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## SPICe Briefing

# Long Leases (Scotland) Bill

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The [Long Leases \(Scotland\) Bill](#) is based on the recommendations for reform made by the [Scottish Law Commission](#) in 2006 and was introduced in the Scottish Parliament on 10 November 2010, having first been the subject of an online [consultation](#) by the Scottish Government in March 2010.

This briefing provides an introduction to the relevant law, an overview of the Bill's proposals and a discussion of some of the key policy issues associated with the Bill.



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Pàrlamaid na h-Alba

# CONTENTS

<b>EXECUTIVE SUMMARY</b> .....	<b>3</b>
<b>INTRODUCTION AND BACKGROUND</b> .....	<b>5</b>
<b>OVERVIEW OF THE LAW OF LEASES</b> .....	<b>5</b>
THE BASICS .....	5
MAXIMUM DURATION OF LEASES .....	6
DIFFERENT TYPES OF LEASE .....	6
<b>THE BACKGROUND TO THE BILL</b> .....	<b>7</b>
THE BILL AS PART OF A PROGRAMME OF PROPERTY LAW REFORM .....	7
EARLIER CONVERSION SCHEMES RELATING TO LONG LEASES .....	8
INCIDENCE OF LONG LEASES .....	8
<b>OVERVIEW OF THE BILL'S PROPOSALS</b> .....	<b>9</b>
THE POLICY RATIONALE FOR THE BILL .....	9
QUALIFYING LEASES .....	10
CONVERSION OF LEASEHOLD CONDITIONS TO REAL BURDENS .....	10
PRESERVATION OF SPORTING RIGHTS .....	12
COMPENSATION AND ADDITIONAL PAYMENTS FOR LANDLORDS .....	12
<b>KEY POLICY ISSUES ASSOCIATED WITH THE BILL</b> .....	<b>13</b>
COMMON GOOD .....	13
ECHR ISSUES .....	16
COMMERCIAL LEASES .....	20
RESIDENTIAL GROUND LEASES .....	21
<b>SOURCES</b> .....	<b>23</b>
<b>RELATED BRIEFINGS</b> .....	<b>28</b>



## EXECUTIVE SUMMARY

The [Long Leases \(Scotland\) Bill](#) is the final part of a series of recent legislative reforms to the system of property law in Scotland based on reports published by the [Scottish Law Commission](#) (SLC).

The main policy rationale for the Bill is that a tenant's right under an ultra-long lease is akin to a right of ownership and so the Bill provides for such a right to be automatically converted to a right of ownership on an appointed day, with compensation for the former landlord. Broadly speaking, an ultra-long lease is defined as a registered lease of over 175 years which has more than 100 years left to run (section 1).

Compensation for a former landlord is based on the annual rent payable under the ultra-long lease in question. Additional payments to the former landlords are also payable in some circumstances (Part 3).

Some conditions contained in leases (leasehold conditions) enforceable by the landlord under an ultra-long lease are also to be converted to 'real burdens' under the Bill. These are a category of legal obligations affecting property which burden the owner of one piece of property for the benefit of the owner of another piece of property and which survive changes of ownership of the affected properties. Sometimes provision is made for the conversion to real burdens to happen automatically, in other instances it will happen only if a further process is followed. In some circumstances it is the former landlord who will be able to enforce the real burdens in question, in other instances the enforcement rights will pass to third parties (Part 2).

The Scottish Government estimates that there are currently around 9,000 ultra-long leases in Scotland eligible for conversion to ownership under the Bill. The basis for this figure is an empirical study carried out by the SLC in 2000 which surveyed long leases in four out of the 33 land registration counties in Scotland.

The Scottish Government undertook an online [consultation](#) in respect of the proposed Bill in March 2010 and received [15 publicly available responses](#) (as well as two confidential responses). Thirteen of those 15 responses were supportive of the proposed conversion scheme for ultra-long leases.

One of the policy issues associated with the Bill which has attracted the most attention so far is to what extent common good land and property will be affected by the conversion scheme for ultra-long leases contained in the Bill, and, if it is affected, whether this is desirable in policy terms. The common good is a fund of money and assets owned and administered by each Scottish local authority in respect of each former burgh within the area of that local authority. Land and property which forms part of the common good is subject to a range of statutory controls, including in relation to its "disposal" which in some circumstances must be sanctioned by the court (Local Government (Scotland) Act 1973, section 75).

Andy Wightman, writer and researcher on land related issues, argues that Waverley Market in Edinburgh is part of Edinburgh Council's common good and is concerned that the Bill's provisions would result in a commercial tenant's interest in an ultra-long lease of Waverley

Market being converted to a right of ownership. The City of Edinburgh Council's view is that Waverley Market is not part of its common good fund, although it supports exempting ultra-long leases of common good land and property from the scope of the Bill.

Two aspects of the European Convention on Human Rights (ECHR) are relevant to the Bill, namely, Article 1 of Protocol 1 of the Convention (A1P1), which protects against confiscation of property or interference with property rights by the state (unless a public interest objective is being pursued and various other conditions are satisfied) and Article 14 of the ECHR which prohibits differing treatment of like situations in relation to the rights protected by the ECHR (including the rights protected by A1P1).

Various aspects of the Bill raise issues associated with these aspects of the ECHR including the definition of a qualifying ultra-long lease (section 1), the scheme for conversion of certain conditions under ultra-long leases to real burdens after the appointed day (Part 2) and the opportunity for preservation of former landlords' sporting rights to freshwater fishing and game (section 7).

'Blairgowrie leases' are a particular type of long lease of residential property which have an initial duration of 99 years and are perpetually renewable by the tenants for further periods of 99 years at a time. The special treatment of unrenewed Blairgowrie leases under section 69 of the Bill (which represents an amendment to the Bill as consulted on) is also relevant in the context of A1P1 and Article 14.

The Scottish Government considers the Bill to be ECHR-compliant in all respects and the Bill received a positive Statement from the Presiding Officer of the Scottish Parliament (Rt Hon Alex Ferguson MSP) on legislative competence.

Other policy issues associated with the Bill relate to the scope of the Bill. In a change to the Bill as consulted on, the Bill now excludes leases with an annual rent of over £100 (section 1), with the aim of excluding leases let on commercial terms. This provision of the Bill responds to concerns expressed by several respondents to the Scottish Government's consultation that tenants' interests under commercial leases were not akin to a right of ownership. The SLC was against making distinctions in the Bill based on the type of property being leased.

The Bill does not provide a separate conversion scheme for ground leases of residential property (where they do not otherwise qualify for conversion under the main conversion scheme associated with ultra-long leases). Ground leases are a form of long lease whereby the landlord leases the ground only, usually for a relatively modest rent, and the tenant supplies the buildings. There are a range of policy arguments for and against providing a separate conversion scheme (or some other form of protection) for tenants under the remaining residential ground leases which exist in Scotland today.

# INTRODUCTION AND BACKGROUND

The [Long Leases \(Scotland\) Bill](#) (plus accompanying documents) was introduced in the Scottish Parliament on 10 November 2010. The purpose of the Bill is to implement the recommendations of the [Scottish Law Commission](#) (SLC) in its report entitled [Conversion of Long Leases](#) (SLC 2006)('the Report').

