



Scottish Law Commission  
*promoting law reform*

| (SCOT LAW COM No 254)

# Report on Section 53 of the Title Conditions (Scotland) Act 2003

report



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# Report on Section 53 of the Title Conditions (Scotland) Act 2003

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Laid before the Scottish Parliament by the Scottish Ministers

April 2019

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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# SCOTTISH LAW COMMISSION

*Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*

## **Report on Section 53 of the Title Conditions (Scotland) Act 2003**

To: Humza Yousaf MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Section 53 of the Title Conditions (Scotland) Act 2003.

(Signed) ANN PATON, *Chair*  
CATHERINE DOWDALLS  
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DAVID JOHNSTON  
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Malcolm McMillan, *Chief Executive*  
25 March 2019

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# Abbreviations

## 2003 Act

Title Conditions (Scotland) Act 2003

## CMS

CMS Cameron McKenna Nabarro Olswang LLP

## Discussion Paper

Discussion Paper on Section 53 of the Title Conditions (Scotland) Act 2003 (Scot Law Com DP No 164, 2018)

## Discussion Paper on Real Burdens

Scottish Law Commission, Discussion Paper on Real Burdens (Scot Law Com DP No 106, 1998)

## Gretton and Reid, *Conveyancing*

G L Gretton and K G C Reid, *Conveyancing* (5<sup>th</sup> edn, 2018)

## Gretton and Steven, *Property, Trusts and Succession*

G L Gretton and A J M Steven, *Property, Trusts and Succession* (3<sup>rd</sup> edn, 2017)

## *Hislop*

*Hislop v MacRitchie's Trs* (1881) 8 R (HL) 95

## Justice Committee Report

Scottish Parliament Justice Committee, *8<sup>th</sup> Report, 2013 (Session 4) Inquiry into the effectiveness of the Title Conditions (Scotland) Act 2003*, available at <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/59247.aspx>

## McDonald, *Conveyancing Manual*

D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7<sup>th</sup> edn, 2004)

## O'Neill Survey

B O'Neill, *Title Conditions Survey* (2016)

## Reid, "New Enforcers for Old Burdens"

K G C Reid, "New Enforcers for Old Burdens: Sections 52 and 53 Revisited" in R Rennie (ed), *The Promised Land: Property Law Reform* (2008) 71-90

## Reid, *Property*

K G C Reid, *The Law of Property in Scotland* (1996)

Reid, *The Abolition of Feudal Tenure*

K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003)

Rennie, *Land Tenure*

R Rennie, *Land Tenure in Scotland* (2004)

Report on Real Burdens

Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000)

Steven, "Implied Enforcement Rights"

A J M Steven, "Implied Enforcement Rights in relation to Real Burdens in terms of the Title Conditions (Scotland) Act 2003" 2003 Scottish Law Gazette 146

Wortley, "Love Thy Neighbour"

S Wortley, "Love Thy Neighbour: The Development of the Scottish Law of Implied Third-Party Rights of Enforcement of Real Burdens" 2005 Juridical Review 345



# Glossary

Amenity burden	A real burden which protects amenity such as by forbidding building or non-residential use.
Benefited property	A property which benefits from a real burden. Its owner and certain other parties, such as a tenant of that property, can enforce the burden. See the 2003 Act s 1(2)(b).
Burdened property	A property which is affected by a real burden. See the 2003 Act s 1(2)(a).
Common scheme	A set of real burdens which are identical or similar and affect a group of properties. The term is found in the 2003 Act ss 52 and 53, but is undefined.
Community burden	A real burden which regulates a group or “community” of properties and is mutually enforceable by the owners of the properties in the community. See the 2003 Act s 25.
Deed of conditions	A document imposing title conditions against a group of properties, such as a tenement or housing development or industrial estate.
Facility burden	A real burden which regulates a common facility. See the 2003 Act s 56. A list giving examples of facilities is provided by the 2003 Act s 122(3) and includes a common area for recreation, a private road and a boundary wall.
Feudal superior	The holder of a superiority interest in land under the feudal system, which was abolished on 28 November 2004.
<i>Hislop</i> type 1	Where real burdens have been imposed in successive deeds and the grantees have implied enforcement rights. This is the first of the two scenarios identified by Lord Watson in <i>Hislop v MacRitchie’s Trustees</i> (1881) 8 R (HL) 95. It can also be referred to as the “external enforcement” case as it is necessary to look at deeds other than the deed affecting the relevant property, to see if there is a common scheme.
<i>Hislop</i> type 2	Where real burdens have been imposed in a single deed and the land is subsequently sub-divided, conferring implied enforcement rights on the grantees. This is the second scenario identified by Lord Watson in the <i>Hislop</i> case. It can also be referred to as the “internal enforcement” case as only the one deed needs to be considered.

Notice of common scheme	A requirement under the 2003 Act s 52 and the common law for there to be implied rights to enforce under a common scheme. The main examples of notice are that the deed imposing the burdens (i) affects both the property whose owner wants to enforce and the property against which enforcement is sought; or (ii) contains an obligation on the grantor to impose burdens in future grants in the same development.
Real burden	A perpetual obligation affecting land, usually of a positive or negative character, which can be enforced by neighbouring landowners.
Related properties	A term found in the 2003 Act s 53 which refers to certain units of land affected by real burdens. "Related" is to be "inferred from all the circumstances" and a non-exhaustive list of examples is given.
Service burden	A real burden which requires the provision of a service such as electricity. See the 2003 Act s 56.
Title and interest to enforce	A real burden can only be enforced by someone with both title and interest. See the 2003 Act s 8. Title is a general concept essentially tied to ownership of a benefited property, whereas interest relates to the breach (or anticipated breach) in question.
Title condition	A general term for obligations affecting land which can be varied or extinguished by the Lands Tribunal, such as real burdens. See the 2003 Act s 122(1).



# Chapter 1 Introduction

## Terms of reference

1.1 On 31 August 2013 we received a reference<sup>1</sup> from the then Minister for Community Safety and Legal Affairs, Roseanna Cunningham MSP:

“To review section 53 of the Title Conditions (Scotland) Act 2003 in the context of part 4 of that Act and make any appropriate recommendations for reform.”

1.2 The reference followed a recommendation by the Justice Committee of the Scottish Parliament in its *Inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003* (2013) that the matter be remitted to us.<sup>2</sup> It was this Commission which was responsible for the draft Bill on which the 2003 Act is based.<sup>3</sup> But what is now section 53 was a new provision added by the then Scottish Executive,<sup>4</sup> during the Parliamentary passage of the Bill.

## Background

1.3 The 2003 Act codified the Scottish law of real burdens. It was part of a package of legislation which abolished the feudal system and modernised Scottish land law.<sup>5</sup> It deals mainly with real burdens. These are obligations affecting land, such as to maintain a boundary wall or not to carry out any further building. They can burden any type of land, including that which is residential or commercial.<sup>6</sup> In principle real burdens are perpetual and thus “run with the land”, although there are a number of ways in which they can be extinguished (ie removed).<sup>7</sup> The land affected by real burdens is known as the “burdened property” and the land whose owner is entitled to enforce the burdens is known as the “benefited property”. At common law there were strict requirements for the burdened property to be identified and for the real burdens to be registered against that property. But conversely there was no requirement to identify the benefited property (or properties). The courts were willing to imply benefited properties, provided that certain conditions were met.<sup>8</sup>

1.4 The 2003 Act reformed the law so that to create real burdens since 28 November 2004 it is usually necessary to identify both the benefited and burdened properties and to register the burdens against the title to both.<sup>9</sup> For real burdens created before that date, Part 4 of the 2003 Act abolished the common law rules on implied enforcement rights and replaced these with a set of statutory rules. Section 53 is the most important of these rules. It concerns the

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<sup>1</sup> Under the Law Commissions Act 1965 s 3(1)(e).

<sup>2</sup> Justice Committee Report recommendation 11.

<sup>3</sup> See Report on Real Burdens.

<sup>4</sup> The predecessor term for the Scottish Government.

<sup>5</sup> See Chapter 2 below.

<sup>6</sup> In relation to commercial property, see the important case of *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd* [2014] CSIH 105, 2015 SC 339.

<sup>7</sup> See eg Gretton and Steven, *Property, Trusts and Succession* paras 14.59-14.75.

<sup>8</sup> See Chapter 2 below.

<sup>9</sup> 2003 Act s 4. For community burdens, the community (such as a housing development) is to be identified.

situation where there is a “common scheme” of burdens affecting “related properties”. The provision does not define “common scheme” and provides that whether properties are “related” is to be “inferred from all the circumstances”.<sup>10</sup> A non-exhaustive list of examples is given, including flats in the same tenement and properties subject to the same deed of conditions.

1.5 Section 53 has been the subject of significant criticism, principally directed at its uncertainty. For example, the Law Society of Scotland in its response to our Discussion Paper stated: “The lack of clarity . . . in relation to the application of section 53 is undesirable and increases . . . costs.” Dentons said:

“English clients sometimes struggle to understand why the situation is not as clear as it would be south of the border and consequently we feel that the current uncertainty might make it less attractive to buy property in Scotland.”

1.6 Professors Reid and Gretton have described the provision as “fatally unclear”.<sup>11</sup>

### **The Discussion Paper**

1.7 In May 2018 we published our Discussion Paper, containing provisional proposals and questions. We concluded that section 53 was defective and proposed that it should be replaced with a new provision that would implement its policy aim more clearly and effectively. We identified that policy aim as being that the owners of properties within an identifiable community should have the implied right to enforce a common scheme of burdens affecting that community against each other. Consultees were asked to confirm whether they agreed with that policy. The Discussion Paper then proposed a set of provisional rules which would govern whether such a community existed, such as where the properties were flats in the same tenement. These hard and fast rules would replace the list of examples in section 53(2). We asked consultees also whether there should be a residual rule based on proximity. The other main issue covered by the Discussion Paper was a preservation scheme to allow any owner who would lose rights of enforcement under our proposals to maintain these by means of registration of a notice. We were influenced here by previous reforms such as those made by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the need to ensure that our proposals were compatible with the European Convention on Human Rights (ECHR).

1.8 Consultation ran for three months, until the end of August 2018. During that period the project team delivered seminars on the Discussion Paper to many of the large Scottish law firms where property lawyers regularly have to attempt to apply section 53 in practice. In addition, we attended meetings of the Edinburgh Conveyancers Forum, RICS Residential Property Board and the Scottish Factoring Network to speak on the project. We eventually received 34 responses to the Discussion Paper.

1.9 These responses were analysed and policy recommendations decided on. This allowed us to prepare our draft Title Conditions (Scotland) Bill which, if enacted, would amend the Title Conditions (Scotland) Act 2003 to give effect to our recommendations. We carried

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<sup>10</sup> 2003 Act s 53(2).

<sup>11</sup> K G C Reid and G L Gretton, *Conveyancing 2013* (2014) 138.

out a short technical consultation on that draft Bill in early 2019. We received 19 responses to that consultation and the helpful comments of consultees led to some refinements.

## **Structure and content of the Report**

1.10 This Report is divided into five chapters. This chapter considers introductory matters. Chapter 2 gives a brief account of the background to section 53, followed by an assessment of the difficulties which it is causing in the property sector. Chapter 3 makes recommendations as to how it should be replaced, together with some clarification of related matters. Chapter 4 sets out recommendations in relation to a preservation scheme to ensure that the reforms would be compatible with Article 1 Protocol 1 to the ECHR. Chapter 5 lists our recommendations.

1.11 There are two appendices. Appendix 1 contains the draft Title Conditions (Scotland) Bill. Appendix 2 lists (a) those who responded to our Discussion Paper; (b) those who responded to our draft Bill consultation; and (c) the members of our advisory group.

## **Legislative competence and human rights**

1.12 The 2003 Act is an Act of the Scottish Parliament and deals with land law, which is *not* a reserved matter. In particular, it does not appear in the list of reservations in Part II of Schedule 5 to the Scotland Act 1998 (specific reservations). It is indeed an aspect of Scots private law.<sup>12</sup>

1.13 An Act of the Scottish Parliament is not law in so far as any provision of the Act is outside the legislative competence of the Parliament and a provision is outside that competence in so far as it is incompatible with any right under the ECHR.<sup>13</sup> In a land law context, Article 1 Protocol 1 to the ECHR is particularly important as it protects property rights. As will be seen later,<sup>14</sup> this was a relevant factor in the Scottish Executive departing from the scheme for implied rights recommended in our Report on Real Burdens and bringing forward an alternative approach including section 53. In recommending possible reforms we need to ensure that these would be ECHR-compliant. We deal with this matter in Chapter 4 where, as noted above, we recommend a preservation scheme.

## **Scottish Land Rights and Responsibilities Statement**

1.14 In preparing this Report we have taken account of the Scottish Government's Scottish Land Rights and Responsibilities Statement, which was published in 2017, under the Land Reform (Scotland) Act 2016.<sup>15</sup> Part of Principle 5 of the Statement is that there "should be improved transparency of information about the ownership, use and management of land". We consider that the effect of our recommendations if implemented would be to provide greater transparency as to whether land owners have implied rights to enforce real burdens against other land owners. This is because the law in this area would become much more certain.

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<sup>12</sup> Scotland Act 1998 s 126(4).

<sup>13</sup> Scotland Act 1998 s 29(2)(d).

<sup>14</sup> See para 2.21 below and the Discussion Paper paras 6.19-6.20.

<sup>15</sup> See <https://www.gov.scot/publications/scottish-land-rights-responsibilities-statement/>.

## Business and Regulatory Impact Assessment (BRIA)

1.15 In line with the Scottish Government's requirements for regulatory impact assessments of proposed legislation,<sup>16</sup> we have prepared a BRIA in relation to our recommendations. In the Discussion Paper we noted that the Justice Committee in 2013 received representations from several stakeholders that the current law resulted in increased costs.<sup>17</sup> This might be because copies of the titles of properties which may have enforcement rights under section 53 require to be obtained and assessed. Since section 53 is so opaque, owners may in some cases be advised by their lawyers to approach the Lands Tribunal for a ruling on the enforceability of a burden.<sup>18</sup> They might be advised too to pay for an expert opinion (from Counsel (an advocate) or a professor) or for title insurance.

1.16 We asked consultees for information or data on the economic impact of section 53 and of the reforms proposed. We are grateful for their responses. These very much reinforced the evidence which the Justice Committee received. For example, Dentons informed us of a case where a developer paid £19,000 for a title indemnity policy against the risk of burdens being enforced under section 53. A member of our advisory group, Bernadette O'Neill, told us that when she carried out her survey of solicitors mentioned below<sup>19</sup> she was advised of a case where a client had spent £20,000 in establishing that section 53 gave it title to enforce.

1.17 DLA Piper Scotland said: "The potential economic impact of any reform which clarifies the law will be positive for the real estate sector [and] should have the effect of increasing investor confidence." Gillespie Macandrew stated: "The reforms proposed will lead to more clarity and as such will allow practitioners to advise their clients more efficiently and effectively. This will ... mean genuine savings for the client."

1.18 These comments and others have allowed us to prepare the BRIA which is available on our website. Its main points are:

- Section 53 is causing significant difficulty in practice. Its uncertainty affects development and property investment in Scotland.
- There is strong support for replacing the provision with an improved version.
- If implemented, our recommendations would reduce the costs of many property transactions.
- The recommendations would clarify the law in relation to implied rights to enforce real burdens, encouraging people and businesses to develop land in confidence.

1.19 As all Bills introduced in the Scottish Parliament require an accompanying BRIA there is likely to be a need to update our version when a Title Conditions (Scotland) Bill is brought forward. It will be examined as part of the Parliamentary process, especially at Stage 1. We

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<sup>16</sup> See <https://www.gov.scot/policies/supporting-business/business-regulation/>.

<sup>17</sup> See Discussion Paper para 1.10. For example, in its written evidence, McCarthy and Stone Retirement Lifestyles Ltd said that section 53 has led to "additional costs, delays and uncertainties [which] make Scotland a less attractive place for investment and development than other parts of the UK."

<sup>18</sup> 2003 Act s 90(1)(a)(ii). See *Thomson's Exr, Applicant* 2016 GWD 27-494, discussed below at paras 2.38 and 2.52.

<sup>19</sup> See para 1.20 below.

would encourage all those who may be affected by the reforms, or otherwise with an interest in them, to consider engaging with that process at the appropriate time in the future.

### **Acknowledgements**

1.20 We are grateful to the members of our advisory group, whose names are listed in Appendix B. We thank particularly Bernadette O'Neill of the University of Glasgow for providing us with the results of her Title Conditions Survey. This involved issuing a questionnaire to solicitors in 2016, which attracted 100 responses. We acknowledge also the assistance from Professor Kenneth Reid of the University of Edinburgh in relation to the preparation of our draft Bill. Finally, we thank Jennifer Henderson, the Keeper of the Registers of Scotland, and her staff for their assistance in relation to our recommendations in respect of a preservation scheme.<sup>20</sup>

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<sup>20</sup> See Chapter 4 below.



# Chapter 2      Current law: overview and assessment

## Introduction

2.1      In the Discussion Paper we gave a detailed account of the common law background to section 53;<sup>1</sup> our previous project on real burdens;<sup>2</sup> the passage of the Title Conditions (Scotland) Bill, during which the provision which became section 53 was first introduced;<sup>3</sup> and an assessment of that provision.<sup>4</sup> What follows here is an abbreviated version. We have also taken account of the views of consultees in the part of this chapter assessing section 53.

## Implied rights to enforce real burdens

2.2      The growing urbanisation of Scotland from the late eighteenth century brought with it the need to develop a mechanism which regulated building projects and future use of land.<sup>5</sup> Public law controls, such as planning and building laws, came much later, in the mid-twentieth century. Servitudes, brought into Scots law from Roman law, could not play this regulatory role as they are unable to impose positive obligations and always require neighbouring land. And mere contractual obligations could not bind third parties such as successor owners. Conveyancers were inventive and began to impose conditions when land was feued (under the now-abolished feudal system) or disposed. These conditions became known as real burdens and their validity was accepted by the courts.<sup>6</sup>

2.3      Real burdens required to have a benefited property and a burdened property. As to the burdened property, the courts required precise identification.<sup>7</sup> But, as regards the benefited property, the courts were considerably more generous. There was no requirement to identify that property, because it was possible to imply one. There were three broad categories where a benefited property or properties would be implied by the courts.<sup>8</sup>

2.4      The first category arose where there was a *feudal* conveyance. Where land was the subject of such a conveyance and it imposed real burdens, the feudal superiority was deemed to be the benefited property.

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<sup>1</sup> Discussion Paper, chapter 2.

<sup>2</sup> Discussion Paper, chapter 3.

<sup>3</sup> Discussion Paper, chapter 4.

<sup>4</sup> Discussion Paper, chapter 5.

<sup>5</sup> See Reid, *Property* paras 376-385.

<sup>6</sup> See especially *Tailors of Aberdeen v Coutts* (1840) 1 Robin 296.

<sup>7</sup> *Anderson v Dickie* 1915 SC (HL) 79.

<sup>8</sup> See eg Reid, "New Enforcers for Real Burdens" 71-73. At 73 it is stated: "The result [of the courts' efforts] was not pretty. This area of judge-made law was complex, obscure, and difficult to apply."

2.5 The second category arose where there was a *non-feudal* conveyance. If the disponent retained land in the neighbourhood then that land was deemed to be the benefited property. The leading case was *J A Mactaggart & Co v Harrower*.<sup>9</sup>

2.6 The third category related to neighbouring owners whose properties were subject to the same or similar burdens imposed under feudal or non-feudal conveyances. In other words, where there was some form of *common scheme* the owners of properties subject to the scheme could enforce. This was the most complex and, for present purposes, the most relevant category.

**Implied enforcement rights in common schemes: introduction**

2.7 The leading case on common-scheme enforcement rights under the common law is *Hislop v MacRitchie’s Trs*,<sup>10</sup> which was decided in 1881. The account of the law given there was developed in subsequent cases.<sup>11</sup> *Hislop* involved two properties in Gayfield Square in Edinburgh. The owner of one property unsuccessfully attempted to enforce real burdens in the title of the other to stop building work. The burdens had been imposed by the superior, who was not a party to the action. In the House of Lords, Lord Watson stated that implied rights in favour of third parties could arise in the following two cases:

“(1) where the superior feus out his land in separate lots for the erection of houses, in streets, or squares, upon a uniform plan; or (2) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions granted by him.”<sup>12</sup>

2.8 The two identified cases can be set out in diagram form.<sup>13</sup>

*Hislop type 1*

1	2	3
RB	RB	RB
4	5	6
RB	RB	RB
7	8	9
RB	RB	RB

*Hislop type 2*

1	2	3			
<b>RB</b>					
			4	5	6
			7	8	9

<sup>9</sup> (1906) 8 F 1101.

