Consolidated responses to:

Discussion Paper No 164 on Section 53 of the Title Conditions (Scotland) Act 2003

DP No 164 on Section 53 of the Title Conditions (Scotland) Act 2003: Consultees' responses

This document contains, immediately below, a list of those who have responded to the Discussion Paper.

Their comments in relation to the individual proposals or questions have been cut and pasted so as to follow the relevant proposal or question, and any general comments have been cut and pasted into the section at the end of the paper.

Some of those who responded commented only on some questions, and the table shows the comments that were made.

Others who responded asked for all or part of their comments to be treated as confidential, and again the table does not show confidential responses.

List of those who submitted responses

1. Aberdeen City Council
2. Aberdeenshire Council
3. Dr Craig Anderson, Robert Gordon University
4. Anderson Strathern
5. Argyll Community Housing Association
6. Brodies
7. Brymer Legal
8. Burness Paull
9. Church of Scotland
10. CMS
11. Dentons
12. DLA Piper
13. DWF
14. Edinburgh Conveyancers Forum
15. Faculty of Advocates
16. First Scottish Group
17. Gillespie Macandrew
18. Professor George Gretton

19. Harper MacLeod
20. Keeper of the Registers of Scotland
21. Sarah King
22. The Law Society of Scotland
23. Lindsays
24. MacRoberts
25. Lionel Most
26. Bernadette O'Neill
27. Professor Roderick Paisley
28. Pinsent Masons
29. Property Litigation Association
30. Professor Kenneth Reid
31. Scottish Factoring Network
32. Scottish Water
33. Shepherd and Wedderburn
34. Shoosmiths

1. What information or data do consultees have on:

(a) the economic impact of section 53 of the Title Conditions (Scotland) Act 2003, or

(b) the potential economic impact of any reform proposed in this Discussion Paper?

(Paragraph 1.10)

Respondent	
Aberdeenshire Council	(a) The Council's Legal team 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. (b) It is likely that the clarification of the law proposed in the Discussion paper would at least help to save these additional costs.
Dr Craig Anderson, Robert Gordon University	I have no relevant information or data.
Anderson Strathern	The ambiguities present in section 53 have a negative economic impact because if section 53 may be applicable it is at times not possible to reach a definitive view on whether it does or not. However, in order to arrive at that unsatisfactory conclusion, time (which equates to money for a service provider and its clients) and money (in the form of costs) must be expended. This is unsatisfactory altogether.
Argyll Community Housing Association	(a) No information or data. (b) No information or data.
Brodies	(a) Section 53 of the Title Conditions (Scotland) Act 2003 ("Section 53") has added another dimension to the examination of titles when buying, selling, leasing, developing and funding property. Prior to feudal abolition, third party rights to enforce real burdens were largely ignored unless they were expressly provided for in title deeds. The title deeds to the individual property would be examined and then, at most, the superior would be approached for consent to vary or discharge burdens.

	The introduction of sections 52 and 53 has resulted in lawyers having to cast the net wider when examining title. The titles to adjoining properties have to be checked if there is a hint of a common scheme. The vagueness of the drafting in Section 53 in particular makes it very difficult to decide when and how far to cast that net. While neighbouring proprietors must possess both title and interest to enforce, in some situations Section 53 confers title on many proprietors and, depending on the type of burden concerned, interest can be shown by more remote neighbours all of which results in a large group of proprietors entitled to enforce burdens. 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. (b) Any reform of Section 53 which brings more certainty as to how and when the provision is to apply will save time and money for clients wishing to deal with property in Scotland.
Brymer Legal	I have no evidence of economic impact other than the cost of delay during a conveyancing transaction as investigations are made to try and ascertain who might be “related properties” in a “common scheme” The proposed reforms must, by necessity, have an economic impact. That is a matter for the Commission to identify once all responses are to hand.
Burness Paull	Generally such a provision which is considered opaque or lacks clarity will inevitably lead to an assumption that there are implied enforcement rights. This assumption leads to additional costs in fees as well as time and delays in order to protect against the uncertain and provide the certainty required (although it will not yield the absolute certainty you would want) to proceed with development and the capital expenditure that will entail.

	Of course each case will depend on the real consequences to the proprietor when a view may be taken on the risk especially given other factors such as applying for planning or a licence will flush out potentially issues and will also provide an opportunity for objectors.
Church of Scotland	a) dealing with the potential application of s.53 in a property transaction often requires additional expense for solicitors and clients in time taken to investigate titles to neighbouring properties and the cost of obtaining copies of deeds to ascertain if there might be a common scheme, and occasionally the cost of obtaining a title indemnity policy where it is not possible to convince the purchaser's solicitor that there is no common scheme or title to enforce or where the purchasing client or their solicitor is not able or willing to take a view. b) the reforms proposed in the Discussion Paper are likely to remove the need for the additional work referred to in paragraph a) and therefore lessen the economic impact for solicitors and clients.
CMS	The lack of certainty in the extent of current Section 53 of the Title Conditions (Scotland) Act often causes delays in transactions, particularly those for development sites and can require parties to insure against the risk of enforcement under Section 53 even where the likelihood of its application is felt to be remote. One of the main issues is that the position in relation to any burden from pre-28 November 2004 can't be determined without examination of neighbouring titles which can be costly and cause delay.
Dentons	(a) the economic impact of section 53 of the Title Conditions (Scotland) Act 2003 is in our experience, significant. We have some examples of extra costs that our clients have had to incur due (in part) to the uncertainty that this provision confers: (i) An application to the Lands Tribunal for a variation of title conditions to allow a Mews house to be built in rear ground of a property in Edinburgh's New Town; (ii) 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 Shawlands, Glasgow.

