting toil on a relatively minor matter, they were left with more ambiguity than they started with. When people have to go back to minute books that are 150 years old, and when decisions that might affect just one piece of land have not been systematically indexed, a substantial effort is involved.

The question is why an asset is held for common good—whether as “Common Good” with initial capital letters or for common good—and whether the council concerned would be disadvantaged if the ownership changed. The argument is that, by converting the conditions in the lease to real burdens, we protect the interests of the people who seek to benefit from the asset, through access or other means.

Annabelle Ewing: I have listened carefully to what the minister has said. I will put to him a point that was made by Bill Miller, who spoke on the City of Edinburgh Council’s behalf at our meeting last week. We are back to discussing the Waverley market or Princes mall, as we expected that we might be. He said:

“By retaining ownership of the whole site, the council can maintain any conditions it wishes, either through a lease or ownership, but if it loses sight of both the lease and the ownership it loses control over the future use of the site.

Future Parliaments might decide to do away with the” City of Edinburgh District Council Order Confirmation Act 1991

“and planning legislation might change ... However, while the council remains the owner—or as a landlord—it is in control of the site, no matter what the planners or an act of Parliament say.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 29 February 2012; c 668-9]

That encapsulates the council’s argument for a particular treatment of the site. Would the minister care to comment on that proposal?

Stewart Stevenson: The essence of what you just said is that Parliament might change the laws in the future. That might happen anyway. Independent of whether we pass the bill, the Parliament might change the laws in a way that adversely affected the City of Edinburgh Council’s interests. That would be a matter for whatever change in the law was concerned.

It is interesting that the council does not appear to have identified any specific change over which it feels that it would lose control. It is the planning authority so, within the planning system, it has the ability to control the appearance and development of the Waverley market and all other properties on Princes Street, which are equally important to world heritage status and most of which the council does not own or lease out. The distinction between the council’s ability to influence what happens to the Waverley market and its ability to do that in relation to every other building on Princes Street is unclear. That boils down to saying that I wait for the examples.

Annabelle Ewing: I was going to go on to the City of Edinburgh Council’s argument, which it appears developed as late as last week, on the world heritage site, but you have anticipated my supplementary question and answered it.

My last question on the subject is about additional payments under sections 50 to 52. There was a debate at last week’s meeting about whether those provisions could apply in this scenario. Can you provide any clarification on that point?

Stewart Stevenson: We provide for the prospect of additional payments precisely because each case will need to be looked at in its own right. It is not for me to speculate on what the Lands Tribunal might conclude. The relevant bit of section 52 states that the value is the value “which the right could reasonably be expected to obtain if sold on the open market by a willing seller to a willing buyer.”

In considering the matter under section 55, I suspect that the Lands Tribunal would consider matters such as grassum, which is an exchange of value. I imagine that the Lands Tribunal would wish to look at timing. In other words, if the grassum that was paid in the past is discounted with an appropriate rate of interest to the point at which the decision is being made, would that grassum adequately reflect the value, scaled up because the council has had it for many years?
The Lands Tribunal would also perhaps wish to consider what the value might look like at the end of the lease. It would, of course, be very little because the leaseholder would, in the normal course of events, cease to have an interest in the site. The Lands Tribunal and the lawyers for the respective parties would wish to consider a number of significant issues. It is not for me to speculate about what the decision would be. I think that it would not be possible to put in a more specific general provision, because I suspect that every case will have individual features.

The best approach is for a body such as the Lands Tribunal, which is used to dealing with debates about value, to be part of the process for dealing with such issues. Section 54 deals with situations when additional amounts are mutually agreed and section 55 deals with cases when there is a reference to the Lands Tribunal. The bill has all the provisions necessary to cover loss of value when there is transfer of ownership from the current owner to the leaseholder.

Claudia Beamish (South Scotland) (Lab): Good morning, minister. I will pursue the matter further. Brodies LLP and others have stated that it is unsatisfactory that the bill gives no guidance to the Lands Tribunal on how to calculate compensation when the matter is in dispute. Could you comment on that?

Stewart Stevenson: A formula in section 47 refers to “2.5 per cent Consolidated Stock”.

That gives a way by which the discounting can be done. It is important that we do not give advice to the Lands Tribunal that would be confusing rather than helpful. Such a debate comes up regularly during the consideration of bills. For example, I recall that, during consideration of the Land Reform (Scotland) Bill, there was a debate about curtilage—in other words, what represents the land round a domestic dwelling that is there for the privacy and enjoyment of the owner of the building and is therefore not covered by land access. The Parliament debated that, and found that the only satisfactory way of dealing with it was to allow the courts to look at cases on the facts before them.

In the same way, it is not possible for us to know what is in every lease. We have not seen the leases, and we have to delegate to the Lands Tribunal the task of looking at the details of individual leases, and at how grassums and other payments, and the balance of income should be accounted for. I very much doubt that one could come up with comprehensive guidance, and such guidance would anyway be likely to make the tribunal’s job substantially more difficult and would perhaps conflict with case law. The professionals in the Lands Tribunal are well used to this kind of activity, and I suspect that we are better to let them get on with it, without providing more guidance than on the formula for compensation—as outlined in step 4 of the calculation process in section 47 of the bill.

10:30

Claudia Beamish: As a non-lawyer, like you minister, may I ask why it might be that Brodies has concerns about this section?

Stewart Stevenson: We will let my lawyer answer that.

Annalee Murphy (Scottish Government): I could not guess why Brodies had a particular concern, but it might be something to do with its advising clients fully on the consequences that the bill will have for their property rights. As the minister has highlighted, section 47 provides a formula for calculating the compensation payment, and section 50(2) contains further guidance for the Lands Tribunal, on how to calculate the additional payment. We have received a response from the tribunal that indicates that it does not seek any further guidance. As the minister pointed out, no guidance could possibly cover all the circumstances of a case and might well hinder rather than help the tribunal in its determination.

Simon Stockwell (Scottish Government): For the Lands Tribunal, much of this will probably follow on from work that it did when feudal tenure was abolished. The bill closely follows the model that we used at that time, and the tribunal will be able to use that experience here.

Margaret McDougall (West Scotland) (Lab): Given local authorities’ mixed track record in relation to their common good responsibilities, why has the Government opted for non-statutory guidance for them on compensation received for ultra-long leases of common good land?

Stewart Stevenson: It comes back to diversity: the common good goes back a long way, and its roots are extremely diverse. To be blunt, we would probably need to issue 32 sets of guidance, so it is better that councils consider what makes sense for them. Of course, councils are governed by the need for accountability. They need to ensure that they can show what has happened to common good assets and that they have not transferred assets without proper cause or compensation. They must be able to demonstrate that they are delivering good value in the management of common good assets. I know that that is often a matter of debate—as it happens, the costs of administration of the common good are a matter of some debate in the council in my constituency. I take no view on the matter.
Because common good covers such an enormous range of options and because of the different legal heritage of many items in the common good, it would be nigh on impossible for us to provide statutory guidance that tied councils’ hands. It is better to have non-statutory guidance, which lays down principles and allows councils to work out their own salvation according to local circumstances.

**Margaret McDougall:** What is your view on the alternative approach of stipulating in the bill what must be done in relation to such compensation?

**Stewart Stevenson:** For clarity, are you suggesting that the bill should say that the money should be kept in the common good fund?

**Margaret McDougall:** Yes—or is there an alternative?

**Stewart Stevenson:** Again, the issue is covered by the existing rules and, again, the use to which assets in common good are put is a matter for councils—and their electorates, for that matter. Councils have very different ways of using common good assets. Some councils have a relatively small amount of such assets and the issue does not drive public policy; others have substantial income streams, which they are often able to use for matters for which it would be difficult to justify using council tax payers’ money or the money that comes from the Government through the Convention of Scottish Local Authorities formula.

The approach that you suggested would be restrictive and would represent a return to the old days before we took the shackles off in respect of how councils spend their money. My preference is not to take such an approach but to allow councils to use their good common sense to determine how they use the assets that are at their disposal, and to be accountable to their electorates for what they do.

**Graeme Dey:** This is a slight digression; it is about interaction between the Government and local authorities on the bill. The bill team appears to have had to put considerable effort into obtaining information from some local authorities on common good cases and how the bill might impact on them. Indeed, members of the committee have assisted in the process, by encouraging their local councils to play ball.

Is there a lesson to be learned? In future, might the Scottish Government compel local authorities or other bodies to provide the information that bill teams require—if indeed it can compel bodies in that way—to spare its officials the task of chasing up information or the problem of having an incomplete picture with which to work?

**Stewart Stevenson:** You make a relatively fair point, but it must be balanced with a couple of things. Each level of government has its responsibilities, and as a matter of general principle it would probably be unhelpful if the Scottish Government were to start to instruct local government on what it must do. That would take power away from local authorities and, as a general principle, that is not an approach that we would want to take.

More fundamentally, what has emerged from the bill process is that it is probably not possible to have 100 per cent accuracy, however much effort is made, and there will continue to be areas of uncertainty. It is clear that a large amount of work is involved in getting even relatively close to 100 per cent certainty. Councils, ultimately, will have to deal with the consequences of the bill and it is up to them to make a judgment on how much effort they want to expend.

At the end of the day, we always make decisions based on what is likely to be, to some degree, imperfect information. If we could make decisions at all times based on 100 per cent perfect information, we would just put that into a computer and press a button, it would tell us what to do and we would not need anything else. In other words, the process of making legislation and of administration involves our exercising judgment, balancing interests and making the best possible decision within the resources that we have.

In that sense, councils have made a pretty decent, honest effort to give sufficient information to enable us all to make a defensible and reasonable judgment on the matter. However, ultimately, they are responsible for matters that affect them, and for drawing it to our attention if we inadvertently create difficulties for them of which we might not otherwise be aware. The relationship is a partnership; it is not a master and slave relationship. It would not be helpful to get into that position.

**Simon Stockwell:** I have been a civil servant for a long time—more than 25 years—and in most of my career I have worked with local authorities. There was a time when the relationship was perhaps a bit more like a master and slave relationship, or trench warfare as I call it. In the past, we have gone out to local authorities and said that we would like them to supply information to us, and we have quoted relevant statutory provisions. That quickly gets local authorities’ backs up, understandably. When I have gone out and said to local authorities that I want information because of section whatever of such-and-such an act, they have been more likely to say no than to say yes.

**Stewart Stevenson:** The genuine difficulty is that if there is not partnership working, we get the
appearance of co-operation, but the reality might be otherwise.

The Convener: Armed neutrality. [Laughter.]

Stewart Stevenson: Or mutually assured destruction, convener?

The Convener: Let us get back to the realities of the bill rather than the philosophy. Claudia Beamish has a question on variable rents.

Claudia Beamish: I would like to explore two aspects. New provisions on variable rents were added to the session 3 bill. In oral evidence to the committee on 8 February, officials stated that they were content with the drafting of the provisions on variable rents, although they said that they would double-check the position and report back to the committee. Brodies suggested that the provisions need to be amended. It observed that section 2(5), which contains the instruction to leave variable rent out of account, should be expressly disappplied in relation to sections 64 and 69, which provide for the opportunity to exempt leases over £100, taking into account variable rent. The Scottish Property Federation endorsed that point in oral evidence to the committee on 22 February.

Will you give a view on whether the provisions on variable rents require to be amended in the interest of clarity?

10:45

Stewart Stevenson: Obviously, I will listen carefully to what the committee says and I will read its report. However, section 2(1) limits the scope of section 2 to section 1(4)(a), so it is less restrictive than it might seem. The issue is also covered in section 64, particularly in subsection (1), which covers the issue in a different way. We will consider the matter further, but we believe that we have covered the necessary bases through section 2(1), which limits the scope of section 2, and hence of 2(5), to only section 1(4)(a), and through section 64, which is on “Exemption of qualifying lease by registration of agreement or order”.

As much as anything, the point is that irregular payments might be made or demanded. Because of circumstances, irregular payments might be part of a lease. So the issue is not only about a single payment; it might be about multiple payments. We believe that the bill as drafted covers that. In particular, section 64(1)(b) talks about cumulo rent, so I believe that we have that covered.

We have considered the matter now, as you have asked the question, and we believe that it is covered. Just to make absolutely sure, we will consider it in more depth than my officials and I can do sitting here.

Claudia Beamish: Another committee member with more of a legal mind than I have might want to probe the issue further. However, so that we can have a full discussion, I will raise the second point, which relates to section 2(2) and rent review. Dundas and Wilson is concerned that the section might be inadequately drafted. In particular, the wording appears to exclude situations in which the original lease was varied by agreement in a separate document, such as a rent review memorandum. When we took evidence on 22 February, Brodies and the Scottish Property Federation agreed on that. Brodies also argued that the drafting excludes situations in which a rent variation has been agreed verbally, which adds another complication. I would value your comments on that. The convener might wish to call other members to ask questions on the issue.

Stewart Stevenson: An agreement does not have to be on paper to exist, albeit that the tests that apply when there is a dispute are a bit more challenging.

Simon Stockwell will do the techie bit.

Simon Stockwell: We think that that is a stronger point than the first one that Claudia Beamish raised. We are not really persuaded on the first point, given that section 2 applies only in relation to section 1(4)(a).

On the second point, there is an argument in relation to section 2(2) that we should perhaps cover other cases in which the rent has been varied and where that is clear. We think that there might be a bit more in that than there is in the first point. We will come back to the committee to let you know precisely what we are thinking.

The Convener: Thank you. We will move on to standard securities.

Annabelle Ewing: Concerns have been expressed that the current drafting is not absolutely clear in preserving a standard security that has been granted with respect to the subjects. When we took evidence from the bill team, it was comfortable that the drafting is okay, but would you care to comment on those concerns, minister?

Stewart Stevenson: We are talking about leases that are worth no more than £100 a year. It is not terribly likely that there will be a large number of standard securities over such small leases, because they represent such a modest asset. I start from that viewpoint.

Such cases are unlikely, but if there are any, the effect of section 6(4) will be to extinguish the standard security on the appointed day. That is deliberate, because it would not be appropriate for a standard security of a former landlord to affect the title of a former tenant—the new owner.
However, the personal debt that the former landlord owes is not extinguished.

Given the modest amounts of money that we are talking about, where a landlord retained a genuine financial interest in the property, it is more likely that he or she might have granted a standard security over his or her interest.

**Annabelle Ewing:** I wonder whether it would be helpful to clarify the language in the relevant section.

**Stewart Stevenson:** It is quite clear that Simon Stockwell wants to respond to that.

**Annabelle Ewing:** I see him shaking his head.

**Simon Stockwell:** The short answer is no. After discussing the issue with our lawyers, our view is that the section is as clear as it can be.

**Annabelle Ewing:** I suppose the fact that only a few standard securities will be affected is neither here nor there; the point is that, if a standard security is going to be affected, the person who granted it will want to know that their rights will be preserved. I accept Mr Stockwell’s view that he is confident that the language in the bill is sufficient in that respect.

**Stewart Stevenson:** The view is, I think, that it is as clear as certain complex legal issues can be made.

**Annabelle Ewing:** As a lawyer in a previous life, I take the point.

We discussed with the bill team the possibility of seeking a comment from the British Bankers Association on its position, to the extent that it has one. Have you received any response?

**Stewart Stevenson:** We have, and the BBA understands that the protections that the bill puts in place seem appropriate.

**Annabelle Ewing:** Thank you for that clarification.

**Jim Hume:** On standard security, the minister said that because it would apply to rents of under £100 the assets involved would be modest. However, the Edinburgh Waverley market site, which has a rent of under £100 per annum but a £6.25 million grassum, is quite a substantial asset.

**Stewart Stevenson:** The standard security applies to the lease, not to the asset—unless the lease itself is an asset. In the case of the Waverley site, it is rather unlikely that a standard security would be granted over a lease of the value of a penny per annum. Indeed, I am not sure what asset the standard security would be secured over.

**Jim Hume:** But we are talking about long leases. In the case of the Waverley market, the tenant is not paying a large rent but is obviously getting a large income from subletting the site.

**Stewart Stevenson:** The tenant might use their interest in a lease as an asset to back borrowing, and a standard security might be granted over that. However, in such circumstances, they are hardly disadvantaged by the transfer of ownership to the tenant.

**Jim Hume:** That is fine. It is something to think about.

**The Convener:** A number of submissions have raised concerns that the Government’s approach to updating property registers as a result of this bill should be made compatible with the Land Registration (Scotland) Bill’s objective of ensuring that the public and relevant professionals have accurate and up-to-date information on land ownership. Will you comment on the compatibility of this bill’s approach with the aims of the Land Registration (Scotland) Bill?

**Stewart Stevenson:** Clearly, we think that it is compatible. The question is whether it is necessary to update the registers at one point in time, and it is proposed that the updating take place the next time it is necessary to update the land register in respect of ownership. That method is more economical and, indeed, more effective, particularly given that the Registers of Scotland will be heavily engaged in implementing the Land Registration (Scotland) Bill, should it be passed by Parliament.

For a property transaction, including a sale, the former tenant can choose to make an application to rectify the land register to reflect his or her ownership. The fee for that is currently £60. So, the obligation is on the former tenant and present owner to protect their interest by paying the fee and making the update. If they planned to hold the property for a long time, they might choose not to do that for a long time, but that would be a matter for them. The proposed method is simply more effective than spending a large sum of money to develop a system to do it. It makes it relatively straightforward, costs a great deal less and does not appear to cause any legal difficulties.

**The Convener:** Updating the land register seems to take longer than glaciers do to melt. In fact, we do not have a good picture of the land register because of the lack of updated transactions. The impression was given that we wanted to use the land registration system to try to bring items together and update them at the one time. Are we approaching updating on a transaction-by-transaction basis for merely economic reasons?

**Stewart Stevenson:** There are choices here. Historically, land ownership has involved lodging deeds in the register of sasines. However, that in
Annabelle Ewing: In a previous evidence session, at least one individual expressed disappointment that the opportunity had not been taken in this bill or in the Land Registration (Scotland) Bill to provide for registration as part of the process of conversion, with the appropriate fee therefore being payable according to the scale. Such a requirement would not simply rely on action on the tenant’s initiative and would facilitate the production of a land register that would provide far greater clarity on land holding in Scotland. Do you have any comment on that?

Stewart Stevenson: What the bill will affect is comparatively modest compared with the system as a whole. How many leases do we think there are?

Simon Stockwell: Nine thousand.

Stewart Stevenson: Right, which is a comparatively small number. Again, the question is what benefit would be derived from forcing registration to be done at one point and at considerable extra cost to tenants, landlords and, indeed, the public purse. The system has been such from the outset of reforming the feudal system. I recall owning a house that was feu’d, and basically you converted only when you sold the house. There is much to commend that. It smoothes the workload and it is perfectly clear to lawyers who make inquiries what the situation is when they look at what is in the files. The inconvenience to which the member referred is comparatively modest compared with the advantage in smoothing the workload over a period of time.

The Convener: We will crack on with time limits issues.

Annabelle Ewing: On a perhaps more technical point, a representation was made inter alia by the Faculty of Advocates—I think that the Law Society in general supported its position—on time limits and whether it would be preferable to set them in the bill rather than in secondary legislation. It would be helpful to have the minister’s comments on that.

Stewart Stevenson: It would be better to do the consultation and seek views on a potential time limit. I am not clear on what the advantage of incorporating the limit into the bill at this stage would be, and think that it would cause difficulties. Parliament will have to consider a suitable timetable when secondary legislation is proposed. When the bill reaches its final stage—assuming that Parliament consents to that—we will seek views and consult on the time limit. We would prefer to take that approach.

Annabelle Ewing: I am heartened to hear about the potential future involvement of those august bodies in fixing the time limit.

The Convener: We now turn to land held in trust and managed by local authorities

Margaret McDougall: What are the minister’s views of the comments made during our previous discussions of the issue? Is the Scottish Government’s approach still as stated by officials in their evidence to the committee?

Stewart Stevenson: This issue occupies the same space as common good. Sometimes, councils have not realised that land that they thought was held for the common good was actually held in trust. A senior official with whom I happened to be speaking casually gave me an example of that a few days ago. When it comes to taking the benefits of any conversion, a council’s rules on common good are likely to be applied to this issue as well. At the end of the day, it is a matter for local authorities. Given the diversity of what trust deeds may say—every trust is individual—local authorities, rather than Government, are best placed to make such decisions.

Margaret McDougall: In that case, a trust could be dealt with differently, because its conditions may say that the land should continue to be held for the benefit of the people.

Stewart Stevenson: That takes us back to the change in ownership structure that could result from the bill. It is necessary to protect the public interest exercised by the council on behalf of the trust. This is about the trust, rather than the council—you are asking me about trusts managed by the authorities. Ultimately, the ownership is one thing, but the responsibilities that the council has accepted by taking on the management of the trust would endure.

Margaret McDougall: Is the minister minded to make any further drafting amendments to the pipes and cables exemption, based on the Law Society’s comments to the committee on the issue?
Stewart Stevenson: It is necessary to include an exemption in the bill. Wayleave is an English term, but I think that the term I am looking for is heritable right of access.

Simon Stockwell: The correct term is servitude.

Stewart Stevenson: Thank you. Servitude is a different issue. We believe that the clarification of the wording should make it clear that the responsibilities of the tenant and the owners are covered.

We are aware of leases of exactly 175 years for pipes and cables, and they would not convert, as the lease must be over 175 years. In practical terms, we think that the bill covers the needs that exist.

The Convener: We have had a fairly thorough look at those matters.

Finally, there is an issue that I want to return to, as we have received further, late submissions from the City of Edinburgh Council. Does the minister accept the City of Edinburgh Council’s argument that Waverley market is a special site for Edinburgh and Scotland? Is he minded to amend the bill to make that site the subject of a special exemption?

Stewart Stevenson: I am still entirely unclear about why Waverley market is different from the Balmoral hotel, which is adjacent to it, Marks and Spencer on Princes Street, and every other building in the area that is covered by planning law and a range of other laws. Until and unless there is something distinct, it is difficult to identify why, when we look at the policy as a whole, one building should be treated differently in primary legislation in a relatively arbitrary way. I await further information on what the distinct difference might be.

The Convener: Thank you for that answer, minister.

We have a lot of deliberations to make. The area is complex, and we will provide a stage 1 report on the bill in due course.

I thank the minister and his officials for their evidence.

11:06

Meeting suspended.
ANNEXE E LIST OF OTHER WRITTEN EVIDENCE

SUBMISSIONS RECEIVED IN RESPONSE TO CALL FOR VIEWS

- Alison Johnstone MSP (72KB pdf)
- Brodies LLP (121KB pdf)
- City of Edinburgh Council (96KB pdf)
- The Cockburn Association (200KB pdf)
- Council of Mortgage Lenders (67KB pdf)
- Dundas and Wilson CS LLP (8KB pdf)
- Faculty of Advocates (78KB pdf)
- Morton Fraser LLP (63KB pdf)
- Scottish Land and Estates (65KB pdf)
- Scottish Law Agents Society (6KB pdf)
Submission from Alison Johnstone MSP

Introduction

I am a Scottish Green Party MSP and, until May this year, an Edinburgh councillor. I first engaged with this Bill in that capacity when it was first introduced to Parliament in session 3.

In December 2010 I tabled a council motion that would have Edinburgh Council support the exemption of common good land from the provisions of the Long Leases (Scotland) Bill and write to Parliament in this respect. Another relevant motion in my name was passed on the 2nd February 2012 in relation to the Bill as introduced in session 4.

Evidence

I argue here that the RACCE committee agree that Waverley Market in Edinburgh should be exempted from the provisions of the Long Leases (Scotland) Bill.

In the Justice Committee Stage 1 report on the Long Leases (Scotland) Bill in Session 3 the committee concluded on the evidence and discussions regarding common land that:

The desirability for certainty from this legislation and the provisions for compensation provided in the Bill have led the Committee to conclude that it is not persuaded, at this time, that there is a compelling case for exempting leases of common good property from this Bill.

As alluded to above the main reason for this view was the desire to ensure uncertainty and delay was minimised in the context of there being incomplete registers of common good property and the potential for legal challenge against any land disposal.

The arguments for common good land remain strong in my view and should be reconsidered at this stage against any improvements in the registers of common good property held by Local Authorities, the Land Registration etc. (Scotland) Bill currently under consideration and, of course, the strength of the arguments themselves. Namely that land held in common good is often leased only due to restrictions on its disposal; that local authorities can in fact dispose of this land, ordinarily with the authority of the courts; and that the land is held on behalf of the residents of former burghs and not private interests. Common good land under long
lease should not be converted into ownership as “it is not in the same class as private property where leases were entered into as an alternative to feuing”.¹

However, if in reconsidering these arguments the committee is minded to not exempt common good land, I propose The RACCE committee recommend an exemption specifically for Waverley Market in Edinburgh.

This land may be easily and unambiguously defined and an exemption for this site alone would not lead to the legal uncertainty cited as a problem in the previous session.

Waverley Market is an iconic site and a substantial and incredibly valuable asset, held for the benefit of the public. It may represent a large part of the common good asset currently at risk as a result of the provisions in this Bill, although I would welcome other examples from other areas.

As a result of the strength of feeling in Edinburgh a motion was passed by full council on 2/2/2012 agreeing to write to the RACCE Committee to seek an exemption for Waverley Market.

As you know, Edinburgh Council are scheduled to give evidence to committee on this Bill on 29th February.

The Committee may be aware of differences of opinion with regards to Waverley Market’s Common Good status. Whether or not it is proven that the site is, or is not, Common Good Land, it belongs to the City and its people and is managed on their behalf by the City of Edinburgh Council.

It is well documented that under the provisions of the current Bill Waverley Market would pass into private hands for a very small sum.

This is unfair to the people of Edinburgh and as a result I am seeking an exemption for this specific site.

¹ See Andy Wightman’s evidence in Session 3
Submission from Brodies LLP

Written evidence to the Rural Affairs, Climate Change and Environment Committee of the Scottish Parliament from Brodies LLP on the terms of the Long Leases (Scotland) Bill 2012 ("the 2012 Bill").

Introduction

Brodies LLP is a large commercial legal practice which acts for various types of clients who buy, sell, lease and grant and take security over property throughout Scotland. In particular, we act for a number of property investor clients and are familiar with property investment structuring techniques.

We have restricted our comments on the Bill to those provisions which deal with the issue of variable rents highlighted in our previous written and oral evidence on the Bill as introduced to the Parliament in 2010 ("the 2010 Bill") and have also made supplementary comments on Section 3 of the 2012 Bill which is unchanged from the 2010 Bill.

Section 2 – Further provision about annual rent

When giving evidence on the 2010 Bill we submitted evidence regarding how long leases of a valuable commercial nature could be affected by the Bill as then drafted due to the terms of section 2(5) of the 2010 Bill. That section provided that when determining the annual rent for the purposes of establishing whether a lease qualified for conversion, "Any rent payable under a lease which is variable from year to year is, to the extent that it is so variable, to be left out of account." We explained that such a provision could bring valuable commercial leases within the ambit of the Bill where the annual rent was a nominal amount less than £100 and the variable element was, for example, a share of occupational rents or turnover, the latter being a significant amount.

The 2012 Bill retains this provision but also contains further provisions to give landlords the opportunity to enter an agreement with tenants to confirm the true amount of the annual rent (Section 64 of the 2012 Bill) or, if an agreement cannot be reached, to seek an order from the Lands Tribunal to confirm the rent payable (Section 69) and have the lease exempted from the effects of the 2012 Bill.

The Explanatory Notes to the 2012 Bill explain that Sections 64 and 69 have been included to provide for the situation where significant variable rent is paid in terms of the qualifying lease. We are pleased to see that these sections have been added but would suggest that further slight amendments should be made to the Bill for clarification purposes.
Suggested amendments

Unlike the other provisions in the 2012 Bill dealing with the determination of annual rent (Sections 2 and 48), Sections 64 and 69 do not provide what is and what is not to be included in the calculation of the amount of annual rent. The Explanatory Notes clearly envisage that variable rent will be included in the annual rent but neither Section 64 nor 69 makes that clear.

We consider the use of the expression "annual rent" to be potentially misleading in the context of Sections 64 and 69 of the 2012 Bill. The expression annual rent may infer that the payment is made annually, whereas we believe that the intention of the amended legislation is to take into account the aggregate amount of rent, including where applicable a variable rent, payable in the year of calculation at any point during the relevant 5 year period specified. This exact amount of rent may not be payable in any other year, and indeed in the context of a variable rent based on turnover, would never be the same from one year to another. As such it may not be regarded as annual rent, but rather rent payable in respect of a qualifying 12 month period. The matter might be clarified by inclusion of an appropriate definition in Section 80.

We would also suggest that Section 2 of the 2012 Bill, in particular Section 2(5), should be expressly disapplied from Sections 64 and 69.

In the absence of the prescribed form of agreement to be entered into by the landlords and the tenants, it is difficult to interpret what can be included in the determination of the annual rent. It may be that Sections 64 and 69 have deliberately been left to allow the landlords and tenants to reach agreement on the true amount of rent payable and to permit them to include variable rent but this is not clear. We would however request that the prescribed form of agreement does not leave scope for extended negotiation between the parties and that it clearly sets out what may be included in the calculation.

Section 3 -Only one qualifying lease

Whilst the headings in the Bill are for guidance only, we believe that the heading to this section is misleading. We understand from the Explanatory Notes that if there is more than one potential qualifying lease – for example, a head lease of the whole and a sub lease of part, both the head lease (to the extent that the subjects of the lease have not been sub-let) and the sub-lease will convert to ownership on the Appointed Day. There could therefore be more than one qualifying lease and so the heading should be amended to note that there is only one qualifying lease in respect of any particular land.

Conclusion

We welcome the changes included in the 2012 Bill and are happy to assist further with any of the points raised above.
Submission from City of Edinburgh Council

Dear Sirs

Long Leases (Scotland) Bill

We write in connection with the Long Leases (Scotland) Bill, and the Rural Affairs, Climate Change and Environment Committee's invitation to all interested parties to submit views on this, in order to propose the Bill be amended to the extent more fully set out below.

1. Exemption for Leases where the premium / grassum equates to an annual rent greater than £100

The Bill provides that a lease will not be eligible for conversion to ownership where the annual rent is over £100, albeit that there is now an ability for variable rents to also be taken account of.

As previously suggested in our submissions of 11 January and 28 February 2011 (copies attached), the Bill makes no allowance for situations where the landlord has chosen to receive an upfront premium or grassum on the granting of the lease, with the tenant only then paying a nominal or peppercorn rent during the lease term. As a consequence, it is to be expected that the Bill will result in many landlords (including local authorities and other public sector bodies) being divested of valuable land which would have otherwise generated an annual rent in excess of £100, but where the decision was taken at the granting of the lease to instead receive a lump sum.

The Council considers that this distinction needs to be recognised, in order to give full effect to the proposed exemption of leases with a certain minimum value. Further, it is respectfully suggested that the Bill does not give sufficient regard to the fact that the parties to the lease had chosen that their relationship be governed by the Scottish law of leases, when they might have alternatively chosen to transfer the heritable interest in the land, subject to such title conditions as they might have agreed at the time. There will often be good reason why such properties have been leased and not disposed, particularly if they have a location which is of particular importance to the landlord, and the parties’ decision to deal with the property in that manner should be protected.

As such, the Council would, therefore, again propose that the Bill also excludes from conversion those leases where any premium / grassum paid to the landlord on the granting of the lease would equate to an annual rent in excess of £100 if the premium / grassum were divided by the number of years which the lease was granted for, or that instances such as this were otherwise taken account of. Naturally, this proposal is made while at the same time acknowledging the previous consideration already given to this point by the
Justice Committee. It should be borne in mind by the Committee that even this might not adequately reflect the value of the lease in question, since a landlord taking a premium / grassum would ordinarily accept that such a payment should be less than it would have otherwise received in rent over the life of the lease, if it had chosen to receive payment solely by way of an annual rent.

2. Princes Mall Shopping Centre

As the Committee will be aware, the Council is the heritable proprietor of Princes Mall (formerly the Waverley Market Shopping Centre) and the head landlord of the property under an ultra-long lease (for a period of 206 years) which is a qualifying lease under the Bill.

The Bill as introduced would result in this long leasehold interest being converted into outright ownership for the tenant of the land in question, with the implication that the Council would be divested of this land without having formally resolved to do so. Waverley Station is the gateway to Edinburgh for many residents and visitors, and Princes Mall often their first sight upon leaving the station. Given this, the property’s central location within an UNESCO World Heritage Site, and its proximity to Princes Street Gardens and the other main transport hub at St Andrew Square Bus Station, this property has significant importance to the Council, beyond any monetary value the residual heritable interest might have.

As such, the Bill’s provisions entitling a landlord to compensation in the event of such a conversion are, we would respectively submit, unlikely to give the Council and the City’s residents appropriate recompense for the loss of the property, and the Council’s ability as owner to have an involvement in its future development and use.

While the amendment to the Bill which we have proposed above would address our general concerns with the Bill, and also our specific concerns over the possible loss of the ownership of Princes Mall, should the Committee not be minded to recommend the Bill be changed in that manner, then the Council would as an alternative ask the Committee to specifically exclude this property from the scope of the Bill.

We would also highlight that a full meeting of the Council on 2 February 2012 resolved that we write to the Committee seeking such an exemption, given the Council’s concerns over the potential loss of ownership of Princes Mall.

We again confirm that Iain Strachan (Principal Solicitor) and Bill Miller (Property Management and Development Manager) will be pleased to attend to give oral evidence to the Committee on 29th February. However, if the Committee have any specific queries before 29th February, please do not hesitate to contact James Doherty in the first instance.
Letter to the previous Justice Committee - 11 January 2011

Dear Sirs

Long Leases (Scotland) Bill

We write in connection with the above, and the Justice Committee’s invitation to all interested parties to submit views on the Bill.

Common Good Land

There are two points The City of Edinburgh Council would wish to raise in connection with the topic of Common Good land.

Firstly, the Council would wish to clarify the position on whether or not the property known as Princes Mall (formerly the Waverley Market Shopping Centre) forms part of the Common Good of the City of Edinburgh, since it has been reported in the press that it does. So the Committee are aware, the Council's interest in this property is as head landlord under a long lease, which might be a “qualifying lease” under the Bill.

In short, the site on which Princes Mall is built ceased to form part of the Common Good of the City of Edinburgh in 1938. Historically it is correct that this site was the City’s Fruit and Vegetable Market and as such was held on the Common Good account. However, the actual site of this market was transferred with Council approval in the late 30s to land at Cranston Street and East Market Street, Edinburgh. This transfer of the market included the transfer of the Common Good status. As a consequence, Princes Mall is not held on the Common Good account, and it is not land forming part of the Common Good of the City of Edinburgh.

We understand that this has also recently been confirmed to you, or possibly the Scottish Government's Family and Property Law Team, by the Council's Finance Department.

Secondly, the Committee might, however, wish to consider that there may be a number of properties across Scotland, which are owned by local authorities and subject to long leases, but forming part of the Common Good of the local authorities in question. For such properties, the Bill as introduced might result in these long leasehold interests being converted into outright ownership for the tenants of the land in question, with the result that those local authorities would be divested of such Common Good land without resolving to do so. The Bill’s provisions entitling a landlord to compensation in the event of such a conversion may not give the local authority and its residents appropriate recompense for the loss of such an asset.
We have been requested by the Council to highlight this to the Committee, and to propose on behalf of the Council that long leases of such Common Good land be exempted from the Bill, and not capable of conversion to ownership.

We are aware that on 23 December 2010 the Scottish Government’s Family and Property Law Team issued a further specific consultation on the potential impact of the Bill on Common Good land, and as requested by them we shall separately respond to that consultation on behalf of the Council by the 21 January 2011 deadline.

Exemption for Leases with Annual Rent Greater than £100

The Bill as introduced provides that a lease will not be eligible for conversion to ownership where the annual rent is over £100. However, the Bill makes no allowance for situations where the landlord has chosen to receive an upfront premium or *grassum* on the grant of the lease, with the tenant only then paying a nominal rent during the lease term.

In such situations, the Bill as introduced could result in landlords being divested of valuable land which would have generated an annual rent in excess of £100, but where the decision was taken at the grant of the lease to instead receive a lump sum.

The Council considers that this distinction needs to be recognised, in order to give full effect to the proposed exemption of leases with a certain minimum value. Further, the Bill as introduced ignores the fact the parties to the lease had chosen that their relationship be governed by the Scottish law of leases, when they might have alternatively chosen to transfer the heritable interest in the land, subject to such title conditions as they might have agreed at the time. There will often be good reason why such properties have been leased and not disposed, particularly if they are valuable, and the parties’ decision to deal with the property in that manner should be protected.

The Council would, therefore, propose that the Bill also excludes from conversion those leases where any premium/*grassum* paid to the landlord on the grant of the lease would equate to an annual rent in excess of £100, if the premium/*grassum* were divided by the number of years which the lease was granted for. It should be borne in mind by the Committee that even this might not adequately reflect the value of the lease in question, since a landlord taking a premium/*grassum* would ordinarily accept that such a payment would be less than it would have otherwise received in rent over the life of the lease if it had chosen to receive payment solely by way of an annual rent.
I refer to your letter of 8 February. I understand from our subsequent telephone conversation that you wish further information about the original grant of the long lease at Waverley Market, Princes Street, Edinburgh, and the background to the Council entering into that transaction. I will not deal with the City of Edinburgh Council’s position on the alleged Common Good status of the site, namely that it is not Common Good, since our view on this has been explained in some detail in previous correspondence, and also in our evidence given to the Scottish Parliament’s Justice Committee on 1 February 2011.

Development of Waverley Market.

As you may be aware, the former fruit and vegetable market which was located at this site was demolished in the early 1970s. Following that demolition, the site was then used as a car park until the 1980s.

Edinburgh District Council entered into a Development Agreement with Reed Publishing Pension Trustees Limited and Reed Pension Trust Limited (“Reeds”) in 1982, whereby the site was leased for 125 years at £0.01 per annum with Reeds constructing the Waverley Market Shopping Centre and sub-letting the completed centre back to Edinburgh District Council for the remaining period of the head lease, at a rent which was to be the greater of £941,250 per annum or 76.102% of the net rental income from the centre. Edinburgh District Council subsequently sub-underlet the individual units within the centre.

In 1989 Edinburgh District Council and Reeds agreed to extend the period of the head lease as part of the proposed sale of the centre. The sale comprised (a) Edinburgh District Council’s interest as both tenant under the sub-lease (of the completed shopping centre) and as landlord of the sub-under leases granted to the individual units and (b) Reeds’ interest as both tenant under the head lease and landlord under the sub-lease (of the completed shopping centre). In this way, Edinburgh District Council retained its interest as heritable proprietor of the site subject to the head lease at the above-mention rent of £0.01 per annum. The sale price of the respective interests was £23,500,000, exclusive of VAT, of which £17,250,000 was paid to Reeds and £6,250,000 was paid to Edinburgh District Council. The disposal was completed in November 1989, with the duration of the head lease being simultaneously extended to 206 years from its commencement in 1982.

The disposal was proposed by Reeds, given a re-structuring and re-organisation of their investment funds, as they wished to disinvest from direct
property holdings throughout the UK. By Edinburgh District Council and Reeds jointly disposing of their interests this created a marriage value of both interests potentially greater than disposing of those interests separately, and as such an enhanced disposal price for both parties. The 1989 disposal was approved by Edinburgh District Council’s Policy and Resources Committee, as the accepted offer was the highest offer made.

While it would have been possible for the District Council to buy out Reeds this course of action was not recommended, as the sums involved would have been considerable without certainty of major or ongoing improvement of the then rental income. The purchase price to buy out Reeds’ interests was at the time estimated to be in the order of £17,250,000.

The terms of the head lease mean that Edinburgh District Council’s consent was not required to further disposals of the whole of the tenant’s interest, i.e. Reeds’ interest, which we understand is now held by PPG Metro 39 Limited (“PPG”), provided the proposed incoming tenant is of sound financial standing demonstrably capable of fulfilling the tenant’s obligations. While this might seem unusual, this is in fact quite common in a long lease of a commercial property such as this, since it reflects the commercial reality that, in essence, the tenant “owns” the centre with the landlord having been paid a full market value for the tenancy, and having no practical involvement in it other than its residual heritable interest.

As such, as far as we are aware, Edinburgh District Council and subsequently the City of Edinburgh Council has not been directly involved in any subsequent disposals of the tenant’s interest. Subsequent re-development of the shopping centre and increases in the value of commercial property have clearly made it a more valuable asset in monetary terms than it was in 1989, but equally PPG and previous tenants under the head lease will also have had to have paid full market value for their interests. We understand that PPG paid £37,600,000 for the leasehold interest in May 2004.

**Impact of Long Leases (Scotland) Bill**

If the above-mentioned Bill is enacted in such a form that enables PPG to acquire the heritable interest in the long lease of this property, then, leaving aside any question as to the Common Good status of this site, the Council should not be prejudiced in financial terms, given that in 1989 it received an open market value capital receipt for its interest and will also be entitled to some level of compensation under the Bill, although no doubt a fairly nominal one given the passing rent. As explained above, even if such compensation is nominal, PPG would not be acquiring the heritable interest free of cost, given the large amount it paid for the tenancy in 2004.
However, as the Council has previously highlighted in its evidence to the Scottish Parliament’s Justice Committee, the Bill as introduced does not exclude such commercial long leases from the scope of the proposed legislation, unless the passing rent is greater than £100 per annum, which is not the case here. With Waverley Market, the former District Council agreed a deal which gave it an upfront grassum (or premium) in 1989, and not a commercial rent, as this provided a capital receipt which was to be used to support the District Council’s strategic objectives at the time. Importantly, this use of a leasehold structure also gave the District Council certainty that the ownership of such an important and centrally located site would remain with it, and not be lost to the City, and clearly the developer accepted this by entering into the Lease. If the District Council had envisaged that it would have been required to charge a rent of £100 per annum to retain this ownership, then it would certainly have done so. The Council consider that the Bill should recognise situations such as this, and make provision to exclude such commercial leases from the ambit of the Bill as introduced. To fail to do so risks parties being denied the objectives they set out to achieve, and in this instance will mean the Council is divested of the ownership of this prominent site, which was never its intention.

I hope that this is of some assistance, but please feel free to contact me further if required.
Submission from the Cockburn Association

The Cockburn Association is Edinburgh’s Civic Trust, established in 1875. We are a registered Scottish charity, No:SCO11544. The Association’s remit is to protect and enhance the City of Edinburgh and its setting. We have a longstanding interest in all issues relating to transport, the planning process and the safeguarding of Edinburgh’s civic amenity.

The Association’s attention was drawn to the issues surrounding Common Good assets by our member Miss Mary Mackenzie and we have followed the research of Andy Wightman on the matter. If Scotland does hold an estimated £1.8 billion in Common Good assets it is vital that these remain for public benefit and are not transferred in to private ownership as an unintended consequence of the Bill. It remains the case that not all local authorities have published full and transparent registers of their Common Good accounts and therefore the impact of the Bill cannot be appreciated. In light of this we would support an amendment as drafted by Andy Wightman for the 2011 Bill and supported by the City of Edinburgh Council amongst others to exempt Common Good assets from the Bill. The alteration should be inserted as Section 1(4)(e) “it is of land forming part of the common good of a burgh”.

It is notable that the Justice Committee has accepted the amendment proposed by the Peterhead Port Authority to the 2011 Bill and exempted harbours where related to a harbour authority but not exempted Common Good despite a number of submissions. The Association calls upon the Rural Affairs, Climate Change and Environment Committee to revisit the matter and give it the necessary weight to protect a public benefit.

Andy Wightman has raised the issue that the land Princes Mall stands upon remains Common Good and a consequence of the Long lease (Scotland) Bill will be to effectively facilitate the sale to the current lessee for 40p. The City of Edinburgh Council refutes that it remains Common Good but Mr Wightman remains unsatisfied and refers to the fact that no legal provision has been made to remove said land from the Common Good.¹ It would be remiss of the Scottish Government to facilitate the loss of such a financial asset to the people of the City of Edinburgh and it is hard to imagine a private property owner allowing it to occur.

