

# Business and Regulatory Impact Assessment

## Title of Proposal

Draft Title Conditions (Scotland) Bill (“the Bill”)

## Purpose and intended effect

### **Background**

Land owners can, in principle, make use of their land as they wish. Clearly, this is subject to constraints under public law such as planning and building regulation, and environmental protection legislation. It is also important that certain conditions are imposed upon ownership of land as a matter of private law. This is because actions taken by owners, or inaction, can have an effect upon neighbouring owners. For example, the titles of a development may impose certain use or building restrictions which protect the overall amenity of the area or the commercial interests of the owners. Public law may not always provide a remedy here.<sup>1</sup> Alternatively, the failure of owners to maintain their properties may have an adverse effect on neighbours. It is common, therefore, for certain conditions to be imposed in the titles of land.

These conditions are known as “real burdens”. More technically, a real burden is a perpetual obligation affecting land, usually positive or negative in character, which can be enforced by neighbouring owners. Following on from the discussion above, examples are obligations to maintain certain property, such as a garden fence, or not to carry out any building work or change use. The land burdened by the obligation is known as the “burdened property”. Conversely, the land in favour of which the real burden is imposed (and the owner of which has the corresponding *right*<sup>2</sup> to enforce the real burden) is known as the “benefited property”. Often properties in a development such as a housing estate or business park will be both benefited and burdened properties in respect of all the burdens affecting the development.

The law of real burdens is governed by the Title Conditions (Scotland) Act 2003 (“the 2003 Act”). The 2003 Act was part of a package of legislation which abolished the feudal system on 28 November 2004 and reformed Scottish land law, including the law of the tenement.<sup>3</sup> The 2003 Act codified the law of real burdens, following a Report on Real Burdens produced by the Scottish Law Commission (“SLC”) (Scot Law Com No 181, 2000). In doing so, however, it made a distinction between real burdens created *before* 28 November 2004 and real burdens created *after* 28 November 2004 (the “appointed day”).<sup>4</sup> For real burdens created after the appointed day, it is normally necessary to identify both the benefited and burdened properties

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<sup>1</sup> E.g. *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd* [2014] CSIH 105, 2015 SC 339, where the real burden restricted the extent to which the land could be used for offices, to protect the commercial interests of the neighbouring land which had offices on it.

<sup>2</sup> Enforcement of a real burden requires both title and interest. See the Title Conditions (Scotland) Act 2003 s 8. Interest is fact-specific to the breach. The Bill concerns only title to enforce.

<sup>3</sup> The other Acts, respectively, were the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the Tenements (Scotland) Act 2004.

<sup>4</sup> This was also the date when the three Acts came into force.

and to register the deed imposing the burdens against the titles to these properties.<sup>5</sup> This renders it straightforward to identify the land owner(s) entitled to enforce the burden(s).

For real burdens created *prior to* the appointed day, the common law rules on enforcement were generous because they did not require the benefited property to be expressly identified. Benefited properties were *implied*. The common law rules were replaced by Part 4 of the 2003 Act, which continues to recognise implied rights. Part 4 includes, for present purposes, sections 52 and 53 of that Act. Sections 52 and 53 govern implied enforcement rights in relation to real burdens in “common schemes”. This is a term which is found in both sections but is undefined. A typical example is a housing development which has common landscaped or recreation areas. Section 52 was drafted as a restatement of the common law rules on enforcement, as set out in the case of *Hislop v MacRitchie’s Trs*<sup>6</sup> and subsequent cases.

