



SCOTTISH LAW COMMISSION
(Scot Law Com No 103)

Housing (Scotland) Bill

Report on the Consolidation of Certain Enactments
relating to Housing in Scotland

Presented to Parliament by the Lord Advocate
by Command of Her Majesty
March 1987

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Scottish Law Commission

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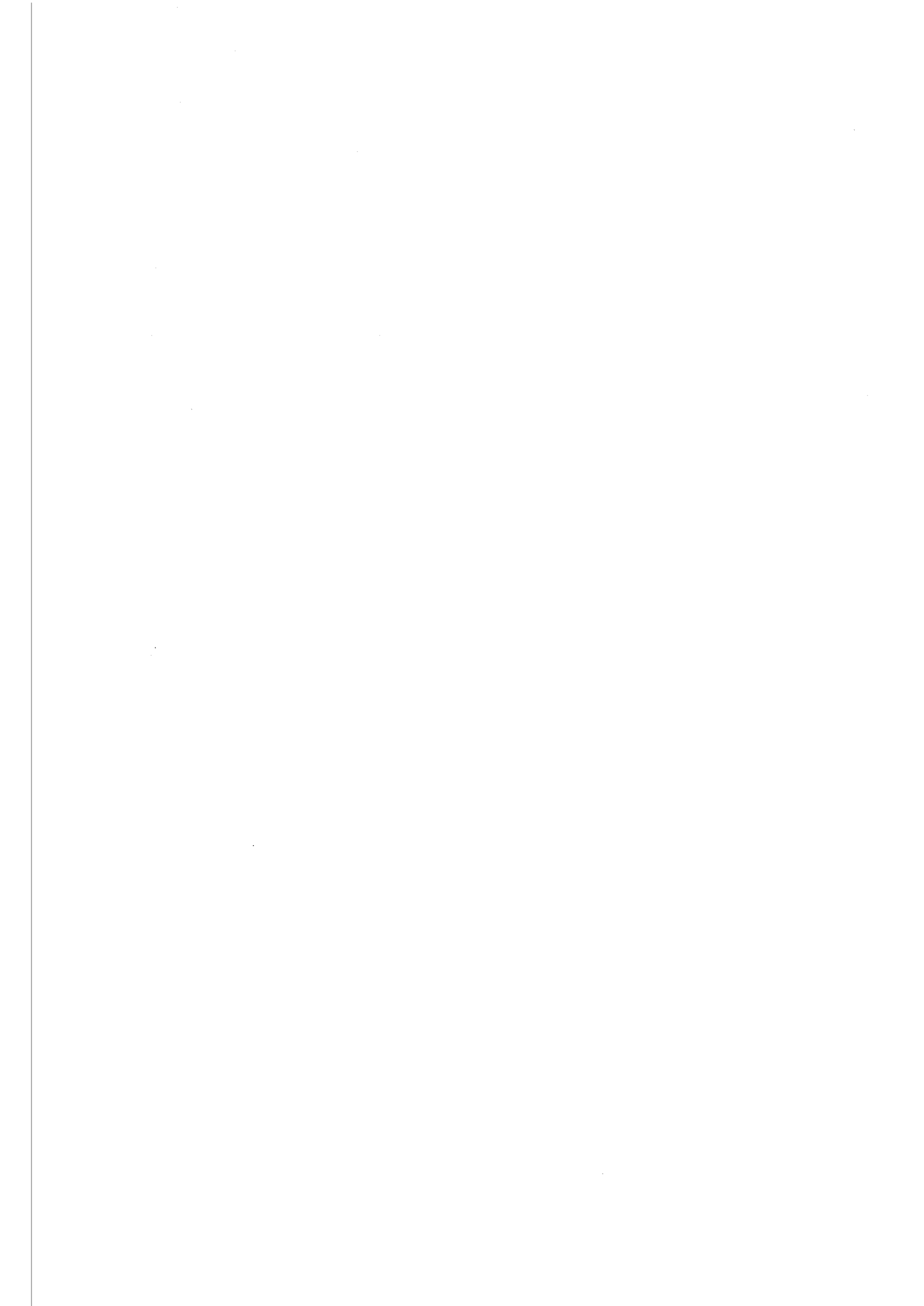
*To: The Right Honourable the Lord Cameron of Lochbroom, QC,
Her Majesty's Advocate*

The Housing (Scotland) Bill which is the subject of this Report consolidates various enactments relating to housing in Scotland. In order to facilitate a satisfactory consolidation we are making the recommendations set out in the Appendix to this Report. All our recommendations are intended to remove anomalies.