Cockburn Association
31 January 2011

¹ See para 19 of 07.01.11 written submission from Andy Wightman
Submission from the Council of Mortgage Lenders

Introduction

The Council of Mortgage Lenders (CML) is the representative trade association for mortgage lenders. Our 111 members and 88 associates comprise banks, building societies, insurance companies and other specialist mortgage lenders who, together, lend around 94% of the residential mortgages in the UK. In addition, the CML members have lent over £60 billion UK-wide for new-build, repair and improvement to social housing.

CML Scotland welcomes the opportunity to submit written evidence on the Long Leases (Scotland) Bill to the Scottish Parliament, Rural Affairs, Climate Change and Environment Committee.

General

We are supportive of the introduction of the Bill which would convert long leases lasting more than 175 years and with more than 100 years left to run into outright ownership. The report which the Scottish Law Commission produced into this matter did in our view set out valid reasons for conversion. Long leases of residential property are rare and historical and clearly the value of the tenant’s interest will reduce as the termination date approaches and this could clearly impact on the value of any Standard Security held by a lender over the tenant’s interest in the lease.

Our support outlined in 3 above is given on the basis that where a Standard Security is held over the tenant’s interest in the long lease prior to conversion it would remain in force following conversion. In section 6(2) of the Bill it effectively says that on conversion any real right which the qualifying lease was subject to the converted land is now subject to. This would therefore appear to allow a Standard Security over the lease to remain in force.

Our interest in this matter is restricted to residential mortgages but we note in terms of Section 6(4) any Standard Security granted by the landlord over the land subject to the long lease will be extinguished when the Bill becomes law although the landlord would remain personally liable to the creditor under the Standard Security. This in many ways makes logical sense given the nature of the Bill which effectively ends the rights of the Landlord. If it did not the Heritable Creditor could step into the shoes of the Landlord if they chose to call up their security. What we are not sure of is whether there could be any situations where lenders had lent on a commercial basis to a landlord and held a Standard Security from the landlord over the land subject to the lease. It may be worth obtaining the views of the British Bankers Association on this aspect of the Bill if you have not already done so.

This response has been prepared by the CML in conjunction with its members.
Submission from Dundas and Wilson CS LLP

Exemption for leases where the annual rent payable under the lease is over £100.

In terms of s1(4)(a) of the draft Bill, leases do not qualify for conversion if:

"the annual rent payable under the lease is over £100".

S2 goes on to provide that for the purposes of this section the rent payable under a lease is the rent:

"as set out in the lease (or as the case may be the assignation of the lease)".

Where you have a lease and the original rent reserved is less than £100 but the lease has been varied so that the rent is now greater than £100, would this qualify for automatic exemption? In our opinion it is not clear whether s1(4)(a) covers the rent as originally reserved or the rent as varied.

The reference to the assignation is in our view particularly unhelpful as it could lead to an interpretation that it is only those two documents (the original lease and the assignation of it) that you would be permitted to look at. The draft provisions do not seem to take into account that a lease can be varied other than in gremio of an assignation.

The wording could be easily clarified to ensure that there is no ambiguity. The addition of words such as "or any agreement varying the terms of the lease" after "the assignation of the lease" would in our view clear up any possible uncertainty.

Exemption of qualifying lease by registration of agreement or order

We are also of the view that sections 64 and 69 could be clarified to put beyond doubt what can be included in "annual rent" for these sections. Although it is clearly intended that variable rent will be included, the Bill does not expressly state this.
INTRODUCTION

The Faculty has previously been consulted (1) at the Consultation Draft stage in March 2010 and (2) on the previous Bill introduced in November 2010. The Faculty provided responses on both occasions and, following the later response, was invited, and accepted the invitation, to give evidence to the Justice Committee of the Scottish Parliament in January 2011. That Bill fell on the dissolution of the Scottish Parliament in March 2011.

The Faculty’s second Response questioned the use, a difference from the Consultation Draft, of subordinate legislation particularly relating to the provision of the necessary forms, the provision of time limits and the power to alter primary legislation.

Thereafter the Justice Committee issued a Stage 1 Report on the Bill. The Report took up the question of one particular time limit where the power to introduce it was to remain with the Scottish Ministers to provide by subordinate legislation. A Bill in substantially similar terms has now been introduced in the present Parliamentary Session.

The Faculty considers that the points previously made in its January 2011 Response remain valid but accepts that the provisions of the Bill as now presented are similar to those previously commented on. The Faculty therefore adds very little to its previous Response, a copy of which is attached. The addition relates to the time limit on which the Justice Committee commented and to an associated point about giving notice in the Land Register that an application to the court or to the Lands Tribunal for Scotland has been made.

USE OF SUBORDINATE LEGISLATION TO PRESCRIBE TIME LIMITS

The Justice Committee’s Sixth Report, 2001 (Session 3) SP Paper 630 – the Stage 1 Report on the Long Leases (Scotland) Bill (the Bill that fell on dissolution) – recommended in paragraph 19 of Annex A to the report: the Subordinate Legislation Committee 5th Report, 2011 (Session 3), that further consideration be given to providing in the Bill fixed dates or periods rather than leaving them to be prescribed by the Scottish Ministers. These powers (in the then cl.75 and now repeated in cl.78 of the 2012 Bill) relate to applications to the court or to the Lands Tribunal for Scotland to determine the registrability of notices or agreements initially rejected by
the Keeper. Although a period is provided in cl.78(2) within which a court or Tribunal determination of registrability may be registered, there is no express limitation of the period after the Keeper’s rejection within which the application to the court or Tribunal has to be made. Power is given to the Scottish Ministers under cl.78(5)(a) to put a time limit on the registration of notices and agreements determined as registrable and under cl.78(5)(b) to limit the period within which an application to the court or Tribunal may be made.

2.2 The latter power puts it in the hands of the Scottish Ministers to introduce such a time limit, thereby potentially rendering worthless a person’s existing ability to proceed with a court or Lands Tribunal application. The Faculty recognises that a time limit is wholly appropriate in this area to support the certainty desirable in the Land Register. In the Annex to the Justice Committee Report (Correspondence with the Scottish Government) the point is made by the Government in relation to the (then) 75(5)(b) that Ministers should be given the power to stop applications being made long after the Keeper has made a decision. The Faculty agrees with the aim but proposes that the period should be a short one, provided provision is made for the Keeper’s rejection to inform the applicant of that limited period for appealing by application to the court or Tribunal.

2.3 The Faculty accordingly recommends that consideration is given to provision being made in the Bill for inclusion of a limited time period from the date of the Keeper’s rejection for any application to be made to the court or Tribunal.

NOTICE IN THE LAND REGISTER OF PENDING APPLICATIONS

3.1 Allied to the Faculty’s recommendation for a short time limit on applications against the Keeper’s rejection, and again associated with the aim of certainty in the Land Register, the Faculty also recommends consideration be given to an ability to register in the Land Register a caveat that application has been made to the court or Tribunal against rejection of any notice or agreement. This would follow the position presently being proposed in cl.65-70 of the Land Registration (Scotland) Bill for registration of caveats related to civil proceedings brought to reduce a voidable deed, to determine that the Land Register is inaccurate, or to rectify a deed. That could be provided within the current Long Leases (Scotland) Bill by authorising the court and the Tribunal to grant warrant to place such caveats on the title sheet or sheets of any land to which the application or appeal relates, and by requiring the Keeper to enter on the relevant title sheet or sheets such caveats as are presented to him by the person to whom the warrant has been granted.
Submission from Morton Fraser LLP

Long Leases (Scotland) Bill

I am writing to make a submission on the Long Leases (Scotland) Bill for your attention.

I have been considering the provisions of section 6 of the Bill from the point of view of a mortgage lender with a customer with leasehold title to property who has granted the lender a standard security over their (tenant’s) interest in the property. The concern from the mortgage lender’s viewpoint is to ensure that their standard security survives the conversion of a qualifying leasehold title to ownership under section 4.

Paragraphs 29, 30 and 31 of the Explanatory Notes accompanying the Bill appear to make it clear that the intention is that the customer’s standard security survives conversion, however it is far from conclusive either in the Explanatory Notes or in section 6 itself.

I would strongly suggest that if this is the desired intention, then section 6 is re-worded to make it a bit clearer. On repeated reading, I have still to convince myself that the combined effect of section 6(3) and 6(4) is anything other than that the mortgage lender’s standard security is extinguished on conversion.
Submission from Scottish Land and Estates

Scottish Land & Estates is a member organisation that uniquely represents the interests of landowners and land managers across Scotland. Scottish Land & Estates has over 2,500 members with interests in a great variety of land uses and we thank you for inviting the views of Scottish Land & Estates on the changes introduced in the Bill as compared with the Long Leases (Scotland) Bill which fell in March 2011 due to insufficient parliamentary time.

Scottish Land & Estates is pleased to note the inclusion of Section 1 (4) (c) in connection with leases for the installation and maintenance of pipes and cables.

Scottish Land & Estates notes that no exemption is made for non-exclusive “leases” over private access roads but accepts the point made in paragraph 48 of the accompanying Policy Memorandum and has no further comments to make on this issue.

Scottish Land & Estates is pleased to note that no change has been made either to section 1 (4) (a) in connection with the exemption of leases where the rent is over £100 per annum or to section 8 in connection with the right of a landlord to preserve rights to game or fishing.
Submission from Scottish Law Agents Society

We support the principles of the Bill which are well set out in the Scottish Law Commission Report. Such titles represent an anomaly and ought to be converted. As the Parliament has already abolished the feudal system this remains a piece of unfinished business in simplifying and modernising the system of land ownership in Scotland.

This Bill will necessarily involve the variation of property rights of landlords which has the potential to engage A1P1 ECHR. However in our view the changes fall within the margin of appreciation of state - they serve a legitimate purpose and is proportionate in its effect. The ECtHR held in *James v UK* [1986] in relation to the analogous provisions of the Leasehold Reform Act of 1967 in England that this was not an interference of a landlord's rights under A1P1. We do think it advisable for the Committee to expressly consider this argument in their deliberations and the Stage 1 Report.

We note that the Government has made some minor changes to the Bill as introduced in the last session in response to evidence heard by the Justice Committee in the last session. The changes and the underlying reasoning supporting them are set out in the Policy Memorandum. We consider these are clear and we support the Bill as now introduced.
LONG LEASES (SCOTLAND) BILL: REPLY TO STAGE 1 REPORT

Introduction

1. The Government is grateful to the Committee for its scrutiny of the Long Leases (Scotland) Bill at Stage 1 and for its Stage 1 Report. This letter responds to the Report. You asked in particular for a response to the concerns expressed to the Committee about updating the Land Register. I deal with that in paragraphs 9 to 15 below.

2. The Government is also responding to the Report by the Subordinate Legislation Committee and I am sending you a copy of that response.

3. In this letter, I have tried to deal with the issues you have reported on in the same order as they are in your Report.

Leases where the landlord has retained a significant interest

4. We are pleased that the Committee, at paragraph 53, welcomes the provisions to take account of variable rents for the purposes of exempting leases from the Bill where the landlord has retained a significant interest.

5. In paragraph 54, the Committee notes the points that were raised about the provisions. As we indicated in Committee, section 2 of the Bill only applies for the purposes of section 1(4)(a): section 2(1) makes that clear. Therefore, there is no need to disapply section 2 any further.
6. The Government does intend to lodge an amendment at Stage 2 in relation to section 2. As your Report notes, a number of bodies gave evidence noting that the rent paid in relation to leases can be varied. We intend to lodge an amendment to amend section 2 to deal with certain cases where the rent has been varied.

Standard securities

7. As the Committee indicates at paragraph 65 of the Report, section 6(2) ensures that the land which has been converted to ownership under the Bill continues to be subject to any standard securities which the tenant granted when the land was held on leasehold tenure. More details on these provisions is contained in paragraphs 30 and 31 of the Explanatory Notes to the Bill\(^1\) and in paragraph 3.25 of the report by the Scottish Law Commission\(^2\).

Compensation for loss of landlords' rights

8. I am grateful to the Committee for its consideration of the compensatory and additional payments available to landlords. An overview of the compensatory and additional payments provided for in the Bill can be found in paragraphs 56 to 58 of the Policy Memorandum for the Bill\(^3\).

Registration

9. I am grateful to the Committee for its consideration of this issue. There are a number of points I would like to make to respond to the concerns expressed to the Committee.

10. First of all, updating the Land Register of Scotland is not required for the Bill to work. I understand the concerns expressed to Committee and will cover these below. However, section 4 of the Bill provides that on the appointed day a qualifying lease converts to ownership. This happens under the Bill without requiring any action to be taken by Registers of Scotland.

11. Secondly, one of the points mentioned in Committee was that "there could be a mechanism whereby the registers could be corrected on application for a fee". This point is mentioned in the evidence quoted in paragraph 78 of the Report. It will be possible for those with an interest in a lease which converts to ownership under the Bill to make an application for the Land Register to be updated. This was mentioned in paragraph 308 of the Financial Memorandum (attached at the back of the Explanatory Notes) and I mentioned it when I gave oral evidence to Committee\(^4\).

12. Thirdly, there are a number of events which may lead to the information on the Land Register being updated. First of all, information will be updated in the Land Register when a property transaction takes place. A property transaction would include a sale but would also include the granting or discharge of a standard security over the property. Secondly, as I have indicated above, somebody with an interest in the property could choose to make an application to update the Land Register. Thirdly, if the property is recorded on the Register

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1 The Explanatory Notes are at: http://www.scottish.parliament.uk/S4_Bills/Long%20Leases%20(Scotland)%20Bill/Ex_Notes_and_FM.pdf
2 The Scottish Law Commission report is at: http://www.scotlawcom.gov.uk/download_file/view/251/
3 The Policy Memorandum is at http://www.scottish.parliament.uk/S4_Bills/Long%20Leases%20(Scotland)%20Bill/Policy_Memo.pdf
of Sasines, the former tenant could apply for voluntary first registration in the Land Register and pay a registration fee.

13. Fourthly, updating the Land Register when necessary helps to smooth the workload over time. I mentioned this at Column 695 of my oral evidence.

14. As we indicated in paragraph 316 of the Financial Memorandum, the Scottish Government and Registers of Scotland will work together to provide information on the Bill to ensure that those affected, such as tenants and landlords and their lawyers, are given information about it. As well as information on websites, the Government and Registers of Scotland will provide more targeted information in those areas of Scotland where we know there are concentrations of ultra-long leases.

15. Finally, both the Government and Registers of Scotland recognise the value to Scotland and to the Scottish economy of keeping the Land Register as up to date as possible. I can assure the Committee that we will take every reasonable opportunity to keep the Land Register up to date and that if the Long Leases (Scotland) Bill is approved by Parliament my officials in the Government will work very closely with Registers of Scotland on implementing the Bill.

Land Registration etc. (Scotland) Bill

16. As indicated in paragraph 65 of your Report, the Scottish Government intends to lodge amendments to reflect the interaction between the Long Leases (Scotland) Bill and the Land Registration etc. (Scotland) Bill. Amendments may be proposed to this Bill at Stage 2 or directly to the Land Registration (Scotland) Bill at Stage 2 of that Bill.

Pipes and cables

17. As your Report notes, we consider that including the exemption puts the matter beyond doubt and that the exemption has been appropriately clarified following the Justice Committee's scrutiny of the Session 3 Bill.

Common good

18. We will continue to work closely with local authorities in relation to information they have on ultra-long leases and on common good land.

19. Ultimately, common good assets and funds are the responsibility of local authorities who must manage them in accordance with their statutory and non-statutory obligations. Similarly, common good asset registers are also a matter for individual local authorities. Audit Scotland has and will continue to monitor progress on the completion of common good asset registers as part of their audit process.

20. On a possible exemption from the Bill for common good land, we think that there are a number of reasons why common good land should not be exempt:

- The fundamental rationale of the Bill is that an ultra-long lease is akin to ownership and leases should convert to ownership to simplify property law. That is true regardless of who the landlord is and who the tenant is.
- As we noted during the evidence sessions, we have made some exemptions in the Bill where there has been clear evidence of an adverse impact on the landlord. As we noted, we exempted harbours, for example because we received evidence that
the Bill could adversely affect a harbour authority's ability to ensure the safe operation of a harbour. We have not received clear evidence that converting leases of common good land would have an adverse impact on the landlords.

- As you note in paragraph 126 of your report, there would be legal and administrative complexities which would arise should an exemption for common good land be included in the Bill. These complexities could lead to litigation which would result in additional costs for local authorities.

21. On paragraph 135 of your report, we will as you say, write again to local authorities indicating that any compensatory and additional payments in relation to common good land should be allocated to the common good fund. We will work closely with the Convention of Scottish Local Authorities on this matter.

Waverley Market (Princes Mall).

22. It is not for the Government to reach a view as to whether or not the Waverley Market is held under the common good fund.

23. We note the Report says in paragraph 158 that the "Committee believes that the case for exempting the Edinburgh Waverley Market site from the Bill has still to be made".

Subordinate Legislation Committee Report

24. I am replying separately to the Subordinate Legislation Committee and am copying you in.

Financial Memorandum

25. I note that the Committee has no further issues to raise with regard to the Financial Memorandum.

Accompanying documents

26. We have noted a small number of points in relation to the Accompanying Documents for the Bill. I attach a list of these points in the Annex to this letter.

Conclusion

27. I am, of course, happy to discuss any points arising.

STEWART STEVENSON
ANNEX: NOTE OF POINTS IN ACCOMPANYING DOCUMENTS.

Policy Memorandum

In paragraph 39, the third line should read: "the on-going interest in the land is low" (rather than "the on-going interest of the land is low").

Explanatory Notes

In paragraph 277 of the Explanatory Notes, the reference in the third line to section 73 should be to section 72.

In paragraph 286 of the Explanatory Notes, the word "late", in the first line, should be removed.

Financial Memorandum

On the last sentence of paragraph 317 of the Financial Memorandum, we have, as a result of your Committee's work, carried out further inquiries of local authorities on the number of ultra-long leases held on the common good. The information we now have is that across Scotland as a whole there are 9 ultra-long leases of land held on the common good.

Family and Property Law Team
April 2012
LONG LEASES (SCOTLAND) BILL: AMENDMENTS

I thought it would be helpful to write to you, to other members of the Committee and to Marco Biagi MSP and Alison Johnstone MSP on amendments 1 and 2 to the Long Leases (Scotland) Bill, which the Government lodged yesterday. The amendments can be found in the Business Bulletin at http://www.scottish.parliament.uk/parliamentarybusiness/BusinessBulletin/50482.aspx. In total, the Government has lodged 8 amendments. We will prepare purpose and effect notes for all of these amendments. I will send these notes to you and other members of the Committee before Stage 2 on 16 May.

Amendments 1 and 2 follow the evidence put forward by the City of Edinburgh Council and others at Stage 1 of the Bill in relation to the Waverley Market. The details of that lease are outlined in the Council’s written information provided to the Committee for the meeting on 29 February 2012: http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/29Feb.pdf. In particular, in 1989 the arrangements were changed so that the lease runs for 206 years from its commencement in 1982, meaning that it expires in the year 2188.

One of the points made in Committee was about the durational periods of leases covered by the Bill. As you know, the origins of the Bill are that it implements a report by the Scottish Law Commission (SLC). Following the evidence given at Committee, we have looked at both the SLC report¹ and the SLC Discussion Paper² which was issued before the report.

¹ The SLC report is at http://www.scotlawcom.qov.uk/download file/view/251/
(The SLC’s usual practice, which was followed in relation to long leases, is to issue a Discussion Paper first, to seek views on their proposals, and then submit their final report to Ministers).


Option A was that the unexpired portion of the lease had to be more than 175 years for the lease to convert under the Bill.

Option B was the lease had to have an initial term of over 175 years coupled with an unexpired duration of more than 100 years. Option B is what the SLC recommended in its final report and is what the Bill, as introduced, provides, at section 1(3).

Option B was favoured by the SLC because, as it said in paragraph 2.19 of the Discussion Paper, it would bring in an additional 2.4% of leases, mostly residential. Paragraph 2.19 of the Discussion Paper also noted that these leases would be included by option B because they have an unexpired duration of between 100 and 175 years.

When considering unexpired durations, the SLC received advice from the Royal Institution of Chartered Surveyors (RICS). The SLC, in footnote 25 to the Discussion Paper, on page 11, noted that the “RICS were satisfied that, in relation to residential leases at least, 100 years was an appropriate measure for the purposes of conversion”.

However, the RICS did not say this in relation to commercial leases. The RICS are quoted in paragraph 2.20 of the SLC Discussion Paper as saying that: “while we accept that the residual value between 100 and 175 years may be nominal, we would argue that in “institutional perception” terms, there could certainly be some value”. The RICS are also quoted as saying, in paragraph 2.20 of the Discussion Paper, that “we would be concerned that a cut off point of 100 years could discourage institutional investors from proceeding with developments”.

Therefore, having looked again, following the evidence taken by your Committee, at the RICS evidence referred to in the SLC Discussion Paper, it appeared to the Government that option B recommended by the SLC does not take into account the residual value that exists in non-residential long leases with an unexpired duration of between 100 and 175 years. The RICS advice outlined in the Discussion Paper was that in relation to residential leases, it is appropriate to have a cut-off of 100 years in respect of the unexpired duration of the lease. However, for non-residential leases, the evidence suggests that there could be value for up to 175 years.

Therefore, amendment 1 removes the current general requirement that leases must have more than 100 years to run to convert under the Bill and replaces this with requirements that differ according to whether or not the subjects of the lease are residential. Where the subjects of the lease wholly or mainly comprise a private dwelling house, the Bill still requires that leases must have more than 100 years to run in order to convert. As a result, residential leases greater than 175 years long and with more than 100 years left to run will still convert to ownership under the Bill. However, where the subjects of the lease do not wholly or mainly comprise a private dwelling house, amendment 1 provides that the lease must have more than 175 years left to run. This is in line with the evidence referred to in the SLC Discussion Paper.

Amendment 1 refers to "wholly or mainly" to ensure that a non-residential development which also happens to include some ancillary living accommodation (e.g. sleeping quarters for janitors or security guards) is not regarded as residential just because of this ancillary accommodation. Amendment 2 makes it clear that pertinents belonging to a dwelling house (e.g. a garden) are treated as part of a dwelling house. This ensures that a lease is still treated as residential even if, for example, the house itself is relatively small but its associated garden is relatively large.

As is the position now, the durational periods are counted from the appointed day. Section 70 of the Bill provides that the appointed day means the first Martinmas – 28 November – two years after section 70 comes into force. Our intention is that the appointed day will be 28 November 2015. Therefore, under the amendment non-residential leases let for more than 175 years will only convert to ownership the lease is due to expire from 2190 onwards.

The Government has considered the overall impact of the amendment. As indicated in paragraph 2.19 of their Discussion Paper, the SLC estimated that around 2.4% of the leases let for more than 175 years in their survey have an unexpired duration of between 100 and 175 years. In total, the Government has estimated that there are around 9,000 leases covered by the Bill. 2.4% of that is 216 leases.

However, the Commission also note in paragraph 2.19 of their Discussion Paper that most of the leases with an unexpired duration of between 100 and 175 years are residential. These residential leases are not affected by this amendment. Therefore, we estimate that fewer than 100 non-residential leases will not convert to ownership under this Bill as a result of this amendment. In other words, the amendment affects around 1% of leases currently covered by the Bill.

This amendment is in line with other provisions in the Bill which impact on non-residential leases. For example, the Bill already has exemptions for mineral leases, leases relating to harbours where there is a harbour authority and leases where the annual rent is over £100.

I am copying this letter to Annabelle Ewing MSP, Alex Fergusson MSP, Claudia Beamish MSP, Dennis Robertson MSP, Graeme Dey, MSP, Jim Hume MSP, Margaret McDougall MSP, Richard Lyle MSP, Marco Biagi MSP and Alison Johnstone MSP.
LONG LEASES (SCOTLAND) BILL: STAGE 3

Introduction

At Stage 2, I promised to write in relation to the Common Good. I thought it would also be helpful to write on land registration and on the issue Annabelle Ewing raised at Stage 2 on the Books of Council and Session.

Common Good

I have thought carefully about whether or not the Government should lodge an amendment at Stage 3 in relation to the Common Good. My conclusion is that we should not do so.

My reasons reflect the points made when the Bill has been considered by your Committee and by the Justice Committee previously. The Bill is about simplifying property law generally and clarifying title. It does not matter who the landlords and tenants are. The Bill protects landlords' interests by making provision for compensatory and additional payments and by making provision for some leasehold conditions to convert to real burdens. The Bill excludes certain classes of leases where we or the Scottish Law Commission have concluded that the Bill would have an adverse impact on landlords which cannot properly be dealt with under the Bill.

I do not consider we have received evidence in relation to the Common Good that the Bill will impact adversely on the public interest. By entering into the type of lease covered by the Bill, local authorities have, in effect, already granted something akin to ownership to the tenant. In some cases, there may be relevant leasehold conditions. Some of these conditions may
convert to real burdens. Others may not. That reflects that, in many cases, conditions imposed in leases let some time ago may not now be appropriate.

It seems to me that an exemption for Common Good would cut across the general principle in the Bill that ultra-long leases akin to ownership should convert to actual ownership. Therefore, I do not plan to lodge an amendment at Stage 3.

**Land Registration**

At Stage 2, Government amendments to sections 20 and 23 of the Long Leases Bill removed references to the Land Registration (Scotland) Act 1979 and replaced them with references to the Land Registration etc. (Scotland) Bill which has just gone through Parliament. I noted at Stage 2 that the Government might need to lodge further amendments to reflect any changes to the numberings of the Land Registration etc. (Scotland) Bill. However, the Parliamentary authorities have agreed the references can be updated as a matter of printing. No amendments are therefore required.

**Books of Council and Session**

At Stage 2, Annabelle Ewing asked if minutes of variation (which could, for example, vary the amount of rent paid) could, under the Bill, be registered in the Books of Council and Session. The answer, as I indicated, is no.

Under the Bill, leases have to be registered in the Land Register or recorded in the Register of Sasines to convert to ownership. The SLC noted, in paragraph 8.14 of their report, that the statutory facility to register leases dates only from 1857 but also noted that the number of unregistered ultra-long leases is likely to be very small. However, as recommended by the SLC, the Bill makes provision for unregistered leases to be registered (section 65). A lease of this nature is then treated as “exempt” but the tenant may recall the exemption (under section 67) so that the lease can convert.

In the past some ultra-long leases may have been registered in the Books of Council of Session. The Books of Council and Session is a register of deeds and agreements. It dates back to 1554. However, it is not a formal property register and so any ultra-long leases still only registered there would need to be registered in the Land Register or the Register of Sasines to convert.

Similarly, any minutes of variation which vary the amount of rent paid would have to be registered in the Land Register or the Register of Sasines. A landlord may wish to use such a minute of variation to show that the annual rent under the lease is over £100 and, therefore, the lease should not convert under the Bill – section 1(4)(a) as read with section 2 refers.

However, if the landlord considers that the annual rent is over £100 but this is not shown by the documentation held by Registers of Scotland in the Land Register or the Register of Sasines, the landlord could still exempt the lease by registering under section 64 of the Bill an agreement with the tenant or an order by the Lands Tribunal that the annual rent is over £100.
Conclusion
I am, of course, happy to discuss any points arising with you and other members of the Committee

STEWART STEVENSON
Long Leases (Scotland) Bill - Stage 1: The Minister for Environment and Climate Change (Stewart Stevenson) moved S4M-02682—That the Parliament agrees to the general principles of the Long Leases (Scotland) Bill.

After debate, the motion was agreed to (DT).
Long Leases (Scotland) Bill: Stage 1

The Deputy Presiding Officer (John Scott):
The next item of business is a debate on motion S4M-02682, in the name of Stewart Stevenson, on the Long Leases (Scotland) Bill. As we have quite a bit of time in hand for the debate, interventions will be welcomed.

15:27

The Minister for Environment and Climate Change (Stewart Stevenson): I look forward with eager anticipation to the thoughtful and helpful interventions that members from around the chamber will make.

The bill that I bring to Parliament today will convert ultra-long leases—that is, leases of more than 175 years that have more than 100 years left to run—to ownership. It will implement the final report in a series of reports by the Scottish Law Commission on modernising property law in Scotland. Previous work included the abolition of feudal tenure.

In its report on the conversion of long leases, the commission outlines why the legislation is necessary. In paragraph 1.1, it says that the report “seeks to apply to certain types of long lease the principle of conversion already applied to feus by the Abolition of Feudal Tenure etc. (Scotland) Act 2000.”

In paragraph 2.4, when discussing the conversion of ultra-long leases, it says that “A pseudo-feu should be treated in the same way as the real thing”,

and, in paragraph 2.5, it says that “In fact the difficulties with leases extend beyond those with feus. Because ultra-long leases are relatively rare, and concentrated within small geographical areas, they are unfamiliar to many legal practitioners. The result is often an increase in transaction costs when the property comes to be sold.”

In its first session, Parliament passed the Abolition of Feudal Tenure etc (Scotland) Act 2000. That landmark legislation affected property throughout Scotland. By comparison, we estimate that the bill will cover about 9,000 ultra-long leases. However, the Scottish Law Commission has said that the difficulties with ultra-long leases are even more significant than those with feus. Parliament has the opportunity to deal with leases that can, in individual cases, give rise to more problems than feus would have done.

I have mentioned a number of the key points in the bill. There are also provisions on compensatory and additional payments to landlords for the loss of rights. It will be possible for some leasehold conditions to become real
burdens in the title deeds. Landlords will be able to take steps to preserve sporting rights in relation to game and fishing, and tenants will be able to opt out of converting to ownership, if that is their wish. The bill also deals with long-standing issues around what are known as Blairgowrie leases, which are a perfect example of the particular and localised complexities that arise in this area of our land ownership law.

Annabelle Ewing (Mid Scotland and Fife) (SNP): Will the minister clarify what a Blairgowrie lease is, for the benefit of those of us who do not know what such leases involve?

Stewart Stevenson: The Blairgowrie lease is a local form that has a high degree of informality but is nonetheless capable of being implemented in law. Some people have said that such leases have been used for many years as a mechanism for people in Blairgowrie to play mischief with people from elsewhere who make purchases. There is broad consensus that action is needed, and the constituency member, who spoke to me about the matter recently, is anxious for it to be resolved by the passage of the bill.

I turn to the history of the proposed legislation. This is the second time that such a bill has been considered by Parliament. The Justice Committee in the previous session of Parliament published a stage 1 report on the previous bill, but that bill fell when Parliament was dissolved for the Scottish elections in May last year. We have made amendments to reflect that committee’s report. In particular, we added an exemption for harbours, clarified the exemption for pipes and cables—the issue of wayleave—and exempted leases in which the annual rent is in excess of £100. We have also dealt with the issue of variable rental so that we will not catch leases whose value is, in effect, more than £100 a year but in which the rent is paid in a pattern that does not necessarily make that clear.

I am grateful to the Rural Affairs, Climate Change and Environment Committee, as the lead committee, and to the Subordinate Legislation Committee and the Finance Committee, for the scrutiny that they carried out. Paragraph 54 of the lead committee’s report, on leases in which the landlord retains a significant interest, notes that evidence was taken in relation to variable rental. In the light of that evidence, the Government intends to lodge an amendment at stage 2 to deal with certain cases in which the rent has been varied.

Paragraph 84 of the report notes that witnesses made points about updating the land register.

Alex Fergusson (Galloway and West Dumfries) (Con): The minister mentioned that a bill was introduced in the previous session of Parliament. The question of registration was addressed in that bill. Why has there been a change of heart in the current bill?

Stewart Stevenson: I have a little more to say about that; I will, perhaps, expand on it in the light of Alex Fergusson’s question.

As the report notes, Registers of Scotland has decided not to carry out a bespoke exercise to update the land register as a result of the bill as it now stands, because updating the land register is not required for the bill to work. Section 4 provides that, on the appointed day, a qualifying lease will convert to ownership. That will happen independently of any action that is taken by Registers of Scotland.

It was mentioned in evidence to the lead committee that there should be a mechanism whereby the register is corrected on application, for a fee. In fact, it will be possible for those who have an interest in a lease that converts to ownership under the bill to make an application for the register to be updated, and that application can be made at any time. It is worth saying that Registers of Scotland, too, will undertake work on a related piece of legislation that touches on this issue and to which I will return in a minute or two. It is therefore easier, more practical and of lower cost to deal with the issue in this way.

A number of events may lead to information in the land register being updated. In particular, information will be updated in the land register when a property transaction takes place. That would include a sale, but it could also include the granting or discharging of a standard security over the property. If the property is recorded in the register of sasines, the former tenant could apply for voluntary first registration in the land register and pay a registration fee at the outset.

The Government and Registers of Scotland recognise the value to Scotland and the Scottish economy of keeping the land register up to date. That brings me to the Land Registration etc (Scotland) Bill, which will implement another Scottish Law Commission report and which is designed to improve the system of land registration in Scotland. If Parliament agrees to the general principles of the Long Leases (Scotland) Bill, my officials will work closely with Registers of Scotland on implementing it and will take every opportunity to ensure that the land register is as up to date as possible. The two bills will, to an extent, work in tandem. In dealing with the issue in that way, we will avoid having to make a particular provision in the Long Leases (Scotland) Bill and we will reduce effort on the land register without creating any concomitant difficulties. If Mr Fergusson has further questions, I will be happy to address them later.
Paragraph 85 of the committee report notes that amendments may be needed to ensure that the Land Registration etc (Scotland) Bill and the Long Leases (Scotland) Bill work together. We intend to lodge amendments, which may be made directly to the Land Registration etc (Scotland) Bill where that is the appropriate drafting solution. We have further work to do to ensure that we get that right.

The committee report makes a number of comments on common good land and buildings, following evidence that the committee received. I am told that the issue of common good stems from well back, in an act of James VI, so we are going back a considerable time. Many members will receive representations generally about common good land. There are such issues in my constituency; I discussed them at the weekend.

We will continue to work closely with local authorities on information that they have on ultra-long leases and common good. However, ultimately, common good land and funds are the responsibility of local authorities, which must manage them in accordance with their statutory and other responsibilities. Common good asset registers are a matter for individual authorities. Audit Scotland monitors and will continue to monitor progress on the completion of registers, as part of its audit process.

On a possible exemption from the bill for common good, we have not received clear evidence that converting leases of common good land would have an adverse effect on that land. In addition, an exemption for common good land might increase discussions about whether land is held in the common good or not, which could lead to increased litigation and costs for local authorities. That simply would not be in the taxpayers’ interest. In any event, there are nine parcels of land involved and in almost every case it is about a transfer from one public form of ownership to another, with only a few exceptions. Therefore, to try to legislate on common good in this context would be a formidable challenge.

In the debate on common good, the committee received considerable evidence about Waverley market in Edinburgh. The Government is not reaching any view as to whether the Waverley market is held in the common good or otherwise. However, the committee noted that the case for exempting the Waverley market site from the bill has still to be made. I advise Parliament, however, that since I gave oral evidence to the committee on 7 March we have had an initial look at other legislation that may touch on that or other leases. Both Waverley market and some common good land in Stonehaven are governed by private parliamentary acts. In view of possible issues arising from provisions in those acts from converting leases to ownership, I have asked my officials to undertake further work on the matter, particularly on whether it would be appropriate to amend the legislation that covers the two areas that the leases apply to, or to take other appropriate action. We continue to engage on the issue, because it is of substantial concern to a wide range of people.

The bill is quite lengthy and rather technical, but its aim is straightforward—it will simplify Scots property law by converting ultra-long leases, which are essentially akin to ownership, to actual ownership. The consultations by the Scottish Law Commission and the Government showed that there is widespread support for the bill’s general principles. The committee also recommended that the Scottish Parliament support the bill’s general principles at stage 1. I therefore invite Parliament to support the motion at decision time. I take pleasure in moving the motion that stands in my name.

I move,

That the Parliament agrees to the general principles of the Long Leases (Scotland) Bill.

15:40

Rob Gibson (Caithness, Sutherland and Ross) (SNP): As has been noted, the bill will convert ultra-long leases of more than 175 years into ownership. The Rural Affairs, Climate Change and Environment Committee took account of the evidence that the previous session’s Justice Committee heard on a similar bill and focused on new aspects of the bill. I thank the previous Justice Committee for its work.

As well as considering new provisions, the committee heard evidence from witnesses on related policy issues to which the bill does not refer directly. We carefully considered common good and the status of Edinburgh’s Waverley market in the future, on which I will say more later.

The bill takes forward work of the Scottish Law Commission by seeking to convert ultra-long leases into ownership unless the tenant chooses to opt out, with compensation to the former landlord. The ultra-long leases in question are leases of more than 175 years that have more than 100 years left to run. Leases that are granted for such long periods are akin to ownership, so the bill will simply convert such leases to ownership. The Scottish Government estimates that there are about 9,000 ultra-long leases in Scotland, most of which are for 999 years, so few people will be directly affected. The committee agrees with that general principle of the bill, which will meet people’s needs.

As has been said, the bill is largely technical. I will describe some interesting issues that were raised with the committee.
The bill provides for various exemptions, which include making commercial leases exempt from conversion to ownership by having an annual rent cut-off point of £100. Should the annual rent be varied, that would be taken into account in the commercial lease exemption provisions.

The rent payable is the rent that was set out in the original lease, but variations to the annual rent are not necessarily reflected in the original lease. As drafted, the exemption might not include all commercial leases, if variable rents are not captured correctly, so we welcome the commitment in the Government’s response to our stage 1 report to lodge an amendment on that at stage 2.

We considered whether leases for which a single payment, or grassum, was paid in addition to the annual rent would count as commercial leases and therefore be exempt from the bill; for example, a developer paid the City of Edinburgh District Council a lump sum of £6.25 million in 1989 for the Waverley market. We noted the conflicting evidence, but we came to no conclusion.

The committee considered the position of standard securities when long leases are converted to ownership. The bill allows lenders to collect moneys that relate to mortgages on leases once they have converted to ownership.

The number of questions about the potential loss of landlords’ rights when leases convert to ownership is expected to be fairly low. The committee noted that sections 50 to 55 provide for additional payments on the basis of the loss of heritable interest and potential development value. There will be a role for the Lands Tribunal for Scotland to determine the amount that is to be paid to landlords.

The bill relates to the Land Registration etc (Scotland) Bill, which is reaching stage 2 scrutiny in the Economy, Energy and Tourism Committee, as has been said. Concern was expressed that Registers of Scotland does not wish to carry out a specific exercise to update the land register to reflect the conversion of ultra-long leases to ownership under the Long Leases (Scotland) Bill. The committee believes that the land register must be updated, and it called on the Scottish Government to respond on that. I have raised the issue of registration in my speeches in the chamber on the Land Registration etc (Scotland) Bill and the Agricultural Holdings (Amendment) (Scotland) Bill. The need to dovetail those bills with this bill requires a more accurate picture of land ownership in Scotland. Thankfully, the Scottish Government has responded to the committee’s report by stating that both the Government and Registers of Scotland recognise the value to the Scottish economy of keeping the land register as up to date as possible. We welcome the Government’s assurance that it will lodge amendments at stage 2.

That brings me to the other issues that became major focuses of the committee’s work. The bill contains no specific provisions in relation to common good or on whether there should be an exemption for common good land. The committee acknowledges the extreme complexity of common good land law and the lack of robust information being held by councils. Although the numbers are small, such land is of significant importance to the public interest. We recommended that the Scottish Government work with local councils and other professionals to gather and maintain a correct register.

Should common good land be exempted? The committee was not persuaded and neither was the previous Justice Committee. We have acknowledged the legal and administrative complexities in that respect. We were strongly of the view that any financial compensation that would be received by local councils for long-lease conversion must be directed to their common good funds, so we welcome the Scottish Government’s intention to write to local councils to tell them just that.

The most contentious part of our evidence taking was on the status and future of Edinburgh’s Waverley market, otherwise known as Princes mall. First, is it or is it not part of Edinburgh’s common good? It is not for the committee to decide what is and what is not, common good property. Secondly, should the site have a specific exemption from the legislation? The City of Edinburgh Council insisted that Princes mall is not part of its common good portfolio. It asked us to consider an exemption and we concluded that the case for such an exemption is still to be made. I note the movement in the Government undergrowth on the issue.

Parliament should agree that the bill be passed in order to complete this key part of the Scottish Law Commission’s programme of property law reform. It is time to end the types of ultra-long leases in Scotland that the bill addresses.

15:47

Claire Baker (Mid Scotland and Fife) (Lab): I am pleased to take part in the debate and I thank the Rural Affairs, Climate Change and Environment Committee for its work on the bill. The hours that the committee spent taking evidence and debating the key points may make my contribution much easier.

It may be appropriate to thank the previous session’s Justice Committee, because the bill was initially introduced in the previous session. It is
welcome that, in reintroducing the bill, the Scottish Government has moved to address many of the issues that were raised in the previous stage 1 report.

I also acknowledge the contribution that has been made by witnesses who contributed to the debate. In many cases they illuminated the technicalities of what is a short but complex bill that will, put most simply, enable the conversion of ultra-long leases to ownership.

I am happy to confirm that Labour will support the bill at stage 1 and look forward to the debates at stages 2 and 3.

I thank the Scottish Law Commission, which has been at the heart of the debate over the legal context for land in Scotland. It has carried out a major review of the structure of land law. That review concludes with this bill, which extends the principle of conversion that was established by the Abolition of Feudal Tenure etc (Scotland) Act 2000. The 2000 act prevents—with some exceptions—the granting of leases, after June 2000, that last more than 175 years. The estimated 9,000 ultra-long leases that will be addressed by the Long Leases (Scotland) Bill were largely generated by large estates from around 1750 to 1930, often with the purpose of encouraging the industrialisation of Scotland. As the minister indicated, such leases tend to be concentrated in particular parts of the country.

As the Scottish Law Commission highlights, ultra-long leases are “barely distinguishable from feu” and carry the same disadvantages. As the minister said, in the case of ultra-long leases the difficulties can be even more significant. The disadvantages are that, by providing a small income stream to the landlord, restrictions and other obligations can be imposed on the tenant, although the tenant is the owner, in the everyday sense of that term. The conditions might allow for an inappropriate degree of control by the landlord. Given the conditions that are identified in the bill—annual rents of less than £100, and more than 100 years being left to run on a lease of more than 175 years—the tenant is in a similar position to that of an owner, and the landlord has little real interest.

The Scottish Government has responded to issues that were raised by the Justice Committee in the previous session of Parliament. I welcome the decision to exempt from the scope of the bill low-base rentals with variable rent, when agreement or order has been registered; leases that include a harbour, either wholly or partly, in relation to which there is a statutory harbour authority, which provision has been included following evidence from Peterhead Port Authority; and leases that are granted solely to allow the installation and maintenance of pipes and cables.

The committee supports proposals to allow for one-off payments to compensate for loss of landlord rights. The minister expects such payments to be modest, and the Lands Tribunal for Scotland will be part of the process. Such matters are complex but relatively straightforward. The bill generated more discussion in the context of its relationship with the Land Registration etc (Scotland) Bill, the role of common good land and how it should be understood in the context of the bill, and the case of Waverley market and whether it should be exempt from the scope of the bill.

The report, as the Justice Committee’s report did in the previous session, talks about common good land. There are a number of issues in that regard. Identification, ownership and use of common good land are complex issues. Although the bill does not address the matter, it will change the ownership of some common good land. Concerns about that were expressed in both reports. The Public Petitions Committee in the previous session also looked at common good funds and identified common problems to do with lack of knowledge of what is common good and how it operates. I do not have the answers, but the issue is challenging. Parliament seems continually to confront the problem without being able to find a satisfactory way of resolving it.

Stewart Stevenson: We are faced with practical difficulties, which we must all consider. A case has been brought to my attention in which a very small piece of land was being sold by a council, and it took three days of effort to search through 200-year-old minute books to ascertain whether the land was common good. There are genuine difficulties, in that record keeping was incomplete and common good land is unindexed. We absolutely share the belief that we should try to achieve a better understanding of common good, but we are confronted with practical difficulties, which are historical.