The Scottish Government undertook an online [consultation](#) in respect of the proposed Bill in March 2010 and received [15 publicly available responses](#), as well as two confidential responses. All remaining references in this briefing to the consultation responses are to the publicly available responses only.

The key principle of the Bill is that “qualifying” ultra-long leases should be converted into ownership, with compensation for landlords. Unless the tenant opts-out under Part 4 of the Bill, conversion of a qualifying ultra-long lease is automatic and occurs on “the appointed day” (sections 3 and 67).<sup>1</sup>

This briefing provides an introduction to the law of leases and an overview of the background to the Bill, including explanation of some of the key terminology associated with leases. The briefing also provides a summary of the proposals contained in the Bill (including the changes to the Bill since consultation) and a discussion of some of the key policy issues associated with the proposed reforms.

As well as several policy changes to the Bill since consultation, it is worth noting that the Bill as introduced omits 20 schedules which appeared in the SLC version of the Bill. These primarily contained forms to be used when converting leases into ownership and the intention is they will now appear in secondary legislation (see further the [Delegated Powers Memorandum](#) of the Bill).

## OVERVIEW OF THE LAW OF LEASES

### THE BASICS

A **lease** is a contract by which a person, known as a **tenant**, is allowed to occupy someone else’s land or buildings for a finite period of time. In return for this he or she pays to the person who granted this right (ie the **landlord**) a periodical payment known as **rent**.

A lease may be registered if it meets certain requirements including that its initial duration exceeds 20 years. Leases eligible for registration are now registered in the **Land Register**, the ‘new’ public land register which has been phased in across Scotland, geographical area by geographical area, over the last 30 years. A significant number of registered leases remain registered in the **Register of Sasines**, the old register of deeds relating to property in Scotland.<sup>2</sup>

In the case of leases eligible for registration in the Land Register, registration is now the only way of acquiring a **real right** binding on successors to the original landlord and tenant. Formerly possession by the tenant was equivalent to registration for this purpose and consequently, some **unregistered leases** of over 20 years which bind successors are likely to remain in existence today in Scotland.

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<sup>1</sup> Section 67 sets the appointed day as the first Whitsunday (28 May) or Martinmas (28 November) occurring two years after section 67 comes into force. However, section 80 also provides that section 67 itself can come into force on a day which Scottish Ministers appoint via secondary legislation.

<sup>2</sup> For more information on the property registers see [Registers of Scotland](#) and [Land Registration Counties and Operational Dates](#) (Registers of Scotland 2003).

The terms and conditions of a particular lease may be **express terms and conditions** negotiated between the landlord and the tenant and contained in the lease document itself or they may be terms which do not appear in the lease document but which are **implied by law** (either statute or the common law).

A tenant's interest in a lease may be **assigned**, ie sold or otherwise transferred to a third party. In respect of an assignation the party who is transferring his or her entire interest exits from the lease arrangement completely and a new tenant enters. This can be contrasted with the situation where the original tenant **sub-lets** to another tenant. Here the original tenant remains party to the original lease with the landlord, however he or she also becomes a landlord in relation to the incoming tenant.

An important common law doctrine applicable to leases is that of **tacit relocation** (sometimes known as the doctrine of 'silent renewal'). This doctrine provides that if neither the landlord nor the tenant sends a notice to the other party intimating that they wish the lease to end, the assumption is that both parties want the lease to continue and the lease is automatically extended for a year.<sup>3</sup> As there is no limit to the number of times this doctrine can operate in relation to a particular lease, it is possible for a lease to last many years beyond the initial original duration stated in the lease document.

## MAXIMUM DURATION OF LEASES

Section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) (an Act discussed in more detail in the next section of this briefing) restricts all new leases created on or after 9 June 2000 to a maximum length of 175 years.

The Land Tenure Reform (Scotland) Act 1974 (c 38) (the 1974 Act) (section 8) prohibits the creation of leases of houses (including flats) for a period in excess of twenty years.<sup>4</sup>

## DIFFERENT TYPES OF LEASE

### Commercial, agricultural and residential leases

There are three main categories of lease: commercial leases, residential leases and agricultural leases. A **commercial lease** is the term generally applied to leases of shops, offices, factories or other business premises. Commercial leases in Scotland (though not in England and Wales) are almost entirely free of statutory regulation.

**Agricultural leases** are leases of farmland and associated buildings, including in some cases the farm house. Agricultural leases are regulated by statute and tenants often have **security of tenure**, ie the right to stay on after the expiry date stated in the lease has expired. **Residential leases** are leases of houses, including flats, and are also regulated by statute. Rights in favour of the tenant include security of tenure in relation to the main type of lease granted by social landlords and some types of lease granted by private sector landlords.

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<sup>3</sup> The extension for a year occurs where the original lease duration was one year or more. If the original duration was for under a year, the extension will be for the same period as the original duration of the lease.

<sup>4</sup> At Stage 3 of the [Housing \(Scotland\) Bill](#), Scottish Government amendments were passed with the aim of stimulating investment in the social housing sector. As a consequence, section 138 of the Housing (Scotland) Act 2010 removes the 20 year restriction on residential leases where the tenant is a social landlord, a body connected to a social landlord or a rural housing body. The general prohibition on leases in excess of twenty years in relation to residential leases is unaffected.

## Mineral leases and sporting rights

Under Scots law the status of lease is also given to certain types of agreement where the tenant does not have an exclusive right to occupy the property, but the right to use it for certain purposes only. Leases falling into this category include **mineral leases** involving the right to extract minerals from the ground and leases of **sporting rights** in relation to game and freshwater fishing.

## Long leases and ultra-long leases

The term **long lease** does not have a technical legal definition but is usually taken to mean a lease that is sufficiently long to be able to be registered in the property registers. Today, long leases of commercial property are common, much more common than outright sales of commercial property. However, in contrast to the position in England and Wales, long leases of residential property are relatively rare (due to the statutory restriction on the length of residential leases which has existed since 1974).

It is thought that long leases appear as a mainstream alternative to outright ownership of property in certain distinct geographical areas. The SLC's initial [Discussion Paper](#) on the topic of long leases identified pockets of long leases in Alva, Ardrossan, Saltcoats, Stevenson and Wishaw (SLC 2001, para 10).

The term **ultra-long lease** refers to long leases eligible for conversion to ownership under the scheme proposed by the Bill (see further below).

## THE BACKGROUND TO THE BILL

### THE BILL AS PART OF A PROGRAMME OF PROPERTY LAW REFORM

The Report completes a detailed review of property law in Scotland and the current Bill should be viewed in that context. Previous SLC reports have resulted in four pieces of legislation passed by the Scottish Parliament, the key provisions of which are summarised below.

#### Abolition of Feudal Tenure etc (Scotland) Act 2000

Prior to the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) ('the 2000 Act') coming into force, there was a feudal system of land ownership in Scotland. This allowed an individual to sell (or otherwise transfer) ownership of property but to reserve to himself or herself, notwithstanding the sale (or transfer), an interest in the property known as a **feudal superiority**. The holder of the superiority was known as the **feudal superior** and the owner of the property the **vassal**. The superior retained certain important rights in respect of the property, including the right to collect a periodical payment (known as **feu duty**).