The Scottish Development Department have been consulted and they agree with our recommendations.

(Signed) PETER MAXWELL
Chairman of the Scottish Law Commission

12 March 1987



Appendix

Recommendations

1. Ancillary provisions of general application

There are a number of provisions in the Housing (Scotland) Act 1966 (c.49) which apply generally for the purposes of that Act but which have not been uniformly applied by subsequent Housing Acts. They are:

- section 177 (duty of local authority to have regard to amenities of locality, etc);
- section 178 (power of local authority to enforce obligation against owner of land);
- section 197 (power to prescribe forms, etc);
- section 199 (power to dispense with advertisements and notices);
- section 200 (local inquiries).

In order to reproduce the present effect of these provisions it would be necessary to list the provisions of the consolidation deriving from the 1966 Act and the provisions directed to be construed as one with it. This would produce an unsatisfactory assortment of provisions.

The alternative is to apply these provisions generally. This appears more satisfactory. We recommend that they should apply generally for the purposes of the Bill.

Effect is given to this recommendation in Clauses 6, 15, 330, 332 and 333.

2. Scope of local authority housing management powers

Local authorities are given a number of general housing management powers in relation to their housing. The statutory provisions in question are:

- (1) section 149 of the Housing (Scotland) Act 1966 (c.49) (general responsibility for local authority's houses) (see Clause 17);
- (2) section 150 of that Act (byelaws for regulation of authority's houses) (see Clause 18);
- (3) section 151 of that Act (conditions to be observed in the management of authority's houses) (see Clause 20(1));
- (4) section 62(1) of the Housing (Scotland) Act 1969 (c.34) (increase of rent without notice to quit) (see Clause 212);
- (5) section 160(3) of the 1966 Act and section 71 of the Housing (Financial Provisions) (Scotland) Act 1972 (c.46) (power to contribute to tenants' removal expenses) (see Clause 234).

A problem arises from the fact that the houses in relation to which these powers are exercisable are defined in different ways:

The provisions referred to in paragraphs (1), (2) and (5) apply to houses provided under Part VII of the 1966 Act. (Part I of the Bill.)

The provisions referred to in paragraph (3) apply to houses included in the housing revenue account of the authority.

The provisions referred to in paragraph (4) apply to houses belonging to the authority.

These differences do not appear to reflect any deliberate legislative policy. Section 71 of the 1972 Act assumes, wrongly, that all houses within the authority's housing

revenue account fall within the general management powers conferred by section 149 of the 1966 Act. This variation in the scope of application of these provisions is unsatisfactory. However, we do not think it is appropriate to apply any one of the existing definitions referred to.

A general application of the provisions to houses under Part VII of the 1966 Act (Part I of the Bill) is too narrow. Houses may be acquired for housing purposes but not be provided under Part VII.

A general application of the provisions to houses to which the housing revenue account relates is too wide. It would apply to houses formerly belonging to the authority which have been disposed of. It would also apply to houses brought within the account by the Secretary of State in accordance with section 23(4) of the 1972 Act. It is unsatisfactory that the exercise of such a power conferred for accounting purposes, should affect the management of the houses concerned.

In these circumstances we recommend that housing management powers should apply to houses held by a local authority for housing purposes, whether or not they are provided by the authority under Part I of the Bill. Effect is given to this recommendation in Clauses 17, 18, 20, 212 and 234.