<sup>10</sup> (1881) 8 R (HL) 95. For a full analysis, see Wortley, “Love Thy Neighbour” at 355-362.

<sup>11</sup> For a comprehensive account, see A J McDonald, “The Enforcement of Title Conditions by Neighbouring Proprietors” in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 9-32.

<sup>12</sup> (1881) 8 R (HL) 95 at 102.

<sup>13</sup> See Steven, “Implied Enforcement Rights” at 149.

2.9 It can be seen in the first case that the real burdens are imposed in separate deeds, whereas in the second case the one deed imposes them. These two cases have traditionally been referred to as *Hislop* type 1 and *Hislop* type 2.<sup>14</sup> More recently, Professor Kenneth Reid has suggested moving on from Lord Watson's analysis and drawing a distinction between "internal enforcement" (case 2, where the properties are burdened by the same deed) and "external enforcement" (case 1, where the properties are burdened by different deeds).<sup>15</sup> He points out that Lord Watson's division does not take account of deeds of conditions, which were in their infancy in 1881 but in more modern times are very common.

2.10 While the statement made by Lord Watson was in feudal language, it became settled that the same principles applied where the burdens were imposed in a non-feudal conveyance or conveyances.<sup>16</sup>

## Requirements

2.11 *Hislop* and subsequent cases set out a number of criteria which required to be satisfied before implied enforcement rights in favour of third-party owners would be recognised under the common law.<sup>17</sup> First, the burdens had to be imposed by a *common author*, that is to say either the same superior or disponent.

2.12 Secondly, the property owned by the party seeking to enforce (the would-be benefited property) required to be subject to the same or similar burdens as the burdened property. The properties had to be the subject of a planned *common scheme*. The burdens did not have to be identical but there had to be a sufficient degree of equivalence or similarity. That degree was found not to be satisfied in *Hislop* itself where although both properties had building restrictions they lacked commonality. Lord Watson said that "it is essential that the conditions to be enforced ... shall in all cases be similar, if not identical".<sup>18</sup>

2.13 Thirdly, there required to be *notice* of the common scheme in the title of the burdened property. It was not enough that the burdens affecting it and the property of the party seeking to enforce were the same.<sup>19</sup> That said, where the burdens were imposed by the same deed, the notice requirement was automatically satisfied because it could be seen by inspecting the title of the burdened property that the real burdens affected a wider area. Where, however, the burdens were imposed in separate deeds, there were two established ways of giving notice. One was an obligation by the granter to impose the same or equivalent burdens in future grants in the same development.<sup>20</sup> The other was a reference to a common plan for the development.<sup>21</sup>

2.14 The final requirement was a *negative* one. There had to be nothing in the deed creating the burdens which excluded implied enforcement rights arising. The classic example of this

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<sup>14</sup> See eg Wortley, "Love Thy Neighbour" at 356.

<sup>15</sup> Reid, "New Enforcers for Old Burdens" at 86.

<sup>16</sup> *Braid Hills Hotel Co Ltd v Manuel* 1909 SC 120.

<sup>17</sup> See eg Reid, *Property* paras 399-402 and 404; McDonald, *Conveyancing Manual* paras 17.22-17.31.

<sup>18</sup> (1881) 8 R (HL) 95 at 101. See also *Botanic Gardens Picture House Ltd v Adamson* 1924 SC 549 at 563 per Lord President Clyde and *Co-operative Wholesale Society v Ushers Brewery* 1975 SLT (Lands Tr) 9.

<sup>19</sup> *North British Railway Co v Moore* (1891) 18 R 1021.

<sup>20</sup> See eg *McGibbon v Rankin* (1871) 9 M 423.

<sup>21</sup> *Main v Lord Doune* 1972 SLT (Lands Tr) 14.

was the granter reserving the right to vary or waive the burdens.<sup>22</sup> Another possibility, in the case where the deed was over a wider area, was a prohibition on the land being sub-divided.<sup>23</sup>

## Feudal abolition

2.15 The feudal system, which provided the structural basis of Scottish land law, was progressively dismantled over time.<sup>24</sup> This Commission was tasked with preparing the way for final feudal abolition. Our Report on the Abolition of the Feudal System, and the draft Bill appended to that Report, formed the basis of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.<sup>25</sup> It came fully into force on 28 November 2004, the “appointed day” on which the feudal system was abolished. Superiorities and superiors’ rights to enforce real burdens were abolished on that day.<sup>26</sup> The first category of implied enforcement rights referred to above<sup>27</sup> was therefore consigned to history. Prior to the appointed day, however, it was possible for superiors in limited cases to preserve their enforcement rights by “reallotting” the real burden to neighbouring land which they owned or by converting the burden into a personal real burden.<sup>28</sup> To do this it was necessary to register<sup>29</sup> a preservation notice and thus the right to enforce became patent on the register. Very few preservation notices were registered.

## Project on real burdens

2.16 It became apparent to this Commission when working on feudal abolition that the law of real burdens in general required reform.<sup>30</sup> Consequently a separate, albeit related, project on real burdens commenced. We issued a Discussion Paper in 1998 and a Report in 2000.<sup>31</sup> We made numerous criticisms of the common law, including that it was over-reliant on implied rights, it was difficult to operate and it was uncertain.<sup>32</sup> For the future we recommended that it should be mandatory to specify the benefited property and for the deed creating the real burdens to be registered against the title to that property.<sup>33</sup> These recommendations drew widespread support and have now been enacted in section 4 of the 2003 Act.

2.17 We found the question of reform of existing implied rights a difficult one and the recommendations which we made in the Report differed to some extent from the proposals which we made in the Discussion Paper. We recommended abolition of implied rights with some savings. One recommended saving was for burdens regulating the maintenance and use of common facilities, such as shared amenity ground, a private water system or the common parts of a tenement. We recommended that such burdens should become

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<sup>22</sup> See eg *Thomson v Alley and Maclellan* (1883) 10 R 433.

<sup>23</sup> See eg *Girls School Ltd v Buchanan* 1958 SLT (Notes) 2.

<sup>24</sup> See Reid, *The Abolition of the Feudal System* paras 1.5-1.6.

<sup>25</sup> Scottish Law Commission, Report on the Abolition of the Feudal System (Scot Law Com No 168, 1999).

<sup>26</sup> 2000 Act ss 2 and 17.

<sup>27</sup> See para 2.4 above.

<sup>28</sup> 2000 Act Part 4. See Reid, *The Abolition of the Feudal System* chs 3 and 4, and Rennie, *Land Tenure* ch 3. A “personal real burden” was a new creation of the 2000 and 2003 Acts. It is a real burden of a defined content in favour of a defined person. The most important example is a conservation burden. See Gretton and Steven, *Property, Trusts and Succession* paras 14.49-14.58.

<sup>29</sup> In the Register of Sasines and/or Land Register (depending in which register(s) the relevant properties were registered).

<sup>30</sup> Discussion Paper on Real Burdens para 1.21.

<sup>31</sup> Discussion Paper on Real Burdens and Report on Real Burdens.

<sup>32</sup> Discussion Paper on Real Burdens paras 3.17-3.28.

<sup>33</sup> Report on Real Burdens paras 3.3-3.10.

enforceable following the appointed day by those whose property is benefited by the facility.<sup>34</sup> This recommendation was implemented by section 56 of the 2003 Act. We made a similar recommendation in relation to burdens requiring the provision of a service, although such burdens are rare in practice.<sup>35</sup> For the situation where land retained in the neighbourhood by the grantor was implied to be the benefited property,<sup>36</sup> we recommended a preservation scheme requiring the registration of the right of enforcement.<sup>37</sup> This recommendation was implemented by section 50 of the 2003 Act.

2.18 For burdens imposed under common schemes dealing with amenity, such as prohibitions on development, we proposed originally a preservation scheme once again, but we changed approach following opposition from consultees. Empirical research which we commissioned influenced us to recommend a rule based on planning law notification.<sup>38</sup> Only owners within four metres (disregarding roads which are 20 metres or narrower in width) would have implied rights to enforce. They would only have these if the common law requirements<sup>39</sup> for the deed imposing the burdens – in particular notice of a common scheme and nothing to negative the implication of third-party enforcement rights – were satisfied. But the common law requirement that the burdens were imposed by the same author would be dropped on the basis that a housing development may be completed by another developer.<sup>40</sup> Apart from that, the recommendation was to codify *Hislop*,<sup>41</sup> but with the four-metre distance limitation. This could be termed a “*Hislop* four-metre rule”. It would not be restricted to amenity burdens: a burden which could qualify as a facility burden or a service burden would be included too.<sup>42</sup>

2.19 We considered whether, given pending feudal abolition, the *Hislop* four-metre rule was too restrictive.<sup>43</sup> We recommended ultimately that two cases merited special treatment. The first was tenements. A tenement is a very clear example of a community, but individual flats might well be more than four metres apart. The fact that all the flats are in the same tenement should be regarded as sufficient notice of there being a community. Thus we recommended that where burdens have been imposed under a common scheme on all the flats in a tenement, each flat should be a benefited property.<sup>44</sup> The second case was sheltered housing complexes. These are another clear case of a community. We recommended that where real burdens have been imposed under a common scheme on all the units in a sheltered housing development (or on all units other than one which is used in a special way, such as a warden’s flat) each unit should be a benefited property.<sup>45</sup>

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<sup>34</sup> Report on Real Burdens paras 11.34-11.39.

<sup>35</sup> Here the owner of a property entitled to benefit from the service would have the right to enforce. See Report on Real Burdens para 11.40.

<sup>36</sup> See para 2.5 above.

<sup>37</sup> Report on Real Burdens paras 11.72-11.79.

<sup>38</sup> Report on Real Burdens paras 11.48-11.56.

<sup>39</sup> See paras 2.11-2.14 above.

<sup>40</sup> Report on Real Burdens para 11.52.

<sup>41</sup> See para 2.7 above.

<sup>42</sup> Report on Real Burdens para 11.71.

<sup>43</sup> Report on Real Burdens para 11.58.

<sup>44</sup> Report on Real Burdens paras 11.62-11.64.

<sup>45</sup> Report on Real Burdens paras 11.65-11.67.

## Scottish Executive Consultation Paper

2.20 The Scottish Executive subsequently published its consultation paper on the draft Bill appended to our Report on Real Burdens.<sup>46</sup> Chapter 4 of that paper dealt with implied rights of enforcement. In relation to the *Hislop* four-metre rule, the Executive was concerned that this was too restrictive. But its concerns ran wider. Under the feudal law it was possible for the superior to enforce burdens. Housing developments were often regulated by feudal burdens with the developer retaining the superiority. Similarly, feudal conveyancing was also used when local authority housing was sold under the right-to-buy legislation. Commonly, the developer (or, in right-to-buy cases, the local authority) had reserved the right to vary the burdens and thus there were no implied rights in favour of the householders under *Hislop*.<sup>47</sup> With feudal abolition, the result of our recommendation for amenity burdens would be that these would be extinguished, except in the cases of tenements and sheltered housing developments.

2.21 The Executive asked whether neighbours in other common schemes should be able to enforce amenity burdens even although they could not at common law. It then suggested that consultees should try to imagine three types of modern housing estate. The first is where there are express enforcement rights in favour of all the owners. The second is where there are implied enforcement rights under *Hislop* and in respect of which we proposed a four-metre rule. The third is where the developer was the superior, who had reserved the right to vary the burdens meaning that there were no implied enforcement rights in favour of the house owners. The paper asked whether the schemes should be treated differently.<sup>48</sup> A large majority of respondents to the consultation paper was opposed to the proposed different treatment of the three common schemes.<sup>49</sup> Consequently the subsequent Bill took a far wider approach to implied enforcement rights than we had recommended. A further reason for this approach was concerns that the *Hislop* four-metre rule might not be ECHR-compatible.<sup>50</sup>

### Title Conditions (Scotland) Bill

2.22 The Scottish Executive introduced the Title Conditions (Scotland) Bill in the Scottish Parliament in 2002. The Bill's policy for burdens in common schemes was to treat the three types of cases outlined in the consultation paper identically, following the views expressed by consultees. Thus, in cases where there were no express enforcement rights, all that was required was notice of the common scheme within the titles. Typically that notice would be supplied by there being a deed of conditions over the development as a whole. A reserved power of the developer to vary the burdens made no difference.<sup>51</sup>

2.23 Stage 1 of the Bill took place in the Justice 1 Committee. It heard oral evidence at four meetings and received a considerable amount of written evidence, before completing its Report.<sup>52</sup> Three of its recommendations merit mention.

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<sup>46</sup> Scottish Executive, *Title Conditions (Scotland) Bill Consultation* (2001).

<sup>47</sup> See para 2.14 above.

<sup>48</sup> Scottish Executive, *Title Conditions (Scotland) Bill Consultation* Discussion Point 22.

<sup>49</sup> Scottish Executive, Policy Memorandum in relation to the Title Conditions (Scotland) Bill (SP Bill 54) para 77.

<sup>50</sup> This is open to question. See Discussion Paper paras 6.19-6.20.

<sup>51</sup> Title Conditions (Scotland) Bill as introduced s 48.

<sup>52</sup> Scottish Parliament Justice 1 Committee, *9<sup>th</sup> Report, 2002, Stage 1 Report on Title Conditions (Scotland) Bill*.

2.24 First, given the policy that common schemes were to be treated alike, the meaning of the term “common scheme” as used in the Bill was clearly very important:

“Accordingly, the Committee recommends that there should be a clear definition of the term in the Bill given that it underpins substantial parts of the Bill and appears open to confusion at the moment.”<sup>53</sup>

2.25 The Committee referred also to evidence from the Confederation of Scottish Local Authorities (COSLA) and the Society of Local Authority Solicitors and Administrators (SOLAR) that there would be cases of “mixed tenure”<sup>54</sup> housing estates where the policy that there should be enforcement rights was not achieved by the Bill.<sup>55</sup> This was because the Bill, in line with the position under the common law, required *notice* of the common scheme. If the burdens had been imposed in the individual conveyances of the properties rather than in a deed of conditions this requirement might not be satisfied.

2.26 Secondly, the Committee noted that the result of this policy where a developer had reserved the right to vary the burdens would be that instead of one person (typically the superior) having to be approached for permission to breach a burden, numerous neighbours would now need to give consent. It therefore was of the view that the Scottish Executive’s policy was in some ways too generous as regards implied rights (by having a general disapplication of the rule that a right to vary burdens reserved by the developer precluded such implied rights) and in some ways too restrictive (because the absence of notice of the common scheme would preclude such implied rights and this was unsatisfactory in housing estates).

2.27 Thirdly, the Committee reviewed the provisions on implied rights in the Bill as introduced compared with the Commission’s recommended *Hislop* four-metre rule.<sup>56</sup> Its conclusion was that it supported the Scottish Executive’s approach.

### **The Scottish Executive response**

2.28 Following the evidence given at Stage 1, the Scottish Executive reconsidered the provisions on implied enforcement rights in relation to common schemes<sup>57</sup> and therefore amended the Bill. The amendments were tabled and agreed to at Stage 2. The result of these was that the Bill now contained in relation to burdens in common schemes:

- (a) a provision which was designed to restate the common law as set out in *Hislop* and successor cases (so that an absence of notice of a common scheme or a reserved right to vary the burdens would preclude implied enforcement rights); and
- (b) a provision creating a new rule whereby there would be implied enforcement rights where there was a “common scheme” of “related properties”.

2.29 Provision (a) would subsequently become section 52 of the 2003 Act and provision (b) would become section 53.

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<sup>53</sup> Justice 1 Committee 9<sup>th</sup> Report para 93.

<sup>54</sup> Estates where some of the properties have been sold under the right-to-buy legislation.

<sup>55</sup> Justice 1 Committee 9<sup>th</sup> Report paras 90 and 100.

<sup>56</sup> Justice 1 Committee 9<sup>th</sup> Report paras 101-103.

<sup>57</sup> Justice 1 Committee, Official Report, 21 November 2002 col 12565.

## Assessment: introduction

2.30 We now look at section 53 in detail and assess the criticisms that can be made of it. Its sister provision is section 52, which restates the common law of common-scheme enforcement rights as set out in *Hislop* and subsequent cases.<sup>58</sup> When assessing section 53 it is important to remember the existence of section 52 too.

2.31 Section 53 provides:

“(1) Where real burdens are imposed under a common scheme, the deed by which they are imposed on any unit comprised within a group of related properties being a deed registered before the appointed day, then all units comprised within that group and subject to the common scheme (whether or not by virtue of a deed registered before the appointed day) shall be benefited properties in relation to the real burdens.

(2) Whether properties are related properties for the purposes of subsection (1) above is to be inferred from all the circumstances; and without prejudice to the generality of this subsection, circumstances giving rise to such an inference might include—

- (a) the convenience of managing the properties together because they share—
  - (i) some common feature; or
  - (ii) an obligation for common maintenance of some facility;
- (b) there being shared ownership of common property;
- (c) their being subject to the common scheme by virtue of the same deed or conditions; or
- (d) the properties each being a flat in the same tenement.

(3) This section confers no right of pre-emption, redemption or reversion.

(3A) Section 4 of this Act shall apply in relation to any real burden to which subsection (1) above applies as if—

- (a) in subsection (2), paragraph (c)(ii);
- (b) subsection (4); and
- (c) in subsection (5), the words from “and” to the end,

were omitted.

(4) This section is subject to sections 57 and 122(2)(ii) of this Act.”

2.32 The most important parts of section 53 are subsections (1) and (2). These can be analysed in terms of three requirements in relation to the relevant real burdens. First, the

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<sup>58</sup> On section 52, see Gretton and Reid, *Conveyancing* para 14-15; McDonald, *Conveyancing Manual* para 17.34, Rennie, *Land Tenure* para 6-09 and Steven, “Implied Enforcement Rights” at 150-151.



burdens must have been imposed in a deed registered before the appointed day. Secondly, the burdens must have been imposed under a “common scheme”. Thirdly, the property on which the burdens have been imposed must be within a group of “related properties”.

### **Deed registered before the appointed day**

2.33 This requirement is straightforward. The real burdens in the scheme must have been first imposed prior to 28 November 2004. As long as one property in the scheme satisfies this requirement then section 53 can apply. For example, a local authority sells properties in a housing scheme to tenants under the right-to-buy legislation.<sup>59</sup> It imposes the same real burdens in each disposition in favour of the purchasers. Provided that at least one of these dispositions was registered before 28 November 2004 then section 53 can operate. This requirement of section 53 was indeed particularly aimed at local authority housing schemes which were in the process of being sold when the legislation came into force.<sup>60</sup>

### **“Common scheme”**

2.34 We saw earlier that the requirement for a common scheme of real burdens was present under the common law.<sup>61</sup> Where the same deed imposes burdens on multiple properties there is less difficulty than where the burdens are in the break-off deeds for the individual properties.

2.35 In the former case, the burdens will typically be identical. A deed of conditions might have different sets of burdens for different streets in a development but this would not be that usual.<sup>62</sup> A more likely scenario is a deed of conditions relating to a development of flats and houses where there are: (1) flat-specific burdens; (2) house-specific burdens; and (3) general burdens, for example on paying for the maintenance of common grass areas. If there is a burden requiring the flat owners not to leave bicycles in the common stair, it is arguable that the house owners would not be benefited owners because their properties are not subject to this burden. In other words there is a separate common scheme in respect of the flat-specific burdens. The counter-argument is that there is only the one common scheme so all the owners in the development have title to enforce all the burdens.<sup>63</sup> In contrast, in the latter case of the burdens being imposed in separate deeds, these may well not be identical. The respective deeds will have to be checked.

2.36 Despite the call from the Justice 1 Committee,<sup>64</sup> “common scheme” is not defined in the 2003 Act. The Policy Memorandum to the Title Conditions (Scotland) Bill and the explanatory notes to the 2003 Act both say:

“Common schemes exist where there are several burdened properties all subject to the same or similar burdens.”<sup>65</sup>

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<sup>59</sup> Now no longer in force.

<sup>60</sup> See Rennie, *Land Tenure* para 6-06.

<sup>61</sup> See para 2.12 above.

<sup>62</sup> We know of examples of this in larger developments in cities.

<sup>63</sup> See Reid, “New Enforcers for Old Burdens” at 81-82.

<sup>64</sup> See para 2.24 above.

<sup>65</sup> Scottish Executive, Title Conditions (Scotland) Bill Policy Memorandum para 197.