The 2000 Act abolished the feudal system of land ownership and granted former vassals outright ownership of their property, with compensation payable for loss of their rights to collect feu duty to former superiors.

#### Leasehold Casualties (Scotland) Act 2001

The Leasehold Casualties (Scotland) Act 2001 (asp 5) abolished **casualties**, ie payments due on assignation of a tenant's interest under some long leases (and on certain other occasions). The 2001 Act also abolished the landlord's remedy of **irritancy** for most leases of 175 years or more, ie the landlord's right to terminate the lease prematurely because of the tenant's breach of contract.

## **Title Conditions (Scotland) Act 2003**

**Title conditions** are a category of legal obligations affecting property which burden the owner of one piece of property for the benefit of the owner of another piece of property and which survive changes of ownership of the affected properties. The Title Conditions (Scotland) Act 2003 (asp 9) ('the 2003 Act') dealt with a sub-set of title conditions known as **real burdens**. Many real burdens were enforceable by former superiors and the 2000 Act addressed the issue of the survival of such burdens after reform of the feudal system. The 2003 Act built on the 2000 Act by adding to the categories of feudal burdens which could be preserved, as well as modernising the general law relating to real burdens.

## **Tenements (Scotland) Act 2004**

The Tenements (Scotland) Act 2004 (asp 11) created the 'Tenement Management Scheme', a default system of rules for the maintenance and management of 'tenements', a term defined broadly to include blocks of flats and flats in houses which have been sub-divided. The innovative feature of the scheme is it provides for decision-making by a simple majority of flat owners (removing any one flat owner's right of veto).

## **EARLIER CONVERSION SCHEMES RELATING TO LONG LEASES**

The conversion scheme for ultra-long leases proposed in the Bill can be placed in the context of earlier conversion schemes relating to long leases, both in Scotland and elsewhere in the UK.

### **Scotland**

A scheme for the conversion of long leases was introduced by the Long Leases (Scotland) Act 1954 (c 49) ('the 1954 Act') and was in operation between 1954 and 1959. A lease was eligible for conversion if it was of residential property and had been granted before 10 August 1914 and for a period of at least 50 years.

### **Other UK schemes**

In England and Wales it has been possible to convert ultra-long leases since 1881, with the current scheme appearing in the Law of Property Act 1925 (c 20) (section 153). The Leasehold Reform Act 1967 (c 88) also allows the conversion of leases of houses of more than 21 years on payment of compensation, a right extended to flats in 1993 (by virtue of the Leasehold Reform, Housing Urban Development Act 1993 (c 28)). Northern Ireland also has comparable legislation (the Leasehold (Engagement and Extension) Act (Northern Ireland) 1971 (c 7) and Ground Rents Act (Northern Ireland) 2001 (c 5)).

## **INCIDENCE OF LONG LEASES**

### **Empirical studies**

A study of the incidence of long leases was carried out in 1951 for the Scottish Leases Committee by Lord Guthrie, involving an examination of all search sheets in the Register of Sasines for the period of 1905–1951. The results disclosed 13,151 such leases and almost 9,000 leases were found to have more than 100 years still to run (Scottish Home Department 1952).



As part of its review of the law relating to long leases, the SLC carried out a study of its own, looking at entries in the Land Register in respect of long leases for four out of the 33 land registration counties. The results of the study can be found in Appendix C of the Report. The SLC noted:

“Our survey is of course incomplete in a number of important respects. It is confined to four out of the 33 registration counties...It covers only such period as the counties have been operational for the purposes of the Land Register – a period which ranges from nineteen years (Renfrew) to only three (Ayr). And it omits both those leases which have never been registered and also those which, although registered, saw no activity during the period under scrutiny [and therefore remained in the Register of Sasines]...any conclusions based on such a survey are speculative and subject to challenge” (SLC 2006, para 9.5)

## **The Scottish Government’s approach**

The Scottish Government estimates that there are currently around 9,000 ultra-long leases in Scotland eligible for conversion under the Bill, a figure reached by extrapolating from the figure arrived at by the SLC in relation to the four registration counties surveyed to Scotland as a whole (Financial Memorandum, para 306). The Scottish Government acknowledges the limitations of the survey referred to by the SLC, as well as the fact that there may have been further changes since the SLC carried out their survey in 2000. Nevertheless, it considers the SLC’s figure to be “the best available”. It also notes that the figure of 9,000 leases eligible for conversion was not challenged as a result of the Scottish Government’s consultation (Financial Memorandum, paras 296 and 303).

# **OVERVIEW OF THE BILL’S PROPOSALS**

## **THE POLICY RATIONALE FOR THE BILL**

### **The Scottish Government’s position**

In the [Policy Memorandum](#) (paras 3 and 33) to the Bill, the Scottish Government lists eleven suggested benefits of the automatic conversion scheme. Its key rationale for the Bill is that granting a lease of more than 175 years effectively amounts to a transfer of ownership and, accordingly, it would simplify the law to convert a tenant’s interest in such a lease to a right of ownership.

Other suggested benefits of the scheme relate to the programme of property law reform already undertaken. For example, it is suggested that because ultra-long leases were often granted on occasions where there was a legal prohibition on a transfer of ownership under the feudal system, ultra-long leases can be “feus in disguise”. Accordingly, their conversion to ownership is a necessary adjunct to the abolition of the feudal system (Policy Memorandum, para 33).

Likewise, part of the policy justification for the abolition of the feudal system was that superiors’ interests in property had become targets for ‘title raiders’, ie commercial entities seeking to make money out of superiors’ rights by buying up multiple superiorities. Title raiders’ activities in relation to the feudal system were thought objectionable in policy terms because they had no interest (other than financial) in the property affected (such as an interest in maintaining it or preserving its amenity). The conditions in ultra-long leases present landlords with an opportunity to charge tenants for waiving them and so, the argument goes, make them possible targets for title raiders (Policy Memorandum, para 33).

Some of the other benefits of the Bill identified by the Policy Memorandum relate to suggested difficulties encountered by virtue of ultra-long leases being relatively rare and concentrated in certain parts of Scotland. These include a lack of familiarity with them by many legal practitioners which, it is argued, may hold up conveyancing transactions and increase legal costs. Furthermore, some mortgage lenders are reluctant to advance money on the security of an ultra-long lease (Policy Memorandum, para 33).

## **Views of those who responded to the Scottish Government's consultation**

Thirteen of the 15 respondents to the Scottish Government's online [consultation](#) who expressed a view on whether ultra-long leases should be converted into ownership were supportive of the conversion scheme.

The two respondents who were opposed to the conversion scheme, the [Royal Institution of Chartered Surveyors Scotland](#) (RICS Scotland) and an anonymous respondent, did so because they were unhappy about the scope of the Bill extending to leases affecting commercial property. In a similar vein, the [Scottish Rural Property and Business Association](#) (SRPBA) extended its support for the Bill, on the condition that leases affecting commercial property were excluded from the scope of the Bill. [Andy Wightman](#) (writer and researcher on land related issues) extended his support for the Bill on the condition that his concerns about the potential impact of the Bill on common good funds of Scottish local authorities were taken into account. (See further below under 'Policy Issues associated with the Bill' in respect of both these issues.)

