FINANCE COMMITTEE

AGENDA

10th Meeting, 2004 (Session 2)

Tuesday 23 March 2004

The Committee will meet at 9.45 am in Committee Room 2 to consider the following agenda items:

1. **Items in private:** The Committee will be invited to consider agenda item 3 in private and to consider whether it is still necessary to take item 4 in private, as agreed at its meeting on 9 March 2004.

2. **Scottish Water (in private):** The Committee will continue its consideration of a draft report by its reporters as part of the Committee’s investigation into Scottish Water.

3. **Witness expenses:** The Committee will be invited to agree to the payment of witness expenses and to delegate to the Convener responsibility for considering claims for expenses under Rule 12.4.3.

4. **Proposed Contingent Liability:** The Committee will consider a minute from the Scottish Executive in relation to a contingent liability and take evidence from—

   Gavin Barrie, Head of Lottery and Sponsorship Unit, Cultural Policy Division, Education Department, Scottish Executive

   Dr Gordon Rintoul, Director, National Museums of Scotland

5. **Inquiry into the Relocation of Public Sector Jobs:** The Committee will take evidence from—

   Clive Shore, Director of Business Consultancy and Neil Blake, Director of Research, Experian Business Strategies
6. **Tenements (Scotland) Bill:** The Committee will take evidence on the Bill’s Financial Memorandum from—

Philip Shearer, Solicitor, Technical Unit, Scottish Legal Aid Board

John Blackwood, Director, Scottish Association of Landlords

Susan Duffy
Clerk to the Committee

The papers for this meeting are:

**Agenda Item 2**

PRIVATE PAPER – to follow

**Agenda Item 4**

PRIVATE PAPER - papers published subsequent to meeting

**Agenda Item 5**

Paper by the Clerk – written submission

PRIVATE PAPER

**Agenda Item 6**

Tenements (Scotland) Bill, Policy Memorandum and Explanatory Notes

Paper by the Clerk – written submissions

SPICe Briefing

PRIVATE PAPER
Finance Committee

10th Meeting 2004 – Tuesday 23 March 2004


Background

1. On the 3 February 2004, the Finance Committee indicated that it would wish to take evidence from relocation experts in relation to the economic benefits of relocating public sector jobs.

2. Members will also be aware that the Lyons Review (an independent review of public sector relocation) has reported to the UK Government on Monday 15 March 2004 the results of its year long inquiry into the relocation of public servants out of London and the South East.

3. As part of the Lyons review, Experian Business Strategies Division was commissioned to undertake an appraisal of completed private and public sector relocations and to examine the economic impacts of public sector relocation.

4. Experian reported its findings in January 2004 and an overview of its findings is attached in this paper.

5. Members who may wish to read the full report will find it at the following web address (under the Lyons Review Research heading):

http://www.hm-treasury.gov.uk/consultations_and_legislation/lyons/consult_lyons_index.cfm

6. A full copy of the Lyons Review final report can also be found at this web address although an Executive Summary of the report has been included in this paper. The Lyons Review final report Executive Summary has been included for information only and should not form the basis of questioning of Experian representatives.

Jane Sutherland
Senior Assistant Clerk
Experian Business Strategies Division - The Impact of Relocation

Overview

1. Experian Business Strategies Division was commissioned by the Independent Review of Public Sector Relocation led by Sir Michael Lyons to undertake an appraisal of completed private and public sector relocations, and examine the economic impacts of public sector relocation. Our report falls into two parts. Part One draws lessons from the experience of past relocations, and is based on a series of interviews with senior staff from ten public sector bodies and seven private sector companies. We identify what worked, what did not work and why, and we consider how these lessons can be applied in the future. Part Two deals with the economic impact of relocating Government functions from London and the South East to other parts of the UK. We revisit the conclusions of earlier analysis, examine the evidence for multiplier effects, and consider briefly the contribution that relocation might make to Government aims such as addressing regional economic disparities.

2. We found considerable evidence that relocation brings significant benefits to organisations, enabling them to reduce operating costs, reshape their culture, and modernise working practices in the light of new technology. We found that the economic benefit to areas receiving relocated government functions was greater than had been believed, and that there were broader, but less tangible benefits to these areas in terms of boosting skills and investment, and building confidence for future development and investment.

3. Organisations in our study reaped a range of benefits from relocation (Part 1: Chapter 3). Savings in pay and accommodation costs were key benefits. Organisations managed to reduce their pay bill by saving London weighting payments, and by moving to areas where the underlying wage rates were lower than those in the South East. Rent, rates and related services were also areas which yielded savings.

4. We also found that many organisations’ experience was that labour markets outside the South East delivered a good supply of able staff, particularly at more junior grades. This not only improved productivity, but the improved recruitment and retention rates delivered further savings in recruitment and training costs. Recruiting new staff also provided the opportunity to develop a new organisational culture, for example with a better customer focus, and to introduce new working practices.

5. Importantly, the study revealed that the main benefit delivered by relocation was the opportunity to re-engineer the business and embrace different working methods and technologies. While reducing operating costs is a key driver, we found that long-term benefits would be maximised only if relocating to new premises went hand in hand with fundamental changes in the way the business is done. This process re-engineering was usually supported by developments in ICT.
6. Not all of the relocations we studied were successful in capturing the whole range of these benefits. Our study identified a number of factors critical to success, and we found much good practice in the planning and execution of a successful relocation which is set out in Part 1: Chapter 4. In summary, we found that strong and committed leadership at the very top of the organisation was crucial to a successful move. Good communication with staff was important to maintain morale and prepare and persuade staff to move. The rigour and transparency of the business case was also fundamental. Risk management, realistic planning and close monitoring of progress were also key success factors. It was good practice to have a full time dedicated project team lead by a senior project manager or director.

7. We found that even when the critical success factors were well managed, organisations encountered other obstacles and risks to successful relocation, some of which were not apparent until the move was complete. With foresight and careful planning many of these can be avoided or mitigated.

8. Careful choice of location, with regard to labour supply and accommodation, is essential to ensure that costs savings are sustainable over time. Some organisations found that savings could be eroded as other organisations moved to the same location and drove up operating costs. This was particularly relevant to private sector relocations and call centre operations, where staff are prepared to switch job for a small salary increase. We conclude that good local market intelligence, coupled with co-ordination of public sector relocations at the centre, would help avert the risk of localised overheating caused by a large number of jobs moving to the same area. This also underscores the importance of using relocation to deliver fundamental business change, as well as pursuing lower operating costs.

9. We found that a 'them and us' culture could emerge after time, whereby relocated staff felt isolated and under-valued in comparison with those remaining 'at the centre'. This can be countered by ensuring that the same cultural and business changes affecting relocated staff are equally applied to those who do not relocate. Another mitigating measure is to base senior managers in offices in the regions, or arrange for them to make regular visits. Shared events such as training or professional seminars can promote shared objectives and consistent corporate values. Some planned face-to-face contact also facilitated successful communication via email, telephone and videoconferencing.

10. Some of the organisations in our study had underestimated the need for senior staff to travel back to London for meetings with stakeholders or Ministers. The cost of this both in terms of staff time and fares could be high, and there was a further human cost arising from the stress and burden of regular travel. We felt that this could be addressed, at least in part, by greater use of ICT − telephone conferencing, virtual meetings via Intranets, and by video-conferencing. The availability of broadband means that services are much more reliable than in the past. We know that some departments, for example, the Department for International Development, make excellent use of this technology, but that this
is by no means widespread across Government Departments. We concluded that there was a significant opportunity to exploit the technology more fully.

11. One issue which emerged from the relocations we studied was that senior staff can be reluctant to relocate. The perception, especially among civil servants, that career opportunities outside London are limited, is strong. We considered this might be addressed by clustering relocated public sector functions in a small number of areas to provide a broader range of career opportunities. We also thought that clustering could build on synergies between public sector organisations, such as research establishments, universities and existing regional presence, to promote a more informed and coordinated approach to policy development and administration. The economic impact of clustering on an area is mixed. As discussed below, moving a larger number of more senior posts into an area maximises the economic benefits to that area. But if a large number of posts relocate, this could drive up local wages and ‘crowd out’ private sector jobs.

12. Another counter to career isolation, mainly used by the private sector, is to make secondments away from ‘the centre’ an integral part of the senior manager’s career path. In this way each senior manager is expected to have a period of service with the organisation outside the South East. We conclude that the public sector could usefully adopt this practice, although support by way of training, networking, and facilitating return to London (if wanted) would be important.

13. In the second part of our study, we examine the economic impact that relocation of public sector functions might have on both the receiving location and on London. Sir Henry Hardman, in his 1973 analysis, concluded that public sector relocation would result in limited positive impact on the receiving area. We examined a range of existing case studies, and undertook two further case studies of our own (Leeds and Newport). We concluded that many of the assumptions underpinning the earlier analysis no longer held good, and that the economic impact on both the receiving location (chapter 2) and the UK as a whole (chapter 4) would be more positive.

14. The economic benefit of relocation to the receiving area is derived from increased spending by the relocated department and its employees on goods and services, which boost demand and create jobs ‘in the wake’ of the public sector jobs moved. But an influx of well paid public sector jobs can also drive up local pay, and can lead to the loss of jobs in the private sector. This negative economic effect has to be set against the positive, when assessing the overall impact on the area.

15. Our work suggested that the benefit to receiving locations depended crucially on the extent to which relocated public sector jobs would drive up local pay and wages. Several factors have a bearing on this, critically the available spare capacity in the local labour supply; but also the number and the type of posts relocating. Overall we conclude that to maximise the economic benefit to an area, public sector pay rates must be more closely aligned with those applying locally.
16. The type of posts relocating also has a bearing on the economic impact. Broadly, the more senior posts involved, the greater the economic benefit to the receiving location, because more senior staff tend to be better paid and to have more disposable income to spend locally. In addition they are more likely to move with their post, or be based outside the area and travel longer distances to work, so they will not be exacerbating competition for local labour. But, as outlined above, there are issues which make it more difficult to move this group from London, and this is borne out by our analysis of public sector employment in (Part 2: Chapter 5), which demonstrates that the better paying managerial and professional jobs are concentrated in the Greater South East. We conclude that it will be necessary to address this imbalance if the full potential economic benefits for other parts of the UK are to be realised.

17. We have concluded above that clustering public sector activity in a small number of areas can encourage staff to relocate. Staff may feel there are more options open to them if there is a concentration of public sector work in the area, and senior staff will be attracted if there are more upward career paths outside London. Clustering may also offer more scope for employment of spouses and partners. Another positive effect is that clustering can encourage support services, such as IT support or related consultancies, to relocate or develop in the area. And there may be potential for departments to exploit economies by way of shared premises and services.