There is no difficulty with “the same”, but what is less certain is how similar is “similar”. As we saw earlier,<sup>66</sup> the same issue arose at common law. It arises too with regard to section 52 of the 2003 Act where the expression “common scheme” also appears without definition. Burdens which are randomly the same or similar, such as where a conveyancer has simply used the same style for two nearby developments, will not constitute a common scheme.<sup>67</sup> The commonality has to be *planned* when the burdens are imposed and not arise by chance.<sup>68</sup>

2.37 The case law in relation to “common scheme” and section 53 more generally has been slight.<sup>69</sup> *Russel Properties (Europe) Ltd v Dundas Heritable Ltd*<sup>70</sup> is the only Court of Session case in relation to section 53 of which we are aware. It was an Outer House decision of Lord Woolman and concerned the Westwood Neighbourhood Centre in East Kilbride. This is a mixed development of flats, offices and shops. The various units were subject to use burdens of varying description and Lord Woolman held on the facts that there was insufficient similarity for there to be a common scheme. The case was decided at the stage of interim interdict. Therefore all the issues may not have been fully canvassed. Professors Reid and Gretton state that, while accepting that Lord Woolman’s view was “tenable, our inclination is to say that, on the information available to us, there was indeed a common scheme.”<sup>71</sup> They say that it would not be possible to reach a definitive view without considering the burdens in the respective titles as a whole rather than only comparing the burdens on use, because in a mixed estate these will inevitably be different.<sup>72</sup>

2.38 In *Thomson’s Exr, Applicant*<sup>73</sup> plots of land in Old Humbie Road in Newton Mearns had been sold by means of feu dispositions between 1958 and 1960. The deeds each contained real burdens. The Lands Tribunal was asked to determine whether the burdens imposed on 9 Old Humbie Road were enforceable under sections 52 and 53 of the 2003 Act.<sup>74</sup> In its judgment it noted that there was no statutory definition of “common scheme”, but said that it “would suppose that ‘scheme’ suggests some sort of planned or systematic regulation by the superior over a certain area.”<sup>75</sup> It decided that there was a common scheme in relation to the houses despite the real burdens not being identical. In particular, the properties were all subject to burdens requiring the houses built on them to be of a value of at least £2,500. This was held to be a “significant common characteristic, and if not a ‘uniform plan’, at least embodied an intention that the relevant residential area should attain a certain quality of amenity.”<sup>76</sup>

2.39 Since the Discussion Paper was published last year there has been a further Lands Tribunal case: *O’Gorman v Love*.<sup>77</sup> This involved two adjacent villas in East King Street,

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<sup>66</sup> See para 2.12 above.

<sup>67</sup> This was a point made to us in their consultation responses by Dr Craig Anderson and the Faculty of Advocates.

<sup>68</sup> The word “plan” is used in the leading common law cases including *Hislop* and *Botanic Garden Picture House Ltd v Adamson* 1924 SC 549. On the latter see the Discussion Paper para 2.19.

<sup>69</sup> See Discussion Paper paras 5.11-5.17. And see now too *Martin v Turnbull*, 26 June 2018, Lands Tribunal at para 22.

<sup>70</sup> [2012] CSOH 175. For discussion see K G C Reid and G L Gretton, *Conveyancing 2012* (2013) 113-118 and A Stewart and E Sinclair, *Conveyancing Practice in Scotland* (7<sup>th</sup> edn, 2016) para 8.25.5.

<sup>71</sup> Reid and Gretton, *Conveyancing 2012* at 116 fn 5.

<sup>72</sup> Reid and Gretton, *Conveyancing 2012* at 117.

<sup>73</sup> 2016 GWD 27-494.

<sup>74</sup> See 2003 Act s 90(1)(a)(ii) for the basis of the application.

<sup>75</sup> Para 28 of judgment.

<sup>76</sup> Para 38 of judgment.

<sup>77</sup> 2019 GWD 5-62.

Helensburgh. Both had similar real burdens, imposed by the same granter, in feu dispositions dating from the 1860s in relation to the type and location of the houses that could be built. The Tribunal had no hesitation in holding that there was a common scheme.

### “Related properties”

2.40 For section 53 to apply, the benefited and burdened properties must be “related properties”. This phrase is not defined. It has to be “inferred from all the circumstances”.<sup>78</sup> A non-exhaustive list of examples is provided.

2.41 The policy was explained by Mr Jim Wallace QC MSP, the Deputy First Minister and Minister for Justice at the time of the Title Conditions (Scotland) Bill when what is now section 53 was introduced at Stage 2 as section 48A:

“The purpose of new section 48A is to ensure that amenity burdens in all housing estates or tenements should be mutually enforceable by the owners of houses in the estate or of flats in a tenement. ... A large majority of respondents to the consultation on the bill were in favour of such amenity burdens being treated in the same way, irrespective of whether rights had been granted expressly to owners in the original deeds or whether they had arisen by implication under existing law.

We needed to ensure that section 48 [the relevant provision in the Bill as introduced and which in amended form is now section 52] would not confer enforcement rights as between scattered properties in rural areas. [Section 48A] does not require notice of a common scheme, but it retains the need for a common scheme of burdens and introduces a requirement for the properties to be related to one another. For example, houses on a typical housing estate would be related properties. The relationship would be inferred from all the circumstances, but the amendment gives examples of when such inference might arise. ...

[S]ubsection (2) of new section 48A gives several examples of circumstances that might give rise to an inference that properties are related properties for the purpose of being treated as a common scheme. One example is of properties that are flats in the same tenement, so section 49 [the provision dedicated to implied enforcement rights in tenements] will no longer be needed, as it will have no independent effect.”<sup>79</sup>

2.42 This has long been assumed to have been a statement made with *Pepper v Hart*<sup>80</sup> in mind.<sup>81</sup> We understand that it was.<sup>82</sup> It can be seen from Mr Wallace’s statement that the policy of section 53 is for there to be implied enforcement rights in housing estates. The words “housing estate” do not appear in section 53. We understand that this is because an appropriate definition of the term for this purpose could not be found at the time. The difficulties are apparent. For example, it may be difficult to know where one estate stops and a neighbouring estate starts.

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<sup>78</sup> 2003 Act s 53(2).

<sup>79</sup> Justice 1 Committee, Official Report, 10 December 2002 cols 4371-4372.

<sup>80</sup> [1993] AC 593. This case authorised reference to statements made in Parliament during a Bill’s passage to interpret a statutory provision in the Act which resulted from that Bill.

<sup>81</sup> See eg Reid and Gretton, *Conveyancing 2012* at 118 fn 3.

<sup>82</sup> And at Stage 3 of the Bill, Mr Wallace expressly said that he was making a *Pepper v Hart* statement in relation to what is now section 53. See Justice 1 Committee, Official Report, 26 February 2003 col 15711.

2.43 Rather than referring to a “housing estate”, section 53 instead provides a list of examples of where properties are “related”. The list has been the subject of a penetrating analysis by Professor Reid, to which the account here is indebted.<sup>83</sup> The examples can be divided into “legal” and “physical”.

2.44 The first legal example is the convenience of managing the properties together where there is an obligation for common maintenance of a facility such as a private road or water supply.<sup>84</sup> It is not apparent why this is relevant to amenity burdens given that section 56 of the 2003 Act separately deals with implied rights in relation to facility burdens.<sup>85</sup>

2.45 The second legal example is shared ownership of common property.<sup>86</sup> This might perhaps be a recreational or landscaped area in a development which is co-owned by the property owners.

2.46 The third legal example is the properties being subject to the common scheme by virtue of the same deed of conditions.<sup>87</sup> This example is evidently intended to implement the Executive’s policy that there should be implied enforcement rights in housing estates on the basis that such estates, at least modern ones, are typically the subject of a deed of conditions imposed by the builder. But of course this is not always true.

2.47 The more important of the two physical examples is the properties being flats in the same tenement.<sup>88</sup> Indeed this seems more than an example, given the comments of the Justice Minister quoted above<sup>89</sup> to the effect that its presence removed the need for a separate provision dedicated to tenements as there was in the Bill at the time of introduction.

2.48 The other example is the convenience of managing the properties together because they share some common feature.<sup>90</sup> “Feature” seems to mean an aspect of the properties themselves (perhaps the design of the houses) rather than something such as a garden shared by the properties, because the latter is covered by the facility example.<sup>91</sup> But it is difficult generally to see how such features would assist the convenience of the management of the properties.<sup>92</sup>

2.49 A small number of cases have considered the meaning of “related properties”. In *Brown v Richardson*<sup>93</sup> the Lands Tribunal decided that, where there is a conveyance of a wider area imposing burdens followed by a sub-division (in other words a *Hislop* type 2 case), the conveyance could be treated in the same way as a deed of conditions to infer that the

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<sup>83</sup> Reid, “New Enforcers for Old Burdens” at 82-87.

<sup>84</sup> 2003 Act s 53(2)(a)(ii). For examples of a “facility”, albeit in the context of facility burdens, see s 122(3) of the Act.

<sup>85</sup> Professor Reid in “New Enforcers for Old Burdens” at 83 suggests it may have been copied inappropriately from s 66.

<sup>86</sup> 2003 Act s 53(2)(b).

<sup>87</sup> 2003 Act s 53(2)(c).

<sup>88</sup> 2003 Act s 53(2)(d).

<sup>89</sup> See para 2.41 above.

<sup>90</sup> 2003 Act s 53(2)(a)(i).

<sup>91</sup> See Reid, “New Enforcers for Old Burdens” at 84-85. But the Lands Tribunal in *Thomson’s Exr, Applicant 2016 GWD 27-494* held otherwise. See para 2.52 below.

<sup>92</sup> This too may have been the result of inappropriate borrowing from s 66.

<sup>93</sup> 2007 GWD 28-490.

properties burdened by it were related. The Tribunal took the same approach in *Franklin v Lawson*.<sup>94</sup>

2.50 *Russel Properties (Europe) Ltd*, discussed above,<sup>95</sup> involved use restrictions on a mixed estate. Lord Woolman said:

“Although the court has a discretion as to what constitutes related properties, some guidance can be gleaned from the illustrations set out in section 53(2). *Russel* do not plead that it fits any of these cases. In my view, having regard to the whole circumstances, it has failed to establish an arguable case that the properties are related.”<sup>96</sup>

2.51 It is unknown what “the whole circumstances” were. This aside it is not certain that properties in the same mixed, as opposed to wholly residential, development should not be regarded as “related”.<sup>97</sup>

2.52 In *Thomson’s Exr, Applicant*, discussed above,<sup>98</sup> the properties were burdened with an obligation to maintain the boundary fence they shared with their immediate neighbour or neighbours. The Tribunal regarded such a fence as a “common feature”, as well as being a “facility” in respect of which there was an obligation to maintain.<sup>99</sup> It noted also that the requirement that the fences should be maintained at joint expense suggested “a certain convenience in managing the properties together”.<sup>100</sup> The fences were also declared to be owned in common by the owners who shared them as a boundary. All these factors are mentioned in section 53(2). The Tribunal therefore concluded that the properties on either side of the common fences were related. This meant only the immediate neighbours. Thus although there was one “common scheme” for the five properties in the road, there were several sub-groups of “related properties”.<sup>101</sup> It may be questioned whether this was the intention of the Scottish Executive when bringing forward section 53. As we saw above,<sup>102</sup> the provision was aimed at conferring title in respect of an entire housing estate, rather than creating multiple micro-communities based on shared boundary obligations.

2.53 The most recent case of *O’Gorman v Love*, also discussed above,<sup>103</sup> concerned the issue once again of whether a neighbouring house was a “related” property. The facts differed from *Thomson’s Exr, Applicant* in that the wall separating the properties was not declared to be common property and there was no real burden requiring it to be maintained at joint expense. In fact what the relevant real burdens envisaged was two separate fences on the boundary line, each separately maintained. The Tribunal held that the properties were not “related”. What is most interesting about the decision is the discussion in it about whether the wall could be regarded as a “common feature”. In contrast with *Thomson’s Exr, Applicant*, the Tribunal analyses more closely the meaning of “the convenience of managing the properties

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<sup>94</sup> *Franklin v Lawson* 2013 SLT (Lands Tr) 81 at para 9.

<sup>95</sup> See para 2.37 above.

<sup>96</sup> [2012] CSOH 175 at para 22.

<sup>97</sup> Reid and Gretton, *Conveyancing 2012* at 118.

<sup>98</sup> See para 2.38 above.

<sup>99</sup> Paragraph 46 of judgment.

<sup>100</sup> Paragraph 46 of judgment.

<sup>101</sup> As suggested in Gretton and Reid, *Conveyancing* para 14-16 example 2. See also Reid, “New Enforcers for Old Burdens” at 85.

<sup>102</sup> See paras 2.41-2.42 above.

<sup>103</sup> See para 2.39 above.

together”.<sup>104</sup> It notes that the properties had no history of being so managed. Further, it considers the Scottish Parliament Official Report in relation to the introduction of what is now section 53 into the then Title Conditions Bill and concludes that the provision is aimed at the management of housing estates, in particular those coming into private ownership under the then right-to-buy legislation. As a result of this decision, the correctness of *Thomson’s Exr, Applicant* can be increasingly doubted.

### **What section 53 does not require**

2.54 It is worth highlighting three criteria that section 53 does not require. The first is notice of the common scheme. The second is the absence of anything negating there being implied rights. As we have seen, these were requirements of the common law.<sup>105</sup> They are also requirements of section 52 of the 2003 Act.<sup>106</sup> That provision, as we have noted,<sup>107</sup> codified the common law but the Scottish Executive’s policy was that the common law was too restrictive. Hence there was a need for section 53. Thirdly, the burdens in the common scheme do not have to be imposed by the same author. This was a requirement of the common law but the policy of the 2003 Act further to our Report on Real Burdens was to drop this.<sup>108</sup> This was on the basis that a development may be the work of more than one builder, either jointly or consecutively.<sup>109</sup>

### **Difficulties: general**

2.55 In the foregoing paragraphs we have attempted to explain section 53 and the case law which has discussed it. We now set out the difficulties relating to the provision, many of which were identified in the evidence to the Justice Committee in 2013.

#### **(1) Uncertainty**

2.56 It is often impossible to know whether section 53 confers implied rights or does not.<sup>110</sup> In its written evidence to the Justice Committee, DWF Biggart Baillie stated:

“In many cases much time can be spent trying to ascertain whether there is a benefited property with enforcement rights, often involving a time consuming examination of neighbouring titles, only to come to the unsatisfactory conclusion ‘there might be’. For most clients, this is a frustrating, and costly, conclusion.”

2.57 In response to the O’Neill Survey fewer than half of the respondents (49%) said that they felt confident advising clients on questions of implied rights to enforce real burdens. Moreover, only 26% said that the 2003 Act made it easier to find benefited owners who have implied rights to enforce. And only 10% said that it made it less expensive to find the benefited owners who have implied rights to enforce. While these questions were directed at Part 4 of

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<sup>104</sup> Paragraphs 35 and 36 of judgment.

<sup>105</sup> See paras 2.13-2.14 above.

<sup>106</sup> Eg, in *Franklin v Lawson* 2013 SLT (Lands Tr) 81 the superior’s reserved right to vary the burdens precluded s 52 from applying. See similarly *MacKay v McGowan* 2016 SLT (Lands Tr) 6.

<sup>107</sup> See para 2.30 above.

<sup>108</sup> See para 2.18 above.

<sup>109</sup> Report on Real Burdens para 11.52. See Reid, “New Enforcers for Old Burdens” at 81. Cf McDonald, *Conveyancing Manual* para 17.33 and Wortley, “Love Thy Neighbour” at 367.

<sup>110</sup> Eg 67% of the solicitors who responded to the O’Neill Survey said that either often or a few times it was impossible to give useful advice on whether a common scheme exists.

the 2003 Act in general rather than section 53 in particular, section 53 is such an important provision in Part 4 that it must have influenced many of these responses.

2.58 Similar conclusions can be drawn from the views of consultees to our Discussion Paper. For example, Gillespie Macandrew wrote:

“[The process of finding out whether section 53 applies] more often than not . . . ends in a discussion with the client which is not particularly conclusive, and leads to frustration.”

2.59 The uncertainty introduced by section 53 can also be shown by the fact that a provision in the 2003 Act requiring the Keeper to add statements to Land Register title sheets explaining whether there are implied rights was repealed because the task was too difficult and the provision was thus unworkable.<sup>111</sup>

2.60 Much of the problem arises because the provision does not provide bright-line rules, but rather a non-exhaustive list of examples. This contrasts with the common law rules, which were much more certain, albeit the question of whether there was a common scheme was not free from difficulty in the case of similar, rather than identical, burdens.

## **(2) Complexity**

2.61 There is evidence that section 53 is regarded by many as too complex. The O’Neill Survey asked whether the rules set out in the provision were easy to understand. Only 26% of respondents agreed; 64% disagreed and 10% did not know. In its written evidence to the Justice Committee, MacRoberts said:

“Section 53 is one of the most, if not *the* most, difficult sections in the Act. . . . Property law should not be so complicated.”

2.62 In her oral evidence to the Committee, Alison Brynes of T C Young, who was representing the Scottish Federation of Housing Associations, said:

“I find it fairly difficult to understand section 53, but what I find really difficult is explaining it to a client in a way that they can understand. What is a common scheme? What does the phrase “related properties” mean?”

2.63 In their response to our Discussion Paper, DLA Piper Scotland stated:

“Section 53 has proved difficult to apply in practice (for the reasons explained in the Discussion Paper) and this has led, on occasion, to higher transactional costs, including fees for professorial opinions, and title insurance.”

2.64 The issue of complexity to some extent shades into the issue of uncertainty. Section 53 is arguably not that complex: once it is established that a property in the purported common scheme was burdened before 28 November 2004 the provision essentially rests on the twin

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<sup>111</sup> 2003 Act s 58, repealed by the Land Registration etc. (Scotland) Act 2012 Sch 5 para 43(4). See Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) paras 10.19-10.30.

criteria of “common scheme” and “related properties”. It might even be said to be less complex than section 52 and the common law, which require more criteria to be satisfied.<sup>112</sup>

2.65 Sections 52 and 53 taken together, however, can be argued to be more complex than is necessary. It would seem preferable to have a simpler rule dealing with common schemes.

### **(3) Lack of publicity on the burdened property’s title**

2.66 Under the common law it was possible to determine whether implied rights existed almost entirely from the title of the burdened property alone, ie from within the title in respect of which the owner proposed to breach a burden.

2.67 In *Hislop* type 2 cases<sup>113</sup> the fact that the relevant deed burdened a wider area meant that the requirements of the same author, identical or similar burdens and notice of a common scheme were immediately satisfied. All that had to be ascertained beyond that was whether there was a negating factor, but that too could be found in that deed. Where the real burdens were imposed by a deed affecting the relevant property alone (the *Hislop* type 1 case), it was necessary to look at the neighbouring properties’ titles, but only to check whether the burdens were the same or similar and imposed by the same author. The other requirements, such as notice of a common scheme, were all matters to be determined from within the burdened property’s title.<sup>114</sup>

2.68 In contrast, section 53 requires an assessment of “relatedness” between the burdened owner’s title and those of neighbours. Professor Reid, however, while accepting that criticism based on lack of publicity has force, regards it nonetheless as “exaggerated”<sup>115</sup> on the basis that what amounted to publicity at common law was “often slight”.<sup>116</sup> Furthermore, under section 53 the fact that the property is a flat in a tenement or subject to a deed of conditions provides publicity. But these of course are the easier cases.

### **(4) Too generous**

2.69 As we have seen, the recommendation in our Report on Real Burdens was to restrict implied enforcement rights in common schemes to neighbours within four metres.<sup>117</sup> But the Scottish Executive was concerned about the loss of rights by further-away owners and our recommendation was not accepted.<sup>118</sup> Instead the common law was codified by section 52 and further rights were conferred by means of section 53. The Executive policy, as we have seen, was for the owner of each property in a housing estate to have title to enforce the burdens against all the other owners.<sup>119</sup>

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<sup>112</sup> See paras 2.7-2.14 above.

<sup>113</sup> See paras 2.7-2.9 above.

<sup>114</sup> Wortley, “Love Thy Neighbour” at 359-360.

<sup>115</sup> Reid, “New Enforcers for Old Burdens” at 79.

<sup>116</sup> Reid, “New Enforcers for Old Burdens” at 79.

<sup>117</sup> See paras 2.17-2.18 above.

<sup>118</sup> See para 2.19-2.21 above.

<sup>119</sup> See paras 2.21-2.22 and 2.41-2.42 above.



2.70 Title to enforce is not the only requirement for a party wishing to rely on a real burden. Interest must also be shown. In relation to amenity burdens, section 8(3)(a) of the 2003 Act provides that a person has such interest if:

“in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person’s ownership of, or right in, the benefited property”.