Claire Baker: The minister gave a good example of the difficulties that we face in relation to common good land. However, MSPs find it frustrating when constituents come to us with a problem and we cannot find an easy solution. The difficulty to do with our confidence in the records of common good property, particularly in relation to land that will be affected by the bill, is frustrating. The committee is right to think that even though perhaps only a small number of cases will be involved, such cases are important to the public interest.

In its report, the committee made a strong comment about compensation payments for common good land and asked whether payment can compensate for the loss of common good land, saying:
"the Committee believes, with respect to leases of land held under the common good, financial compensation on transfer of ownership is not necessarily adequate compensation for the loss of that land and the loss of greater public benefit."

The committee went on to welcome
"the Scottish Government’s intention to write to local authorities recommending that the proceeds of any compensation should be directed to its common good fund."

We will not resolve the issue of common good land through the bill. The issue is, rightly, the responsibility of local authorities. I was initially concerned that the minister, in saying that he would write to local authorities to make recommendations about use of compensation, did not fully appreciate the importance that many people place on common good land, which goes beyond its monetary value. However, I note that the minister indicated a stronger interest in the matter in his formal response to the stage 1 report. We will see how the situation develops.

I anticipate that we will hear more about exemption of Waverley market during the debate. The City of Edinburgh Council argued that the grasssum that it received in 1989 represents commercial value that is greater than £100 per annum, and that the council should not lose its interest in a property that is within a United Nations Educational, Scientific and Cultural Organization world heritage site. Other people argue that the site is common good land and should be exempted on that basis. The City of Edinburgh Council does not support that interpretation, and the committee and the Government are not inclined to exempt common good land.

The Scottish Government argued that there is no need for an exemption and that the council would be able to maintain an interest through its role as a planning authority. The committee concluded that there is still a case to be made. It may be that the City of Edinburgh Council has still to convince the committee and the minister that there is a case, but as we look to stage 2, the council must be heard. I am pleased by the minister’s comment in his opening speech that he is actively seeking a solution to the situation. There seems to be a unique set of circumstances—there is no equivalent case—and it seems that no other local authority has raised similar concerns. The Scottish Government must respond in a way that is in the public interest.

Over the years, the Scottish Parliament has sought to tackle the inequalities, inconsistencies and intricacies of land ownership. The process has been, and continues to be, complex, but it aims to deliver transparent, fair and equitable land laws that will deliver for a modern society.
When the previous bill was introduced in the third session of Parliament, the Scottish Government wrote to all 32 councils in Scotland to ask them to identify ultra-long leases of common good land and property in their area. It has already been said that Scottish Government officials have recently confirmed that nine common good leases have been identified. I think that I am right in saying that that is still a matter of some complexity and that it is still unclear whether that number of common good leases is definitive. I find it quite hard to believe that the number can be so low.

Stewart Stevenson: I am not necessarily going to debate the number, but I will make a point that we might think about. The debate about whether Waverley market is common good land relates to a substantial asset, whereas the majority of common good assets that will be affected beyond the nine, if the number has not been identified, are likely to be of very low value, because even 200 years ago, councils would not give away something for a peppercorn rent unless it was of comparatively low value. Although Alex Fergusson’s point is well made, I suspect that, in practice, any undiscovered issues are likely—although I cannot say this with certainty—to be of relatively low importance.

Alex Fergusson: I am grateful to the minister for that intervention. I entirely accept what he has said, but that simply highlights the complexity of the whole area.

Although there remains some concern around the bill’s impact on common good assets, it does not provide for an exemption. The committee report acknowledges the complexities that would arise from including an exemption in the bill, and the committee remains unconvinced by the arguments for the introduction of such an exemption. Perhaps we can return to the issue in closing remarks.

The second issue is variable rent. The bill provides an exemption for properties for which the annual rent is more than £100, in order to exclude commercial properties from the automatic transfer. The bill also provides that a landlord may register an exemption where the annual rent was more than £100 at any point in the five years before royal assent. That reflects the fact—it is, indeed, a fact—that some leases have variable rents. The whole of that aspect seems to me, with my rural mind, to be incredibly complex, so I look forward to hearing further comments on that during the debate.

The bill contains no requirement for Registers of Scotland to update the land register or the register of sasines to show a change in the ownership of land once the ultra-long lease has been converted to ownership. I hear what the minister said in reply to my intervention, but I remain concerned that the land register will wrongly show the original landlord as the owner, and the new owner as tenant. Surely a key feature of Scottish property law is that the registers can be relied on. The minister referred to another bill that is currently going through Parliament as perhaps being the correct vehicle through which to address the issue, but I continue to have some concerns in that regard. Again, we may come to that later in the debate.

I appreciate that time is against me, Presiding Officer. I look forward to the rest of the debate. We will, perhaps, in closing speeches return to the points that I have raised.

The Deputy Presiding Officer (Elaine Smith): We move to the open debate, with speeches of four minutes. There is a little bit of time for interventions, but not too much.

16:02

Annabelle Ewing (Mid Scotland and Fife) (SNP): As the deputy convener of the Rural Affairs, Climate Change and Environment Committee, which is the lead scrutiny committee for the Long Leases (Scotland) Bill, I am pleased to speak in the stage 1 debate.

I make my remarks this afternoon in an individual capacity, and not in my capacity as deputy convener. It is important to point that out before I opine on how nice it is to deal with amendments to Scots law in the Scottish Parliament, rather than dealing with poorly drafted amendments that are treated as an afterthought at the 11th hour and rarely given time to be debated, which was the practice in the House of Commons, certainly when I was a member in that place.

As we have heard, the bill emanates from the considerable work of the Scottish Law Commission and was designed to complete the process of the abolition of feudal tenure in Scotland, thereby simplifying property law and—importantly—bringing it into the 21st century. We have heard that the bill will enhance the position of tenants, as long leases—we have heard about how they are to be defined—will be converted to ownership, so the tenant will gain a clear benefit. Such conversion will be automatic unless the tenant chooses to opt out. The bill will facilitate the tenant becoming the owner of the property: that is in effect the de facto position at present for the leases that will fall within the scope of the bill, which will give that position legal recognition.

At the same time, compensation and additional payments will be paid to the landlord, who will have an entitlement, which is important to point out. We have heard about the exemptions that have been set out, including the threshold of £100 for annual rental; the pipes and cables exemption,
which is important; and Peterhead harbour, which—as the committee accepted—is in a unique position.

None of those exemptions was controversial but, as we have heard from several members, two issues arose during our consideration of the bill—one with respect to the common good and one with respect to the Waverley market. In relation to the common good, it became clear during the committee’s scrutiny that there was a significant lack of clarity on what common good land would be covered by the bill and even on what common good land was held by the 32 local authorities in Scotland. It also became clear that there was no easy solution to that lack of clarity. As the minister has explained, the difficulties of compiling a register in a timely and non-resource-intensive manner are not insignificant. That is a work in progress that we must look to in the future.

The status of the Waverley market was the subject of considerable debate. The committee was not hugely impressed with the evidence that was provided on the issue. Indeed, we were disappointed in the quality of the case that was purportedly put forward by the proponents of an exemption. However, I am pleased to hear from the minister that the issue is being considered further and that pre-existing legislation relating to the Waverley market that the bill may have an adverse impact on is being examined. I imagine that that will be welcome news to some of the people who gave evidence to the committee.

16:06

Claudia Beamish (South Scotland) (Lab): The bill has been a long time coming. As we have heard, it was considered by the Justice Committee in session 3 before it came to the Rural Affairs, Climate Change and Environment Committee. As I am not, like my colleague Annabelle Ewing, a lawyer, I speak with some trepidation, but I will try to reinforce some of the important points that have already been made and to shed a bit of light on some of them.

I am pleased to highlight Scottish Labour’s support for converting ultra-long leases into ownership. I believe that the principle is correct and that the granting of a lease of more than 175 years, in effect, amounts to a transfer of ownership. I agree with the Government that the bill will significantly simplify property law in Scotland.

As we have heard, there are some 9,000 ultra-long leases in Scotland. The committee welcomed

"the new provisions in the Bill to take into account variable rents for the purposes of exempting commercial leases from the Bill" and the Scottish Government’s commitment to bring forward an amendment on the issue at stage 2.

In relation to additional payments, the committee noted the compensation provisions in the bill and the provision of an additional payment. As Rob Gibson highlighted, it is important that the level of that payment will be set by the Lands Tribunal for Scotland.

The committee heard evidence on the concerns that exist about the land register of Scotland in the context of the bill. The Scottish Government’s recognition of the value to Scotland and to the Scottish economy—which we have heard about—of keeping the land register as up to date as possible is welcome, as is the minister’s recognition that updating the land register is not required for the bill to work. It is important to emphasise that the register should be as up to date as possible.

The recently introduced Land Registration etc (Scotland) Bill will have an impact on the Long Leases (Scotland) Bill. It is reassuring that the minister has explained that that bill will work in tandem with the long leases bill.

The committee acknowledged that the common good is “an extremely complex area”. I am aware of that, not least because I live near the royal burgh of Lanark, which is a good example of a place where common good land gives rise to complexities and sometimes causes tempers to rise.

Beyond the bill, although the committee accepts that the task of compiling a more accurate register of common good assets and funds would be expensive, it

"recommends that the Scottish Government works together with local councils and relevant professionals to identify better ways in which this information could be gathered, verified, recorded and maintained."

The minister referred to that earlier.

I believe that that is long overdue and will have far-reaching benefits, not just for this legislation, which it will not actually clarify. It has been highlighted that it is an issue that needs resolution. As Claire Baker pointed out, constituents come to us with concerns about the issue. It is in the public interest to have the issue resolved.

The committee recognised that it was the view of the Justice Committee in session 3 not to support an exemption for common good and noted that there was no compelling case in favour of an exemption. However, as other speakers have said, there is further work to be done on the issue. We perhaps need to take further evidence on the issue before stage 2.
As Claire Baker said, although the Scottish Government is not keen to impose statutory guidance on local authorities in relation to where any common good compensation should go, I seek further reassurance from the minister that it is likely that it will be directed into councils' common good funds. I take the point that many properties will be of low value.

**The Deputy Presiding Officer:** I would be grateful if you could come to a conclusion.

**Claudia Beamish:** Scottish Labour supports the bill, in our quest for fairness and in consideration of the public interest.

16:11

**Marco Biagi (Edinburgh Central) (SNP):** The Government estimates that 9,000 leases will be affected by the bill, but one has commanded a disproportionate amount of attention: that of Princes mall, otherwise known, from its former use, as Waverley market, which is in the heart of my constituency.

Edinburgh residents have, rightly, been concerned by a stream of repeated claims in the media that land that is owned by the council on behalf of the city, with some degree of special status in law, might transfer to the private developers who currently hold the lease, and that the compensation that is to be received by the council could best be described as trivial. The City of Edinburgh Council has itself expressed its dissatisfaction with this aspect of the bill and has asked for amendment. I am therefore glad that the minister has stated his intention to have officials revisit the issue.

I agree with the committee that the case that has been put forward has not always been the most well-argued case that we have heard, but I am clear that the case exists and should be considered. Clearly, I cannot do it justice in the short time that is available to me, so I would be grateful if the minister could indicate to me, when he sums up, whether he would be willing to meet me, in my capacity as the member for the constituency concerned and as an MSP who has raised the matter with him in writing, to discuss the outstanding concerns with regard to the bill's impact and the work that he is instructing officials to undertake.

**Stewart Stevenson:** It might be useful if I indicated at this stage that I would be happy to meet the member.

**Marco Biagi:** I am most grateful to the minister. Improvements to bills are a natural part of the parliamentary process and should be welcomed.

A number of points have been raised with regard to Waverley market, which is an important location. Many of them go right to the heart of the concerns. The question of its common good status is a technical and legal one. I believe that the council is arguing honestly and legitimately its view that the site is not common good land. After all, if it argued that it was common good land, that would potentially have strengthened the case that it was making for exclusion. That said, the view that Waverley market is not common good land is predicated on the council having made an error in 2005, when it listed it on its register of common good assets. The minister stated in committee that the bill "has certainly thrown up a wider issue about how accurate information about common good is in the generality." [Official Report, Rural Affairs, Climate Change and Environment Committee, 7 March 2012; c 681.]

I whole-heartedly agree with him on that point. That is quite clearly a matter for local authorities, but we might want to revisit it in the Parliament at a more appropriate time and through a more appropriate vehicle.

I am satisfied that the common good status of Waverley market is not an issue for this bill. The bigger question for me, as the member whose constituency contains Waverley market, is whether it would be in the public interest for this particular long lease to transfer into private ownership for a trivial sum.

The status of landlord, which is currently held by the council, confers a qualitatively different relationship to the status of regulator, through being the planning authority.

The policy memorandum also describes long leases as being "generally granted by large estates from about 1750 to around 1930."

A deal entered into by a cash-strapped capital city in the Thatcher era, when there was no foreseeable prospect of the lease being converted to ownership, is entirely different from Georgian and Victorian-era attempts to retain and extend feudalism by the back door. Had the deal been made with perfect foreknowledge, I have no doubt that the lease would have been for less than 175 years and would have been outwith the scope of the bill's provisions.

In light of that, I hope that the minister's thinking will continue to develop and I welcome the opportunity to meet him in advance of stage 2.

16:15

**Jim Hume (South Scotland) (LD):** As we know, long leases are similar to feuers; there is little difference in how they work. Following up on the issue of long leases seems to be the logical next
step after the implementation of the Abolition of Feudal Tenure etc (Scotland) Act 2000.

Leases and sub-leases are complex, and their conditions may allow the landlord an inappropriate degree of control, including the opportunity to charge for waivers. In the case of feus, such disadvantages were considered sufficient grounds for conversion to ownership, and on that basis the long leases bill seeks to do the same with leases and sub-leases.

The bill closely follows the scheme for conversion of feus that is set out in the 2000 act. The scheme would be automatic, so tenants would not need to do anything, although they would have the right to opt out. On conversion, the tenant would become owner and the conditions contained in the lease would be extinguished, but with some exceptions. For example, conditions concerning maintenance and use of common facilities, or the provision of services, would survive, and there would be an option to the landlord to preserve certain conditions for the benefit of neighbouring land. Special provision is made for servitudes and sporting rights. The landlord would be entitled to compensation, calculated as a multiplier of the rent. In some cases, additional compensation may also be due. In most and possibly all cases, the amount of compensation would be small, but a tenant who was not willing to pay could opt out.

The committee considered all those issues and, generally speaking, there has been little discontent. The committee noted some unresolved issues that relate to common good land. I have some reservations about that aspect when considering long leases. We are talking about the philosophy and principles behind the protection of publicly owned land.

It has been well noted by many that the accurate recording of common good land is not a straightforward or inexpensive process for local authorities to undertake. Nor can it be done overnight. The number of long leases on common good land is said to be small, but nonetheless that number could be more than we think, given that records are not accurately kept. I do not believe that we can simply ignore what could potentially be damaging to the public interest in Scotland.

The issue of the Waverley market site in Edinburgh has featured heavily in this debate and throughout committee discussions. Under the bill, the tenants could become full owners of land worth perhaps £50 million, which currently may be owned by Edinburgh’s common good fund, although there is dubiety over that. If that is correct—and it seems to be so—that would be a strange outcome.

One peculiarity of common good land is that it cannot be alienated and sold off. That may be the very reason why Waverley market and similar plots were let out on long leases in the first place—to enable the land to be used productively. However, it was never the intention that the ground should be sold off entirely, so it seems odd that tenants in that position, who have paid very little rent—perhaps to encourage development—could earn vast amounts of money from what is in fact public land.

It is crucial that the common good land issue is addressed and resolved and I look to the minister for assurances that it will be addressed as the bill progresses.

16:19

Jamie Hepburn (Cumbernauld and Kilsyth) (SNP): I welcome today’s debate. I congratulate the Rural Affairs, Climate Change and Environment Committee, in particular Rob Gibson as the convener of the committee, on the committee’s work on the bill. As a member of the Rural Affairs and Environment Committee in session 3, I can say to Alex Fergusson that I feel no comparative advantage. It was not an issue that we looked at in my time as a member, so I cannot claim detailed knowledge of each of the provisions of the bill. I welcome its broad thrust, however.

It is worth remembering that the legislation was not created out of a vacuum but out of the Scottish Law Commission’s revision and updating of property law more generally to ensure that it is fit for the 21st century. Alex Fergusson was right to point out that the bill builds on the Parliament’s work on updating Scotland’s feudal laws and, in its report, the SLC makes the point that the principle of conversion already applies to feus because of previous legislation, which is essentially the same as what will come about under the bill. As the minister said, the Scottish Law Commission says that a pseudo-feu should be treated in the same way as the real thing. I have to say that the word “pseudo-feu” is not something that I thought that I would ever say in the chamber or, indeed, outwith it. There is probably a first and last time for everything.

The bill also builds on work done in the previous parliamentary session. The session 3 Justice Committee looked at the proposals fairly favourably and I note that the Government has proposed amendments following Justice Committee recommendations; that is welcome. As Marco Biagi said, legislation should develop as it goes through the parliamentary process. That has happened in this case and it demonstrates the Government’s willingness to work with others on the proposals.
Of course, the Rural Affairs, Climate Change and Environment Committee has scrutinised the bill and concluded that ultra-long leases should no longer exist in Scotland. We should also refer to the fact that the bill has widespread popular support outwith the Parliament, as demonstrated in the consultations undertaken by the Scottish Government and the Scottish Law Commission.

We broadly accept that the bill is necessary because of the difficulties associated with ultra-long leases. The bill will simplify Scotland's land tenure system. The point has also been made that, in effect, ultra-long leases are ownership in all but name, so it makes sense that we consider the matter now.

We should also reflect the fact that owners will, rightly, be compensated, which is all well and good. Mr Hume also made the point that the bill contains no element of compulsion. Any tenant can opt out; tenants are not compelled to become owners. I do not know in what circumstances that would happen, but it is right that there should be no element of compulsion.

Throughout the debate, extensive reference has been made to Waverley market; Marco Biagi was right to say that that issue has dominated the headlines on the bill. I do not have Marco Biagi's constituency interest, nor do I have the benefit of the experience of looking at the matter in the way in which the committee has, but I note that the committee concluded that the case for exempting the Waverley market has not been made. It sounds as if the evidence is just not there. That said, I understand the concerns that have been expressed. Any one of us would be concerned that a wealthy developer could acquire a site for peanuts and make a great profit out of it. I therefore welcome the minister's commitment to look at the matter again and, on that basis, I look forward to the bill proceeding to stage 2 and beyond.

16:24

Margaret McDougall (West Scotland) (Lab): I am afraid that I will repeat much of what has already been said, but I intend to reinforce it.

The bill is similar in nature to the bill that was introduced in November 2010, although it contains some amendments that are based on the Justice Committee's original findings and recommendations in session 3. Many of the issues in the bill were changed before it came back to the Parliament this session.

The bill aims to convert ultra-long leases to ownerships. The leases are those that are for more than 175 years and have more than 100 years left to run. They will convert to ownership, unless the tenant opts out. The bill will also protect landlords' rights by providing compensation; clarify the position of lenders; and move away from an unnecessarily complex form of land tenure. As has been said, it is estimated that the bill will affect 9,000 ultra-long leases in Scotland. The committee recommends that the Parliament supports the general principles of the bill, but points out that some issues that were raised in evidence should be considered before stage 2.

Broadyes LLP called for clarity on sections 64 and 69, to put beyond doubt what can be included in annual rent. Although the people who gave evidence on that felt that the issue was clear in the explanatory notes, they argued that the same could not be said for the bill.

Another issue is the way in which the bill interacts with the Land Registration etc (Scotland) Bill. There was a call for Registers of Scotland to update the land register to accurately reflect the conversion of ultra-long leases to ownership under the bill. The committee recommends that the land register should be updated to accurately reflect ownership and that the Scottish Government should respond to that concern. I thank the minister for clarifying that individual owners can apply to have the land register updated. The Long Leases (Scotland) Bill might need to be amended at a later date, depending on the way in which it interacts with the Land Registration etc (Scotland) Bill.

Every member who has spoken has raised the issue of common good land, although it is not directly related to the bill. There does not appear to be a comprehensive list of common good assets that local authorities throughout Scotland hold. The committee noted that it would be a complex task to compile a register that is 100 per cent accurate. It would be expensive and time consuming to produce a list of all common good properties, but that should be considered. I hope that officials will work with local authorities on that. During the evidence taking on the bill, the small number of common good properties that we are aware will be affected by the bill more than doubled, from four to nine. As common good leases are in the public interest, the committee calls on the Scottish Government to work with councils to find better ways to collect information so that we better understand the effect that the bill will have on common good properties.

The committee took evidence on the City of Edinburgh Council's request for the Waverley market site to be exempt. That is a complex case. Based on the information that was provided, the committee decided that the case had not been made and that we could not say whether the Waverley market should be exempt. I am glad to hear that the minister is investigating ways of addressing the issue.
The committee urges the Parliament to support the general principles of the bill and to allow it to progress, but calls on the Scottish Government to investigate further the issues that have been raised in the debate, some of which do not arise directly from the bill.

16:28

Nigel Don (Angus North and Mearns) (SNP): I thank the Scottish Law Commission for its hard work in producing the template from which the bill has come. I note once again that, in previous years, we have not been very good at implementing the commission’s work. I hope that we will get better at that.

I thank Rob Gibson and Claire Baker for their comments on the previous Justice Committee. I think that I am the only member in the debate who was on that committee. Our consideration of the previous Long Leases (Scotland) Bill was interesting. Members have noted that we brought up issues to do with Peterhead harbour, which have been dealt with, but I also remember an interesting discussion about pipes and cables, which did not figure much in the recent investigation. Last time round, there was considerable debate about whether a lease for a pipe or cable even existed as a lease because, apparently, if it did, the area of land was a seam underneath that never reached the surface. I refer members to that interesting discussion.

I want to pick up on the common good issues. As Stonehaven is in my constituency, I ask the minister whether he will spare me some time to ensure that we get the Stonehaven recreation grounds issue sorted properly, not least because, as the minister well knows, the town is short of spare space, so we need to ensure that the centre of the town is correctly laid out.

Stewart Stevenson: That is one of the two leases that we have identified that are covered by a Government act. It is covered by a private act that went through Westminster in 1902, which ties that piece of property to be used in perpetuity for recreation. We understand that the transfer that would be caused by the bill, if it became an act, would leave the use of the piece of land unchanged, and it would then be in a public trust rather than a local authority—it is not a question of the property passing into private hands. That is our current understanding, but it is always subject to further review if more information comes to hand.

Nigel Don: I thank the minister for clarifying that. That brings some relief, although all such things are subject to further clarification and we must ensure that we get it right.

Blairgowrie leases have come up before. My recollection is that they are verbal, annual rolling leases that became locally deemed to be perpetual leases even though they were never actually renewed. That is a bit of local law, but it is honourable law. Nonetheless, it is an opportunity for mischief these days.

I return to a point that others have made about the registers. When one goes to look in the registers, one should get the right answer—surely, that is the basic principle. I do not dispute that the law can change instantly and the registers can catch up later—of course, that is the case. Nonetheless, we should have the correct information in the registers as far as possible, and now is a good time to ensure that. Given that the housing market is at a historic low point and is not likely to pick up any time soon, this is a good time to do the work. I am concerned that we should not miss the opportunity.

There was some debate in the committee about the European convention on human rights issues relating to the bill. Government officials said that those were a matter of huge importance to them and felt that they had been covered. I am not going to argue that the registers are an ECHR issue, but the question arises whether one of my rights as a citizen is the ability to go to a register and get the right information. I have a suspicion that, even if the ECHR does not say that it is, we could readily recognise it as such.

I raise another concern, although to what extent this matters is another issue. Richard Blake of Scottish Land and Estates said:

“...I do not think that it will be a huge issue. In my practising career, I have not come across any examples of long leases in which sporting rights have been reserved.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 22 February 2012; c 628.]

It may be theoretical whether any funds that change hands will have to go back to any common good fund, as they will probably be so small that they will not matter.

The final issue that I raise is the bill’s interaction with the Land Registration etc (Scotland) Bill—an issue that we considered in the Subordinate Legislation Committee. How the two bills interact is fundamentally about the timing of transactions and registrations. Officials now understand that—we are getting indications that they are clear that that needs to be worked through—and I hope that the work can be progressed satisfactorily.

16:33

Alison Johnstone (Lothian) (Green): I declare an interest as a councillor on the City of Edinburgh Council.
The reasons why we have long leases in Scotland are largely historical. They were created because feuing was not permitted on a particular piece of land or because the long-lease option was sometimes cheaper or just normal practice locally. I support the principle behind the bill because, following the abolition of both entail and feudalism, it makes sense for the Government to produce legislation to abolish historical long leases, many of which can be described as “feus in disguise”.

There has been much debate over how the bill affects the lease on Waverley market, in my region, which is the site of the current Princes mall shopping centre. As the bill is drafted, the Princes mall site would be transferred from public to private ownership for the not-so-princely sum of 40p, and the council would relinquish a massively valuable asset that should be available to benefit future generations when the lease runs out.

I have campaigned on that issue for some time, as a councillor and now as an MSP. Rob Gibson mentioned movement in the Government’s undergrowth, and I welcome the minister’s willingness to explore the options for excluding land that is already subject to statutory provision. Given that Waverley market is subject to a significant amount of statutory provision—the City of Edinburgh District Council Order Confirmation Act 1991 and three other statutes that I have here all relate to it—I suggest that the easiest and most certain way to deal with the issue is to exempt from the bill land that is under such existing statutory provision.

The problem with Waverley market, and potentially with other sites, is that not all long leases are feus in disguise. Some are more like commercial leases, in which the landlord receives a non-nominal rent. The bill that was considered in the previous parliamentary session would have converted such leases to ownership. However, as a result of lobbying on behalf of property interests, such long leases are exempted from the bill that is before us on the basis that the landlord has a continuing interest in the land.

The argument for exempting Waverley market is also based on interest. The council’s continuing financial interest in the ground over the period of the lease is nominal: it gets a penny a year. However, the interest that it sought to retain by issuing a long lease was the power proactively to manage the site as the owner for the benefit of Edinburgh’s citizens, as opposed to the solely negative powers that it has as the planning authority. On top of that, the council sought to retain the right to regain the valuable land in the future for the benefit of the citizens.

On top of that, there is the difficult issue, which I have already mentioned, that Waverley market is subject to substantial existing statutory powers. That is the issue that the minister has recognised needs tackling, and I look forward to seeing what comes of the exemption that he is exploring.

The City of Edinburgh District Council Order Confirmation Act 1991 contains special provisions to help to protect and promote the whole of the Waverley valley. Paragraph 35 of the schedule to the act enables the council to erect and maintain new buildings on Waverley market. The bill does not repeal that provision, nor was the repeal of that existing statutory regime part of the consultation. If the bill is passed as drafted, I am not sure where that will leave the 1991 act. It will certainly be stranded in limbo.

The Waverley market site is subject to existing statutory provision that is not repealed by the bill. It is valuable public land that should not be transferred for the measly sum of 40p. I am pleased at the minister’s willingness to iron out problems with the bill and I ask him to confirm that exempting from it land that is under existing statutory provision would exempt Waverley market. I would welcome the opportunity to join him when he meets Marco Biagi.

16:38

Alex Fergusson: I had to smile slightly at the minister’s opening remarks. If I picked him up rightly, he said, “If Parliament agrees” the bill. The reason for my slight smile was that that is a highly likely outcome, given the majority that the Government enjoys. I have no objection to that likely outcome, although I find myself voicing a note of caution as we proceed towards stage 2.

Almost all members have raised common good in general and Waverley market in particular. I continue to have concerns about the somewhat inexact nature of the evidence base behind the relevant part of the bill. As Claudia Beamish said in her speech, it is in the interest of the public to have those matters resolved. I agree entirely. When it comes to Waverley market, I have to raise the white flag of surrender in the face of the legal complexities that surround it. I came across the phrase “cumulo rent” in the Scottish Parliament information centre briefing, although not in the context of Waverley market. I had always assumed that the word “cumulo” related to cloud formations, and I am afraid that that is exactly what envelops my brain when trying to address that issue. Therefore, I am delighted that the minister will meet Marco Biagi and, I hope, Alison Johnstone to try to sort out the matter. If they succeed in that, they will have my backing as well as my congratulations.

On a more serious note, I cannot help but feel that those matters and others reflect the degree of
uncertainty—indeed, cloudiness—that surrounds the bill. Some of those other matters relate to the variable rents issue that I mentioned briefly in my opening remarks, but they are definitely in evidence when we consider the issue of registration. As I said earlier, if the bill is not amended, the land register will wrongly continue to show the original landlord as the owner and the new owner as the tenant. As I understand it, it is a key feature of Scottish property law that the registers can be relied on, and I am far from convinced that we should be party to a piece of legislation that might be seen in any way to undermine that principle. I believe that the bill should include a provision that compels either the keeper or the new owners of property to rectify that inaccuracy.

Annabelle Ewing mentioned her time at Westminster—for a moment, I thought that I detected a tear in her eye as she recalled those happy days—and its poorly drafted Scottish legislation. I entirely agree with her about the need to avoid poor legislation. We must heed the evidence that several members of the legal profession gave to the committee during its deliberations, some of which was mentioned by Margaret McDougall. It is not often that one is offered free advice from members of the legal profession and, under some circumstances, I might be hesitant to accept it but, on this occasion, we should look carefully at the evidence if we are to avoid passing poor legislation. Westminster does not have a monopoly on that. Accuracy is vital.

I am happy to confirm that we on the Conservative benches will support the bill at stage 1 but, as it proceeds, I will want to be sure that we do not run the risk of having to review the legislation in three or four years’ time because we have got it wrong.

16:41

Claire Baker: I am pleased to be closing for the Labour Party. The debate has been wide ranging and complex. I particularly liked Alex Fergusson’s description of the bill in his opening speech as dealing with a relic of the feudal system.

Members covered a number of issues and provided examples from their constituencies and regions. Some members, including Claudia Beamish, focused on the bill’s relationship with the Land Registration etc (Scotland) Bill, which is also going through Parliament. These parallel bills interact with each other and, as the minister acknowledged, there might be a need for amendments to the Long Leases (Scotland) Bill at stages 2 and 3 in response to any changes to the Land Registration etc (Scotland) Bill.

Concerns were expressed to the committee that Registers of Scotland has made it clear that it does not intend to carry out a specific exercise to update the land register to reflect the conversion of ultra-long leases to ownership, and that it will therefore not be possible to rely on the register to be accurate and correct. In the committee, the minister replied that the updating will take place the next time the land register is updated in respect of ownership, and that that will be more economical and effective.

We can all appreciate the attraction of that approach, particularly in the current financial circumstances, but there were concerns that that was not a satisfactory response. The committee recommends that the land register should be updated to accurately reflect ownership. Alex Fergusson discussed those concerns this afternoon. Scottish Land and Estates encapsulated the problem when it said in evidence to the committee:

“this would seem to be a very good opportunity to catch some land that might otherwise stay under the same ownership for a long enough time before it triggered first registration.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 22 February 2012; c 627.]

However, I welcome the further comments from the minister in his response to the stage 1 report, and his recognition of the value to Scotland and the Scottish economy of keeping the land register as up to date as possible. The minister’s comment that Government officials will work closely with Registers of Scotland on implementing the bill is welcome, although he might want to clarify whether it relates to both of the bills that are going through Parliament.

As we have a land registration bill going through the Parliament, it seems incongruous that we have a parallel bill that looks as though it will add to the inaccuracy of the land register. The Economy, Energy and Tourism Committee is calling for further information on plans to complete the land register and a target date for its completion. That chimes with the Rural Affairs, Climate Change and Environment Committee’s concerns about the accurate inclusion in the register of long leases once they are transferred to ownership.

A few members discussed the Waverley market issue, particularly those with an interest in Edinburgh, such as Marco Biagi and Alison Johnstone, although it was clear that all members found the subject of interest. I was particularly interested in the committee report’s reference to the issue of grassum. Following the evidence taking, the committee did not take a firm view on grassum, but it noted the conflicting evidence on it. Part of the City of Edinburgh Council’s argument for exemption for Waverley market is that a grassum should be taken into consideration when
the lease is of a commercial nature. It argued that, because a grassum of £6.25 million was paid for the market, the low annual rent does not reflect the true nature of the lease. The minister argued that that was not appropriate because a grassum is not a substitute for rent and that such an approach would misapply a grassum.

I appreciate and understand the minister’s point. However, has there been a common misapplication of grassums? Has it been common practice to have a grassum operating as an element of commercial rent? Will the exclusion of a grassum lead to the transfer of land that, it could be argued, is outwith the bill’s scope? Alternatively, is it the case that other leases that might be relevant were agreed several hundred years ago, so their grassums can justifiably be discounted, and that the case in Edinburgh is exceptional?

We must consider the consequences of the bill, which I imagine were not envisaged when the lease arrangements for Waverley market were entered into in 1989. Marco Biagi described the economic circumstances and decisions that faced the City of Edinburgh Council at that time and gave some insight into why the council took the path that it did on Waverley market. That might have been short-sighted, but we must respond to the conditions and the circumstances that we face now. I welcome the consideration that the minister is giving to the issue. It would be helpful if more details on the issue could be provided to members as soon as it is available.

Members also raised the issue of compensation payments for long-lease common good land that will transfer to the tenant under the bill. Annabelle Ewing talked about the lack of clarity about common good land and the difficulty in gaining proper information about it. Margaret McDougall highlighted that the committee initially thought that four sites were involved, but now it seems that nine sites are affected. Alex Fergusson asked how much confidence we can have in that figure.

I was intrigued by the minister’s statement in evidence to the committee that

"the test is whether the asset and its availability for public good would be affected by what is in the bill."—[Official Report, Rural Affairs, Climate Change and Environment Committee, 7 March 2012; c 683.]

That suggests that it is not about who owns the land but about how it is used and its availability. I apologise in advance if that is a misinterpretation, but that is my understanding of what the minister said. In his speech, Jim Hume outlined the principles that would challenge that view.

It would be helpful to have further detail on how far access to and activity on common good land will be maintained if it is transferred. Perhaps the minister can say more about that in his closing speech. It is expected that nine common good land sites will fall under the bill, but only limited information was provided to the committee on the sites. Does the minister have any idea of the value of the sites? I refer not just to their financial worth but to their community value and contribution. The leases in question in Dumfries and Galloway were created in the early 1800s—there is an example there of a lease that has changed tenancy—and the leases in Glasgow include three parkland sites. Is the minister confident that those leases are appropriate and that the loss of those sites will not have an impact on local communities?

It has been an interesting debate, with many insightful contributions, and it will no doubt provide plenty for us to consider at stage 2.

16:48

Stewart Stevenson: The debate has been interesting if somewhat technical. It carried with it the danger of being that kind of political debate that is over not when everything has been said but only when everyone has said it. However, we managed to avoid falling into that trap. Right up to the very last moment, we were hearing about new aspects of the issues around the bill, which was very welcome.

Alex Fergusson referred to the word “cumulo” as an issue and to clouds in that respect. Perhaps I should draw to his attention the fact that one of the variants of cumulo clouds is, of course, cumulonimbus clouds, which are thunderclouds. Perhaps he might be on to something in dealing with the issue. I know that he just wanted me to make that particular point.

Claire Baker asked whether we would look at this bill and the Land Registration etc (Scotland) Bill, and I can say that we will.

The issue of grassum is complex. In legal terms, it is not a substitution for rent but a transfer of value.

I listened carefully to Alison Johnstone’s detailed comments on the bill that was taken through Westminster on behalf of the City of Edinburgh District Council and I will study carefully what she said. Mr Biagi has indicated that he would be happy for all three of us to sit down and discuss the issue, and I would be equally happy to do that. I ask the members to use my private office to make that happen.

Claire Baker talked about the three Glasgow common good sites that are among the nine common good sites that will be affected. Of the three Glasgow sites, it is interesting that one is Balloch country park. The bill will transfer ownership of that site from Glasgow City Council
to West Dunbartonshire Council, which is the tenant. In principle, that should not greatly concern us. The other two sites are recreational areas in Pollok park and, because of how things work, their tenant will remain unchanged in practical terms.

We have talked about the site in Stonehaven—Nigel Don referred to that.

One site is a tiny bit of land at Stevenlaw’s Close in Edinburgh that provides long-established access to somebody’s house. In Ayr, a little bit of Rozelle house—an ancient house that is looked after by a public trust—is common good and would fall under the bill. Reference was made to the three pieces of land adjacent to Sanquhar that were subject to lease between 1800 and 1810. In practice, the effect of the bill on the nine leases that are known to be common good will not really be of great concern.

Claudia Beamish made a number of references to common good, as did many other members. It is worth saying that the Local Government (Scotland) Act 1973 provides that common good funds do not form part of general funds. That is a more recent provision. It is therefore naturally assumed that, if common good assets are sold, the proceeds cannot be transferred simply on a whim to the general fund. Without giving a definitive legal opinion—I would not want to appear to do that—I think that what we are discussing would remain in the public area.

Rob Gibson talked about registration, as did many other members. One provision in the bill covers one of the tricky issues, which is leases that may or may not be registered. We will look further at section 65 in relation to that.

Variable rent has been mentioned. There is uncertainty because the existence of some leases is uncertain or unknown and owners might be dead. We have to deal with much bigger issues in Scotland’s land tenure system.

We heard further comments about Blairgowrie leases as we went through the debate. They are essentially 99-year leases that can be perpetually renewed, but they are not necessarily written down—that is where much of the mischief has come from.

Marco Biagi made a reasonable point about the context in which the Waverley market lease was written—it was almost a gun-to-the-head job on the part of Edinburgh. On that basis, it differs from the overwhelming majority of leases that the bill will affect. I will certainly take forward with officials the complex legal issues that the existing legislation raises. I am certainly motivated to deliver the kind of outcome on which views are broadly shared across the Parliament.

Nigel Don raised the issue of ECHR. I assure him that we have looked at the issue very carefully.

I repeat that we will not take a view on whether or not Waverley market is common good. The lease was entered into in 1992. It was originally for 125 years. Through a complex process of sub-leasing and transfers of interest, the money associated with the asset that went to the City of Edinburgh Council was £6.25 million and other people received £23 million. The lease is a peppercorn rent. I do not believe that the penny is collected, for obvious reasons, as it would be rather difficult to justify the economics of doing so.

As members have said, sections 50 to 55 of the bill provide for reversionary payments. Ultimately, that can be a matter of agreement between the tenant and the landlord or it can be determined by a tribunal. In the case of Waverley market, the lease expires in 2188. On that basis, it would be open to the council to consider claiming an additional payment.

It is certainly likely that any assessment by a tribunal of the residual value that might be due on the return of the asset to the council in 2188 would take account of the grasssum that was paid. My own back-of-an-envelope calculations suggest that a 7.5 per cent discount rate on £6.25 million takes us to £25 million today, which is probably there or thereabouts. It may well be that there is not much residual value.

I acknowledge the points made by the City of Edinburgh Council, Andy Wightman and Marco Biagi about Waverley market. The council briefly mentioned the City of Edinburgh District Council Order Confirmation Act 1991 when it gave evidence to the committee, but that act focuses on issues such as the height of Waverley market, which can be controlled by the planning system. We must look at the interaction between the bill that is before us, which I hope will become an act, and other acts. We will take that extremely seriously.

The whole debate around common good is one that is worthy of revisiting in another context at another time. We cannot legislate away some of the practical problems that may exist, but the debate has certainly thrown some of the issues into public view.

I have been grateful for the help that we have had from local authorities in providing information on common good land that might be affected by changes to ultra-long leases. That has been very helpful. We expected the number of such leases to be low, and it is, as we believe that the figure is nine.

When the Justice Committee considered the previous bill, James Kelly asked Andy Wightman,
“Do you therefore accept the view that the number of ultra-long leases of common good property is limited?” — [Official Report, Justice Committee, 18 January 2011; c 4036.]

He responded, “Yes.” There is a shared recognition that we expected the figure to be low and it is.

To date, we have not received from the City of Edinburgh Council a terribly convincing argument that helps us to see how we can deal with Waverley market differently. However, the work that we are now doing picks up some important issues.

Paragraph 135 of the committee’s report

"welcomes the Scottish Government’s intention to write to local authorities recommending that the proceeds of any compensation should be directed to its common good fund."

Albeit that it will not be very much money, I will write to the authorities again if Parliament passes the bill.

On the land register, we will certainly see how best to achieve what needs to be done. We believe the current proposals to be proportionate and we will work with the Registers of Scotland. Ultra-long leases are concentrated in particular areas of the country, so we will target those areas.

I am delighted to have the privilege of bringing forward this law reform measure. The principles of the bill have been widely accepted and I urge members to agree to the motion at decision time.
Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Long Leases (Scotland) Bill on 23 February 2012 in its 9th Report of 2012.

2. The Minister for Environment and Climate Change has responded to the report. His letter is reproduced in the appendix.

Government response

3. In its Stage 1 report, the Committee determined that it needed to draw the Parliament’s attention to only two of the delegated powers provisions in the Bill.

4. On section 78(5), the Committee accepted that the negative procedure provides sufficient opportunity for the Parliament to object to the Scottish Government’s proposals, but only provided that the instrument is laid at least 40 days in advance of the date on which it is proposed that it come into force.

5. In the response, the Minister notes the point and confirms that the Scottish Government will comply with the statutory requirements in laying any order made under this power and will aim to lay any order as soon as practicable before it is due to come into force. In addition, he confirms that the Scottish Government will consult on any draft order and follow its consultation good practice guidance when consulting.

6. On section 81(1), the Committee stated that, where the Scottish Government may choose which mechanisms to use to make a particular provision, it should have regard to the complexity and effect of the provision and, in complex cases or where the exercise of the power affects individual rights, choose the mechanism that provides for a higher level of parliamentary scrutiny.

7. In the response, the Minister notes the point and confirms that the Scottish Government will aim to afford the Parliament the opportunity for a higher level of parliamentary scrutiny in such cases. He also acknowledges that any instrument made under the Bill that textually amends primary legislation should be subject to the affirmative procedure.

8. Unless amendments are made to the Bill at Stage 2 that affect the delegated powers provisions, the Committee will not consider it again. Members are therefore invited to make any comments they wish on the Bill at this stage.
Recommendation

9. Members are invited to note the Government’s response on the Bill and to make any comments they wish at this stage.
Appendix

Correspondence from the Minister for Environment and Climate Change dated 19 April 2012

Long Leases (Scotland) Bill: Report by the Subordinate Legislation Committee

Introduction

1. I am grateful to the Subordinate Legislation Committee for its report. I am also grateful to you, Convener, for the work you have put in on this Bill: I am aware that you were on the Justice Committee which considered this Bill previously in the last Parliament.

2. I am responding separately to the Rural Affairs, Climate Change and Environment Committee in relation to their Report. This letter responds to the points made in your Report.

Section 78(5) - Power to prescribe a date or period after which notices and agreements determined registrable by the courts or the Lands Tribunal cannot be registered and to provide that applications to the courts must be made within a specified period for the notices and agreements to be registrable.

3. I have noted the point made in paragraph 13 of your Report that the subject matter of this power is of more importance than other procedural matters given that the exercise of the power would have the effect of limiting the period during which applications to a court or the Lands Tribunal could be made and would prevent persons from registering notices and agreements which a court or the Tribunal had determined to be registrable. I can confirm that we will comply with the statutory requirements in laying any order made under this power and will aim to lay any order as soon as practicable before it is due to come into force. In addition, as indicated in our correspondence with the Committee, we will consult on any draft order and follow our consultation good practice guidance when consulting.

Section 82 - "Bolt on" powers to make ancillary provision in relation to the exercise of all powers to make regulations and the power under section 78(5).

4. We have noted the points made and will aim to afford the Parliament the opportunity for a higher level of parliamentary scrutiny in complex cases or where the exercise of the power affects individual rights. We acknowledge that any instrument made under the Bill which textually amends primary legislation should be subject to the affirmative procedure.

Conclusion

5. I am, of course, happy to discuss any points arising.

6. I am copying this letter to Rob Gibson MSP, the Convener of the Rural Affairs, Climate Change and Environment Committee.