3. Notice of authority's decision on homelessness and related matters

Section 8 of the Housing (Homeless Persons) Act 1977 (c.48) requires the local authority to notify an applicant of their decision on a number of matters relevant to his entitlement under that Act. Subsections (8) and (9) provide for service of notice by leaving the notice at the authority's office for collection by or on behalf of the person to whom it is to be given. This is because of the practical difficulties of obtaining an address at which a homeless person can be reached.

Subsection (8) provides that the notice "shall be treated as having been given to him only if" the method of service specified in subsection (9) is followed. The intention appears to be not to make that form of service mandatory in all cases (to the exclusion, for instance, of personal service) but only to exclude the operation of the general statutory provisions (section 7 of the Interpretation Act 1978 (c.30) and section 192 of the Local Government (Scotland) Act 1973 (c.65)) which deem service to have been effected in certain cases although the document may not actually have been received by the person to whom it was addressed. In other words it does not seek to exclude actual service but to provide the only means by which service can be deemed to have been effected.

We recommend that the provision should be made clear in this sense and that it should also be made clear that written notice is required, which appears to be implicit in the present provisions. Effect is given to this recommendation at Clauses 30(5) and 34(4) of the Bill.

4. Disapplication of certain provisions relating to security of tenure of tenants of non-registered co-operative housing associations: a missed consequential

Section 11(3) of the Tenants' Rights, Etc. (Scotland) Act 1980 (c.52) as originally enacted provided:

"(3) Part II of this Act (Rights of public sector tenants to security of tenure) with the exception of sections 16, 17 and 21 to 25 shall apply to a tenancy at any time when the interest of the landlord belongs to a housing association which is a registered society but is not a registered association."

The sections that were disappplied related to the tenant's right to a written lease (section 16), the variation of the terms of a secure tenancy (section 17), subletting (sections 21 and 22) and provisions relating to improvements and repairs (sections 23-25).

Section 7 of the Tenants' Rights, Etc. (Scotland) Amendment Act 1984 (c.18) added a new section 17A to the 1980 Act conferring power on the Secretary of State to make a scheme entitling a secure tenant to carry out certain repairs. The 1984 Act did not expressly amend section 11 of the 1980 Act. The effect of the existing wording of section 11(3) was to apply the new section 17A to the tenancies to which it related.

We do not think it likely that this was intended as section 11(3) disapplying the group of sections relating to improvements and repairs (sections 23–25) which deal generally with the same subject matter as section 17A. It is more likely in our view that consequential amendment disapplying section 17A should have been made to section 11(3) by the 1984 Act, but because of an oversight this was not done.

Paragraph 45(4) of Schedule 2 to the Housing (Consequential Provisions) Act 1985 (c.71) substituted a new section 11 in the 1980 Act, but without remedying this mistake.

We recommend that section 17A of the 1980 Act should be disappplied by section 11(2) (as it now is) in relation to the special landlord it applies to.

Effect is given to this recommendation in Clause 45(2).

**5. Definition of “tenement”:
an unintended repeal** By virtue of paragraph 15 of Schedule 6 to the Housing (Scotland) Act 1969 (c.34) a definition of “tenement” was inserted in section 114 of the Housing (Scotland) Act 1966 (c.34) (management code to be available for dwellings in certain tenements) in the following terms:

“‘tenement’ has the same meaning as in section 5 of the Housing (Scotland) Act 1969”.

Section 5 of the 1969 Act defined “tenement” as meaning “a building which contains two or more flats . . .”.

Section 5 was repealed by Schedule 4 to the Housing (Scotland) Act 1974. No saving was made for the definition of “tenement” in section 114 of the 1966 Act. It accordingly ceased to have effect. We do not think it likely that this was intended.

We recommend that the definition of “tenement” is reinstated in section 114 of the 1966 Act.

Effect is given to this recommendation in clause 172(4) of the Bill.

**6. Parliamentary procedure
relating to improvement
grants: two inconsistencies** Part I of the Housing (Scotland) Act 1974 (c.45) makes provision in respect of financial assistance towards works of improvement, repair and conversion by way of improvement grants. The provisions set out percentages of approved expenditure and exchequer contributions, rateable value limits, and maximum amounts of approved expenditure. These provisions are subject to variations by orders made by the Secretary of State. These orders are subject to a variety of parliamentary procedures.