## **QUALIFYING LEASES**

Section 1 of the Bill provides the definition of a "qualifying" ultra-long lease for the purposes of the conversion scheme with the key criteria for qualification as follows: 1) the lease must be registered in the Register of Sasines or the Land Register; 2) it must be granted for an initial period of more than 175 years and 3) it must have an unexpired duration of more than 100 years.

Section 1 of the Bill also provides that certain ultra-long leases are not qualifying leases. These include leases relating to the right to extract minerals (ie mineral leases) and leases where the annual rent in respect of the lease is over £100. The latter is a change to the SLC version of the Bill (see further 'Policy Issues associated with the Bill' at 'Commercial Leases').

Although only registered leases may be "qualifying leases" under section 1, Part 4 of the Bill provides a separate scheme for unregistered ultra-long leases to be subsequently registered and converted into ownership if the tenant wishes this.

## **CONVERSION OF LEASEHOLD CONDITIONS TO REAL BURDENS**

Whilst some conditions in ultra-long leases are specific to the landlord and tenant relationship (eg the obligation to pay rent), many ultra-long leases contain conditions which, in a deed transferring ownership, would be classified as real burdens.

The SLC recommended that specified conditions in qualifying ultra-long leases comparable to real burdens should be subject to a conversion scheme of their own in the Bill, ie from leasehold conditions to real burdens. "Self-evidently", stated the SLC, the scheme proposed should closely follow the complex scheme contained in the 2000 and 2003 Acts in respect of real burdens formerly enforceable by feudal superiors (SLC 2006, para 4.28).

## Overview of the conversion scheme

Part 2 of the Bill adopts the SLC's recommendations by providing a conversion scheme, the key provisions of which can be summarised as follows:

- **the 100 metre rule:** if a former landlord under an ultra-long lease owns a piece of land within 100 metres of the property subject to the former lease, he or she can reallocate a qualifying leasehold condition (by registration of a notice) as a real burden enforceable by the former landlord in his or her capacity as owner of that land (sections 13–15)
- **personal real burdens:** a range of qualifying leasehold conditions serving a variety of public policy purposes (eg conservation, reducing greenhouse gas emissions, economic development and provision of facilities for health care) can be converted to real burdens enforceable by a public body on registration of a notice (sections 24–27). This type of real burden is “personal” because the public body’s enforcement right is not attached to a piece of property, in contrast to the usual position with a real burden<sup>5</sup>
- **facility and service burdens:** qualifying leasehold conditions will be automatically converted to service and facility burdens on the appointed day. A facility burden regulates the maintenance, management, reinstatement or use of a facility, such as a shared part of a tenement. A service burden relates to the provision of services, such as water or electricity to another property. They are enforceable by the owners of the property or properties benefiting from the facility or service (section 29)
- **third party rights:** qualifying leasehold conditions expressly conferring rights on neighbouring properties to the property leased are automatically converted to real burdens on the appointed day, enforceable by these neighbouring property owners (section 32). Qualifying leasehold conditions which are imposed under a “common scheme” in respect of a group of “related properties”, will automatically become real burdens enforceable by the owners of these properties against each other from the appointed day (section 31)

## Leasehold conditions affecting related properties

Section 31 of the Bill, referred to in the final bullet point above, deserves some further explanation. In situations of outright ownership, real burdens are quite often imposed under a common scheme, so, for example, the same real burdens affect a particular block of flats or a housing estate. Prior to the recent property law reforms, it had long been established by case law that, provided certain criteria were satisfied, mutual enforcement rights in favour of the owners of the properties in the common scheme could be implied by law (even though they were not expressly stated in the title deeds).

When introducing the bill which became the 2003 Act, the then Scottish Executive departed from the relevant SLC recommendation (SLC 2000, recommendation 90) and relaxed the criteria which had to be satisfied for implied enforceable rights to be created. Consequently, more people had implied enforcement rights in respect of real burdens after legislative reform than before it (2003 Act, s 53). The need for the change was said to be human rights related (Scottish Parliament 2002) but it attracted criticism on various policy grounds from leading property law academics (see, for example, Reid 2008).

Whilst the pre-2003 Act position with real burdens imposed under a common scheme has long been established by case law, in contrast, it has never been clear that implied enforcement

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<sup>5</sup> In addition to personal real burdens serving public policy purposes and enforceable by public bodies, there is also an opportunity for pre-emptions and redemptions (types of option to purchase property) to be preserved as personal real burdens (section 23).

rights can be created in favour of parties other than the landlord in respect of leasehold conditions imposed under a common scheme (SLC 2006, para 4.52). However, section 31 of the Bill mirrors the equivalent provision of 2003 Act by providing for conversion of leasehold conditions imposed under a common scheme in respect of a group of related properties to real burdens on the appointed day. To an even greater extent than was the case under the 2003 Act, this raises the possibility of new enforcement rights in favour of third parties, where none existed previously.

The academic debate on the policy implications of section 53 of the 2003 Act was not referred to by the SLC in the relevant part of its report associated with the Bill. Instead it was stated that it “would be anomalous and potentially confusing” to do otherwise that to mirror the scheme created by the 2003 Act (SLC 2006, para 4.52). The Scottish Government outlined the proposed conversion scheme for leasehold conditions in its online [consultation](#) and no issues were raised by consultees (chapter 3).

## **PRESERVATION OF SPORTING RIGHTS**

Sporting rights to freshwater fishing (ie fish other than salmon) and sporting rights to game can be reserved to a landlord in an ultra-long lease, so that the tenant exercises his or her right of occupancy subject to the sporting rights held by the landlord. Section 7 of the Bill follows the scheme provided for in the 2000 Act (as amended by the 2003 Act) in relation to a former feudal superior’s sporting rights by providing the opportunity for a former landlord to preserve the sporting rights, on registration of a notice, before the appointed day.

Both the conversion scheme for leasehold conditions and the opportunity for former landlords to preserve their sporting rights are considered further below under ‘ECHR Issues’.

## **COMPENSATION AND ADDITIONAL PAYMENTS FOR LANDLORDS**

### **Compensation payments**

Part 3 of the Bill contains provision on compensation for loss of landlords’ rights under ultra-long leases.

The proposed compensatory payments are based on the annual rent paid and (consistent with the approach taken in the 2000 Act with compensation for former feudal superiors) are calculated by reference to 2.5% Consolidated Stock. Under the proposed scheme a former landlord will be entitled to such sum as if invested in the 2.5% Consolidated Stock would produce an annual sum equal to the former rent. For example, on 24 December 2010, the price of 2.5% Consolidated Stock was £53.55 so in relation to an annual rent of £2.50 a landlord would receive £53.55 by way of compensation.