Stewart Stevenson
Long Leases (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 79 Schedule
Sections 80 to 84 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Stewart Stevenson

1 In section 1, page 1, line 15, leave out <more than 100 years.> and insert <—
   (i) where the subjects of the lease wholly or mainly comprise a private
dwelling house, more than 100 years,
   (ii) in any other case, more than 175 years.>

Jim Hume

9 In section 1, page 1, line 19, at end insert—
   ( ) the whole or part of the subjects of the lease is land which forms part of the
common good of a local authority,>

Stewart Stevenson

2 In section 1, page 2, line 2, at end insert—
   ( ) For the purposes of subsection (3)(c)(i), “dwelling house” includes any yard, garden,
outbuilding or other pertinent.>

Section 2

Stewart Stevenson

3* In section 2, page 2, line 7, leave out from first <the> to end of line and insert <a document
mentioned in subsection (2A).
   (2A) The documents are—
      (a) the lease,
      (b) a registered assignation of the lease, or
      (c) a registered minute of variation or agreement in relation to the lease.>
Stewart Stevenson

4 In section 20, page 12, line 7, leave out <15(3) of the Land Registration (Scotland) Act 1979 (c.33)> and insert <97 of the Land Registration etc. (Scotland) Act 2012 (asp 00)>

Stewart Stevenson

5 In section 20, page 12, line 14, leave out <15(3) of the Land Registration (Scotland) Act 1979 (c.33)> and insert <97 of the Land Registration etc. (Scotland) Act 2012 (asp 00)>

Section 23

Stewart Stevenson

6 In section 23, page 14, line 35, leave out <15(3) of the Land Registration (Scotland) Act 1979 (c.33)> and insert <97 of the Land Registration etc. (Scotland) Act 2012 (asp 00)>

Section 80

Stewart Stevenson

7 In section 80, page 43, line 34, at end insert—
<“Register of Sasines” has the same meaning as in section 2 of the Conveyancing (Scotland) Act 1924 (c.27),>

Stewart Stevenson

8 In section 80, page 43, line 35, leave out from beginning to <document> in line 38 and insert—
<“registered” means registered in the Land Register of Scotland or (as the case may be) recorded>
## Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

### Groupings of amendments

<table>
<thead>
<tr>
<th>Category</th>
<th>Amendments</th>
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<tr>
<td><strong>Meaning of “qualifying lease”: unexpired portions</strong></td>
<td>1, 2</td>
</tr>
<tr>
<td><strong>Meaning of “qualifying lease”: exclusion of common good land</strong></td>
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<td><strong>Annual rent</strong></td>
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<tr>
<td><strong>Minor and technical amendments</strong></td>
<td>4, 5, 6</td>
</tr>
<tr>
<td><strong>Meaning of “registered”</strong></td>
<td>7, 8</td>
</tr>
</tbody>
</table>
Present:
Claudia Beamish
Annabelle Ewing (Deputy Convener)
Jim Hume
Margaret McDougall

Also present: Stewart Stevenson, Minister for Environment and Climate Change.

Long Leases (Scotland) Bill: The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 1, 2, 3, 4, 5, 6, 7 and 8. Amendment 9 was disagreed to (by division: For 3, Against 5, Abstentions 0).

The following provisions were agreed to without amendment: sections 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78 and 79, the schedule, sections 81, 82, 83, and 84 and the long title.

The following provisions were agreed to as amended: sections 1, 2, 20, 23 and 80.

The Committee completed Stage 2 consideration of the Bill.
**Scottish Parliament**

**Rural Affairs, Climate Change and Environment Committee**

**Wednesday 16 May 2012**

[The Convener opened the meeting at 10:00]

**Long Leases (Scotland) Bill: Stage 2**

The Convener (Rob Gibson): Good morning, everybody. Welcome to the 14th meeting in 2012 of the Rural Affairs, Climate Change and Environment Committee. Members and the public should turn off mobile phones and BlackBerrys as leaving them in flight mode or on silent will affect the broadcasting system. We have apologies from Alex Fergusson. [Interruption.] It sounds like somebody will have to switch off their phone.

Agenda item 1 is stage 2 proceedings on the Long Leases (Scotland) Bill. I welcome the Minister for Environment and Climate Change, Stewart Stevenson, and his officials: Simon Stockwell, bill team leader; Sandra Jack, a policy officer; Annalee Murphy, a solicitor; and Matthew Lynch, assistant Scottish parliamentary counsel.

Members should have the bill, the marshalled list and the groupings. Our task is to consider all the amendments and also to agree to each section of and schedule to the bill.

I will call the member with the lead amendment in each group to open the debate on that group by moving the lead amendment and speaking to all amendments in the group. I will then call other members who wish to speak on the group, taking the minister last if he does not have an amendment in the group. Finally, I will invite the member who opened the debate to wind up and indicate whether they wish to press or withdraw the lead amendment.

Any member present may object to the withdrawal of an amendment. If there is an objection, we will proceed straight to the question on the amendment—there is no division on whether an amendment may be withdrawn. We will follow the normal procedure if a division is required.

When we reach amendments on the marshalled list that have already been debated, I will ask the relevant member to move the amendment. If the member who lodged the amendment does not move it, any other member present may do so.

**Section 1—Meaning of “qualifying lease”**

The Convener: The first group is on meaning of “qualifying lease”: unexpired portions. Amendment 1, in the name of the minister, is grouped with amendment 2.

The Minister for Environment and Climate Change (Stewart Stevenson): I will say a fair amount about the two amendments, as the issue was the subject of substantial debate earlier in the process.

As members are aware, a number of representations were made at stage 1 in relation to Waverley market. In particular, one point related to the length of time left on the lease.

We looked back at the Scottish Law Commission’s report and discussion paper, which was the genesis of the bill. Part 2 of the discussion paper outlined options on durational periods. Option A was that the unexpired portion of the lease had to be more than 175 years for the lease to convert under the bill. Option B was that the lease had to have an initial term of over 175 years coupled with an unexpired duration of more than 100 years.

The SLC favoured option B. It said in paragraph 2.19 of the discussion paper:

“Option B would bring in an additional 2.4% of leases,”

which would be mostly residential—our focus is, after all, on dealing with the feudal system and, in particular, residential leases—because they “have an unexpired duration of between 100 and 175 years.”

When considering unexpired durations, the SLC received advice from the Royal Institution of Chartered Surveyors. The SLC noted, in footnote 25 to the discussion paper, on page 11:

“RICS were satisfied that, in relation to residential leases at least, 100 years was an appropriate measure for the purposes of conversion”.

In respect of commercial leases, however, the RICS is quoted in paragraph 2.20 of the SLC discussion paper as noting:

“While we accept that the residual value between 100 and 175 years may be nominal, we would argue that in ‘institutional perception’ terms, there could certainly be some value.”

In light of that evidence, the amendment retains the position that residential leases with more than 100 years left to run will convert on the appointed day. However, it will change the position for non-residential leases, which will need to have more than 175 years left to run on the appointed day in order to convert. We consider that that more closely reflects the arguments that were presented to the SLC about the residual value that landlords can have in non-residential leases.
Section 70 provides that the appointed day means the first Martinmas—28 November—two years after that section comes into force. We currently intend that the appointed day will be 28 November 2015. Therefore, non-residential leases will convert under the bill only if the lease is due to expire from 2190 onwards.

Although the amendment to the bill involves a material change, it will not dramatically reduce the number of leases that will convert under the bill. The SLC estimated that around 2.4 per cent of leases that have been let for more than 175 years have between 100 and 175 years to run. We estimate that there are around 9,000 leases let for more than 175 years, so 2.4 per cent comprises 216 leases. Most of the leases with an unexpired duration of between 100 and 175 years are residential, and so are not affected by the amendment. Therefore, we estimate that the amendment will remove fewer than 100 non-residential leases from the scope of the bill.

I hope that those relatively lengthy remarks provide adequate rationale for the amendment and its impact, but I am happy to respond to the committee’s comments.

I move amendment 1.

The Convener: I see that, having heard that explanation, no other member wishes to speak. I therefore invite the minister to wind up.

Stewart Stevenson: Given that the committee has no further remarks, I will pass on that.

Amendment 1 agreed to.

The Convener: The next group is on meaning of “qualifying lease”: exclusion of common good land. Amendment 9, in the name of Jim Hume, is the only amendment in the group.

Jim Hume (South Scotland) (LD): Amendment 9 is fairly simple. There have been quite a lot of concerns, around the committee table and from some of the witnesses, about common good land. The amendment would simply exempt common good land from the provisions in the bill that convert long leases to ownership.

At the start of the bill process, it was suggested that four common good property leases would be affected by the bill. That figure has now been revised to nine, which, although a small number, is already more than double the original figure. There are concerns that more leases may well be affected, as there is no audit of common good land throughout Scotland.

I recognise that identifying common good land is complex—there is no question about that—but I do not view that as a reason not to protect common good assets.

Stewart Stevenson: It would be helpful to the debate and to me in formulating a response to know whether the member has identified a concern about any particular lease.

Jim Hume: I was coming to that. Keeping common good land for the public interest is a matter of principle. We know that nine leases will be affected, which is more than double the original figure of four. There are concerns that 10, 11 or 12 leases might be affected—we do not know.

The news that the Scottish Government and local authorities will work together to identify better ways of gathering, verifying, recording and maintaining information on common good assets is welcome. However, as I said, we need to look again at the case for exempting common good land and assets in order to protect the public interest in that land.

The minister has previously said that there could be issues over legal costs and so on for local authorities. I suggest that local authorities would take legal action only if that were in the public interest and for the public good. However, if common good land is not exempted, there is no course for any local authority to pursue in order to protect the land.

I move amendment 9.

Claudia Beamish (South Scotland) (Lab): Good morning, minister. I speak in support of Jim Hume’s amendment. I will be brief. Following discussion, I feel that it is important to protect the public interest, and the amendment would provide an effective way of doing that in relation to those parcels of common good land with long leases that have been identified. Although, as we have acknowledged, the majority of them would transfer to other public bodies, there is a question mark over one of them in South Scotland that, as I understand it, would transfer to Buccleuch Estates. I reiterate Jim Hume’s point that it is possible that there will be more such pieces of land in view of the vagueness of the register at the moment, which I acknowledge is a separate issue. I therefore ask the minister to clarify what the legal implications might be. We appear to have quite clear responses from local authorities on where things would be going. I support the amendment as a means of protecting the greater public good.

Annabelle Ewing (Mid Scotland and Fife) (SNP): I am afraid that I do not support the amendment. I have been reading the committee’s stage 1 report—although, of course, when one looks for something specific, one never seems to find the right paragraph—and at stage 1 the committee did not favour an approach such as the one that Jim Hume proposes. Indeed, in paragraph 112, we stated:
“The Committee recommends that the Scottish Government works together with local councils and relevant professionals to identify better ways in which this information”—

about the common good—

“could be gathered, verified, recorded and maintained.”

We also stated, in paragraph 110:

“The Committee acknowledges that common good is an extremely complex area and understands that to compile an accurate register of all common good property under an ultra-long lease would be an expensive and time-consuming exercise and may not result in the identification of a significant number of leases which would convert to ownership under this Bill.”

That was the committee’s position in its stage 1 report.

I agree entirely with those paragraphs and think that we reached the right conclusion. If we cannot clearly define what common good is throughout the 32 councils in Scotland, to introduce such a level of legal uncertainty into a piece of legislation would not be particularly helpful.

We will perhaps hear more about this from the minister this morning, but I imagine that the cost implications could be significant for local authorities at a time when everybody’s budget is subject to significant pressure.

The bill makes provision for compensatory payments to be made, and the Scottish Government has already indicated that it would like local authorities that are in receipt of any such payments to put them into the common good fund. As far as is possible, given the legal uncertainty about the definition of common good land, provisions have been put in place to protect the public interest.

10:15  

Margaret McDougall (West Scotland) (Lab): My concern is that, if common good land is not excluded, common good land and assets will pass to others over time and the common good will be lost to communities forever. For that reason, I support Jim Hume’s amendment 9.

Graeme Dey (Angus South) (SNP): My recollection of our discussions on the issue is that we concluded that the case for exempting common good land had not been made, as I think the previous Justice Committee concluded when it considered the matter. On that basis, I am not minded to support the amendment.

The Convener: As no other member wishes to speak, I ask the minister to comment, if he wishes to do so.

Stewart Stevenson: Yes, I do.

Significant points have been raised in relation to a matter of general principle. We have worked with local authorities to establish how many leases of common good land might be affected—we have gone to local authorities formally twice and informally at other times. Probably, there is not absolute certainty, but there is as high a degree of certainty as it is possible to obtain that there are nine such leases.

Claudia Beamish referred to the Duke of Buccleuch’s leases, of which there are actually three, albeit that they are all in the same area of Sanquhar. It is worth making the point that those leases were originally to another party, between 1800 and 1810, and were subsequently acquired, some 10 years later, by the Duke of Buccleuch. They have been in the dukes’ hands for 200 years and they will remain so for a further 800 years or thereby, as they are 999-year leases. Therefore, de facto, they are in any event lost to public use. They are tradeable. Therefore, as an asset for the public, they are in effect gone. We are trying to abolish the feudal system. It just happens that, in this particular case, the beneficiary is the Duke of Buccleuch, although to no particular practical effect.

The other six leases are in essence ones that involve transfers within public use, in one way or another. Therefore, in relation to the identified leases, I have not heard any particular concerns being expressed. From that point of view, we need not allow the issue to concern us greatly. There are certainly no great financial implications that could be used to argue either for or against the measures.

The bill is about clarifying ownership and responsibility. Compensatory payments are available under the bill, although they are not particularly big. By the way, it has been said that the payment in relation to the Waverley market would be 40p, but actually that is wrong as, the last time that we looked, it was 23.6p. That gives members a sense of what the compensatory payments might be. There certainly should not be concern about the conversion of the long lease at Balloch country park from Glasgow to West Dunbartonshire, as it remains with a local authority.

Although amendment 9 is competently drafted, there is a wider context that creates significant uncertainties. It is not clear what would happen should it be discovered after the appointed day, which I have suggested will be 28 November 2015, that an ultra-long lease that has been converted under the bill is actually part of a common good fund. As the bill stands, it would be possible for any compensatory and additional payments that are received by the authority to be transferred to the common good fund. That is fine.
However, if the land converts and it is then discovered that it should have been exempt, it is not clear who would own the land.

The fundamental rationale of the bill is that ultra-long leases such as the Duke of Buccleuch’s 999-year leases, are in essence equivalent to ownership. That applies regardless of who the tenant and landlord are.

I suggest that if Mr Hume presses amendment 9, the committee does not agree to it. While I am prepared to look at the matter further and write to the committee in relation to what we might consider doing at stage 3, I do not wish to raise expectations unduly.

It is worth pointing out that the beneficiaries of the bill include local authorities, which are tenants whose tenancy will convert to ownership. I leave that as a further point to consider.

Jim Hume: I thank members for their useful contributions.

Annabelle Ewing mentioned the expense of compiling a register. However, I am not asking local authorities to provide a register. If common good land was affected by the bill it would be costly only if the local authority decided to take legal action, and the local authority would take legal action only if it thought that it was in the public interest to do so. As I said in my opening remarks, if we do not exempt common good land it leaves local authorities unable to protect the common good land that the bill may or may not affect.

The minister said that he cannot be 100 per cent certain about the number of leases that would be affected. Amendment 9 is an amendment on a principle. There may be no further pieces of land than the nine that are known about but, as the minister has more or less said, there may be more than nine.

He also mentioned 28 November 2015—three and a half years that might be useful for local authorities or holders of common good land or assets.

I am minded to press amendment 9.

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Beamish, Claudia (South Scotland) (Lab)
Hume, Jim (South Scotland) (LD)
McDougall, Margaret (West Scotland) (Lab)

Against
Dey, Graeme (Angus South) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)

Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Lyle, Richard (Central Scotland) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 9 disagreed to.

Amendment 2 moved—[Stewart Stevenson]—and agreed to.

Section 1, as amended, agreed to.

Section 2—Further provision about annual rent

The Convener: The next group is on annual rent. Amendment 3, in the name of the minister, is the only amendment in the group.

Stewart Stevenson: Amendment 3 provides clarity to section 2. A number of bodies that gave evidence at stage 1 raised questions about variable rental. In particular, in its written submission, Dundas & Wilson raised concerns that section 2(2) did not cover cases in which rent payable under lease had been varied. We looked at that again and have accepted that point. Amendment 3 reflects that the amount of the rental can be varied by a minute of variation or agreement. Under the amendment, the minute of variation or agreement has to be registered. That ensures that the Registers of Scotland can see that the rent as varied is more than £100 and the lease is therefore exempt.

If an agreement amending the rent paid under the lease has not been registered, it would still be open to the landlord, under section 64, to exempt the lease. That could be done by registering an agreement with the tenant or an order by the Lands Tribunal for Scotland that the rent being paid is more than £100 a year.

We have sought to respond to an issue that was raised and to give the necessary clarity.

I move amendment 3.

Amendment 3 agreed to.

Section 2, as amended, agreed to.

Sections 3 to 19 agreed to.

Section 20—Conversion by agreement: title not completed

The Convener: The next group is on minor and technical amendments. Amendment 4, in the name of the minister, is grouped with amendments 5 and 6.

Stewart Stevenson: Amendments 4, 5 and 6 will amend sections 20 and 23, which refer to section 15(3) of the Land Registration (Scotland) Act 1979. The references need to be updated to
refer to the Land Registration etc (Scotland) Bill, which is going through Parliament. The amendments will therefore remove the references to the 1979 act and replace them with references to section “97 of the Land Registration etc. (Scotland) Act 2012”—of course, the 2012 act does not yet exist, but it will do if the Parliament agrees.

If changes are made to the section numbers of the Land Registration etc (Scotland) Bill as it goes through Parliament, we might need to revisit the position at stage 3 of the Long Leases (Scotland) Bill, to check that we get our cross-references right. I have confirmed with officials that there will be sufficient time in the timetable to enable us to do that.

I move amendment 4.

The Convener: We are keen for the land registration system to be modernised and for the process to be smooth. I welcome the opportunity to clarify the situation.

Amendment 4 agreed to.

Amendment 5 moved—[Stewart Stevenson]—and agreed to.

Section 20, as amended, agreed to.

Sections 21 and 22 agreed to.

Section 23—Conversion to personal pre-emption or redemption burden

Amendment 6 moved—[Stewart Stevenson]—and agreed to.

Section 23, as amended, agreed to.

Sections 24 to 79 agreed to.

Schedule agreed to.

Section 80—Interpretation

The Convener: The next group is on meaning of “registered”. Amendment 7, in the name of the minister, is grouped with amendment 8.

Stewart Stevenson: Registers of sasines that record land deeds in Scotland have been in existence since 1617. At one time, there were local burgh registers and particular sasine registers, as well as the general register of sasines. Some ultra-long leases might still be recorded on those older registers.

Amendment 7 means that the bill will use the definition of “register of sasines” that is in section 2 of the Conveyancing (Scotland) Act 1924. The definition covers the general register of sasines, particular registers of sasines, burgh registers of sasines and the register of booking in the burgh of Paisley. The amendment will put beyond doubt that the definition of “register of sasines” includes the older registers.

Amendment 8 is partly related and is a minor technical amendment, to replace the definition of “registering” with a definition of “registered”, which takes a more straightforward approach. The new definition will read:

“registered” means registered in the Land Register of Scotland or (as the case may be) recorded in the Register of Sasines; and cognate expressions are to be construed accordingly”.

The revised and simplified definition reflects the approach that is being taken in the Land Registration etc (Scotland) Bill, which is going through Parliament.

I move amendment 7.

10:30

The Convener: Thank you for that. Do members have any questions?

Annabelle Ewing: Yes, I have a question. [Interruption.] I am being congratulated on having a question; perhaps my fellow members should wait and see what it is.

Following on from what was said about a previous amendment, it may be that the answer lies in the very first line of section 80, which says: “unless the context otherwise requires”.

By defining the lease to include minutes of variation and so forth, what we have done is to refer to registration, but the minutes of variation may be registered in the books of council and session. I am looking at one of the minister’s officials, in particular. I take it that that element is duly taken into account in this definitional section, which says: “unless the context otherwise requires”.

Is that the case?

The Convener: We will await a reply.

Stewart Stevenson: No. [Laughter.]

The bottom line is that documents have to be registered in the register of sasines or the land register.

Annabelle Ewing: Including minutes of variation?

Stewart Stevenson: Yes.

Annabelle Ewing: Okay. That is clear. Thank you, minister.

Stewart Stevenson: I am so glad that I brought Annalee Murphy with me.

The Convener: Do you wish to wind up, minister?
Stewart Stevenson: No.
Amendment 7 agreed to.
Amendment 8 moved—[Stewart Stevenson]—and agreed to.
Section 80, as amended, agreed to.
Sections 81 to 84 agreed to.
Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. Thank you very much for that interesting excursion into law. I will allow a little time for people to move.
# Long Leases (Scotland) Bill

## AS AMENDED AT STAGE 2

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Long Leases (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to convert certain long leases into ownership; to provide for the conversion into real burdens of certain rights and obligations under such leases; to provide for payment to former owners of land of compensation for loss of it on conversion; and for connected purposes.

PART 1

CONVERSION OF LONG LEASE TO OWNERSHIP

Determination of “qualifying lease”

1 Meaning of “qualifying lease”

(1) A lease is a “qualifying lease” if it complies with subsection (3).

(2) Subsection (1) is subject to section 3.

(3) A lease complies with this subsection if, immediately before the appointed day, it is a right of lease in land—

(a) which is registered,

(b) granted for a period of more than 175 years, and

(c) in respect of which the unexpired portion of that period is—

(i) where the subjects of the lease wholly or mainly comprise a private dwelling house, more than 100 years,

(ii) in any other case, more than 175 years.

(4) But a lease does not so comply if—

(a) the annual rent payable under the lease is over £100,

(b) the subjects of the lease include a harbour (either wholly or partly) in relation to which there is a harbour authority,

(c) it is one granted for the sole purpose of allowing the tenant to install and maintain pipes or cables, or

(d) it is one either—

(i) of minerals, or
(ii) which includes minerals and in respect of which a royalty, lordship or other payment of rent determined by reference to the exploitation of those minerals is or may be payable.

(5) Where a lease is divided (whether as a result of partial assignation or otherwise), each part is treated as a separate lease for the purposes of this Act.

(6) For the purposes of subsection (3)(c)(i), “dwelling house” includes any yard, garden, outbuilding or other pertinent.

2 Further provision about annual rent

(1) This section applies for the purposes of section 1(4)(a) in determining the annual rent payable under a lease.

(2) Subject to subsections (3) to (5), the rent payable under a lease is the rent as set out in a document mentioned in subsection (2A).

(2A) The documents are—

(a) the lease,

(b) a registered assignation of the lease, or

(c) a registered minute of variation or agreement in relation to the lease.

(3) Where a cumulo rent is payable in relation to two or more leases, the annual rent payable under each lease is deemed to be nil.

(4) Any rent payable under a lease which is expressed wholly or partly in non-monetary terms is, to the extent that it is so expressed, to be left out of account.

(5) Any rent payable under a lease which is variable from year to year is, to the extent that it is so variable, to be left out of account.

3 Only one lease is qualifying lease

(1) This section applies where land is subject to two or more potential qualifying leases.

(2) Subsections (3) and (4) have effect for the purposes of determining—

(a) which of the leases is the qualifying lease, and

(b) of which land the lease is a qualifying lease.

(3) A potential qualifying lease is not a qualifying lease if all of the land which forms the subjects of the lease forms the subjects of an inferior lease.

(4) In any other case, a potential qualifying lease is the qualifying lease of land that—

(a) forms the subjects of the potential qualifying lease, but

(b) does not form the subjects of an inferior lease.

(5) In this section—

“potential qualifying lease” means a lease that complies with section 1(3),

“inferior lease”, in relation to a potential qualifying lease, means a sublease—

(a) of the whole or part of the subjects of the potential qualifying lease, and

(b) which is itself a potential qualifying lease.
Consequences of conversion

5 Extinction of certain rights and obligations

(1) Subject to subsection (2), and sections 6 and 7 and Part 2, all rights and obligations arising (whether expressly or by implication) from—

(a) a qualifying lease, and
(b) any superior lease,

are extinguished on the appointed day.

(2) Subsection (1) does not affect any right or obligation arising from a lease mentioned in that subsection in so far as that right or obligation is, by its nature, enforceable only as a personal right or obligation, that is to say, the right or obligation could not be enforced by or against the successor of a party to the lease.

(3) Despite subsection (1)—

(a) rent continues to be payable for any period before the appointed day, and
(b) if (in so far as so payable) it has not fallen due before that day, it falls due on that day.

(4) Subject to subsection (5)—

(a) on or after the appointed day, no proceedings for enforcement of any such rights or obligations as are mentioned in subsection (1) may be commenced,

(b) any proceedings already commenced for such enforcement are deemed to have been abandoned on that day and may, without further process and without any requirement that full judicial expenses be paid by the pursuer, be dismissed accordingly, and

(c) any decree or interlocutor already pronounced in proceedings for such enforcement is deemed to have been reduced or (as the case may be) recalled on that day.

(5) Subsection (4) does not affect any proceedings, decree or interlocutor in relation to—

(a) a right or obligation which subsists by virtue of section 6,

(b) a right or obligation which is created under section 7,
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Part 1—Conversion of long lease to ownership

(c) a right or obligation which is converted under Part 2,
(d) a right to recover damages or to the payment of money (including rent), or
(e) a right of irritancy.

6 Subordinate real rights, reservations and pertinents

(1) This section applies where a right of ownership in land is created by the conversion of a qualifying lease under section 4(1)(a) (such land being referred to in this section as “the converted land”).

(2) The converted land is subject to any subordinate real rights to which the qualifying lease was, immediately before the appointed day, subject.

(3) The converted land is, subject to subsection (4), subject to—

   (a) any subordinate real rights (other than any superior lease extinguished by virtue of section 4(1)(c)), and
   (b) any other encumbrances,

   to which the converted land itself was, immediately before the appointed day, subject.

(4) Any heritable security or proper liferent to which the converted land itself was subject immediately before the appointed day is, on that day and to the extent that the security or liferent affected the land, extinguished.

(5) The converted land—

   (a) includes any pertinent (whether express or implied) of the qualifying lease which, by its nature, may be a pertinent of land, and
   (b) excludes anything capable of being held as a separate tenement in land (including any right so held by virtue of section 8) which is reserved (whether expressly or by implication) from—

      (i) the qualifying lease, or
      (ii) any superior lease.

7 Creation of servitudes on conversion

(1) This section applies where a right of ownership in land is created by the conversion of a qualifying lease under section 4(1)(a) (such land being referred to in this section as “the converted land”).

(2) The converted land includes or (as the case may be) is subject to any servitudes which would have been created (whether expressly, by implication or by positive prescription) had the original grant of—

   (a) the qualifying lease,
   (b) any superior lease, or
   (c) any partial assignation of a lease, where the subjects of that lease include the land which forms the subjects of the qualifying lease, been a conveyance of land.
8 Conversion of reserved sporting rights

(1) This section applies where a right of—
   (a) game, or
   (b) fishing,

is reserved (whether expressly or by implication) from a qualifying lease or superior
lease (such a right being referred to in this Act as a “sporting right”).

(2) A landlord may, before the appointed day, execute and register a notice in the prescribed
form.

(3) The notice must—
   (a) set out the title of the landlord,
   (b) identify the land affected by the sporting right,
   (c) set out the terms of such right, and
   (d) set out the terms of any counter-obligation to the right.

(4) For the purposes of subsection (2)—
   (a) a notice is registered only when registered against the land identified in pursuance
of subsection (3)(b), and
   (b) the notice may be registered against the title of the owner of the land or the tenant
under the qualifying lease.

(5) Before submitting a notice for registration under this section, the landlord must swear or
affirm before a notary public that to the best of the knowledge and belief of the landlord
all the information contained in the notice is true.

(6) For the purposes of subsection (5)—
   (a) if the landlord is—
      (i) an individual unable by reason of legal disability, or incapacity, to swear or
affirm as mentioned in that subsection, then a legal representative of the
landlord may swear or affirm, or
      (ii) not an individual, then any person authorised to sign documents on its
behalf may swear or affirm, and
   (b) any reference in that subsection to the landlord is to be construed in accordance
with paragraph (a).

(7) If subsections (2) to (6) are complied with (and immediately before the appointed day
the sporting right to which the notice relates is still enforceable), on the appointed day—
   (a) that right becomes a separate tenement in land,
   (b) in the case of a right of game, the separate tenement comprises—
      (i) in a case where the right is expressly reserved, the rights and obligations
specified in the lease and, in so far as is consistent with those express rights
and obligations, an exclusive right to take hare, pheasant, partridge, grouse,
and ptarmigan (any particular type of each where applicable),
      (ii) in a case where the right is reserved by implication, an exclusive right to
take hare, pheasant, partridge, grouse and ptarmigan (any particular type of
each where applicable), and
(c) in the case of a right of fishing, the separate tenement comprises—

(i) in a case where the right is expressly reserved, the rights and obligations specified in the lease and, in so far as is consistent with those express rights and obligations, an exclusive right to fish for freshwater fish,

(ii) in a case where the right is reserved by implication, an exclusive right to fish for freshwater fish.

(8) Any exclusive right conferred by subsection (7)(b) is subject to section 1 of the Ground Game Act 1880 (c.47) (right of occupier to kill and take ground game).

(9) Where a right becomes, under subsection (7)(a), a separate tenement in land—

(a) that right is subject to any counter-obligation enforceable immediately before the appointed day, and

(b) without prejudice to any other way in which such a counter-obligation may be extinguished, any such counter-obligation is extinguished on the extinction of the right.

(10) In this section and section 9, any reference to a “landlord” is a reference—

(a) in a case where there is one superior lease, to the landlord under the superior lease,

(b) in a case where there are two or more superior leases, to the landlord under whichever of those leases is not itself subject to a superior lease.

(11) This section is subject to section 75.

9 Further provision for section 8

(1) Where more than one qualifying lease is affected by the same sporting right, a landlord must, if that landlord wishes to execute and register a notice under section 8(2) in relation to those qualifying leases in respect of that right, do so in relation to each separately.

(2) Where a qualifying lease is affected by more than one sporting right, a landlord may, if that landlord wishes to execute and register a notice under section 8(2), do so by a single notice.

PART 2

CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS

Determination of “qualifying conditions”

10 Qualifying conditions

(1) A condition is a “qualifying condition” if—

(a) it is constituted in accordance with subsection (2),

(b) it is enforceable against the tenant (and the successors of the tenant) of—

(i) the qualifying lease, or

(ii) any superior lease,

(c) it complies with subsection (3), and
(d) it is not an excluded condition.

(2) A condition is constituted in accordance with this subsection if it is set out in—
(a) the qualifying lease,
(b) any superior lease which is not a lease granted by virtue of section 17(1) of the Land Tenure Reform (Scotland) Act 1974 (c.38) (interposed leases),
(c) any deed varying a lease mentioned in paragraph (a) or (b), or
(d) any assignation of or other deed relating to a lease mentioned in paragraph (a) or (b) where the assignation or other deed is registered under section 3 of the Registration of Leases (Scotland) Act 1857 (c.26) (assignation of leases).

(3) A condition complies with this subsection if it consists of—
(a) an obligation to do something (including an obligation to defray, or contribute towards, some cost),
(b) an obligation to refrain from doing something,
(c) a right to enter, or otherwise make use of, property which is for a purpose ancillary to an obligation mentioned in paragraph (a) or (b), or
(d) a provision for management or administration which is for a purpose ancillary to an obligation mentioned in paragraph (a) or (b).

(4) In determining whether a condition complies with subsection (3), regard is to be had to the effect of the condition rather than to the way in which the condition is expressed.

(5) A condition is an “excluded condition” if—
(a) it is an obligation to pay rent,
(b) it confers a right of irritancy,
(c) the provision constituting it states that it is enforceable only by irritancy,
(d) it imposes a restriction on—
(i) assignation, or
(ii) subletting,
that is neither a right of pre-emption, a right of redemption or reversion nor any other type of option to acquire the lease, or
(e) it imposes a monetary penalty which is payable on the failure of the tenant to comply with any of the other conditions under the lease.

11 Restriction on conversion of qualifying conditions
A qualifying condition does not become a real burden by virtue of this Part unless the real burden that would be so created complies with the provisions of section 3 (omitting subsection (5)) of the Title Conditions (Scotland) Act 2003 (asp 9).

Meaning of “qualifying land”

12 Meaning of “qualifying land”
In this Act, “qualifying land”, in relation to a qualifying condition, means the land which forms the subjects of the qualifying lease.
Entitlement to enforce qualifying conditions

13 Determination of who may enforce condition

(1) Subsections (2) and (3) have effect for the purposes of determining in relation to sections 14 to 28 whether a person is entitled to enforce a qualifying condition.

(2) A person having right to property to which the entitlement to enforce a qualifying condition attaches may enforce the qualifying condition whether or not the person has completed title to that right (and where more than one person comes within that description, only the person who most recently acquired that right may enforce the qualifying condition).

(3) Where before the appointed day the tenant under a lease—

(a) assigns the lease in part, and

(b) includes in the assignation or (as the case may be) a deed registered under section 3 of the Registration of Leases (Scotland) Act 1857 (c.26), a qualifying condition, a person who is a tenant or subtenant of the part of the land that is not so assigned (or a successor as tenant or subtenant of such person) may enforce the qualifying condition.

(4) In sections 14 to 21, a person is an “entitled person” if that person is entitled to enforce a qualifying condition (whether as landlord or otherwise).

(5) Where the entitlement to enforce a qualifying condition is held in pro indiviso shares—

(a) if the entitlement is held as landlord, any reference in sections 14 to 21 to an entitled person is a reference to all of the persons holding such a share, and

(b) if the entitlement is held otherwise than as landlord, any reference in those sections to an entitled person is a reference to any of the persons holding such a share.

Conversion of conditions to burdens

14 Conversion by nomination of benefited property

(1) This section applies to a qualifying condition where—

(a) at least one conversion condition is met, or

(b) the Lands Tribunal makes an order under section 21.

(2) An entitled person may, before the appointed day, prospectively convert a qualifying condition into a real burden by executing and registering a notice.

(3) The notice must—

(a) be in the prescribed form,

(b) set out the title of the entitled person to enforce the qualifying condition,

(c) identify the qualifying land, or any part of it, which the entitled person nominates as the burdened property in relation to the real burden,

(d) identify the land mentioned in subsection (5), or any part of it, which the entitled person nominates as a benefited property in relation to the burden,

(e) in a case where this section applies by virtue of an order under section 21, state that such an order has been made,
(f) in any other case, specify which of the conversion conditions is (or are) met,

(g) set out the terms of the qualifying condition, and

(h) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the entitled person.

(4) The conversion conditions are—

(a) that the land which would by virtue of this section and sections 15 and 16 become a benefited property has on it a permanent building which is in use wholly or mainly as a place of human—

(i) habitation, or

(ii) resort,

and that building is, at some point, within 100 metres (measuring along a horizontal plane) of the land which would by virtue of this section and sections 15 and 16 become the burdened property,

(b) that the qualifying condition comprises a right of pre-emption or of redemption,

(c) that the land which would by virtue of this section and sections 15 and 16 become a benefited property comprises—

(i) minerals, or

(ii) salmon fishings or some other incorporeal property,

and it is apparent from the terms of the qualifying condition that the condition was included in the lease for the benefit of such land.

(5) The land referred to in subsection (3)(d) is land, other than the qualifying land, which—

(a) if the land is not subject to a qualifying or exempt lease, the entitled person is owner of, or

(b) if the land is subject to such a lease, the entitled person is tenant of under that lease.

(6) Where the entitled person holds the entitlement to enforce the qualifying condition otherwise than as landlord—

(a) the land referred to in subsection (5)(a) is the land to which the entitlement to enforce the condition attaches, and

(b) the lease referred to in subsection (5)(b) is the lease to which the entitlement to enforce the condition attaches.

15 Conversion by nomination: registration

(1) For the purposes of section 14(2), a notice is registered only when registered against both the burdened property and the benefited property.

(2) Registration under subsection (1) must—

(a) in the case of the burdened property, be against the title of—

(i) the owner of the property, or

(ii) the tenant under the qualifying lease of the property, and

(b) in the case of a benefited property, be against the title of—
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(1) the owner of the property, or
(ii) if the property in question is subject to a qualifying lease or exempt lease, the tenant under such lease.

(3) Before submitting any notice for registration under section 14, the entitled person must swear or affirm before a notary public that to the best of the knowledge and belief of the entitled person all the information contained in the notice is true.

(4) For the purposes of subsection (3), if the entitled person is—
(a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the entitled person may swear or affirm, or
(b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm,

and any reference in that subsection to an entitled person is to be construed accordingly.

(5) This section and section 14 are subject to sections 36 and 75.

16 Conversion by nomination: effect

(1) This section applies in relation to a qualifying condition where—
(a) an entitled person registers a notice in accordance with sections 14 and 15, and
(b) immediately before the appointed day the qualifying condition is still enforceable by the entitled person (or that person’s successor).

(2) On the appointed day, the qualifying condition becomes a real burden in relation to which—
(a) the land identified in pursuance of section 14(3)(c) is the burdened property, and
(b) the land identified in pursuance of section 14(3)(d) is a benefited property.

17 Conversion by agreement

(1) An entitled person may, before the appointed day—
(a) serve notice on the tenant under the qualifying lease, that the entitled person seeks to enter into an agreement with the tenant under this section—
(i) prospectively converting a qualifying condition into a real burden,
(ii) prospectively nominating the qualifying land, or any part of it, as the burdened property in relation to such burden, and
(iii) prospectively nominating land mentioned in subsection (2), or any part of that land, as a benefited property in relation to such burden,
(b) subject to subsection (5), enter into such an agreement with the tenant, and
(c) register that agreement.

(2) The land referred to in subsection (1)(a)(iii) is land, other than the qualifying land, which—
(a) if the land is not subject to a qualifying or exempt lease, the entitled person is owner of, or
(b) if the land is subject to such a lease, the entitled person is tenant of under that lease.

(3) Where the entitled person holds the entitlement to enforce the qualifying condition otherwise than as landlord—

5  (a) the land referred to in subsection (2)(a) is the land to which the entitlement to enforce the condition attaches, and

(b) the lease referred to in subsection (2)(b) is the lease to which the entitlement to enforce the condition attaches.

(4) The notice referred to in subsection (1) must—

10  (a) be in the prescribed form,

(b) set out the title of the entitled person to enforce the qualifying condition,

(c) identify the land nominated as the burdened property,

(d) identify the land nominated as a benefited property,

(e) set out the terms of the qualifying condition, and

(f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the entitled person.

(5) If the entitled person and the tenant think fit they may, by the agreement, modify the qualifying condition or any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the entitled person (or both the qualifying condition and any such counter-obligation).

(6) An agreement mentioned in subsection (1)(b) must be a written agreement which—

(a) expressly states that it is made under this section, and

(b) includes all the information, other than that relating to service, required to be set out in completing the notice the form of which is prescribed under subsection (4)(a).

(7) This section is subject to section 36.

18 Conversion by agreement: registration

(1) For the purposes of section 17(1), an agreement is registered only when registered against both the burdened property and the benefited property.

30  (2) Registration under subsection (1) must—

(a) in the case of the burdened property, be against the title of—

(i) the owner of the property, or

(ii) the tenant under the qualifying lease of the property, and

(b) in the case of a benefited property, be against the title of—

(i) the owner of the property, or

(ii) if the property in question is subject to a qualifying lease or exempt lease, the tenant under such lease.
19 Conversion by agreement: effect

(1) This section applies in relation to a qualifying condition where—
   (a) sections 17(1)(b) and (c) and (6) and 18 are complied with, and
   (b) immediately before the appointed day the qualifying condition is still enforceable
       by the entitled person (or that person’s successor).

(2) On the appointed day, the qualifying condition becomes a real burden in relation to which—
   (a) the land identified in pursuance of section 17(4)(c) is the burdened property, and
   (b) the land identified in pursuance of section 17(4)(d) is a benefited property.

20 Conversion by agreement: title not completed

(1) Subsection (2) applies for the purposes of section 17 where—
   (a) the entitled person has not completed title to—
       (i) the property by virtue of which such person is entitled to enforce a
           qualifying condition, or
       (ii) the land nominated as a benefited property, and
   (b) section 97 of the Land Registration etc. (Scotland) Act 2012 (asp 00) (circumstances
       where unnecessary to deduce title) does not apply.

(2) The entitled person may enter into an agreement under section 17 only if in the agreement the entitled person deduces title from the person who appears in the Register of Sasines as having the last recorded title to the interest in question.

(3) Subsection (4) applies for the purposes of section 17 where—
   (a) the tenant has not completed title to the qualifying lease, and
   (b) section 97 of the Land Registration etc. (Scotland) Act 2012 (asp 00) (circumstances where unnecessary to deduce title) does not apply.

(4) The tenant may enter into an agreement under section 17 only if in the agreement the tenant deduces title from the person who appears in the Register of Sasines as having the last recorded title to the interest in question.

Applications relating to section 14

21 Lands Tribunal order

(1) This section applies where an entitled person cannot proceed under section 14(2) because none of the conditions set out in subsection (4) (“the conversion conditions”) of that section are met.

(2) The entitled person may apply to the Lands Tribunal for an order under subsection (5).

(3) An application may be made under subsection (2) only if the entitled person has first, in pursuance of section 17, attempted to reach agreement as respects the qualifying condition in question with the tenant under the qualifying lease.

(4) An application under subsection (2)—
   (a) must include a description by the entitled person of the requisite attempt to reach agreement, and
(b) must be made not later than 1 year after the day on which this section comes into force.

(5) The Lands Tribunal may make an order dispensing with the need for any of the conversion conditions to be met if satisfied that, were the qualifying condition to be extinguished, there would be material detriment to the value or enjoyment of the entitled person’s ownership (taking such person to have ownership) of the land which is to be identified, in pursuance of section 14(3)(d), as a benefited property.

(6) The decision of the Lands Tribunal on an application under subsection (2) is final.

(7) A person opposing an application made under subsection (2) incurs no liability in respect of expenses incurred by the entitled person unless, in the opinion of the Lands Tribunal, the actings of the person opposing are vexatious or frivolous.

### Dealing with application under section 21

(1) This section applies where the Lands Tribunal receives an application under section 21.

(2) The Lands Tribunal must give notice of the application, whether by way of advertisement or otherwise, to—

- (a) the tenant under the qualifying lease, and
- (b) if the Lands Tribunal thinks fit, any other person.

(3) Any person (whether or not the person has received notice under subsection (2)) who—

- (a) is a tenant under the qualifying lease, or
- (b) is affected by that qualifying condition or by its proposed constitution as a real burden,

may oppose or make representations in relation to the application.

(4) The Lands Tribunal—

- (a) must allow any such person as is mentioned in subsection (3), and
- (b) may allow any other person who appears to it to be affected by the qualifying condition to which the application relates or its proposed constitution as a real burden,

may be heard in relation to the application.

### Personal real burdens

### Conversion to personal pre-emption or redemption burden

(1) Without prejudice to section 14, the person entitled to enforce a qualifying condition mentioned in subsection (2) (whether as landlord or otherwise) may, before the appointed day, prospectively convert that qualifying condition into a personal pre-emption burden or (as the case may be) into a personal redemption burden by executing and registering a notice.

(2) The qualifying condition referred to in subsection (1) is a condition comprising—

- (a) a right of pre-emption, or
- (b) a right of redemption.

(3) The notice referred to in subsection (1) must—

- (a) be in the prescribed form,
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(b) set out the title to enforce the qualifying condition of the person executing and registering the notice,
(c) identify the qualifying land (or any part of such land),
(d) set out the terms of the qualifying condition, and
(e) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice.

(4) For the purposes of subsection (1)—
(a) a notice is registered only when registered against the land identified in pursuance of subsection (3)(c), and
(b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.