(1) As regards orders varying percentages of approved expenditure, the procedure under sections 5(1), 5(1A), 7(4), 7(b), 10A(4), 10B(4) and 12(5) and (6) is by way of draft orders with consent of the Treasury subject to affirmative resolution. Provision is also made in section 5(3)(a) and (b) for the making of orders prescribing percentages of the approved expense of executing the improvement works. The procedure in these two cases is by way of regulations subject to annulment by either House.

This is anomalous. We recommend for reasons of consistency that the procedure in these two cases is brought into line with the procedure generally applicable to orders varying percentages of approved expenditure.

Effect is given to this recommendation in Clause 242(7) and (8).

(2) As regards orders varying the maximum amount of approved expenditure, the procedure under sections 3(2)(c), (3A), 3(3B) (rateable value limits), 5(1), 3(a) and (b), and 10A(4) (maximum amount of approved expenditure) is by way of orders subject to annulment of either House. Section 52 of the Local Government and Planning (Scotland) Act 1982 (c.43) added a new section 10B to the 1974 Act to make provision for grants for fire escapes for houses in multiple occupation. Under

subsection (3) of that section the maximum amounts of such grants may be varied by order. The procedure applied for variation was by draft order with the consent of the Treasury subject to affirmative resolution. This is anomalous. We recommend for reasons of consistency that the procedure in this case also is brought into line with the procedure generally applicable to orders varying the maximum amounts of approved expenditure.

Effect is given to this recommendation in Clause 249(8).

7. Repayment of payment made by local authority following a demolition or closing order: a missed consequential amendment

Section 23 of the Housing (Scotland) Act 1969 (c.38) provides:

“Where a payment in respect of a house has been made by a local authority under section 25 of the principal Act (the 1966 Act) or section 11 or 18 of this Act in connection with a demolition or a closing order and . . . the demolition order or the closing order is determined by an order under section 15(3) of the principal Act, then if at any time the person to whom the payment was made is entitled to an interest in the house (within the meaning of section 20(2) of this Act), he shall on demand repay the payment to the authority.”

Section 11 of the 1969 Act made provision for payment in respect of well-maintained houses. This section was repealed by Schedule 5 to the Housing (Scotland) Act 1974 (c.45). Section 30 of the 1974 Act made new provision for payment in respect of well-maintained houses. Schedule 3 to the 1974 Act makes certain consequential amendments to the 1969 Act. It makes no amendment to section 23 of that Act. The effect is that section 23 does not apply to section 30 of the 1974 Act. Nothing in section 30 indicates any reason why section 23 of the 1969 Act should not apply to payments made under it as it applied to payments made under its predecessor.

In our view it is plain from a consideration of these provisions that a consequential amendment should have been made by the 1974 Act to section 23 of the 1969 Act by substituting for the reference to section 11 of the 1969 Act a reference to section 30 of the 1974 Act. This was apparently overlooked. We recommend that this mistake be put right in the Bill.

Effect is given to this recommendation in Clause 307 of the Bill.

8. Liability of directors and others in case of offence by body corporate

Section 118(1) of the Housing (Scotland) Act 1966 makes provision in respect of offences by bodies corporate under sections 100–117 (Houses in multiple occupation). This is a common form provision. There is no similar provision in respect of other offences in other provisions of that Act, nor in any of the subsequent Scottish Housing Acts.

It is anomalous that in some cases express provision is made for the responsible officers of the body corporate and in other cases no provision is made.

We recommend that the modern common form provision should apply to all offences in the consolidation.

Effect is given to this recommendation in Clause 321(1) and (2) of the Bill.

**9. Definition of “flat”:
omission of words
“constructed for use for the
purposes of a dwelling”**

Section 208 of the Housing (Scotland) Act 1966 defines “flat” for the purposes of that Act as meaning:

“a separate and self-contained set of premises, whether or not on the same floor, constructed for use for the purpose of a dwelling and forming part of a building from some other part of which it is divided horizontally;”.