Section 53 was not included in the SLC’s Report on Real Burdens or in the Bill which became the 2003 Act when that Bill was first introduced to the Scottish Parliament. It was added at Stage 2 because the Bill was regarded, in certain respects, as being too restrictive by the then Scottish Executive as to the extent it accepted implied rights in common schemes. This followed evidence received by the Justice 1 Committee. The Bill as introduced did not confer enforcement rights upon certain persons (i.e. owners who did not fall within the requirements of section 52), such as owners within some “mixed-tenure”<sup>7</sup> housing estates.<sup>8</sup>

Under section 53(1), properties subject to a common scheme of real burdens may enforce the burdens against one another where the properties are “related”.<sup>9</sup> Section 53(2) provides that whether the properties are “related” is to be “inferred from all the circumstances” and provides a non-exhaustive list of examples, such as where the properties are flats in the same tenement<sup>10</sup> or are regulated by the same deed of conditions.<sup>11</sup>

Section 53 has been the subject of numerous criticisms, aimed principally at its uncertainty. Many of these were made to the Justice Committee of the Scottish Parliament in 2013 when it carried out its *Inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003*.<sup>12</sup> As a result of that reference, in 2013 the then Minister for Community Safety and Legal Affairs referred section 53 to the SLC. The SLC issued its Discussion Paper on Section 53 (Scot Law Com DP No 164, 2018) in May 2018. The Discussion Paper reviewed the main criticisms of section 53. These are as follows.

<sup>5</sup> Title Conditions (Scotland) Act 2003 s 4(5).

<sup>6</sup> (1881) 8 R (HL) 95.

<sup>7</sup> Estates where some of the properties have been sold under the right-to-buy legislation.

<sup>8</sup> Scottish Parliament Justice 1 Committee, *9<sup>th</sup> Report, 2002, Stage 1 Report on Title Conditions (Scotland) Bill*: <https://archive.parliament.scot/business/committees/historic/justice1/reports-02/j1r02-09-vol01-02.htm>, paras 115 and 120. This followed evidence from the Confederation of Scottish Local Authorities (COSLA) and the Society of Local Authority Solicitors and Administrators (SOLAR). This was because section 52 requires *notice* of the common scheme; a requirement that may not be satisfied where real burdens were imposed in individual conveyances of the houses rather than in one deed of conditions over a wider area.

<sup>9</sup> That is not to say, however, that the two provisions are mutually exclusive. In principle, there can be title to enforce under sections 52 *and* 53.

<sup>10</sup> Title Conditions (Scotland) Act 2003 s 53(2)(d).

<sup>11</sup> Title Conditions (Scotland) Act 2003 s 53(2)(c).

<sup>12</sup> Available at <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/59247.aspx>.

First, there is uncertainty arising from the lack of a definition of “common scheme”. The Explanatory Notes to section 53 of the 2003 Act state that there is a common scheme where the burdens are the “same or similar”, but go no further than this.<sup>13</sup> A particular issue here is the extent to which the burdens as a whole need to be considered in determining whether they are sufficiently similar.<sup>14</sup> The Scottish Parliament’s Justice 1 Committee, during the Parliamentary passage of the Bill which became the 2003 Act, had stated:

“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>15</sup>

Professor Stewart Brymer, in his response to the SLC Discussion Paper on Section 53 pointed out that:

“It should not be assumed that solicitors and their clients read the Explanatory Notes.”

Burness Paull said that it would be:

“preferable to have some further clarity on what constitutes a common scheme.”

Dentons said similarly that:

“the provisions of the 2003 Act are unclear and require reform to bring more certainty to the position.”

Secondly, the uncertainty stems from the legislation’s use of the list of suggestive examples mentioned above, which are non-exhaustive and provide only an *indication* as to whether land owners have title to enforce burdens. Thus, despite the presence of examples, the law is complex and it can be very difficult for members of the legal profession to advise on whether section 53 applies where the particular set of circumstances before them does not fall into one of the statutory examples listed. This, in turn, leads to increased time being spent by solicitors as it is often necessary to conduct further investigation of the titles of properties in the area. Not only is this a burden upon the busy practitioner’s time, but also leads to increased costs for clients. For example, Brodies, in their response to the Discussion Paper said:

“The extension of enforcement rights and consequent extension of examination of title means additional time has to be spent and, inevitably, more cost incurred checking titles. Having spent that time and incurred the additional cost, it is not always clear whether a common scheme exists or, if it is clear that there is one, how many neighbouring proprietors are part of that common scheme. In more difficult examples, expert opinion has been sought to confirm the position. In other examples, because of the uncertainty and threat of enforcement action by neighbours, title insurance is obtained.”