	Additionally we are aware that even if a developer client takes a commercial view of the risk of enforcement being low (based on the advice of their lawyers), sometimes they are still required by a risk averse funder to take out title insurance regardless. Less significant and less traceable costs are the time that it costs solicitors to examine titles, and the cost of ordering extra deeds to establish if there is a common scheme. These costs are however incurred across a far greater number of transactions and therefore affect more clients. Finally, 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.
DLA Piper	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. The potential economic impact of any reform which clarifies the law will be positive for the real estate sector. Reducing uncertainty over whether (and by whom) potentially problematic real burdens may (or may not) be enforceable should have the effect of increasing investor confidence.
First Scottish Group	We have no information on this so are unable to comment.
Gillespie Macandrew	As it stands there is an element of uncertainty, and whilst I personally don't have experience of having to obtain title indemnity policies in circumstances where s53 doesn't hold the answer, I have certainly had to go to the cost of obtaining title deeds for other properties to investigate the position further. There are of course costs to the client here in terms of the outlay and indeed my time for perusing the deeds. More often than not this ends in a discussion with the client which is not particularly conclusive, and leads to frustration. The reforms proposed will lead to more clarity and as such will allow practitioners to advise their clients more efficiently and effectively. This will invariably cut down on research time, and will mean genuine savings for the client.

Harper MacLeod	Many of our solicitors had experience of economic impact in relation to Section 53. The economic impact was largely to do with extra legal expenses in: (a) Obtaining expert Opinion as to whether or not Section 53 applied. (b) Incurring extra legal expense in dealing with queries involving the sale of part of large landed estates where other parts of the estate had already been sold subject to burdens in circumstances where arguments arose as to whether the two properties could be said to be related despite the fact they were miles apart. It was not considered that there would be any potential economic impact of any reform proposed in the Discussion Paper in the sense that a reform would not make things worse. Our firm were involved in the *Humby Road* case which is referred to in the Consultation Document. Confidentiality means that we cannot disclose figures but there was a clear economic impact because of the suggestion of properties being related and part of a common scheme.
Sarah King	(a) Here I can offer only anecdotal evidence. Before becoming an academic I was a lawyer in practice in commercial litigation with a focus on property related disputes. I have experience of title disputes generally and of cases in the Lands Tribunal for Scotland. The practical problem I experienced with section 53 was the uncertainty resulting in increased costs for clients. As anticipated in para 1.10 of the Discussion Paper there was an increased need to examine title deeds. The problem for clients was that this increased legal work would not result in a definitive answer, only an answer along the lines of X, Y and Z "may have title to enforce against you" or "you may have title to enforce against A." This is clearly not an acceptable answer either for someone seeking to enforce a burden or wondering whether a burden can be enforced against them. From my experience there can also be increased costs either before or at the start of a Lands Tribunal case due to time spent corresponding with other parties over whether or not they have title to enforce the burden (and to be involved in the Lands Tribunal process). The uncertainty also makes it difficult to advise clients on the approach that should be taken when faced with a burden that "may" be enforceable. Should the client go ahead with their plans and see if the breach is challenged (putting the onus on the benefited proprietor to do something)? Or should the client play it safe by seeking a discharge either from a majority (s 33) of a (likely undefinable) whole community, from all neighbouring properties (s 35) or by using the "sunset rule" (s 20)? The risk is that this brings the burden to the attention of potential benefited proprietors who may have let the plans go ahead unhindered but who now decide to take

	enforcement action. (b) The Commission's proposals should lead to increased economic efficiency by removing uncertainty as to who has title to enforce.
The Law Society of Scotland	We are not in a position to provide any specific data on the economic impact of current section 53 provisions or on the potential economic impact of any reform which is proposed. We can however provide some general remarks in relation to the economic impact of the current section 53 provisions in practice. In the experience of our members, the majority of costs incurred addressing section 53 provisions are typically incurred 'internally' to a legal firms' 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. We are not in a position to quantify the extent or costs of this.
Lindsays	None, perhaps surprisingly as a rural property lawyer the author has never encountered section 53.
MacRoberts	It is extremely difficult to assess the potential economic impact that any reform might make. The Discussion Paper indicates that there have been issues with large commercial transactions not proceeding in light of the uncertainty brought about by Section 53. I have not personally had that experience and I have not heard of an issue of that nature in my firm. Nevertheless, it is clearly desirable that all legislation is as clear in its operation as possible having regard to the policy intentions of the Scottish Parliament and that all legislation can therefore be applied to legal practice and (in this case) property transactions in a fair and efficient manner so that members of the public can clearly identify where they stand.

	Clearly, Section 53 is causing issues in view of the uncertain application of the legislation at the moment and I agree that reform is required. Making such reform in the manner set out in the Discussion Paper will hopefully provide the necessary clarity so that the legal profession can advise their clients with a greater degree of certainty. It is my view that this will have a beneficial consequence in maintaining Scotland as a good place to conduct property business even though the actual impact cannot be accurately assessed.
Bernadette O'Neill	(a) In my research it was disclosed that one client estimated having spent £20,000 in establishing his title to enforce under s53 and expected to spend a further £20,000 on enforcement proceedings. Re the cost of the title insurance, some examples were provided by solicitors as follows: 1. Premium £4,500 paid for £100,000 of cover. 2. Premium £5,000 or £6,000 (unsure of exact figure) paid for a development valued at £1 million. 3. Premium £15,000 (development value not disclosed but this was the level charged on a regular basis). 4. Premium £100,000 proposed for high risk development – no confirmation of this policy proceeding. Insurers' data (incomplete as not all willing to disclose) 1. Premium charged ranges from 0.05% to 0.12% of developed value (down from a high of 0.2% pre-recession). 2. Premium charged ranges from 0.035% to 0.04% of developed value. 3. Premium ranging from 0.06% to 0.12% of developed value. Further breakdown of the premium charged - pre-planning scenario (0.12% of developed value) and a post-planning scenario (0.1% of developed value), or a continued breach situation (0.06% to 0.08% of developed value). Those who provided details of costs said that the level of premia had decreased significantly since the recession but there was also mention of increased competition in the title insurance market in Scotland which may have had an impact.

