This document relates to the Long Leases (Scotland) Bill (SP Bill 61) as introduced in the Scottish Parliament on 10 November 2010

LONG LEASES (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Long Leases (Scotland) Bill introduced in the Scottish Parliament on 10 November 2010. 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 61 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. 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.

4. 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.

THE WORK OF THE SCOTTISH LAW COMMISSION

5. 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.

6. The SLC has 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 2000, and the Abolition of Feudal Tenure etc. (Scotland) Act 2010.

1 The report by the Scottish Law Commission can be found at http://www.scotlawcom.gov.uk/publications/reports/2000-2009/
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2003 and the Tenements (Scotland) Act 2004. The report on conversion of long leases marked the final stage of this review.

7. 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

8. 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

9. Two alternative approaches to this Long Leases (Scotland) Bill have been considered.

10. 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.

11. 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.

12. 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 paragraph 8, ultra-long leases (over 175 years long) can no longer be created, private agreements may well, in time, eliminate all ultra-long leases.

13. 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 33 would not accrue or would accrue more slowly.
INCIDENCE OF ULTRA-LONG LEASES


15. 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 rights 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”.

16. Appendix C to the SLC report recorded the results of a survey of long leases carried out by the SLC in the year 2000.

17. 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).

18. The Scottish Government consulted on the draft Long Leases (Scotland) Bill earlier this year. 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 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 the Bill.

THE BILL

19. The Bill is in five parts. It closely follows the recommendations in the SLC report.

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3 This consultation can be found at http://www.scotland.gov.uk/Publications/2010/03/26131302/0
20. 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.

21. Leases must be registered in the Register of Sasines or the Land Register to be eligible for conversion.

22. 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 registered. If so, the numbers are likely to be very small”. However, Part 4 of the Bill makes provision for unregistered ultra-long leases to be registered and then converted to ownership, if the tenant so wishes.

23. Section 1 also 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. Following the Scottish Government consultation, section 1 also exempts leases granted solely for the purpose of installing and maintaining pipes or cables and leases where the annual rent is over £100. The reason for exempting leases where the rent is over £100 is that the Bill is not designed to cover leases let on commercial terms. More information on this exclusion is at paragraphs 42 to 47 of this Memorandum.

24. By virtue of section 3, conversion to ownership of a qualifying ultra-long lease is automatic.

25. Section 7 allows landlords to preserve rights to game or fishing. This follows similar provisions in the legislation abolishing feudal tenure.

26. 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.

27. Part 3 of the Bill contains provisions on compensation for loss of landlords’ rights. Compensatory and additional payments may be payable by tenants.

28. 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 feuduty 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.

29. Part 3 also makes provision for additional payments, on top of the compensatory payments, in areas such as:

- non-monetary rents (e.g. six fat hens or a personal right to play golf);
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- rent reviews;
- 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.

30. 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”.

31. Part 4 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.

32. Part 5 of the Bill covers miscellaneous matters. In particular, section 68 contains provisions on how the duration of leases is to be calculated. Renewals that the landlord is obliged to grant are included. Section 69 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).

33. 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.
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- 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.

- 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.

CONSULTATION

34. The SLC consulted widely on its Discussion Paper on Conversion of Long Leases (Scot
Law Com DP No112), 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
conducted 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.

35. The Scottish Government issued a consultation paper and a draft Bill in March 2010
seeking views on the Government’s proposed approach to implementing the SLC Report. There
were 17 responses to the consultation.

36. 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.

37. A copy of the responses to the consultation (other than those given in confidence) has been made available on the Scottish Government’s website. Copies of these responses have also been placed in the Scottish Government library.

CHANGES TO THE BILL FOLLOWING THE GOVERNMENT CONSULTATION

38. Following the consultation, three main changes have been made to the draft Bill.

39. First of all, the draft Bill was amended to exclude leases let solely to allow access for pipes and cables (section 1(4)(b) of the Bill refers). This exclusion was added after some consultees 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).

40. 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. The exclusion at section 1(4)(b) in the Bill refers to the “sole purpose of allowing access (including work) to pipes or cables”. This ensures that ultra-long leases of other property which happened to include pipes or cables would not be excluded.

41. 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.

42. Secondly, the draft Bill was amended to exclude leases with a rent of over £100, with the aim of excluding leases let on a commercial basis from the Bill (section 1(4)(a) refers). Consultees suggested, and the Government agreed, that the policy behind the Bill was not to convert to ownership leases let on commercial terms. 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.

43. In leases let on commercial terms, 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.

44. 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 that were not let on commercial terms.

4 The consultation responses can be found at http://sh45inta/Publications/2010/07/15143717/0
45. 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.

46. 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.

47. The Government recognised that a cut-off of £100 may not necessarily exclude all leases let on commercial terms. However, the Bill makes provision for additional payments (see sections 48 to 53) where a landlord considers a compensatory payment based on rent is insufficient. Following the consultation, the Government made a change to the draft Bill to provide that additional payments could also relate to rent which is variable from year to year, such as rent based on the turnover of a business (section 49(1)(c) of the Bill).

48. The final major change to the Bill after the consultation was to provide that in leases continuing on tacit relocation (i.e. on a year by year basis) any provision in the lease requiring the landlord to renew it should be regarded as having been complied with (section 69 of the Bill). Renewable leases are eligible for conversion under the Bill (see section 68(1)(b) so long as they meet the requirement (counting the renewals if necessary) that the lease must be over 175 years long.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT

49. In some cases, renewals of leases have not taken place, as the landlord and tenant may well have forgotten that a renewal had become due. Section 69 makes it clear that for the purposes of the Bill any provision requiring the landlord to renew should be regarded as having been complied with.

Equal Opportunities

50. 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

51. The provisions of the Bill are not prejudicial to human rights.

52. Article 1 of Protocol 1 (A1P1) of the European Convention of Human Rights provides:

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5 This has been an issue in Blairgowrie and Rattray where leases were let for 99 years, perpetually renewable.
“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.”

53. The Government considered the compatibility of the Bill with A1PI. 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 3 of the Bill refers). In addition, landlords can preserve rights to game and fishing (section 7 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.

54. 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.

55. 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.”

56. Key issues here are outlined below.

57. 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.

58. 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).
59. 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).

60. 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.

61. 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 42 to 47 above. Given these reasons, the Government considered that Article 14 was complied with.

62. Finally, the Government considered the terms of section 69 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**

63. 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**

64. 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.

**Sustainable development**

65. 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.
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