This view was shared by DLA Piper who said that section 53 has:

<sup>13</sup> Title Conditions (Scotland) Act 2003, Explanatory Notes, para 234.

<sup>14</sup> See *Russel Properties (Europe) Ltd v Dundas Heritable Ltd* [2012] CSOH 175, discussed in K G C Reid and G L Gretton, *Conveyancing 2012* (2013) 113-118.

<sup>15</sup> Justice 1 Committee, *9<sup>th</sup> Report*, para 34.

“led, on occasion, to higher transactional costs, including fees for professional opinions, and title insurance.”

Some examples can be given of specific costs incurred in investigating whether section 53 has applied in a particular case. For example, in correspondence with the SLC, one law firm gave the example of acting for:

“a public body who had queried if they had a maintenance liability for a structure on land that was once owned by them but had since been sold and over which they had retained a right of access. There were three properties with potential to use the structure and so we had to consider whether s 53 might apply. We did not need to obtain further deeds as we had sufficient [evidence] already to indicate that s 53 may be in issue and searching to find other potential related properties was not necessary. In the end, we resolved the position by establishing the right of access over the structure had not been exercised in 20 years and so the right had prescribed. In the absence of a continuing right of access, we judged that the associated burden to maintain the structure was not sufficiently closely related to the client’s property as to burden it.

Even so, we were in some doubt but reassured ourselves that if a third party would ever question the matter, including by way of s 53, then we would have a decent case to discharge the burden at the lands tribunal.

In due course the client will be billed about £800, we will consider £200 billable but not charged, and we will write off £1,300 as “trainee time” for having researched it and not quite nailed it.”

Bernadette O’Neill, a solicitor and member of the SLC’s advisory group on section 53, who is undertaking a doctorate on real burdens, said:

“In my research it was disclosed that one client estimated having spent £20,000 in establishing title to enforce under s 53 and expected to spend a further £20,000 on enforcement proceedings.”

Similarly, Dentons, in its response to the Discussion Paper, gave the example of:

“a developer paying around £19,000 on a title indemnity policy to cover the risk that someone sought to enforce title conditions that were being breached by a flatted development in Glasgow.”

It made the further general comment:

“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.”

Aberdeenshire Council, in their response, stated that their legal department:

“has incurred additional costs because of uncertainty as to whether section 53 (and 52) applies. For example, during 2017/18, it spent £2,640 on opinions from experts.”

The Law Society of Scotland said:

“the majority of costs incurred addressing section 53 provisions are typically incurred ‘internally’ to a legal firm’s business, for example, by way of time spent by solicitors and/or legal staff in researching and assessing whether a property is affected by a common scheme under section 53. The lack of clarity in the current legislation in relation to the application of section 53 is undesirable and increases these costs. On occasion, the costs which require to be incurred may be disproportionate to the fee being paid by a client for the transaction (as such transactions are often carried out on a ‘fixed fee’ basis). There are also circumstances where additional ‘external’ costs require to be incurred, for example obtaining title insurance to cover the possibility that section 53 might apply and obtaining expert opinion as to whether or not section 53 applies.”

These uncertainties have resulted in section 53 being widely recognised as an unsatisfactory statutory provision. This may inhibit development and property investment in Scotland.

Thirdly, the Discussion Paper identified further difficulties in relation to section 53: (a) conveyancers consider it to be over-complex; (b) it does not require sufficient publicity in relation to whether there are implied rights on the title of the relevant burdened property; (c) it is arguably too generous given that title to enforce is always limited by the requirement to show interest to enforce; and (d) the drafting has been the subject of criticism.<sup>16</sup> In relation to (a), the Discussion Paper noted that the complexity is worsened by having two separate provisions on pre-28 November 2004 common schemes: sections 52 and 53.