	Insurance premium tax of 12% is also payable on the premium. Some Insurers will charge a higher than usual premium if e.g. there has been an approach to a possible benefited proprietor. If there has been an offer to grant a waiver for a sum of money, e.g. £10,000, the excess on the policy in the event of a claim will be set at £10,000. Legal costs My Questionnaire asked: **Is there any change in the time, cost and complexity involved in finding out who has implied enforcement rights post-TCA? Please explain**. In the free text responses: 16 responses specifically mentioned increased costs for clients without giving more detail on the costs. 25 responses said that finding out who has implied enforcement rights post-TCA involved a lot more by way of title investigation, without giving more detail on the costs. Most of the solicitors interviewed said that they had to carry out more detailed title examination than they would have done previously and this meant additional costs for their clients, without giving more detail on the costs. On solicitor said that in a fixed fee scenario the firm had had to absorb some of the extra costs for the title examination. Two solicitors said it is more expensive, complex and takes longer to investigate neighbouring titles if they are sasine ones, without giving more detail on the costs. (b) Unknown
Professor Roderick Paisley	I have been asked for an opinion on the operation of 2003 Act, s.53 on about a dozen ocasions since its enactment. Invariably this has been to enable the developer to obtain title insurance against because,

	even before instruction, the client has been aware no definite and clear answer to the matter of enforceability of real burdens under this section has been possible. Very rarely have the clients decided to approach the Lands Tribunal because of the possibility of delay of the development or publicity of the existence of the implied right of enforcement. In one or two cases the solicitors acting have told me that the possibility of s.53 rights has been the reason given by a bank for the withdrawal of an offer of finance for a development.
Pinsent Masons	We do not have any objective data on how much additional time is spent addressing issues with implied rights of enforcement under section 53. However we are aware that it does add significantly to the time we take to carry out an examination of title and establish who may have a right to enforce a real burden. This has the greatest impact on our developer clients who wish to bring land back in to economic use. The uncertainty about who can enforce historic use restrictions adversely affects our clients by increasing the costs and the time taken to conclude a transaction. The potential economic impact of the proposals to clarify the law will reduce the time taken to complete the title investigation thereby reducing costs and will increase certainty allowing development to proceed with confidence bringing land back in to economic use.
Property Litigation Association	Section 53 is not particularly well worded and creates a degree of uncertainty. More than that, we cannot comment on economic impact.
Scottish Factoring Network	Members of the Scottish Factoring Network believe there is the potential to increase their ability to recover costs, therefore the economic impact would be positive. The proposals have the potential to protect the investment of housing associations and other owners in their existing homes by providing a mechanism to enable communal repairs to be carried out. At present many tenements require urgent or critical repairs to common parts (SHCS) yet have no means of getting other owners to agree to repairs. A mechanism to require investment and upkeep in common parts would help protect buildings covered by the new conditions and limit the longer term costs of repairs.
Shepherd and Wedderburn	Often, the additional title investigations required to establish whether or not there may be enforcement rights arising under section 53 add significant additional time and cost to transactions, which may not

	always be justified in cases where no certain outcome can be reached. Often the parties will resort to title indemnity insurance, which carries a further additional cost to clients.
Shoosmiths	(a) In our experience there has been a negative economic impact. 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. The client then has spent a significant amount of money on these additional investigations only to be faced with taking the same risk as they were originally presented with i.e. that nobody would seek to enforce against them if they, for example, build in breach of a use restriction. Using that example, if someone did then seek to enforce, they would have the additional costs of defending an action, paying a sum of money to avoid the nuisance factor, or (worse case) having to reverse a development which had been constructed in contravention of a use restriction. These challenges could come from persons who were never intended by the original granter to have title to enforce the real burdens but are just looking to create a nuisance and happen to have an argument as regards implied rights to enforce under Section 53. It is in our experience fairly common to recommend in cases where the burden is likely to be breached by the clients' development plans to obtain title indemnity insurance to cover the risk of enforcement in the future. The cost of this insurance can be massive if the gross developed value of the site is anticipated to be high. That insurance may well not have been recommended if the provisions of Section 53 were clearer, allowing the client to take a more informed and educated risk. As we agree with the majority of the reforms which seek to clarify and restrict the application of Section 53, we believe that the economic impact of suggested reform must be a positive one, or have no impact, on the basis that the examples of additional costs we have given above would not apply where the provisions of Section 53 were clearer and more restricted.