18. Clustering does however suggest a large number of jobs being moved to a single location, which presents a greater risk of driving up wages and tightening the labour market. We found a few overheating regional centres where further relocation would not be welcome by existing large employers, especially if public sector pay rates remained out of line with local rates. Equally, there are examples such as Leeds and Sheffield where public sector clusters have proved a success and have made a positive contribution to local prosperity. On balance, we concluded that, despite the potential for local 'overheating', there were considerable benefits to be derived from this approach.

19. There were ranges of wider economic impacts which are not necessarily captured by multiplier analysis and yet should not be excluded from our overall assessment. Relocation implies a significant boost for skills and investment, which are both key drivers of regional productivity. The more senior posts moved, the greater the injection of skills into the area. This could be expected, over time, to create a flow of learning to other sectors, through networking and turnover of staff. If the relocation results in a greater proportion of managerial and professional staff in the area, then this can lead to greater involvement in public services such as schools, which helps create pressure to drive up standards.

20. We also found that public sector relocation can develop confidence in the future of an area, perhaps stemming a spiral of decline, or contributing to the successful regeneration of a deprived area. A public sector presence can encourage qualified people to stay, and can act as a catalyst for further investment by reducing the risk facing potential investors.
21. We examined the potential effect of relocation on London. Here we found that moving jobs out to other parts of the UK is unlikely to have significant long-term implications for the capital. This is a consequence of tightness in the labour and housing markets in London and the city’s attractiveness to private investors, due to its transport links, its reputation as an international financial and business trading centre and its general long term economic robustness. Overall, we conclude that over time, benefits that accrue due to the reduction in congestion and overheating and the boost to private sector investment encouraged by the slack in the market, will work to offset the reduction in public sector jobs.
Lyons Review Final Report – Conclusions and Recommendations

I was asked to advise ministers on the relocation of public servants out of London and the South East.

I conclude that the pattern of government needs to be reshaped. National public sector activity is concentrated in and around London to an extent which is inconsistent with Government objectives. In particular this pattern fails fully to reflect the large cost disparities between London and other parts of the UK and the revealed benefits of dispersal for the efficient delivery of government business and for regional economies.

London as capital needs a governmental core supporting ministers and setting the strategic policy framework. In every other respect the status quo is open to challenge.

If the Government wishes to make a significant impact on the pattern of its locations it will need to take firm action. I have proposed ten recommendations as follows:

1. Departments have identified more than 27,000 jobs that could be taken out of London and the South East, including up to 20,000 jobs for dispersal as a first tranche. Plans for these dispersals should be taken forward urgently as part of Government’s forthcoming spending review.

2. Major dispersals are unlikely to offer a quick payback and they incur considerable costs up front. The Government must be prepared to make the necessary investment. Equally, there is a strong case for sharper incentives to encourage departments to seek the benefits of locations out of London and to keep their presence in the capital to a necessary minimum.

3. Departments should implement their relocation plans alongside efforts to align their pay with local labour market conditions. My review has demonstrated that failure to make progress on locally flexible pay will limit the efficiency gains from dispersal, and could undermine the economic benefits for receiving locations.

4. Whitehall headquarters should be radically slimmed down, reflecting a clearer understanding of what is really needed in London, and of the distinction between policy and delivery.

5. There should be a strongly enforced presumption against London and South East locations for new government bodies and activities; for functions such as back office work and call centres which do not need to be in London; and for bodies and functions whose effectiveness or authority would stand to be enhanced by a location outside London.

6. Cabinet needs to give continuing political impetus to the locational agenda. Leadership should be provided by a Cabinet Committee and, in the short term at least, a lead minister. These arrangements should be supported by a small, short life unit at the centre, to act as a ginger group, to monitor and report on
progress with dispersals, and to ensure that best practice is disseminated and embedded.

7. Permanent secretaries and other public sector chiefs are responsible for managing their departments’ resources, accounting to ministers and to Parliament. Locational considerations must be an integral part of these responsibilities. The aim should be to mainstream the locational aspect of business planning.

8. The Government must take responsibility for the whole pattern of its locations, developing a strategic framework of guidance for departments and ensuring a mechanism for reviewing and where necessary challenging departments’ locational preferences.

9. The Government office portfolio must be much more tightly managed. In particular, exits from London should be coordinated to ensure overall value for money and to strengthen individual relocation business cases.

10. The civil service needs a more coordinated approach if it is to minimise the costs and the adverse impacts on staff associated with relocation and redundancy.

These actions will help create a better pattern of government. By setting a good example, the Government may also promote more rigorous thinking about location in the wider economy, in the interests of UK competitiveness.
Finance Committee
Tenements (Scotland) Bill - Financial Memorandum
Written Submissions

1. In order to assist the Committee in its consideration of the Financial Memorandum of the Tenements (Scotland) Bill, written submissions have been received from the following organisations:

   Scottish Court Service (SCS)
   Scottish Legal Aid Board (SLAB)

2. The Committee is invited to consider these submissions.

Emma Berry
March 2004
SUBMISSION FROM THE SCOTTISH COURT SERVICE (SCS)

Further to your letter of 8 March Inviting Mr Ewing, Chief Executive to give evidence to the Finance Committee this is to confirm that as our interest in the Bill is minimal he declines the invitation.

It is anticipated that approximately 50 applications per annum may be lodged and on this basis we have submitted an estimate of £15K for judicial salaries and £5K for running costs in the financial memorandum.

Patricia Fiddes
Personal Assistant to Chief Executive

SUBMISSION FROM THE SCOTTISH LEGAL AID BOARD (SLAB)

INTRODUCTION

The Scottish Legal Aid Board (“the Board”) welcomes the opportunity to provide evidence to the Finance Committee on the Tenements (Scotland) Bill. The Board’s comments are limited to the legal aid implications of the Bill.

EVIDENCE

Sections 5 and 6 of the Bill allow owners of flats to apply to the Sheriff by way of summary application to annul certain decisions and resolve disputes. An appeal would lie to the Court of Session on a point of law. These are civil proceedings for which civil legal aid could be sought.

However, applications to the Sheriff, and any appeal from the Sheriff’s decision, relate to disputes concerning more than one owner of a flat. This raises questions of an applicant for civil legal aid having a joint or common interest with the other proprietors. Joint or common interest could apply to both pursuers and defenders.

Where the Board considers that an applicant for civil legal aid is jointly concerned with or has the same interest as other persons in the matter for which legal aid is sought, the Board is required by regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 to refuse the application if it is satisfied that:

(a) the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted; or

(b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted.

Since the matters before the court, both at first instance and on appeal, will concern decisions taken by a number of proprietors or disputes over matters such as common
repairs, it appears to the Board that applicants for civil legal aid may well fail the test in regulation 15 in which case legal aid will be refused. The Board has no discretion where it is satisfied that the criteria in regulation 15 are met.

FINANCIAL MEMORANDUM

The issues discussed above may affect the number of applicants who can be granted civil legal aid. The Scottish Executive estimates that only 10% of the 50 Sheriff Court cases will attract legal aid. Legal aid costs are estimated to be £60,000. That figure appears reasonable.

Philip Shearer
Solicitor - Technical Unit
TENEMENTS (SCOTLAND) BILL

SARAH DEWAR

The Tenements (Scotland) Bill was introduced in the Scottish Parliament on 30 January 2004. It aims to provide clear rules on the ownership of the various parts of a tenement and a system for the management of tenements. Its overall objective is to facilitate the carrying out of outstanding necessary repairs to tenements.
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KEY POINTS OF THIS BRIEFING

• The Tenements (Scotland) Bill was introduced in the Scottish Parliament on 30 January 2004. The Bill is the final item in the Scottish Executive’s legislative programme of property law reform based on recommendations of the Scottish Law Commission. Earlier Bills led to the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5) and the Title Conditions (Scotland) Act 2003 (asp 9)

• The Bill contains a broad definition of what constitutes a ‘tenement’ (s 23). Consequently, a wide range of residential property, mixed use property (eg where there are shops on the ground floor and flats above) and certain types of commercial property will qualify as tenements under the new legislation

• The law of the tenement, in the sense of special and self-contained rules governing the ownership and management of tenements, has been developing through case law and the work of legal academics since the seventeenth century

• The existing law of the tenement is a default law – it applies only to the extent that there is no provision in the title deeds of a property in relation to ownership and maintenance. The device used in title deeds to make provision in relation to maintenance is the type of title condition known as a ‘real burden’

• There are problems with the existing law of the tenement, particularly in relation to the management of a tenement. For example, the agreement of all the owners in a tenement is required before repairs to the tenement can be carried out, unless the title deeds provide for majority decision making. This means important repairs are often not carried out

• The Bill has two main policy aims: 1) to clarify and re-state the common law rules which demarcate ownership of the various parts of the tenement and in so doing remove a number of uncertainties and anomalies in the existing law (sections 1-3); and 2) to provide a comprehensive set of default rules for the management of tenements, referred to in the Bill as the ‘Tenement Management Scheme’ (TMS) (section 4 and Schedule)

• The TMS has two main innovations – provision for decision making by majority (TMS, rule 2.5) and the introduction of the concept of ‘scheme property’ (TMS, rule 1.2)

• ‘Scheme property’ includes the main structural parts of the tenement, eg the roof, the foundations and the external walls (TMS, rule 1.2). If a part of the tenement qualifies as scheme property decisions on its repair and maintenance can be taken by all the individual flat owners on a majority basis, even if the part in need of repair or maintenance is exclusively owned by one flat owner

• The Bill also covers a range of other matters relating to tenements including duties of ‘support’ and ‘shelter’ owed by flat owners to one another (ss 7–10), insurance (s 15), the continuing liability of outgoing owners for repairs to a tenement building (s 11), access to flats by other flat owners for maintenance purposes (s 14), and demolition and abandonment of a tenement building (ss 16 – 20)
INTRODUCTION

The Tenements (Scotland) Bill (‘the Bill’) (with the Policy Memorandum and Explanatory Notes) was introduced in the Scottish Parliament on 30 January 2004. The Bill is the final item in the Scottish Executive’s legislative programme of property law reform based on recommendations of the Scottish Law Commission (SLC). Earlier bills led to the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003.

The Bill clarifies the rules which demarcate ownership of the different parts of a tenement (ss 1-3), sets outs a framework for the management and maintenance of tenements (s 4 and the Schedule to the Bill) and aims to make it easier for owners in a tenement to reach agreement and ensure that their property is well maintained.

The Bill also covers a range of other matters relating to tenements including duties of ‘support’ and ‘shelter’ owed by flat owners to one another (see pages 19–20 of this briefing for definitions of these terms) (ss 7–10), insurance (s 15), the continuing liability of outgoing owners for repairs to a tenement building (s 11), access to flats by other flat owners for maintenance purposes (s 14), and demolition and abandonment of a tenement building (ss 16 – 20).