## Objectives

The objective of the SLC’s project on section 53 was to ensure a greater degree of *clarity* for those wishing to enforce real burdens pre-dating 28 November 2004 and for those advising them. If an owner acts in breach of such a real burden, the law should be clear as to whether neighbouring owners have the implied right to enforce that real burden against the party acting in breach of it. Furthermore, solicitors should be able to advise with confidence as to whether title to enforce a real burden is held by those wishing to enforce. This will encourage people and businesses to develop land in confidence. In its response to the Discussion Paper, MacRoberts said:

“indicative examples is one of the main sources of difficulty with the current legislation. It is key to any reform to set out clear rules where a title to enforce will exist in order to provide the necessary certainty.”

The Bill, if enacted, will replace the examples in section 53(2) with clear rules. It will often then be possible to determine whether there are implied rights by looking at the burdened property’s title alone, from which it will be apparent if any of the rules are applicable. The Bill also provides a definition of “common scheme”, whereas there is currently none in the 2003 Act. This makes it clear that there is such a scheme where there are burdens which considered as a whole are the same or similar.

A further objective of the Bill is *simplification* of the law, as it will be easier to determine if a person has title to enforce a real burden pre-dating the appointed day.

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<sup>16</sup> Discussion Paper on Section 53 of the Title Conditions (Scotland) Act 2003 paras 5.44-5.62.

The law will be made simpler to understand not only for laypeople but for solicitors advising them. In addition, the law will be more straightforward to teach to those who require to learn it, such as students and emerging lawyers. Dr Craig Anderson of Robert Gordon University, in his response to the Discussion Paper, said that:

“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 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?”

Therefore, it is an objective of the Bill that the law in this area be made clearer, in other words more accessible and simpler for laypersons and lawyers alike.

### **Rationale for Government intervention**

As explained above, the current law in relation to implied rights of enforcement of real burdens in common schemes created prior to 28 November 2004 is unsatisfactory. That law is set out in sections 52 and 53.<sup>17</sup>

The only way to remedy this problem is to introduce legislation which will amend the 2003 Act to make it clearer and more accessible. A significant majority of consultees to the Discussion Paper supported the replacement of sections 52 and 53 with a single consolidated provision governing implied rights to enforce real burdens created before the appointed day. For example, Burness Paull stated:

“This would certainly provide a more straightforward position.”

Similarly, Shoosmiths said:

“We do not think that having two very similar but different sections (52 and 53) is helpful.”

Consultees also supported the changes which the replacement provision would introduce including, but not limited to, the introduction of fixed rules determining when an owner has the implied right to enforce a real burden. These changes would be introduced by means of an Act of the Scottish Parliament.

## **Consultation**

### **Within Government**

As noted above, the section 53 project was the result of a Scottish Government reference in 2013 from the then Minister for Community Safety and Legal Affairs, Roseanna Cunningham MSP.<sup>18</sup>

<sup>17</sup> Section 54 sets out a separate rule where the common scheme relates to a retirement or sheltered housing development. This rule is outwith the scope of the project.

<sup>18</sup> Under the Law Commissions Act 1965 s 3(1)(e).

Copies of the Discussion Paper were sent to the Civil Law Reform Unit of the Scottish Government Justice Directorate.

The SLC team also informed the Unit regularly about the progress of the project.

### **Public Consultation**

As noted above, the Discussion Paper was published in May 2018. It was circulated to individuals and organisations identified by the SLC as having a potential interest in the topic and it was also published on the SLC website. Therefore, the Discussion Paper was available freely to the general public online. The publication was also announced on Twitter.

The Discussion Paper sought the views of stakeholders on 12 questions. The consultation was open until the end of August 2018 and attracted 34 responses. These came from law firms, academics, local authorities, the Edinburgh Conveyancers Forum, the Faculty of Advocates, the Keeper of the Registers of Scotland, the Property Litigation Association and the Scottish Factoring Network.

A further consultation, on a working draft of the Bill, took place from 22 January to 12 February 2019. The draft Bill, a covering minute and draft Explanatory Notes were published on the SLC website and an announcement was made about the consultation on Twitter.

Nineteen responses were received. Those who responded included law firms, academics, the Keeper of the Registers of Scotland, the Lands Tribunal for Scotland, the Faculty of Advocates and the Law Society of Scotland. All responses were considered carefully and resulted in some refinements to improve further the clarity of the Bill.