2. 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 7.9)

Respondent	
Aberdeen City Council	Agreed.
Aberdeenshire Council	We agree with this statement.
Dr Craig Anderson, Robert Gordon University	I agree, subject to my comments here and below. However, if used in provisions replacing ss. 52 and 53, the term "community" is likely to prove no easier to define than "related properties". I would suggest that the term should be avoided, or should be defined by reference to the more familiar term "common scheme".
Anderson Strathern	No objection to this proposal, subject to what is determined to be the definition of "community".
Argyll Community Housing Association	As acknowledged in the discussion paper I consider the main issue initially is identifying the community which, in my experience with mixed tenure estates/schemes – tends to be the main problem. I don't consider it necessary for the wider community to have implied rights to enforce, unless it has a detrimental effect on crucial services to the estate – e.g. accesses and safety. I agree that there should be an interest to enforce.
Brodies	The answer to this question will depend on how "community" is to be defined. If there are clear rules on how community is to be defined, it should work. We appreciate than any amendment of the legislation will result in changes. However, we would caution against allowing such communities becoming too large. Giving a community of proprietors the implied right to enforce burdens could potentially cast the net even wider than it is at the moment. If an identifiable community is to be given the implied rights to enforce, this could include properties subject

	to a Section 52 common scheme and bring back into play burdens which, if not preserved, were extinguished by feudal abolition. We wonder if there has been a push to extend enforcement rights? Those with title to enforce must also have interest to enforce. Interest to enforce has also become a vague concept which is something of a moving target. Through decisions of the courts and Lands Tribunal, we now seem to have reached a point that a proprietor need only show that the breach has something more than a trivial effect on the value or enjoyment of their property. A clear statement or guidance on the level of interest which must be shown would be welcomed. The Discussion Paper refers to the use of Section 35. We wonder how often Section 35 is being used to vary or discharge burdens? Our experience would suggest rarely if ever at all. When problem burdens arise, many proprietors do not want to alert neighbours to the possibility that they have enforcement rights or do not want to spend the time and effort which would be involved in getting their immediate neighbours to sign up to a Section 35 variation or discharge. The need to alert all other potential enforcers within the whole community can also be off putting for those seeking to vary or discharge and can mean that title insurance cannot be obtained.
Brymer Legal	Agreed.
Burness Paull	It would be beneficial to provide certainty that all owners within the community would have the implied right to enforce (rather than an arbitrary restriction which in certain circumstances would produce an unfair result), is it certain enough? The main issue being the question of the community being appropriately defined. The extent of “community” could be considered to be subjective. Some may consider themselves to be part of the community, others not (depending on the circumstances in question). Given the rules referred to later on for what is a common scheme could this also be used as a basis for what is a community? The original consultation was clear that the majority do not think all owners should have the rights and that some form of restriction would be more akin to owners’ expectations. Giving the right to all will still rely on owners expectations/understanding of what is the community and how is that to sit with what is a common scheme.

	For example, a difficulty may arise where there are mixed housebuilders in close proximity of each, which formed part of a larger area of ground purchased by an initial area. In such an event, they would clearly be a community even though there are different deeds of conditions in place. However, often there will be an underlying infrastructure deed of conditions covering the whole site. If the whole development was considered the community and subject to a common scheme it would be necessary to have restrictions such as proximity (referred to later on) to make operation of the right sensible and in line with expectations. Is it necessary to define community if the other restrictions apply? There is reference in the DP to a suggestion by MacRoberts regarding planning and could other sources be used to define e.g. subject to a single planning permission including any variations, or subject to a single planning agreement? Other factors could be considered e.g. the more dense the development the smaller the "community" whereas a smaller development of say 25 houses should include the whole in community. Of course interest would still be required.
Church of Scotland	This seems a sensible approach – owners of properties within, say, a tenement or a housing development would expect to have the right to enforce the burdens applying to all the properties within the tenement or development, subject to the application of s.8 (3) in assessing their interest to enforce.
CMS	We would agree with this proposal.
Dentons	Agreed.
DLA Piper	We agree with this general principle, for the reasons explained in paragraphs 7.6 and 7.9 of the Discussion Paper.
DWF	Yes.
Faculty of Advocates	This is a policy objective, the identification and specification of which is primarily a matter for the Government and Parliament. That is particularly so since section 53 was apparently intended to confer enforcement rights which did not exist under the previous law. We see no particular objection to such a policy, as long as it is recognised that it confers rights which the granters of the burdens, as understood at common law, did not intend to grant. This point is important, because it emphasises the need for the legislation to state with precision when the enforcement rights arise. The deeds, construed by the courts

	on normal principles, cannot themselves perform that function. It seems to us that a failure to specify these circumstances with precision is the fundamental flaw of section 53 in its present form. The question acknowledges that there is a need to ensure there is a proper definition of the "community" which is to receive this title to enforce. We agree. This is critical if the legislation is to function properly. The question asks about a *right to enforce*. We consider it is important to keep in mind the distinct elements of a right to enforce, being title and interest. The need for both of these elements is clearly established by section 8 of the 2003 Act. If, as is apparently the objective of section 53, title to enforce is to be conferred upon a wider class, interest becomes a more important factor in limiting enforcement rights to those who can demonstrate that they would be materially affected by non-compliance with the burden. Conferring title on a wider class of people does not necessarily mean that all of them will thereby acquire enforcement rights, since many of them will lack interest.
First Scottish Group	We agree with the above proposal. This could operate effectively in a Tenement of Flats and in Developments governed by a Deed of Conditions where the community is generally readily identifiable. In housing estates and other communities with no Deed of Conditions then any amenity burdens would require to be mutually enforceable by the owners in the estate. If this was not the case, any amenity burdens would be extinguished unless they were saved by savings notices. This would enable co-proprietors to enforce burdens, even if in some cases they had no rights of enforcement before the appointed day. In the latter case problems may lie with the identification of the community.
Gillespie Macandrew	I agree with these comments. Put simply, given this is the pattern that has been adopted for developments commenced post-28 November 2004, then there is no obvious reason why this should not be the position pre-28 November 2004. What is key is that 'community' is clearly defined, more on this below.
Harper MacLeod	We considered that owners of properties within an identified community should have an implied right of