(5) Before submitting any notice for registration under this section, the person entitled to enforce the qualifying condition must swear or affirm before a notary public that to the best of the knowledge and belief of that person all the information contained in the notice is true.

(6) For the purposes of subsection (5), if the person entitled to enforce the qualifying condition is—
(a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of that person may swear or affirm, or
(b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm,
and any reference in that subsection to the person entitled to enforce the qualifying condition is to be construed accordingly.

(7) If subsections (1) to (6) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the person who executed and registered the notice under subsection (1) (or that person’s successor) then, on that day—
(a) the qualifying condition is converted into a real burden in favour of that person, to be known as a “personal pre-emption burden” or (as the case may be) as a “personal redemption burden”, and
(b) the land identified in pursuance of subsection (3)(c) becomes the burdened property.

(8) The right to a personal pre-emption burden or personal redemption burden may be assigned or otherwise transferred to any person.

(9) An assignation or transfer under subsection (8) takes effect on registration.

(10) Where the holder of a personal pre-emption burden or personal redemption burden does not have a completed title—
(a) title may be completed by the holder registering a notice of title, or
(b) without completing title, the holder may grant a deed—
   (i) assigning the right to the burden, or
   (ii) discharging, in whole or in part, the burden.
(11) The holder must, in a deed granted under subsection (10)(b), deduce title from the person who appears in the Register of Sasines as having the last recorded title to the burden in question unless the deed is one to which section 97 of the Land Registration etc. (Scotland) Act 2012 (asp 00) (circumstances where unnecessary to deduce title) applies.

(12) This section is subject to sections 36 and 75.

24 Conversion to economic development burden

(1) Where a local authority is, or the Scottish Ministers are, entitled to enforce a qualifying condition which is imposed for the purpose of promoting economic development, it or they may, before the appointed day, prospectively convert that qualifying condition into an economic development burden by executing and registering a notice.

(2) The notice must—
   (a) be in the prescribed form,
   (b) set out the title to enforce the qualifying condition of the person executing and registering the notice,
   (c) state that such person is a local authority or the Scottish Ministers,
   (d) identify the qualifying land (or any part of such land),
   (e) set out the terms of the qualifying condition,
   (f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice, and
   (g) state that the qualifying condition was imposed for the purpose of promoting economic development and provide information in support of that statement.

(3) For the purposes of subsection (1)—
   (a) a notice is registered only when registered against the land identified in pursuance of subsection (2)(d), and
   (b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.

(4) If subsections (1) to (3) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the local authority or the Scottish Ministers then, on that day, the qualifying condition becomes an economic development burden—
   (a) in favour of the local authority or (as the case may be) the Scottish Ministers, and
   (b) in relation to which the land identified in pursuance of subsection (2)(d) is the burdened property.

(5) This section is subject to sections 36 and 75.

25 Conversion to health care burden

(1) Where the Scottish Ministers are entitled to enforce a qualifying condition which is imposed for the purpose of promoting the provision of facilities for health care, they may, before the appointed day, prospectively convert that qualifying condition into a health care burden by executing and registering a notice.
(2) The notice must—
   (a) be in the prescribed form,
   (b) set out the title of the Scottish Ministers to enforce the qualifying condition,
   (c) identify the qualifying land (or any part of such land),
   (d) set out the terms of the qualifying condition,
   (e) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the Scottish Ministers, and
   (f) state that the qualifying condition was imposed for the purpose of promoting the provision of facilities for health care and provide information in support of that statement.

(3) For the purposes of subsection (1)—
   (a) a notice is registered only when registered against the land identified in pursuance of subsection (2)(c), and
   (b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.

(4) If subsections (1) to (3) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the Scottish Ministers then, on that day, the qualifying condition becomes a health care burden—
   (a) in favour of the Scottish Ministers, and
   (b) in relation to which the land identified in pursuance of subsection (2)(c) is the burdened property.

(5) This section is subject to sections 36 and 75.

26 Conversion to climate change burden

(1) Where a public body or trust is, or the Scottish Ministers are, entitled to enforce a qualifying condition which is imposed for the purpose of reducing greenhouse gas emissions, it or they may, before the appointed day, prospectively convert that qualifying condition into a climate change burden by executing and registering a notice.

(2) The notice must—
   (a) be in the prescribed form,
   (b) set out the title to enforce the qualifying condition of the person executing and registering the notice,
   (c) state that such person is a public body, trust or the Scottish Ministers,
   (d) identify the qualifying land (or any part of such land),
   (e) set out the terms of the qualifying condition,
   (f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice, and
   (g) state that the qualifying condition was imposed for the purpose of reducing greenhouse gas emissions and provide information in support of that statement.

(3) For the purposes of subsection (1)—
(a) a notice is registered only when registered against the land identified in pursuance of subsection (2)(d), and
(b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.

If subsections (1) to (3) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the public body, trust or the Scottish Ministers then, on that day, the qualifying condition becomes a climate change burden—
(a) in favour of the public body, the trust or (as the case may be) the Scottish Ministers, and
(b) in relation to which the land identified in pursuance of subsection (2)(d) is the burdened property.

In this section—
“emissions” has the meaning given by section 17(1) of the Climate Change (Scotland) Act 2009 (asp 12),
“greenhouse gas” has the meaning given by section 10(1) of that Act,
“public body” means a body listed in Part I or II of the Schedule to the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003 (SSI 2003/453).

This section is subject to sections 36 and 75.

27 Conversion to conservation burden: rule one

(1) Where a conservation body is, or the Scottish Ministers are, entitled to enforce a qualifying condition of the category described in subsection (2), it or they may, before the appointed day, prospectively convert that qualifying condition into a conservation burden for the benefit of the public by executing and registering a notice.

(2) The category is those qualifying conditions which have the purpose of preserving or protecting—
(a) the architectural or historical characteristics of land, or
(b) any other special characteristics of land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of the land).

(3) The notice referred to in subsection (1) must—
(a) be in the prescribed form,
(b) set out the title to enforce the qualifying condition of the person executing and registering the notice,
(c) state that such person is a conservation body or the Scottish Ministers,
(d) identify the qualifying land (or any part of such land),
(e) set out the terms of the qualifying condition, and
(f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice.

(4) For the purposes of subsection (1)—
(a) a notice is registered only when registered against the land identified in pursuance of subsection (3)(d), and
(b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.

(5) If subsections (1) to (4) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the conservation body or the Scottish Ministers then, on that day, the qualifying condition becomes a conservation burden—
(a) in favour of the conservation body or (as the case may be) the Scottish Ministers, and
(b) in relation to which the land identified in pursuance of subsection (3)(d) is the burdened property.

(6) The references in subsection (5) to—
(a) the conservation body include references to—
(i) any conservation body which is, or
(ii) the Scottish Ministers where they are, its successor as the person entitled to enforce the qualifying condition, and
(b) the Scottish Ministers include references to a conservation body which is their successor as such person.

(7) This section is subject to sections 36 and 75.

28 Conversion to conservation burden: rule two

(1) The person (not being a conservation body or the Scottish Ministers) entitled to enforce a qualifying condition of the category described in section 27(2) (whether as landlord or otherwise) may before the appointed day—
(a) prospectively convert that condition into a conservation burden for the benefit of the public, and
(b) nominate a conservation body or the Scottish Ministers to have title to enforce that burden, by executing and registering a notice.

(2) Subsection (1) applies only where the consent of the nominee to being so nominated is obtained—
(a) in a case where sending a copy of the notice, in compliance with section 75(2), is reasonably practicable, before that copy is so sent, and
(b) in any other case, before the notice is executed.

(3) The notice referred to in subsection (1) must—
(a) be in the prescribed form,
(b) set out the title to enforce the qualifying condition of the person executing and registering the notice,
(c) state that the nominee is a specific conservation body or the Scottish Ministers (as the case may be), and
(d) comply with section 27(3)(d) to (f).
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(4) For the purposes of subsection (1)—

(a) a notice is registered only when registered against the land identified in pursuance of subsection (3)(d), and

(b) the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.

(5) If subsections (1) to (4) are complied with and immediately before the appointed day the qualifying condition is still enforceable by the person who executed and registered the notice under subsection (1) (or that person’s successor) then, on that day, the qualifying condition becomes a conservation burden—

(a) in favour of the conservation body or (as the case may be) the Scottish Ministers, and

(b) in relation to which the land identified in pursuance of subsection (3)(d) is the burdened property.

(6) This section is subject to sections 36 and 75 except that, in the application of subsection (3)(b) of section 36 for the purposes of this subsection, such discharge as is mentioned in that subsection is to be taken to require the consent of the nominated person.

Other real burdens

Conversion to facility or service burden

(1) Where a qualifying condition regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to land other than the qualifying land then, on the appointed day, such condition becomes a facility burden in relation to which—

(a) the qualifying land is the burdened property, and

(b) the heritable property which constitutes the facility and any land to which the facility is (and is intended to be) of benefit is the benefited property.

(2) Where a qualifying condition relates to the provision of services to land other than the qualifying land, then the qualifying condition, on the appointed day, becomes a service burden in relation to which—

(a) the qualifying land is the burdened property, and

(b) any land to which the services are provided is the benefited property.

(3) Without prejudice to the generality of subsection (1), examples of property which might constitute a facility mentioned in that subsection are—

(a) a common part of a tenement,

(b) a common area for recreation,

(c) a private road,

(d) private sewerage,

(e) a boundary wall.

Conversion to manager burden

(1) Where a qualifying condition confers on such person as may be specified in the condition power to—
(a) act as the manager of related properties,
(b) appoint some other person to be such manager, or
(c) dismiss any person appointed by virtue of the power mentioned in paragraph (b),

then, on the appointed day, such condition becomes a real burden in favour of such person and in relation to such burden the qualifying land is the burdened property.

(2) A real burden constituted by virtue of subsection (1) is a manager burden.

(3) For the purposes of subsection (1), whether properties are related properties is to be inferred from all the circumstances.

(4) Without prejudice to the generality of this section, circumstances giving rise to such an inference might include—

(a) the convenience of managing the properties together because they share—
   (i) some common feature, or
   (ii) an obligation for common maintenance of some facility,
(b) it being evident that the properties constitute a group of properties on which qualifying conditions are imposed under a common scheme, or
(c) there being shared rights to common property.

31 Conversion where common scheme affects related properties

(1) Where qualifying conditions are imposed under a common scheme on a group of related properties, such conditions, on the appointed day, become real burdens in relation to which each property is a benefited and a burdened property.

(2) For the purposes of subsection (1), whether properties are related properties is to be inferred from all the circumstances.

(3) Without prejudice to the generality of this section, circumstances giving rise to such an inference might include—

(a) the convenience of managing the properties together because they share—
   (i) some common feature, or
   (ii) an obligation for common maintenance of some facility,
(b) there being shared rights to common property,
(c) the properties being subject to the common scheme by virtue of the same deed of conditions, or
(d) the properties each being a flat in the same tenement.

(4) This section confers no right of pre-emption, redemption or reversion.

32 Conversion where expressly enforceable by certain third parties

Where a qualifying condition is expressed as being enforceable by—

(a) the owner, or
(b) the tenant,
of land other than the qualifying land then, on the appointed day, such condition becomes a real burden in relation to which the qualifying land is the burdened property and that other land is a benefited property.

Exclusions from conversion

33 Qualifying condition where obligation assumed by public authority

Sections 29(1) and 31(1) do not apply to a qualifying condition in so far as such condition constitutes an obligation—

(a) to maintain or reinstate, and

(b) which has been assumed—

(i) by a local or other public authority, or

(ii) by virtue of any enactment, by a successor body to any such authority.

Effect of conversion on counter-obligations

34 Counter-obligations on conversion

(1) Where a qualifying condition becomes, by virtue of any of sections 14 to 32, a real burden, the right to enforce the burden is subject to any counter-obligation mentioned in subsection (2).

(2) The counter-obligations are—

(a) in the case of a real burden constituted by virtue of—

(i) section 14 or 23 to 28, those specified in the notice registered under the section in question,

(ii) section 17, those specified in the agreement,

(iii) section 30, those enforceable against the person on whom power is conferred,

(iv) section 32, those enforceable against the owner or (as the case may be) tenant of the other land, and

(b) in any other case, those enforceable against any person who immediately before the appointed day was entitled to enforce the qualifying condition which was converted into the burden.

Prescription

35 Prescriptive period for converted conditions

(1) This section applies where a qualifying condition becomes, by virtue of any of sections 14 to 32, a real burden.

(2) Section 18(5) of the 2003 Act (prescription where breach of burden occurs before the appointed day) applies to any breach of the qualifying condition as it applies to a breach of a real burden.
Further provision for notices and agreements

(1) Subsections (2) and (3) apply in relation to a qualifying lease where—
   (a) an agreement relating to a qualifying condition has been registered under section
        17, or
   (b) a notice relating to a qualifying condition has been registered under section 14 or
        23 to 28.

(2) It is not competent for the person who registered the agreement or notice (or that
    person’s successor) to register under any of those sections in relation to the qualifying
    lease another such agreement or notice relating to the same qualifying condition.

(3) Nothing in subsection (2) prevents registration of an agreement or notice where (as the
    case may be)—
    (a) the discharge of any earlier such agreement has been registered, jointly, by the
        parties to that agreement (or by their successors), or
    (b) the discharge of any earlier such notice has been registered by the person who
        registered that notice (or by that person’s successor).

(4) Where more than one qualifying lease is affected by the same qualifying condition
    enforceable by the same person, that person must, if that person wishes to execute and
    register a notice under this Part in relation to those qualifying leases in respect of that
    qualifying condition, do so in relation to each separately.

(5) Where a qualifying lease is affected by more than one qualifying condition enforceable
    by the same person, that person may—
    (a) enter into and register a single agreement under section 17 in relation to that
        qualifying lease in respect of those qualifying conditions, or
    (b) execute and register a single notice under section 14 or 23 to 28 in relation to that
        qualifying lease in respect of those qualifying conditions.

(6) Nothing in this Part requires registration against land prospectively nominated as a
    benefited property but outwith Scotland.

PART 3

ALLOCATION OF RENTS AND RENEWAL PREMIUMS ETC.

Key terms

Partially continuing leases and renewal obligations etc.

In this Act—

“partially continuing lease” means a lease which, on the appointed day—

(a) is extinguished by virtue of Part 1, in respect of part of the subjects of the
    lease (such subjects being referred to in this Act as the “converted
    subjects”), and

(b) whether by exemption under Part 5 or otherwise, continues in respect of
    any other subjects (such subjects being referred to in this Act as the
    “continuing subjects”),
“renewal obligation” means an obligation on the landlord under a lease to renew it after a fixed period on payment by the tenant of a premium,

“renewal period” means, in relation to a renewal obligation, the fixed period after which the landlord must renew the lease,

“renewal premium” means, in relation to a renewal obligation, the premium payable.

38 Cumulo rent and cumulo renewal premium

(1) In this Act—

“cumulo rent” means, subject to subsection (2), a single rent payable in relation to two or more leases, and

“cumulo renewal premium” means, subject to subsections (2) to (4), a single renewal premium payable in relation to two or more leases.

(2) Where such rent or renewal premium—

(a) has been apportioned between—

(i) those leases, or

(ii) some of those leases, and

(b) the parties to those leases consented (whether expressly or by implication) to the apportionment,

any rent or renewal premium so apportioned is not cumulo rent or (as the case may be) not a cumulo renewal premium and is the rent or renewal premium payable under the lease for the purposes of this Act.

(3) Subsection (4) applies if—

(a) subsection (2) applies to rent payable under two or more leases, and

(b) a single renewal premium is payable under the leases.

(4) For the purposes of this Act—

(a) the renewal premium is to be treated as if it were apportioned between the leases in the same proportion as the apportionment of rent, and

(b) that apportioned renewal premium is the renewal premium payable under the lease.

39 Allocation of cumulo rent before appointed day

(1) This section applies where—

(a) a cumulo rent is payable in relation to two or more leases, and

(b) one or more of the leases is a qualifying lease.

(2) The landlord may, at any time before the appointed day, allocate the cumulo rent between the leases mentioned in subsection (1)(a).

(3) The allocation under subsection (2) must be in such proportions as are reasonable in all the circumstances.
(4) For the purposes of subsection (3), the proportions are presumed to be reasonable insofar as they accord with any apportionment of the *cumulo* rent that was effective immediately before the allocation under (2).

(5) Where the landlord allocates the *cumulo* rent between two or more leases under subsection (2), the annual rent payable under each lease from the day on which the landlord gives notice to the tenant of the allocation is the annual rent allocated to the lease and such rent is not *cumulo* rent for the purposes of this Act.

### Allocation of *cumulo* rent after appointed day

(1) This section applies where—

(a) immediately before the appointed day, a *cumulo* rent was payable in relation to two or more leases, and

(b) on that day, one or more of the leases is extinguished by virtue of Part 1 in respect of any subjects of the leases.

(2) The landlord must, before the expiry of the period of 2 years beginning with the appointed day, allocate the *cumulo* rent between the leases mentioned in subsection (1)(a).

(3) The allocation under subsection (2) must be in such proportions as are reasonable in all the circumstances.

(4) For the purposes of subsection (3), the proportions are presumed to be reasonable insofar as they accord with any apportionment of the *cumulo* rent that was effective immediately before the appointed day.

(5) The annual rent payable from the appointed day under a lease which is not wholly extinguished by virtue of Part 1 is (subject to section 41) the annual rent allocated to the lease under subsection (2).

(6) In this section and sections 41, 42 and 43, “landlord” includes former landlord.

### Partially continuing leases: allocation of rent

(1) The landlord in relation to a partially continuing lease must, before the expiry of the period of 2 years beginning with the appointed day, allocate the annual rent between the converted subjects and continuing subjects.

(2) In subsection (1), the annual rent is—

(a) the annual rent payable under the lease immediately before the appointed day, or

(b) where a *cumulo* rent is allocated to the lease under section 40(2), the annual rent so allocated.

(3) The allocation under subsection (1) must be in such proportions as are reasonable in all the circumstances.

(4) The annual rent payable from the appointed day under the partially continuing lease is the annual rent allocated to the continuing subjects under subsection (1).

### Allocation of renewal premium

(1) This section applies where—
Part 3—Allocation of rents and renewal premiums etc.

(a) immediately before the appointed day, the renewal premium payable in relation to two or more leases containing a renewal obligation was a *cumulo* renewal premium,

(b) on that day, one or more of the leases is extinguished by virtue of Part 1 in respect of any subjects of the leases, and

(c) a lease mentioned in paragraph (b) complies with section 1(3)(b) and (c) by virtue of section 71(1)(b).

(2) The landlord must, before the expiry of the period of 2 years beginning with the appointed day, allocate the *cumulo* renewal premium between the leases mentioned in subsection (1)(a).

(3) The allocation under subsection (2) must be in such proportions as are reasonable in all the circumstances.

(4) For the purposes of subsection (3)—

(a) the proportions are presumed to be reasonable in so far as they accord with any apportionment of the *cumulo* renewal premium that was effective immediately before the appointed day,

(b) where there is no such apportionment, the proportions are presumed to be reasonable in so far as they accord with any allocation of rent under section 40.

(5) The renewal premium payable from the appointed day under a lease which is not wholly extinguished by virtue of Part 1 is (subject to section 43) the renewal premium allocated to the lease under subsection (2).

### Partially continuing leases: allocation of renewal premium

(1) This section applies to a lease which—

(a) contains a renewal obligation,

(b) complies with section 1(3)(b) and (c) by virtue of section 71(1)(b), and

(c) is a partially continuing lease.

(2) The landlord must, before the expiry of the period of 2 years beginning with the appointed day, allocate the renewal premium between the converted subjects and continuing subjects.

(3) For the purposes of subsection (2), the renewal premium is—

(a) the renewal premium payable under the lease immediately before the appointed day, or

(b) where a *cumulo* renewal premium is allocated to the lease under section 42(2), the premium so allocated.

(4) The allocation under subsection (2) must be in such proportions as are reasonable in all the circumstances.

(5) For the purposes of subsection (4), the proportions are presumed to be reasonable in so far as they accord with any allocation of rent under section 41.

(6) The renewal premium payable from the appointed day under the partially continuing lease is the renewal premium allocated to the continuing subjects under subsection (2).
Allocation disputed or not made

44 Allocation disputed or not made: reference to Lands Tribunal

(1) This section applies where—

(a) a tenant under a lease referred to in section 39(1)(a) disputes the allocation made under section 39(2),

(b) a tenant under a lease referred to in section 40(5) disputes the allocation made under section 40(2),

(c) a tenant under a lease referred to in section 42(5) disputes the allocation made under section 42(2),

(d) a tenant under a partially continuing lease disputes the allocation made under section 41(1) or section 43(2),

(e) a landlord under a lease referred to in section 40(5) or 42(5) does not, within the period of 2 years beginning with the appointed day, give notice to a tenant of an allocation under section 40(2) or 42(2), or

(f) a landlord under a partially continuing lease does not, within the period of 2 years beginning with the appointed day, give notice to a tenant of—

(i) an allocation under section 41(1), or

(ii) where section 43 applies to the lease, an allocation under subsection (2) of that section.

(2) The tenant may apply to the Lands Tribunal for an order—

(a) where this section applies by virtue of subsection (1)(a), fixing the annual rent payable under the lease from the day the landlord gave notice to the tenant of the allocation,

(b) in any other case, fixing the annual rent or (as the case may be) the renewal premium payable under the lease from the appointed day.

(3) Where this section applies by virtue of subsection (1)(a) to (d), an application under subsection (2) must be made before the expiry of the period of 56 days beginning with the day on which the landlord gives notice to the tenant of the allocation.

PART 4

Compensation for loss of landlord’s rights

Compensatory payment

45 Requiring compensatory payment

(1) This section applies where, on the appointed day, the rights of a landlord under a lease are extinguished by virtue of Part 1.

(2) The former landlord under such a lease may serve on the former tenant a notice in the prescribed form requiring that a compensatory payment be made to the former landlord by the former tenant.

(3) The compensatory payment must be—

(a) calculated in accordance with section 47, and
(b) specified in the notice.

(4) A notice served under subsection (2) must be—
   (a) served before the expiry of the period of 2 years beginning with the appointed
day, and
   (b) accompanied by a copy of the prescribed explanatory note.

(5) Where the compensatory payment required is equal to or greater than £50, the former
landlord must, together with the notice served under subsection (2), serve on the former
tenant an instalment document.

(6) This section is subject to section 56.

(7) In this Act—
   “compensatory payment” means a payment of the kind mentioned in subsection
   (2),
   “instalment document” is to be construed in accordance with section 57(2).

46 Making compensatory payment

15 (1) This section applies where the former landlord has served notice in accordance with
section 45.

(2) The former tenant must, before the expiry of the period of 56 days beginning with the
day on which the notice is served, make the compensatory payment to the former
landlord.

20 (3) Subsection (2) is subject to section 57.

Calculation of compensatory payment

47 Calculation of the compensatory payment

The compensatory payment in relation to a lease is calculated as follows—

Step 1

Determine the annual rent (AR) in accordance with section 48.

Step 2

Calculate the notional annual renewal premium (NARP) (if any) in accordance with
section 49.

Step 3

Calculate the annual income (AI) according to the following formula—

\[ AI = AR + NARP. \]

Step 4

Calculate the sum of money which would, if invested in 2.5 per cent Consolidated Stock
at the middle market price at the close of business last preceding the appointed day,
produce an annual sum equal to AI.

The sum calculated is the compensatory payment.
Annual rent

48 Determination of the annual rent

(1) For the purposes of section 47, the annual rent in relation to a lease is—

(a) where the lease is not a partially continuing lease and the rent payable immediately before the appointed day was a *cumulo* rent, the annual rent allocated to the lease under section 40,

(b) where the lease is a partially continuing lease, the annual rent allocated to the converted subjects under section 41,

(c) in any other case, the annual rent payable under the lease.

(2) Any rent payable under the lease which is expressed wholly or partly in non-monetary terms is, to the extent that it is so expressed, to be left out of account.

(3) Any rent payable under the lease which is variable from year to year is, to the extent that it is so variable, to be left out of account.

Renewal premiums

49 Calculation of notional annual renewal premium

(1) This section applies where—

(a) a lease contains a renewal obligation,

(b) the renewal premium (determined in accordance with subsection (3)) next payable on or after the appointed day is less than or equal to £100, and

(c) the lease complies with section 1(3)(b) and (c) by virtue of section 71(1)(b).

(2) For the purpose of section 47, the notional annual renewal premium is calculated according to the following formula—

\[
\text{NARP} = \frac{\text{RP}}{Y}
\]

where—

\[
\text{NARP} \text{ is the notional annual renewal premium,}
\]

\[
\text{RP} \text{ is the renewal premium (determined in accordance with subsection (3)) next payable on or after the appointed day,}
\]

\[
Y \text{ is the renewal period (expressed as a number of years).}
\]

(3) The renewal premium is—

(a) where the lease is not a partially continuing lease and the renewal premium payable immediately before the appointed day was a *cumulo* renewal premium, the renewal premium allocated to the lease under section 42,

(b) where the lease is a partially continuing lease, the renewal premium allocated to the converted subjects under section 43,

(c) in any other case, the renewal premium payable under the lease.
50 Claiming additional payment

(1) This section applies where, on the appointed day, a right of a landlord under a lease, being a right mentioned in section 51(1), is extinguished by virtue of Part 1.

(2) The former landlord under the lease may serve on the former tenant a notice claiming that a payment, calculated in accordance with section 52, be made to the former landlord by the former tenant in respect of the extinction of the right (such payment being referred to in this Act as an “additional payment”).

(3) Where—

(a) the lease mentioned in subsection (1) is a superior lease, and

(b) the extinguished right is a right referred to in section 51(1)(e) to (g),

references to the “former tenant” in subsection (2) and sections 52 to 55 and 57 to 59 are to be construed as references to the former tenant under the qualifying lease.

(4) The notice served under subsection (2) must—

(a) be served before the expiry of the period of 2 years beginning with the appointed day,

(b) be in the prescribed form,

(c) be accompanied by a copy of the prescribed explanatory note,

(d) set out the right which has been extinguished and in respect of which the claim is made,

(e) specify the amount of additional payment claimed and the basis on which the amount is calculated, and

(f) where the claim is in respect of a right to development value, set out the basis on which the development value is reserved under the lease.

(5) Where the additional payment claimed is equal to or greater than £50, the former landlord must, together with the notice served under subsection (2), serve on the former tenant an instalment document.

(6) This section is subject to section 56.

51 Extinguished rights

(1) The rights referred to in section 50(1) are—

(a) any right to a rent to the extent that such right is expressed wholly or partly in non-monetary terms,

(b) any right to have the amount payable as rent reviewed or increased from time to time,

(c) any right to a rent to the extent that the amount payable is variable from year to year,

(d) any right to receive a premium (other than a renewal premium which satisfies the condition in section 49(1)(b)) in return for renewing the lease after a fixed period, where, by virtue of section 71(1)(b) such a renewal is required in order for the lease to comply with section 1(3)(b) and (c),
(e) any right to resume natural possession of the land subject to a lease upon expiry of the lease, provided that the lease would expire no later than the end of the period of 200 years beginning with the appointed day,

(f) any right, other than a right of pre-emption, enabling a lease to be terminated earlier than the date on which the lease would otherwise expire, providing that such right—

(i) is exercisable no later than the end of the period of 200 years beginning with the appointed day,

(ii) is not a provision of the lease purporting to terminate the lease, or entitling the landlord to terminate it, in the event of a failure of the tenant to comply with any provision of the lease,

(iii) is not a provision of the lease deeming such a failure to be a material breach of contract, and

(iv) does not become a real burden by virtue of section 16, 19 or 23, and

(g) any right to development value, providing that such right does not become a real burden by virtue of section 16 or 19.

(2) In this Part—

“development value” means any significant increase in the value of a lease arising as a result of the subjects of the lease becoming free to be used, or dealt with, in some way not permitted under the lease, and

any reference to a “right to development value” means a right to the benefit of any development value of a lease where—

(a) the lease was granted subject to a condition, enforceable by the landlord, reserving to the landlord the benefit (whether wholly or in part) of any development value, and

(b) the consideration (including rent) paid for, or payable under, the lease was—

(i) nominal, or

(ii) significantly lower than it would have been had the lease not been subject to the condition.

52 Calculating additional payment

(1) This section applies for the purpose of calculating the amount of an additional payment.

(2) The extinguished right mentioned in section 51(1) is to be valued as at the appointed day.

(3) In the case of a claim for an additional payment arising from the extinction of the right mentioned in section 51(1)(e), the value mentioned in subsection (2) must represent the value which the right could reasonably be expected to obtain if sold on the open market by a willing seller to a willing buyer.

(4) For the purposes of subsection (3)—

(a) it is to be presumed that the lease will continue until the expiry of the period for which it was granted, and

(b) no account should be taken of—
Part 4—Compensation for loss of landlord’s rights

(i) any factor attributable to the known existence of a person (including the former tenant) who would be willing to buy the right at a price higher than other persons because of a characteristic of the right which relates peculiarly to that person’s interest in buying it, and

(ii) any depreciation in the value of any other land owned by the former landlord.

(5) Any obligations of the former landlord arising from the lease which are, on the appointed day, extinguished by virtue of Part 1 must be taken into account.

(6) But no account is to be taken of any such obligation in so far as it is preserved as a counter-obligation to a real burden.

(7) Any other entitlement (including under this Act) of the former landlord to recover any loss for which the additional payment is claimed must be taken into account.

(8) In the case of a claim for an additional payment arising from the extinction of a right to development value, the additional payment may not exceed such sum as would make up for any effect which the right produced, at the time when the condition reserving the right was imposed, in reducing the consideration (including rent) paid for or payable under the lease.

Additional payment: former tenant agrees

(1) This section applies where—

(a) a former landlord has served on the former tenant a notice in accordance with section 50, and

(b) the former tenant agrees to make the additional payment specified in the notice to the former landlord.

(2) The former tenant must, before the expiry of the period of 56 days beginning with the day on which the notice is served, make the additional payment to the former landlord.

(3) Subsection (2) is subject to section 57.

Additional payment: amount mutually agreed

(1) This section applies where—

(a) a former landlord has served on the former tenant a notice in accordance with section 50(2), and

(b) the former tenant and the former landlord agree the amount of the additional payment, being an amount other than that specified in the notice.

(2) The former landlord may, before the expiry of the period of 5 years beginning with the appointed day, serve on the former tenant a notice requiring that the agreed additional payment be made to the former landlord by the former tenant.

(3) The notice referred to in subsection (2) must—

(a) specify the agreed additional payment,

(b) be in the prescribed form, and

(c) be accompanied by a copy of the prescribed explanatory note.
(4) Where the agreed additional payment is equal to or greater than £50, the former landlord must, together with the notice served under subsection (2), serve an instalment document on the former tenant.

(5) The former tenant must, before the expiry of the period of 28 days beginning with the day on which the notice is served under subsection (2), make the additional payment to the former landlord.

(6) Subsection (5) is subject to section 57.

**Claim for additional payment: reference to Lands Tribunal**

(1) If no agreement has been reached under section 53 or 54, the—

(a) former landlord, or

(b) former tenant,

may refer any matter arising in relation to a claim for an additional payment under section 50 to the Lands Tribunal.

(2) In determining any such matter, the Lands Tribunal may make such order as it thinks fit (including an order fixing the amount of additional payment).

(3) Where the Lands Tribunal makes an order fixing an additional payment which is equal to or greater than £50 it must provide the former tenant with the option of making the payment in instalments in accordance with section 57 but—

(a) no instalment document is required,

(b) in subsection (3)(b) of that section, for the words “when so returning such document” there is to be substituted “before the expiry of the period of 28 days beginning with the day on which the Lands Tribunal makes the order fixing the additional payment”, and

(c) the reference in subsection (4) of that section to the date on which the instalment document is served is to be construed as a reference to the date on which the Lands Tribunal makes the order.

(4) A reference under subsection (1) must be made before the expiry of the period of 5 years beginning with the appointed day.

**Supplementary**

**Claims in excess of £500: preliminary notice**

(1) This section applies where a landlord intends, after the appointed day, to require or (as the case may be) claim from the tenant under a qualifying lease—

(a) a compensatory payment which is,

(b) an additional payment which is, or

(c) two or more additional payments which, taken together, are, likely to exceed £500.

(2) The landlord must, not later than 6 months before the appointed day, serve on the person registered as tenant a notice (such notice being referred to in this Act as a “preliminary notice”) stating the landlord’s intention to require or (as the case may be) claim such a payment.
(3) The preliminary notice must—
   (a) be in the prescribed form,
   (b) state—
         (i) the amount of compensatory payment to be required or (as the case may be)
             additional payment to be claimed, or
         (ii) where such amount cannot be determined, the best estimate of such
             amount, and
   (c) be accompanied by a copy of the prescribed explanatory note.

(4) Where a preliminary notice has not been served in accordance with this section—
   (a) the amount of compensatory payment required under section 45(2),
   (b) the amount of additional payment claimed under section 50(2), or
   (c) where two or more additional payments are claimed, the total amount of such
       payments,
       may not exceed £500.

57 Making payment by instalments

(1) This section applies where an instalment document under section 45(5), 50(5) or 54(4) is
    served on a former tenant.

(2) An instalment document must be—
    (a) a filled out document in the prescribed form, and
    (b) accompanied by a copy of the prescribed explanatory note.

(3) Subject to subsection (4), the former tenant obtains the option of making the
    compensatory or (as the case may be) additional payment by instalments only if—
    (a) the former tenant signs, dates and returns the instalment document within the
        period which (but for this section) is allowed for making that payment—
        (i) in the case of a compensatory payment, under section 46, or
        (ii) in the case of an additional payment, under section 53(2) or (as the case
             may be) 54(5), and
    (b) when so returning such document, the former tenant pays to the former landlord
        an amount equivalent to one tenth of the payment (such amount being payable in
        addition to the payment and irrespective of how or when such payment is
        subsequently made).

(4) If on or after the date on which an instalment document is served on the former tenant
    under a qualifying lease the former tenant ceases, by virtue of a sale or transfer for
    valuable consideration, to have right to the land in respect of which the claim for
    payment has been made or any part of that land then—
    (a) where the former tenant has obtained the option mentioned in subsection (3), the
        former tenant loses that option and the outstanding balance of the entire payment
        falls due on the seventh day after the day on which the former tenant ceases to
        have that right, and
    (b) where the former tenant has not obtained that option, the former tenant loses the
        right to obtain it and the following apply accordingly—
(i) in the case of a compensatory payment, section 46(2), or
(ii) in the case of an additional payment, section 53(2) or (as the case may be) 54(5).

(5) Subsections (6) to (8) apply where the option of making the payment by instalments is obtained.

(6) The instalments are to be equal instalments payable on the term days of Whitsunday and Martinmas which follow the making of the payment under subsection (3)(b).

(7) The number of instalments is set out in the following table—

<table>
<thead>
<tr>
<th>Amount of compensatory or additional payment</th>
<th>Number of instalments</th>
</tr>
</thead>
<tbody>
<tr>
<td>£50 or more than £50 but no more than £500</td>
<td>5</td>
</tr>
<tr>
<td>More than £500 but no more than £1,000</td>
<td>10</td>
</tr>
<tr>
<td>More than £1,000 but no more than £1,500</td>
<td>15</td>
</tr>
<tr>
<td>More than £1,500</td>
<td>20</td>
</tr>
</tbody>
</table>

(8) In a case where any instalment payable by virtue of subsections (6) and (7) remains unpaid for 42 days after falling due, the outstanding balance of the entire payment immediately falls due.

(9) In any other case, the former tenant may pay that outstanding balance at any time.

58 Collecting third party to disclose information

(1) This section applies where a landlord or (as the case may be) former landlord receives or has at any time received from a third party an amount—

(a) collected in respect of rent from, and

(b) remitted to the landlord or former landlord on behalf of, a tenant or (as the case may be) former tenant.

(2) The third party must—

(a) if required by the landlord or (as the case may be) former landlord for the purpose of serving notice under section 45(2),

(b) in so far as it is practicable, and

(c) as soon as is reasonably practicable, disclose to the landlord or former landlord the information mentioned in subsection (3).

(3) The information referred to in subsection (2) is—

(a) the identity and address of the tenant or former tenant, and

(b) in a case where the rent remitted is part of a cumulo rent, the amount so collected from the tenant or former tenant.

59 Duty to disclose identity etc. of former tenant

(1) This section applies where—

(a) a former landlord purports to serve notice under section 45(2) or 50(2) on the former tenant, and
(b) the person on whom that notice is served—

(i) was the tenant at some time before the appointed day, but

(ii) is not the former tenant.

(2) The person on whom the notice is served must as soon as is reasonably practicable disclose to the former landlord—

(a) the identity and address of the former tenant, or

(b) (if that person cannot do so) such other information as that person has which might enable the former landlord to discover that identity and address.

60 Prescription of requirement to make payment

In Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (which specifies obligations affected by prescriptive periods of 5 years under section 6 of that Act)—

(a) in paragraph 1, after sub-paragraph (ac) there is inserted—

“(ad) to any obligation to make a payment under section 46, 53(2) or 54(5) of the Long Leases (Scotland) Act 2012 (asp 00),”, and

(b) in paragraph 2(e), for the words “, (aa), (ab) or (ac)” substitute “to (ad)”.

61 Interpretation of Part 4

(1) In this Part—

“former landlord”, in relation to a lease, means the person who was the landlord immediately before the appointed day, and

“former tenant”, in relation to a lease, means the person who was the tenant immediately before the appointed day.

(2) Where, immediately before the appointed day, the right as tenant under a lease is held by two or more persons in common—

(a) they are—

(i) severally liable to make any compensatory or (as the case may be) additional payment,

(ii) as between themselves, liable in the proportions in which they hold the right as tenant, and

(b) subject to section 74, they are together to be treated for the purposes of this Part as being a single tenant.

Part 5

Exemption from conversion and continuing leases

62 Exempt leases

(1) If, immediately before the appointed day, land is subject to an exempt lease—

(a) that lease does not become the right of ownership of the land,
(b) any right of ownership of that land existing immediately before the appointed day and any superior lease is not extinguished, and
(c) the provisions of this Act, in so far as they relate to—
   (i) the conversion of a qualifying lease into the right of ownership, or
   (ii) the extinction of a right of ownership or (as the case may be) lease,
do not apply.

(2) In this Part, “exempt lease” is to be construed in accordance with sections 63 to 66.

Types of exempt lease

63 Exemption of qualifying lease by registration of notice

A lease is an exempt lease if—
(a) it is a qualifying lease, and
(b) the tenant under the lease, not later than 2 months before the appointed day, executes and registers a notice in the prescribed form (referred to in this Act as an “exemption notice”).

64 Exemption of qualifying lease by registration of agreement or order

(1) A lease is an exempt lease if—
(a) it is a qualifying lease,
(b) it is not a lease in relation to which *cumulo* rent is payable, and
(c) the landlord, not later than 2 months before the appointed day, registers against the title of the tenant—
   (i) an agreement entered into with the tenant, or
   (ii) an order made by the Lands Tribunal under section 69.

(2) The agreement must—
(a) be in the prescribed form,
(b) be signed by or on behalf of the landlord and the tenant,
(c) state either—
   (i) that the annual rent payable under the lease immediately before the appointed day will be over £100, or
   (ii) that the annual rent paid under the lease was over £100 at any point during the relevant period.

(3) The relevant period is the period of 5 years ending on the day the Bill for this Act received Royal Assent.

65 Certain leases registered near or after the appointed day

A lease is an exempt lease if—
(a) it is not registered on the day falling 1 year before the appointed day,
(b) it would, had it been so registered, have been converted on the appointed day into a right of ownership under section 4(1)(a),
(c) despite not being registered, it constitutes a real right in land, and
(d) it is subsequently registered (whether before, on or after the appointed day).

66 Subleases of exempt leases
A sublease of an exempt lease is an exempt lease if—
(a) it would have been converted on the appointed day into a right of ownership under section 4(1)(a), had the sublease been registered immediately before the appointed day, and
(b) it is registered (before, on or after the appointed day).

Recall of exemption
67 (1) This section applies in relation to a lease where—
(a) the lease is an exempt lease (other than by virtue of section 64), and
(b) the tenant under the lease executes and registers a notice in the prescribed form (referred to in this Act as a “recall notice”).

(2) On the day on which the recall notice is registered (“the registration day”) the lease ceases to be an exempt lease.

(3) Where the registration day—
(a) is less than 6 months before the appointed day,
(b) is the appointed day, or
(c) is after the appointed day,
this Act applies as if the appointed day were the first Whitsunday or (as the case may be) Martinmas occurring on or after the day which falls 6 months after the registration day.

(4) Section 56 does not apply in relation to the lease.

Supplementary
68 Exemption and recall notices: supplementary
(1) Subsections (2) and (3) apply to a tenant under a lease where—
(a) the lease is a qualifying lease and the tenant intends to execute and register an exemption notice, or
(b) the lease is an exempt lease and the tenant intends to execute and register a recall notice.

(2) Except where it is not reasonably practicable to do so, the tenant must, before the notice is executed, send by post to the person registered as landlord under the lease and (as the case may be) the person registered as landlord under any superior lease a copy of—
(a) the notice, and
(b) the prescribed explanatory note.

(3) Before the notice is executed, the tenant must state in the notice either—
   (a) that a copy of the notice has been sent in accordance with subsection (2), or
   (b) that it was not reasonably practicable for such a copy to be sent (and the reasons why that was so).

(4) An exemption notice or (as the case may be) recall notice must be registered against the title of the tenant who executed the notice.

69 Application to Lands Tribunal for order confirming rent

(1) A landlord under a lease may apply to the Lands Tribunal for an order confirming either—
   (a) that the annual rent payable under the lease immediately before the appointed day will be over £100, or
   (b) that the annual rent paid under the lease was over £100 at any point during the relevant period.

(2) The relevant period is the period of 5 years ending on the day the Bill for this Act received Royal Assent.

(3) An application may be made under subsection (1) only if the landlord has first attempted to reach agreement as respects the annual rent with the tenant under the lease.

(4) The application—
   (a) must include a description by the landlord of the requisite attempt to reach agreement, and
   (b) must be made not later than 1 year after the day on which this section comes into force.

(5) The Lands Tribunal must give notice of the application, whether by way of advertisement or otherwise, to the tenant.

(6) The tenant may oppose or make representations in relation to the application.

(7) The Land Tribunal must allow the tenant to be heard in relation to the application.

(8) The decision of the Lands Tribunal on an application under subsection (1) is final.

(9) A tenant opposing an application made under subsection (1) incurs no liability in respect of expenses incurred by the landlord unless, in the opinion of the Lands Tribunal, the actings of the tenant are vexatious or frivolous.

PART 6

GENERAL AND MISCELLANEOUS

The appointed day

70 The appointed day

In this Act, the “appointed day” means the first Martinmas occurring on or after the day 2 years after the day on which this section comes into force.
71 Determining duration of lease

(1) In calculating the period for which a lease is granted for the purposes of any provision of this Act—

(a) any provision of a lease (however expressed) enabling the lease to be terminated earlier than the date on which it would otherwise terminate must be disregarded,

(b) where a lease includes provision (however expressed) requiring the landlord to renew the lease, the period for which any such renewed lease would, were that provision complied with, be granted must be added to the period for which the original lease is granted,

(c) where the period for which a lease is granted is expressed (in whole or in part) by reference to the lifetime of a person, the period expressed by reference to that lifetime is—

(i) in a case where such person is deceased and the period beginning on the first day of the period for which the lease was granted and ending on the day that person died can be ascertained, that period,

(ii) in a case where such person is identifiable and is not deceased, deemed to be the period of life expectancy as calculated in accordance with the table of life expectancy set out in regulations made by the Scottish Ministers, or

(iii) in any other case, deemed to be a period of 35 years, and

(d) where, before the end of the period for which a lease is granted, the parties to that lease enter into a subsequent lease—

(i) of the same subjects as the original lease, and

(ii) for a period beginning immediately after the end of the period for which such lease is granted,

the period for which the subsequent lease is granted must be added to the period for which the original lease is granted.

