

REPORT ON SECTION 53 OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003 EXECUTIVE SUMMARY

1. The Scottish Law Commission has published recommendations for reform in relation to Section 53 of the Title Conditions (Scotland) Act 2003. These are set out in a Report (Scot Law Com No 254, 2019), which includes a draft Bill.

2. The draft Bill consists of seven sections. If enacted, it would amend Part 4 of the 2003 Act to give effect to our recommendations.

Background to Report

3. Real burdens are a type of title condition affecting land, imposed on a burdened property in favour of a benefited property. They may affect flats and houses, as well as commercial properties and may be positive (e.g. they may require that the burdened property be maintained) or negative (e.g. they may prohibit building use). Real burdens therefore play a key role in regulating housing estates and other communities.

4. The 2003 Act, which came into force on 28 November 2004 (the “appointed day” for feudal abolition), resulted from the recommendations in our earlier Report on Real Burdens (Scot Law Com No 181, 2000).

5. Section 53 of that Act gives *implied* rights to property owners to enforce real burdens against other property owners in the case where real burdens were imposed prior to the appointed day. This is subject to the conditions that the properties are “related” and are subject to a “common scheme” of real burdens. Neither “related” nor “common scheme” are defined, but section 53(2) gives possible examples of when properties are related.

6. For real burdens imposed *after* the appointed day, it has been necessary to identify the benefited property when imposing the relevant burdens. Thus, rights are conferred *expressly*.¹ Formerly, the law did not require the benefited property to be identified. Rights were implied.

7. Therefore, section 53 only applies where a housing estate or other property development was commenced prior to 28 November 2004. Moreover, section 53 is about *title* to enforce real burdens. For enforcement, *interest* must also be shown, by proving that the activity in question will cause material detriment to the value or enjoyment of the benefited property.²

8. Section 53 did not appear in the draft Bill in our Report on Real Burdens. It was developed by the then Scottish Executive (now the Scottish Government) along with section 52, which codified the common law in relation to implied enforcement rights.

9. In 2013, however, the Justice Committee of the Scottish Parliament received evidence that section 53 causes significant difficulties in practice. The Committee recommended that the Scottish Government should refer section 53 to us.³ That recommendation was accepted.⁴

¹ Title Conditions (Scotland) Act 2003, s 4(2)(c)(ii) and (4).

² Title Conditions (Scotland) Act 2003, s 8(3).

³ See <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/59247.aspx>.

⁴ See https://www.scotlawcom.gov.uk/files/1215/1568/0184/Letter_from_Roseanna_Cunningham_MSP.pdf.

Report

10. The Report comprises five chapters.
11. Chapter 1 is the introduction. It provides an overview of the Report and of the business and regulatory impact assessment (BRIA) which accompanies it.
12. Chapter 2 provides a summary of the current law. It gives an assessment of the criticisms that have been made of section 53 since its enactment:
 - Uncertainty,
 - Complexity,
 - Lack of publicity on the burdened property's title,
 - Over-generosity of application i.e. that it confers rights too widely, and
 - Drafting issues.
13. Chapter 3 sets out our recommendations. The overarching policy objective is that owners of properties within an identifiable "community" (such as a housing estate or tenement building) would have the implied right to enforce any common scheme of real burdens affecting that community against all the other property owners in that community. We consider that this is the policy which already underpins section 53, but is unsatisfactorily implemented by that provision.
14. We therefore recommend:
 - Section 53 (and section 52) should be replaced with one clear provision governing implied rights to enforce real burdens in common schemes.
 - The term "common scheme" should be defined.
 - The new provision should replace the suggestive examples in section 53 with clear rules. These would include where the properties are flats in the same tenement, where the burdens were imposed in the same deed and where the properties are subject to common management provisions. This would make it much easier to determine when owners have title to enforce real burdens pre-dating 28 November 2004.
15. Chapter 4 examines human rights considerations. Our recommendations need to comply with the ECHR and in particular Article 1 Protocol 1 (the property protection clause) and therefore we have included a scheme under which rights under sections 52 and 53 could be preserved by registering a notice. But, we expect that most cases of implied rights will be retained under our new scheme without any action having to be taken because the overarching policy has not changed.
16. Chapter 5 provides a list of our recommendations.
17. Appendix A contains our draft Bill.
18. Appendix B lists our consultees and advisory group members.