2.71 As can be seen, whether there is interest to enforce depends on the facts of the case. Nevertheless, as a general rule, the further the distance between the properties the less likely there is to be interest.<sup>120</sup> For example, in *Kettlewell v Turning Point Scotland*,<sup>121</sup> the pursuers, who successfully showed interest to enforce a burden to prevent a change of use, were all owners of adjacent or closely neighbouring properties. The requirement of interest influenced our Report on Real Burdens where we recommended the four-metre rule discussed above.<sup>122</sup>

2.72 There seems little value in giving title to enforce to owners whose properties are more distant if they are not going to have interest.<sup>123</sup> Nevertheless, because interest to enforce must always be considered on a fact-specific basis a blanket four-metre limitation would seem on reflection to be too restrictive. For example, in some modern housing developments the individually-owned plots are separated by more than four metres by common landscaped areas. Here there is a readily identifiable community where the owners would expect to be entitled to enforce the burdens affecting it. There may also be cases where the immediate neighbours are unwilling to take action and where it is legitimate to allow neighbours who are further away but within the same community to be entitled to do so.

## (5) Drafting

2.73 The drafting of section 53 has also been criticised. In his oral evidence to the Justice Committee Professor Rennie said that the provision is “almost unintelligible and is very difficult to teach”.<sup>124</sup> This was endorsed by Dr Craig Anderson in his response to the Discussion Paper:

“That has certainly been my experience. This is a point whose importance is often overlooked. I would make two observations. First, today's law students are tomorrow's legal advisers. If their teachers are unable to understand s. 53, it is improbable that they will find it easy to advise properly on it amidst of the pressures of legal practice. Second, if law students, with the advantage of at least some legal education, cannot be made to understand the provision, how are the general public supposed to understand their position?”

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<sup>120</sup> See eg *Aberdeen Varieties Ltd v James F Donald (Cinemas) Ltd* 1939 SC 788 and *Barker v Lewis* 2008 SLT (Sh Ct) 17 at para 27 per Sheriff Principal R A Dunlop QC. See generally R Rennie, “Interest to Enforce Real Burdens” in R Rennie (ed), *The Promised Land: Property Law Reform* (2008) 1-24; McDonald, *Conveyancing Manual* para 17.51; Gretton and Reid, *Conveyancing* para 14-13 and Stewart and Sinclair, *Conveyancing Practice* para 8.25.8.

<sup>121</sup> 2011 SLT (Sh Ct) 143. In his consultation response, Professor Roderick Paisley drew our attention to *Mannofield Residents Property Co Ltd v Thomson*, Aberdeen Sheriff Court, 2 and 30 June 1982 (reported in R Paisley and D Cusine (eds), *Unreported Property Cases from the Sheriff Courts* (2000) 212). There, interest to enforce a real burden to prevent amenity being harmed by smell emanating from a fish and chip shop was held to be dependent on neighbouring properties being close enough to be materially affected by that smell.

<sup>122</sup> Report on Real Burdens para 11.51. See para 2.18 above.

<sup>123</sup> See Reid, “New Enforcers for Old Burdens” at 78.

<sup>124</sup> Justice Committee, Official Report, 19 March 2013 col 2528.

2.74 In its response, the Property Litigation Association commented that “section 53 is not particularly well worded”. Brodies mentioned “the vagueness of the drafting”.

2.75 Professor Reid has shown how some of the difficulties arise from section 53 being based on another provision in the 2003 Act – section 66 – which deals with the different subject of manager burdens.<sup>125</sup> But, when he gave evidence at the same session as Professor Rennie, he said that:

“The drafting of section 53 is a little bit unhappy, but that is not the main difficulty. The main difficulty is that section 53 is trying to do something that is almost impossible to do by legislation. By means of a general rule, section 53 tries to provide clarity to title deeds that are extremely varied in type. Although it would help if one recast section 53 and tightened up the drafting, that would not solve the fundamental problem.”<sup>126</sup>

### **Summary**

2.76 While some of the foregoing arguments are more persuasive than others, cumulatively they amount to a strong case for reform. There is clear discontent among stakeholders about the current law. This is evidenced not only by the evidence to the Justice Committee in 2013 but also by the responses to our Discussion Paper of 2018.

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<sup>125</sup> Reid, “New Enforcers for Old Burdens” at 82. For example, section 53 refers to both “units” and “properties”.

<sup>126</sup> Justice Committee, Official Report, 19 March 2013 col 2529.

## Chapter 3      A replacement provision

### Introduction

3.1      In this chapter we consider how section 53 of the 2003 Act could be replaced. Our starting point is the identification of what the appropriate general *policy* should be in relation to implied rights of enforcement in common schemes. We then look at how that policy should best be *implemented* by means of recommendations which would enable clearer statutory provision to be made.

### **General policy: should section 53 be repealed and not replaced?**

3.2      In the Discussion Paper,<sup>1</sup> we noted that if there is to be reform of section 53, the two broad options are to (1) repeal it without replacement; or (2) replace it. Having reviewed the matter, we concluded that simply repealing section 53 would not be sensible. The result would be to leave section 52 (the provision which codifies the common law on implied rights in common schemes), section 54 (the special rule for sheltered housing) and section 56 (the special rule for facility and service burdens).

3.3      This would mean no special rule for flats in the same tenement. We recommended such a rule in our Report on Real Burdens and the Scottish Executive's view was that section 53(2)(d) in effect implements that recommendation.<sup>2</sup> It would be unsatisfactory for that rule simply to disappear. We noted also that 36% of the respondents to the O'Neill Survey believed that repealing section 53 would cause problems since it has created new rights on which people may now wish to rely. Only 23% disagreed, with 41% being unsure. The other significant difficulty with a simple repeal is that this could contravene the ECHR meaning that compensation might have to be paid or some form of preservation scheme devised. With one exception,<sup>3</sup> none of the respondents to the Discussion Paper favoured repeal of section 53 without replacement.

### **General policy: an identifiable community**

3.4      In Chapter 2 above we explained the Scottish Executive policy which lay behind section 53. Put shortly, this was that owners of flats within the same tenement or properties within the same housing estate should have title to enforce the burdens affecting that community. In this regard it should not matter whether the right to enforce was (a) expressly conferred by the deed creating the burdens; (b) impliedly conferred by the common law; or (c) not conferred by the common law. Provided that there was an identifiable community, there should be mutual enforcement rights for the owners within it. The Scottish Executive was influenced by the fact that a large majority of respondents to its consultation believed that housing estates should be treated in the same way as regards the burdens regulating them, no matter the conveyancing niceties of the particular case. On the other hand, there should

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<sup>1</sup> Discussion Paper para 7.2.

<sup>2</sup> See paras 2.19 and 2.47 above.

<sup>3</sup> See para 3.13 below.

be no implied enforcement rights where there was no identifiable community, such as in the case of scattered rural properties.

3.5 We asked in the Discussion Paper whether that policy should be disturbed in any reform of section 53. Our provisional view was that it should not be. As we saw in Chapter 2, many of the problems identified in relation to the provision concern only the execution of the policy: notably the difficulties of uncertainty and complexity, as well as the criticisms made as to the drafting. It is perhaps unsurprising that these problems exist, given that section 53 was a Stage 2 amendment when the legislation was passing through the Scottish Parliament and was produced at speed.

3.6 We commented that the practice by developers since feudal abolition supports the adherence to the policy behind section 53. Deeds creating real burdens require either to set out expressly the benefited property – or, in the case of community burdens, the community - which has title to enforce.<sup>4</sup> In new housing developments we understand that deeds of conditions are normally used to impose burdens and these provide that all the properties are to be both benefited and burdened. If this is the position as regards developments commenced after 28 November 2004 there is force in the proposition that the same rule should apply as regards older developments. Another advantage of broadly keeping the *status quo* in policy terms is that it would minimise the human rights consequences of any reform being taken forward.

3.7 We noted that other policy approaches were possible. From the perspective of simplicity there would be an argument in favour of reducing the pre-requisites for implied enforcement rights in common schemes effectively to one.<sup>5</sup> There would have to be a common scheme, no more no less. The other requirements of *Hislop* and the common law would not apply. Nor would the properties require to be related. Such an approach might be simpler, but it seems unattractive in policy terms. The mere fact that a conveyancer had used the same style when imposing burdens on disparate properties would result in the respective owners having title to enforce against each other, even although there was no connection between the properties.<sup>6</sup> Enforcement rights would significantly be multiplied with little justification and it is not clear therefore that such a policy would be ECHR-compliant.

3.8 Another possibility would be a narrower approach. As we saw in Chapter 2, the policy that everyone in a community should have title to enforce can be regarded as too generous. Given that distant owners are unlikely to have interest to enforce amenity burdens it may be questioned why they should have title. On this view, it should be left to immediate neighbours to take action or not. But there may be cases where distant owners can arguably show interest and should be entitled to take action. We understand also that in “mixed tenure” estates it is often the local authority or housing association which is called upon by owners to take up the matter of the breach of a burden with the relevant owner, even although that authority or association does not have ownership of an immediately-neighbouring house.

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<sup>4</sup> 2003 Act s 4.

<sup>5</sup> There would also be the requirement that at least one of the deeds imposing the burdens had been registered prior to 28 November 2004.

<sup>6</sup> Obviously, interest to enforce would provide a limitation where the properties were distant. See paras 2.70-2.72 above.

3.9 From the perspective of the owner wanting to carry out work in breach of a real burden, the fact that title to enforce is held by all the owners in the estate is qualified by both (a) the need to show interest to enforce; and (b) section 35 of the 2003 Act, which enables a minute of waiver to be obtained from immediate neighbours (albeit owners whose properties are further away can object by means of an application to the Lands Tribunal to preserve the burden). Therefore, in practice the fact that less immediate owners have title to enforce is unlikely to be a barrier to work in many cases.

3.10 We asked consultees whether they agreed with our provisional view that owners of properties within an identifiable “community” should have the implied right to enforce any common scheme of real burdens affecting that community against all the other owners (subject to “community” being appropriately defined).

3.11 There was near unanimous agreement from consultees. Gillespie Macandrew said: “Put simply, given that this is the pattern adopted for developments commenced post-28 November, then there is no obvious reason why this should not be the position pre-28 November 2004.” Sarah King commented: “The problem with the current legislation is in defining the community created by s 53, not the underlying policy.”

3.12 The Faculty of Advocates, while having “no particular objection to such a policy” also said that this “is a policy objective, the identification and specification of which is primarily a matter for the Government and Parliament.” We think that this is true in relation to all the recommendations which we make in our Reports.

3.13 Only one response out of the total of 34 responses to the Discussion Paper rejected the policy based on an identifiable community. This response – which we have been asked to treat as confidential – favoured the abolition of *all* implied rights to enforce real burdens dealing with amenity, but subject to there being a preservation scheme requiring registration of notices. This was an approach which we considered in our 1998 Discussion Paper but from which we came away because of opposition from consultees.<sup>7</sup> In our 2000 Report we said:

“On reconsideration the disadvantages [of such an approach] loom large. As applied to common scheme burdens, a registration requirement would affect a large number of people, involve considerable trouble and expense, lead to disputes about which properties were and were not to be included in the community, and result in a patchwork of rights preserved and rights extinguished.”<sup>8</sup>

3.14 When we consulted on our draft Bill in early 2019, our confidential respondent once again argued for this approach. MacRoberts and CMS, in contrast to their Discussion Paper responses, now also favoured a policy along these lines. CMS commented that this would improve transparency for land owners, which is an objective of the Scottish Government.<sup>9</sup> In addition, Pinsent Masons expressed a concern at this stage that our draft Bill “creates a lot of implied rights”. We think it is fairer to say that our recommendations *perpetuate* a lot of implied rights. This is because almost all our Discussion Paper consultees favoured a policy based on an identifiable community and not one of generally abolishing implied rights. While we accept that abolishing implied rights subject to a preservation scheme would much improve

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<sup>7</sup> See also para 2.18 above.

<sup>8</sup> Report on Real Burdens para 11.49.

<sup>9</sup> See the Scottish Land Rights and Responsibilities Statement discussed in para 1.14 above.

transparency, as well as making conveyancing easier, we continue to be persuaded by the arguments which we quote above from our 2000 Report. Such a preservation scheme would be too onerous on ordinary householders in housing developments across Scotland. In human rights terms, it may be regarded as not proportionate.<sup>10</sup> Plainly many owners would not go to the trouble and expense of preserving. The result would be, in contrast to the comment made by Gillespie Macandrew quoted above,<sup>11</sup> a bifurcation between pre and post-28 November 2004 developments. This is undesirable. We continue to be of the view that a policy based on an identifiable community is preferable.

3.15 Finally on this matter, it is worth mentioning, because the point was raised at some of the seminars which we gave on the Discussion Paper, that by “identifiable community” we do not mean a town or a village. Rather, we mean an area which should be regarded as a community in conveyancing terms because the properties within that area are subject to a common scheme of real burdens and there is relatedness between the properties.<sup>12</sup>

3.16 We recommend:

- 1. Owners of properties within an identifiable “community” should have the implied right to enforce any common scheme of real burdens affecting that community against all the other owners (subject to “community” being appropriately defined).**

(Draft Bill, s 1 as inserting a new s 53A into the 2003 Act)

### **Implementing policy: a unitary provision**

3.17 The next matter is how best to implement the appropriate policy and improve what is currently section 53. We noted in the Discussion Paper that our advisory group shared our view that having two separate provisions on implied rights to enforce real burdens in common schemes – sections 52 and 53 – makes Part 4 of the 2003 Act more complex than it needs to be.<sup>13</sup> Neither of these provisions is easy to apply. Our advisory group provisionally agreed that it would be preferable to replace the sections with a consolidated provision clearly expressing an appropriate policy in relation to common schemes. We proposed this in the Discussion Paper.

3.18 There was almost unanimous agreement from consultees. For example, Shepherd and Wedderburn noted: “Having two similar but separate provisions complicates the title investigation process, particularly when the two are not necessarily mutually exclusive.”

3.19 Professor Kenneth Reid, however, saw the matter as rather finely balanced. He was concerned that any merger of sections 52 and 53 might “increase enforcement rights [which] would be difficult to justify in policy terms.” He argued that the “simplest and safest way to avoid an increase in enforcement rights is (a) to leave s 52 as it is, and (b) to re-enact s 53 as

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<sup>10</sup> Cf paras 4.34-4.35 below.

<sup>11</sup> See para 3.11 above.

<sup>12</sup> Note also the definition of “community” in the 2003 Act s 26(2)(a) as “units subject to community burdens”. Whether burdens are “community burdens” depends on there being (1) a common scheme and (2) reciprocity of enforcement rights among the units. See the 2003 Act s 25. Criterion (2) depends on there either being express or implied enforcement rights, the latter being the subject of this Report.

<sup>13</sup> Discussion Paper para 7.10.

a series of bright-line rules which do not, however, go beyond the four situations already identified in s 53(2). “Nonetheless” he noted, “there is a case for replacing s 52.” He mentioned two “especially strong” arguments. The first is the convenience of having one section. It is “awkward and confusing to have two separate and overlapping provisions”. The second is that section 52 and the common law which preceded it are deficient due to their complexity. He favoured a distance requirement to deal with the difficulties arising from s 52. As the former Commissioner responsible for the Report on Real Burdens his views are particularly valuable.

3.20 The Faculty of Advocates was “uneasy about any replacement of section 52.” It noted that our reference from the Minister was to review section 53. In fact, the wording is to “review section 53 in the context of Part 4” of the 2003 Act. Therefore, section 52 as the most closely related provision to section 53, is within the scope of the reference. The Faculty appeared to favour the retention of section 52 as representing the common law. But, as Professor Reid noted in his response (as have others elsewhere<sup>14</sup>), that law is deficient.

3.21 In the light of the views of almost all consultees, while having regard to Professor Reid’s concern of not increasing enforcement rights,<sup>15</sup> we recommend:

**2. Sections 52 and 53 of the 2003 Act should be replaced with a new provision regulating implied enforcement rights in relation to common schemes.**

(Draft Bill, s 1 as inserting a new s 53A and s 2 as inserting a new s 53C into the 2003 Act)

**“Common scheme”**

3.22 The idea of a “common scheme” is at the core of both the common law of implied enforcement rights, as well as sections 52 and 53. But the lack of statutory definition is something which many regard as making the current law uncertain.<sup>16</sup>

3.23 The difficulties here clearly exist in the situation where the burdens are imposed in separate deeds (the *Hislop* type 1 or “external enforcement” case<sup>17</sup>). In contrast, where there is only one deed (the *Hislop* type 2 or “internal enforcement” case), such as a deed of conditions over a development, the matter is straightforward and there is almost certainly a common scheme.<sup>18</sup>

3.24 In the Discussion Paper we said that one possibility would be for the expression “common scheme” to be given the definition which appears in the explanatory notes to the 2003 Act: “several burdened properties all subject to the same or similar burdens”.<sup>19</sup> But, we noted that the explanatory notes are already publicly available. The real difficulty is knowing what degree of similarity is required. Certainty could be achieved by requiring the burdens to

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<sup>14</sup> Eg Wortley “Love Thy Neighbour” at 362: “The rules in *Hislop* were complex and impractical to operate.”

<sup>15</sup> See para 3.19 above.

<sup>16</sup> See paras 2.56-2.60 above.

<sup>17</sup> See paras 2.7-2.14 above.

<sup>18</sup> In theory, the same deed of conditions might impose significantly different burdens on different areas of land being subjected to it. The result would be no common scheme, but this is very unlikely in practice.

<sup>19</sup> Discussion Paper para 7.13.

be identical rather than similar, but we doubted that such a reform could be justified in policy terms because it surely imposes too high a threshold. It is also at odds with the common law.<sup>20</sup>

3.25 We suggested a particular clarification. Whether there is a common scheme in relation to a group<sup>21</sup> of properties should be assessed by considering as a whole the respective deeds which impose the burdens on the properties. It should not be done by only comparing the directly relevant burdens.<sup>22</sup> For example, if the relevant burden is one restricting use, the comparison with the real burdens affecting the properties in the group should not be confined to those properties' use-burdens. Rather the burdens in their totality should be considered to see whether there is sufficient similarity for the properties to be viewed as being subject to a common scheme. The result of this approach would be that there are either enforcement rights in respect of (i) all the burdens subject to the scheme or (ii) none.

3.26 We asked consultees for their general comments in relation to defining "common scheme". Several, including Burness Paull, Professor Stewart Brymer and Sarah King, favoured enacting the definition in the explanatory notes. Professor Reid said that he had changed his mind since the time of preparing the draft Title Conditions (Scotland) Bill annexed to the Report on Real Burdens and argued in favour of a definition.

3.27 A number of consultees, including Gillespie Macandrew, Harper Macleod and the Law Society of Scotland specifically agreed with our view that limiting a common scheme to identical (thus excluding similar) burdens was inappropriate. Lionel Most favoured a definition of "exactly the same or very or mostly similar". First Scottish Group argued that the burdens must be "identical or substantially similar". Brodies said that it would be "useful to have a clear rule setting out when the burdens are the same or similar."

3.28 Dr Craig Anderson said that in determining whether there is a common scheme there should be less focus on the question of whether the burdens are the same or similar. Rather, in his view, "variations between burdens affecting different units must be explicable in terms of 'conformity to a general plan' (*Botanic Gardens Picture House Ltd v Adamson* 1924 SC 549 at p 563 per Lord President). To put it another way, there must be evidence of some overall plan of development or regulation." The latter statement accords with one made by the Lands Tribunal in *Thomson's Exr, Applicant*<sup>23</sup> that "scheme" suggests "some sort of planned or systematic regulation by the superior over a certain area".<sup>24</sup>

3.29 The Faculty of Advocates argued that "common scheme" has a different meaning in section 52 (and the common law) from section 53. In the former, but not the latter, there requires to be relatedness between the actual properties. In the latter, relatedness is dealt with separately in section 53(2). We do not think that this can be right. Parliamentary Counsel would not use the same term in adjacent sections with the intention of it having different meanings. The Faculty said that it would not be helpful to use the definition in the explanatory notes as this could mean that properties in Inverness and Edinburgh are part of the same common scheme if the house builder has used an identical deed of conditions. Again, we do

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<sup>20</sup> See para 2.12 above.

<sup>21</sup> A group could be as few as two properties. Cf 2003 Act s 25(1)(a).

<sup>22</sup> See para 2.37 above.

<sup>23</sup> 2016 GWD 27-494. See para 2.38 above.

<sup>24</sup> Para 28 of judgement.



not think that this can be right. Clearly, the Inverness housing development is one “scheme” and the Edinburgh development is another “scheme”.

3.30 Aberdeen City Council argued that the definition of “common scheme” should take into account the situation where homes and flats retained by the Council, in contrast to those sold under the right-to-buy legislation, are not subject to burdens and are therefore not part of a common scheme under the current law. It said that the private owners should be entitled to enforce community burdens against the Council and vice versa. An answer to this, however, was discussed at the time of the 2003 Act, namely that a deed of conditions should be registered over the retained land.<sup>25</sup> We are therefore not minded to make a recommendation on this matter.