(2) Subsection (1)(b) to (d) is subject to section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) (prohibition of leases of more than 175 years).

72 Leases continuing on tacit relocation

Part 4 and section 71(1)(b) apply in relation to a lease which is continuing by tacit relocation as if any provision (however expressed)—

(a) included in the lease prior to it so continuing, and

(b) requiring the landlord to renew the lease,

had been complied with.

Extinction of right of irritancy in certain leases

73 Extinction of right of irritancy in certain leases

(1) On and after the day on which this section comes into force, it is not competent for a lease to which subsection (2) applies to be terminated by irritancy.
(2) This subsection applies to a lease which, immediately before the day on which this section comes into force, is a right of lease in land which—

(a) complies with section 1(3) or,
(b) had it been registered, would comply with that section.

(3) But subsection (2) does not apply to a lease which, on the day this section comes into force, is an exempt lease by virtue of section 64.

(4) Any proceedings already commenced to enforce any right of irritancy in relation to a lease to which subsection (2) applies are deemed to be abandoned on the day on which this section comes into force and may, without further process and without any requirement that full judicial expenses be paid by the pursuer, be dismissed accordingly.

(5) Subsection (4) does not affect any cause in which final decree (that is to say, any decree or interlocutor which disposes of the cause and is not subject to appeal or review) is granted before the coming into force of this section.

### Notices etc.

**74 Service of notices**

(1) Service of a notice on a person under section 17(1)(a) or Part 4 must be effected—

(a) by delivering it to the person,
(b) by sending it to the person at a place mentioned in subsection (2)—

(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c.26)), or

(ii) by a postal service which provides for the delivery of the notice to be recorded,

(c) in a case where a notice sent under paragraph (b) is returned to the person who sent it with an intimation that it could not be delivered—

(i) by delivering, or

(ii) by sending it by post,

with that intimation to the Extractor of the Court of Session.

(2) The place referred to in subsection (1)(b) is—

(a) the person’s place of residence,
(b) the person’s place of business,
(c) a postal address which the person ordinarily uses, or
(d) if none of those places or that address is known at the time of delivery or posting, whatever place is at that time the person’s most recently known—

(i) place of residence,

(ii) place of business, or

(iii) postal address which the person ordinarily used.

(3) For the purposes of this Act, any of the following is sufficient evidence of service of the notice—
(a) an acknowledgement in the prescribed form signed by the person on whom the notice is served,

(b) in the case of a notice sent under subsection (1)(b), a certificate in the prescribed form signed by the sender of the notice and accompanied by the postal receipt,

(c) in the case of a notice delivered or sent under subsection (1)(c), an acknowledgement of receipt by the Extractor on a copy of the notice.

(4) The date on which a notice is served on a person is the date of delivery or (as the case may be) posting of the notice.

(5) In this section, “notice” includes an instalment document.

75 Notices: pre-registration requirements

(1) This section applies in relation to any notice which is to be submitted for registration under section 8 or Part 2.

(2) Except where it is not reasonably practicable to do so, the person who intends to execute the notice must, before so doing, send by post to the tenant under the qualifying lease (addressed to “The Tenant” where the name of that person is not known) a copy of—

(a) the notice, and

(b) the prescribed explanatory note relating to the notice.

(3) The person who executes the notice must, in the notice, state either—

(a) that a copy of the notice has been sent in accordance with subsection (2), or

(b) that it was not reasonably practicable for such a copy to be sent (and the reasons why that was so).

76 Keeper’s duty as regards documents

(1) In relation to any notice submitted for registration under this Act, the Keeper is not required to determine whether the terms of section 68(2) or (as the case may be) 75(2) have been complied with.

(2) In relation to any notice or (as the case may be) agreement submitted for registration under—

(a) section 14, 17, 23, 24, 25, 26, 27 or 28, the Keeper is not required to determine whether, for the purposes of registering the notice or agreement, a qualifying condition is enforceable by the person submitting the notice or agreement for registration,

(b) section 14, the Keeper is not required to determine—

(i) in pursuance of subsection (3)(e) of that section, that an attempt to reach agreement has been made in accordance with section 21(3), or

(ii) where the condition specified under subsection (3)(f) of that section is the condition mentioned in subsection (4)(a) of that section, whether the terms of that condition are satisfied,

(c) section 17, the Keeper is not required to determine whether the requirements of section 17(1)(a) are satisfied, or

(d) section 24 to 26, the Keeper is not required to determine whether—
(i) for the purposes of subsection (1) of the section in question, a qualifying condition is imposed for the reasons mentioned in that subsection, or

(ii) the statement made in pursuance of section 24(2)(g), 25(2)(f) or (as the case may be) 26(2)(g) is correct.

(3) The Keeper is not required to determine for the purposes of section 8(7) whether immediately before the appointed day a sporting right is still enforceable.

(4) The Keeper is not required to determine for the purposes of section 16, 19, 23(7), 24(4), 25(4), 26(4), 27(5) or 28(5) whether immediately before the appointed day a qualifying condition is, or is still, enforceable, or by whom.

(5) In relation to any order submitted for registration under section 64(1)(c)(ii), the Keeper is not required to determine that an attempt to reach agreement has been made in accordance with section 69(3).

77 Disputed notices: reference to Lands Tribunal

(1) A dispute arising in relation to a notice registered under this Act may be referred to the Lands Tribunal.

(2) In determining the dispute, the Lands Tribunal may make such order as it thinks fit discharging or, to such extent as may be specified in the order, restricting the notice in question.

(3) An order under subsection (2) has effect in respect of a third party when an extract of the order is registered.

78 Certain documents registrable despite initial rejection

(1) This section applies where one of the following is rejected by the Keeper—

(a) a notice submitted before the appointed day for registration under section 8(2) or Part 2,

(b) an agreement submitted before the appointed day for registration under section 17(1)(c),

(c) an exemption notice submitted before the day falling 2 months before the appointed day for registration under section 63, or

(d) an agreement submitted before the day falling 2 months before the appointed day for registration under section 64(1)(c).

(2) Where a court or the Lands Tribunal determines the notice or agreement is registrable, it may be registered not later than the day falling 2 months after the day on which the court or the Lands Tribunal made the determination.

(3) An exemption notice or an agreement mentioned in subsection (1)(d) which is registered under subsection (2) on or after the day falling 2 months before the appointed day is to be treated as if it had been registered before that day.

(4) Any other notice or agreement which is registered under subsection (2) on or after the appointed day is to be treated as if it had been registered before the appointed day.

(5) The Scottish Ministers may by order—

(a) specify a date after which (or a period after the expiry of which) notices and agreements cannot be registered under subsection (2),
(b) provide that subsection (2) applies only where the application to the court or to the Lands Tribunal which resulted in the determination is made within such period as the order may specify.

(6) In this section, “court” means Court of Session or sheriff.

Miscellaneous

Amendments to enactments

The schedule makes minor and consequential amendments.

Interpretation

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

“the 2003 Act” means the Title Conditions (Scotland) Act 2003 (asp 9),
“additional payment” has the meaning given by section 50,
“appointed day” has the meaning given by section 70,
“compensatory payment” has the meaning given by section 45,
“cumulo renewal premium” has the meaning given by section 38(1),
“cumulo rent” has the meaning given by section 38(1),
“exempt lease” has the meaning given by section 62,
“freshwater fish” means any fish living in fresh water—
(a) including trout and eels (and the fry of eels),
(b) excluding salmon and any kind of fish which migrate between the open sea and tidal waters,

“harbour” and “harbour authority” have the meanings given by section 57(1) of the Harbours Act 1964 (c.40),
“Keeper” means Keeper of the Registers of Scotland,
“land” includes anything held or which, by its nature, may be held as a separate tenement,
“landlord”, in relation to a lease, means the person who has right as landlord under the lease whether or not such person has completed title (and, where more than one person comes within that description, the person who most recently acquired that right),

“Lands Tribunal” means Lands Tribunal for Scotland,
“lease” includes a sublease,
“owner”, in relation to any land, means the person who has right to the land whether or not such person has completed title (and, where more than one person comes within that description, the person who most recently acquired that right),

“partially continuing lease” has the meaning given by section 37,
“prescribed” means prescribed by the Scottish Ministers in regulations,
“qualifying lease” has the meaning given by section 1(1),
“qualifying condition” means a condition which qualifies under section 10,
“Register of Sasines” has the same meaning as in section 2 of the Conveyancing (Scotland) Act 1924 (c.27),

“registered” means registered in the Land Register of Scotland or (as the case may be) recorded in the Register of Sasines; and cognate expressions are to be construed accordingly.

“renewal obligation” has the meaning given by section 37,

“renewal period” has the meaning given by section 37,

“renewal premium” has the meaning given by section 37,

“sporting right” has the meaning given by section 8(1),

“superior lease” has the meaning given by section 4, and

“tenant”, in relation to a lease, means the person who has right as tenant under the lease, whether or not such person has completed title (and where more than one person comes within that description, the person who most recently acquired that right).

(2) Subject to the provisions of this Act, expressions used in this Act and in the 2003 Act have the same meaning in this Act as they do in that Act.

81 Ancillary provision

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

(2) Subject to subsection (3), an order under subsection (1) is subject to the negative procedure.

(3) An order under subsection (1) which adds to, replaces or omits any part of the text of an Act (including this Act) is subject to the affirmative procedure.

82 Subordinate legislation

(1) Any power of the Scottish Ministers to make an order under section 78(5) or regulations under this Act includes power to make—

(a) such incidental, consequential, supplementary, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient, and

(b) different provision for different purposes.

(2) Orders under section 78(5) and regulations under this Act are subject to the negative procedure.

83 Commencement

(1) Sections 81 and 82, this section and section 84 come into force on the day of Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
(3) An order under subsection (2) may include such transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient in connection with the commencement of this Act.

84 Short title

The short title of this Act is the Long Leases (Scotland) Act 2012.
SCHEDULE
(introduced by section 79)

MINOR AND CONSEQUENTIAL AMENDMENTS

Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)

1 In section 9(2B) (no standard security over personal pre-emption burden or personal redemption burden) of the Conveyancing and Feudal Reform (Scotland) Act 1970, after the words “Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5)” insert “or as the case may be of section 23 of the Long Leases (Scotland) Act 2012 (asp 00)).”

Tribunals and Inquiries Act 1992 (c.53)

2 In section 11(7) of the Tribunal and Inquiries Act 1992 (which makes provision for Scotland in relation to appeals from certain tribunals), in paragraph (c)—
(a) the words after “under” become sub-paragraph (i), and
(b) after that sub-paragraph insert—
“(ii) section 21 of the Long Leases (Scotland) Act 2012 (asp 00)
(applications in relation to the conversion of certain conditions in leases into real burdens); or
(iii) section 69 of that Act (applications in relation to confirmation of rent);”.

Title Conditions (Scotland) Act 2003 (asp 9)

3 (1) The 2003 Act is amended in accordance with this paragraph.

(2) In section 12 (division of a benefited property), in subsection (4)(a), after “Act” insert “or sections 29 or 31 of the Long Leases (Scotland) Act 2012 (asp 00)”.

(3) In section 20 (notice of termination of real burdens), after subsection (6) insert—
“(7) This section applies to a real burden created by the conversion of a qualifying condition under Part 2 of the Long Leases (Scotland) Act 2012 (asp 00) as if the reference to the “constitutive deed” were a reference to the deed setting out the qualifying condition.”.

(4) In section 63 (manager burdens)—
(a) in subsection (4)(d), for “the case mentioned in subsection (6)” substitute “either of the cases mentioned in subsection (6) or (6A),”;
(b) in subsection (5)(a), for “the case” substitute “either of the cases”,
(c) after subsection (6), insert—
“(6A) The case is where—
(a) a leasehold condition is imposed on the disposal, by virtue of section 61 of the Housing (Scotland) Act 1987 as modified by section 84A of that Act (application of right to buy in cases where landlord is lessee), of a landlord’s interest in a property by—
(i) a person such as is mentioned in any of the sub-paragraphs of subsection (2)(a) of section 61; or

(ii) a predecessor of such a person,

to a tenant of such a person; and

(b) that condition is converted into a manager burden under section 30 of the Long Leases (Scotland) Act 2012 (asp 00) (conversion of qualifying conditions into manager burdens).”, and

(d) in subsection (8)(b)—

(i) for “that” substitute “those”, and

(ii) for “subsection (6)” substitute “subsections (6) or (6A)”.

5

(5) In section 105 (consequential alterations to Land Register)—

(a) in subsection (2), for the words from “section”, where it first occurs, to “Act”, where it second occurs, substitute “—

(a) section 18, 19 or 20 of the 2000 Act;

(b) section 15 or 18 of the Long Leases (Scotland) Act 2012 (asp 00); or

(c) section 4(5), 50, 75 or 80 of this Act,”, and

(b) in subsection (3), after paragraph (a) insert—

“(aa) any—

(i) notice under section 14 of the Long Leases (Scotland) Act 2012; or

(ii) agreement under section 17 of that Act,

which converts a qualifying condition (within the meaning of that Act) into a real burden;”.

(6) In section 122 (interpretation), subsection (1)—

(a) in the definition of “conservation burden” the word “or” immediately following sub-paragraph (a) is repealed and after sub-paragraph (b) insert—

“(c) obtained by virtue of section 27 of the Long Leases (Scotland) Act 2012 (asp 00) (conversion of qualifying condition to conservation burden); or

(d) obtained by virtue of section 28 of that Act (conversion of qualifying condition to conservation burden where conservation body or Scottish Ministers nominated to enforce);”;

(b) in the definition of “economic development burden”, at the end insert “and to a real burden created under section 24 of the Long Leases (Scotland) Act 2012 (asp 00) (conversion of qualifying condition to economic development burden)”,

(c) in the definition of “health care burden”, at the end insert “and to a real burden created under section 25 of the Long Leases (Scotland) Act 2012 (asp 00) (conversion of qualifying condition to health care burden)”,

(d) in the definition of “personal pre-emption burden” and “personal redemption burden” after the word “Act” insert “and section 23(1) of the Long Leases (Scotland) Act 2012 (asp 00)”. 

40
Long Leases (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to convert certain long leases into ownership; to provide for the conversion into real burdens of certain rights and obligations under such leases; to provide for payment to former owners of land of compensation for loss of it on conversion; and for connected purposes.

Introduced by: Richard Lochhead
On: 12 January 2012
Bill type: Executive Bill
LONG LEASES (SCOTLAND) BILL

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Long Leases (Scotland) Bill (introduced in the Scottish Parliament on 12 January 2012) as amended at Stage 2. Text has been added or amended as necessary to update information previously provided and reflect amendments made to the Bill at Stage 2. These changes are indicated by sideling in the right margin.

INTRODUCTION

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

SUMMARY AND BACKGROUND

4. The Long Leases (Scotland) Bill converts ultra-long leases into ownership. For the purposes of the Bill, “ultra-long leases” are leases that were let for over 175 years and, for residential leases, have over 100 years left to run from the appointed day laid down in the Bill and, for non-residential leases, have over 175 years left to run from the appointed day. Under the Bill, compensatory and additional payments are payable by tenants to landlords. Some leasehold conditions are preserved and become real burdens in the title deeds. Landlords are also able to preserve sporting rights. The traditional name for a lease in Scotland is “tack”.

5. The Bill follows a report by the Scottish Law Commission\(^1\) published in December 2006 and a Scottish Government consultation\(^2\) published in March 2010. The Government introduced

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\(^2\) The Scottish Government consultation can be found at [http://www.scotland.gov.uk/Publications/2010/03/26131302/0](http://www.scotland.gov.uk/Publications/2010/03/26131302/0) and the non-confidential responses at [http://scotland.gov.uk/Publications/2010/07/15143717/0](http://scotland.gov.uk/Publications/2010/07/15143717/0)
This document relates to the Long Leases (Scotland) Bill as amended at Stage 2 (SP Bill 7A)

a Long Leases (Scotland) Bill in the last session of Parliament but this Bill fell when Parliament was dissolved for the Scottish elections in May 2011.

OVERVIEW OF BILL


7. Part 2 covers conversion of certain leasehold conditions to real burdens.

8. Part 3 covers allocation of rents and renewal premiums.


10. Part 5 covers exemption from conversion and continuing leases.

11. Part 6 covers general and miscellaneous matters.

PART 1: CONVERSION OF LONG LEASE TO OWNERSHIP

Overview of Part 1 of the Bill

12. Part 1 lays down which leases are eligible for conversion to ownership under the Bill; which rights are extinguished and which continue and contains provisions enabling landlords to preserve sporting rights in relation to game and fishing.

Determination of “qualifying lease”

Section 1: Meaning of “qualifying lease”

13. This section provides a definition of “qualifying lease” for the purposes of converting to ownership. Under subsections (3) and (4), a lease is “qualifying” if:

- it is registered in the Sasines Register or the Land Register maintained by Registers of Scotland; and
- it was granted for more than 175 years; and
- if a residential lease, has more than 100 years left to run from the appointed day laid down in the Bill; and
- if a non-residential lease, has more than 175 years left to run from the appointed day; and
- the annual rent does not exceed £100; and
- it does not include a harbour where there is a harbour authority; and
- it was not granted for the sole purpose of allowing the tenant to install and maintain pipes or cables; and

3 The Bill introduced in the last Parliament can be found on the Scottish Parliament’s website at http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22395.aspx
• it is not a lease of minerals or a lease containing minerals in which some payment is determined in relation to the exploitation of the minerals.

14. Provision is made in section 65 for the registration of unregistered ultra-long leases. These are then treated under the Bill as “exempt leases” and provision is made in section 68 for the tenant to recall the exemption. Such leases then become eligible for conversion to ownership.

15. Subsection (5) provides that leases which have been divided are to be treated as separate leases.

16. Subsection (6) provides that “dwelling house” for the purposes of subsection (3)(c)(i) includes any yard, garden, outbuilding or other pertinent. This ensures, for example, that a lease which consists of a small house with a large attached garden is still treated as wholly or mainly consisting of a private dwelling house for the purposes of subsection (3)(c)(i).

Section 2: Further provision about annual rent

17. This section makes provision relating to section 1(4)(a) to determine whether or not the annual rental under the lease exceeds £100.

18. Subsection (2) provides that the rent for the purposes of section 1(4)(a) is deemed to be the rent as set out in a document mentioned in subsection (2A), subject to subsections (3) to (5).

19. The documents mentioned in subsection (2A) are the lease, a registered assignation of the lease or a registered minute of variation or agreement in relation to the lease.

20. Subsection (3) disapplies subsection (2) in relation to cumulo rent. Cumulo rent is defined in section 38 of the Bill and means a single rent payable in relation to two or more leases. Section 39 allows the landlord to allocate cumulo rent to individual leases before the appointed day, when leases covered by the Bill convert to ownership. When cumulo rent is allocated in this way, it ceases to be cumulo rent. After allocation of cumulo rent, if the annual rent in a lease is over £100, the lease can be exempted from conversion under section 64.

21. Subsection (4) disapplies subsection (2) in relation to any non-monetary rent. Section 51(1)(a) makes provision for landlords to claim an additional payment in respect of any leases converting to ownership under the Bill where there is any right to any rent expressed wholly or partly in non-monetary terms (such as six fat hens).

22. Subsection (5) disapplies subsection (2) in relation to any variable rent. Section 64 of the Bill makes provision relating to the exemption of leases where the annual rental at any point during the period of 5 years before Royal Assent exceeded £100. Section 64 allows landlords to register an agreement with the tenant or, if agreement cannot be reached, to register an order made by the Lands Tribunal for Scotland.
Section 3: Only one lease is qualifying lease

23. This section sets out rules where land is subject to two or more leases which satisfy the requirements in section 1.

24. If land has been sublet, the sublease too might fulfil the criteria for conversion. The intention is that the last lease should qualify for conversion. If the sublease affects only part of the land originally leased, conversion would apply to this part and the head lease would be the qualifying lease for the remaining part. For example, if A, the owner of land, leases 10 hectares to B for 999 years and B in turn sublets 4 of these hectares to C for 920 years, C is the qualifying tenant in relation to the 4 hectares and B in relation to the remaining 6 hectares.

Conversion of right of lease to ownership

Section 4: Conversion of right of lease to right of ownership

25. Under this section, the conversion of qualifying leases to ownership is automatic, unless the tenant chooses to opt out under Part 5 of the Bill. Conversion happens on the “appointed day”. The “appointed day” is defined in section 70 although this definition does not apply when a tenant of a lease recalls an exemption from conversion (see section 67(3)).

Consequences of conversion

Section 5: Extinction of certain rights and obligations

26. Subsection (1) extinguishes all rights and obligations arising from the qualifying lease and any superior lease. The rights and obligations may be set out expressly in a deed or be implied by virtue of the landlord and tenant relationship. There is a saving for any rights or obligations that survive the appointed day in one form or another under sections 6 and 7 and Part 2.

27. Subsection (2) provides an exception for personal rights and obligations.

28. Subsection (3) makes it clear that the obligation to pay rent for any period before the appointed day remains enforceable.

29. Subsection (4) prevents any proceedings being raised or continued after the appointed day for the enforcement of any rights and obligations extinguished by subsection (1). It does not matter that the breach occurred before the appointed day. Any decree or interlocutor already pronounced does not survive the appointed day. For instance, an interdict enforcing a use restriction would cease to apply.

30. Subsection (5) provides that subsection (4) does not apply to rights and obligations which survive the appointed day under sections 6 and 7 and Part 2. It will also remain possible after the appointed day to enforce a right to recover damages or a right to the payment of money (such as unpaid rent due before the appointed day). Subsection (5) further provides that subsection (4) does not apply to a right of irritancy. (“Irritancy” means a landlord’s right to terminate a lease). Section 73 contains specific provision on the extinction of right of irritancy in certain leases.
Section 6: Subordinate real rights, reservations and pertinents

31. This section sets out the subordinate real rights and encumbrances that burden the right of ownership of the converted land from the appointed day. It also makes provision in respect of pertinents (matters belonging to the lease) and reservations (matters excluded from the lease). In this section “converted land” is the land in which a right of ownership is created through the conversion of a qualifying lease under section 4(1)(a).

32. Subsection (2) lays down that on the appointed day subordinate real rights over the qualifying lease (such as a standard security or a mortgage) become subordinate real rights over the right of ownership.

33. Subsections (3) and (4) provide that the right of ownership created under section 4 is subject to any encumbrances and subordinate real rights, other than heritable securities, proper liferents (a right to use and enjoy a thing during life) or any superior leases, which burdened the head landlord’s ownership immediately before the appointed day. Servitudes, real burdens, and public rights of way, for example, will all continue. Subsection (4) does not affect the personal obligation of the debtor under the heritable security.

34. Subsection (5) defines the extent of the converted land by reference to pertinents and reservations of the lease. On the appointed day, a pertinent of the qualifying lease becomes a pertinent of the converted land provided that it is of a type that is recognised as a pertinent of land. Excluded from the converted land is anything reserved from the qualifying lease (or any superior lease), provided that it is capable of being held as a separate tenement in land (i.e. capable of being owned separately). If the reservation is not capable of being held as a separate tenement, it is disregarded on conversion and forms part of the converted land.

35. The main example of a reservation is a minerals reservation. Where the minerals are not already separate tenements, they become separate tenements on the appointed day when ownership of the surface is separated from ownership of the minerals. The reservation clause will continue to regulate the relationship between the owner of the minerals (the former landlord) and the owner of the surface (the former tenant).

36. Subsection (5) interacts with section 8. Under section 8 a notice may be registered converting reserved sporting rights into a separate tenement. If a notice is registered, the sporting rights will not form part of the converted land. If a notice is not registered, the converted land will include the sporting rights. If such rights have been leased out separately, the lease in question is not affected by conversion of the qualifying lease but there would be a change of landlord.

Section 7: Creation of servitudes on conversion

37. The effect of this section is to create those servitudes (e.g. rights of access over neighbouring land to maintain a water supply or a drainage pipe) which would have been created (whether expressly, impliedly or by positive prescription) had the deeds referred to been a conveyance of land leading to separation of ownership.
38. The deeds referred to are the qualifying lease, any lease higher in the hierarchy of leases (where there is such a hierarchy), or any partial assignation relating to the qualifying lease. The latter, for example, covers the case where a single lease is divided into two by assignation. The assignation may include rights and obligations which affect the part of the lease that is assigned and also the part that is retained.

Section 8: Conversion of reserved sporting rights

39. This section provides for landlords to preserve sporting rights: i.e. rights to game and to fish.

40. Section 8 does not apply to exclusive rights to fish for salmon. Exclusive rights to fish for salmon are separate tenements in land: i.e. they are capable of being owned separately from the land or river in which they subsist. This means that either exclusive rights to fish for salmon are included in the qualifying lease or they are not. Given this, no special provisions are required for exclusive rights to fish salmon.

41. Subsection (2) provides for the execution and registration of a notice by the landlord.

42. Subsection (3) sets out requirements as to the content of the notice. This includes the terms of any counter-obligation to the right.

43. Under subsection (4), registration can be either against the interest of the landlord (i.e. the owner of the land) or the tenant of the qualifying lease.

44. Subsections (5) and (6) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally by the landlord but some exceptions are set out in subsection (6). Subsection (6)(a)(ii) must be read with Schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.

45. Subsection (7) converts the sporting right into a separate tenement on the appointed day provided that the requirements of the section have been complied with and the right is still enforceable. It also prescribes the content of the separate tenement.

46. Where the right has been expressly reserved in the lease, the operation of subsection (7) clarifies the types of game which may be included in the right to take game. First of all, it comprises the rights and obligations set out in the lease in question. Secondly, insofar as consistent with those express rights etc, it comprises, in the case of game, an exclusive right to take hares, pheasants, partridges, grouse and ptarmigan, and, in the case of fishing, an exclusive right to fish for freshwater fish. freshwater fish is defined in section 80. The definition mirrors that in section 69(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

47. Subsection (8) qualifies subsection (7) by providing that any exclusive right to game is subject to the right of the occupier under the Ground Game Act 1880 to take or kill hares and rabbits.
48. Subsection (9) provides that the separate tenement continues to be subject to any existing counter-obligation. It also provides that a counter-obligation is extinguished on the extinction of the right.

49. Subsection (10), as read with the definition of landlord in section 80, makes clear that only the owner of the land can serve a notice converting the right into a separate tenement. Where the right is held in common each co-owner must sign the notice.

50. The section is subject to section 75 which deals with pre-registration requirements for notices.

Section 9: Further provision for section 8

51. Subsection (1) provides that where a right affects more than one qualifying lease a landlord has to register a separate notice in respect of each lease. However, where the same qualifying lease is affected by different rights subsection (2) allows one notice to be used.

PART 2: CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS

Overview of Part 2 of the Bill

52. Part 2 provides a scheme for the conversion of certain leasehold conditions into real burdens. Once the conditions have been converted they become subject to the law on real burdens. The law on real burdens is primarily contained in the Title Conditions (Scotland) Act 2003. Section 1 of the 2003 Act outlines what real burdens are. Generally, a real burden is an encumbrance on land constituted in favour of the owner of other land in that person’s capacity as owner of that other land. However, personal real burdens are burdens constituted in favour of a person other than by reference to the person’s capacity as owner of any land.

Determination of “qualifying conditions”

Section 10: Qualifying conditions

53. This section identifies the criteria that must be met for a leasehold condition to qualify for conversion to a real burden. The section should be read with section 11. The effect of the two sections is that the leasehold condition must be capable of being constituted as a real burden under the Title Conditions (Scotland) Act 2003.

54. Subsection (1)(a), along with subsection (2), requires the condition to be set out in certain deeds. An interposed lease is specifically excluded from the list of constitutive deeds. An interposed lease may be granted under section 17 of the Land Tenure Reform (Scotland) Act 1974 by the original landlord to another party. The tenants of the original lease then become responsible to the new party, who is their new landlord. Interposed leases may, for example, be granted when the original landlord wishes to retain an interest in the property but does not wish to carry out the day to day management.

55. Subsection (1)(b) requires the condition to be binding on successors.
56. Subsection (1)(c), along with subsection (3), sets out certain requirements as to the content of the condition. Subsection (4) is an aid to interpretation. Whether a leasehold condition complies with subsection (3) will be judged by the effect of the words and not merely by their form.

57. Subsection (5) sets out some exclusions. Obligations to pay rent and restrictions on assignation and subletting are based on the relationship of landlord and tenant and therefore cannot be converted. Rights of irritancy (to terminate a lease) and penalty clauses (monetary penalties if lease conditions are not complied with) are also excluded. However, rights of pre-emption (a right to acquire certain property in preference to any other person), redemption (a right to buy back) or reversion (right to retake possession) may be capable of conversion.

Section 11: Restriction on conversion of qualifying conditions

58. The effect of this section is that a condition which becomes a qualifying condition must comply with section 3 of the Title Conditions (Scotland) Act 2003 for it to be validly converted into a real burden. Section 3 of the 2003 Act provides rules as to the content of a real burden. It must, for instance, relate directly or indirectly to the burdened property and it must not be contrary to public policy.

59. Section 3(5) of the 2003 Act which prohibits the creation of new rights of redemption is excluded as it would otherwise prevent the conversion of a qualifying condition having the effect of a redemption or reversion.

Meaning of “qualifying land”

Section 12: Meaning of “qualifying land”

60. This section defines the term “qualifying land”.

Entitlement to enforce qualifying conditions

Section 13: Determination of who may enforce condition

61. The notice procedure introduced by sections 14 to 28 for converting a qualifying condition into a real burden can only be used by a person who has the right to enforce the qualifying condition. Section 13 sets out some rules on who can enforce a qualifying condition.

62. Subsection (2) provides that a person who has not completed title to the property to which the right to enforce a qualifying condition attaches has the right to enforce the condition. Where more than one person comes within that description then only the person with the latest right to the property may enforce it.

63. Subsection (3) provides that where a lease has been partially assigned, the tenant or subtenant of the retained part of the lease can enforce conditions imposed in the assignation or related deed. Such a person can then serve a notice under sections 14, 17, and 23 to 28. The reference to a deed registered under section 3 of the Registration of Leases (Scotland) Act 1857 includes a deed of conditions registered under the old section 3(5) of the 1857 Act which was repealed and replaced by the Title Conditions (Scotland) Act 2003 (section 128, schedule 14 paragraph 1, and schedule 15).
64. Subsection (4) defines “entitled person” for the purposes of sections 14 to 21. The definition recognises that third parties may have a right to enforce a qualifying condition.

65. Subsection (5) sets out rules, for the purposes of sections 14 to 21, for the situation where a right to enforce is held by more than one person pro indiviso (pro indiviso property or land is owned by several persons in common). If the right to enforce is held in the capacity of landlord, all pro indiviso landlords have to act together. In a section 14 case, for example, they must all be parties to the notice and they must all own the land to be nominated as a benefited property. If the right to enforce is held by a third party, a pro indiviso holder of the right can act alone but the effect is to convert the condition into a real burden for the benefit of all pro indiviso holders.

**Conversion of conditions to burdens**

**Section 14: Conversion by nomination of benefited property**

66. This section allows a person with a right to enforce a qualifying condition (the “entitled person”) to convert the condition into a real burden in favour of neighbouring land. “Entitled person” is defined in section 13(4). The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

67. Subsections (1) and (2) provide that where a conversion condition set out in subsection (4) is met, or the Lands Tribunal for Scotland makes an order under section 21, an entitled person may prospectively convert a qualifying condition into a real burden by executing and registering a notice.

68. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (h)) is made in section 34.

69. Subsections (5) and (6) determine what land may be nominated by an entitled person as a benefited property. In the majority of cases the entitled person is the landlord. In such a case, the land to be nominated as the benefited property is land which either:

- the landlord owns and which is not subject to a qualifying or exempt lease; or
- land which the landlord is tenant of under a qualifying or exempt lease.

70. In the case of third parties, the land which may be nominated as a benefited property is that land to which the right to enforce attaches (whether to the ownership of that land or to the tenant’s interest under a lease of that land). In the latter case the tenancy under an ultra-long lease qualifies as ownership for the purposes of nominating the benefited property.

71. For example, A is the tenant of a qualifying lease and has assigned the lease in part to B, imposing a qualifying condition. Section 13(3) makes it clear that A has the right to enforce that condition and section 13(4) provides that A is an entitled person for the purposes of section 14.

72. To convert the qualifying condition, A has to serve a notice nominating land as the prospective benefited property. The land to be nominated as the benefited property has to satisfy section 14(5) as read with section 14(6) given that A is not a landlord. In other words, if the land to be nominated is subject to a qualifying or exempt lease, the entitled person has not only to be
the tenant of that lease (subsection (5)) but also that lease has to be the lease to which the entitlement to enforce the condition attaches (by virtue of subsection (6)).

73. Section 32 deals with cases where a qualifying condition is expressly enforceable by the owner or tenant of land other than the qualifying land.

Section 15: Conversion by nomination: registration

74. Subsection (1) requires dual registration of the notice against both the burdened and the benefited property. Under subsection (2), there is a choice in both cases of registering against the title of the owner or (where applicable) the title of the tenant.

75. Subsection (3) provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (4). Subsection (4)(b) must be read with Schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.

Section 16: Conversion by nomination: effect

76. This section converts the qualifying condition into a real burden on the appointed day provided that the requirements of the section have been complied with and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.

Section 17: Conversion by agreement

77. This section allows the “entitled person” (as defined in section 13(4)) to enter into an agreement with the tenant of the qualifying lease for the purpose of converting a qualifying condition into a real burden in favour of neighbouring land. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour. An attempt to reach agreement is a prerequisite to an application under section 21 for an order from the Lands Tribunal dispensing with the need for any of the conversion conditions set out in section 14(4) to be satisfied.

78. Subsection (1) requires a notice to be served on the tenant under the qualifying lease as a preliminary to the agreement.

79. Subsections (2) and (3) determine what land may be nominated as a benefited property.

80. Subsection (4) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

81. Subsection (5) allows the parties to the agreement to modify the terms of the qualifying condition or any counter-obligation.

82. Subsection (6) regulates the form and content of the agreement.
83. Subsection (7) provides that this section is subject to section 36, which lays down further provision for notices and agreements.

**Section 18: Conversion by agreement: registration**

84. Subsection (1) requires dual registration of the agreement against both the burdened and the benefited property. Under subsection (2), there is a choice in both cases of registering against the title of the owner or (where applicable) the title of the tenant.

**Section 19: Conversion by agreement: effect**

85. This section converts the qualifying condition into a real burden on the appointed day if the requirements have been met and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.

**Section 20: Conversion by agreement: title not completed**

86. This section provides the method for deduction of title in cases where under the general law deduction of title would be required.

**Applications relation to section 14**

**Section 21: Lands Tribunal order**

87. This section allows an “entitled person” (as defined in section 13(4)) to apply to the Lands Tribunal for an order dispensing with the need to satisfy any of the conversion conditions set out in section 14(4). The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

88. Subsection (3) prevents an application being made unless there has first been an attempt to reach agreement under section 17.

89. Subsection (4) requires the application to be made within a year of the section coming into force. The application has also to include a description of the attempt to reach agreement.

90. Subsection (5) provides that the Lands Tribunal can make an order if it is satisfied that there would be material detriment to the value or enjoyment of the entitled person’s ownership (taking such person to have ownership) of the prospective benefited property were the qualifying condition in question to be extinguished. If an order is granted, the entitled person can then proceed to register a notice under section 14 converting the qualifying condition into a real burden.

91. Subsection (6) provides that the decision of the Lands Tribunal is final.

92. Subsection (7) makes provision for expenses in the case of a person opposing an application.
Section 22: Dealing with application under section 21

93. This section makes provision for the procedure in the Lands Tribunal in respect of applications under section 21.

94. The Scottish Ministers also already have powers to make rules in respect of Lands Tribunal procedures under section 3 of the Lands Tribunal Act 1949.

Personal real burdens

Section 23: Conversion to personal pre-emption or redemption burden

95. This section allows a person with the right to enforce a qualifying condition which confers a right of pre-emption or redemption to convert that condition into a real burden to be known as a personal pre-emption burden or a personal redemption burden.

96. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

97. Subsection (1) provides for the execution and registration of a notice. This must be done by the person with the right to enforce the qualifying condition. All pro indiviso landlords, for example, have to be parties to the notice.

98. Subsection (2) identifies the type of qualifying condition which may be converted.

99. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (e)) is made in section 34.

100. Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

101. Subsection (5) provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (6).

102. Subsection (6)(b) must be read with Schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.

103. Subsection (7) converts the qualifying condition on the appointed day into a personal pre-emption burden or a personal redemption burden in favour of the person with the right to enforce (or that person’s successor) provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

104. Subsection (8) makes clear that the benefit of the burden in question can be assigned or otherwise transferred to any person. Subsection (9) lays down that the assignation is completed by registration.
Subsection (11) provides the method for deduction of title in cases where under the general law deduction of title would be required.

The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

**Section 24: Conversion to economic development burden**

This section allows a local authority, or the Scottish Ministers, with the right to enforce a qualifying condition which was imposed for the purpose of promoting economic development to convert that condition into an economic development burden in their favour. An economic development burden may lay down how the property should be used or may require money to be paid to the local authority or the Scottish Ministers. The relevant provision in the Title Conditions (Scotland) Act 2003 is section 45.

Subsection (1) provides for the execution and registration of a notice.

Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

Subsection (4) converts the qualifying condition on the appointed day into an economic development burden in favour of the local authority or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

**Section 25: Conversion to health care burden**

This section allows the Scottish Ministers when they have the right to enforce a qualifying condition which was imposed for the purpose of promoting the provision of facilities for health care to convert that condition into a health care burden in their favour.

Subsection (1) provides for the execution and registration of a notice.

Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (e)) is made in section 34.

Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

Subsection (4) converts the qualifying condition on the appointed day into a health care burden in favour of the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.
been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

118. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

Section 26: Conversion to climate change burden

119. This section allows a public body or trust (defined in subsection (5)) or the Scottish Ministers with the right to enforce a qualifying condition which was imposed for the purpose of reducing greenhouse gas emissions (defined in subsection (5)) to convert that condition into a climate change burden in their favour. Climate change burdens were introduced by the Climate Change (Scotland) Act 2009. Section 68 of the 2009 Act inserted section 46A into the Title Conditions (Scotland) Act 2003.

120. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.

121. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

122. Subsection (4) converts the qualifying condition on the appointed day into a climate change burden in favour of the public body, trust or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

123. Subsection (5) lays down various definitions. The definitions of “emissions” and “greenhouse gas” are taken from the Climate Change (Scotland) Act 2009. The definition of “public body” is taken from an order made by the Scottish Ministers under section 38(4) of the Title Conditions (Scotland) Act 2003.

124. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

Section 27: Conversion to conservation burden: rule one

125. This section allows a conservation body, or the Scottish Ministers, with the right to enforce a qualifying condition which promotes conservation to convert that condition into a conservation burden in their favour. “Conservation burden” is defined in section 38(1) of the Title Conditions (Scotland) Act 2003. “Conservation body” is defined in section 122(1) of the 2003 Act and refers to any body prescribed by an order made by the Scottish Ministers under section 38(4) of the 2003 Act.

126. Subsection (1) provides for the execution and registration of a notice.

127. Subsection (2) identifies the type of qualifying condition which may be converted. This mirrors the definition of conservation burden in section 38(1) of the 2003 Act.
128. Subsection (3) sets out the content of the notice. Further provision as to counter-
obligations (paragraph (f)) is made in section 34.

129. Subsection (4) provides for registration of the notice against the burdened property. 
Registration can be against either the title of the owner or the title of the tenant.

130. Subsection (5) converts the qualifying condition on the appointed day into a conservation 
burden for the benefit of the public in favour of the conservation body or the Scottish Ministers 
provided that the requirements of the section have been complied with and that immediately 
before the appointed day the qualifying condition is still enforceable.

131. Subsection (6) qualifies the reference in subsection (5) to a conservation body or the 
Scottish Ministers so as to include successors provided that they are either a conservation body 
or the Scottish Ministers. In any other case the notice falls and the condition is extinguished on 
the appointed day.

132. The section is subject to section 36, which makes further provision in relation to notices, 
and section 75, which deals with pre-registration requirements for notices.

**Section 28: Conversion to conservation burden: rule two**

133. This section allows a person with the right to enforce a qualifying condition which 
promotes conservation to convert that condition into a conservation burden in favour of a 
conservation body or the Scottish Ministers. The entitled person is usually the landlord (of the 
qualifying lease or a superior lease) but in some circumstances is a neighbour. “Conservation 
burden” is defined in section 38(1) of the Title Conditions (Scotland) Act 2003. “Conservation 
body” is defined in section 122(1) of the 2003 Act and refers to any body prescribed by an order 
made by the Scottish Ministers under section 38(4) of the 2003 Act.

134. Subsection (1) provides for the execution and registration of a notice. This must be done 
by the person with the right to enforce the qualifying condition. All pro indiviso landlords, for 
example, have to be parties to the notice.

135. Subsection (2) requires the consent of the nominee to be obtained before a copy of the 
notice is sent to the tenant under the qualifying lease under section 75(2) or in other cases before 
the notice is executed. The nominee is required to sign the notice by way of indicating consent.

136. Subsection (3) sets out the content of the notice. Further provision as to counter-
obligations is made in section 34.

137. Subsection (4) provides for registration of the notice against the burdened property. 
Registration can be against either the title of the owner or the title of the tenant.

138. Subsection (5) converts the qualifying condition on the appointed day into a conservation 
burden for the benefit of the public in favour of the nominated conservation body or Scottish 
Ministers provided that the requirements of the section have been complied with and that
This document relates to the Long Leases (Scotland) Bill as amended at Stage 2 (SP Bill 7A)

immediately before the appointed day the qualifying condition is still enforceable by the person with the right to enforce or that person’s successor.

139. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices. The adjustment to section 36(3)(b) makes clear that a discharge of a section 28 notice also requires the consent of the nominated person.

Other real burdens

Section 29: Conversion to facility or service burden

140. Subsection (1) provides for the automatic conversion of qualifying conditions concerned with the maintenance, management, reinstatement or use of facilities into facility burdens. Typical examples of facilities are given in subsection (3). “Facility burden” is defined in section 122(1) of the Title Conditions (Scotland) Act 2003.

141. Obligations to maintain or reinstate which have been taken over by a local or other public authority are excluded (see section 33).

142. Subsection (2) provides for the automatic conversion of qualifying conditions concerned with the provision of services to other land into service burdens. “Service burden” is defined in section 122(1) of the Title Conditions (Scotland) Act 2003.

Section 30: Conversion to manager burden

143. This section provides for the automatic conversion of a qualifying condition which confers a power of management over a group of related properties into a real burden known as a manager burden. “Manager burden” is defined in section 63(1) of the Title Conditions (Scotland) Act 2003. Such burdens are time limited, usually to five years from creation (section 63(4) to (7) of the 2003 Act), which in the case of converted conditions is the date of registration of the qualifying lease or other constitutive deed.

144. Subsections (3) and (4) provide that whether properties are related depends on the circumstances of each case and gives a list of indicators. They are modelled on section 66(1) of the Title Conditions (Scotland) Act 2003.

Section 31: Conversion where common scheme affects related properties

145. This section applies to qualifying conditions the regime provided by section 53 of the Title Conditions (Scotland) Act 2003 for real burdens. It draws on concepts of “common scheme” and “related properties”, used in the 2003 Act. Essentially, qualifying conditions will be imposed under a common scheme insofar as they apply identical or equivalent conditions to each property.

146. The effect of subsection (1) is to convert automatically qualifying conditions which meet the criteria into real burdens in respect of which each property covered by the scheme will be both a benefited and a burdened property. The burdens created will be community burdens. Part
2 of the Title Conditions (Scotland) Act 2003 provides for community burdens and section 25 of the 2003 Act defines “community burdens”.

147. Subsections (2) and (3) provide that whether properties are related depends on the circumstances of each case and gives a list of indicators. A typical example would be flats in the same tenement.

148. Subsection (4) prevents rights of pre-emption, redemption or reversion being conferred by virtue of this section.

Section 32: Conversion where expressly enforceable by certain third parties

149. Sometimes the lease makes clear that, in addition to the landlord, the conditions (or some of them) are to be enforceable by neighbours, i.e. by the owners or tenants of other land. Without express provision the rights fall with the conditions themselves. This section therefore provides for the conversion of such conditions into real burdens.