### **Additional payments**

In accordance with the SLC report, Part 3 of the Bill makes provision for the possibility of “additional payments” to the landlord, on top of the basic compensatory payment in some circumstances. According to sections 48 and 49, additional payments can be claimed in respect of:

- **non-monetary rent:** any right to a non-monetary rent (such as a personal right to play golf)
- **rent reviews or increases:** any right to have the rent reviewed or increased from time to time

- **variable rents:** rights to rent where the amount payable is variable, eg when rent is based on the turnover of a business. (This ground was added following the Scottish Government’s consultation)
- **premiums:** any right to receive a premium, ie an extra payment over and above the rent, on renewal of the lease exceeding £100 (renewal premiums under £100 are covered by the ordinary compensation provisions)
- **reversionary interests:** any right to resume possession of the land subject to a lease (a “reversionary interest”) providing that the lease in question would expire no later than the end of the period of 200 years beginning with the appointed day.
- **early termination:** subject to certain qualifying conditions, a right to terminate the lease early
- **development value:** a right to the “development value”, ie any significant increase in the value of a lease arising as a result of the property subject to the lease becoming free to be used, or dealt with, in some way not permitted under the lease. This applies where 1) the landlord has granted a lease subject to a leasehold condition restricting the use of the property by the tenant with the aim of preserving for himself or herself the development; and 2) this leasehold condition has not been converted to a real burden under Part 2 of the Bill (as discussed above)

The value of the additional payment is based on what the right in question would fetch on the open market (section 50). Where the landlord and tenant fail to reach agreement relating to an additional payment, the matter can be referred to the Lands Tribunal for Scotland which has a wide discretion to determine the matter (section 53).

## KEY POLICY ISSUES ASSOCIATED WITH THE BILL

This section of the briefing outlines some of the key policy issues associated with the Bill, not so far addressed by this briefing.

### COMMON GOOD

#### The policy issue

An emerging policy issue associated with the Bill is to what extent common good land and property will be affected by the conversion scheme for ultra-long leases contained in the Bill, and, if it is affected, whether this is desirable in policy terms (see, for example, Blackley 2010).

The common good is a fund of money and assets owned and administered by each Scottish local authority in respect of each former burgh within the area of that local authority. It is subject to a range of statutory controls. In the first place, it must be held in a separate account from a local authority’s general fund account, although it is subject to the general financial scrutiny scheme associated with local authorities which requires the delivery of “best value” (Local Government (Scotland) Act 1973 (c 65), section 93; Local Government in Scotland Act 2003 (asp 1), Part 1).

Furthermore, in administering the common good, Scottish local authorities (except Aberdeen, Dundee, Edinburgh and Glasgow) must have regard to the interests of the inhabitants of the former burgh to which the common good related. Aberdeen, Dundee, Edinburgh and Glasgow councils must have regard to the interests of all the inhabitants of their areas in administering the common good (Local Government etc (Scotland) Act 1994 (c 39), section 15(4)).

Section 75 of the Local Government (Scotland) Act 1973 (c 65) (the 1973 Act) provides that if a local authority wishes to dispose of common good land or buildings “with respect to which a question arises as to the right of the local authority to alienate” (ie put to an alternative use by a third party) it requires to go to court to receive authority to do so. “Disposal” under section 75 of the 1973 Act includes an outright sale or a transfer to a third party but also, according to several cases, a lease of a property, at least where the public use of the property is lost.<sup>6</sup> The court may authorise the disposal, subject to any conditions it thinks fit, including the possibility of a requirement on the council to provide substitute land or buildings to be used for the purpose that the common good land or buildings were used.

Other than a suggested example provided by one consultee in response to the Scottish Government’s consultation and a further example provided by Fife Council (and reported below) there seems to be no publicly available information about whether there are ultra-long leases of common good land and property which would be eligible for conversion under the Bill and, if there are such leases, how many of them there are. Neither of the empirical studies on long leases referred to above at pp 8–9 addressed the matter and the Scottish Government has not to date published any additional information.

Identification of common good property in general and common good property which is subject to section 75 in particular, can be a legally complex matter. For example, it is thought that land might initially have a common good character but, through a lack of public use for a sustained period lose that character (Ferguson 2006, para 7.3). Although some improvements have been made in recent years (Audit Scotland 2010), there have been concerns expressed in the past that Scottish local authorities have not correctly identified, and appropriately accounted for, common good land and property (see, for example, Wightman and Perman 2005).

The legal and policy issues associated with common good land and property, including their potential relationship with the current Bill, are explored in more detail in a separate [briefing](#) prepared by SPICe for the Justice Committee of the Scottish Parliament dated 23 December 2010 (Harvie-Clark 2010).

## **The approach of the Scottish Law Commission and the Scottish Government**

The SLC Report did not address the issue of the Bill’s relationship with the common good. The following Parliamentary Question and Answer gives an indication of the Scottish Government’s position on the topic of the Bill and the common good in 2008:

**S3W-14926 - Patrick Harvie (Glasgow) (Green) (Date Lodged Wednesday, July 09, 2008):** To ask the Scottish Executive how it will ensure common good assets are protected and retained for community ownership in any future legislation regarding the conversion of long leases.

**Answered by John Swinney (Tuesday, July 29, 2008):** The protection of common good assets and their retention for community ownership will be given careful consideration in any future legislative proposals on the conversion of long leases.

The Scottish Government did not address the issue of the Bill’s relationship with the common good in its online [consultation](#) on the Bill in 2010 or in the [Policy Memorandum](#) to the Bill. Late in 2010 the Scottish Government wrote to all 32 councils in Scotland asking them to identify by 21 January 2011 ultra-long leases of common good land and property within their area. So far

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<sup>6</sup> For example, in *East Lothian District Council v National Coal Board* (1982) a 99 year lease was categorised as a “disposal”. On the other hand, the recent case of *South Lanarkshire Council Petitioners* (Inner House, unreported 11 August 2004) it was held that a 30 year lease and leaseback arrangement in the context of a Public Private Partnership does not amount to a disposal on the basis that the public use of the property was not lost.

Fife Council has identified a 1000 year lease of common good land in St Andrews (which ends in the year 2857) (Stockwell 2011).

The Scottish Government also recently wrote to the Convener of the Justice Committee of the Scottish Parliament in relation to the issue of the Bill's relationship with common good (in respect of which see further below).

## **Views of stakeholders**

Fourteen out of 15 respondents to the Scottish Government's consultation did not express a view on the issue of the Bill and its relationship with the common good. Andy Wightman, independent writer and researcher on land-related issues, commented as follows:

“The SLC report proposes that no exemptions to conversion should be made due to the nature of the landlord and that seems correct. However, there is a situation where long leases were entered into because of the character of the property involved – common good property.

I have taken a close look at the Waverley Market in Edinburgh...This property forms part of the common good of the City of Edinburgh and was leased in 1982 on a 125 year leases for one penny a year. In 1989, the Council extended the lease to 206 years.

If the proposals to convert leases of over 175 years with 100 years to run become law then the current tenant of Waverley Market will become the owner of a multi-million pound asset which currently costs only 1p per year in rent. Since this property forms part of the common good fund of the City of Edinburgh and is probably inalienable...it does not seem appropriate that the tenant should be able to convert to full ownership.