Section 2 of the Housing (Scotland) Act 1986 provides for an increased discount where the house purchased is a flat.

Section 2(i)(d) defines “flat” for this purpose as “a separate and self-contained set of premises, whether or not on the same floor, forming part of a building from some other part of which it is divided horizontally”.

The only difference between the two definitions is the use in the 1966 Act of the words "constructed for use for the purposes of a dwelling".

We do not think these words make any material difference to the definition of "flat". "Flat" is used generally in the legislation in the context of a house. Section 208 of the 1966 Act defines "house" as including "any part of a building, being a part which is occupied or intended to be occupied as a separate dwelling, and, in particular, includes a flat . . .". This definition has the effect, in our view, of defining a flat as a part of a building which is occupied or intended to be occupied as a separate dwelling. We think this makes the repetition of the words "constructed for use of the purposes of a dwelling" unnecessary.

We recommend the omission of these words and the use of one definition of "flat" in the Bill.

Effect is given to this recommendation in Clause 338.

10. Advance by local authority not to exceed value of security

The object of section 49(3) of the Housing (Financial Provisions) (Scotland) Act 1968 (c.31) is to ensure that the amount advanced by the local authority under that section, which by paragraph (a) must be secured by a heritable security of the lands with which the advance is concerned, does not exceed the value of the security. It provides;

"(b) the amount of the principal of the advance shall not exceed, in the case of a house or houses to be acquired, the value of the subjects disposed or assigned in security, and, in any other case, the value which it is estimated the subjects disposed or assigned in security will bear when the construction, conversion, alteration, enlargement, repair or improvement is carried out;"

The language reflects the purposes for which an advance may be made under paragraphs (a)-(d) of section 49(1). It does not fit an advance under paragraph (e), which was added by section 45(2) of the Housing (Scotland) Act 1974 (c.45) and relates to refinancing an existing loan.

It does not seem likely that an advance under paragraph (e) was intended to be exempt from the general requirement that the security should be sufficient, rather than that a small consequential amendment should have been made. We recommend that in reproducing this provision the wording should be modified to cover such an advance. Effect is given to this recommendation in paragraph 3 of Schedule 17 to the Bill.

11. Overcrowding provisions

(1) The overcrowding provisions at present in Part V of the Housing (Scotland) Act 1966 (which are reproduced in Part VII of the Bill) derive from the Housing (Scotland) Act 1935 (c.41). That Act did not apply to overcrowding existing at the time it came into operation. Section 90(2) of the 1966 Act provides that an occupier is not guilty of an offence of causing or permitting overcrowding if the persons sleeping in the house are persons who were living there when the 1935 Act came into operation and have continued to live there.

It is most unlikely that there are any cases remaining to which section 90(2) applies. This provision is accordingly not re-enacted in the Bill. The effect is preserved by the general saving in Schedule 22 to the Bill.

(2) A related problem arises from the definition of "house" in section 99 of the 1966 Act which applies to the overcrowding provisions in Part V. The definition is in the following terms;

"'house' means any premises used or intended to be used as a separate dwelling, not being premises which are entered in the valuation roll last authenticated at a rateable value exceeding forty-five pounds".

This provision is the same as and derives from the definition of "dwelling-house" contained in section 12 of the 1935 Act.

The restriction to a rateable value of £45 has become unrealistic with the passage of time and inflation. If it were omitted, the extension to all housing would have little practical effect because overcrowding is defined by reference to the number and size of rooms and not to the size or nature of the house.

We recommend the omission of the reference to rateable value of £45. Effect is given to this in Clause 151.

12. Other repeals

(1) *The Housing Act 1914*
(c.31) (power to make arrangements with public utility societies for provision of housing for government employees)

This Act was an emergency measure passed in August 1914 to deal with a shortage of housing for workers at the Government dockyard at Rosyth. It provides in general terms for the making of arrangements with public utility societies (now housing associations) for the erection of housing for government employees.