The Bill was supported by a large number of consultees. For example, a working group of the Centre for Scots Law at the University of Aberdeen said that it:

“considers that the draft Bill has been appropriately drafted in order to give effect to the Scottish Law Commission’s intended reforms to the law.”

Furthermore, Brodies said that the Bill:

“certainly progresses matters in terms of bringing more certainty to the application of common schemes.”

This opinion was shared by CMS Cameron McKenna Nabarro Olswang, who stated that the Bill is:

“clear in its terms from a technical perspective and a huge improvement on the current Section 53.”

MacRoberts stated likewise:

“The Bill is a significant improvement on Sections 52 and 53 and the drafting is clearer.”

Finally, Dr Frankie McCarthy said that:

“the Bill captured the [policy] intention very well.”

### **Business**

The SLC has also worked extensively from the outset of the project with an expert Advisory Group, comprised of academics and members of the legal profession (including professionals from Anderson Strathern, Harper Macleod, Shepherd and Wedderburn and T C Young). Frequent interaction with members of the Advisory Group helped to define the scope of the project as well as its refinement of policy. However, the SLC’s project team also gave a series of seminars on the project to different law firms and businesses, within “continuing professional development” programmes, including the following:

- Anderson Strathern
- Brodies
- Burness Paull
- CMS Cameron McKenna Nabarro Olswang
- Dentons
- DLA Piper Scotland
- DWF
- Edinburgh Conveyancers Forum
- Gillespie Macandrew
- Lindsays
- MacRoberts
- Pinsent Masons
- Royal Institution of Chartered Surveyors
- Scottish Factoring Network
- Shepherd and Wedderburn
- Shoosmiths
- Turcan Connell

While the audiences comprised mainly practising solicitors, there were also representatives from other businesses present at these seminars. All such presentations offered excellent opportunities for discussion with business interests.

### **Options**

#### **Option 1 – Do nothing**

In terms of Option 1, the Bill would not be introduced and section 53 in its current form (with its list of indicative, non-exhaustive examples of when an owner has title to enforce) would remain. In addition, section 52 would continue as a separate provision codifying the common law in relation to implied enforcement rights. The opportunity would be lost to provide a larger degree of clarity and understanding that is lacking from having two separate provisions. The benefits discussed below would not be realised.



## **Option 2 – No implied rights**

The second option considered by the SLC was to repeal, but not replace, the current law.

The effect of such an approach would be to abolish implied rights to enforce real burdens in common schemes.<sup>19</sup> It would follow that a real burden could only be enforced by a person with an express right to do so in the title of their land.

This approach was recommended to the Commission by a few consultees.

## **Option 3 – Introduce the Bill**

In terms of Option 3, the recommendations outlined in the Report on Section 53 and implemented through the Bill would be introduced. If implemented, the changes to the law listed under the heading “Objectives” above would be introduced, bringing a significant degree of clarity, certainty and simplification to the law, as well as increased confidence for those advising upon it.

## **Sectors and groups affected**

The Bill is general in its application and is not confined to any particular sector or group. It has the potential to impact upon anyone dealing with the development of land (such as members of the legal profession and housing associations).

However, with regard to the general public, the Bill is also capable of applying to home owners and those wishing to purchase land in Scotland. It is in the interests of such persons that it should be clear if they have an implied right to enforce particular real burdens against neighbouring land or, conversely, if neighbours have an implied right to enforce particular real burdens against them. On a similar basis, the Bill is capable of impacting upon juristic persons such as companies.

Mention must also be made of the Scottish Land Rights and Responsibilities Statement,<sup>20</sup> prepared and published under section 1 of the Land Reform (Scotland) Act 2016. Principle 5 of that Statement includes the objective that there “should be improved transparency of information about the ownership, use and management of land”. The effect of the Bill will be to make implied enforcement rights in relation to real burdens affecting many properties in Scotland more transparent.

We have concluded that the Bill will not impact upon any person by virtue of their particular religion, belief, age, sexual orientation, gender, race or ethnicity.