3.31 We found the contributions of consultees very helpful. On reflection, we think now that there would be merit in attempting to define statutorily “common scheme”. We recall too that during the passage of the Bill which became the 2003 Act the Justice 1 Committee asked for a clear definition.<sup>26</sup> It is also worth noting that the term appears in a few other places in the 2003 Act in addition to sections 52 and 53.<sup>27</sup> We think that there should be two principal elements to the definition. The first flows from the word “common”. The relevant burdens need to be the same or similar. Secondly, in line with the policy behind section 53 it should not be essential that the burdens were imposed by the same person.<sup>28</sup>

3.32 We included a provision to this effect in the draft Bill upon which we consulted in early 2019. This drew comments from consultees. The Faculty of Advocates, in line with its Discussion Paper response, was concerned that defining “common scheme” in terms of the same or similar burdens but without providing that there is an element of planning behind the scheme risked randomly similar burdens being found to constitute such a scheme. However, the planning element is always captured by the other requirements for there to be enforcement rights.<sup>29</sup> The danger of adding it into the definition of “common scheme” is that it over-complicates that definition.

3.33 Dr Craig Anderson argued that “similar” was not the appropriate word. He recommended instead “equivalent”. Dr Anderson gave the following examples to illustrate his thinking: “The French word *terre* is equivalent to the English word *land*, but the two words are not remotely similar. A skilled forgery is similar to the original, but is not equivalent.” While we found these examples helpful in the abstract, we found them less easy to apply to real burdens. Take, for example, *Co-operative Wholesale Society v Ushers Brewery*.<sup>30</sup> Here the Lands Tribunal held that there was a common scheme in relation to three neighbouring properties restricting their use respectively to (i) a public house; (ii) a grocers and convenience store; and (iii) a bookmakers. Dr Anderson argues that the burdens here are equivalent and not similar. But, for our part, we think that they can also be regarded as similar because they

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<sup>25</sup> See K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003) para 5.10.

<sup>26</sup> See para 2.24 above. Professor Rennie in his *Land Tenure* para 6-03 describes the lack of a definition as “perhaps . . . unfortunate.”

<sup>27</sup> In particular ss 25 and 54.

<sup>28</sup> See para 2.18 above.

<sup>29</sup> In relation to the replacement provision for ss 52 and 53, these are the five rules set out below at paras 3.48-3.90. For s 54, there is the fact that the units form part of the one sheltered or retirement housing development. For s 25, in the case of express enforcement rights, the fact that these have conferred expressly is the planning element.

<sup>30</sup> 1975 SLT (Lands Tr) 9.

are all use restrictions.<sup>31</sup> It is also possible to find many statements of the law in this area including Lord Watson in *Hislop v MacRitchie's Trs*<sup>32</sup> and Dr Anderson in his own book,<sup>33</sup> which use the word “similar”.<sup>34</sup> Other authorities do use “equivalent”.<sup>35</sup> Some use both “similar” and “equivalent”.<sup>36</sup> It is worth noting also the following statement from *Professor McDonald's Conveyancing Manual*:

“Case law gives guidance as to which burdens will be sufficiently similar. An important factor is that the burdens . . . have a degree of equivalence.”<sup>37</sup>

3.34 Dr Anderson suggested that in a development which is a mix of retail and residential units with carefully planned variations in the burdens there might only be equivalence and not similarity. While we are doubtful that a court would reach this conclusion, particularly given our recommendation below that the relevant deeds must be considered as a whole, we think that the matter can be put beyond any doubt by drawing on the above explanation in *Professor McDonald's Conveyancing Manual* and making it clear that equivalence is to be considered when determining whether burdens are similar.

3.35 We should also mention that Shepherd and Wedderburn, in its draft Bill consultation response, queried the use of the word “similar” on the basis that it is not clear whether what is meant is similarity in purpose or similarity in effect. The example was given of a block of flats next door to a shop, with both sharing common property such as a mutual access. The flats have burdens restricting them to residential use whereas the shop has a burden restricting it to use as a shop. It was argued that the burdens are similar in purpose because they limit use but not similar in effect because the uses in question are different. It was suggested that it should not be appropriate for the flats and shop to have enforcement rights against each other.<sup>38</sup> We are doubtful about this reasoning. We think that the purpose of the burdens here is to protect the amenity of neighbouring properties, whereas the burdens are similar in effect because they affect the freedom to use the property.

3.36 We recommend:

3. (a) **“Common scheme” should be defined to mean the situation where the same or similar burdens are imposed on two or more properties, whether or not by one person.**
- (b) **In determining whether one real burden is similar to another, regard must be had to the degree of equivalence between the burdens.**

(Draft Bill, s 4 as inserting a new s 57A(1) and (3) into the 2003 Act)

3.37 We also asked consultees whether they agreed that whether there is a common scheme should be determined by considering as a whole the deeds which imposed the

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<sup>31</sup> The word used by the Tribunal itself at p 10 was: “matching”.

<sup>32</sup> (1881) 8 R (HL) 95 at 101.

<sup>33</sup> C Anderson, *Property: A Guide to Scots Law* (2016) para 12.46.

<sup>34</sup> See eg Rennie, *Land Tenure* para 6-03 and Gretton and Steven, *Property, Trusts and Succession* para 14.24.

<sup>35</sup> See eg R Paisley, *Land Law* (2000) para 9.17 and Report on Real Burdens para 11.6.

<sup>36</sup> See eg Reid, *Property* para 400 and Reid, *The Abolition of Feudal Tenure* para 5.2.

<sup>37</sup> McDonald, *Conveyancing Manual* para 17.31.

<sup>38</sup> While noting the approach taken in *Lees v North East Fife District Council* 1987 SLT 769.

burdens. Apart from Argyll Community Housing Association, Dentons and the confidential response, consultees who responded to this question unanimously agreed. Dentons said that they would “need further information . . . to comment fully”. They had a concern that the rule might make implied rights more likely because the majority of the burdens affecting the relevant properties are similar rather than the type of burden in question being similar. Professor Reid, however, said that he had “little doubt that this is already the law, but there would be value in a for-the-avoidance-of-doubt provision.”

3.38 Given the overwhelming views of consultees, we inserted a provision requiring the relevant deeds to be considered as a whole in the draft Bill which we consulted upon in early 2019. Our draft provision drew criticism from Shepherd and Wedderburn:

“Further clarification . . . is required. It is unclear what criteria are to be considered in applying this subsection. The Explanatory Notes do not elucidate sufficiently. Must all properties in a common scheme have the same types of burdens imposed on all of them (not just the burden in question), and if they do not, is a common scheme absent, even if some of the burdens are similar? It is not clear from [the provision] what the examining solicitor is expected to be looking for. In our view this section requires considerably more work to produce a sufficient level of certainty and clarity that is needed if the problems of sections 52 and 53 are not to be perpetuated in another form.”

3.39 We have since reworked the provision slightly to deal with a point raised by the Faculty of Advocates. This was that, as drafted, the provision could be interpreted as requiring only consideration of the burdens similar to the burden in respect of which enforcement is sought rather than consideration of *all* the burdens, although we considered that interpretation to be a strained one. But the provision is not significantly changed. This is because it deals with a fact specific issue: whether the burdens in the relevant deeds considered as a whole constitute a common scheme. It is simply not possible to draft for all possible factual scenarios.

3.40 First, in relation to the point that the explanatory notes were not sufficiently detailed, it must be remembered that the draft Bill must also be read in conjunction with this Report, which was not available at the time of our draft Bill consultation. Secondly, it is not necessary for all the properties to have the same types of burdens. Rather, the question is whether the burdens taken as a whole are sufficiently similar to evidence a common scheme. It must be remembered here that it is always only necessary to establish a common scheme as between the property whose owner wants to enforce and the property against which enforcement is sought.<sup>39</sup> It does not matter what the position is about another neighbouring property, unless the owner of that property too wants to enforce. Thirdly, what the examining solicitor is expected to be looking for, as already mentioned, is whether the burdens affecting the two<sup>40</sup> properties taken as a whole show a common scheme. To put it conversely, the solicitor should not limit the enquiry to whether burdens of a specific type (eg use burdens) are similar.

3.41 In its response to our draft Bill consultation, MacRoberts raised the following interesting question:

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<sup>39</sup> See K G C Reid and G L Gretton, *Conveyancing 2012* (2013) 116 commenting on *Russel Properties (Europe) Ltd v Dundas Heritable Ltd* [2012] CSOH 175: “In order to succeed, the pursuer required to show that only *one* of its properties was part of the common scheme as the defender’s property.”

<sup>40</sup> Or more if other owners want to enforce.

“If title A has three burdens (burdens 1, 2 & 3) and title B has ten burdens (burdens 1, 2, 4 – 11) there is a commonality of two burdens (burdens 1 & 2). Is that enough to create a common scheme?”

3.42 We think that such a scenario would be unusual. If title A is a house and title B a flat in the same development with burdens 1 and 2 regulating the shared landscaped areas we consider that there is a common scheme in relation to the burdens as a whole, or at least as regards burdens 1 and 2.<sup>41</sup> If this is not the case, Professor Reid has suggested some factors that should be taken into account when, in his words, “[o]ccasionally, the boundaries of a common scheme may be in doubt.”<sup>42</sup> These include (i) how close the properties are; (ii) whether the burdens were imposed by the same person; (iii) whether the burdens were imposed in the same deed; and (iv) whether the burdens are the same or different, and, if different, whether there are still some burdens which apply to all the properties. He concludes that: “[i]n general, the law is and probably ought to be expansive in its approach to common schemes.”<sup>43</sup> Ultimately, however, cases will come down to their own facts. Often the answer will be certain, such as where there is a single deed of conditions over a housing development imposing the same burdens on all the houses.

3.43 We recommend:

**4. In determining whether real burdens are imposed under a common scheme:**

- (a) regard must be had to the deeds imposing the burdens; and**
- (b) the burdens imposed must all be considered and be considered as a whole.**

(Draft Bill, s 4 as inserting a new s 57A(2) into the 2003 Act)

**A requirement for there to be a “community”**

3.44 Earlier we set out our recommendation that for there to be implied enforcement rights in common schemes the relevant properties should have to form part of an identifiable “community”.<sup>44</sup> In policy terms this is effectively the same broad idea as that of “relatedness”, which of course is currently found in section 53. We think that the main difficulty with that provision is that it is merely suggestive. It gives indicative examples. They are non-exhaustive.

3.45 In the Discussion Paper we expressed the view that any replacement provision should not have examples.<sup>45</sup> Instead it should have bright-line rules which provide clarity for owners and solicitors advising them. This would mean that property owners would know where they

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<sup>41</sup> Reid, *New Enforcers for Old Burdens* para 3-25.

<sup>42</sup> Reid, *New Enforcers for Old Burdens* para 3-24.

<sup>43</sup> Reid, *New Enforcers for Old Burdens* para 3-25.

<sup>44</sup> As noted in a footnote to para 3.15 above, “community” is already a defined term in the 2003 Act: see s 26(2). It has a wider meaning there which applies to “units subject to community burdens” and “any unit in a sheltered or retirement housing development which is used in some special way as mentioned in section 54(1) of this Act”. Using the word “community” as so defined would not be appropriate in the narrower context of a replacement for ss 52 and 53.

<sup>45</sup> Discussion Paper para 7.15.

stand in relation to enforcement rights in the post-feudal world where superiors can no longer be called upon to take action.<sup>46</sup>

3.46 All consultees who responded to this question, except two, agreed with our view. Lindsays favoured rules and examples. Dr Craig Anderson said that he was “broadly neutral” on the matter. He explained that: “Examples are fine insofar as they actually aid understanding. The examples in s 53 do not. My only real concern with the proposal is the impossibility of foreseeing every situation, and the risk that individuals will lose enforcement rights that hindsight would say that they should have kept.” We think that the degree to which our recommended rules mirror the existing examples coupled with the preservation scheme which we outline in Chapter 4 should help assuage these concerns.

3.47 We recommend:

5. **The replacement statutory provision should set out clear rules as to the circumstances in which there is title to enforce, rather than indicative examples.**

(Draft Bill, s 1 as inserting a new s 53A into the 2003 Act)

## **Five rules**

3.48 Having reviewed consultees’ responses to the Discussion Paper, we consider that there should be five rules conferring implied enforcement rights in common schemes which pre-date feudal abolition. We have concluded that in maintaining the policy behind section 53 it would be sensible for there to be continuity with the four examples which appear in subsection (2) of that provision. Those examples would now be reformulated into bright-line rules. This approach should also make our recommendations broadly neutral in human rights terms.<sup>47</sup> The fifth rule would be a revised version of section 52, but with a proximity limitation.

### **Rule 1: flats in the same tenement**

3.49 In the Discussion Paper we considered this rule to be uncontroversial.<sup>48</sup> It appeared in the draft Bill appended to our Report on Real Burdens and the Title Conditions (Scotland) Bill as introduced. It is the example given by section 53(2)(d). No clearer case of a community of properties can be given than a tenement.<sup>49</sup>

3.50 Apart from the confidential response, which favoured a different approach based on abolishing implied rights subject to a preservation scheme, the responses to this question unanimously agreed.

3.51 In its response to our draft Bill consultation, the Lands Tribunal wondered whether properties which share a common gable wall should be treated like flats in the same tenement.

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<sup>46</sup> Our advisory group informed us that prior to feudal abolition, owners in housing estates would typically rely on the superior eg a local authority in the case of former council housing, to enforce burdens.

<sup>47</sup> See Chapter 4 below.

<sup>48</sup> Discussion Paper para 7.16.

<sup>49</sup> Note that “tenement” is defined in s 122(1) of the 2003 Act by reference to the Tenements (Scotland) Act 2004 s 26.

This is a policy question. Given that no other consultee raised the issue and that the situations can be distinguished,<sup>50</sup> we have concluded against extending the scope of this rule.

3.52 We make therefore the following recommendation:

6. **Owners of flats in the same tenement and subject to a common scheme of real burdens should have title to enforce these burdens against each other.**

(Draft Bill, s 1 as inserting a new s 53A(4)(a) into the 2003 Act)

## **Rule 2: properties subject to common management provisions**

3.53 We saw in Chapter 2 that the Scottish Executive's policy, when taking forward what is now the 2003 Act, was that owners of properties within a housing estate should have title to enforce the burdens affecting that estate against each other.<sup>51</sup> In other words, the estate should be regarded as a community of related properties. But it was found impossible to define the term. Instead, section 53(2) gave a list of examples designed to cover housing estates and exclude scattered rural properties.

3.54 In the Discussion Paper we said that, having reviewed the examples in section 53(2) and consulted our advisory group, we believed that it might be possible to identify a community in many cases by looking at the real burdens to see if there are common management provisions.<sup>52</sup> We noted that, for example, a housing estate may well have a deed of conditions with rules in relation to a residents' association or the appointment of a property manager (factor). The manager is likely to be tasked with looking after the common parts of the development, such as landscaped or recreation areas. Another possibility would be a provision allowing decision-making by a majority of the owners in relation to maintenance of common areas. Such provisions enable the extent of the individual community to be determined. We argued that a rule based on common management provisions would draw on the existing example in section 53(2)(a) of the convenience of being able to manage the properties together because they share some common feature or an obligation for common maintenance of some facility, but in contrast it would be certain. It would apply to both residential and commercial developments.

3.55 We proposed therefore that owners of properties subject to real burdens providing for common management in respect of their community should have title to enforce a common scheme of real burdens against each other. Apart from the one confidential response, all consultees who responded to this proposal, including significantly in this context the Scottish Factoring Network, agreed. MacRoberts said that it "provides clarity based on actual conveyancing practice."

3.56 Gillespie Macandrew and Lionel Most both mentioned the situation where developments have been built in phases. They tended to the view that each phase would be a separate common scheme. Shoosmiths noted similarly that adjacent developments may have similar management provisions but should be viewed separately. Shepherd and

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<sup>50</sup> In particular, tenement flats share a roof and (other in the case of main door flats) a close.

<sup>51</sup> See paras 2.20-2.22 and 2.41-2.42 above.

<sup>52</sup> Discussion Paper para 7.18.

Wedderburn said that commercial properties in a mixed development which are subject to the same management arrangements will have different management requirements and said that consideration should be given to how the rule would work here. We think that in all these cases it will depend ultimately on the wording of the deeds in question whether the properties form part of the same community for the purposes of the rule. Thus if one manager was responsible for a development comprising both residential and commercial properties we consider that this would evidence a single community.

3.57 We recommend:

- 7. Owners of properties subject to a common scheme of real burdens providing for common management in respect of their community should have title to enforce these burdens against each other.**

(Draft Bill, s 1 as inserting a new s 53A(4)(b) into the 2003 Act)

### **Rule 3: properties subject to burdens imposed in the same deed**

3.58 Section 53(2)(c) gives the example of properties being related because they are subject to a common scheme by virtue of the same deed of conditions. We saw earlier that the Lands Tribunal has said that where properties are the subject of burdens as a result of another single deed (a conveyance such as a feu disposition or disposition) then this should be treated equivalently.<sup>53</sup> At common law this example, as thus interpreted, is the *Hislop* type 2 case.<sup>54</sup>

3.59 In the Discussion Paper, we did not propose a specific rule based on the deeds of conditions example in section 53(2)(c). This was because we considered that such deeds will typically have management provisions and be covered by rule 2 above. But we asked if consultees considered that there should be other situations of implied rights beyond those which we identified. The Faculty of Advocates and First Scottish Group proposed a rule based on a deed of conditions. Professor Reid also supported such a rule in its broadened form as interpreted by the Lands Tribunal. We have found these suggestions persuasive. While we continue to believe that most deeds of conditions will have management provisions, some may not. Further, including this rule provides continuity with section 53. Moreover, it is an easier rule to apply than rule 2. All that needs to be found is a deed of conditions over an area including the relevant properties without having to scrutinise it for management provisions.

3.60 We recommend:

- 8. Owners of properties subject to a common scheme of real burdens by virtue of the same deed should have title to enforce these burdens against each other.**

(Draft Bill, s 1 as inserting a new s 53A(4)(c) into the 2003 Act)

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<sup>53</sup> See para 2.49 above.

<sup>54</sup> See paras 2.8-2.9 above.

#### **Rule 4: shared common property**

3.61 Section 53(2)(a)(ii) provides the example of properties being related because of the convenience of managing these together because they share an obligation for common maintenance of some facility. Section 53(2)(b) in turn gives the example of relatedness because of shared ownership of common property. In the Discussion Paper, we asked consultees whether there should be rules based on these examples.<sup>55</sup>

3.62 We expressed some scepticism in relation to a rule based on maintenance. Section 56 of the 2003 Act already deals with the enforcement of facility burdens. Further, maintenance obligations in relation to roads and services will have often been taken over by the local authority, meaning that such burdens are superfluous.<sup>56</sup> It is not apparent that the existence of such burdens is a sound basis on which to confer implied enforcement rights in relation to burdens protecting amenity. Furthermore, if the maintenance provisions concerned boundary features the properties would be adjacent and thus potentially covered by a proximity rule.<sup>57</sup>

3.63 Our question to consultees drew a mixed response. 17 supported rules based on both shared common property and maintenance obligations. The Faculty of Advocates “inclined” to this view on the basis that these were indicative of a “sufficient relationship” between the properties. The Scottish Factoring Network said that such rules “would be helpful in ensuring maintenance of common parts where there is not a common management scheme in place.” In fact, we think that section 56 of the 2003 Act would deal with such a situation. Shoosmiths noted that “older deeds may not be as comprehensive as modern deeds of conditions and may not have set up a scheme for common management”.

3.64 11 were against both rules. For example, Lionel Most said: “If I am responsible for half the cost of my boundary fence and the law provides adequately for the other owner to be responsible for the other half then I see no reason to make such property [the subject of common scheme enforcement rights].” Solicitors at DWF and members of the Property Litigation Association had differing views.

3.65 Aberdeenshire Council favoured a rule based on common property only. It said:

“We do not think it would be equitable really if burdens unrelated to maintenance could be enforced as common scheme burdens where the determination of the common scheme rests solely on there being some burdens that provide for common maintenance, but we *do* think that there might be an argument for this where the property is shared in common, and we think that in most cases where there are common maintenance obligations it is likely that some or all of the property will be shared in common.”

3.66 We have found this persuasive. Considering also the division of views among consultees, we have come to the conclusion that the rule should be limited to shared common property. This would perpetuate the section 53(2)(b) example. It must be remembered that the section 53(2)(a)(ii) common maintenance example is predicated on the convenience of

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<sup>55</sup> Discussion Paper paras 7.19-7.20.

<sup>56</sup> See the 2003 Act ss 52(4) and 53(4), referring to the 2003 Act s 122(2)(ii).

<sup>57</sup> See rule 5 below.



managing the properties together. We think that rule 2 above – which depends on the presence of common management burdens – is a more appropriate way of implementing a policy based on management.