This briefing contains an outline of the background to the reforms, consideration of the main provisions of the Bill and a summary of the main issues arising on consultation. Those wishing to gain a detailed understanding of the background to the Bill should also have regard to the following sources of information:

- The Housing Improvement Task Force’s final report, Stewardship and Responsibility: A Policy Framework for Private Housing in Scotland (2003a), published in March 2003. This Task Force was appointed by the Executive in December 2000 to consider issues relating to housing quality in the private sector and the house buying and selling process. It made several recommendations related to the reform of the law of the tenement and the Executive’s consultation process on the Bill also sought comments on these.
- The Executive’s consultation document (2003b) also published in March 2003 and its web page on the Bill, containing a report on the consultation (2003t) and the individual consultation responses

THE EXISTING LAW IN SCOTLAND

THE ORIGINS OF THE LAW OF THE TENEMENT

Tenements have existed in Scotland since medieval times and at the end of the twentieth century made up a quarter of the occupied housing stock (Scottish Homes 1997). The law of the tenement – in the sense of special and self-contained rules governing the ownership and maintenance of tenements – originated in the work of influential legal writers in the 17th century.

1 Known as the ‘institutional writers’.
and subsequently has been developed by a small amount of case law. It is, therefore, part of the common law.

THE ROLE OF THE REAL BURDEN

Many countries, including France, Germany, South Africa and the United States, have special legislation codifying the law relating to tenements. However, Scotland does not. This is almost wholly due to the development since the 18th century of a type of title condition known as a ‘real burden’, which binds not only the first purchasers of flats but also their successors as owners. Real burdens have been used to create bespoke arrangements for the management and repair of individual tenements which override the law of the tenement provided by the common law.

PROBLEMS WITH THE EXISTING LAW

However, real burdens in title deeds only override the law of the tenement, to the extent that the real burdens make express provision on a particular matter. Otherwise the common law still applies as a default law.

Some title deeds do not make adequate provision in relation to every matter affecting the management of the tenement, leaving flat owners reliant on the common law to fill in the gaps. However, the common law is inadequate in several respects. For example, it is relatively common for burdens to oblige all owners to contribute to the cost of a common repair but for there to be no real burden in the title deeds stipulating how the owners are to decide to carry out the repair. In such a case the common law applies and this requires that all of the owners must agree before the repair can be carried out (ie majority support is not sufficient). It is very often impossible to obtain the consent of all the owners and this can make it very difficult to carry out necessary repairs to tenements.

POLICY OBJECTIVES OF THE BILL

In the Policy Memorandum to the Bill (at para 2) the Executive outlines the two main policy objectives of the Bill as follows:

- to clarify and re-state the common law rules which demarcate ownership of the various parts of the tenement, removing a number of anomalies and uncertainties in the existing law
- to provide a statutory system of management for tenements ensuring that the owners of every tenement will have a mechanism to reach decisions on important matters such as repairs

THE WIDER PROGRAMME OF PROPERTY LAW REFORM

The Bill should be considered within the Executive’s wider legislative programme of property law reform. The reforms began with the Abolition of Feudal Tenure etc (Scotland) Act 2000 (‘the 2000 Act’) (asp 5) which abolished the feudal system of land ownership, where land was held subject to a feudal superiority, and created in its place a system of ordinary land ownership.
There then followed the Title Conditions (Scotland) Act 2003 (‘the 2003 Act’) (asp 9) which aimed to improve the rules governing the imposition of real burdens on property in the system of ordinary land ownership following feudal abolition.

Both Acts will affect individuals living in tenements. For example, as mentioned above, real burdens are often included in the title deeds of individual tenement flats to create arrangements for the management and maintenance of a particular tenement. Of particular note in the 2003 Act are the provisions which make it easier for any real burdens which are perceived as being out of date or ill-conceived by those subject to them, to be varied or discharged (see, for example, ss 32 – 37). The 2003 Act also contains outline provisions for a ‘Development Management Scheme’, a scheme for management and decision making which can be opted into (Part 6). It is regarded as being particularly suitable for use in larger, more complex developments. It will be able to be used in relation to tenements – an issue which is considered further below.

A useful way to think about the relationship between the 2003 Act and the Tenements (Scotland) Bill is that the 2003 Act is, in relation to tenements, principally of relevance in relation to tailor made systems for management and maintenance created in title deeds and the Bill concentrates on the default rules applicable to tenements where the title deeds are silent or inadequate.

The Executive plans to fully commence both the 2000 Act and the 2003 Act together on 28 November 2004. The Executive states in the Policy Memorandum to the Bill (at para 8) that it hopes that the Bill, if enacted, will be commenced on the same date.

DEFINITION OF A TENEMENT

The definition of what constitutes a tenement in the Bill is a broad one. Under s 23 a tenement is a building comprising two or more related flats which are owned or designed to be owned separately and which are divided horizontally. Under s 25 a flat is “a dwelling-house, or any business or other premises in a tenement building.”

The effect of these provisions is that a wide variety of residential property, including large houses which have been converted into flats, high rise blocks, modern blocks of flats, as well as the traditional sandstone or granite buildings of three or four storeys, will qualify as a ‘tenement’. Furthermore, mixed use property, where there are shops on the ground floor with flats on the upper floors, as well as some purely commercial property (e.g. where different parts of an office block are owned, rather than just being leased, by different businesses), will qualify as a ‘tenement’.

SOME OTHER USEFUL DEFINITIONS

**Sector**

Used in the Bill as a way of describing the different areas which go to make up a tenement building. A sector can be a flat or some other separate part of the tenement such as the close or the roofspace (s 25).

**Close**

A connected passage, stairs and landings within a tenement building which together constitute a common access to two or more of the flats (s 25). External paths and staircases are not included in the definition.
Solum
The ground on which a building is erected.

Pertinents
Parts of the tenement building which are not within the boundaries of individual flats (eg the close). Also referred to as the ‘common parts’. Not to be confused with ‘common property’ (see below).

Common property
Property that is owned by more than one person, where each owner has a right to a share in the whole property, but none of the owners have an absolute right to any individual physical portion of that property.

OWNERSHIP OF THE TENEMENT (SECTIONS 1 – 3)

WHY OWNERSHIP IS IMPORTANT

Ownership within a tenement matters because at common law the liability to pay for the repairs and maintenance goes along with ownership, as does the right to use the various parts of the tenement.

THE COMMON LAW RELATING TO OWNERSHIP

The title deeds of individual flats often make express provision as to who owns the different parts of the tenement, such as the roof, the external walls and the close. However, where the title deeds are silent the common law applies. Under the common law most parts of the tenement are owned individually and there is little common property. So, for example, under the common law, the owner of the top flat in the tenement owns the roof and therefore has sole responsibility for repairs to the roof.2

WHAT THE BILL PROVIDES IN RELATION TO OWNERSHIP

Re-stating and clarifying the common law

The Bill does not propose to radically alter the common law relating to ownership. It largely re-states the current position but seeks to remove a number of uncertainties and anomalies.

However, later in the Bill, with the creation of ‘scheme property’, important changes are made to the rules relating to liability for maintenance and repairs of the main structural parts in the tenement, eg the roof and the external walls. Broadly speaking, the Bill provides that these structural parts are to be maintained collectively by all the owners in the building, even where these parts are not in common ownership. See further below under the heading ‘Scheme property’.

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2 If there is more than one top flat in the tenement, the common law provides that each flat owns the portion of the roof immediately above them.
**Free variation**

Section 1 of the Bill determines the scope of the rules relating to ownership, created in sections 2-3. The rules will apply to both existing and new tenements, subject to an important proviso:

<table>
<thead>
<tr>
<th>Principle of free variation</th>
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<tbody>
<tr>
<td>The re-stated rules in sections 2-3 will <em>only</em> apply to the extent that the title deeds of the tenement or any other enactment do not make different provision, ie the rules created are default rules (section 1). This permits what is referred to in the Policy Memorandum as ‘free variation’ of the title deeds to suit the particular circumstances of the tenement (paras 13–15). This re-creates the current position at common law.</td>
</tr>
</tbody>
</table>

A majority of those who responded to the Executive’s consultation came out in support of the principle of free variation, including the Royal Institute of Chartered Surveyors, the Property Managers Association and the Law Society of Scotland (Scottish Executive 2003t, p 4). The Law Society of Scotland commented:

“We accept the principle of free variation as a sound one. No set of general rules could provide solutions, which apply with equal appropriateness to every single case. Nor can general rules safely supply the level of rules which efficient tenement management often requires. Like the old law, therefore, the new law should be a background law only, freely variable by conveyancers”. (Scottish Executive 2003k, p 1)

**Boundaries (section 2)**

Section 2 of the Bill creates the default ownership rules relating to the boundary features of a tenement, including both internal boundaries features, such as walls between flats, and external boundary features, such as the outer surface of the tenement building or the roof. The rules are outlined in full in the box below and, for ease of reference, their effect is illustrated in the diagram on page 13 of this briefing.

The overall effect of the rules can also be summarised as follows: (a) a flat will be a section of airspace bounded by four walls, a ceiling and a floor; and (b) the boundary features will generally be owned to the mid-point, but where they form the outer surface of the building (as with the external walls or the roof) the entire feature will be counted as part of the flat bounded by that feature. An overwhelming majority of those who responded to the Executive’s consultation agreed with this approach (Scottish Executive 2003t, p 4)
Rules relating to boundaries of the tenement (section 2)

- **Internal features**: where one sector is adjacent to another sector the boundary between them is the mid-point of the structure which separates them; (s 2(1)(a)). For example:
  - the boundary between two flats on the same level would be the mid-point of the common wall
  - the boundary between two flats on the upper and lower level would be the mid-point of the joists between the two flats

- **External features**: where one sector is bounded by an external feature of a tenement (eg the outer wall of the building), then ownership of the sector includes the part of the external feature adjacent to that sector (s 2(1)(b)(i))

- **Other buildings**: where one sector is bounded by a building which is not the tenement the boundary between them is the mid-point of the structure that separates them (eg the common wall) (s 2(1)(b)(ii))

- **Structures including doors and windows**: where the structure separating two adjacent sectors (eg a door or a window) wholly or mainly serves one of those sectors, the thing is in its entire thickness part of that sector (s 2(2)). So, for example, the front door of a flat leading to the close is part of the flat and not of the close.