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<sup>19</sup> Except for where other provisions of the 2003 Act, in particular ss 54 (retirement and sheltered housing developments) and 56 (facility and service burdens) apply.

<sup>20</sup> A copy of which can be found at: [www.gov.scot/Publications/2017/09/7869](http://www.gov.scot/Publications/2017/09/7869).

## Benefits

### **Option 1 – Do nothing**

Option 1 would not produce any benefits, given that the present uncertainties and ambiguities arising from section 53 would remain. Moreover, the common law rules in relation to common schemes would continue to be codified by means of a separate provision (section 52). There would be no bringing together of sections 52 and 53 into one single, clear provision.

### **Option 2 – No implied rights**

Option 2 means that no right to enforce could be implied in relation to real burdens in common schemes created before feudal abolition in 2004.<sup>21</sup>

This option would clarify and simplify the law, in a similar way to the benefits discussed under Option 3. It would, however, have significant disbenefits as discussed below.

### **Option 3 – Introduce the Bill**

The Bill if introduced and implemented would bring the following benefits:

#### *Increased certainty and clarity*

The changes brought into force by the Bill would provide an extensive degree of certainty and clarity to the law. This would be the result of the replacement of suggestive examples in section 53(2) with a new provision with clear rules.

#### *Accessibility of the law*

The Bill would make the law more accessible to lawyer and layperson alike. It would enable members of the legal profession to advise their clients more clearly and coherently on the law in this area. It is important to such parties that the law should be as certain as possible so that it can be understood by laypeople and applied efficiently by their legal advisers.

One change implemented by the Bill is a statutory definition of the term “common scheme”. As explained above, this was a definition absent from the 2003 Act but included within the Explanatory Notes of that Act. The inclusion of such a definition introduces a degree of accessibility by making it clearer to owners whether their own properties form part of a “common scheme”.

#### *Simplification of the law*

As stated above, the replacement of sections 52 and 53 of the 2003 Act with a series of fixed-rules regulating title to enforce implied rights in common schemes will help to simplify the law.

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<sup>21</sup> Except, as noted earlier, under other limited rules in the 2003 Act, notably ss 54 and 56.

### *Potential savings*

The Bill has the potential to bring about significant savings. As is explained in further detail under the heading “Costs” below, the implementation of the Bill will mean that solicitors will be able to advise upon the law more quickly and efficiently. Thus, the time spent by legal advisers, and the resultant costs will be reduced significantly.

## **Costs**

### **Option 1 – Do nothing**

As Option 1 is to do nothing, there would be no additional costs or savings associated with this option. Given the need for change outlined by the chosen Option 3, however, the lack of additional costs imposed by Option 1 would not add any positive value.

As explained above, a significant number of law firm consultees to the SLC Discussion Paper highlighted that section 53 in its current form results in a large economic burden for clients seeking advice on its possible application, as members of the legal profession, often unsure as to the provision’s applicability, must carry out further investigation as to whether it will apply. These economic difficulties would remain if Option 1 was implemented.

### **Option 2 – No implied rights**

Option 2 means the right to enforce a real burden imposed under a common scheme created before feudal abolition on 28 November 2004 could not be implied.<sup>22</sup>

The law would be simpler and clearer. But under this option many real burdens in pre-2004 common schemes would become unenforceable. This would adversely affect many residents in housing developments. It would also make some commercial developments harder to manage. The effects could be significant and, if so, would reduce the value of the properties.

It is likely in addition that simple abolition would unlawfully deprive persons of a property right they currently enjoy, contrary to Article 1 of Protocol 1 to the European Convention on Human Rights.

That could be mitigated by:

- Paying compensation; or
- Permitting such persons to preserve their rights.

It would be difficult to quantify the value of any compensation, given the uncertainty of the current law. That difficulty would itself add to the costs of this option. It would also need to be ascertained who would be liable for the compensation if not the taxpayer.

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<sup>22</sup> Except, as noted earlier, under other limited rules in the 2003 Act, notably ss 54 and 56.