	enforcement in respect of a common scheme of real burdens subject to “community” being appropriately defined.
Sarah King	Agreed. The problem with the current legislation is in defining the community created by s 53, not the underlying policy.
The Law Society of Scotland	We agree with this statement, noting that such owners should have title to enforce, with their interest to enforce being assessed in terms of section 8(3) of the Act. We consider that there requires to be a degree of flexibility to ensure that relevant property owners have title to enforce. We are in favour of a reasonably broad test for title as we consider that this can be narrowed in scope to an appropriate extent by the separate test of interest to enforce being assessed as a secondary matter. It is likely to be expected by those property owners who share the same burdens as another owner that they will have the right to enforce such burdens.
Lindsays	Yes, but as alluded to above defining “community” is potentially very difficult as it means different things within difference geographical areas. In a crofting area the “community” might refer to a township or a wider area spread over a considerable area, whereas in an urban context it could be limited to a tenement block or cul-de-sac or a few streets within a suburb.
MacRoberts	I agree with this proposal.
Lionel Most	I think the crux of this is the definition of “community” which should be done in a way which creates certainty.
Professor Roderick Paisley	I agree.
Pinsent Masons	Agreed subject to “community” being appropriately defined.
Property Litigation Association	We agree. The concepts of title and interest work well together; the latter being an important restriction in practice to how the former would operate.
Professor Kenneth Reid	I agree.

Scottish Factoring Network	Members of the Scottish Factoring Network support this proposal. The proposal would help the majority in a stair or community to ensure that properties are repaired and maintained, protecting the property and also preventing longer term potential safety problems with buildings in disrepair.
Scottish Water	Scottish Water agrees with this proposal. Owners of properties within an identifiable "community" should have title to enforce, and their interest should be assessed in terms of Section 8(3) of the Title Conditions (Scotland) Act 2003.
Shepherd and Wedderburn	We have sympathy with this proposal, but it is essential that clear provisions are made about how to identify the community in any circumstance.
Shoosmiths	We agree with this. Although there are cases where it is unclear whether or not an ability to enforce within the community was ever envisaged/required, there are many clear cases where that was the intention and those cannot be lost. Planning law and building control cannot provide a complete answer.

3. 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 7.10)

Respondent	
Aberdeen City Council	Agreed.
Aberdeenshire Council	Again, we agree with this statement. We think a new composite provision would also help to resolve issues relating to Section 52. For example, we have transactions involving landed estates where the foundation deed covers a huge area. If break-off titles containing the same or similar burdens

	'automatically' qualify under Section 52, then you could have a community in which properties with qualifying burdens are a long way apart.
Dr Craig Anderson, Robert Gordon University	I am entirely in agreement with this. As a teacher of property law, I take some comfort from the comment by Professor Rennie that is quoted at paragraph 5.62 of the Discussion Paper, that s. 53 is "almost unintelligible and is very difficult to teach". 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?
Anderson Strathern	Agreed.
Argyll Community Housing Association	Agreed – the change would be an advantage to clarify the provision of implied rights to enforce real burdens in common schemes – provided this clarifies the meaning of "common scheme" which would make it easier to follow.
Brodies	In principle this would be a good move and make things simpler but we wonder how it might be achieved. If the new provision involved an "identifiable community", depending on how that community is defined, enforcement rights are likely to be extended or restricted. We would assume that if rights are restricted, a preservation scheme would operate to allow those affected to preserve their rights.
Brymer Legal	Agreed.
Burness Paull	Yes, this would certainly provide a more straightforward position.
Church of Scotland	Agreed – clarification on the definition of "common scheme", "related properties" and title to enforce would be beneficial. The problem of interpretation largely lies in section 53, and it does not seem to us that any material change to section 52 is required other than to clarify the definition of "common scheme".
CMS	We would agree with this proposal.

Dentons	Agreed.
DLA Piper	We agree with the proposal that sections 52 and 53 should be replaced with a single new provision.
DWF	Yes.
Faculty of Advocates	We agree that section 53 should be replaced. It is poorly expressed, almost impossible to understand and difficult to apply in practice. We are uneasy about any replacement of section 52. We note that the SLC's reference from the Minister was to review section 53. As reported in the discussion paper (paragraphs 4.18 to 4.20), section 52 was intended to restate the common law rule for implied enforcement, derived from Hislop, and section 53 was intended to create a new rule conferring implied enforcement rights more broadly. It seems to us that most of the difficulties arise from the attempt to create new enforcement rights rather than from the restatement of the existing common law rule. It would be very unfortunate if a second attempt to achieve the policy underlying section 53 were to introduce confusion or uncertainty to the preserved common law rule.
First Scottish Group	For the reasons stated at Paragraph 7.10 we agree that a new clearer provision should replace sections 52 and 53 of the 2003 Act.
Gillespie Macandrew	I agree with this. One clear policy will be far easier to follow for practitioners and clients alike.
Harper MacLeod	It was agreed that Sections 52 and 53 should be replaced by a new provision.
Sarah King	Agreed. This would be make the legislation more coherent. My experience as a lecturer in property law is that students struggling with grasping the relationship between s 52 and s 53 and there is no obvious logic as to why there are two similar but distinct provisions. If this is difficult for law students to grasp, it must also be difficult for members of the general public (who, if property owners, may be affected by these provisions).