3.67 We have also reached the view that boundary features which are owned in common should be excluded from this rule. Were these to be included the result, as Professor Reid noted in his response, would be a series of overlapping “communities” of two properties.<sup>58</sup> This makes little sense in a housing development of say 50 properties. Enforcement of real burdens providing for the maintenance of such boundary features will remain possible under section 56.

3.68 We recommend:

9. **Owners of properties which share common property which is not a boundary feature and which are subject to a common scheme of real burdens should have title to enforce these burdens against each other.**

(Draft Bill s 1, as inserting a new s 53A(4)(d) into the 2003 Act)

#### **Rule 5: close properties**

3.69 Rules 1 to 4 effectively cover the examples set out in section 53. But they would not cover situations where section 52 currently operates and where there is *no* overlap with section 53.

3.70 For example, a builder constructs a tenement in 1990 and imposes a deed of conditions over it. The builder does not reserve the right to vary the burdens. Under the common law and section 52, the flat owners could enforce the burdens in the deed of conditions against each other. But they would also be able to enforce under section 53 and our recommended rules 1 and 3 above.

3.71 In contrast, imagine that a developer has not used a deed of conditions but instead imposed the same real burdens in the individual conveyances of houses on a road. In these deeds, the developer has undertaken to impose like burdens in the other dispositions and has not reserved the right to vary the burdens. Section 52 applies. But in the absence of the properties being conveniently managed together or there being shared common property, section 53 probably does not. And rules 1 to 4 recommended above would not.

3.72 In the Discussion Paper we expressed the provisional view that close neighbours should have title to enforce *merely* where there is a common scheme.<sup>59</sup> The question then was: *how* close? We said that one possibility was four metres (excluding roads not exceeding 20 metres in width). We noted that this distance limitation was familiar from planning law, from a recommendation in our Report on Real Burdens<sup>60</sup> and from section 35 of the 2003 Act. It

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<sup>58</sup> See in this regard *Thomson's Exr, Applicant* 2016 GWD 27-494, discussed at para 2.52 above.

<sup>59</sup> Discussion Paper paras 7.21-7.25.

<sup>60</sup> See para 2.18 above.

must be remembered that when deciding on a distance in general terms the greater the distance between the properties the less likely there is to be interest to enforce.<sup>61</sup>

3.73 We wondered whether the rule should have an additional requirement. This would be that close neighbours would only have title to enforce where there was *notice* of the common scheme on the burdened property's title. This is a requirement of section 52. Notice would be satisfied by the burdens being imposed by the same deed affecting the relevant properties, such as a deed of conditions (the "internal enforcement" or *Hislop* type 2 case) or where the burdens are imposed in a series of deeds, an indication of a common plan, such as the developer undertaking to impose the same burdens on the other properties (the "external enforcement" or *Hislop* type 1 case).<sup>62</sup>

3.74 In the interests of simplicity, we said that we inclined to the view that the developer reserving the right to vary the burdens should not matter.<sup>63</sup> With this in mind we noted also that while the requirement of notice would provide continuity with section 52, it may be argued, also in the interests of simplicity, that it should be dropped.

3.75 The issue of a rule based on proximity perhaps unsurprisingly attracted a range of views from consultees. The vast majority agreed with such a rule in principle. For example, Burness Paull stated that "[i]t would meet expectations of owners of close properties that they should have title to enforce against near neighbours." Professor Reid said that "[o]n the whole I favour this proposal but I do not regard it as essential." He viewed it as being "a limitation on s 52 rather than a replacement for s 53".

3.76 There were two categories of opponents. The first disagreed with the "close" requirement. The confidential response argued that any party with a right to enforce should be allowed to register a preservation notice failing which the enforcement right would be extinguished. Dr Craig Anderson believed that being subject to a common scheme alone should give title to enforce and that interest to enforce would apply to restrict more-distant neighbours. He suggested a presumption of non-interest for owners further away than four metres. The Faculty of Advocates opposed a distance limitation in relation to section 52, but seemed sympathetic to it in relation to section 53. Scottish Water opposed any distance restriction.

3.77 The second group in effect took the opposite view and opposed a proximity rule in principle. These were CMS, a "strong contingent" at Gillespie Macandrew, and Harper Macleod. CMS said: "We do not consider that such properties are necessarily related under the current legislation and therefore this would extend the application of section 53 which we do not consider to be appropriate."

3.78 Of the consultees who favoured a distance restriction, many including Aberdeenshire Council, Anderson Strathern, Professor Brymer, DLA Piper, First Scottish Group, Professor Roderick Paisley, Professor Reid, Lionel Most and Pinsent Masons favoured a four-metre rule. Shoosmiths favoured a 20-metre rule, referring to open space/landscaped areas not exceeding that distance and MacRoberts argued for a 25-metre rule (but excluding roads less

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<sup>61</sup> See paras 2.70-2.72 above.

<sup>62</sup> See para 2.13 above.

<sup>63</sup> This was not uncommon in deeds of conditions registered before 28 November 2004.

than 20 metres wide). Harper Macleod (who as noted above opposed the proximity rule in principle) and Shepherd and Wedderburn suggested 100 metres.

3.79 It has now come to our attention that in planning law the notification rule has changed from four metres (excluding roads of up to 20 metres wide) to a general 20-metre rule.<sup>64</sup> We think that the point made by Shoosmiths about open space is persuasive. We have concluded therefore in favour of a 20-metre rule. This means a disconnect with section 35 of the 2003 Act, but it is a very marginal one.<sup>65</sup>

3.80 In relation to whether there should require to be notice of the common scheme on the title of the burdened property, fifteen consultees favoured this and fourteen opposed it. Professor Reid said that “it is essential to retain the notice requirement in s 52 because otherwise the effect of proposal 9 would be to confer enforcement rights on those who currently have none.” Brodies also were of the view that no additional rights should be created. First Scottish Group noted that requiring notice “will ensure transparency by the publication [of the notice].” Lionel Most favoured it “[i]n the interests of certainty”. Those who were against there being a notice requirement and who explained their reasoning tended to refer to simplicity, which was a factor that had been mentioned in the Discussion Paper.

3.81 Given the view of the majority of consultees and accepting the argument that new enforcement rights should not be created, we now favour a notice requirement. When we carried out our draft Bill consultation, some consultees argued that we should define “notice”.<sup>66</sup> We note also that 42% of the respondents to the O’Neill Survey said that the notice requirement in section 52 had caused them issues in finding out who has a right to enforce. It is possible, however, to identify numerous commentaries on how the notice requirement can be satisfied.<sup>67</sup> In the “external enforcement” or *Hislop* type 1 case the standard example is an obligation by the granter of the deed to impose the same or similar burdens in subsequent grants in the same development.<sup>68</sup> But in the final analysis this is only an example and notice is a broad concept. We think that it would not be sensible to attempt to define it exhaustively.

3.82 In response to our Discussion Paper consultation, Shepherd and Wedderburn said that consideration should also be given to “retaining in the new rule that there should be no negating requirement, such as a superior retaining the right to vary.” This is a requirement of section 52 and of the common law. Again in the interests of not creating new enforcement rights we favour now having such a requirement.<sup>69</sup>

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<sup>64</sup> We are grateful to Bernadette O’Neill for alerting us to this. See the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 (SSI 2013/155) reg 3(1) (definition of “neighbouring land”).

<sup>65</sup> Section 35 uses a four metre (excluding roads no wider than 20 metres) rule in respect of neighbours who can grant a minute of waiver for community burdens.

<sup>66</sup> In particular, Brodies, Shepherd and Wedderburn and the confidential response.

<sup>67</sup> See eg Reid, *Property* para 400; Reid, *The Abolition of Feudal Tenure* para 5.15; McDonald, *Conveyancing Manual* para 17.26; Rennie, *Land Tenure* para 6-09 and Gretton and Steven, *Property, Trusts and Succession* para 14.28.

<sup>68</sup> *McGibbon v Rankin* (1871) 9 M 423.

<sup>69</sup> In the Discussion Paper para 7.24 and fn 27 we said that in the interests of simplicity we inclined against such a requirement. We mentioned that the developer reserving the right to vary the burdens was not uncommon in pre-28 November 2004 deeds of conditions. But in the Discussion Paper we did not propose a specific rule for where there is a deed of conditions, in contrast to rule 3 which we recommend at paras 3.58-3.60 above.

3.83 It is also necessary under section 52 (but not section 53) that the deed imposing the relevant burden must have been registered before 28 November 2004.<sup>70</sup> We think that this rule should apply here too.

3.84 The result would effectively be that section 52 would be re-enacted but subject to a distance limitation. Where the burdens were imposed in a deed across a wider area (the “internal enforcement” or *Hislop* type 2 case) rule 3 above would, in any event, preserve the implied rights. It would only be where there was a series of deeds (the “external enforcement” or *Hislop* type 1 case) that the distance limitation would apply. The limitation would assist those advising in relation to the development of a site. They would only need to check the titles within the 20-metre distance for the same or similar burdens to see if rule 5 could apply. In contrast, the position at present was set out by Shoosmiths in their response to the Discussion Paper:

“Clients purchasing property often request additional title investigation of surrounding titles with the aim of ascertaining which of them may contain similar real burdens as the title to the property they are looking to acquire, and therefore have the ability to enforce. We would start with reviewing the titles in the immediate vicinity, in a ring around the property being acquired, and if they contain the same or similar burdens then we would review the next layer of titles and keep going until the titles do not include the same or similar burdens. At each stage the clients would need to sign off on another round of costs. The problem is that you can spend all of that time and money in reviewing nearby titles and ultimately still not be in a position to provide adequate assurances to the client in terms of enforceability.”

3.85 We recommend:

**10. Owners of properties which are no more than 20 metres apart should have title to enforce a common scheme of real burdens against each other provided that:**

- (a) the burdens were imposed prior to 28 November 2004;**
- (b) there is notice of the common scheme in the deed imposing the burdens that are to be enforced; and**
- (c) there is nothing in that deed which expressly or impliedly excludes enforcement rights (such as the granter of the deed reserving the right to vary the burdens).**

(Draft Bill, s 1 as inserting a new s 53A(4)(e), (5) and (6) into the 2003 Act)

## Summary

3.86 The recommendations made above would introduce five rules under which there could be implied enforcement rights in relation to real burdens imposed under a common scheme which pre-dates 28 November 2004. Of course, some properties will have rights to enforce under more than one of these rules. This does not matter as there can be overlaps under the current law, including with section 56 (the provision which deals with facility and service

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<sup>70</sup> Reid, *The Abolition of Feudal Tenure* para 5.17.

burdens). The result of these rules would be much greater certainty than under section 53. Therefore we think that there would be clear economic benefit in making this reform.

### **Some examples**

3.87 We think that it would be helpful to provide some examples as to how the rules would work in practice. It must be stressed that these are all limited to the question of *title* to enforce. Whether there is *interest* to enforce is a separate question.<sup>71</sup>

#### *Example 1*

3.88 Alex is a flat owner in a tenement of eight flats, which was built in the late nineteenth century. The original conveyances of the individual flats all have burdens requiring private use only. They are silent on who can enforce the burdens. Bella, the owner of one of the ground floor flats, proposes to convert her flat into a shop. Alex has the implied right to enforce the burden against her under rule (1) to prevent this proposed use.

#### *Example 2*

3.89 Carol owns a house in a development constructed by a volume builder in the 1980s. The development is subject to a deed of conditions recorded in 1981. It does not state who can enforce the burdens. The deed has a prohibition against commercial vehicles being parked. Douglas has recently bought the house next door to Carol and begun parking his fast food van at the front of his house. Carol has the implied right under rule (3) to enforce the burden against him to stop this.

#### *Example 3*

3.90 Causewayside Construction Ltd, a developer, is acquiring a site. Its lawyer, Eric, inspects the title. It is subject to a real burden which limits building. The site is not a tenement flat. So rule (1) does not apply. By looking at the title Eric can see if (2) there are common management burdens; (3) there are burdens imposed under a deed of conditions etc; (4) there is shared common property; and (5) there is notice of a common scheme of real burdens and nothing to negative implied enforcement rights. If none of these are present, there can be no implied rights. This conclusion can be reached by looking at the title to the relevant property alone without, as section 53 may necessitate, looking at other titles or making a site visit to look for “some common feature”. If of course one of the factors is present Eric, other than in the case of factor (3), will have to look at neighbouring titles to see if there is a common scheme.

### **Post-28 November 2004 sub-divisions**

3.91 The scope of this Report is limited to common schemes in which at least one of the relevant deeds imposing the real burdens was registered prior to 28 November 2004. In the Discussion Paper, however, we highlighted an uncertainty which has been identified by Professor Reid as to whether section 53 can arise following a sub-division after that date.<sup>72</sup> It is best approached by means of an example. Imagine that Keith disposes land to Leonard in

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<sup>71</sup> On interest to enforce, see paras 2.70-2.72 above.

<sup>72</sup> Discussion Paper para 5.43.

2002 and imposes a burden preventing trading. He provides that the land to be retained by him is to be the benefited property. In 2016 Leonard sells part of the land to Marjory. In 2018 Leonard starts trading. Can Marjory enforce the 2002 burden against him under section 53 on the basis that there is now a common scheme and the properties are related?

3.92 We said that on one view there should be an implied right to enforce here as it seems reasonable that the owners of the two or more sub-parts should be entitled to enforce against each other.<sup>73</sup> The counter-view is that the parties should have to follow the rules set out by the 2003 Act for real burdens being imposed after 28 November 2004. On this view, Marjory should have made express provision in the conveyance in her favour for a real burden preventing Leonard and his successors from trading. This view is supported by the policy behind section 12 of the 2003 Act which requires express provision to be made for a new benefited property to be created when an existing benefited property is divided. Thus if Keith had sold part of his property to Nancy, that part would only remain benefited if express provision were made in the disposition in her favour.

3.93 Of the twenty-six consultees who provided their views on this matter, twenty argued that no implied rights should arise. Burness Paull noted that the parties can deal with the position expressly as part of the conveyancing process. Brodies, the Church of Scotland, Gillespie Macandrew and Shoosmiths made similar comments. The Law Society of Scotland was ambivalent but said that it was important that the rule is clear. Dentons, while “on balance” favouring implied rights, said that “it is more important for the situation to be unambiguously clarified either way”.

3.94 We are persuaded by the views of the great majority of our consultees. We recommend:

11. **There should be no implied rights to enforce real burdens imposed before 28 November 2004 under the new rules where the relevant common scheme only arises following a sub-division of the land affected by the real burdens after the appointed day.**

(Draft Bill, s 1 as inserting a new s 53B into the 2003 Act)

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<sup>73</sup> Discussion Paper para 7.28.

# Chapter 4      A preservation scheme

## Introduction

4.1 In the Discussion Paper we considered in some detail the need for any reform recommendations to conform with the European Convention on Human Rights (ECHR).<sup>1</sup> This is because they would be implemented by an Act of the Scottish Parliament. Such an Act is not law in so far as any provision of the Act is outside the legislative competence of that Parliament. A provision is outside that competence in so far as it is incompatible with a Convention right.<sup>2</sup>

4.2 Here we give a briefer account of the relevant law. We consider the possibility of implied rights to enforce real burdens being lost as a result of our recommendations. We conclude that it would be appropriate to have a preservation scheme to ensure compatibility with the ECHR. We then set out what a scheme could look like.

## Article 1 Protocol 1

4.3 The provision protecting property rights in the ECHR is Article 1 Protocol 1.<sup>3</sup> It provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

4.4 The European Court of Human Rights has noted that the article comprises three distinct rules: (1) a general rule against state interference with possessions in the first sentence; (2) a rule against deprivation in the second sentence; and (3) a rule in relation to control in the third sentence.<sup>4</sup>

4.5 Once it is established that there is a “possession”, the next steps to be considered are whether there has been an “interference” and, if so, its nature.<sup>5</sup> There then follows the

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<sup>1</sup> Discussion Paper, chapter 6.

<sup>2</sup> Section 29 of the Scotland Act 1998 provides for the legislative competence of the Scottish Parliament and subsection (2)(d) of that section states that a provision of an Act of that Parliament is outside competence if it is incompatible with any of the “Convention rights”. Section 126(1) of the 1998 Act provides that “the Convention rights” has the same meaning as in the Human Rights Act 1998. Section 1 of that Act defines that term with reference to the ECHR, including the rights guaranteed by Article 1 Protocol 1, which are discussed in this chapter.

<sup>3</sup> See generally J Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* (4<sup>th</sup> edn, 2017) ch 8.

<sup>4</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 at para 61. See also *James v UK* (1986) EHRR 123 at para 37.

<sup>5</sup> We follow here the approach set out in *Reed and Murdoch: Human Rights Law in Scotland* para 8.06.

question of whether the interference amounts to a violation. For there not to be a violation the following conditions must be satisfied:

- (a) the interference has to be shown to have a basis in domestic law and thus meet the test of legal certainty;
- (b) it must be justified by the general or public interest; and
- (c) there must be a reasonable degree of proportionality between the means selected and the end to be achieved, in order to maintain a fair balance between individual and collective interests.

We look at these issues in turn.

### **Possession**

4.6 It requires to be asked whether a right of enforcement in relation to a real burden is a “possession” because, if it is, the abolition of such a right would engage Article 1 Protocol 1. The answer is not readily apparent. It is well-known that the European Court of Human Rights in Strasbourg has adopted a *sui generis* approach to the meaning of “possessions”.<sup>6</sup> In the current context it is arguable that it is the benefited property which is the “possession” and that the right to enforce the burdens is merely an aspect of that right. We reviewed the case law in the Discussion Paper and found it to be inconclusive.<sup>7</sup> Our provisional view was that it is preferable to view the ownership of the benefited property as the “possession”.

### **Interference**

4.7 Legislative intervention removing existing implied rights would in our view constitute an “interference” under Article 1 Protocol 1. The question as to the nature of that interference is inextricably tied to the question of what is a “possession”. On the basis that it is the ownership of the benefited property that is the “possession”, the nature of the interference is a “control” within the third sentence of Article 1 Protocol 1.

### **Basis in domestic law**

4.8 The reforms which we recommend in Chapter 3 would provide more certainty as to implied rights to enforce real burdens.<sup>8</sup> If implemented, these would become law by means of an Act of the Scottish Parliament.

### **Legitimate aim**

4.9 In Chapter 2 we set out in detail the difficulties relating to section 53. There is a general interest in reforming and clarifying the law to remedy such difficulties. There is also a particular public interest in ensuring that land owners can readily determine the identity of those persons who have title to enforce real burdens affecting their properties and equally that the neighbouring owners can determine whether or not they have such a title. The current lack of

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<sup>6</sup> See eg *Gasus Dosier- und Födertechnik v Netherlands* (1995) 20 EHRR 403.

<sup>7</sup> Discussion Paper paras 6.8-6.9.

<sup>8</sup> Given that one of the main criticisms of section 53 as set out in Chapter 2 is uncertainty.



clarity in these respects has significant adverse effects, including delays in transactions and additional costs being incurred.<sup>9</sup> We therefore believe that a reform bringing clarity would have a legitimate objective.

### **Proportionality: fair balance**

4.10 The UK Supreme Court, drawing on Strasbourg jurisprudence, has said that four issues require to be considered in reviewing proportionality:

- “(i) whether there is a legitimate aim which could justify a restriction of the relevant protected right;
- (ii) whether the measure adopted is rationally connected to that aim;
- (iii) whether the aim could have been achieved by a less intrusive measure; and
- (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.”<sup>10</sup>

Issue (i) was considered above.<sup>11</sup> In relation to issue (iv), there is no set list of factors which the court will consider when carrying out the balancing exercise.

4.11 In deciding whether an interference with property rights is lawful or not under Article 1 Protocol 1, states are given a “margin of appreciation”, in other words some flexibility, on issues where they may be better placed to assess whether a matter of general interest is engaged and to select the means by which that interest is preserved. Since property rights can be considered more as economic rather than civil rights, this margin is wider than that applied by the Strasbourg Court to some other ECHR provisions.<sup>12</sup>

4.12 Presumptively compensation is required in order for a fair balance to be struck where there is a “deprivation”.<sup>13</sup> But in *Strathclyde Joint Police Board v The Elderslie Estates Ltd*<sup>14</sup> the Tribunal concluded that its jurisdiction to discharge real burdens without necessarily awarding compensation was compliant with Article 1 Protocol 1.<sup>15</sup> That jurisdiction prevented a benefited owner charging unreasonable sums for a minute of waiver and was therefore in the public interest and proportionate. Compensation is not limited to money.<sup>16</sup>

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<sup>9</sup> See the BRIA referred to in paras 1.15-1.19 above.