It is thought that many people would preserve their implied rights, given the lack of any alternative remedy under this option. That would mean that no corresponding benefit would be delivered.

There would also be costs associated with any notice procedure, as set out below.

### **Option 3 – Introduce the Bill**

Option 3 would significantly reduce transaction costs in cases where implied rights are an issue, but some additional costs even so would be incurred.

It is considered that the benefits of this option clearly outweigh the disbenefits of the additional costs as set out below.

#### *Training and transition costs*

Adapting to the new regime will result in training and other adoption costs for legal and other professional advisers. However, it is thought that these costs will be modest.

The project undertaken by the SLC is a restricted one with a relatively narrow scope. It looks to build on (rather than replace) the current law. One of the main objectives is to introduce a series of “bright line” rules which will be much easier to understand. The current policy on implied enforcement rights in the 2003 Act is maintained.

The Bill provides that current right holders can preserve their rights by registering a notice of preservation in the appropriate property register. The notice procedure is directly modelled on similar procedures that have caused no practical difficulties. But in practice it will generally be unnecessary to do this because rights held under sections 52 and 53 will typically be perpetuated under the replacement provision.

It is thought that the additional costs will be modest enough to be accommodated within existing professional training budgets, given for example that solicitors are required to complete a minimum of 20 hours continuing professional development every year.

#### *Notice of preservation*

It is thought that it is appropriate, in order to ensure compatibility with A1P1 rights as set out above, to enable persons who wish to preserve their existing rights to do so by registering a notice of preservation.

Such persons are likely to incur legal costs which will vary depending upon the facts of the case in question, but are unlikely to be substantial.

They will also have to pay a registration fee to the Keeper. Based on the fees for analogous deeds under The Registers of Scotland (Fees) Order 2014 (SSI 2014/188) as amended, this would be £60 for each Land Register title sheet affected (or £50 where the application is submitted electronically and also £60 if registration is required in the Sasine Register).

It is thought that the numbers of persons who will seek to preserve their rights in that way will be very small, because this option means that implied rights will generally be maintained but placed on a clearer statutory basis.

Overall, therefore, the additional costs incurred will be modest and those preserving rights will gain a corresponding benefit.

#### *Keeper of the Registers of Scotland*

The Keeper will incur some costs in adapting the registration process to enable persons to record a notice of preservation, which are estimated by her to be in the range £10,000 to £15,000.

This will be balanced to some extent by a reduction in processing costs for the registration of titles where there is a common scheme, given that the law would be rendered clearer and simpler.

In any event, the Keeper will charge a registration fee as set out above. It is her policy to set the fee at a level that enables full costs recovery. Overall, this option will have a neutral effect on the Keeper.

### **Scottish Firms Impact Test**

No Scottish Firms Impact Test was carried out. The aim of the Bill is principally to provide legal certainty. Certainty was highlighted as a necessity by stakeholders for this area of the law and the Bill will be beneficial to relevant professionals and individuals alike.

As explained above, the Bill will benefit both lawyers and laypeople. The legal sector, however, would enjoy the greatest benefit from the passage of the Bill but this is not to the exclusion of any other sector. Moreover, it is not anticipated that the Bill will have significant cost implications for any markets or industries. On the contrary, the Bill has the potential to reduce costs per transaction.

### **Competition Assessment**

It is not anticipated that the Bill would have an impact on competition within Scotland. The recommendations reflected in the Bill do not create a competition advantage for any particular sector or individual; they simply offer benefits for professionals and individuals alike.

- The legal sector as well as other relevant professionals and businesses dealing with the development of land would be positively affected by the Bill. We do not anticipate an impact upon any other particular market or product.
- The Bill would not result in any restrictions on competition in the legal services market nor in any other relevant professional markets. The number and range of suppliers would not be affected nor would the ability of suppliers to compete be limited. We do not consider that the Bill would reduce incentive to compete vigorously.

The Bill does not introduce any new business forms.