The Law Society of Scotland	Yes, we consider that these sections should be replaced with a new provision. Sections 52 and 53 do not currently dovetail with each other in a clear manner and a new provision with greater comprehensibility would be welcome.
Lindsays	Yes.
MacRoberts	I agree with the view of your advisory group that having 2 separate provisions on implied rights to enforce real burdens in common schemes under Sections 52 and 53 makes part 4 of the 2003 Act more complex than it needs to be and accordingly Sections 52 and 53 should be replaced with a new provision regulating implied enforcement rights in relation to common schemes.
Lionel Most	Agreed.
Professor Roderick Paisley	I agree subject to the new provisions being less opaque. However, the proposal envisaged by the Scottish Law Commission does not deal with the rights of third parties (in the form of a number of dominant proprietors in servitudes affecting a single area) to enforce servitude conditions as that matter will still rest on the common law. There is an overlap with real burdens to a degree in that, for example, the obligation to maintain a road subject to a multiplicity of servitudes may be governed by a scheme of real burdens where the dominant and servient tenements are members of the community (and this s.53 applies) or they may be governed by servitude conditions where the dominant proprietors probably have a common law *ius quaesitum tertio* to enforce the maintenance and use obligations e.g. no use by heavy lorries or an obligation to repair. For an example relating to a canal see ***Tennant v Napier Smith's Trustees* (1888) 15R. 671**. The reform proposed in the Discussion Paper will not address this issue of servitude conditions. I do not think it should attempt to do so. Indeed the enforcement rights of servitude conditions by third parties should be expressly preserved.
Pinsent Masons	Agreed. It would greatly simplify and speed up the conveyancing process if there was just one law of implied rights of enforcement.
Property Litigation Association	We agree. As stated, they are not particularly well worded and create confusion.

Professor Kenneth Reid	Section 53 must certainly be replaced. I am less sure about replacing s 52. A key requirement of any new provision is that, while it may *reduce* existing enforcement rights (provided there is provision for preservation by registration of a notice), it must not *increase* them. To increase enforcement rights would be difficult to justify in policy terms. And it might create some potentially tricky problems including (i) the possible revival of burdens which, due to the absence of a benefited property on the appointed day, were extinguished on that day; (ii) action by the new enforcer in respect of a breach which took place before the new enforcer acquired any right; and (iii) ECHR problems. 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 a series of bright-line rules which do not, however, go beyond the four situations already identified in s 53(2). This approach may also be attractive presentationally in respect that it does no more than fix the problem which the SLC was asked to fix. Nonetheless, I accept that there is a case for replacing s 52. Two arguments seem especially strong. One is convenience. It is awkward and confusing to have two separate and overlapping provisions (ie ss 52 and 53) each of which deals with burdens imposed before the appointed day under a common scheme. The other is the deficiencies in s 52, and in the previous common law which s 52 seeks to re-state. The great merit of s 52, as compared with s 53, is that it is possible to tell, by looking at the burdens writ alone, whether neighbours have enforcement rights. The great difficulty with s 52 is that, in a case where the common-scheme burdens were imposed in a sequence of separate split-off deeds (ie the *Hislop* type (1) case but where a deed of conditions is not used), the burdened proprietor has the unpleasant and expensive task of trying to identify the other relevant split-off deeds in order that he might discover which of his neighbours have enforcement rights. The only way of mitigating this difficulty, I think, is to limit the pool of potential enforcers by means of a distance requirement, as the SLC proposed in its original Report and which it again proposes now. I return to this topic in my response to proposal 9.
Scottish Factoring Network	Members of the Scottish Factoring Network support this proposal.
Scottish Water	Scottish Water agrees with this proposal which would simplify the law.

Shepherd and Wedderburn	Agreed. Having two similar but separate provisions complicates the title investigation process, particularly when the two are not necessarily mutually exclusive.
Shoosmiths	We agree. We do not think having two very similar but different sections (52 and 53) is helpful (albeit we understand the background to why the legislation ended up like that). They are in desperate need of replacement in order that they are fit for purposes/useable. In our experience Section 52 is usually overlooked in favour of Section 53 in any event, as that is the wider provision which therefore poses the most risk (in the case of burdened proprietors) or the most potential (in the case of benefited proprietors).

4. (a) What general comments do consultees have in relation to defining "common scheme"?

(b) Do consultees agree that whether there is a common scheme should be determined by considering as a whole the deeds which impose the burdens?

(Paragraph 7.14)

Respondent	
Aberdeen City Council	Historically, the Local Authority held Title to large areas of ground on one Estate Title. Within that large area there are many different Tenement Buildings and Housing Estates where the Local Authority have split off individual homes/flats under the Right to Buy Legislation. The Local Authority still own the majority of homes/flats in these areas. The sales were effected by Disposition, with an attached Schedule purporting to include "Community Burdens". Under the current s53 regime, as the Council's own Title is the large historic sasine title, it does not include the same or similar "community burdens" and therefore we are left in a situation where the Council does not form part of the Common Scheme within large tenement buildings or housing estates. This is an unsatisfactory and unintended outcome of the policy decision taken by the Council on the way to split off these properties at the outset of Right to Buy. Surely the private owners within these tenements/estates should be able to enforce the "Community Burdens" against the Council, and likewise the Council should be able to enforce against