- **Top flats and bottom flats**: a top flat extends to and includes the roof over that flat (s 2(3)) and a bottom flat extends to and includes the solum under that flat (s 2(4))

- **Ownership of the close**: a close extends to and includes the roof over, and the solum under, the close (s 2(5))

- **Airspace**: where a sector includes the solum (or any part of it) the sector shall also include, the airspace above the tenement building and directly over the solum (or part of it) (s 2(6)). This is subject to the exception in s 2(7) (see below)

- **Triangular airspace**: where the roof of a tenement slopes, a sector which includes the roof (or any part of it) shall also include the airspace above the slope of the roof (or part of it) up to the level of the highest point in the roof (s 2(7)). Is rule is designed to deal with the situation where the owner of the top flat wishes not only to build into the roof space above his or her flat, but to build a dormer window for the benefit of that loft conversion.

**Pertinents (section 3)**

Section 3 deals with ownership of the pertinents (or common parts) of tenements. Its effects are also illustrated in the diagram on page 13 of this briefing.

**Close, lift and adjoining land**

Where the title deeds have made no provision to the contrary, section 3 provides as follows:
• **close and lift**: the owners of all the flats which obtain access by way of a close and/or a lift (where the lift allows access to more than one flat) will have a right of common property in the whole of the close and/or the lift. This right of common property is held in equal shares (s 3(1), 3(2))

• **adjoining land**: any land belonging to a tenement shall be owned by the bottom flat most nearly adjacent to the land (or part of the land) (s 3(3)). This rule does not apply to any part which constitutes the solum of the tenement, an access path, an outside stair and any other means of access to the tenement

*The service test*

The remaining pertinents, such as paths, outside stairs, fire escapes, rhones (ie roof gutters), pipes, conduits (ie channels, tubes or ducts for transporting water or other fluid, or for covering electric wires), flues, tanks or chimney stacks are subject to ‘the service test’.

*The service test (s 3(4))*

If the pertinent:

• wholly serves one flat, then it shall be owned solely by that flat

• serves two or more flats, then the owner of each flat served by it has a right of common property in the pertinent

When the service test makes a pertinent common property, each owner of a flat served has an equal right of common property in it. The exception to this is where the common property is a chimney stack. In this case, the share allocated to a flat shall be determined in direct accordance with the ratio which the number of flues serving the flat in the stack bears to the total number of flues in the stack (s 3(5)).

*Responses on consultation*

A narrow majority of those who commented on this aspect of the Bill disagreed with the concept of the service test. Many of the respondents to the Executive’s consultation argued in favour of an alternative approach to the service test – that all flats in a tenement should be given an equal right of common property in the pertinent, regardless of whether they are served by it or not (Scottish Executive 2003t, p 5). For example, Dundee City Council commented:

“owners will find it difficult to work out precisely which flats are ‘served’ by particular pertinents and having different pertinents owned by different groups of owners within a tenement will be a nightmare when it comes to major repair schemes. It will be better simply to say that everything that was not owned exclusively by one flat was owned equally by all flats”. (Scottish Executive 2003h, p 1)

Similarly, the Chartered Institute of Housing stated that:

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*providing research and information services to the Scottish Parliament*
“The service test is overly complex and would inevitably lead to confusion, resentment and neighbourhood disputes”. (Scottish Executive 2003e, p 2)

In the Policy Memorandum to the Bill the Executive, in support of the service test, points out that respondents may not have considered the full consequences of the alternative approach in relation to all types of pertinents in a tenement. For example, a pipe is a pertinent and it may serve two owners in a tenement. If the pipe becomes the common property of these two owners they can reach agreement on its repair without consulting others in the tenement. However, if that pipe were to become the common property of all owners in the tenement all owners would have a say in its repair,

“in spite of the fact that the majority would have no interest in the pipe and may therefore be unwilling to pay for its repair” (Policy Memorandum, para 32)

(Figure 1 appears on the next page of this briefing)
Figure 1: Ownership of a tenement under ss 2–3 of the Bill

Notes: Figure 1 illustrates the implications of the rules relating to ownership for one tenement layout. The red lines denote the boundaries separating sectors of the tenement from one another. The broken black lines illustrate physical features of the tenement. In Figure 1 ownership of the front door of the tenement, the external path and the chimney are allocated according to the service test. It is assumed that the chimney only serves Flats 1 and 3 and therefore it is only owned by Flats 1 and 3. Where sectors are stated to be owned by more than one flat owner these are in equal shares. The exception to this in relation to the chimney stack where the respective shares allocated to each flat will have been determined in direct accordance with the ratio which the number of flues serving a flat in the stack bears to the total number of flues in the stack (in accordance with s 3(5) of the Bill – see above).
TENEMENT MANAGEMENT SCHEME (SECTION 4 & SCHEDULE)

THE CURRENT POSITION

As mentioned above, one of the main problems in Scottish tenements concerns the common law rules relating to management and decision-making where there is no provision in the title deeds. On decision-making, the basic common law rule is that every owner in a tenement must agree before repairs can be carried out. Unanimity is very often impossible to obtain and so repairs are not carried out.

THE TENEMENT MANAGEMENT SCHEME

Section 4 and the Schedule to the Bill make provision for a ‘Tenement Management Scheme’ (TMS), the vehicle intended to provide an effective system of management and decision making by owners. It comprises eight individual rules, the main ones of which are outlined below. For the complete scheme see the Schedule to the Bill.

Scope of the TMS

The Development Management Scheme

The Bill provides that the TMS will not apply where the ‘Development Management Scheme’ (DMS) is in place for the tenement (s 4(2)).

As mentioned above, outline provisions for the DMS are found in the Title Conditions (Scotland) Act 2003, with the intention being that details of the scheme will be fleshed out by secondary legislation at a later date. The DMS is a scheme for management and decision making which can be opted into. It is intended for use in developments generally, not just in relation to tenements. Developers, or individual owners in a development (if the development is complete and the units have been sold off), will be able to opt into the DMS. This may be done in relation to a particular tenement.

Use of the DMS will be particularly suited to larger and more complicated developments which will require a sophisticated management regime. It might, for example, be applied to a tenement which contained shops at ground level, offices of varying size above, penthouse flats at the top and parking spaces in the basement. By contrast, the TMS is a simpler scheme, suitable for smaller tenements.

Provision in the title deeds

Where the DMS does not apply and there is no provision in the title deeds in relation to any of the matters covered in the TMS then the TMS will apply to a tenement, existing or future, in its entirety (s 4).

However, it will be quite unusual for the title deeds of existing tenements to make no provision on any of the matters covered by the TMS. What is more likely is that there will be adequate
coverage of at least some of them. Section 4 provides that each individual rule of the TMS will only apply to a tenement – existing or built in the future – if the title deeds of that tenement do not cover the subject of that individual rule. In other words, the principle of ‘free variation’ referred to above, applies here also. Accordingly, it is probably conceptually more straightforward to think of the TMS as a set of default rules, rather than a scheme as such, as the applicability of each rule to a tenement is to be assessed individually.

**Scheme property**

Rule 1 of the TMS introduces the concept of ‘scheme property’, the innovative feature of which is that, without express provision being made in the title deeds, flat owners could be liable for the repair and maintenance of a part of the tenement they do not own.

Scheme property is defined as:

- any part of the tenement that is common property
- any part of the tenement in respect of which there is a real burden that imposes liability for maintenance of that part on two or more owners
- any part that is on the list specified in the Bill which includes the major structural parts of the building such as the roof, the foundations and the external walls (rule 1.2)

Parts of the building that are excluded from the definition are certain parts which serve only one flat and any chimney stack or chimney flue (rule 1.3).

**Scheme decisions**

Rule 3 sets out a list of subjects on which decisions can be made by flat owners under the TMS.

Under rule 3.1(a) owners can decide to carry out maintenance to any part of the scheme property. ‘Maintenance’ is defined in the TMS as including a variety of routine matters such as cleaning and painting and also includes repairs. It does not include significant improvements which are not incidental to maintenance (rule 1.5).

Other examples of decisions that can be made include decisions to appoint a property manager or factor (rule 3.1(c)) and to arrange a common insurance policy for the tenement (rule 3.1(e)).

**Procedure for making decisions**

Rule 2 provides for majority decision making by flat owners in a tenement. If the majority of owners decide, for instance, to have repairs carried out, the minority will be obliged to pay their share (though there will be the possibility of applying to the sheriff court for annulment of the decision on certain grounds – see below). The Executive hopes that this change will lead to many outstanding repairs being carried out (Policy Memorandum, para 35).
Costs: liability and apportionment

Rule 4 sets out liability for costs associated with decisions made by the flat owners under the TMS, including liability for the maintenance and running costs relating to scheme property.

Common property

It provides that where the scheme property is common property (and there is no specific provision for allocation of costs in the title deeds amongst the owners) then the costs should be shared amongst the owners in the proportions in which the owners share ownership of that property (rules 4.2(a) and 4.3(a)).

As mentioned above, the default rule relating to ownership of common property provides for equal sharing of ownership amongst those who are served by the relevant part of the tenement. This would lead to costs being allocated equally amongst those owners. However, the title deeds often make provision for ownership with different sizes of shares, without making a specific allocation of costs. This would lead to costs being allocated in proportion to these different sized shares.

Main structural elements

Where the scheme property is one of the main structural elements of the building (eg the roof) then the costs are to be shared equally amongst the flats in the building (rule 4.2(b)(iii)).

Parts where title deeds impose liability for maintenance

Where part of a tenement is scheme property because the title deeds make provision for it to be maintained by two or more flat owners, but the title deeds fail to specify how the costs are to be allocated or are inconsistent in this regard, the costs are to be shared equally amongst the owners of the flats identified in the title deeds as responsible for maintenance (rule 4.2(b)(ii)).

Exception to the general rule

An exception to the general rule applicable to 1) the main structural parts; and 2) the parts where the title deeds impose liability for maintenance on particular owners, is where the floor area of the largest flat is more than one and a half times the floor area of the smallest flat. Where this exception applies, the rule is that costs are to be divided in proportion to the floor area (rule 4.2(b)(i)).