The situation may very well be repeated in other cases in Scotland's 196 former burghs and it would be retrograde indeed if the existing attrition of common good was to be exacerbated further by leasehold reform.”

As discussed at pp 12–13 above, under sections 48 and 49 of the Bill, where a the lease has an unexpired duration of at least 200 years from the appointed day, the landlord can claim an additional payment on conversion of the ultra-long lease from the tenant (as well as the compensatory payment based on rent), with the value of this additional payment being based on what the right would fetch on the open market.

There seems to be some difference of opinion regarding whether or not Waverley Market is part of the common good of the City of Edinburgh. In 2008 a report was prepared by officials for the Finances and Resources Committee of the Council entitled [Review of the Common Good in Edinburgh](#) (The City of Edinburgh Council 2008) which also reflects the Council's current position on the status of Waverley Market (McGougan 2010; The City of Edinburgh Council 2011). The report refers to Waverley Market in the following terms:

“Waverley Market ceased to be an asset of the Common Good and its inclusion on the asset register and balance sheet of the Fund in 2005 is an error. Acts of the Council in 1937 and 1938 transferred the fruit and vegetable market from Waverley Market to premises in East Market Street. In effect the then Council substituted the East Market Street premises for the Waverley Market premises, and with it the common good status. Accordingly Waverley Market ceased to be part of the common good at the time of the transfer of the fruit and vegetable market to East Market Street.”

Andy Wightman (2010, p 228), in his recent book, 'The Poor Had No Lawyers', comments as follows on the above paragraph:

“The Council are claiming here that the inclusion of Waverley Market as a common good asset in 2005 ‘was an error’. This is based upon the claim that the 1937 and 1938 acts transferred the market functions to East Market Street resulted in the transfer of the common good status. This is a fairy story. In 1983, an exchange of letters between the Director of Administration and the Director of Finance in relation to VAT liability for the shopping centre construction confirmed that the site was common good. The letters confirm that the site was freed from any statutory market obligations in 1933 but that the loss of these rights had no impact on the common good status since that was derived from the fact that the land had been purchased by the Common Good Fund in 1766. The Director of Administration even suggests that forthcoming private legislation could be used to remove the site from the common good as had been done with the markets and slaughterhouses in 1967.

The Waverley Market is part of the Edinburgh Common Good Fund because it was acquired by the Common Good Fund as part of the land assembly of the First New Town in the late eighteenth century. Nothing that has transpired since alters that.”

On 16 December 2010, The City of Edinburgh Council approved a [motion](#) laid by Councillor Alison Johnstone (The City of Edinburgh Council 2010, para 9.6) calling for ultra-long leases of common good land and property to be exempted from the scope of the Bill. The Council affirmed its call for such an exemption in its recent written submission to the Justice Committee on the Bill (The City of Edinburgh Council 2011).

## **Letter to the Convener of the Justice Committee**

On 23<sup>rd</sup> December 2010 Fergus Ewing MSP, Minister for Community Safety, [wrote](#) to Bill Aitken MSP, Convener of the Justice Committee, regarding the issue of the Bill’s relationship with the common good. The Minister referred to the City of Edinburgh Council’s recently stated position regarding Waverley Market, as well as the opportunity for former landlords to obtain compensatory and additional payments. The Minister also commented:

“I have seen no evidence that Common Good will be adversely affected by the Bill. If such evidence were to be presented, I would, of course, consider the need for any Government amendments to the Bill” (Ewing 2010)

## **ECHR ISSUES**

Various aspects of the Bill raise issues associated with the European Convention on Human Rights (ECHR) and these are considered in turn below (following a description of the relevant provisions of the ECHR).

In all respects, the Scottish Government considers the Bill to be ECHR-compliant (Policy Memorandum, paras 51–62) and the Bill received a positive Statement from the Presiding Officer of the Scottish Parliament (Rt Hon Alex Fergusson MSP) on legislative competence.<sup>7</sup>

### **The relevant provisions of the ECHR**

#### *Article 1 of Protocol 1*

Article 1 of Protocol 1 (A1P1) to the ECHR provides as follows:

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<sup>7</sup> A bill must be ECHR compliant to be within the legislative competence of the Scottish Parliament (Scotland Act 1998 (c 46), section 29).



“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 conditions provided for by law and by the general principles of international 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”

Part of compliance with A1P1 by the state requires it to show that any confiscation of property or interference with property rights is in pursuit of a public interest objective and that a fair balance has been struck between the rights of an individual and the rights of the community in pursuit of its aims. This requires there to be a reasonable degree of proportionality between the means selected and the ends sought to be achieved.

Whether or not the state has compensated an individual for interference with his or her property rights is significant in determining whether a fair balance was struck, although this compensation does not have to be the full market value of the right concerned. In a situation where there is a deprivation of property (as opposed to a mere interference with property rights) an absence of compensation reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation is only justifiable in exceptional circumstances (Reed and Murdoch 2008, para 8.20–21).

#### *Article 14*

Article 14 prohibits differing treatment of like situations in relation to the other rights protected by the ECHR (such as the right to peaceful enjoyment of property protected by A1P1) with reference to a non-exhaustive list of grounds. In *James v United Kingdom* (1986 8 EHRR 123) the court considered the conversion scheme for long leases of residential property contained in the Leasehold Reform 1967 (c 88) and held that there were sufficient differences of treatment of property owners in respect of the right safeguarded by A1P1 for Article 14 to be relevant.<sup>8</sup>

Again, differing treatment is only prohibited under Article 14 if no legitimate aim is being pursued by the state and there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (Springham 2001, para 7.14).

### **The relevant parts of the Bill**

#### *Definition of an ultra-long lease*

In the Policy Memorandum to the Bill (paras 41–42, 57–62), the Scottish Government considered the definition of a qualifying ultra-long lease contained in section 1 of the Bill (which excludes some ultra-long leases and many long leases from its scope). The Government’s discussion included a review of the requirement that the annual rent in respect of the lease is over £100 (which, as discussed below, is a change from the Bill as consulted on). The Government also considered the selection of ‘over 175 years’ as the relevant original lease duration, as opposed to ‘over 125 years’. Whilst acknowledging the policy arguments in favour of alternative approaches, the Government identified various policy reasons for selecting the criteria contained in section 1 and accordingly considered Article 14 of the ECHR to be complied with.

On duration, the Scottish Government noted that the SLC’s survey of leases suggested a clear dividing line between ordinary long leases on the one hand and leases which amount to virtual

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<sup>8</sup> However, the court also held that the provisions of the legislation which were challenged by the applicant did not breach article 14 (in conjunction with A1P1).

ownership on the other. Further, it noted that, according to the SLC figures, most leases have been granted for around 999 years or for 125 years or less, with little in between (Policy Memorandum, paras 57–58; SLC 2006, paras 2.13–2.15, Appendix C, paras 11 and 12 and charts 2 and 3). On the basis of those figures, the Government acknowledged that the dividing line between the two types of leases would seem to be 125 years. However it argued that using 125 years as the criteria would be inconsistent with section 67 of the 2000 Act, which prohibits the grant of new leases with a duration in excess of 175 years. Accordingly, it considered that a 175 year cut-off is the appropriate one (Policy Memorandum, paras 57–58).