We are informed by the Property Services Agency that these powers would not now be used.

We recommend that the whole Act be repealed and not re-enacted.

In consequence, section 166 of the 1966 Act (powers of Secretary of State to acquire shares in societies under the 1914 Act) has been repealed and not re-enacted in the Bill.

(2) *Section 206 of the Housing (Scotland) Act 1966*
(powers of Act to be cumulative)

Section 206 provides:

“All powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred by Act of Parliament, law or custom, and such other powers may be exercised in the same manner as if that Act had not passed, and nothing in this Act shall exempt any person from any penalty to which he would have been subject if this Act had not passed:

Provided that a local authority shall not, by means of any local Act relating to a place within the jurisdiction, be exempted from the performance of any duty or obligation to which such authority are subject under any Part of this Act.”

Provisions such as this were common form in public health legislation (see, for instance, section 171 of the Public Health (Scotland) Act 1897 (c.38)) and appear to have been previously directed at the question of the relationship between the public general Act and local legislation in the same field.

There is now relatively little local legislation in the housing field and its relationship with the relevant public general Acts can be resolved by the ordinary processes of statutory construction.

In these circumstances we recommend that section 206 be repealed and not re-enacted.

(3) *Local authority borrowing for housing purposes*

The housing legislation confers powers of borrowing for housing purposes on local authorities under the following enactments:

section 163 of the 1966 Act (Borrowing in connection with operations carried out by a local authority outside their area);

section 165 of and Schedule 7 to the 1966 Act (Power of local authority to issue local bonds);

section 164 of the 1966 Act (Secretary of State may authorise joint issue of local bonds).

A local authority has general powers to borrow for all those purposes and by those means under the provisions of Schedule 3 to the Local Government (Scotland) Act 1975 (c.30). (Borrowing and lending by local authorities.)

It is accordingly unnecessary to re-enact the provisions of sections 163–165 of and Schedule 7 to the 1966 Act in the Bill.

We recommend that these provisions are repealed and not re-enacted.

(4) *Authentication of documents by local authority*

Section 191 of the 1966 Act provides:

“(1) An order in writing by a local authority under this Act shall be under their seal and authenticated by the signature of their clerk, or, where the authority have not a seal, shall be authenticated by the signature of any two or more members of the authority and of their clerk.

(2) A notice, demand or other written document proceeding from a local authority under this Act shall be signed by their clerk.”

Similar provision is made in section 193 of the Local Government (Scotland) Act 1973 (c.65) in the following terms:

“(1) Any notice, order or other document which a local authority are authorised or required by or under any enactment . . . to give, make or issue may be signed on behalf of the authority by the proper officer of the authority, and may be withdrawn by a notice similarly authenticated.

. . .

(3) Where any enactment . . . makes, in relation to any document . . . , provisions with respect to the matters dealt with by one of the foregoing subsections, that subsection shall not apply in relation to that document. . . .”

The effect of the last subsection is that section 191 has effect and section 193 does not. The only difference is that section 191 requires an order under a provision of the 1966 Act to be under seal.

It seems unlikely that this formality adds significantly to the protection afforded to the individual concerned.

We are informed that local authorities use section 193 of the 1973 Act and not section 191 of the 1966 Act in relation to authentication of the orders in question, and have done so since the reorganisation of local government came into effect in May 1975.

In these circumstances we recommend that section 191 of the 1966 Act is repealed and not re-enacted in the Bill.

(5) *Arrangements between Secretary of State and other departments*

Section 202 of the 1966 Act provides:

“The Secretary of State may make arrangements with any other government department for the exercise or performance by that department of any of his powers and duties under this Act which in his opinion could more conveniently be so exercised or performed, and in said case that department and the officers thereof shall have the same powers and duties as are by this Act conferred on the Secretary of State and his officers.”

This provision serves no useful purpose. Such arrangements are now a matter of administration.

We therefore recommend that this provision should not be reproduced in the Bill.