	the private owners. We therefore request that the definition of Common Scheme should take the foregoing situation into account.
Aberdeenshire Council	**(a)** We think there may be circumstances in which a definition would be useful, but a general definition might not be flexible enough to be fair in all cases. We favour the idea of having a definition that lists a number of bright-line alternatives, including the 4 metre rule, under any of which the burden would qualify. **(b)** We agree with this.
Dr Craig Anderson, Robert Gordon University	(a) This is a familiar term, and is in broad terms readily intelligible. I agree that it should continue to be used. However, I would suggest that the definition should focus rather less than the Discussion Paper does on the idea of the burdens having to be identical or similar. Such a definition risks being at once too broad and too narrow. It is too broad in that it risks holding a common scheme to exist over too separate developments that really have nothing in common other than the burdens having been imposed using the same law firm's style deed of conditions. It is too narrow in that it excludes cases where the burdens are different but are in some sense equivalent. For example, the burdens affecting the three units in the development in *Cooperative Wholesale Society v Ushers Brewery* 1975 SLT (Lands Tr) 9 could not be described as "similar" without unduly stretching the meaning of that word. Nonetheless, it makes sense for there to be reciprocal enforcement rights in such a case. My own view of the authorities is that, for a common scheme to exist, 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. Similarity of the burdens affecting different units will certainly be strong evidence of such an overall plan, but cannot be determinative of its existence. (b) Agreed.
Anderson Strathern	(a) The present lack of clarity over what "common scheme" means and how the presence or absence of one is to be assessed is undesirable and problematic. (b) Views are mixed. On one hand, there is a sense that individual burdens are counterparts of one another and that, therefore, if a particular burden is not present in one title, the owner of that property should not be able to enforce that particular burden against another owner. On the other hand, if, for

	example, if preservation of amenity is considered in broader perspective it makes sense to consider whole sets of burdens.
Argyll Community Housing Association	(a) We have a number of difficulties in identifying common schemes which stem from inconsistent titles, a variety of different estate maps and different areas of common ground. This leaves us with no clear definition of how to identify the common scheme. On the ground schemes can be assumed as one thing but title deeds may not provide clarity because of inconsistent plans, different burdens and conditions, and no defined estate. The task of inspecting all title deeds is often difficult and costly and can result in us still being unclear on the outcome even after investigation. As detailed in the paper it would be difficult to ascertain how a "common scheme" could best be defined as its not a "one size fits all" situation with a different interpretation of each situation. (b) No, in our experience it would simplify the process if there was a clear definition of a common scheme rather than having to inspect each individual title which can be into the hundreds on some occasions, with a variety of different burdens and conditions. The issue is how to define it in a different manner – for our purposes it may be what the Council's originally defined scheme was but this would not cover every situation or where the schemes have been developed in future years.
Brodies	**Defining common scheme** A definition of common scheme would be welcomed. **Identifying extent of common scheme** One of the problems with common schemes is the uncertainty as to how far they stretch meaning that numerous titles have to be checked for same or similar burdens. A clear rule, whether that be by an "identifiable community" or a distance requirement would assist. **Applying a distance requirement**

	If “identifiable communities” as suggested above become quite large, a distance limit could assist to limit the enforceability of the common scheme to only part of the identified community. While that containment would be welcomed, it may result in the loss of existing rights under Section 52 if Sections 52 and 53 were to be combined as suggested above. We would assume that any rights which could be lost could be preserved under any preservation scheme. **Identifying same or similar burdens** Another problem to be addressed when defining “common scheme” is deciding what the term “same or similar” means. While a full discussion on the point did not take place, the case of *Russel Properties (Europe) Ltd v Dundas Heritable Ltd* has muddied the waters on this question, seeming to contradict what was said in the case of *Co-operative Wholesale Society v Ushers Brewery* It would be useful to have a clear rule setting out when burdens are the same or similar. **How many same or similar burdens?** When seeking to define a common scheme, it will have to be clear whether one same or similar burden in a number of titles is enough for a common scheme to be established. Also, it will have to be clear to what extent, if at all, the other burdens in the titles to the various properties become enforceable by the neighbours. While we recognise that Section 57 will continue to prevent burdens which are no longer enforceable being resurrected, if all the burdens were to become enforceable, we fear that may extend rights of enforcement beyond those which exist at the moment. **Sharing common property** The mention of a shared boundary wall in the *Thomsons Exr* case indicating a common scheme could multiply the number of common schemes in existence if it were relied on. (See our comments below about common maintenance and property). At the same time, that same case seemed to restrict the number of proprietors who could enforce the burden under the common scheme to those sharing common property. This would seem to be too restrictive in situations where there are a number of surrounding properties burdened with the same or

	similar burdens but not sharing a common feature. There may be good reason for those other proprietors to object to a breach of a burden. They should not have to rely on the immediate neighbour taking action on their behalf. It may be the case that Rule 3 about properties close together could address this potential gap. **Considering the deeds as a whole** (b) Against a backdrop of clear rules and restrictions as to how far the common scheme extends, when burdens are the same or similar and what deeds will have to be considered, yes we agree that deeds should be considered as a whole.
Brymer Legal	The reference in the Explanatory Notes is helpful. It should not be assumed that solicitors and their clients read the Explanatory Notes. I agree with (b) above.
Burness Paull	(a) It would certainly be preferably to have some further clarity on what constitutes a common scheme. Same or similar burdens which share the same purposes i.e. use restriction need not be identical or possibly even that similar to try and achieve the same effect i.e. not to be used for trade or nuisance. The definition could bring in the wording from the explanatory note and go further for clarification. (b) It would be useful to set out parameters for determination and all or nothing enforcement would perhaps be clearer but what if some clearly matching ones fell because others were missing or were not clear? Generally speaking the deeds themselves will often provide the clearest evidence. A concern might be if two separate titles formed part of a larger area of ground may years before and that area of ground is very large. However, that concern will be largely eliminated by having to demonstrate both title and interest to enforce. Could there be something else to consider other than the deed for example as mentioned above subject to a single planning permission or planning agreement or the density or otherwise of the development, use e.g. commercial might have larger subjects further away from each other.
Church of Scotland	a) Generally agree with the policy that provided that there is an identifiable community, with a relationship amongst the properties, there should be mutual enforcement rights for the owners within it regardless of whether currently the right is express, implied or not referred to in the titles. Following