### **Consumer Assessment**

It is not anticipated that the Bill would have an impact upon consumers within Scotland. The recommendations reflected in the Bill do not concern the purchase of goods or digital content nor the usage of goods or services in the public or private sector. The recommendations simply offer benefits for those seeking advice upon purchasing land in Scotland or seeking advice in respect of their legal position with regard to their ownership of land in Scotland. As such, the Bill has no effect upon goods or essential services, such as energy or water.

### **Digital Impact Test**

It is not anticipated that the Bill would have an impact upon technology or technological advances in Scotland. Changes in Government processes, such as particular services moving online, would have no impact upon the clarity of the Bill in governing whether individuals have title to enforce real burdens in common schemes. Further, the shift towards increasing economic, social and governmental interactions online would not affect the Bill.

### **Legal Aid Impact Test**

Whilst it is possible that some issues arising from the Bill might be such as to require advice and assistance in terms of the legal aid scheme (as does the current law), it is not anticipated that the recommendations will have any impact upon the legal aid fund. The effect of providing clarity and certainty to implied enforcement rights with respect to real burdens in common schemes will in fact reduce any potential call upon the legal aid fund, as the possibility of litigation in this area of the law will be reduced significantly.

### **Enforcement, sanctions and monitoring**

The Bill does not require public enforcement and imposes no sanctions. The Bill clarifies, increases the certainty of and simplifies the law in relation to implied rights to enforce real burdens in common schemes by providing a series of fixed rules. Any disputes concerning the provisions of the Bill would be resolved by litigation or other dispute resolution processes between the affected parties.

### **Implementation and delivery plan**

If passed by the Scottish Parliament, sections 6 and 7 of the Bill will come into force on the day after Royal Assent. Section 1 will come into force on such day as is prescribed under section 53C of the Title Conditions (Scotland) Act 2003 (as inserted by the Bill). The other provisions will come into force on the day appointed by the Scottish Ministers by regulations.

### Post-implementation review

The Scottish Law Commission, in accordance with its duty under section 3(1) of the Law Commissions Act 1965, will endeavour to stay informed of the Bill's reception by the legal sector and wider business community. We anticipate that a review of the legislation by the Scottish Ministers would be appropriate 10 years from the date on which it is brought into effect.

### Summary and recommendation

#### **Dismiss Option 1**

This option would preserve the status quo and would introduce no new legislation.

It would not produce the benefits offered by Options 2 and 3 and would not mitigate the disbenefits of the current law.

#### **Dismiss Option 2**

This option would simplify and clarify the law, but not in a way that the SLC could recommend given the significant disbenefits that would arise.

#### **Recommend Option 3**

Option 3 is recommended as it would simplify and clarify the law, but without any significant disbenefits.

- **Summary costs and benefits table**

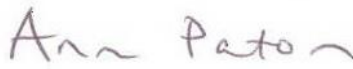
<b>Option</b>	<b>Total benefit per annum: - economic, environmental, social</b>	<b>Total cost per annum: - economic, environmental, social - policy and administrative</b>
1	No benefits	No direct costs.  The costs currently being incurred would not, however, be avoided or mitigated.
2	The law would be clarified and simplified.  Costs currently incurred by legal firms and their clients would be avoided, or mitigated.	Training costs would be incurred by law firms in relation to the new rules.  If there were a preservation procedure, persons wishing to preserve rights would have to pay legal fees and costs, including registration fees. The Keeper of the Registers would need to adapt processes to comply with the new law.  There would be social costs as a result of housing or commercial developments pre-dating feudal abolition no longer being regulated by real burdens, except in so far as any implied right were kept by means of a preservation procedure.

3	<p>The law would be clarified and simplified.</p> <p>Costs currently incurred by legal firms, and their clients such as having to seek expert opinions or obtain indemnity insurance would be avoided or mitigated.</p>	<p>Training costs would be incurred by law firms in relation to the new rules. These would be modest as the reform is limited.</p> <p>Persons wishing to preserve rights would have to pay legal fees and costs, including registration fees.</p> <p>The Keeper of the Registers would need to adapt processes to comply with the new law.</p>
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**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:**



**Lady Paton, Chair, Scottish Law Commission**

**Date: 25 March 2019**