On consultation, opinion was divided on the merits of having this exception to the general rule. The submission by Ross MacKay, a solicitor, summarises the main concerns raised:

3 This rule applies except in relation to the roof of the close. Here the rule is that costs are shared equally amongst the flats except where the floor area of the largest (or larger) flat is more than one and a half times that of the smallest (or smaller) flat, each owner is liable to contribute towards those costs in proportion which the floor area of that owner’s flat bears to the total floor area of all (or both) the flats (rule 4.2 (b) and rule 4.3(b)(i)).
“this will simply be a source of considerable dispute and contention between co-
proprietors. Firstly there is no agreed criteria for determining floor area within the
surveying profession (and determination of floor area can only be made by qualified
surveyors). For example, how are cupboards and other similar non occupied spaces to
be dealt with? Secondly if there is a suspicion that there is a gap between largest and
smallest flats presumably all properties within a tenement will require to be surveyed and
measured in order to determine the exact proportions. Who will be liable to pay the costs
of that substantial exercise? Thirdly to what degree of exactitude are shares to be
calculated (1, 2 or more decimal points)? Fourthly, I appreciate that the paper suggests
that there is a statutory right of access to properties for the purposes of taking such
measurements but I foresee difficulties in enforcing such a duty should any particular
owner be unwilling to voluntarily permit access. Again even if access could be obtained
there does not seem to be any provision as to the remaining co-owners having power to
pay for the costs of such measurement. Fifth, how will this information be stored for
future use/reference by any prospective purchaser? On balance I would argue that whilst
it is possibly in some cases perceived inequitable, equal shares across all tenements has
the merits of simplicity and clarity and avoids the potential for ongoing technical disputes”
(Scottish Executive 2003l, p 1)

Other consultees agreed with the proposed provision in the Bill (eg Dr Andrew Stevens of the
University of Edinburgh and the Property Managers’ Association), or agreed but suggested that
the exception to the general rule should only apply when the floor area of the largest flat is more
than twice the floor area of the smallest flat (eg Chartered Institute of Housing and South
Lanarkshire Council). In its Policy Memorandum to the Bill the Executive states:

“The Executive would be interested to hear how the argument develops in the Parliament
on this point”. (Policy Memorandum to the Bill, para 47)

**Apportionment of costs by certain methods in the title deeds**

The mechanisms laid out in rule 4.2 and 4.3 for apportioning costs are of course default rules
which apply only where the title deeds are silent on apportionment. Although an overwhelming
majority of respondents to the consultation supported this general approach (Scottish Executive
2003s, p 7) a number of respondents raised the issue of whether the title deeds should prevail
over the TMS where the mechanism for apportioning costs found in the deeds is archaic or
difficult to administer. Such respondents included the Law Society of Scotland, Aberdeen City,
North Lanarkshire and City of Edinburgh Councils, and the Chartered Institute of Housing. The
comments of the Law Society below are typical:

“The [Law Society] agrees that the title conditions should prevail on the apportionment of
costs except where there is a reference to rateable value, feu duty or an equitable share.
If the deeds are drafted along these lines the [Law Society] considers that the TMS
should apply because the proportionate sharing of liability can only be ascertained by
reference to extrinsic evidence.

In particular, rateable values are problematic because they cannot be determined by
examination of the title deeds. (…)

Also apportioning by reference to feu duty can be difficult because the information is not
always readily available”. (Scottish Executive 2003k, pp 3–4)
RESOLVING DISPUTES (SECTIONS 5 – 6)

APPLICATIONS TO THE SHERIFF COURTS

As mentioned above, in order to provide some sort of protection for a minority of flat owners against a potentially oppressive majority, the Bill provides that an individual who did not vote in favour of a decision of the majority should be entitled to apply to the sheriff court for an annulment of that decision. The sheriff can only grant the application if he or she is satisfied that the decision is not in the interests of all the owners or is unfair to one or more of the owners (s 5).

The Bill also provides a right for owners to apply to the sheriff if there is a dispute about the operation of the TMS. The sheriff may grant an order to ensure the proper working of the management scheme which is in force for the tenement in question (s 6).

MEDIATION SERVICES

When formulating its proposals in relation to the Bill, the Executive considered whether mediation should be an alternative method available to tenement dwellers to resolve disputes. Whilst indicating that it was committed to encouraging the use of mediation services, it ultimately decided against making specific provision for a referral to mediation services in the Bill. In the Policy Memorandum it explained its reasoning as follows:

“Up to now, mediation services have tended to develop on a sectoral basis, eg in family law, and the Scottish Executive is keen to develop a more cross-sectoral approach, looking at what needs to be done on generic issues, such as training and accreditation (…). One of the generic issues currently being considered is the extent to which parties to a dispute should be encouraged or directed to use mediation, either by legislation or by the provisions of rules of court, for example by giving the sheriff powers to refer parties to mediation, or by allowing the court to take account of parties’ apparent willingness to engage in mediation in any award of expenses. These sorts of issues are being looked at by the Sheriff Court Rules Council and may result in amendment to the sheriff court rules. (…) The Executive would prefer to await the outcome of the Council’s deliberations on these issues, rather than pre-empting the issue by making a specific provision in the Bill”. (para 54)

A number of those who responded to the Executive’s consultation, including the Chartered Institute of Housing, the Scottish Consumer Council, the Council of Mortgage Lenders, Age Concern, councils such as City of Edinburgh Council, the LINK Group, as well as the Scottish Mediation Network, were supportive of a role for mediation to complement the application to the sheriff court provided for in the Bill.

In particular, the Scottish Mediation Network and the Scottish Consumer Council drew attention to section 16 of the Education (Additional Support for Learning)(Scotland) Bill (currently going through Parliament), which creates a duty on education authorities to make provision for independent mediation services to resolve disputes between the authorities and parents or young people about the exercise of authorities’ functions under the Bill. In this regard the Scottish Mediation Network commented:

“The (…) Education Bill includes mediation as one of the options for managing disputes arising from the provision of additional support for learning – even although there are
resource implications, there is not coverage across the country and there may be delays in putting a comprehensive system in place. A similar approach would be appropriate for (...) the [Tenements] Bill". (Scottish Executive 2003r p 3)

When the members of the Scottish Executive Bill Team appeared before the Justice 2 Committee on 24 February 2004 one official commented on this issue as follows:

“The Executive does not believe that the dispute resolution provisions in the Education (Additional Support for Learning) (Scotland) Bill provide a proper parallel to tenement disputes. The bill will place on every education authority a duty to make appropriate provision for dispute resolution, but the dispute in such cases would be between an education authority and parents. In the case of tenements, disputes are generally between private individuals. Therefore, it did not seem appropriate that public authorities be given a duty in the Tenements (Scotland) Bill to set up a mediation process in the same way as in the Education (Additional Support for Learning) (Scotland) Bill. That is a different sort of scenario”. (SP OR J2 24 Feb 2004 cols 547 – 548)

**SUPPORT AND SHELTER (SECTIONS 7 – 10)**

Because certain parts of the tenement are so fundamental to the soundness of the building the principle of common interest (not to be confused with common property) requires owners to maintain any part of the tenement in their ownership which is needed for the shelter or support of the building as a whole. Owners have a right of common interest in those parts of the building which are not theirs but which are needed for the shelter or support of the building as a whole. It is the principle of common interest which obliges the owner of the top flat to maintain the roof to provide shelter for the rest of the building.

The common law doctrine of common interest has evolved into three main rules, namely:

- an owner is under a duty to maintain his or her property if it is necessary for the support and shelter of the building
- an owner must not do anything to interfere with the support and shelter provided by the tenement
- an owner must not do anything to restrict the natural light the tenement enjoys

The Bill proposes that the doctrine of common interest should be replaced by a statutory re-statement of the rules. In line with the current common law, section 8(2) of the Bill makes it clear that an owner shall not be obliged to maintain any part of the tenement building if it would not be reasonable to do so having regard to all the circumstances and including, in particular, the age of the tenement building, its condition and the likely cost of maintenance.

The provisions on support and shelter were strongly supported by respondents to the Executive’s consultation document. However, the City of Edinburgh Council and the Chartered Institute of Housing argued that owners should remain bound by a duty to provide support and shelter, regardless of the age and condition of the building or the likely cost, unless (the Council suggested) demolition was the only reasonable alternative. Aberdeen City Council and Burness WS suggested that owners should not be relieved of a duty to provide support and shelter where the condition of the property is due to the non co-operation of an owner or where the actions of an owner are the obvious cause of the neglect. Renfrewshire Council commented that
the provision could lead to debate in the courts on the meaning of the terms ‘unreasonable’, ‘age and condition’ and ‘likely cost’ (Scottish Executive 2003o, p 13).

REPAIRS: COSTS AND ACCESS (SECTIONS 11 & 14)

DIFFICULTIES WITH PAYMENT OF COSTS

Difficulties sometimes arise over the apportionment of outstanding sums, for example, for repairs, when a flat in a tenement is sold. Other owners in the tenement may not be aware of changes in ownership, or, for the purposes of billing do not have a forwarding address. In practice, the costs are then be paid by the other owners amongst themselves.

Another issue is the position with flats that are rented out – the other owners in the tenement may not know how to get in touch with the owner of the flat, meaning that they cannot contact him or her to arrange for maintenance or the payment a share of the costs.

SEVERAL LIABILITY (SECTION 11)

The Bill provides that the buyer of a flat in a tenement shall be severally liable with the seller for any unpaid debts relating to the tenement. This means that the owners of other flats in the building can approach either the buyer or seller for payment of the whole debt apportioned to the flat which was sold (s 11(1) & (2)). However, where the buyer does pay any unpaid debts relating to the tenement, the buyer may recover the full amount paid from the seller (s 11(3)).

In the Policy Memorandum to the Bill (at para 61) the Executive explains that it envisages that, in line with current practice, solicitors acting on behalf of a purchaser would ensure, by placing an obligation in the contract of sale (known as the missives), that the debts were paid by the seller out of the proceeds of sale.

On consultation there was a good level of support for the sellers remaining liable for repair costs which arose during their period of ownership, with a lower level of support for new owners being severally liable with the old owner. Those in favour of several liability, including the Law Society of Scotland and the Chartered Institute of Housing, thought that if the position was regulated properly in the contract of sale, as the Executive suggests would happen, and solicitors acting on behalf of the buyer made diligent enquiries on behalf of their clients, then costs could be recovered by other flat owners in the tenement more easily and new owners would be protected as part of the normal conveyancing process.

The main reason that some people disagreed with this part of the Bill was that it was felt it would place an unreasonable burden on purchasers and their solicitors to identify the existence of costs left by the outgoing owner, and that the right of relief would be of little use if the outgoing owner had absconded or was insolvent (Scottish Executive 2003t, p 15).

DUTY TO GIVE ADDRESS

The Housing Improvement Task Force has suggested that there should be a duty on any flat owner who is subject to a title condition relating to common repair or maintenance, who does...
not have the flat as his or her main address, to give to the other flat owners, or the property manager if there is one, a contact address (Housing Improvement Task Force 2003, para 309).

In the Policy Memorandum to the Bill (at para 65) the Executive states that it is considering how this proposal would impact on privacy and data protection legislation and will indicate how it proposes to proceed later.