On excluding leases with a rental over £100, the Government noted that the SLC survey indicated that this would exclude very few leases over 175 years long from the Bill (SLC 2006, Appendix C, para 18; Policy Memorandum, paras 43 and 61). Therefore, the Government considered that by choosing the £100 cut-off the Bill excludes leases let on commercial terms while still achieving the objective of converting leases akin to ownership to actual ownership.

### *‘Blairgowrie leases’*

In Blairgowrie and Rattray, it was common for leases of residential property to have an initial duration of 99 years with leases being perpetually renewable further periods of 99 years at a time. Such leases are often referred to as ‘Blairgowrie leases’.

Under section 68 of the Bill, renewable leases, such as Blairgowrie leases, qualify as ultra-long leases for the purposes of the general conversion scheme (the policy rationale for this provision presumably being that such leases are actually intended to be ultra-long leases, despite their notional break points). However, the Bill was also amended after consultation (in response to concerns raised by Miller Gerrard, a local firm of Blairgowrie solicitors) to make provision in respect of the situation where a renewable lease has not been renewed in accordance with the terms of the lease but instead has continued by virtue of the legal doctrine of tacit relocation (see para 5 above in relation to tacit relocation). Without this provision such leases would not satisfy the definition of a qualifying ultra-long lease in the Bill. Miller Gerrard argued that such an outcome legal outcome would be contrary to established legal practice in dealing with them. Accordingly, section 69 of the Bill now provides that renewal obligations in leases continuing on a yearly basis by virtue of tacit relocation should be included for the purposes of calculating the duration of the lease, even if the renewal did not actually happen.

In the Policy Memorandum to the Bill, the special provision for Blairgowrie leases in section 69 of the Bill is considered by the Scottish Government in the context of compliance with Article 14 of the ECHR. It states “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 considers that Article 14 was complied with” (Policy Memorandum, para 62).

### *Preservation of sporting rights*

As mentioned above, section 7 of the Bill mirrors the 2000 Act (as amended by the 2003 Act) and makes provision for preservation of a former landlord’s sporting rights under an ultra-long lease, on registration of a notice by the former landlord.

Professor William Gordon was one of only two consultees responding to the Scottish Government’s consultation who addressed the issue of the proposed treatment of sporting rights. He referred to the fact that the legal form which the former feudal superior’s preserved sporting rights take as a result of the 2000 Act has received some criticism from Professor Roddy Paisley (Paisley 2008) and suggested that this should be addressed in relation to sporting rights under ultra-long leases. Professor Paisley’s issue with the 2000 Act (also arising in the context of the current Bill) is with the preservation of sporting rights in a legal form with a

much greater degree of permanence than a real burden (ie a 'separate tenement'). He suggests this may in turn raise issues when the landowner is seeking to develop his or her land:

“The mechanism of preservation of sporting rights as a separate tenement was incorporated into the legislation to protect the human rights of those entitled to sporting rights. It is ironic that the means of preservation has arguably breached the human rights of the landowner in particular cases by depriving him, without compensation or means of discharge [of the sporting rights], of a material aspect of the right to develop land.”  
(Paisley 2008, para 4-24)

The Scottish Government considers that section 7 of the Bill is compliant with A1P1 (Policy Memorandum, paras 53 and 54). Part of the Scottish Government's policy rationale for preservation of former landlords' sporting rights is that, although reservation of sporting rights in ultra-long leases is rare, where such rights exist they are of considerable value. Consequently, if landlords were to lose these rights under the Bill a separate compensation scheme would have to be provided to ensure ECHR compliance (Scottish Government [consultation](#), para 4.01).

### *Conversion scheme for leasehold conditions*

As discussed earlier in this briefing at pp 10–12, some leasehold conditions in ultra-long leases will be abolished on the appointed day but others will be converted to real burdens under Part 2 of the Bill, either automatically or on the registration of a notice, if they satisfy certain qualifying criteria. Even if the leasehold conditions are converted to real burdens, enforcement rights in respect of these burdens will often pass to third parties, not to the former landlords.

The treatment of former landlords' enforcement rights closely mirrors the treatment of former superiors' rights to enforce feudal real burdens under the 2000 Act (as amended by the 2003 Act). The loss of the superiors' enforcement rights was the subject of some academic commentary from an ECHR perspective:

“The final aspect of the [2000] Act which merits some consideration as to its compatibility with the Convention is the abolition of all other feudal real burdens (apart from the exceptions referred to above). In these circumstances, the Act provides for no compensation. Indeed the Law Commission was quite clear that there should be no compensation for the loss of the right to enforce feudal restrictions or to extract fees for the waivers of feudal restrictions...

In light of the jurisprudence on the meaning of 'possessions' in terms of the Convention, the extinction of superiorities and all that accompanies them is almost certainly a deprivation of property for the purposes of the Convention. In those circumstances, there would normally be a right to compensation. An absence of compensation will be justifiable under the Convention only in exceptional circumstances...the absence of compensation for such superiors, albeit for understandable reasons, must raise some doubts about the compatibility of this aspect of the Act with the Convention. It might, however, be argued that some compensation has been payable since in many cases the superior will be compensated for the abolition of feu duty.” (Springham 2001, para 7.42)

No aspect of the 2000 Act has ever been legally challenged on ECHR grounds.

In the case of *Strathclyde Joint Police Board v The Elderslie Estates Ltd* (2002 SLT (Lands Tr) 2) (heard after the 2000 Act was enacted but before it came into force) the Lands Tribunal for Scotland held that the loss of the superior's right to enforce a real burden was a deprivation of property under A1P1, as opposed to a mere interference with use. At issue in that case was the compensation which the Lands Tribunal may order to be paid when varying or discharging real burdens. The scheme is separate and distinct from that contained in the 2000 Act and does give

the Tribunal discretion to award compensation where a “substantial loss or disadvantage” is suffered by a person with enforcement rights in consequence of the variation or discharge of the real burden.<sup>9</sup> The Tribunal found this to be compliant with A1P1.

In relation to the current Bill, the Scottish Government considered that, although leasehold conditions are extinguished, the opportunities to preserve some types of conditions under the conversion scheme contained in Part 2 of the Bill means the Bill is compliant with A1P1 (Policy Memorandum, paras 53–54). As mentioned earlier, the former landlord also has a right to claim compensation based on the rent formerly payable and he or she can claim additional payments in some instances (Part 3). Mirroring the 2000 Act, there is no additional payment associated with the general loss of the right to enforce leasehold conditions but it is possible to seek an additional payment in the specific situation where a leasehold condition was used to reserve to the former landlord the “development value” of the lease and certain additional criteria are met (section 49)(see further above at p 12). An entitlement to an additional payment on this ground requires (among other things) a “significant” difference in the value of the lease as a result of the leasehold condition in question, a relatively high threshold to satisfy.

## **COMMERCIAL LEASES**

### **The policy issue**

Another policy issue associated with the Bill is whether leases of commercial property should be excluded from the scope of the conversion scheme.