Exclusions from conversion

Section 33: Qualifying condition where obligation assumed by public authority

150. This section provides that the automatic conversion of qualifying conditions involving roads, sewerage or other facilities into facility or service burdens (section 29) does not extend to obligations which have been taken over by a local or other public authority. Obligations of this kind are spent. The provision also applies to obligations which are part of a common scheme (section 31).

Effect of conversion on counter-obligations

Section 34: Counter-obligations on conversion

151. This section makes clear that an obligation which is the counterpart of a qualifying condition converted into a real burden also survives and is binding on the former landlord or third party enforcer or any replacement enforcer. An example might be where a tenant is under an obligation to pay for maintenance which is then to be carried out by the landlord. The section does not provide a free-standing right to enforce the counter-obligation but it makes the right to enforce the burden subject to performance of the counter-obligation.

152. Subsection (2) sets out the relevant counter-obligations.

Prescription

Section 35: Prescriptive period for converted conditions

153. This is a transitional provision. The period of negative prescription (extinction of obligation) for a leasehold condition is presently twenty years. After conversion to a real burden, the period will be five years under section 18 of the Title Conditions (Scotland) Act 2003. The effect of this section is to make the prescriptive period for a breach of a qualifying condition that occurs before the appointed day for leasehold conversion the same as the period for a breach of a real burden that occurred before the day appointed for feudal abolition. That is to say, the
prescriptive period for such a breach will be the shorter of 5 years from the appointed day or 20 years from the breach.

**Notices and agreements under this Part**

**Section 36: Further provision for notices and agreements**

154. Subsection (2) provides that the person with a right to enforce (whether landlord or third party) should not be able to preserve that right under separate heads of conversion. It should not, for example, be competent to convert a condition into a neighbour burden under section 14 and a conservation burden under section 27 or section 28. A choice has to be made but the choice is not final as subsection (3) allows an earlier agreement or notice to be discharged.

155. Subsections (4) and (5) regulate the number of notices that are required. Where the same qualifying condition enforceable by the same person affects more than one qualifying lease, a separate notice must be prepared for each lease but the same notice (or agreement) can be used for more than one condition.

156. Subsection (6) makes clear that there is no requirement of registration where the prospective benefited property is outwith Scotland.

**PART 3: ALLOCATION OF RENTS AND RENEWAL PREMIUMS ETC.**

**Overview of Part 3 of the Bill**

157. Part 3 of the Bill makes provision for the allocation of *cumulo* rent and *cumulo* renewal premium. “*Cumulo*” refers to a single payment made in relation to two or more leases.

**Key terms**

**Section 37: Partially continuing leases and renewal obligations etc**

158. This section defines certain terms.

**Section 38: Cumulo rent and cumulo renewal premium**

159. This section defines *cumulo* rent as a single rent payable under two or more leases and *cumulo* renewal premium as a single renewal premium payable in relation to two or more leases.

160. Subsection (2) qualifies the definitions of *cumulo* rent and *cumulo* renewal premium by providing that where a rent or premium has been apportioned between the leases before the appointed day with the express or implied agreement of the parties the rent or premium apportioned is to be the rent or premium for that lease.

161. The definition of *cumulo* renewal premium is qualified further by subsections (3) and (4). They provide that where a *cumulo* rent has been apportioned with the agreement of the parties but not the *cumulo* premium, the premium is allocated between the leases in the same proportions as the rent.
Allocation of rent

Section 39: Allocation of cumulo rent before appointed day

162. This section allows the landlord to allocate cumulo rent before the appointed day. This allows landlords to claim an exemption from the Bill, if the annual rental for an individual lease after the cumulo rent has been allocated is over £100.

163. Subsection (1) and (2) provide that where two or more leases are subject to cumulo rent and one or more of the leases is a qualifying lease (defined in section 1), the landlord may allocate the cumulo rent.

164. Subsection (3) provides that the allocation must be reasonable and subsection (4) provides that the allocation is presumed to be reasonable if it is in accord with any apportionment that has already taken place. This presumption is relevant only in cases where an apportionment was made without the consent of the landlord: for example, where the rent is collected by a property manager or other third party and remitted to the landlord in a single sum. Subsection (5) provides that once the allocation by the landlord has taken place the rental for each individual lease is the annual rental and is not to be treated as cumulo.

Section 40: Allocation of cumulo rent after appointed day

165. Where the annual rent payable under the lease is a cumulo rent, as defined in section 38, that rent requires to be allocated before the compensatory payment can be calculated under Part 4. This section sets out the rules for doing so.

166. Subsection (2) directs the landlord to allocate the cumulo rent between the leases within 2 years of the appointed day. The rent is to be allocated between all of the leases in respect of which cumulo rent was payable. The allocation must be in such proportions as are reasonable in the circumstances (subsection (3)).

167. Subsection (4) creates a presumption that the landlord’s allocation is reasonable if it accords with an apportionment made before the appointed day. This presumption is relevant only in cases where an apportionment was made without the consent of the landlord: for example, where the rent is collected by a property manager or other third party and remitted to the landlord in a single sum. To assist the landlord, section 58 requires any third party collector to disclose to the landlord information about the tenants from whom the rent has been collected and the amount collected.

168. Under subsection (5), the sum allocated to a lease that continues after the appointed day is the annual rent payable under that lease from the appointed day, subject to any allocation under section 41 in relation to partially continuing leases.

Section 41: Partially continuing leases: allocation of rent

169. Section 41 is concerned with a lease that is partly extinguished and partly continues on and after the appointed day. “Partially continuing lease” is defined in section 37. A lease is a partially continuing lease if, for example, there is a partial sublease further down the leasehold
chain which is exempt from conversion under Part 5. Instead of being extinguished in full, the higher lease continues in force in relation to the subjects of the exempt lease.

170. Subsection (1) directs the landlord of a partially continuing lease to allocate the annual rent payable under the lease between the continuing part and the extinguished part (the “continuing subjects” and the “converted subjects”). Subsection (2)(b) provides that if the rent payable under the lease was a *cumulo* rent, as defined in section 38, the landlord must allocate the *cumulo* rent between the relevant leases, as outlined in section 40, before carrying out the allocation under this section.

171. Under subsection (4), the sum allocated to the continuing part of the lease is the annual rent payable under that lease from the appointed day.

*Allocation of renewal premium*

**Section 42: Allocation of *cumulo* renewal premium**

172. Where a *cumulo* renewal premium (as defined in section 38) is payable under more than one lease, a landlord, for the purposes of claiming a compensatory payment or an additional payment for the loss of the renewal premium, has first to allocate the premium.

173. If the premium allocated is more than £100, compensation can only be claimed under section 51(1)(d) as an additional payment.

174. The allocation must be in such proportions as are reasonable in the circumstances (subsection (3)). Subsection (4) creates a presumption that an allocation of a premium is reasonable if it accords with an apportionment effective immediately before the appointed day or, if there is no such apportionment, it follows any allocation of *cumulo* rent made under section 40.

175. Under subsection (5), the renewal premium allocated to a lease that continues after the appointed day is the renewal premium payable under that lease from the appointed day, subject to any allocation under section 43 in relation to partially continuing leases.

**Section 43: Partially continuing leases: allocation of renewal premium**

176. Where a renewal premium (as defined in section 37) is payable under a partially continuing lease, a landlord, for the purposes of claiming a compensatory payment or an additional payment for the loss of the renewal premium, must first allocate the premium between the converted subjects and the continuing subjects.

177. Subsection (3) provides that if the renewal premium payable under the lease is a *cumulo* renewal premium, as defined in section 38, the landlord must allocate the *cumulo* renewal premium between the relevant leases, as outlined in section 42, before carrying out the allocation under this section.

178. If the premium allocated is more than £100, compensation can only be claimed under section 51(1)(d) as an additional payment.
179. The allocation must be in such proportions as are reasonable in the circumstances (subsection (4)). Subsection (5) creates a presumption that an allocation of a premium is reasonable if it follows an allocation of rent under section 41.

180. Under subsection (6), the sum allocated to the continuing part of the lease is the renewal premium payable under the lease from the appointed day.

Allocation disputed or not made

Section 44: Allocation disputed or not made: reference to Land Tribunal

181. Under subsection (1), the tenant under a continuing lease or the continuing part of a lease can apply to the Lands Tribunal for Scotland to:

- challenge the allocation of *cumulo* rent under sections 39 or 40;
- challenge the allocation of *cumulo* renewal premium under section 42;
- challenge the allocation of rent in relation to partially continuing leases under section 41;
- challenge the allocation of renewal premium in relation to partially continuing leases under section 43;
- seek the allocation of *cumulo* rent or *cumulo* renewal premium, if the landlord has failed to carry out an allocation within two years from the appointed day; and
- seek the allocation of rent or renewal premium, where a lease is partially continuing, between the converted subjects and the continuing subjects, where the landlord has failed to do so within 2 years of the appointed day.

182. Where the landlord has made an allocation which is disputed, any application by the tenant to the Lands Tribunal must be made within 56 calendar days, beginning with the day on which notice of the allocation was given to the tenant. Where no allocation is made, the tenant may apply to the Tribunal at any time after the expiry of the two year period running from the appointed day.

183. This section does not give a former tenant of a lease, or part of a lease, extinguished on the appointed day, a right to challenge the amount of compensation claimed by the former landlord where an allocation has been made. However, it is a defence to a claim for compensation that the allocation was unreasonable.

PART 4: COMPENSATION FOR LOSS OF LANDLORD’S RIGHTS

Overview of Part 4 of the Bill

184. Part 4 sets out a scheme under which the landlord of a lease converting to ownership under Part 1 may claim compensation. A landlord may claim a general payment for the loss of rights. This is termed a compensatory payment and is based on the capitalised value of the rent (see sections 45 to 49).
185. Exceptionally a compensatory payment may not be enough. In certain cases, therefore, a landlord may claim a further payment, termed an “additional payment”, for the loss of the right in question (see sections 50 to 55).

186. Part 4 also contains provisions in relation to the landlord serving a preliminary notice where a claim is likely to exceed £500 (see section 56); the tenant making payments by instalments when the amount due is £50 or more (see section 57) and the disclosure of information (see sections 58 and 59).

Compensatory payment

Section 45: Requiring compensatory payment

187. To claim a compensatory payment, the former landlord must serve on the former tenant a notice in the prescribed form within 2 years of the appointed day, accompanied by a copy of a prescribed explanatory note (subsection (4)).

188. The sum due by the tenant is calculated in accordance with section 47 and is an ordinary unsecured debt. The claim is against the immediate former tenant of the person making the claim.

189. If the sum being claimed is £50 or more, an instalment document has to be served along with the notice (subsection (5)). This gives the former tenant the option of paying by instalments in accordance with the scheme set out in section 57. If an instalment document is not served the notice has no effect.

190. Subsection (6) provides that the section is subject to section 56, the effect of which is to restrict the amount of compensatory payment to no more than £500 unless a preliminary notice has been served.

Section 46: Making compensatory payment

191. If the landlord has followed the notice procedure correctly, the former tenant must, unless entitled to pay by instalments (see sections 45(5) and 57), make the compensatory payment within 56 calendar days beginning with the day on which notice is served.

Calculation of compensatory payment

Section 47: Calculation of the compensatory payment

192. This section sets out how the compensatory payment by tenants to landlords is to be calculated. The method of calculation is based on the compensation scheme under the Abolition of Feudal Tenure etc. (Scotland) Act 2000, which abolished feudal tenure. The compensation is designed to deliver the same economic benefit to the landlord as the ongoing income from rent paid under the ultra-long lease being converted to ownership. Additional payments may also be due – see sections 50 to 55).

193. The compensatory payment is first calculated by working out the Annual Income (AI). As outlined in Step 1, the AI is calculated by determining the annual rent, in accordance with
section 48, and then, as outlined in Step 3, by adding any notional annual renewal premium (NARP) calculated under section 49. Under Step 2 and section 49, the NARP is any renewal premium of £100 or less, divided by the renewal period (RP) (see section 49). Renewal premiums of over £100 may give rise to a separate claim for an additional payment – see section 51(1)(d).

194. To give an example, if the annual rent is £2.50 and the renewal premium is £2.50, with a renewal period of 99 years, the AI is £2.50 plus 3p (£2.50 divided by 99, rounded to the nearest penny). Therefore, the AI is £2.53.

195. The next step, as outlined in Step 4, is to calculate the sum of money which would, if invested in 2.5% Consolidated Stock, produce an annual sum equal to AI. This sum is the compensatory payment.

196. The price of Consolidated Stock varies. At 25 November 2011, the price was £67.50 (to buy £100 of nominal stock yielding 2.5% interest). Therefore, the compensatory payment is £67.50 (price of stock yielding £2.50 a year) multiplied by £2.53 (AI) divided by £2.50 (annual sum produced by investing £67.50 in 2.5% consolidated stock). This gives a compensatory payment of £68.31.

197. To give another example, if the annual rent is £20 and there is no NARP, the compensatory payment is £67.50 (price of stock) multiplied by £20 (AI) divided by £2.50 (annual income from the stock). This gives a figure of £540.

198. Another way of carrying out the calculation is to use a variable multiplier (variable as the price of 2.5% Consolidated Stock varies). Therefore, if the price of 2.5% Consolidated Stock is £67.50, the variable multiplier is 27 (£67.50 divided by £2.50). This variable multiplier can then be multiplied by the AI to produce the compensatory payment.

Annual rent

Section 48: Determination of the annual rent

199. This section lays down how the annual rent should be determined for the purposes of calculating the compensatory payment. In some cases, rent may be paid on a cumulo basis. Cumulo rent is defined in section 38 and refers to a single rent payable in relation to two or more leases. In these cases, the annual rent is allocated under section 40.

200. In other cases, a lease may be “partially continuing” (a definition of “partially continuing lease” is laid down in section 37). In these cases, the annual rent is allocated under section 41.

201. Where the lease does not involve cumulo rents or partially continuing leases, the annual rent is as laid down in the lease, excluding any non-monetary payments.

202. Subsection (2) provides that any rent expressed in non-monetary terms is to be excluded from the calculation of the compensatory payment. Provision is made for non-monetary rents to be the basis of a claim for an additional payment – see section 51(1)(a).
Renewal premiums

Section 49: Calculation of notional annual renewal premium

203. This section applies if a renewal premium of £100 or less is payable under the lease and it is necessary to include the renewal or more than one renewal in order to meet the durational requirements for conversion.

204. Subsection (2) directs the former landlord to divide the amount of the renewal premium by the number of years between each renewal. This gives a sum which represents the “notional annual renewal premium” or NARP. The NARP is added to the annual rent payable under the lease in order to calculate compensation under section 47.

205. Subsection (3) provides that that where there is a partially continuing lease, the renewal premium for leases converting to ownership is as allocated under section 43. Where there is not a partially continuing lease but there is a cumulo renewal premium, the renewal premium is as allocated under section 42. And in all other cases the renewal premium is the amount payable under the lease.

206. If a renewal premium of more than £100 is payable, the landlord can claim compensation under the additional payments regime set out in sections 50 to 55.

Additional payment

Section 50: Claiming additional payment

207. To claim an additional payment for the loss of a right, the former landlord must serve a notice in the prescribed form on the former tenant within two years of the appointed day (subsections (2) and (4)). The amount claimed is calculated in accordance with section 52. The claim is against the immediate former tenant of the person making the claim except in the circumstances set out in subsection (3).

208. Under subsection (3), where the right lost by the former landlord of a superior lease is one specified in section 51(1)(e) to (g), the former landlord is directed to serve the notice claiming an additional payment on the former tenant of the qualifying lease rather than on the former tenant of the superior lease.

209. Subsection (4) sets out various requirements for the form and content of the notice. The notice must be accompanied by a copy of the explanatory note.

210. Under subsection (5), if the sum being claimed is £50 or more an instalment document has to be served along with the notice. This gives the tenant the option of paying by instalments in accordance with the scheme set out in section 57. If an instalment document is not served the notice has no effect.

211. Subsection (6) provides that the section is subject to section 56 the effect of which, in the case of a qualifying lease, is to restrict the maximum amount that can be claimed by way of additional payment to £500 unless a preliminary notice has been served.
Section 51: Extinguished rights

212. This section identifies the rights the loss of which may found a claim for an additional payment. In the notice making the claim it will be for the landlord to nominate, and to justify, the particular ground of claim (see section 50(4)).

213. Subsection (1)(a) refers to a right to a non-monetary rent. Paragraph 6.29 of the Scottish Law Commission report indicated that in around 1% of the leases it surveyed it found non-monetary rents such as six fat hens, oat farm meal and the services of a labourer for three days to work on the roads in a town.

214. Subsection (1)(b) refers to a right to have the rent reviewed or increased. Paragraph 6.30 of the Scottish Law Commission report indicated that provision for rent reviews was rare in ultra-long leases but the possibility should be acknowledged. Paragraph 6.31 of the report indicated that it is possible for rent to increase by way of a fixed formula rather than by virtue of a review.

215. Subsection (1)(c) refers to a right to a rent to the extent that the amount payable is variable from year to year. This might, for example, be relevant where rent is based on the turnover of a business.

216. Subsection (1)(d) refers to a right to receive a renewal premium of more than £100 (rights to receive lesser amounts can be recovered under the compensatory payment regime (see sections 47 and 49)).

217. Subsection (1)(e) relates to a landlord’s right of reversion, so long as the lease would expire no later than 200 years after the appointed day. Reversionary rights occasionally may have a value over and above the income stream from rent. Rights falling into this category are to be valued in accordance with section 52(3) and (4).

218. Subsection (1)(f) refers to a right to bring a lease to an end before its normal expiry. The right has to be within the full control of the landlord and exercisable within 200 years of the appointed day. A break clause exercisable at regular intervals or a right of redemption or resumption exercisable at the landlord’s discretion would be included but not a right to terminate on breach. A right (such as a right of redemption) which is converted into a real burden under sections 16, 19 or 23 is excluded.

219. Subsection (1)(g) refers to a right to development value provided that the right has not been converted into a real burden under sections 16 or 19. “Development value” is defined in subsection (2) as is the expression “right to development value”.

Section 52: Calculating additional payment

220. This section sets out some general and some specific rules for determining the amount of an additional payment. Subsection (2) provides that the right is to be valued as at the appointed day.
221. Subsections (3) and (4) contain specific rules relating to the valuation of a landlord’s reversionary interest in a claim under section 51(1)(e). In particular, the value is deemed to be the value of the right if sold on the open market by a willing seller to a willing buyer, with special buyers and special sellers (i.e. those with a particular interest in the property) disregarded.

222. Subsections (5) to (7) provide that any obligations on the landlord which are extinguished by conversion have to be taken into account (but not insofar as such obligations are preserved as a counter obligation to a real burden) as has any other entitlement of the landlord to recover in respect of the loss. “Any other entitlement” refers primarily to the compensatory payment calculated under section 47.

223. Subsection (8) caps a claim for the loss of the right to development value. In some cases, ultra-long leases may have been granted cheaply on the basis that the property was used for some limited purpose, such as the building of a church or a community hall.

224. Paragraph 6.45 of the Scottish Law Commission report said that if any leasehold conditions preserving development value were discharged by the Lands Tribunal, any compensation would be limited to a sum to make up for the effect the leasehold condition produced in reducing the consideration paid for the interest in the property. No account is taken of inflation. In other words, the loss of the right to development value is limited to the reduction in the price paid for the interest in the property at the time.

Section 53: Additional payment: former tenant agrees

225. This section applies where, following service of an additional payment notice under section 50, the former tenant agrees to make the payment specified in the notice. Unless the former tenant is entitled to pay by instalments (see section 57), payment must be made to the former landlord within 56 calendar days beginning with the day on which the notice was served on the former tenant.

226. There may be cases where the former tenant does not agree to pay the amount specified in the notice. In these cases, the former tenant and the former landlord may agree that a different amount should be paid (see section 54) or where agreement cannot be reached, the matter may be referred to the Lands Tribunal (see section 55).

Section 54: Additional payment: amount mutually agreed

227. Following service of an additional payment notice under section 50, the former landlord and former tenant may agree that a different amount be paid. This section regulates the procedure to be followed.

228. Subsection (2) requires the former landlord to serve a further notice in the prescribed form on the former tenant specifying the agreed amount and requesting payment. The notice must be served within 5 years of the appointed day to be valid. If a notice is not served, the obligation to pay does not arise and the landlord loses the right to collect the payment.
229. Subsection (3) sets out requirements for the form and content of the notice. The notice must be accompanied by a copy of the explanatory note.

230. If the agreed sum is £50 or more, subsection (4) requires that an instalment document is served along with the notice. This gives the tenant the option of paying by instalments in accordance with the scheme set out in section 57. If an instalment document is not served the notice has no effect.

231. Unless entitled to pay by instalments, subsection (5) requires the former tenant to make payment to the former landlord within 28 calendar days, beginning with the day on which the notice is served.

Section 55: Claim for additional payment: reference to Lands Tribunal

232. This section applies in cases where no agreement has been reached under section 53 or section 54.

233. Subsection (1) gives both the former tenant and the former landlord the right to refer any matter relating to a claim for an additional payment to the Lands Tribunal.

234. Subsection (2) gives the Lands Tribunal a wide discretion to determine the matter and make such order as it thinks fit.

235. Subsection (3) requires the Lands Tribunal to provide the former tenant with the option of paying by instalments in accordance with the statutory instalment scheme if the additional payment is fixed at £50 or more. This subsection makes certain amendments to the instalment scheme to take account of the fact that no instalment document will be served on the former tenant in such circumstances.

236. Subsection (4) provides that all references to the Lands Tribunal must be made within 5 years of the appointed day.

Supplementary

Section 56: Claims in excess of £500: preliminary notice

237. A landlord who intends to claim a sum which is likely to exceed £500 by way of compensatory or additional payment from the tenant of the qualifying lease has to serve a preliminary notice. This notice must be served no later than six months before the appointed day on the person who is registered at that time as the tenant. Separate notices have to be served in respect of each type of payment. If a notice is not served the amount of compensatory or additional payment that can be claimed is capped at £500.

Section 57: Making payment by instalments

238. Where the compensatory payment or additional payment is £50 or more the former landlord has to serve an instalment document along with the relevant notice. This section sets out the rules of the instalment scheme.
239. Subsection (2) provides that the instalment document must be completed in the prescribed form and accompanied by a copy of the explanatory note.

240. Subsection (3) requires that to obtain the option to pay by instalments, the former tenant has to sign, date and return the instalment document along with payment of a 10% surcharge. The tenant has to do this within the period allowed for payment of the compensatory or additional payment, which is either 56 or 28 calendar days.

241. Subsection (4) provides that the option of paying by instalments is lost by the former tenant of a qualifying lease in the event of a sale of the whole or part of the land now owned.

242. Subsections (6) and (7) set out the details of the instalment scheme. Whitsunday is 28 May and Martinmas is 28 November.

243. Subsection (8) provides for immediate payment of the balance if an instalment is unpaid for forty two calendar days.

244. Subsection (9) makes clear that in other cases the balance can be repaid at any time.

Section 58: Collecting third party to disclose information

245. This section requires any third party collector of rent (e.g. where rent has been on a cumulo basis) to disclose to the landlord information about the tenants from whom the rent has been collected and, where the rent remitted is part of a cumulo rent, the amount so collected, so far as this is practicable.

Section 59: Duty to disclose identity etc. of former tenant

246. This section requires a person on whom a notice was mistakenly served claiming a compensatory or additional payment to disclose the name and address of the former tenant or, failing that, such other information as will enable the former tenant to be traced.

Section 60: Prescription of requirement to make payment

247. This section provides that the obligation to pay the compensatory or additional payment prescribes (i.e. extinguishes) after 5 years. Prescription starts to run from the date the obligation to pay arises.

Section 61: Interpretation of Part 4

248. Subsection (1) defines former landlord and former tenant for the purposes of Part 4. It has to be read alongside the definitions of landlord and tenant in section 80(1). The definitions include a person who has a right to the interest but who has not completed title. If more than one person comes within the definition the latest such person is treated as the landlord or the tenant.

249. Subsection (2) provides where there are co-tenants their liability is joint and several as regards the compensatory or additional payment in a question with the former landlord and also
among themselves. It also makes clear that for the purposes of Part 4 such tenants are to be treated as a single tenant except for the provisions regarding service of a notice.

PART 5: EXEMPTION FROM CONVERSION AND CONTINUING LEASES

Overview of Part 5 of the Bill

250. This Part contains provisions on the landlord being able to exempt a lease, by agreement with the tenant or through an order of the Lands Tribunal, if the annual rental is over £100 either immediately before the appointed day or at any point in the 5 years before Royal Assent. Part 5 also makes provision on the tenant opting out of converting a lease to ownership by exempting the lease and recalling the exemption. It also contains provisions on the registration of unregistered leases. These are then treated as leases which are exempt from conversion but with the tenant having the option of recalling this exemption.

Exempt leases

Section 62: Exempt leases

251. This section sets out the consequences of a lease being an exempt lease when the appointed day arrives. The effect is to suspend the process of conversion in relation to that lease and any superior lease. Existing landlord-tenant relationships continue in force as before. “Exempt leases” are defined by reference to sections 63 to 66.

Types of exempt leases

Section 63: Exemption of qualifying lease by registration of notice

252. This section allows the tenant of a qualifying lease to opt out of conversion so that it becomes an “exempt lease”. The section requires the tenant to register a notice of exemption at least two months before the appointed day.

Section 64: Exemption of qualifying lease by registration of agreement or order

253. This section allows a landlord to claim an exemption in respect of a lease where the annual rental is over £100.

254. Subsection (1) provides that the landlord must register an agreement with the tenant or an order made by the Lands Tribunal no later than 2 months before the appointed day.

255. Subsection (2) makes provision in respect of the form of the agreement with the tenant.

256. Subsection (2)(c)(i) provides that one option is for the agreement to state that the annual rent immediately before the appointed day will be over £100. Such an agreement might be sought, for example, where the landlord allocates *cumulo* rent under section 39 and the allocated rent for an individual lease is over £100.

257. Subsection (2)(c)(ii), as read with subsection (3), provides that another option is for the agreement to state that the annual rent was over £100 at any point in the 5 years before Royal Assent. This reflects that some leases may have variable rent. Variable rent may mean that the
rent paid in any one year in the 5 years before Royal Assent exceeds £100 even though the base rent laid down in the lease is under £100.

**Section 65: Certain leases registered near or after the appointed day**

258. An unregistered lease which otherwise satisfies the requirements for conversion is not a qualifying lease under section 1. This section makes provision for the situation where the lease is subsequently registered.

259. An unregistered lease which is first registered in the year before the appointed day or at any time thereafter is treated as an exempt lease. This enables the lease to be converted into ownership by registering a recall notice under section 67. This procedure gives the landlord of that lease notification of conversion of the lease to ownership and the opportunity to register notices converting conditions into real burdens etc. Where first registration of the lease takes place in the year before the appointed day, section 62 suspends the process of conversion.

**Section 66: Subleases of exempt leases**

260. The tenant under an exempt lease may grant a sublease which fulfils the criteria for conversion. This section provides that on registration the sublease is to be treated as an exempt lease. The tenant may then register a recall notice.

**Section 67: Recall of exemption**

261. This section allows the tenant under an exempt lease to register a recall notice, so long as the lease is not exempted under section 64 by the landlord. The tenant may register a recall notice before or after the appointed day.

262. Under subsection (2), on registration of a recall notice the exempt lease ceases to be an exempt lease. It then becomes eligible for conversion so long as it meets the general criteria for conversion. In particular, the unexpired duration of the lease must at the appointed day (see subsection (3)) be more than 100 years.

263. Subsection (3) prescribes the appointed day where the notice of recall is registered in the six months before or on or at any time after the standard appointed day laid down in section 70. The effect of deferring the appointed day is to give a landlord of the qualifying lease or any superior lease a period of six months in which to consider whether to register notices converting leasehold conditions into real burdens.

264. Subsection (4) removes the requirement for the landlord to serve a preliminary notice in order to claim compensation or additional payments of more than £500. The purpose of such a notice is to invite consideration of opting out but that is no longer relevant where the decision to recall has been made.
Supplementary

Section 68: Exemption and recall notices: supplementary

265. This section sets out rules for the service and registration of a notice of exemption or a notice of recall.

266. Subsections (2) and (3) provide for the sending of a copy of the exemption notice or recall notice to the landlord of the qualifying or exempt lease and any landlord of a superior lease. Service can be on the person who is registered as landlord. Normally service is by post, and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

267. Subsection (4) requires the notice to be registered against the title of the tenant. This allows anyone dealing with the lease to see the position.

Section 69: Application to Lands Tribunal for order confirming rent

268. This section makes provision for the landlord to obtain an order from the Lands Tribunal that the annual rent in relation to a lease exceeds £100. If such an order is granted, the landlord may register the order under section 64 to claim an exemption.

269. Subsection (3) provides that an application can only be made to the Tribunal if an attempt has been made to reach agreement with the tenant. Subsection (4) provides that any application to the Tribunal must outline what had been done to obtain an agreement and must be made within a year of the section coming into force.

270. Subsection (1)(a) provides that the application may be for an order that the annual rent immediately before the appointed day will be over £100. Such an order might be sought, for example, where the landlord allocates *cumulo* rent under section 39 and the allocated rent for an individual lease is over £100.

271. Subsection (1)(b), as read with subsection (2), provides that the application may be for an order that the annual rent was over £100 at any point in the 5 years before Royal Assent. This reflects that some leases may have variable rent. Landlords may wish to claim an exemption as variable rent may mean that the rent paid in any one year in the 5 years before Royal Assent exceeds £100 even though the base rent laid down in the lease is under £100.

PART 6: GENERAL AND MISCELLANEOUS

Overview of Part 6 of the Bill

272. This Part contains provisions on a variety of issues: the appointed day; how to determine the duration of leases; leases continuing on tacit relocation; irritancy; service of notices; registration of notices; matters that the Keeper of the Registers of Scotland is not required to determine; referring disputed notices to the Lands Tribunal; the registration of documents rejected by the Keeper when the courts or the Lands Tribunal determine that they are registrable; amendments to enactments; interpretation; ancillary provisions; subordinate legislation and commencement.
This document relates to the Long Leases (Scotland) Bill as amended at Stage 2 (SP Bill 7A)

The appointed day

Section 70: The appointed day

273. This section fixes the appointed day, which is the day when qualifying leases are converted into ownership. Martinmas (28 November) is chosen because that is one of the dates on which rent is normally payable. The period of two years between the coming into force of the section under section 70 and the appointed day enables the qualifying leases to be identified ahead of conversion. This in turn enables the statutory notices for conversion of qualifying conditions etc. to be served and registered before the appointed day.

274. The Term and Quarter Days (Scotland) Act 1990 regulates, in Scotland, the date of Martinmas (and Whitsunday, Candlemas and Lammas).

Duration of lease etc

Section 71: Determining duration of lease

275. The provision sets out a number of rules for calculating the period of a lease. The period of a lease is relevant for the purposes of working out whether a lease qualifies for conversion (section 1(3)); whether an additional payment can be claimed for the residual value of the reversionary interest (section 51(1)(e)) and how that value is to be assessed (section 52(3) and (4)); and whether an additional payment can be claimed for the loss of a right to bring a lease to an end early (section 51(1)(f)). In each case the duration of the lease is calculated in the same way.

276. Subsection (1) sets out the rules for break options (which are disregarded), for renewals (which are included), for calculating the lifetime of a tenant (for the exceptional cases where this might be relevant), and for consecutive leases (which are included). A consecutive lease is a lease which is granted during the term of the first lease on essentially the same terms and conditions as the first lease and which is to run from the moment the first lease ends.

277. Subsection (2) makes clear that a calculation of the period of a lease in accordance with the rules in subsection (1) is subject to section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. That provision (with certain exceptions) prohibits the grant of a lease for more than 175 years. The provision has no relevance for break options and so subsection (2) does not apply to such options.

Section 72: Leases continuing on tacit relocation

278. This section relates to leases continuing on tacit relocation (leases continuing on a year by year basis where, for example, a renewal was due to have taken place but did not actually happen). The section provides that Part 4, on compensation, applies to such leases as does section 71, on determining the duration of the lease, as if any provision requiring the landlord to renew the lease had been complied with.

279. To give an example, some leases in Blairgowrie are for 99 years but contain provisions requiring the landlords to renew them in perpetuity for further periods of 99 years. The effect of section 72 is that where such leases have not been renewed but continue on tacit relocation, the
renewal is deemed to have taken place, including conditions about further renewals. This means that the durational requirements for leases to convert to ownership are met.

**Extinction of right of irritancy in certain leases**

**Section 73: Extinction of right of irritancy in certain leases**

280. This section prevents a lease of land granted for a period of more than 175 years which has an unexpired duration of more than 100 years and is not excluded by section 1(4) or section 64 from being terminated by irritancy. The lease does not have to be registered to be covered by this section.

281. Irritancy is the premature termination of the lease by the landlord, when the tenant has failed to comply with one or more of the tenant’s obligations under the lease. It includes a provision in a lease which deems a failure of the tenant to comply with any provision in the lease to be a material breach of contract. Any proceedings already commenced in relation to irritancy of a lease covered by this section are deemed to be abandoned (subsection (4)). However, any final decree granted is not affected (subsection (5)).

**Section 74: Service of notices**

282. This section sets out the rules for service of a notice (and preliminary notice) in respect of a compensatory or additional payment and in respect of serving notices to enter into an agreement with a tenant for the purpose of converting a qualifying condition into a real burden in favour of neighbouring land.

283. Liability to pay any compensatory or additional payment depends on service of a notice. The date of service is the starting point for the period allowed for payment or return of the instalment document. The date of service is the date of delivery or posting. When notices are returned undelivered, provision is made for service on the Extractor of the Court of Session.

**Section 75: Notices: pre-registration requirements**

284. This section applies to notices which require to be submitted for registration under section 8 (sporting rights) or under Part 2.

285. The section provides for the sending of a copy of the notice to the tenant under the qualifying lease. Normally service is by post and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

**Section 76: Keeper’s duty as regards documents**

286. This section relieves the Keeper of the Registers of the need to verify certain matters which the Keeper could not reasonably be expected to check.
Section 77: Disputed notices: reference to Lands Tribunal

287. This section gives the Lands Tribunal a broad jurisdiction to resolve disputes in relation to notices. The section applies not only to notices converting conditions into real burdens under Part 2 but also to notices converting reserved sporting rights (section 8) and to exemption and recall notices (sections 63, 64 and 67).

Section 78: Certain documents registrable despite initial rejection

288. This section allows registration, within limits, if the initial rejection of a notice or agreement by the Keeper is judicially overturned.

289. Subsection (1) identifies the notices and agreements in question.

290. Subsection (2) provides that a notice or agreement has to be registered within 2 months of the determination by the court (defined in subsection (6) as either the Court of Session or the Sheriff Court) or the Lands Tribunal. Under subsections (3) and (4), a notice which is registered after the appointed day is given retrospective effect.

291. Subsection (5) provides for Scottish Ministers to specify a period of time within which application has to be made to the court or the Lands Tribunal. A different period may be prescribed for exempt leases. An exempt lease can be recalled at any time (other than a lease exempted under section 64) and so the appointed day for that lease is uncertain. In the normal case where the appointed day is certain the period that is set will depend on the progress made with applications to the court or the Lands Tribunal.

Miscellaneous

Section 79: Amendments to enactments

292. This section gives effect to the minor and consequential amendments in the schedule.

Section 80: Interpretation

293. Subsection (1) gives the meaning of certain terms. The majority of the terms have already been discussed in the Notes to the earlier sections.

294. Under subsection (2) expressions used in the Title Conditions (Scotland) Act 2003 are to have the same meaning unless otherwise provided. Section 122 of the 2003 Act is the interpretation provision. This technique allows a number of terms to be used without further explanation – for example, benefited property, burdened property, conservation body, conservation burden, economic development burden, enactment, facility burden, service burden, health care burden, manager burden, and notary public.

Section 81: Ancillary provision

295. This section provides ancillary order-making powers for Ministers.
Section 82: Subordinate legislation

296. This section regulates the making of subordinate legislation under the Bill.

Section 83: Commencement

297. This section deals with the date of commencement. Different elements of the Bill may be commenced at different times.

Section 84: Short title

298. This section deals with the short title.

Schedule

299. This makes minor and consequential amendments.
Long Leases (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Section 1 to 84 Schedule

Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Jim Hume

1  In section 1, page 1, line 22, at end insert—

< ( ) the whole or part of the subjects of the lease is land which forms part of the common good of a local authority, >
Long Leases (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

Amendment 1 was disagreed to (by division: For 17, Against 93, Abstentions 0).

Long Leases (Scotland) Bill - Stage 3: The Minister for Environment and Climate Change (Stewart Stevenson) moved S4M-03408—That the Parliament agrees that the Long Leases (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
Long Leases (Scotland) Bill:  
Stage 3

10:12  
The Presiding Officer (Tricia Marwick): The next item of business is stage 3 proceedings on the Long Leases (Scotland) Bill. In dealing with the amendments, members should have before them the bill as amended at stage 2, which is SP bill 7A, and the marshalled list, which is SP bill 7A-ML.

The division bell will sound and proceedings will be suspended for five minutes, should there be a division. The period of voting for the division will be 30 seconds.

Members who wish to speak in the debate on the amendment should press their request-to-speak button.

Members should now refer to the marshalled list of amendments. It would be helpful if members would take their seats so that we can have a bit of order in the chamber.

Section 1—Meaning of “qualifying lease”

The Presiding Officer: Amendment 1 is in the name of Jim Hume.

Jim Hume (South Scotland) (LD): I rise to speak to my amendment—the only amendment.

The term “common good” was recognised in Scottish law as far back as 1491, allegedly, and, more recently, in the Glasgow Airport Rail Link Act 2007, the Housing (Scotland) Act 2010 and the Local Government etc (Scotland) Act 1994. There is, therefore, not much doubt that we all know what “common good land and assets” means—assets that are held for the common good of our communities and people.

In a recent letter to the Rural Affairs, Climate Change and Environment Committee, Stewart Stevenson said:

“I do not consider we have enough evidence in relation to the common good that the bill will impact adversely on the public interest”.

However, in evidence, the number of common good properties that may be affected by the bill changed from four last year to six, and later changed to nine. It became clear that there is a lack of knowledge, and therefore evidence, of where common good assets are and how many there may be. That lack of knowledge is evident at national and local government level. Given that the number grew to nine in a short time, there is no guarantee that there are not other common good properties that might be adversely affected by the bill.

The minister told the committee that there is “not absolute certainty” about how many common good assets might be affected. That uncertainty only adds weight to the importance of the general principle of my amendment to protect common good property.

That does not mean that the amendment would put a burden on local authorities. At stage 2, Annabelle Ewing seemed concerned that my amendment would be costly to councils by making them hold a register of common good assets, but the very opposite is the case. The amendment would simply give councils the powers to protect common good assets that are entrusted to them in safekeeping for their communities, not a burden of a new register. It would protect local authorities’ ability to protect common good assets that are entrusted to them in the interest of our communities and the common good of our people.

I will move my amendment to protect common good assets for the common good of our people against any unintended consequences of the bill.

I move amendment 1.

10:15  
The Deputy Presiding Officer (Elaine Smith): A number of members wish to speak. I ask them to take around two minutes.

Alex Fergusson (Galloway and West Dumfries) (Con): I do not think that I will need two minutes.

I still believe that the issue of common good is a matter of considerable complexity and that the number of common good leases throughout the country remains unclear. That concerns me. Unfortunately, I was unable to attend the stage 2 committee meeting on the bill, but, if I had done so, I would have supported Jim Hume’s amendment, which would have resulted in a 5:4 division, which would have been a little closer than the 5:3 division that there was.

I acknowledge that complexities would arise from including an exemption in the bill and understand the minister’s decision not to lodge an amendment in relation to the common good, as it is likely to impact on only a very few cases, but I feel sure that the minister would agree that complexity alone should not be a valid excuse for failing to amend legislation where that is necessary, and we
should not be encouraged to agree to legislation on issues that remain unclear, as they do in a number of common good cases.

I am persuaded that the amendment is in the public interest and I therefore support it.

Claudia Beamish (South Scotland) (Lab): Scottish Labour is glad that the relationship between common good land and ultra-long leases was debated at length in the committee. A considerable amount of evidence was received. In fact, due to the lack of response from some local authorities, the committee pushed matters and in the end received responses from all the local authorities. Seeking and receiving clarification has been in the public interest.

At stage 1, the committee was undecided on the issue of common good exemption. At stage 2, we supported Jim Hume’s amendment from a desire to protect the public interest. The Waverley market issue has now been resolved, and the only long lease that will transfer to a private landlord—Buccleuch Estates—has more than 800 years to run. There would, in effect, be no public interest in exempting the common good for that specific case.

Alex Fergusson: I accept what the member says about the Buccleuch lease in the context of common good cases that we know about, but we know that there is no clarity about the situation. Would she therefore accept that there is still a need to protect the common good? That is what she talked about in discussing the amendment at stage 2.

Claudia Beamish: I agree with the member that there is a need to protect the common good, but I am coming to the point about whether there are likely to be any other ultra-long leases.

The other eight leases will transfer to public ownership, protecting the public interest, so there is not a reason for exemption. After consideration and discussion, Scottish Labour is of the view—that this answers the member’s point—that there is very little likelihood that further parcels of common good land that are subject to ultra-long leases have not been identified and that, if there are any, the identified parcels will not be of great value. Therefore, we are not minded to support the amendment.

Jim Hume: The member will recall that the minister stated that there was uncertainty about whether there were other ultra-long leases and that she herself stated that protecting the public interest was important and that the amendment, which has not changed since stage 2, would

“provide an effective way of doing that in relation to those parcels of common good land with long leases that have been identified.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 16 May 2012; c 940.]

Why on earth has the member done a U-turn at such short notice?

Claudia Beamish: It is not a case of doing a U-turn. We believe that, as all the local authorities have responded to the question on ultra-long leases, it is extremely unlikely that other such leases exist. We decided after much deliberation and discussion within our party and with others that we are not minded to support the amendment.

The Deputy Presiding Officer: Before I call Annabelle Ewing, I remind members that any conversations should take place outwith the chamber. Members may want to catch up with colleagues before the recess, but I would appreciate it if they showed courtesy and did so outwith the chamber.

Annabelle Ewing (Mid Scotland and Fife) (SNP): On the issue of U-turns, it is important to note that the committee unanimously concluded at stage 1 that it did not wish to include in the bill a provision on the common good. Perhaps Mr Hume should reflect on that for his further comments.

I said at stage 2 that an equivalent amendment by Mr Hume would introduce legal uncertainty in light of the lack of clarity on what is or is not—or, indeed, never could be—regarded as common good land, given that there is no definitive list of such land. That was my key point.

It should be recalled what the bill’s fundamental purpose is, which is the simplification of Scots law on property by the automatic conversion on a specified date to ownership of land that landlords, including local authority landlords, have already granted de facto ownership of to tenants holding that land on a long lease as defined. The proposed amendment would cut across that fundamental purpose and create legal uncertainty.

It is perhaps helpful to say to Mr Hume and Mr Fergusson that I understand that they wish to have a discussion on the common good, as we all did in the committee, and find a vehicle for taking it into account, but the bill is not that vehicle, for the reasons that I have stated. The vehicle may be the newly announced proposal for a community empowerment and renewal bill. The consultation document on the proposal has made it quite clear that the issue of common good is to be considered. I suggest to the two members that that proposed bill would be a better vehicle for consideration of the more general operation of common good issues.

The Deputy Presiding Officer: I call the cabinet secretary.

The Minister for Environment and Climate Change (Stewart Stevenson): Thank you for the promotion. [Laughter.]

Alex Fergusson: It is only a matter of time.
Stewart Stevenson: There is not long enough, but there we are.