ACCESS (SECTION 14)

The Bill proposes to introduce a statutory right of access to parts of a tenement that are individually owned, provided access is required for one of six reasons. They are:

- to carry out maintenance flowing from a decision made under the TMS (s 14(3)(a))
- to carry out repairs to the flat of the person requiring access (ie where access to part of the tenement owned by someone else is required to carry out such repairs) (s 14(3)(b))
- to carry out inspection in order to determine whether maintenance work is necessary (s 14(3)(c))
- to ensure that any part of the tenement building which provides or is intended to provide support and shelter to the building is being maintained (s 14(3)(d))
- to ensure that there is no infringement of the duty to refrain from causing material damage to any part of the building which provides support and shelter, or to ensure that there is no infringement of the duty not to diminish the natural light enjoyed by the building (s 14(3)(e))
- to calculate the floor space of an individual’s flat (s 14(3)(f)) – this is relevant to various provisions in the Bill, including rules on liability for maintenance and demolition costs

As the Executive explains in the Policy Memorandum to the Bill (at para 71) the right of access is not an absolute right – it is only available when it is reasonable to require access. With the aim of ensuring that these proposed access rights are not abused, the Bill provides that any individual should demonstrate that there is a reasonable need (based on one of the above criteria) for him or her to enter a flat (s 14(5)(a)). Furthermore, even if the demand itself is reasonable, the owner would have the right to refuse if the timing is inconvenient or inappropriate (s 14(5)(b)). Reasonable notice would also be required before access is permitted, except in cases of emergency (s 14(1) & (4)).

On consultation a majority of respondents supported the right of access and the safeguards proposed (Scottish Executive 2003t, p 17). However, a minority felt that the proposals were too open to abuse. For example, North Lanarkshire Council commented:

“Forced entry to an individual’s flat is obviously a fairly draconian power and should not be used except in an emergency. If there is a dispute over certain repairs feelings between neighbours could be running high. There is also a human rights angle, as every person has the right to the peaceful enjoyment of their property and a right to privacy.
This issue is a potential minefield and is too important to be left to proprietors to work out. (…) Owners could resolve disputes by reference to the Sheriff Court unless the local authority chooses to become involved in the exercise of its statutory powers.

The Council also suspects that many tradesmen would be extremely wary of entering a flat against the owner’s wishes, even with written authorisation from the other owner requiring access.

Obviously, reference to the court would not be workable in the event of an emergency, but proprietors who abuse emergency rights of access should be liable to some form of punitive action.” (Scottish Executive 2003m, p 5)

INSURANCE (SECTION 15)

STATUTORY INSURANCE FOR TENEMENTS

The Bill provides that all owners in a tenement will be required to take out an individual policy of insurance for their property (s 15(1)). In the Policy Memorandum to the Bill the Executive explains its reasoning as follows:

“Tenement owners are in a situation where they are particularly vulnerable to the physical condition of neighbouring flats. Essentially, a tenement owner is not adequately insured unless his neighbours are also insured” (para 73)

On consultation, there was overwhelming support for the creation of a duty to insure. However, several respondents did raise the issue of enforcement (Scottish Executive 2003t, p 18). For example, the Council of Mortgage Lenders commented:

“unless there is an intention to provide an enforcement regime to back-up this requirement, it would be very difficult to make insurance compulsory under statute” (Scottish Executive 2003g, para 20)

In relation to a possible role for local authorities in relation to enforcement the City of Edinburgh Council commented as follows:

“We do not see a role for local authorities to police this measure. It would be time consuming and intensely bureaucratic and the resources expended would outweigh any practical benefits”. (Scottish Executive 2003f, para 120)

REINSTATEMENT VALUE NOT MARKET VALUE

The Bill stipulates that the duty of an individual owner to insure his or her own property should be for the reinstatement value of the property rather than its market value (s 15(1)). This will be an absolute requirement, irrespective of any provision in the title deeds or in a management scheme. The Executive (Policy Memorandum, para 74) points out that reinstatement value can far exceed market value, and consequently there would be no chance of re-building the tenement if damage occurred and the insurance was based on market value.
RIGHT OF INSPECTION

The Bill gives individual owners the right to inspect policies of their co-owners and to see evidence that the premiums have been paid (s 15(5)).

COMPULSORY COMMON INSURANCE

In formulating its proposals for the Bill the Executive considered whether the duty to insure should be extended from a duty to insure individual flats to a mandatory common policy for all flats within the building. As mentioned above, the Bill provides that the owners will be able, within the TMS, to make a decision to have a common insurance policy (rule 3.1 (e)).

When preparing the draft Bill, the SLC had concluded that these should be encouraged but not made mandatory (SLC 1998, paras 9.9–9.13). However, the Housing Improvement Task Force (Scottish Executive 2003a, para 312) suggested a mandatory common policy for all new developments.

On consultation respondents felt that it would be too difficult to compel owners to introduce common insurance policies into existing developments but there was some support for doing so in relation to new developments (Scottish Executive 2003t, p 19).

In its Policy Memorandum to the Bill (at para 75) the Executive outlines the advantages of having a common policy as follows:

- it is likely to be cheaper
- it removes the possibility of duplicate insurance
- all common areas will be covered
- if a claim is made, then the owners will only have to deal with a single insurer

The Executive also outlined the following disadvantages of having a common policy:

- defaulting owners: if one of the owners who is responsible for the paying the insurance premiums of the policy defaults on payment this would have the effect of invalidating the whole policy, leaving the other owners in a worse position than they are at present (Policy Memorandum, para 79)
- mixed use tenements: there would be difficulties where the building contains a mixture of residential and commercial properties. For example:
  - representatives of the industry have indicated to the Executive that it would not be possible for any individual owner to top up their insurance cover under a common policy – this would prove difficult for instance where there are shops on the ground floor which might want a different type of insurance (Policy Memorandum, para 80)
  - chains of shops sometimes have a block policy covering all their premises. To prescribe that in the future they must tie their insurance to a common policy in an individual tenement would pose problems for them (Policy Memorandum, para 80)
• finding a responsible owner: in tenements without a factor/manager an individual would have to be nominated who was willing to take on the role of arranging and maintaining the common insurance policy (Policy Memorandum, para 76)

• existing policies: it would not be easy for owners in existing tenements to comply with the change in law either quickly or easily because individual policies would have to be discontinued and permission would need to be sought from lenders (Policy Memorandum, para 76)

DEMOlITION OF A TENEMENT AND RELATED MATTERS (SECTIONS 16–20)

A tenement may fall into serious disrepair either by gradual neglect or by some sudden disaster, such as a fire. The building might then be repaired, or it might be left alone and allowed to decay, or it might be demolished.

DEMOlITION AND ABANDONED BUILDINGS

Consent of all owners required

Under the present law, demolition requires the consent of all the owners in the tenement. The Bill does not alter this general position. The SLC’s reasoning for this approach was as follows:

“An owner should not be deprived of his property merely by the actions of his neighbours – even if those neighbours are in a majority. If a person chooses to continue living in a flat in a tenement which is in serious disrepair then that is a matter for him. He should not be forced to give up occupation, and nor should he be forced to bear the cost of demolition.” (SLC 1998, para 9.18)

Abandoned buildings – right of sale

However, where an individual owners right of occupation is not threatened the policy considerations are somewhat different and accordingly section 20 of the Bill makes the following provision: Where the building has been entirely unoccupied for a period of more than six months and has deteriorated to such a state of disrepair that it is unlikely that anyone will return to it, any one owner is entitled to require the building to be sold, with the proceeds of sale being shared among the owners in the same way as they are shared for demolished tenements (see below).

On consultation, a majority of respondents supported this provision in the Bill. The minority that disagreed felt that a power of this kind made available to a single owner would be too wide and too open to abuse. Concerns were also expressed about how it would be determined whether the building had been unoccupied for six months and how one would establish whether anyone was likely to return. The Society of Local Authority Lawyers and Administrators (SOLAR), North Lanarkshire Council and Perth and Kinross Council all suggested that an owner who wishes to sell should have to apply to the Sheriff Court for an order to that effect (Scottish Executive 2003t, p 24).
**Costs of demolition**

It is probably the present law that liability for the cost of demolition is tied to ownership but, as the SLC explained in their report on the law of the tenement (1998, para 9.20), the complex way in which ownership is intermingled in a tenement means this rule creates difficulties in practice.

*Equal shares except where flats are different sizes*

In an attempt to simplify matters, section 17 of the Bill provides that in general, unless the title deeds provide otherwise, liability for the cost of demolition should be borne equally by each flat owner, except where the floor area of any one flat is more than one and a half times the size of any other flat in the building, in which case liability is based on the floor area of each flat.

*Responses on consultation*

A majority of respondents agreed that liability should be divided according to floor area where the area of the largest flat was more than one and a half times that of the smallest flat. However, North Lanarkshire Council, SOLAR and Perth and Kinross Council (Scottish Executive 2003t, p 22) argued that the one and half times rule would be unworkable in practice, citing possible difficulties in accessing and measuring flats - see above at pages 16–17 of this briefing for a fuller discussion of this issue in the context of calculating liability for maintenance under the TMS. Given the likely derelict state of the tenement that is being demolished, SOLAR (Scottish Executive 2003s, p 6) felt that accessing the tenement for the purposes of taking measurements might be particularly difficult.

*Partial demolition*

In the event of partial demolition the same rule is to apply when apportioning costs, except that the costs are to be borne by the flats in the part that has been demolished.

*Responses on consultation*

Although on consultation a majority supported the rules relating to partial demolition, some respondents argued that partial demolition was bound to affect parts of the tenement in common ownership, or that were otherwise scheme property – therefore all the owners in the tenement should be liable for the cost. The Royal Institute of Chartered Surveyors (RICS) commented:

“*The proposals appear to have taken no account of the reasons why part demolition may take place. In the past this has been mainly because a building has become dangerous but there have been viable businesses such as public houses on the ground floors. In these instances it would have been much cheaper to demolish to the ground than to roof over above the ground floor. The normal procedure was for the ground floor proprietors to either pay the excess cost of part demolition or to meet the full cost in return for the transfer of the upper floor proprietors' interest in the solum*. (Scottish Executive 2003p, p 6)
Effect on ownership

Under the current law it is reasonably clear that demolition of a building does not bring existing ownership to an end – each owner continues to have a share in the ownership of the site and thus an interest in its future. Section 16 of the Bill reaffirms this principle in statutory form.

Accordingly, for example, the person who before demolition owned a flat on the second floor of the building will continue, after demolition, to own the airspace formerly occupied by that flat. Similarly, the owner or owners of the solum will continue to own the airspace above the roof of the former tenement.

USE AND DISPOSAL OF THE SITE

In relation to the future of the site (defined as the former solum of the building and the airspace directly above) after demolition, there are two possible options: rebuilding of the tenement or sale for redevelopment.

Rebuilding

A real burden in the title deeds may require the rebuilding of the tenement and it is possible that rebuilding will be carried out at the insistence of one or more of the owners. In the absence of a real burden, rebuilding of the tenement currently requires the agreement of all the owners, for each owns a section of airspace and can prevent that airspace being built into by the others.