Non-residential leases were excluded from the scope of the voluntary conversion scheme running in Scotland between 1954 and 1959 (1954 Act, section 1(1)). However, the English scheme for ultra-long leases makes no distinction by type of property (Law of Property Act 1925 (c 20), section 153).

### **The approach of the Scottish Law Commission**

When it considered the issue, the SLC did not think that ultra-long leases of commercial property should be excluded from the scope of the conversion scheme under the Bill. Its reasoning was as follows:

“If, for example, a tenement is built on land held on an ultra-long lease, it does not seem reasonable, or indeed practicable, that the shops on the ground floor should be treated in a different way to the flats above. Or again there seems no reason for excluding a 999-year lease of a factory or pub granted in 1891 if a lease of a house for the same period would be converted. The basic principle should be universal convertibility.” (SLC 2006, para 2.33)

### **Views of those who responded to the Scottish Government’s consultation**

When the Scottish Government consulted on the proposed Bill in March 2010, it did not specifically address the issue of leases of commercial property.

The majority of those who responded to the Scottish Government’s consultation expressed no view on this particular issue and the Scottish Property Federation, a representative body for the commercial property industry, expressed general support for the Bill. However, three consultees namely RICS Scotland, SRPBA and one anonymous consultee (a private firm of solicitors acting

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<sup>9</sup> The compensation scheme considered in the case was found in section 1(4) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (c 35) (now repealed). It was re-enacted in section 90 of the 2003 Act.

on behalf of a commercial client) expressed concern about this aspect of the Bill. For example, RICS Scotland stated:

“We appreciate the policy position of the Scottish Government and the wish to remove what might be deemed a quasi-feudalist (or ‘feus in disguise’) arrangement. However, the arrangement of a residential property with a lease of say 999 years is very different from a commercial lease which has been entered into (prior to the 2000 Act limiting such leases to 175 years) for very sound contractual reasons”

The SRPBA stated that “serious unintended consequences” would flow from the Bill (p 4) and illustrated the nature of its concerns by reference to several examples of recent commercial leases which it thought would be caught by the Bill’s proposals. One example related to a lease of part of an estate for a holiday chalet development. The SRPBA commented:

“The subjects leased are located in a sensitive part of the estate and agreement never would have been reached for the sale of the land, the landlord having to be confident that the subjects would eventually return to the management of the estate”.

RICS Scotland and SRPBA recommended excluding leases of commercial property from the scope of the Bill, with RICS suggesting, as an alternative, reducing existing ultra-long leases of commercial property to 175 years.

## **The approach of the Scottish Government**

The Scottish Government amended the draft Bill to exclude in the Bill, as introduced, ultra-long leases where the rent was in excess of £100, with the aim of excluding ultra-long leases where the property was let on commercial terms (section 1).

The Scottish Government considered two alternatives to this £100 cut-off. One option was to have a cut-off based on the date the lease was granted, but it considered this arbitrary and could have excluded leases not let on commercial terms (Policy Memorandum, para 44). It also considered excluding all leases relating to commercial property, but agreed with the SLC reasoning outlined above on this point. It also thought use could have changed since the original lease was granted and it might not always be clear whether a lease was of residential or commercial property (Policy Memorandum, paras 45–46).

## **RESIDENTIAL GROUND LEASES**

### **The policy issue**

A ground lease is a common type of long lease whereby the landlord leases the ground only, usually for a relatively modest rent, and the tenant supplies the buildings. Today most ground leases are of commercial property but some pre-1974 long leases relate to residential property. As part of its work on long leases, the SLC considered whether the Bill should include a separate conversion scheme for the remaining residential ground leases (which do not fall into the category of qualifying ultra-long leases for the purposes of the main conversion scheme) (SLC 2006, Part 9).

Based on the empirical study the SLC carried out, the SLC estimated that the number of residential ground leases in existence today is likely to be less than 1000 (SLC 2006, para 9.26).

## **The approach of the Scottish Law Commission**

The SLC found there were two main arguments in favour of the Bill containing separate protection for tenants under residential ground leases: First, tenants under residential ground leases, unlike many residential tenants, typically do not have security of tenure, ie a right to stay on in the property after the lease expires. Secondly, whilst some such tenants will have acquired the tenant's interest in the lease with the buildings already built on the land (eg because they acquired it from an existing tenant on the open market), some tenants will have built the buildings themselves. This is significant because, under Scots law, if a building is built on land (even by a party other than the owner of the land) it belongs to the owner of the land. Accordingly, at the end of a residential ground lease, the tenant is at risk of losing the home built on the land without receiving compensation.

The main argument the SLC identified against protection for tenants under residential ground leases is that such tenants entered into such a lease with a full awareness of its terms and conditions and therefore should not be given a windfall benefit. In particular, a successor to the original tenant under the lease will have acquired the lease for a low rent which reflects the issues with the lease, including the lack of compensation for the buildings built.

The SLC ultimately decided not to pursue the subject of residential ground leases further. It suggested that, in contrast to the position in England and Wales, a legislative solution would not be an "appropriate or proportionate response" (SLC 2006, para 9.26). It also had misgivings about making recommendations "beyond general law reform and into the field of social policy" where there was a lack of clear agreement on the scale of the problem and on its solution (SLC 2006, para 9.27).

## **The approach of the Scottish Government**

The Scottish Government consulted on the issue of residential ground leases as part of its [consultation](#) on the proposed Bill in 2010. It referred to the policy discussion initiated by the SLC and stated its position at that time as follows:

"The Government can, of course, propose social policy reform. However, the Government considers that where a lease is due to expire relatively soon, if a statutory scheme were set up for converting such leases to ownership (or providing some other form of compensation) the compensation payable to landlords by tenants for removing landlords' rights would have to be much higher than is proposed in this consultation for ultra-long leases, as the landlords' rights would have much more value.

Therefore, it seems preferable not to introduce legislation in this area and instead rely on negotiations between the tenant and the landlord as the lease nears its end." (paras 2.32–2.33)

## **Views of those who responded to the Scottish Government's consultation**

Of the 15 consultees who responded to the Scottish Government's consultation, 8 did not express a view on this issue. Three consultees (Andy Wightman, RICS Scotland and South Lanarkshire Council) agreed that the Bill should not provide protection for tenants under residential ground leases. Four consultees did not agree with the Scottish Government's position on this issue (with two not giving a reason for their position). Professor Angus McAllister, author of a leading legal textbook on Scottish leases, supported security of tenure for such tenants. The [Law Society of Scotland](#) commented as follows:

"Whilst it is not within our remit to comment on social policy, we have received representations from some members who are concerned about the potential for title

raiders to take advantage of the vulnerability of tenants under certain leases of residential property which would not qualify as being ultra long leases. Accordingly we consider that some form of mechanism should be put in place whereby on a discretionary basis ownership could be granted to a tenant under such leases in return for suitable compensation for the landlord.

We would agree that it is not appropriate in such cases for tenants to receive a windfall benefit, although it is possible that the tenant may have originally paid the then market value of the property while only obtaining a leasehold interest. Any compensation should therefore be fair and equitable to both parties”

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