<sup>10</sup> *Recovery of Medical Costs for Asbestosis Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3 at para 45 per Lord Mance, drawing on *R (on the application of Quila) (FC) v Secretary of State for the Home Department* [2011] UKSC 45 at para 45 per Lord Wilson; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 at paras 68-76 per Lord Reed and *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd Intervening)* [2014] UKSC 38 at para 80 per Lord Neuberger.

<sup>11</sup> See para 4.9 above.

<sup>12</sup> *Reed and Murdoch: Human Rights Law in Scotland* para 8.06.

<sup>13</sup> See *James v UK* (1986) 8 EHRR 123; *Lithgow v UK* (1986) 8 EHRR 329 and *Holy Monasteries v Greece* (1995) 20 EHRR 329.

<sup>14</sup> 2002 SLT (Lands Tr) 2. See A J M Steven, “The Progress of Article 1 Protocol 1 in Scotland” (2002) 6 EdinLR 396 at 399-400.

<sup>15</sup> The Tribunal did in fact order payment of £1000. It noted when doing so that it had heard nothing in evidence that would justify paying compensation, but equally saw no reason not to accept the concession by the applicant that it would pay that amount of compensation. It can be said therefore that the award was pragmatic rather than principled.

<sup>16</sup> See *Chassagnou v France* (2000) 29 EHRR 615, described in the Discussion Paper paras 6.8 and 6.17.

4.13 We noted in the Discussion Paper that any reform to section 53 is likely to rebalance (to a greater or lesser extent) the effect of implied rights across a community of properties. If Alex can no longer enforce against his neighbour Ben (on the basis say that the properties are too distant), then Ben can no longer enforce against Alex. There is in effect non-monetary compensation for the loss of rights.

4.14 In Chapter 3 above and in line with the views of almost all our consultees, we recommended that sections 52 and 53 should be replaced with a new provision which maintains the policy approach behind section 53: that owners of properties within an identifiable community should have title to enforce real burdens in a common scheme affecting that community.<sup>17</sup> Our objective in our subsequent recommendations was to implement that policy in a way which brings certainty for those applying the provision. We sought to achieve this in essence by turning the indicative examples in section 53 into bright-line rules and having a rule which is based on section 52, but has a distance limitation. Most owners who have rights under either or both sections 52 and 53 will continue to do so. For example, the owners of flats in the same tenement and the owners of properties subject to a deed of conditions will be unaffected. The human rights implications of our recommendations are therefore limited.

4.15 Only owners who have implied rights in an “external enforcement” (*Hislop* type 1)<sup>18</sup> case may be affected. This is because rule 3<sup>19</sup> will confer enforcement rights in an “internal enforcement” (*Hislop* type 2) case where the burdens were imposed in a deed over a wider area, such as a deed of conditions. Rule 5<sup>20</sup> will continue to confer rights in an “external enforcement” case on the same basis as section 52, but not where the properties are more than 20 metres apart. Therefore owners beyond that distance who cannot bring themselves within one of the other rules, such as sharing common property in terms of rule 4,<sup>21</sup> will no longer have implied rights. We note, however, Professors Gretton and Reid’s comment on the extent to which such rights currently exist:

“[[I]t is unusual for individual conveyances to refer, even obliquely, to a common scheme; and even where this is done there may be contra-indicators which exclude mutual enforceability, such as the reservation of a right to vary or waive the burdens. Unlike [s 53], therefore, [s 52] is not often encountered in practice.”<sup>22</sup>

4.16 One other category of owners who may see their rights extinguished is those who have enforcement rights against immediate neighbours under section 53 on the sole basis of a real burden requiring shared maintenance of a boundary wall. As we saw earlier,<sup>23</sup> this was the factor which swayed the Lands Tribunal in *Thomson’s Exr, Applicant*.<sup>24</sup> But, following the decision in *O’Gorman v Love*,<sup>25</sup> we are doubtful if that case can still be considered as being correct.<sup>26</sup>

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<sup>17</sup> See paras 3.2-3.21 above.

<sup>18</sup> See paras 2.8-2.9 above.

<sup>19</sup> See paras 3.58-3.60 above.

<sup>20</sup> See paras 3.69-3.85 above.

<sup>21</sup> See paras 3.61-3.68 above.

<sup>22</sup> Gretton and Reid, *Conveyancing* para 14-15.

<sup>23</sup> See para 2.52 above.

<sup>24</sup> 2016 GWD 27-494.

<sup>25</sup> 2019 GWD 5-62.

<sup>26</sup> See para 2.53 above.

4.17 Our view, however, is that despite the loss of rights to enforce in these cases, our recommended reforms are proportionate on the basis that the policy of only having implied rights in an identifiable community implemented by clear rules is reasonable. We think, however, that it can be put beyond doubt that our reforms are proportionate by offering a preservation scheme. There are legislative precedents in this regard.

### **Legislative precedents**

4.18 Two pieces of legislation have provisions abolishing rights to enforce real burdens. These are the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the 2003 Act. Both have preservation schemes. Thus in the 13 months prior to feudal abolition, the 2000 Act allowed superiors to preserve enforcement rights by reallotting them to land which they owned and which neighboured the burdened property, provided that certain criteria were met.<sup>27</sup> In addition it allowed certain real burdens to be converted into personal real burdens during that period.<sup>28</sup> The 2003 Act abolished the rule in *J A Mactaggart & Co v Harrower*<sup>29</sup> that, where burdens were imposed in a disposition, land retained in the neighbourhood by the granter was implied to be the benefited property.<sup>30</sup> But this reform did not take effect until 28 November 2014, giving a ten-year period after most of the 2003 Act came into force, for a preservation notice to be registered.<sup>31</sup> A third precedent is the Long Leases (Scotland) Act 2012. This converted most ultra-long leases into ownership on 28 November 2015. But, in certain circumstances in the 21 months prior to that date, the landlord could convert lease conditions into real burdens.<sup>32</sup>

4.19 The need to ensure compliance with the ECHR influenced these preservation schemes.<sup>33</sup> No human rights challenge has been made against the provisions extinguishing rights in the Acts in which the schemes appear.

### **The need for and general principles of a preservation scheme: consultation**

4.20 In the Discussion Paper we asked consultees whether in the light of human rights concerns and the legislative precedents just discussed there should be a preservation scheme which could be used by those who would lose rights of enforcement as a result of the law being reformed.<sup>34</sup> Almost all consultees who responded to this question agreed, albeit some reluctantly. Professor Reid said that such a scheme “seems essential”. MacRoberts, and Shepherd and Wedderburn referred to ECHR considerations. There were only a couple of opponents. Aberdeen City Council argued that “those losing enforcement rights under the changed provision would likely lack interest to enforce anyway”. Pinsent Masons said that “[p]reserving implied rights of enforcement which were never intended to exist is not consistent with the new proposals.”

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<sup>27</sup> 2000 Act s 18. In addition it was possible to reallot the burdens by agreement under s 19 with a right to apply to the Lands Tribunal for reallotment if agreement could not be reached.

<sup>28</sup> 2000 Act ss 18A to 18C.

<sup>29</sup> (1906) 8 F 1101. See para 2.5 above.

<sup>30</sup> 2003 Act s 49.

<sup>31</sup> 2003 Act s 50.

<sup>32</sup> 2012 Act Part 2.

<sup>33</sup> See eg Reid, *The Abolition of Feudal Tenure* paras 1.26 and 2.3.

<sup>34</sup> Discussion Paper para 7.29.

4.21 We then asked consultees whether owners should be able to preserve their rights independently, or whether it could only be done collectively by the owners within the scheme, or perhaps a majority of these. In our Discussion Paper on Real Burdens we had suggested a preservation scheme for implied rights in common schemes, but it required the owners to act collectively.<sup>35</sup> After consultation we came away from this as being too complex and difficult to work in practice.<sup>36</sup> In our Discussion Paper of 2018 we therefore inclined to the view that owners should be able to preserve their rights individually. All consultees who responded to this question agreed.

4.22 Finally, we asked consultees for their views on the duration of the period during which preservation notices could be registered. In the interests of improving this area of law quickly, we suggested a period of two years. The great benefit of a preservation-notice scheme is that it is very easy to see whether a notice has been registered when the title of the burdened property is inspected. Of course, the appearance of the notice on the register is not definitive because it would be possible that a notice was invalid because no rights under section 52 or 53 were actually held. On the other hand, the absence of a notice confirms that no rights have been preserved.

4.23 Many consultees favoured two years. But Professor Gretton thought that this “might arouse opposition”. He was “doubtful whether a shorter period than five years could be easily defended in the political arena.” He referred to the rules on negative prescription. Scottish Water advocated a six-month period. At the other end of the spectrum, First Scottish Group and Dr Anderson proposed ten years. Professor Reid noted that, whatever period is chosen, experience shows that “most notices will be registered at the last minute”.

4.24 Having considered the consultation responses, we continue to favour a period of two years. Given that our recommendation for the replacement of sections 52 and 53 deviates only to a limited extent from these provisions, we doubt that the preservation scheme would be significantly used. This was the experience too with previous schemes. We have concluded, however, that the duration of the period in which preservation notices could be registered should be a matter for the Scottish Ministers to decide. This was the position for preservation notices under the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the Long Leases (Scotland) Act 2012.

4.25 This policy was implemented in the draft Bill on which we consulted in early 2019. In response, Shepherd and Wedderburn argued that the two-year period should be written into the draft Bill as in its view this was an “ample” period for notices to be registered. The Faculty of Advocates also argued for the period, or at least a minimum period, to be stated in the draft Bill itself. We are not persuaded to change our view. Pinsent Masons in its draft Bill response argued for the preservation notice scheme to be brought into force soon after the legislation is enacted. We agree that this would be desirable as it would enable the new rules to be brought into force more speedily.

4.26 We recommend:

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<sup>35</sup> See Discussion Paper para 3.12.

<sup>36</sup> See Discussion Paper para 3.18.

12. (a) There should be a preservation scheme under which those losing enforcement rights under the reforms could preserve these by registering a notice.
- (b) Notices could be registered by individual owners.
- (c) The duration of the period in which notices could be registered should be prescribed by the Scottish Ministers.

(Draft Bill, s 2 as inserting a new section 53D into the 2003 Act)

### Further detail

4.27 Here we outline our recommended preservation scheme in greater detail. In this regard we are particularly grateful to the Keeper of the Registers of Scotland for her helpful suggestions in her response to the Discussion Paper. We have modelled the scheme on an existing provision in the 2003 Act – section 50 – which dealt with preservation of rights to enforce real burdens under the rule in *J A Mactaggart & Co v Harrower*.<sup>37</sup>

4.28 The scheme would work as follows. A person holding enforcement rights under either or both sections 52 and 53 who wanted to preserve these would require to register a notice in the Land Register or Register of Sasines as appropriate during the period prescribed by the Scottish Ministers.<sup>38</sup> The notice would:

- (a) identify and describe the burdened property;
- (b) identify and describe the benefited property;
- (c) if the person registering the notice did not have a completed title to the benefited property, set out the links in title;
- (d) set out the terms of the real burdens; and
- (e) explain the basis on which rights are held under section 52 and/or section 53.

4.29 The properties would require to be identified by means of a conveyancing description. In Land Register cases this would be the title number. It would be competent to preserve only some of the burdens. Those which are obsolete could be omitted. The notice would require to be registered against the title of both the benefited and burdened properties.

4.30 There would be a requirement that before submitting the notice for registration it would be sworn or affirmed before a notary public. The oath or affirmation would be that all the information contained in the notice is true to the best of the knowledge and belief of the person registering it. It would require to be given by that person personally and not through a solicitor

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<sup>37</sup> (1906) 8 F 1101. See para 4.18 above.

<sup>38</sup> In its draft Bill response the Faculty of Advocates argued that the notice should appear in the draft Bill itself rather than be prescribed. However, here we are following the most recent direct statutory precedent of the preservation forms under the Long Leases (Scotland) Act 2012, under which the forms were prescribed. This allows for greater flexibility. We think that a concern of the Faculty that the Scottish Ministers could commence the preservation period without prescribing a form is unrealistic.

or other agent, except where the person lacked legal capacity or was a legal entity, such as a company. In these cases a representative could do it. Of course, it would be possible for a solicitor to handle the registration of the notice.

4.31 Section 115 of the 2003 Act, which sets out certain further rules in relation to preservation notices under that Act, would be amended so that it applied to this new type of preservation notice. This would require the person registering the notice, other than where it was not reasonably practicable to do so, to send a copy of it to the owner of the burdened property along with an explanatory note.<sup>39</sup> Further, it would be possible to register a notice late (ie outwith the prescribed period) where it was originally rejected by the Keeper but the Lands Tribunal subsequently determined that the notice was registrable.<sup>40</sup> The Lands Tribunal would be given jurisdiction here by means of an amendment to section 102 of the 2003 Act, which deals with disputes about notices.

4.32 Having taken account of the view of the Keeper in her response to our Discussion Paper, we consider that in line with the preservation notice provisions in the Abolition of Feudal Tenure etc. (Scotland) Act 2000<sup>41</sup> and the Long Leases (Scotland) Act 2012,<sup>42</sup> the Keeper should not be required to determine in relation to a notice submitted for registration whether rights are actually held under section 52 and/or section 53.

4.33 For the avoidance of doubt, as this was a point raised in response to our draft Bill consultation,<sup>43</sup> there could be no question of implied rights being created by registering a preservation notice, where such rights are not held already. The registration of an invalid notice would be open to challenge at the Lands Tribunal under section 102 of the 2003 Act.

4.34 Finally, we must mention the comments of Dr Frankie McCarthy, a member of our advisory group and an expert on property law and human rights. While she was satisfied broadly that the approach taken in our draft Bill is compatible with Article 1 Protocol 1, she said:

“My only concern in relation to the preservation notice procedure is in respect of its potential application where multiple enforcement rights are at risk of extinction. Registration of one notice does not seem particularly onerous, but if a person wishes to preserve rights currently arising under section 52 in respect of a large community, where many of the rights would otherwise be extinguished by the new 20 metre rule, the administrative burden and expense mounts up. I am thinking here of proprietors in estates where there may have been disputes about burdens since the 2003 Act came into force, and who may therefore be alive to the issues, or have solicitors who will draw the issues to their attention. Perhaps no such examples exist. But if they do, an onerous preservation procedure might tip the balance of proportionality the wrong way in their specific case.”

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<sup>39</sup> The Faculty of Advocates supported such a requirement in its consultation response on the basis that it might prompt the recipient to register their own preservation notice against the party who sent it.

<sup>40</sup> But the notice would have to be registered within two months of the determination but before a final date which would be prescribed: see 2003 Act s 115(6).

<sup>41</sup> 2000 Act s 43(3).

<sup>42</sup> 2012 Act s 76(2)(a), (3) and (4).

<sup>43</sup> By Shepherd and Wedderburn and Shoosmiths.

4.35 But, as noted above,<sup>44</sup> because of the new rule 3 only owners beyond 20 metres in the “external enforcement” (*Hislop* type 1) case who currently have rights under section 52 would lose these. This reduces the impact of the 20-metre limitation. Dr McCarthy had two suggestions to ensure proportionality. One was allowing a preservation notice to identify multiple burdened properties. We are doubtful, however, if this would make much practical difference as the descriptions of the different burdened properties would still need to be set out and doing this for one form seems little different to doing it for multiple forms. Her second suggestion was that a special fee arrangement might be made with the Keeper in respect of multiple registrations. We agree that this should be considered and we have drawn Dr McCarthy’s comments to the Keeper’s attention.<sup>45</sup>

4.36 We recommend:

- 13. (a) A preservation notice should have to:**
  - (i) identify the benefited and burdened properties;**
  - (ii) set out the terms of the real burdens; and**
  - (iii) set out the grounds on which enforcement rights currently exist under section 52 and/or section 53.**
- (b) The person submitting the notice for registration should have to swear or affirm before a notary public that all the information contained in the notice is true to the best of that person’s knowledge and belief.**
- (c) The notice should have to be registered against both properties.**
- (d) The existing rules in section 115 of the 2003 Act should apply to the notice.**
- (e) The Keeper should not be required to determine whether the real burdens identified in the notice are enforceable under section 52 and/or section 53.**

(Draft Bill, s 2 as inserting a new s 53D and s 53E into the 2003 Act and s 3(6) and (7) amending ss 102 and 115 of the 2003 Act)

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<sup>44</sup> See para 4.15 above.

<sup>45</sup> Registration fees are set by the Scottish Ministers under The Registers of Scotland (Fees) Order 2014 (SSI 2014/188) and periodically reviewed.

## Chapter 5 List of recommendations

1. Owners of properties within an identifiable “community” should have the implied right to enforce any common scheme of real burdens affecting that community against all the other owners (subject to “community” being appropriately defined).

(Paragraph 3.16; Draft Bill, s 1 as inserting a new s 53A into the 2003 Act)

2. Sections 52 and 53 of the 2003 Act should be replaced with a new provision regulating implied enforcement rights in relation to common schemes.

(Paragraph 3.21; Draft Bill, s 1 as inserting a new s 53A and s 2 as inserting a new s 53C into the 2003 Act)

3. (a) “Common scheme” should be defined to mean the situation where the same or similar burdens are imposed on two or more properties, whether or not by one person.  
(b) In determining whether one real burden is similar to another, regard must be had to the degree of equivalence between the burdens.

(Paragraph 3.36; Draft Bill, s 4 as inserting a new s 57A(1) and (3) into the 2003 Act)

4. In determining whether real burdens are imposed under a common scheme:

- (a) regard must be had to the deeds imposing the burdens; and
- (b) the burdens imposed must all be considered and be considered as a whole.

(Paragraph 3.43; Draft Bill, s 4 as inserting a new s 57A(2) into the 2003 Act)

5. The replacement statutory provision should set out clear rules as to the circumstances in which there is title to enforce, rather than indicative examples.

(Paragraph 3.47; Draft Bill, s 1 as inserting a new s 53A into the 2003 Act)

6. Owners of flats in the same tenement and subject to a common scheme of real burdens should have title to enforce these burdens against each other.

(Paragraph 3.52; Draft Bill, s 1 as inserting a new s 53A(4)(a) into the 2003 Act)

7. Owners of properties subject to a common scheme of real burdens providing for common management in respect of their community should have title to enforce these burdens against each other.

(Paragraph 3.57; Draft Bill, s 1 as inserting a new s 53A(4)(b) into the 2003 Act)



8. Owners of properties subject to a common scheme of real burdens by virtue of the same deed should have title to enforce these burdens against each other.

(Paragraph 3.60; Draft Bill, s 1 as inserting a new s 53A(4)(c) into the 2003 Act)

9. Owners of properties which share common property which is not a boundary feature and which are subject to a common scheme of real burdens should have title to enforce these burdens against each other.

(Paragraph 3.68; Draft Bill s 1, as inserting a new s 53A(4)(d) into the 2003 Act)

10. Owners of properties which are no more than 20 metres apart should have title to enforce a common scheme of real burdens against each other provided that:

- (a) the burdens were imposed prior to 28 November 2004;
- (b) there is notice of the common scheme in the deed imposing the burdens that are to be enforced; and
- (c) there is nothing in that deed which expressly or impliedly excludes enforcement rights (such as the granter of the deed reserving the right to vary the burdens).

(Paragraph 3.85; Draft Bill, s 1 as inserting a new s 53A(4)(e), (5) and (6) into the 2003 Act)

11. There should be no implied rights to enforce real burdens where the relevant common scheme only arises following a sub-division of the land which is affected by the real burdens after the appointed day.

(Paragraph 3.94; Draft Bill, s 1 as inserting a new s 53B into the 2003 Act)

12. (a) There should be a preservation scheme under which those losing enforcement rights under the reforms could preserve these by registering a notice.
- (b) Notices could be registered by individual owners.
- (c) The duration of the period in which notices could be registered should be prescribed by the Scottish Ministers.

(Paragraph 4.26; Draft Bill, s 2 as inserting a new section 53D into the 2003 Act)

13. (a) A preservation notice should have to:
- (i) identify the benefited and burdened properties;
  - (ii) set out the terms of the real burdens;
  - (iii) set out the grounds on which enforcement rights currently exist under section 52 and/or section 53.

(b) The person submitting the notice for registration should have to swear or affirm before a notary public that all the information contained in the notice is true to the best of that person's knowledge and belief.

(c) The notice should have to be registered against both properties.

(d) The existing rules in section 115 of the 2003 Act should apply to the notice.

(e) The Keeper should not be required to determine whether the real burdens identified in the notice are enforceable under section 52 and/or section 53.

(Paragraph 4.36; Draft Bill, s 2 as inserting a new s 53D and s 53E into the 2003 Act and s 3(6) and (7) amending ss 102 and 115 of the 2003 Act)

# Appendix A

Draft Bill

## Title Conditions (Scotland) Bill

[DRAFT]

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# Title Conditions (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to amend the law relating to the enforceability of real burdens; and for connected purposes.