However, there is a difficulty with the current law in that the owner (or owners) of the lowest flat (or flats) in the former tenement can theoretically build into their own airspace without the agreement of the others, as long as they don’t encroach into the others’ airspace. In an attempt to address this potential unfairness, section 18(2) of the Bill provides that, in the absence of a real burden requiring rebuilding or agreement of all the owners of the former flats, no owner may build on or otherwise develop the site.

Disposal of the site

Under section 18(3) of the Bill, where there is no agreement amongst all the owners or requirement in the title deeds to rebuild, any owner of one of the former flats shall be entitled to require that the entire site be sold. Under section 18(4) of the Bill the proceeds of sale shall be shared equally amongst the owners, except again where the floor space of the biggest flat is more than one and a half times that of the smallest flat. In that case, the price will be allocated according to floor space formerly owned. In the Policy Memorandum to the Bill the Executive acknowledge that:

“The exact determination of previous floor space after demolition will not be an easy task. Sometimes there will be records, sometimes not”. (Policy Memorandum, para 87).

On consultation, some respondents expressed concern that this would render the rule unworkable in practice (eg North Lanarkshire Council). However, it was acknowledged that equal division of shares would only be equitable where flats were of equal value and not, for example, where a former tenement consisted of large commercial premises with smaller
residential flats above. Burness WS, a firm of solicitors, commented that the value of a property was not necessarily dependant on size (Scottish Executive 2003d, p 4).

OTHER ISSUES RELATED TO THE BILL

OWNER-FUNDED LONG-TERM MAINTENANCE FUNDS

The Partnership Agreement contains a commitment to “explore the possibility of owner-funded long-term maintenance funds” (Scottish Labour Party; Scottish Liberal Democrats 2003, p 17). Some commentators have argued that the Bill should be amended to provide that flat owners would be obliged to contribute to a type of fund, known as a reserve or sinking fund, to cover future expenditure on their tenement.

The Housing Improvement Task Force (Scottish Executive 2003a, paras 286 – 288) considered this issue and concluded that it would be impractical to compel owners to establish such funds in either existing or new developments. They believed that there would be no ready means of enforcement: local authorities or some public agency would have to keep information on the extent of the reserve or sinking funds and to oversee and regulate their management. It is thought that there would have to be penalties against owners who failed to comply and that the scale of bureaucracy required to enforce this would be very onerous and costly. The Task Force (Scottish Executive 2003a, para 289) recommended, however, that there should be greater encouragement given to owners to establish reserve or sinking funds and for developers to include provision for sinking funds in the title deeds of new developments.

In the consultation on the Bill a significant majority of respondents agreed with the views expressed by the Housing Improvement Task Force (Scottish Executive 2003t, p 11). And in the Policy Memorandum to the Bill the Executive concurs, observing that:

“with interest rates at historically low levels, many owners would prefer to take out loans to pay for major repairs when they arise, rather than paying money on a non-refundable basis into a fund which is intended to cover the cost of major repairs when they arise, rather than paying money on a non-returnable basis into a fund which is intended to cover the cost of major repairs which may take place many years after the current owners have sold up and moved on” (Policy Memorandum, para 98)

However, the Executive has committed itself to producing good practice guidance on the establishment of such funds (Policy Memorandum, para 99).

COMMON FACTORING SCHEMES

The Partnership Agreement contains a commitment to:

“establish an improved framework for encouraging the maintenance of private housing by reforming the law of the tenement to introduce a common factoring scheme”. (Scottish Labour Party; Scottish Liberal Democrats 2003, p 41)

This matter was considered by the Housing Improvement Task Force who decided against recommending that it should be a requirement for owners to appoint a property manager. It recognised that owners might legitimately prefer to instruct or carry out the work themselves,
particularly in a small development. It also noted that concerns had been expressed about the quality of the service provided by some property managers.

The Executive also raised the issue in its consultation document on the Bill. A significant majority of respondents agreed that developers and owners should be encouraged to appoint a property manager, but not compelled to do so. A range of consultees, including the Scottish Federation of Housing Associations, Age Concern and the Law Society of Scotland agreed that there was a need for better training and regulation of property managers (Scottish Executive 2003t, pp 11–12).

The Bill does not include a requirement to appoint a property manager. However, it will allow a majority of owners to appoint or dismiss one if they so wish (TMS rule 3.1(c)(i)). If the majority of owners in a tenement wish to engage a property manager, the minority who voted against will nevertheless be obliged to pay their share of the fees (TMS rules 4.1(e) and 4.4).

**OWNERS’ ASSOCIATIONS**

The Housing Improvement Task Force recommended that there should be a requirement for the establishment of an owners’ association in all new residential developments of eight or more flats (Scottish Executive 2003a, paras 271–272). The Task Force concluded that:

“some formal arrangement for the owners to get together on a periodic basis would facilitate decision making and encourage them to take a planned view about maintenance requirements rather than simply reacting to particular problems. Owners’ association can also provide for overseeing the work of property managers and for making decisions on the use of any reserve or sinking funds”. (Scottish Executive 2003a, para 270)

On consultation, a small minority of respondents agreed with the recommendation of the Task Force (Scottish Executive 2003t, p 11).

The Executive (Policy Memorandum, para 110) are of the view that it would not be competent for the Scottish Parliament to legislate on owners’ associations since they fall within the definition of “business associations” in the Scotland Act 1998 and are therefore reserved. The Executive is considering, along with the UK government, how to proceed with this matter.
SOURCES


Scottish Law Commission [Online]. Available at: http://www.scotlawcom.gov.uk


Tenements (Scotland) Bill: Policy Memorandum Session 2 (2004). SP Bill 19-PM. Available at: http://www.scottish.parliament.uk/bills/pdfs/b19s2pm.pdf
1. At its meeting on 23 March 2004, the Finance Committee considered a proposed Contingent Liability from the Scottish Executive. The Contingent Liability relates to the Army’s role in the transportation of Concorde from Torness to the Museum of Flight in East Lothian. Although the Army has provided its assistance free of charge, it is standard practice for the Army to require an indemnity which will meet any personal injury costs arising from any accidents.

2. As it was anticipated that the arrangements for the transportation of Concorde through East Lothian would not have been finalised in advance of the Committee’s meeting, the Scottish Executive had requested that the Finance Committee consider the proposed Contingent Liability in private. The Committee had agreed to this request at its meeting on 9 March 2004.

3. On 23 March 2004, the Finance Committee considered a formal minute from the Scottish Executive, correspondence from the Minister for Culture, Tourism and Sport and a copy of the indemnity. The Committee also took oral evidence from Gavin Barrie, Cultural Policy Division, Scottish Executive and Dr Gordon Rintoul, Director, National Museums of Scotland. These papers are attached.

4. After discussion, the Finance Committee approved the Contingent Liability and requested that the Scottish Executive provide further clarification on issues of principle. This response, dated 26 March 2004, is also attached.

Emma Berry
April 2004
Finance Committee

10th Meeting 2004 – Tuesday 23 March 2004

Proposed Contingent Liability

Background
1. The Financial Issues Advisory Group (FIAG) recommended that the Scottish Executive should require the authority of Parliament before granting a guarantee or indemnity which would bind the Parliament into providing those resources in the event of that indemnity maturing. This was confirmed in the written agreement between the Scottish Executive and the Finance Committee on the budgeting process1.

Agreement on the Budgeting Process
2. In this agreement the Scottish Ministers undertook to present any proposals granting guarantees or indemnities in excess of £1m to the Finance Committee. The Finance Committee has 20 days in which to consider the proposal and either agree or put forward an amendment. The Scottish Ministers can either accept that amendment, or notify the Committee that they disagree. It is then for the Committee to decide whether to allow the Scottish Executive to proceed with its original proposal, or to refer the matter to the Parliamentary Bureau for a debate.

Definition
3. In the previous Parliamentary session, the Minister for Finance provided further information on contingent liabilities:

A contingent liability is defined in accounting terms as:

a) a possible obligation that arises from past events and whose existence will be confirmed only by the occurrence of one or more uncertain future events not wholly within the entity’s control; or

b) a present obligation that arises from past events but is not recognised because:
   i) it is not probable that a transfer of economic benefits will be required to settle the obligation; or
   ii) the amount of the obligation cannot be measured with sufficient reliability.

More simply, it is a liability that is not certain, but contingent on some event. The most obvious cases are guarantees or indemnities. Specific examples include:

a) indemnities given to owners of historical objects lent to the National Museums against damage or loss;

b) working capital guarantees to housing associations; and

c) bank overdraft guarantees under the Local Government etc (Scotland) Act 1994.

Recommendation
4. The attached correspondence from the Minister for Tourism, Culture and Sport and Scottish Executive minute relates to a contingent liability for a minimum of £2m which the Scottish Executive is seeking to provide in relation to the Army’s role in the transportation of a Concorde aircraft to the Museum of Flight in April.

5. The Committee is invited to approve the terms of the contingent liability.

Emma Berry
March 2004
CONCORDE: SELF-INSURANCE FOR TRANSPORT BY ARMY

Please find attached a minute to the Finance Committee seeking approval to a contingent liability of £2 million against the Scottish Budget under Scottish Minister’s policy of self-insurance and in connection with the Army’s role in the transportation of a Concorde aircraft to the Museum of Flight in East Lothian in April. As you know, Scottish Ministers have a commitment to seek the Parliament’s approval for any non-statutory indemnities over £1 million or where a liability arises from our policy of self-insurance other than in the course of normal business activities.

Please accept my apologies for the short notice, but it would be very helpful to have an early reply to allow the National Museums of Scotland to sign an agreement with the Army - the aircraft is due to leave London on 4 April and will arrive at Torness on 11 April.

The aircraft is currently at Heathrow and must be transported by sea and land to East Fortune. British Airways will partly dismantle the aircraft for the journey, mainly by removing the wings and engines. National Museums of Scotland have engaged transport consultants to organise the move of the aircraft to East Lothian in April.

Under Military Aid to the Civil Community, the Army will provide temporary groundworks and tracking to allow a specialised transporter to cross fields and minor roads from the A1 to the Museum of Flight. The contingent liability arises because the Army has asked National Museums of Scotland for an Indemnity made out in favour of the Secretary of State for Defence under which National Museums of Scotland agree to meet personal injury claims or damage arising from the Army’s operation. Under the terms of the Indemnity, National Museums of Scotland must take out an insurance policy with minimum cover of £2 million for activities on land for any single incident.
Scottish Ministers would be grateful if the Finance Committee would consider this request for approval of a contingent liability of £2 million linked to Scottish Minister’s policy of self-insurance in order to provide the required backing to the Indemnity requested by the Army.