Common good has been regularly raised as an issue throughout the bill’s proceedings. There has been some criticism that the information provided by local authorities to the Government of the number of ultra-long leases of common good land has changed as the bill has gone forward. That has been referred to in the debate. However, I do not think that that is surprising. The landlord in most ultra-long leases has little involvement in the property. Typically, the rental is very low—it is generally under £5 a year and it is often not collected at all. Therefore, local authorities have little day-to-day interest, financial or otherwise, in ultra-long leases where they are the landlord. Other landlords of ultra-long leases also have little day-to-day interest in them. That is, in brief, the point of the bill.

However, given the importance of common good land, we have gone to some lengths to obtain information from local authorities. Authorities have identified nine ultra-long leases of common good land. The three in Dumfries and Galloway, which have been referred to in the debate, are for 999 years and were let some 200 years ago. That is a very common length for an ultra-long lease. The lease in South Ayrshire is to a trust and relates to a museum. In one of the leases where Glasgow is the landlord, another local authority is the tenant. The two parkland leases in Glasgow seem to relate to recreational facilities and to police activities. The lease in Edinburgh is very small and covers a few square feet that gives someone access to their house. The lease in Stonehaven is to a recreational body.

The key point is that ultra-long leases should convert under the bill, unless there is a good reason why they should not. It appears that, in leases of common good land, the real interest is already held by the tenant, which is in line with what we would expect in ultra-long leases. Compensatory and additional payments are payable by tenants to landlords under the bill. We will write to local authorities to say that any such payments relating to common good land should be allocated to the common good fund. Indeed, we have already prepared a draft of that letter for issue if the bill passes stage 3 and royal assent is granted.

As I said at stage 2, we have specific concerns about Jim Hume’s amendment. Well intentioned though it is. It would exempt all common good leases, even those to a trust or a local authority. It is not clear from the amendment how common good status would be established, given that Registers of Scotland would not know that from the deeds that are registered with it.

It is also not clear what would happen if an ultra-long lease that had converted under the bill was subsequently found, after the appointed day, to be part of the common good fund.

As the bill stands, it is possible for any compensatory and additional payments that are received by the authority in respect of the land to be transferred to the common good fund. If the land converts and then it is discovered that it should have been exempt, it is not clear who would own the land. There are real difficulties there.

Mr Hume talked about lack of evidence—I acknowledge that there is uncertainty. We cannot eliminate that uncertainty today. Mr Fergusson said that the whole issue should be reconsidered. I agree with him.

I recognise the general points about the common good that were raised during the passage of the bill. We should reconsider the issue via the consultation on the community empowerment and renewal bill, which was launched on 6 June. The consultation asks specific questions about the common good. That provides a forum for examining this subject to ensure that all its undoubtedly complexities—we have established that this is quite a complex issue—are identified so that an appropriate solution can be developed.

It is worth reminding members that, under the bill, the appointed day is two years after the coming into force of the relevant section, so it is some distance in the future. It ought to be possible to consider this in the context of the community empowerment and renewal bill before we reach the appointed day.

We will continue to work with local authorities and others on updating common good registers. It is important that local authorities have good information on this subject and we encourage them to continue to improve their information. However, the Government cannot support the amendment and I invite Jim Hume not to press it. If he does press it, I invite the Parliament to reject it.

The Deputy Presiding Officer: I will take this opportunity to put you back in your proper place—thank you, minister.

Jim Hume: Thank you, Presiding Officer; it is always good to see Stewart Stevenson put in his proper place.

All joking aside, I think that this has been an interesting debate. There is still some controversy—[Interruption.]—I was getting a bit of an earache in my left ear there, apologies for that. If I may continue—[Interruption.]
The Deputy Presiding Officer: I would appreciate it if you could, as we are running out of time.

Jim Hume: It has been an interesting debate. I appreciate the minister looking into the issue and taking the matter seriously. I still have concerns. The most bizarre part of the whole debate has been the 11th hour U-turn by the Labour Party. Last month, at stage 2, Claudia Beamish said in reference to this amendment that “it is important to protect the public interest, and the amendment would provide an effective way of doing that”— [Official Report, Rural Affairs, Climate Change and Environment Committee, 16 May 2012; c 942.]

Margaret McDougall also stated that the amendment would be a good way of protecting assets.

Claudia Beamish: Does the member not accept that there have been developments since stage 2—that is what I highlighted earlier.

Jim Hume: The only development that Claudia Beamish mentioned was that she had talked with her colleagues and some others. There has been no extra evidence since stage 2 and uncertainty remains over how many common good assets there may be.

Annabelle Ewing said that there would be legal uncertainty; that there is no definitive list of common good land; and that other bills might address the issue. However, we have to address issues using the bills that are before us. I repeat that local authorities could have used an exemption in this bill to protect common good assets.

I admit that Stewart Stevenson has been helpful. He mentioned that any payments that occur should go back to common good funds and he said that he would write to local authorities about that. That is welcome but, of course, it does not guarantee that local authorities will do it. Therefore, at the risk of being the most unpopular member of the Scottish Parliament—at least this morning—I will press amendment 1.

The Deputy Presiding Officer: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. I suspend the meeting for five minutes.
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Easter) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Easter) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
Matheson, Michael (Falkirk West) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McCullough, Margaret (Central Scotland) (Lab)
McDonald, Mark (North East Scotland) (SNP)
McDougall, Margaret (West Scotland) (Lab)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (SNP)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Stuart (West Scotland) (SNP)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Paton, Gil (Clydebank and Milngavie) (SNP)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urguhart, Jean (Highlands and Islands) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 17, Against 93, Abstentions 0.
Amendment 1 disagreed to.

The Deputy Presiding Officer: That ends consideration of amendments.

Long Leases (Scotland) Bill

The Deputy Presiding Officer (Elaine Smith): The next item of business is a debate on motion S4M-03408, in the name of Stewart Stevenson, on the Long Leases (Scotland) Bill.

Before I invite the minister to open the debate, I call the Cabinet Secretary for Rural Affairs and the Environment to signify Crown consent to the bill.

The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead): As the real cabinet secretary, I have pleasure in saying that, for the purposes of rule 9.11 of the standing orders, I advise the Parliament that Her Majesty, having been informed of the purport of the Long Leases (Scotland) Bill, has consented to place her prerogative and interest, so far as they are affected by the bill, at the disposal of the Parliament for the purposes of the bill.

The Deputy Presiding Officer: Many thanks, cabinet secretary.

I call Stewart Stevenson to speak to and move the motion. Minister, you have 10 minutes.

10:37

The Minister for Environment and Climate Change (Stewart Stevenson): Although this is quite a lengthy bill, its key principle is very simple: it converts to ownership ultra-long leases, which are defined as those that are more than 175 years long and which, in the case of residential property, have more than 100 years left to run at the appointed day or, in the case of non-residential property, more than 175 years left to run.

Under the bill, renewals that the landlord is obliged to grant are taken into account when calculating the duration of leases. Examples of that can be found in Blairgowrie. We estimate that the bill will cover around 9,000 leases, but it excludes leases in which the annual rental is more than £100 and in which, therefore, the landlord has retained a genuine interest.

The bill is a modest simplification of property law. Although ultra-long leases are akin to ownership, they are not quite ownership and that can cause problems. For a start, there may be inappropriate conditions in what are often quite old leases. Lenders might not fully understand the precise nature of the title, which might make it harder for the tenant to obtain a loan using the property as security. Moreover, conveyancing lawyers have told us that they groan at the sight of an ultra-long lease, as it makes completing a transaction relating to the property much more complex.

Reform was therefore needed. At the end of 2006, the Scottish Law Commission produced the...
report that we are now seeking to implement. As the Law Commission said when it issued its report, the aim is to
"bring law and reality into line by converting such leases into ownership."

The implementation of the report is part of the implementation of a series of reports on property law by the Law Commission. The work includes the Abolition of Feudal Tenure etc (Scotland) Act 2000, the Leasehold Casualty (Scotland) Act 2001, the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. Indeed, work on the reform of property law and the abolition of feudal tenure has been going on for some time. For example, the Land Tenure Reform (Scotland) Act 1974 prohibited new feu duties, conferred a right to redeem feu duties voluntarily and provided for the compulsory redemption of existing feu duties when a property was sold. So this bill completes an aspect of property law reform. I take this opportunity to record my thanks to the Law Commission for its work on property law reform.

We have, of course, just appointed a new chair of the Law Commission: Lady Clark of Calton. Lynda Clark will be known to many of us, and the Government looks forward to working with her on the reports that the commission produces and on helping to implement those reports.

The value of the commission’s work is shown by the detail of the bill. I said that the bill has a simple concept at its heart—conversion to ownership—but it has to protect landlords’ rights, too, which is one of the reasons why it is fairly lengthy.

The bill makes provision for a number of leasehold conditions to convert to real burdens in the title deeds; it allows landlords to preserve sporting rights; it makes provision for compensatory payments to be made, based on the rent that the landlord will lose; and it makes provision for additional payments to be made, to reflect other rights that the landlord may lose.

In many cases, the detail of the bill may not have much impact on individual leases. On sporting rights, the commission noted in paragraph 5.13 of its report:

"Although not common in the context of ultra-long leases, the rights where they exist may be of considerable value."

The typical annual rental in an ultra-long lease is less than £5, so the compensation for the loss of rent will, inevitably, not amount to very much either. The commission noted in paragraph 6.28 of its report that cases where additional payments will be claimed
"are likely to be rare."

However, the provisions will be needed in some cases and they are there to protect landlords’ rights.

There has been vigorous debate about some of the provisions of the bill when it was considered during the previous parliamentary session by the Justice Committee and when it was considered this time around by the Rural Affairs, Climate Change and Environment Committee. The bill has been improved as a result. The scrutiny that the bill received at stage 1 showed the benefit of the Parliament’s processes, and we have had the benefit of two excellent stage 1 reports.

Before the bill was introduced to Parliament again in January, we made some amendments to reflect the Justice Committee’s report. We added an exemption for harbours, we clarified the exemption for pipes and cables, and we made provision to allow landlords to register an exemption where the rental is over £100 a year. That reflects the fact that the lease may include variable rental, which can mean that the annual rent paid is more than £100 a year.

In this parliamentary session, further amendments have been made to reflect the evidence that was taken. We have amended the requirement in relation to the unexpired portion of a lease, to draw a distinction between residential and non-residential leases; and we amended section 2 to reflect the fact that the annual rent payable under a lease can be varied by a registered minute of variation or agreement.

I appreciate that much has been made about the common good—the debate that we have just had reflects that. The Government is taking very seriously the issues that were raised in that debate. However, we are very reluctant to cut across the general principle in the bill, which is that ultra-long leases akin to ownership should convert to actual ownership.

The bill is part of wider work that has been carried out to reform property law. Clarifying the law in this way will make life easier for tenants in ultra-long leases and lenders and solicitors engaged in transactions relating to the properties. Ultimately, I presume that its simplification will relieve many transfer transaction costs. The bill is not magically going to transform the world, but I think that I can say without fear of contradiction that the simplification will be welcomed by practitioners in the field.

I commend the bill to Parliament and look forward to the concluding debate.

10:45

Claire Baker (Mid Scotland and Fife) (Lab): I am pleased to take part in this stage 3 debate. As
the parliamentary term comes to an end there is a cluster of stage 3 debates, although we are more concise this morning than we were yesterday. If it had not been for Jim Hume raising the thorny issue of common good land, there is a chance that we would have had no amendments to the bill at all.

After our recent cautious approach to the Agricultural Holdings (Amendment) (Scotland) Bill, in relation to which we took a wait-and-see approach on many issues, the rural portfolio may be starting to get a reputation, although the minister might welcome that.

Although we did not support Jim Hume’s proposal today, I welcome the debate that we had on the issue of common good land, which I am sure will be discussed in more detail this morning. I thank the Rural Affairs, Climate Change and Environment Committee for its scrutiny of the bill, and I thank all the witnesses who submitted evidence.

The bill has been thoroughly scrutinised, having gone before the Justice Committee in the previous session of Parliament. Changes were made to the previous piece of legislation to take into account the concerns that were raised during that process; I imagine that that has played a role in our having a limited number of amendments this time round.

The disadvantages of ultra-long leases are evident. The landlord can place restrictions and other obligations on the tenant, although only a very small income stream is provided to the landlord and the length of the lease means in effect that the tenant is the owner and the landlord has very little real interest. On the appointed day in 2015, all appropriate ultra-long leases will convert to ownership. That all sounds quite simple, but the bill is a technically complex piece of legislation, and the contribution from all parties should be recognised.

Our stage 1 debate raised many points to which we returned at stage 2, most notably the concerns around Waverley market. Many members called for a solution to the prospect that Waverley market would transfer from public authority to private ownership. The City of Edinburgh Council argued that that would severely compromise the public interest in the site, and that its location within a United Nations Educational, Scientific and Cultural Organization world heritage site meant that the transfer of ownership would not be appropriate. It also argued that the—admittedly unusual—terms of the lease meant that the grasssum should be taken into account as rent to move the site out of the scope of the bill. Others argued that the site should be recognised as common good land, and as such should be exempt from the provisions in the bill.

Initially, the Scottish Government appeared to be reluctant to accept any of those arguments. Although the minister was technically correct in his view of grasssum, for example, I and other members were pleased to receive at stage 1 a commitment from him to look at the detail of that particular case in order to find a solution. The minister’s solution appeared at stage 2, although the fact that no member of the committee asked any questions about his amendment suggests that the minister’s “relatively lengthy remarks”—as he referred to them—did not explain the amendment’s significance in plain language.

I admit that I was not at the committee meeting, and it took me a few readings of the Official Report to appreciate the amendment’s significance for Waverley market. However, it appears that, by splitting the conditions for residential and non-residential leases and changing the length of time left on the lease of non-residential leases from 100 years to 175 years, a neat solution was found that has little impact on other long leases but results in the City of Edinburgh Council retaining ownership of Waverley market.

Common good land continues to present challenges for public bodies and communities. Whenever the Scottish Parliament considers issues of land ownership, persistent frustrations with common good land arise in relation to identification, ownership and use of the land.

With regard to the bill, neither the Justice Committee nor the Rural Affairs, Climate Change and Environment Committee came to a firm decision about the best way to proceed on exemption during their stage 1 discussions. Although we did not support Jim Hume’s amendment today, for reasons that Claudia Beamish identified, I appreciate his focus on retaining the public interest.

Jim Hume (South Scotland) (LD): Claire Baker mentioned that Labour changed its mind because of new evidence from Claudia Beamish. Can she repeat what that new evidence was?

Claire Baker: There was a discussion on Waverley market at stage 2. Once it became clear that the amendment exempted Waverley market, that was an important factor. I will go on to explain the reasons why.

The narrowness of the criteria in the bill—principally, the length of the lease and the amount of money involved—limits the impact on common good land. Although we accept that the minister cannot be definitive about the amount of land that may be affected—Alex Fergusson raised that point—and that the complexities of common good mean that we probably never can be, I accept that if further land is identified that will be of limited significance.
I was not entirely convinced by the minister’s argument on legal challenge, as that would depend on additional identification. I have a level of confidence that the level of legal challenge would be extremely limited, if there was any such challenge at all, although given that the number of affected parcels of land continually increased—albeit that it never reached double figures—that confidence may be misplaced.

**Stewart Stevenson:** I suspect that most members will have experience of constituency work that involved considering whether a piece of land in their community was common good land. The concern that arises is that if we were to adopt the approach to which Claire Baker refers, it might create a charter for anyone to use the process to challenge almost any disposal of property that a council might make, which would hold up many projects that we would all wish to see progress. It would introduce uncertainty and, potentially, substantial expense for no substantial public benefit. Dealing with matters in the way in which we plan to do in the consultation that is open—to which I encourage everyone to respond, by the way—is probably a better way to proceed. We all agree that the issue is complex and not well understood.

**Claire Baker:** Reconciling the Government’s confidence that only eight pieces of land were affected with its argument that legal challenges might arise in the future was what I had difficulty with. However, now that Waverley is out of the equation, I believe that the principle of protecting the public interest is upheld, in the vast majority of cases, by the transfer from public to public authority.

Claudia Beamish correctly raised concerns about the transfer of parcels of land from Dumfries and Galloway Council to Buccleuch Estates, which will be a transfer from public to private ownership. In that case, the length of the lease impacts on our understanding of the public interest. By the time the lease expires, I am not confident that there will still be a Dumfries and Galloway Council to return the land to. We are dealing with the consequences of decisions that were made in the early 1800s and although that may not be the outcome that we desire, we are limited in how the situation can be resolved. In that context, the minister’s comments that the bill is an attempt to bring law and reality into line are relevant.

The law and practices surrounding common good land, its use and its identification are tangled. As MSPs, we are all aware of those challenges. In evidence to the committee, the representative of Brodies LLP said:

“It seems to me that common good has been an issue for a few hundred years and is a matter that is not going to resolve itself. If it were to receive the attentions of the

Parliament, that may be a favour to all concerned with it.”

[Official Report, Rural Affairs, Climate Change and Environment Committee, 22 February 2012; c 624.]

The minister may wish to reflect on that point.

Finally, although the bill does not address this issue, there are concerns about implementation and the role of the Registers of Scotland. The fact that a specific exercise will not be undertaken to update the land register of Scotland to reflect the conversion of ultra-long leases to ownership raises concerns that the register will not be accurate and correct. We recently passed the Land Registration etc (Scotland) Bill and it seems incongruous that we are now passing a bill that is likely to add to the inaccuracy of the land register. The Economy, Energy and Tourism Committee called for further information to be provided on plans to complete the register, including a target date for completion of the register. That call reflects concerns about the accurate inclusion of ultra-long leases once they are transferred to ownership. Perhaps the minister can provide more detail on that in his closing speech.

The bill makes a contribution towards Scotland’s land laws becoming more transparent and more relevant to modern expectations.
left to run. The main policy rationale for the bill is that a tenant’s right under a long lease is akin to a right of ownership. The bill therefore provides for such a right to be automatically converted to a right of ownership, with compensation being paid to the former landowner if necessary.

I apologise for the repetition, Presiding Officer, but I guarantee that it will not be the last bit of repetition that we hear in the debate.

I am pleased that the bill has passed through the Parliament relatively swiftly and with little contention, but a couple of points continue to be grounds for a little concern. In his opening remarks, the minister described the bill as modest, and so it is, but as he acknowledged, it is also complex. There are a lot of complexities in the issue, and where there is complexity, there is concern.

One of those issues is the common good. I am sorry that Jim Hume’s amendment was defeated this morning. I remain somewhat mystified as to Labour’s change of position, but it is not the first time that we have seen such a thing. As a result of the defeat of the amendment, the bill is not as tidy as it could have been. Members can call me old fashioned if they will, but I do not believe that we should be in the business of passing untidy legislation.

The second issue about which I remain to be convinced—Claire Baker touched on it—is the lack of a statutory requirement for Registers of Scotland to update the land register to reflect the change in ownership once an ultra-long lease has been converted to ownership. In response to my intervention on the issue during the stage 1 debate, the minister tried to appease me by arguing as follows:

“Registers of Scotland has decided not to carry out a bespoke exercise to update the land register as a result of the bill as it now stands, because updating the land register is not required for the bill to work.”

He went on to say that the conversion

“will happen independently of any action that is taken by Registers of Scotland.”—[Official Report, 25 April 2012; c 8366.]

I remain concerned that, as a result of that, the land register will wrongly show the original landlord as the owner and the new owner as the tenant. Surely, if only for the sake of the accuracy of Scottish property law, it is important that the register can be relied upon, yet if there remains no requirement to update the register, it cannot be.

The minister mentioned the Land Registration etc (Scotland) Bill, which was recently agreed to, and indicated that perhaps that would be the correct vehicle through which to address the issue. I understand that his officials will work closely with Registers of Scotland to ensure that the land register is kept as up to date as possible. I welcome that, but even if, as the minister stated in the stage 1 debate, the two pieces of legislation will work in tandem, I remain to be convinced of the reasoning behind the refusal to make a particular provision in the Long Leases (Scotland) Bill merely because of the possible complexity involved. Others might expand on or otherwise comment on the issue during the debate, but I cannot accept that complexity alone is a reason not to address an issue.

Stewart Stevenson: There are perhaps two things to say on the subject. Similarly to the position with the abolition of feudal payments, which essentially crystallised on the sale or disposal of property, transfer of ownership at a later date will ensure that, from that point onwards, the register is clear. However, even today, the register will note the interests of the tenant and landlord. Lawyers are perfectly aware of the bill and will be aware that the ownership has transferred. Also, it will be open to the tenant, if they wish to have the register updated, to take action to do that.

The effect is to distribute the work over a much longer period, so we will have a much more cost-effective solution to the issue without creating unnecessary legal issues.

The Deputy Presiding Officer (John Scott): Briefly, please, Mr Fergusson.

Alex Fergusson: I am grateful to the minister for that explanation. I hear what he says. The Presiding Officer has indicated that my time is up, so I will reflect on that before I make my closing remarks.

For the time being, I am pleased to note that the bill has got to stage 3 with relatively little contention. I welcome the fact that the end of the feudal system is now within our grasp.

10:59

Annabelle Ewing (Mid Scotland and Fife) (SNP): As the Rural Affairs, Climate Change and Environment Committee’s deputy convener, I am pleased to speak in the debate. Our committee was the lead committee on the bill in this parliamentary session, but I pay tribute to the Justice Committee in the previous session for its hard work. That committee secured significant progress on a similar bill but could not complete that work because of what could be regarded as an immutable deadline in this place—an election. I say well done to that committee.

As we have heard, the bill will complete a substantial piece of work by the Scottish Law Commission on the reform of Scots property law. The key element of that reform was the abolition of
Parliament.

The bill will facilitate the objective that was set forth—abolishing the feudal system—by converting to ownership instances of what could be termed de facto ownership, in which a tenant holds over land a registered long lease, as defined in the bill. That is akin to being the owner of the land, but the tenant is not the heritable proprietor, as we have heard.

Conversion will be automatic if the relevant thresholds are passed—they are defined as a rent of more than £100 and, as we have heard, a lease duration of more than 175 years with 100 years or more left to run for residential long leases or with more than 175 years left to run for non-residential long leases. It is important to bear it in mind that a tenant may opt out of automatic conversion. Compensation will be payable to the landlord, although—in keeping with the terms of long leases—the compensation will not be a hugely significant sum.

Those are the bare bones of the bill. As we have heard, some amendments were made to it. As the minister said, they have served to improve the bill’s drafting. We have heard about the contentious part of the debate and in particular about the common good—that was discussed at stage 3 this morning. It is absolutely clear that, if we have an automatic trigger date for the entry into force of the key provision on automatic conversion and if we have a system in which the keeper is not on the face of it in a position to know whether land is common good, it cannot be in the public interest that legal uncertainty could be created by asking who the owner is, if that is not the tenant who would become the heritable proprietor on automatic conversion.

As a conveyancing lawyer in a previous life, I understand absolutely the mechanics of how the system would work in practice, and I know that the proposal in the stage 3 amendment would not have worked in practice. I am pleased that the Labour group changed to a much more sensible position and listened to the debate, and I am also pleased that the Parliament rejected the unworkable amendment that was lodged.

I am pleased to support the bill, which represents a significant further step in reforming Scots property law. That is important, and it is very important to practitioners—as I said, I was one in a former life. I commend the bill’s tenets to the Parliament.

It is estimated that there are 9,000 ultra-long leases in Scotland that the bill could affect, but getting an exact figure is difficult. I welcome the cabinet secretary’s responses to the concerns that were raised at stages 1 and 2—[Interruption.] I am sorry; I have promoted the minister again. However, I feel that a few issues with the bill remain. We will need to monitor how the bill interacts with the Land Registration etc (Scotland) Bill. I believe that Registers of Scotland needs to update the land register, so that it holds an accurate record that reflects the conversion of ultra-long leases to ownership under the Long Leases (Scotland) Bill. However, I accept the minister’s assurance—he has been demoted again—that the Long Leases (Scotland) Bill will not require any further amendments to reflect that and that the land register will be updated independently.

I note that there are still concerns surrounding common good assets. As the issue is extremely complex, that is of little wonder. I welcome the minister’s comments this morning, because there is still a lack of confidence on accuracy where common good assets are concerned. For example, there was some confusion in Kilmarnock recently over whether the land on which the new athletics centre at Queen’s Drive was to be built was common good land. In 2010, the matter was discussed by the council and the idea of a long lease was floated. The council then decided that it was not common good land and that the common good land was on the other side of the river. The latest information that I have, which I received yesterday, is that it is common good land. Having a comprehensive list of what is and is not a common good asset would help with such issues in the future, and there would be cost savings in the long run.

I welcome the minister’s agreement that it would be useful to compile a register of all common good assets at some point in the future. In recognition of the fact that that will be an extremely difficult and expensive exercise for local authorities, the Scottish Government should work with councils to find better ways to collect the information. I
wonder whether funding support could be found to make that happen.

I welcome the bill, as it dispenses with the archaic system of ultra-long leases, but we need to ensure that Registers of Scotland updates the land register.

11:06

Graeme Dey (Angus South) (SNP): When I learned that I was to serve on the Rural Affairs, Climate Change and Environment Committee, I expected to expand my—at that stage—limited knowledge of farming, fishing and environmental issues. I am not sure that I expected to deal with a bill on long leases, and I am not sure that my committee colleagues would have expected to do so either. The subject matter, however, has proved fascinating, as were the committee’s evidence sessions even if they failed to provide compelling reasons to amend the bill to exclude common good land from its reach; at the outset, it might have been thought that we would do that.

It is believed that only nine out of an estimated 9,000 ultra-long leases in Scotland are of a common good nature, but it is a case of “it is believed” rather than “the facts show”. Whatever else the process of getting to stage 3 has demonstrated, it has shown that councils are some way short of being on the case when it comes to understanding the common good portfolio. Members should not just take my word for that, but should consider the evidence that was given to the committee by Bill Miller, the property management and development manager for the City of Edinburgh Council.

Mr Miller revealed that land campaigner Andy Wightman, in researching his respected book, “The Poor Had No Lawyers”, wrote to all councils in Scotland for details of their common good properties. The council responded, but with what Mr Miller acknowledged was “very poor information”. He went on:

“Mr Wightman replied to us and said, ‘But what about’ and listed a number of properties that he felt should be common good and which were not on our register. At that point, we carried out a major exercise to look at those properties and ... agreed that a number of the properties that he suggested should be common good”.—[Official Report, Rural Affairs, Climate Change and Environment Committee, 29 February 2012; c 653.]

Mr Miller expressed the view that, following Mr Wightman’s contribution, the council now has “a fairly good register” but admitted that there remained a “however”.

I cite the example of City of Edinburgh Council not to have a pop at our capital city—indeed, Mr Miller’s candour was very welcome in informing the committee’s deliberations—but to illustrate the complexity of the issue. Given that the task involves going back to the 12th century in seeking to ascertain the status of properties, as has happened in Edinburgh, the process is clearly full of challenges. It is interesting that witnesses representing other local authorities in Glasgow and Fife also admitted that they could not guarantee the absolute accuracy of their registers.

We were told that it was thought that

“most of the significant common good properties in Glasgow are on the common good register”.—[Official Report, Rural Affairs, Climate Change and Environment Committee, 29 February 2012; c 653.] They did not claim that the list is comprehensive.

As the bill has proceeded, a number of changes were made to what we were told regarding the number and the specific nature of common good assets that are subject to long leases. By my recollection, the number started out as five, went down to four and ended up at nine. On the way from four to nine, we were told that Rouken Glen park fell into that category only to be told, subsequently, that it did not. That is just one reason why the bill could not make an exemption for common good land.

The minister made a point during a committee evidence session, and reiterated it today, regarding what would happen if the common good exemption that has been mooted was agreed to. What would happen if a lease was converted under the bill and then the council in question discovered that the asset had been common good in nature and so should not have been converted? Who would own that asset?

Claire Baker questioned the extent to which legal challenge might come forward. Ahead of stage 3, I posed that question to a lawyer who specialises in land matters. His reaction was informative: a broad smile spread across his face at the prospect of arguing the case backwards and forwards, and I am sure that I saw pound signs in his eyes.

I understand the genuine motives behind Jim Hume’s amendment, but the Parliament was right not to exempt common good long leases, with the uncertainties that that might have thrown up. The case for exempting common good land from the reach of the bill was not made, just as happened with the session 3 bill on the same subject at the Justice Committee. That is not to say that we do not have a general issue to address with common good, and I welcome the fact that the status of common good will be included in the consultation on the community empowerment and renewal bill.

As the minister and others have acknowledged, the latest process highlights the wider issue of just how accurate information about common good is. That requires to be addressed—
The Deputy Presiding Officer: I would be grateful if you could close, please.

Graeme Dey: As the Rural Affairs, Climate Change and Environment Committee recommended in its stage 1 report, the Scottish Government should work together with local councils and relevant professionals to identify better ways to gather, verify, record and maintain common good information.

11:11

Jim Hume (South Scotland) (LD): I thank fellow members of the Rural Affairs, Climate Change and Environment Committee for all their hard work on the bill. I also thank, of course, the clerks, the Scottish Parliament information centre, the Scottish Law Commission, which has been mentioned, and our witnesses, too.

The Long Leases (Scotland) Bill has been fairly consensual, although I thought that it was more consensual until about half an hour ago. The bill goes a long way towards addressing remnants of what may be called feudalism in Scotland. I say “fairly consensual” because the SNP Government did not budge in its opposition to my amendment, the purpose of which was to give further protection to common good assets. I believe that my amendment would have helped to do that.

Even though other parties recognised the threat of the bill’s unintended consequences on common good, the SNP dug in its heels on the matter and has hardly taken into consideration others’ views. That is not quite the consensual politics that we were promised at the beginning of this parliamentary session.

Annabelle Ewing: Consensual politics are all well and good, but if the fundamental basis of the amendment can be challenged on the grounds of legal uncertainty—as has been explained at some length—why on earth would people want to promote that?

Jim Hume: The uncertainty is the difference between our two views on the matter; I will clarify that point later.

From the start of the bill proceedings, it was clear that there was a lack of knowledge on the number of common good properties that may be affected. That number rapidly increased, and the minister has stated in evidence and again today that there can be no “absolute certainty” about the number. That leaves me baffled about why the Government decided not to yield to the concerns that were expressed by other parties in the political world and others who gave evidence.

Alex Fergusson, too, was baffled, as was I, at Labour’s U-turn. Claudia Beamish stated in committee:

“I feel that it is important to protect the public interest, and the amendment would provide an effective way of doing that”.

Margaret McDougall said that

“if common good land is not excluded, common good land and assets will pass to others over time and the common good will be lost to communities forever.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 16 May 2012; c 942, 943]

They said that on 16 May and it is now just the end of June.

When Claire Baker was pressed on why Labour had changed its mind, she referred to the Waverley market evidence. My amendment was not to do with that; it concerned the general principle of protecting common good assets and any that are unknown to us. Graeme Dey made it clear in his speech that there is still a great lack of knowledge about common good assets and where they may be. However, we are where we are.

The Liberal Democrats will support the bill, even though it could have been dramatically improved. I am aware that there will be a compensation payment for a landlord who loses land that is affected by the bill. That is welcome. The Government intends to write to all local authorities to recommend that they put any funds gained from a long-term tenant gaining ownership of the common good asset to the common good fund.

Of course, as I said before, that is only a recommendation, not a must. I wonder how we can compensate fully for a common good asset that might have been held in trust since 1491 when the Scots Parliament passed the original Common Good Act 1491. Nevertheless, the Liberal Democrats will support the bill. It will go a long way towards ending what could be called feudalism in Scotland. I note how surprised I was to find out that the Government estimates that around 9,000 leases in Scotland could be affected by the passing of the bill, so I hope that we do not find ourselves in the future regretting not supporting the amendment to exempt common good assets from the bill.

11:15

Rob Gibson (Caithness, Sutherland and Ross) (SNP): As the convener of the Rural Affairs, Climate Change and Environment Committee, which has dealt with the bill and amendments, I know that we have changed and improved an important bill to add to the modernisation of the law of property and land in Scotland. It is a vital aspect of a modern nation’s ability to know who owns what and whether ownership can be conferred on people who have for many years been virtual owners. Making actual owners under the legislation is quite an important development.
I say that because we have been discussing the issue for a long time. In the excellent Scottish Parliament information centre briefing, Sarah Harvie-Clark noted that, under Lord Guthrie, the Scottish leases committee did a search in the register of sasines for the period 1905 to 1951, the results of which disclosed 13,151 such leases, almost 9,000 of which were found to have more than 100 years still to run. That shows for how long there has been concern about long leases. Indeed, I recall debates on Scottish National Party policy formation in the 1970s and conference resolutions by the late Willie MacRae and others that recognised that people have suffered from not being able to borrow on the basis of their assets. The SNP has recognised the need to change that. Vetoes from the House of Lords and others, and lack of time in London, mean that it is only the establishment of the Scottish Parliament that has allowed us to tackle any of those problems.

A comprehensive approach to the problem has thrown up the difficulties of having a register that matches our aspirations. After stage 2 of the bill, we received responses from the minister about books of council and session, which refer to very old arrangements for the ownership and leasing of land, and that made us realise how much had to be modernised and how complex the process would be.

Previous Governments have tried to find out who owns what in the country. In 1872 and then in 1910, a survey was conducted throughout the United Kingdom of who owned what. That was with a view to land value taxation, which the then Government was considering.

We need to think about two aspects of who owns what. The cost of bringing the land register up to date is a matter of concern, but it is worth considering the fact that people were compelled to inform past Governments about what they owned. It would be worth our looking at some way of people providing us with the information without it being a cost to the public purse. That might be difficult, but we must consider it because we are not going to complete our knowledge without it.

Up to 9,000 householders will benefit most from the legislation, and I always welcome more people having a direct stake in the land of Scotland and the properties thereon. It improves their grasp of their own country. If the bill goes a little way, that makes me delighted. It goes hand in hand with other legislation and I recognise that the proposed community empowerment and renewal bill will deal with the common good issue if people choose to raise it. In the meantime, I welcome the changes to the Long Leases (Scotland) Bill made by the Rural Affairs, Climate Change and Environment Committee and the Parliament, and I hope that it passes.
have raised, we will support the passing of the bill this evening.

11:23

Claudia Beamish (South Scotland) (Lab): I am pleased to close on behalf of Scottish Labour, and as a member of the Rural Affairs, Climate Change and Environment Committee, because the bill contributes in a limited way to moving Scotland further away from feudalism and closer to a system of property law that recognises where rights and responsibilities should fairly lie.

In the policy memorandum to the bill, the Scottish Government highlighted some of its benefits. It stated:

“Ultra-long leases amount to virtual ownership. It would simplify property law in Scotland to convert them to ownership.”

As highlighted by the Scottish Government, the bill will also further minimise any threat of title raiders—a point that has not yet been raised in the debate. It will also ensure that property rights lie where they should lie, in the 9,000 or so relevant cases. The Scottish Law Commission stressed that ultra-long leases are “barely distinguishable from feus”. As highlighted in previous stages, that can juxtapose very small rents with unreasonable and sometimes sudden obligations on the tenant.

Alex Fergusson stressed that the bill marks the end of the feudal system. I wonder whether that is the case—I very much hope that it is.

Rob Gibson stressed the importance of clarity for those who have been tenants in ultra-long leases, and said that the ownership of such property is an important step forward.

It is also important that there is clarity about ownership in relation to the land and property in question, due to the difficulties of seeking investment for anyone holding an ultra-long lease.

There will no longer be concern about the uncertainty of compensation for improvements at the end of an ultra-long lease, and no anxiety about the issue of renewal of a long lease in that category.

Annabelle Ewing highlighted the fact that tenants can opt out, which is also significant.

The rarity of ultra-long leases means that in some places in Scotland it can be the case that it is hard to find a legal practice where there is knowledge of them. The passing of the bill will end that concern.

The minister explained that land register arrangements will be distributed over time. Although Scottish Labour acknowledges the concerns that are connected with that, we note the fact that—if I understand the situation correctly—it is possible for a registration to be made through choice rather than only through time, as it were.

The issue of ownership, which is usually assumed in relation to tenements—again, something that is not mentioned in the bill—will be resolved, as ultra-long leases will no longer exist. That will end such complications. The externalities that could occur in that respect—if, for instance, a group of owners wished to improve a tenement and the long lease was in an unclear position—will now be resolved.

Since the bill was considered by the Justice Committee in the previous session of the Parliament, ports and harbours have, rightly, been exempted if there is a statutory port authority. That follows on from evidence that was given by the Peterhead Port Authority. Further, the pipes and cables issue, which could cause complications for owners, has been resolved.

There was much discussion at earlier stages about the exemption of common good land. In its stage 1 report, the committee argued that “common good land is an extremely complex area.”

Many, including Graeme Dey, have highlighted that today.

We spent a great deal of time discussing Jim Hume’s amendment. The lack of an evident threat to the public interest, our concern about legal implications and the resolution of the Waverley market issue led us to the decision that we took today.

Jim Hume: Does the member now regret her support for the amendment at stage 2, and the words that she and her colleague spoke at that stage?

Claudia Beamish: I think that I will just move on. I have tried to highlight the point. We considered issues as carefully as possible and arrived at the decision that we thought was best for the future in order to avoid complexities.

As Claire Baker highlighted, Brodies LLP, said that

“common good has been an issue for a few hundred years and is a matter that is not going to resolve itself. If it were to receive the attentions of the Parliament, that may be a favour to all concerned with it.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 22 February 2012, c 624.]

As Graeme Dey pointed out, the complexities of unravelling the issue might go back to the 12th century. I am confused about that, as I understand that the concept of common good land started in 14-something. We could have a debate about that, but perhaps not on the last day of the term. Common good land is a matter for another day, but Scottish Labour sees a resolution of the issue
as essential to clarifying fair land ownership in Scotland.

The minister has highlighted the opportunity to explore common good in the context of the proposed community empowerment and renewal bill. We welcome that.

Ultra-long leases of over 175 years, with more than 100 years to run, are indeed a feudal anomaly and modern Scotland is better off without them, so we support the passing of the bill.

11:29

Stewart Stevenson: I welcome the positive contribution to the debate from members across the chamber and the indication that this highly technical bill, which has raised a significant number of issues, will be supported, unless people change their minds when we come to decision time.

I will say a little about the common good. I have been passed the Common Good Act 1491, which is a modest little act that contains two sentences. We have been having a little debate, and we believe that it was passed under James IV, but we will be certain if somebody can enlighten us. I will translate the act from Scots into English. It simply says:

"Item, it is stated and ordained that the common good of all our sovereign lord’s burghs within the realm be observed and kept to the common good of the town and to be spent in common and necessary things of the burgh by the advice of the council of the town for time and decades of crafts where they are"—

in other words, for ever. That is it. That is what the approach is founded on. When such modest, little acts—it was the 19th act in 1491—are translated into the modern era, they leave certain interesting and important questions unanswered or uncertain. In talking about the common good, we must recognise that.

The consultation that is open, which includes questions on the common good, is an opportunity to start to understand the status quo and to work out what the new status of the common good might be in the future. Perhaps it is time to move away from the complexities of the past and state some simplicities that are fit for purpose for the future. However, that is for another day and, I suspect, another minister. I am taking the bill forward because the leases that are affected by it are largely rural leases, but it is perfectly fair to say that a range of ministers could have stood here to speak about this particular issue.

Alex Fergusson apologised for repetition. Obviously, he has forgotten one of the important rules of politics: a debate is not over when everybody has said it. Perhaps this debate clearly illustrates that point.

Annabelle Ewing highlighted her experience as a conveyancing lawyer, and I listened carefully to what she had to say.

I am grateful to Margaret McDougall for the albeit transient promotion in the interstices of this debate. She effectively described some of the difficulties that she has experienced in local government in finding out whether something is a common good property. The reality is that a document in somebody’s file somewhere—not necessarily in the files of the council concerned, of course—that says that something is common good property may be all but impossible to find unless it is known that it exists in the first place. There are genuine and significant concerns.

Jim Hume in a sense recognised that consensus probably has been achieved. The Government has responded to the issues as they have arisen and I hope that, as he looks at Labour’s review of its position, he remembers a response given by someone else:

“When the facts change, I change my mind. What do you do?”

I suppose that that is a question that we might address to Mr Hume. Grown-up politics involves recognising that there is a debate, that the debate moves on, and that we take positions as it moves on, as we in the Government have done.

We will continue to work on the common good with local authorities. Local authorities were open and honest with the committees, gave it their best shot, and showed a depth of knowledge and understanding. Paragraph 55 of the Justice Committee’s stage 1 report says:

“This Bill is not about common good. It is about ultra-long leases.”

The conclusion in paragraph 61 of that report is:

“The desirability for certainty from this legislation and the provisions for compensation provided in the Bill have led the Committee to conclude that it is not persuaded, at this time, that there is a compelling case for exempting leases of common good property from this Bill.”

Paragraph 127 of the Rural Affairs, Climate Change and Environment Committee stage 1 report says:

“The Committee is not persuaded by the arguments made thus far to exempt ultra-long leases on common good land, however, neither is the case against this exemption a clear and compelling one.”

There are a number of reasons against the exemption, as I said earlier. The bill does not take account of who the landlord and tenant are and is blind to that. Decisions on development should now be for the planning system. Alex Fergusson referred to enlightened feudal landlords who
helped to build the attractive facades that we have in some of our cities. Of course, it is fair to say that not all feudal landlords were enlightened. That is why the feudal system has been addressed over recent decades.

We need to protect common good land and we will not forget about that. Indeed, our consultation document on the proposed community empowerment and renewal bill has two specific questions—25 and 26—on the issue. I draw members’ attention to the fact that that consultation does not close until 29 August, so if they are short of things to do over the summer recess they can read the consultation document and respond. I do not think that anyone should stand in this chamber or any in other forum and suggest that they have all the answers on common good—that would be specious. It is a genuine question that we should all turn our minds to. Those of us who have been involved in the debate are probably relatively well placed to understand some of the complexities and uncertainties and perhaps make a contribution to the consultation.

I confirm again that I will write to local authorities saying that any compensatory and additional payments should go to the common good fund if common good land is affected, while recognising that the amounts will be very small. We have prepared the letter and, assuming royal assent for the bill, it will go out shortly thereafter.

Land registration came up again in the debate. Our commitment to land registration is shown by the Land Registration etc (Scotland) Bill that we have just put through the Parliament. Again, that bill arose as the result of a Scottish Law Commission report. That highlights the value of having some of the best of the legal brains out there engaged in the issues of reforming Scotland’s law and identifying what needs to be done. Mr Ewing said on 31 May during stage 3 consideration of the Land Registration etc (Scotland) Bill that it “provides the legal framework that will allow the land register to be completed.”—[Official Report, 31 May; c 9596.]

We will ensure that officials continue to work withRegisters of Scotland on that.

We need to ensure that information on the provisions of the Long Leases (Scotland) Bill reaches landlords, tenants and their legal representatives. As ultra-long leases are concentrated in particular areas of the country, we can target the information at those areas. We will ensure that we have articles in relevant publications and will provide information on the Scottish Government website and the Registers of Scotland website.

Our intention is that the appointed day for the bill’s provisions will be in 2015, which should give sufficient time for parties to prepare. We will need some secondary legislation, particularly in relation to forms, and we will consult on those, in line with our best practice.

I am grateful to colleagues across the chamber for their work on the bill. It is a technical bill, but no one could accuse the process of having been dull. Indeed, there have been sparks of humour from many of those who have contributed to the debate.

The bill team had to advise a minister who usually works outside the justice area, but they were superb in their support and in ensuring that the minister was properly engaged and had a proper understanding of the complexities and the legal aspects. I have thoroughly enjoyed having their support.

The bill is an overdue bit of land reform that will reduce costs and complexities, and we have had an excellent debate on it. The common good debate that we have had will warm up the debate that will follow on the consultation that is currently on the table, as I said. I hope that members who have just joined us in the chamber will consider responding to the consultation on common good.

I commend the Long Leases (Scotland) Bill to members and I urge them to support it at decision time and to ensure that their constituents, when they meet them, are aware of the contents of the bill and the opportunities that come with it. We can all play a part in finally ending the feudal system in Scotland.