## 1 Common schemes: rights of enforcement

After section 53 of the Title Conditions (Scotland) Act 2003, insert—

### “53A Real burdens imposed under a common scheme: related units

- (1) This section applies to real burdens imposed under a common scheme on a group of units.
- (2) As respects any such real burden, a unit subject to the common scheme (in this section referred to as “unit A”) shall be a benefited property in relation to any other unit so subject (in this section referred to as “unit B”) if—
  - (a) in the case of any unit of the group (whether or not that unit is either of units A and B), the deed by which the real burden is imposed is a deed registered before the appointed day; and
  - (b) units A and B are related.
- (3) For the purposes of subsection (2)(b) above, units A and B are related where at least one of the conditions mentioned in subsection (4) below is met.
- (4) The conditions are that—
  - (a) each of units A and B is a flat in the same tenement;
  - (b) the common scheme provides for units A and B (whether or not with all or any of the other units of the group) to be managed together for the purposes of some or all of the burdens;
  - (c) each of units A and B is subject to the common scheme by virtue of the same deed;
  - (d) units A and B share ownership of common property (not being common property which constitutes a line of demarcation between units A and B, such as a fence or boundary wall);
  - (e) unit A is, at some point, within twenty metres of unit B.
- (5) But paragraph (e) of subsection (4) above applies only if—
  - (a) the deed imposing the real burden on unit B was registered before the appointed day,
  - (b) there is notice of the common scheme in that deed (or in a constitutive deed incorporated in that deed), being notice which—
    - (i) is express, or

- (ii) is so worded that the existence of the common scheme must necessarily be implied, and
  - (c) in that deed (or constitutive deed) there is no provision made which expressly or by necessary implication, as for example by reservation of a right to vary or waive the real burden, excludes unit A from being a benefited property in relation to the real burden.
- (6) In the application of section 4 of this Act to any real burden imposed as mentioned in subsection (1) above, the following provisions of that section are to be disregarded—
  - (a) in subsection (2), paragraph (c)(ii);
  - (b) subsection (4); and
  - (c) in subsection (5), the words from “and” to the end.
- (7) This section—
  - (a) confers no right of pre-emption, redemption or reversion; and
  - (b) is subject to sections 53B, 57 and 122(2)(ii) of this Act.

**53B Subdivision on or after the appointed day**

- (1) Subsection (2) below applies where, on or after the appointed day, land—
  - (a) on which real burdens were imposed before the appointed day, and
  - (b) which is not already one of a group of units subject to the real burdens under a common scheme,
 is subdivided into two or more parts.
- (2) It is not to be implied, by virtue of section 53A of this Act, that as respects the real burdens either or any of those parts is a benefited property in relation to any other of those parts.”.

NOTE

Section 1 inserts two new sections into the Title Conditions (Scotland) Act 2003 (“the 2003 Act”).

Section 53A will replace sections 52 and 53 as the principal provision governing implied rights to enforce real burdens in a common scheme which (usually) pre-dates feudal abolition on 28 November 2004.

Subsection (1) is self-explanatory. The term “common scheme” is defined in the new section 57A of the 2003 Act, as inserted by section 4 of the Bill.

Subsection (2) imposes two principal conditions for a property (unit A) to have an implied right to enforce burdens against another property (unit B), where the burdens have been imposed under the same common scheme.

First, in terms of subsection (2)(a), at least one of the properties in the scheme must have had the burdens imposed on it before the appointed day of 28 November 2004. Thus the scheme may be of former local authority housing where sales have taken place after the appointed day, provided that at least one of the houses was sold *before* the appointed day.

Secondly, in terms of subsection (2)(b), units A and B require to be “related”.

Subsection (3) defines “related” by reference to subsection (4).

Subsection (4) sets out an exhaustive definition of relatedness by reference to five rules. These draw on sections 52 and 53 of the 2003 Act. It is possible that more than one rule may apply.

The first rule, in subsection (4)(a), is that the units are flats in the same tenement. This draws on section 53(2)(d). “Tenement” is defined in section 122(1) of the 2003 Act by reference to section 26 of the Tenements (Scotland) Act 2004.

The second rule, in subsection (4)(b), is that the units are managed together by real burdens imposed under the common scheme. This draws on section 53(2)(a). Thus the scheme may have provisions requiring the appointment of a factor, or the setting up of an owners’ association, or on majority decision-making. For example, a development consisting of three or four tenements and 50 houses may have factoring provisions in relation to landscaped or car parking areas. While these areas will often be owned in common and therefore the fourth rule below will apply, it may be that the common ownership is restricted to specific parts of the development. For example, each tenement may have its own common parking area. But, under the rule here, the fact that the whole development is to be managed together would confer enforcement rights against all the units within it. Another possibility would be where the “common areas” are owned by the factor rather than strictly being common property.

The third rule, in subsection (4)(c), is where the units are subject to the common scheme in terms of the same deed. That deed might be a deed of conditions, as per section 53(2)(c), but equally it could be an earlier conveyance of the wider area including the two units. Compare *Brown v Richardson* 2007 GWD 28-490.

The fourth rule, in subsection (4)(d), is where the units share ownership of common property. This draws on section 53(2)(b). Boundary features are excluded because conferring enforcement rights based on these would result in multiple micro-communities, typically of two properties. Compare *Thomson’s Exr, Applicant* 2016 GWD 27-494. Section 56 of the 2003 Act will continue to regulate maintenance burdens in relation to boundary structures.

The fifth rule, in subsection (4)(e) as qualified by subsection (5), is effectively a distance-limited version of section 52 of the 2003 Act. It requires four things: (i) the relevant deed must have been registered before the appointed day; (ii) that deed must give notice of the common scheme; (iii) it must not exclude expressly or by implication the right to enforce the burden by the other property, for example by the grantor reserving the right to vary or waive the burden; and (iv) the properties must be within 20 metres of each other.

Subsection (6) disapplies certain requirements in section 4 of the 2003 Act in relation to the creation of real burdens after the appointed day, including the requirements to identify a benefited property and register the deed against that property. It is based on section 53(3A).

Subsection (7)(a) follows section 53(3) of the 2003 Act in preventing section 53A from conferring any right of pre-emption, redemption or reversion.

Subsection (7)(b), which draws on section 53(4), makes section 53A subject to sections 57 (further provisions in relation to enforcement) and 122(2)(ii) (exclusion of enforcement rights in relation to maintenance obligations taken over by local authorities), as well as the new section 53B (post-appointed day sub-divisions).

Section 53B addresses an issue which is currently uncertain, namely whether implied rights can arise where land subject to real burdens is sub-divided after the appointed day. It makes clear that under section 53A

they cannot, except where the property in question is already part of a community in relation to the real burdens. For example, if a property in a housing development subject to a deed of conditions is sub-divided, both parts would be able to enforce that deed of conditions against each other as part of the wider community that is the development.

## **2 Extinction and preservation of rights of enforcement**

Before section 54 of the Title Conditions (Scotland) Act 2003 insert—

### **“53C Extinction of rights of enforcement enjoyed by virtue of either or both of sections 52 and 53**

On and after such day as may be prescribed for the purposes of this section by regulations made by the Scottish Ministers, no real burden shall be enforceable by virtue of either or both of sections 52 and 53 of this Act; but this section is subject to section 53D(2) of this Act.

### **53D Preservation of rights of enforcement enjoyed by virtue of either or both of sections 52 and 53**

- (1) An owner of land which is a benefited property by virtue of either or both of sections 52 and 53 of this Act may, during the period between the coming into force of section 2 of the Title Conditions (Scotland) Act 2019 and the day prescribed under section 53C of this Act, execute and duly register in (or as nearly as may be in) the appropriate form, a notice of preservation as respects the land.
- (2) If the owner does so execute and register such a notice then, despite section 53C, the real burden shall after the expiry of that period continue to be enforceable by virtue of, as the case may be, either or both of sections 52 and 53 (but only in so far as the burdened property, the benefited property and the real burden are the burdened property, the benefited property and the real burden identified in the notice of preservation).
- (3) The notice of preservation shall—
  - (a) identify the land which is the burdened property (or any part of that land);
  - (b) identify the land which is the benefited property (or any part of that land);
  - (c) where the person registering the notice does not have a completed title to the benefited property, set out the midcouples linking that person to the person who last had such completed title;
  - (d) set out the terms of the real burden; and
  - (e) set out the grounds, both factual and legal, for describing as a benefited property the land identified in pursuance of paragraph (b) above.
- (4) For the purposes of subsection (1) above, a notice is, subject to section 116 of this Act, duly registered only when registered against both properties identified in pursuance of subsection (3)(a) and (b) above.
- (5) A person submitting any notice for registration under this section shall, before doing so, swear or affirm before a notary public that to the best of the knowledge and belief of the person all the information contained in the notice is true.

- (6) For the purposes of subsection (5) above, if the person is—
- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the person may swear or affirm;
  - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;
- and any reference in that subsection to a person shall be construed accordingly.
- (7) The reference in subsection (1) above to the “appropriate form” is to such form as may be prescribed for the purposes of that subsection by regulations made by the Scottish Ministers.
- (8) This section is subject to section 115 of this Act.

**53E Notices under section 53D: extent of Keeper’s duty**

In relation to any notice submitted for registration under section 53D(1) of this Act, the Keeper of the Registers of Scotland shall not be required to determine whether the real burden identified in the notice is enforceable by virtue of either or both of sections 52 and 53 of this Act (or any question as to who might so enforce it).”.

NOTE

Section 2 inserts a further three sections into the 2003 Act.

Section 53C extinguishes implied rights of enforcement under sections 52 and 53, on the basis that section 53A will now be the principal provision governing common schemes. (The special rules for sheltered housing in sections 54 and 55 are unaffected). The extinction will take place on a date to be prescribed, but in the run-up to this it will be possible for benefited owners to preserve these rights by means of a registration procedure under section 53D.

Section 53D sets out the preservation procedure. It is modelled on section 50 of the 2003 Act.

Subsections (1) and (2) enable the owner of land which is a benefited property in terms of section 52 and/or 53 to execute and register a preservation notice. The form of the notice is to be prescribed in regulations (See subsection (7)). If the notice is timeously registered, the enforcement right will be preserved.

Subsection (3) sets out the content of the notice.

Subsection (4) requires the notice to be registered against both the relevant benefited and burdened properties for it to be effective. This means that anyone looking at the title of either property will be able easily to see if there are still rights under section 52 or 53.

Subsections (5) and (6) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done by the owner personally, but subsection (5) sets out some exceptions. Subsection (6)(b) should be read with Schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. “Notary public” is given an extended meaning, in relation to overseas execution, by section 122(1) of the 2003 Act.



Section 115 of the 2003 Act, referred to in subsection (8) and amended by section 3 of the Bill, makes further provision as to notices of preservation.

Section 53E frees the Keeper of the need to check whether the right of enforcement under section 52 or 53 is actually held. It is modelled on section 43 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and section 76 of the Long Leases (Scotland) Act 2012.

### **3 Consequential amendments**

- (1) In consequence of the amendments made by sections 1 and 2, the Title Conditions (Scotland) Act 2003 is further amended as follows.
- (2) In section 4(7) (creation), after “53(3A),” insert “53A(6),”.
- (3) In section 49(2) (extinction), after “preservation” insert “executed under section 50(1) of this Act”.
- (4) In section 57 (further provisions as respects rights of enforcement)—
  - (a) for subsection (1) substitute—

“(1) Nothing in—

    - (a) section 52 or 53, or in sections 54 to 56, of this Act revives a right of enforcement waived or otherwise lost before the appointed day; or
    - (b) sections 53A to 53E of this Act revives a right of enforcement waived or otherwise lost before the day prescribed under section 53C of this Act.”,
  - (b) in subsection (3) after “53” insert “and 54”, and
  - (c) after subsection (3) insert—

“(3A) And section 53A of this Act does not confer any such right in respect of anything done, or omitted to be done, in contravention of the terms of a real burden before the day prescribed under section 53C of this Act.”.
- (5) In section 80(7) (negative servitudes to become real burdens), after “preservation” insert “executed under subsection (1) of that section”.
- (6) In section 102(1) (referral to Lands Tribunal of notice dispute), after “50” insert “, 53D”.
- (7) In section 115 (further provision as regards notices of preservation or of converted servitude)—
  - (a) in subsection (2)—
    - (i) in paragraph (b), at the beginning insert “in a case other than is mentioned in paragraph (ba) below,”, and
    - (ii) after paragraph (b) (and before the word “and” which immediately follows that paragraph) insert—

“(ba) in the case of a notice of preservation executed under section 53D(1) of this Act, such explanatory note for the owner of the burdened property as may be provided for in regulations under that section prescribing the form of that notice;”,
  - (b) in paragraph (a) of subsection (6)—

- (i) after “notice” insert “other than is mentioned in subsection (6A)(a) below is”, and
- (ii) after “day” insert “and”,
- (c) after subsection (6) insert—
  - “(6A) Subsection (6B) applies where—
    - (a) a notice of preservation executed under section 53D(1) of this Act and submitted before the prescribed day is rejected by the Keeper; but
    - (b) a court or the Lands Tribunal then determines that the notice is registrable.
  - (6B) The notice may, if not registered before the prescribed day, be registered—
    - (a) within two months after the determination is made; but
    - (b) before such date after the prescribed day as the Scottish Ministers may by regulations prescribe;
 and any notice registered under this subsection shall be treated as if it had been registered before the prescribed day.”
- (d) in subsection (7), for “subsection (6)” substitute “subsections (6)(b) and (6A)(b)”,
- (e) in subsection (8), for “subsection (6)(b)” substitute “subsections (6)(b) and (6A)(b)”, and
- (f) after subsection (8) insert—
  - “(9) In subsections (6A) and (6B) above, “the prescribed day” means the day prescribed under section 53C of this Act.”.
- (8) In section 122(1) (interpretation)—
  - (a) after the definition of “burdened property”, insert—
    - “ “common scheme” shall be construed in accordance with section 57A of this Act;”, and
  - (b) in the definition of “notice of preservation”, for “section 50” substitute “sections 50 and 53D”.
- (9) The title of schedule 7 (form of notice of preservation) becomes—
  - “FORM OF NOTICE OF PRESERVATION EXECUTED UNDER SECTION 50(1)”.

#### NOTE

Section 3 makes a number of consequential amendments to the 2003 Act.

Subsection (2) amends section 4(7) to make it subject also to section 53A(6). The result is to disapply some of the rules on creation in section 4 in relation to where rights can arise under section 53A.

Subsection (3) amends section 49(2) to take account of the fact that the Bill introduces a new form of preservation notice.

Subsection (4) amends section 57 so that the transitional rules currently set out in subsections (1) and (3) of that section apply also to section 53A, but with the adjustment that the relevant date is the date that section 53A is brought into force rather than the appointed day. The result is that section 53A cannot confer new enforcement rights in relation to actions contravening a real burden prior to it coming into force. For

example, if Barry has a right to enforce a burden forbidding building against his neighbour Carol under section 53, but, in return for payment, grants a minute of waiver and Carol proceeds with the work, Barry is not entitled to enforce the burden under section 53A when it comes into force.

Subsection (5) amends section 80(7) to take account of the fact that the Bill introduces a new form of preservation notice.

Subsection (6) amends section 102(1) to give the Land Tribunal jurisdiction in respect of a dispute in relation to a section 53D notice.

Subsection (7) amends section 115 so that the provisions on preservation notices under section 50 and notices of converted servitudes under section 80 apply, with appropriate adjustments, to preservation notices under section 53D. This means in particular that a copy of the notice must be sent to the owner of the burdened property. It also allows notices initially rejected by the Keeper to be registered late if the Lands Tribunal rules that these are valid.

Subsection (8) amends section 122(1), the interpretation provision, to add the new definition of “common scheme” in section 57A and the new form of preservation notice in section 53D.

Subsection (9) amends the title to schedule 7 to take account of the fact that the Bill introduces a new form of preservation notice.

#### **4 Interpretation of Title Conditions (Scotland) Act 2003: the expression “common scheme”**

After section 57 of the Title Conditions (Scotland) Act 2003 insert—

##### **“57A The expression “common scheme”**

- (1) In this Act any reference, however expressed, to the imposition of real burdens under a common scheme is to the imposition of the same, or similar, real burdens on two or more properties, whether or not by one person.
- (2) In determining whether real burdens are so imposed—
  - (a) regard must be had to the deeds by which the burdens have been imposed; and
  - (b) the burdens imposed must—
    - (i) all be considered; and
    - (ii) be considered as a whole.
- (3) In determining whether one real burden is similar to another for the purposes of subsection (1) above, regard must be had to the degree of equivalence between the burdens.”.

#### **NOTE**

Section 4 inserts a new section 57A into the 2003 Act. Subsection (1) provides a definition of “common scheme” for the provisions in Part 4, as well as for the Act more generally. The words “same, or similar”, which are found in the explanatory notes for section 53, are now put into statute. Thus it is not necessary that the burdens affecting the respective properties are identical. There must be an element of planning in relation to the burdens being the same or similar, rather than it being random (such as where the same

solicitor has simply used the same style in relation to two unrelated properties). But the conditions set out in section 53A(4) prevent rights to enforce arising where the burdens are randomly the same.

Subsection (2) makes it clear, that in determining whether there is a common scheme, regard must be had to all the burdens in the relevant deeds taken as a whole. Compare *Russel Properties (Europe) Ltd v Dundas Heritable Ltd* [2012] CSOH 175. For example, in a mixed development the use restrictions may not be identical, but the question of whether there is a common scheme requires looking beyond this to the overall context and the deeds taken as a whole may amount to a common scheme despite differences of detail. Very often it will be clear that there is a common scheme because identical burdens in a deed of conditions affect all the properties. This provision assists in the more difficult cases, but ultimately a judgment has to be made on the individual facts.

Subsection (3) makes it clear that in deciding if burdens are similar, the extent to which they are equivalent must be considered. For example, burdens regulating the permissible usage of neighbouring land may not be similar in wording, but are equivalent in terms of their effect, as in *Lees v North East Fife District Council* 1987 SLT 769.

## **5 Ancillary provision**

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.
- (2) Regulations under subsection (1) may—
  - (a) modify any enactment (including this Act),
  - (b) make different provision for different purposes.
- (3) Regulations under subsection (1)—
  - (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act,
  - (b) otherwise are subject to the negative procedure.

### **NOTE**

Section 5 provides for a general regulation-making power that enables the Scottish Ministers to make provision for consequential and other incidental matters in order to give full effect to the Bill.

The power in this section allows the Scottish Ministers to amend any enactment including the Bill, and any regulations that do so will be subject to the affirmative procedure.

For the meaning of “enactment” see schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

## **6 Commencement**

- (1) This section and section 7 come into force on the day after Royal Assent.
- (2) Section 1 comes into force on the day prescribed under section 53C of the Title Conditions (Scotland) Act 2003.

- (3) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

NOTE

In terms of subsection (3), the provisions in the Bill will, except as provided for in the section, come into force on the day (or days: see section 22(a) of the Interpretation and Legislative Reform (Scotland) Act 2010) appointed by the Scottish Ministers in regulations made for that purpose under this section.

The reference in subsection (2) to section 53C of the 2003 Act is to that section as proposed to be inserted in the 2003 Act by section 2 of the Bill itself.

**7 Short title**

The short title of this Act is the Title Conditions (Scotland) Act 2019.

# Appendix B

## List of Respondents and Advisory Group Members

### I. RESPONDENTS TO THE DISCUSSION PAPER

Aberdeen City Council

Aberdeenshire Council

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Argyll Community Housing Association

Brodies LLP

Professor Stewart Brymer

Burness Paull LLP

Church of Scotland

CMS Cameron McKenna Nabarro Olswang LLP

Dentons LLP

DLA Piper Scotland LLP

DWF LLP

Edinburgh Conveyancers Forum

Faculty of Advocates

First Scottish Group

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Professor George Gretton, University of Edinburgh

Harper Macleod LLP

Keeper of the Registers of Scotland

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Law Society of Scotland

Lindsays

MacRoberts LLP

Lionel Most

Professor Roderick Paisley, University of Aberdeen

Pinsent Masons LLP

Property Litigation Association

Professor Kenneth Reid, University of Edinburgh

Scottish Factoring Network

Scottish Water

Shepherd and Wedderburn LLP

Shoosmiths LLP

One confidential response

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<sup>1</sup> The response was prepared by a working group consisting of Dr Douglas Bain, Malcolm Combe, Dr Alisdair MacPherson, Donna McKenzie Skene, Professor Roderick Paisley and Dr Andrew Simpson.

Lands Tribunal for Scotland

Law Society of Scotland

MacRoberts LLP

Dr Frankie McCarthy

Lionel Most

Pinsent Masons LLP

Professor Kenneth Reid

Shepherd and Wedderburn LLP

Shoosmiths LLP

One confidential response

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