The National Museums of Scotland do not wish to announce too many details of the transportation of Concorde to Scotland until all interested parties are fully signed up. As well as the Army and private contractors, several English and Scottish Local Authorities and Landowners are involved. I am therefore requesting that this matter be treated as confidential meantime.

Yours sincerely

FRANK McAVEETY
REQUEST FOR APPROVAL OF A CONTINGENT LIABILITY:
INDEMNITY BY NATIONAL MUSEUMS OF SCOTLAND TO THE SECRETARY
OF STATE FOR DEFENCE COVERING THE ARMY’S ROLE IN TRANSPORT OF
CONCORDE IN SCOTLAND

1. This note seeks the approval of the Scottish Parliament Finance Committee to a
contingent liability which will arise from an Indemnity which the National Museums of
Scotland has been asked to grant to the Secretary of State for Defence to provide insurance
cover to meet personal injury or damage claims arising from the Army’s role in the
transportation of Concorde from the A1 road to the Museum of Flight in early April. The
contingent liability arises as Scottish Ministers’ wish to rely on their policy of self-insurance
to back the Indemnity. The Army has asked for minimum insurance cover of £2 million for
each single incident arising from land operations. (The Indemnity does not cover the aircraft
itself which will be covered under the Government Indemnity Scheme for museum and
gallery exhibits – contingent liabilities on the Scottish budget under the Scheme are reported
separately to the Scottish Parliament). The transfer of Concorde and its long term display at
the Museum of Flight is clearly something of huge public interest and value to Scotland.

Background

2. British Airways has allocated a retired Concorde to the Museum of Flight at East
Fortune in East Lothian, which is part of the National Museums of Scotland. Scottish
Ministers have awarded £2 million to the National Museums of Scotland for the development
plans for the Museum of Flight. The transport costs of bring the aircraft from Heathrow to
East Fortune by sea and land will have to be met from this sum.

3. National Museums of Scotland has engaged specialist civilian contractors to transport
the aircraft. The contractors will uplift the plane at Heathrow, ship it by barge along the
Thames, then by sea to a landfall at Torness Nuclear Power Station which has harbour
facilities suitable for bringing the aircraft ashore. From there the aircraft will be transported
along the A1, then over minor roads and across fields to the Museum of Flight at East
Fortune. (It has not yet been determined whether Concorde will arrive in time to take part in
the opening ceremony for the new section of the A1 – there are uncertainties over the weather
which may affect the arrival date).

4. Under Military Aid to the Civil Community, the Army will provide temporary
groundworks and tracking to allow the contractor’s specialised transported to cross fields and
minor roads from the A1 to the Museum of Flight. The element of the project which would
require Army assistance falls into two parts. The first involves moving the aircraft from the
new A1 dual carriageway to the unclassified Beanston Mains Road. The Army will need to
lay 100m of specialised tracking. Secondly, the Army will be required to lay 1.7km of
tracking from the Beanston Mains Road to the boundary of the Museum of Flight. In addition
to the tracking, this part of the project would involve various land works, including the
building of two bridging structures to cross a burn and land drain, and a small amount of
levelling of rough ground. Any levelling material and temporary bridging would be removed
afterwards.
Contingent Liability

5. The contingent liability arises because the Army has asked the National Museums of Scotland for an Indemnity made out in favour of the Secretary of State for Defence under which National Museums of Scotland agree to meet personal injury claims or damage arising from the Army’s operation. Under the terms of the indemnity, National Museums of Scotland must take out an insurance policy with minimum cover of £2 million for activities on land for any single incident. A copy of the Indemnity is attached for the Committee’s information.

6. National Museums of Scotland, as a Non-Departmental Public Body, operates within Scottish Ministers’ normal policy of self-insurance. In line with the presumption in government against the purchase of commercial insurance unless there is a strong case for doing so, the National Museums of Scotland has requested that the Scottish Ministers’ normal policy of self-insurance should provide the required insurance cover for the Indemnity for the Army. National Museums of Scotland has made enquiries with commercial insurers and has been told that the risks of such a one-off operation could be difficult to assess.

7. Any claims under the Indemnity would fall in the first instance for National Museums of Scotland to meet, that failing the claim would fall to the Scottish Executive to consider. Claims would therefore be a cost against the Scottish Budget.

Risk Analysis

8. In terms of risk analysis, the transport overland of the aircraft from the A1 to the Museum of Flight is a necessary step and is unavoidable under the circumstances. The runway at East Fortune has been surveyed and is not suitable for Concorde to land. The nearest commercial airport is Edinburgh Airport. The aircraft allocated to the Museum of Flight would, therefore, have to be dismantled and transported overland at some point. For this reason the aircraft that is being allocated to the Museum of Flight is one that, although complete, is not in flying condition as it was not modified after the Paris tragedy.

9. The National Museums of Scotland has stated that public safety during the transport of Concorde is their main objective. The civilian contractor will have its own insurance cover for its role in the operation. The Indemnity and associated insurance and contingent liability will cover only the Army’s role. The Executive feel that the skills and professionalism of the Army will ensure that the operation should be relatively low risk. National Museums of Scotland has made enquiries with commercial insurers and has been told that the risks of such a one-off operation could be difficult to assess.

Request for Approval of the Scottish Parliament

10. Scottish Ministers would be grateful if the Finance Committee would consider this request for approval of this contingent liability arising from Scottish Ministers’ policy of self-insurance, in order to provide the required backing to the Indemnity which requires insurance cover of a minimum of £2 million for each single incident of personal injury or damage arising from the Army’s role in the transportation of Concorde in April.

SCOTTISH EXECUTIVE
MARCH 2004
Dear Emma,

CONTINGENT LIABILITY – CONCORDE: SELF INSURANCE FOR TRANSPORT BY ARMY

The Finance Committee approved this Contingent Liability on Tuesday 23 March. However, the Committee asked for clarification of issues of principle.

Committee Members asked why the Scottish budget should cover the costs of liabilities incurred by the Army in their role in transporting Concorde across East Lothian in April when defence is a reserved matter. Members asked for information on precedents, in particular what happened when the Stone of Scone came to Scotland.

You asked to be kept informed of the timings of the announcement by the National Museums of Scotland so that you could arrange for publication of Tuesday’s private session proceedings. You asked that the additional clarification sought by Members should be available to you to enable you to answer questions when the proceedings are published. I understand that the National Museums of Scotland expect to conclude their negotiations with all parties today, and in view of the press interest will make an announcement today.

This letter provides further information which I hope the Committee will find useful.

As we set out to the Committee on Tuesday, Concorde is being gifted on long term loan by British Airways to the Museum of Flight at East Fortune free of charge. British Airways is paying for the dismantling of the aircraft so that it can be transported to Scotland by sea and overland at the start of April. Under their scheme of Military Aid to the Civil Community (MACC) the Army has agreed to a request from the National Museums of Scotland to provide assistance with the overland operation in Scotland which requires specialist equipment.
The Army has told me that the laying of a trackway to move Concorde from the A1 to East Fortune in assistance to the National Museums of Scotland is not a core military commitment. Were this to be a core military commitment then it would be undertaken at no cost or liability to the Scottish Executive and therefore no devolution issue would be raised.

When approached by the National Museums of Scotland the Army exceptionally agreed to undertake this task as a MACC task for which there are strict criteria. These criteria state that there must be training value and that no costs should fall to the Ministry of Defence.

The Regiment involved is the only Regular Royal Engineer Unit that provides support to the Royal Air Force. For this reason it uses specialist surface expedient equipment (matting used for temporary landing strips etc). The Army’s view was that provision of this equipment by a civilian contractor could be expensive.

As background, the Army says that the Concorde MACC task involves construction of a 1.7 kilometre cross-country access route which will be constructed between the 1st and 8th of April and transited by Concorde on the 13th April. All the works will be conducted with full environmental consideration and the ground will, where appropriate, be reinstated on 14th and 15th April.

The Army says MACC tasks in Scotland are commonly conducted for local authorities. Tasks undertaken in Scotland for public sector organisations under the MACC arrangements include the removal in September 2000 by a Territorial Army Unit of derelict vehicles from the Clyde at the request of Glasgow City Council who signed the Indemnity on that occasion. In the summer of 2001 North Lanarkshire and South Lanarkshire Council signed Indemnity for the removal of derelict vehicles from nature reserve areas. Other recent high profile MACC tasks in Scotland include the construction of an assault course for the chimps at Edinburgh Zoo.

The Ministry of Defence does of course meet all of the costs of the Army’s military role in Scotland, including ceremonial duties, including the costs of involvement with the community where this is part of normal military activities, for instance where there is a role in recruitment. I understand that, much of the Army’s high profile assistance to government is under emergency situations, where human life is at risk, and is carried out under Emergency Aid to the Civil Powers. The costs of these emergency military operations in Scotland are also met by the Ministry of Defence.

The Army has told me that the Stone of Destiny was not a MACC task but one of Ceremonial Duties in respect for such an occasion.

We mentioned the Government Indemnity Scheme (GIS) on Tuesday. This Scheme exists for the UK public benefit and aims to widen public access to objects of historic interest by giving undertakings to lenders and so enabling institutions to borrow objects to an extent they could not otherwise afford. Under Section 16 of the National Heritage Act 1980, Scottish Ministers routinely give Indemnities to owners against loss or damage to their objects while it is being transported to or from, or while the object is on loan to, a national institution in Scotland. This relieves the borrowing institution of the cost of commercial insurance. Claims would fall to be settled by Scottish Ministers from their voted resources. A GIS Indemnity would not cover the liabilities required by the Army’s Indemnity, but Scottish Ministers have so far issued GIS Indemnities totalling £4 million in respect of the Concorde aircraft itself.
In conclusion, as far as the Scottish Executive is concerned, we would stress the following points:

- The Army will provide its contracting services free of charge;
- The signing of an Indemnity and the provision of insurance are standard conditions of the Army’s Military Aid to the Civil Community programme;
- Other public sector organisations in Scotland have met these conditions;
- The level of insurance sought by the Army is no greater than the cover they might seek for similar involvement in a small scale event, for instance a local fete;
- The Army or the Ministry of Defence could not reasonably be expected to carry the insurance risks of all its involvement in tasks in support of other government Departments;
- Museums and galleries are devolved matters and their activities are funded from the Scottish budget;
- The National Museums of Scotland, who will benefit from the Army’s services in this case, is a Scottish public sector body so it is entirely appropriate that the Scottish budget should meet the costs of transporting Concorde to Scotland, including insurance where required;
- As a general rule, the Government and the bodies it funds do not purchase commercial insurance. The Scottish Ministers, like the UK Government, routinely operates a policy of self insurance and meets the costs of any claims itself.

I hope the Committee find this clarification helpful.

Yours sincerely

Gavin Barrie