	feudal abolition and the fact that there are no longer superiors to enforce burdens it is important that property owners have enforcement rights. b) Yes.
CMS	We would agree with the approach of looking at the whole deed rather than any specific burden in isolation. Where a property is burdened with a use restriction it would be helpful if the legislation clarified whether it is a requirement that any use restriction on the property seeking to assert a common scheme requires to be the same (so restricted to exactly the same use) rather than leave this open to interpretation on a case by case basis.
Dentons	(a) We agree that the provisions of the 2003 Act are unclear and require reform to bring more certainty to the position. (b) We would need further information on how this would be applied to comment fully. We would be concerned that this could lead to inequality with some properties having burdens enforceable against them when they are not mirrored in a neighbouring deed merely because the majority of other burdens in their burden deed are similar to the burden deed of a neighbouring property.
DLA Piper	(a) We agree with the comments in paragraph 7.13 of the Discussion Paper. The concept of a "common scheme" does not lend itself readily to a precise statutory definition, and each case should be considered on a case by case basis in order to retain an element of flexibility, with some assistance to be had from the explanatory notes to the 2003 Act. (b) We agree that the question of whether there is a common scheme should be determined by considering the burdens affecting the relevant properties as a whole, as opposed to individual burdens. In relation to this point, the argument put forward by Professors Reid and Gretton in Conveyancing 2012 (referred to at paragraph 5.16 of the Discussion Paper) is a forceful one.
DWF	(a) No comment (b) Yes
Faculty of Advocates	We agree that it would be helpful to provide a statutory definition.

	Care should be taken to ensure, first, that the definition satisfactorily encapsulates the concept of a "common scheme" as it was understood at common law. Unless it does so, any reform would risk undermining the preservation of the common law rule presently achieved by section 52. We would regard that as adding to the existing complexity rather than reducing it. Care should then also be taken to ensure that the same definition can meaningfully be used to achieve the policy objective of conferring title to enforce upon a wider class. We make this point because it appears to us that section 53 as presently drafted uses the term "common scheme" in a sense different to section 52 and thus to the common law. That is a source of considerable confusion when one tries to understand section 53. At common law, the concept of a common scheme includes an element of relationship amongst the burdens *and* an element of relationship amongst the properties. It is impossible to understand the concept of a common scheme without taking into account both elements of that relationship. By contrast, section 53 (as presently drafted) purports to distinguish between those two elements: it requires both that the burdens be imposed under a common scheme, and, separately, that the properties have a distinct quality of being related. This immediately causes confusion, since it implies that the 'relatedness' of the properties is not part of the test for the existence of a common scheme under section 53. Further confusion arises from the fact that section 53 does not define the concept of 'relatedness' in any complete way. That leaves uncertain both what is meant by the concept of 'relatedness', and whether any (and if so what) factors of 'relatedness' might remain relevant in assessing whether or not there is a common scheme. It would be unfortunate if any replacement to sections 52 and 53 were to perpetuate this confusion. We do not consider that it would be helpful to define "common scheme" as meaning simply that there are several burdened properties all subject to the same or similar burdens (as do the Policy Memorandum to the Title Conditions (Scotland) Bill, and the explanatory notes to the 2003 Act). A housebuilder may use identical deeds of conditions in schemes in Inverness and Edinburgh. It is plainly not helpful for the purposes of enforcement to consider the properties in these two cities as being subject to a common scheme. This demonstrates that there is more to the concept of a common scheme than the equivalence or similarity of the burdens (as, indeed, is clear from the concept at common law). There was conceptual confusion about this when section 53 was promoted. That is apparent from Mr Wallace's remarks quoted in the Official Report of the Justice 1 Committee of 10 December 2002

	(repeated at paragraph 5.20 of the Discussion Paper). He described the list of examples in section 53(2), as "*circumstances that might give rise to an inference that properties are related properties* ***for the purpose of being treated as a common scheme****"* (emphasis added). In other words, he treated the 'relatedness' of the properties as part of the test for there being a common scheme. That is not how section 53 is drafted. If it proves not to be possible to define the concept of common scheme in a manner which is suitable both for preserving the common law (as presently achieved by section 52) and to form the basis for the extended enforcement right (as presently achieved by section 53), we consider (a) that it would be unwise to attempt to merge both sets of rights in a single rule, and (b) the concept of a "common scheme" should be abandoned as the basis for the extended enforcement right, to be replaced by a precisely-defined basis which is suitable to achieve its policy objective. We agree that whether there is a common scheme should be determined by considering as a whole the deeds which impose the burdens.
First Scottish Group	For burdens to be imposed under a common scheme 2 properties at least must be subject to the burdens. An example would be a Tenement or a housing development/ estate. Community burdens presuppose a community so the properties need to be related in some way and the community defined so that there is no dubiety. In our view the following should be the case: • Burdens affecting properties must be identical or substantially similar. • Burdens should come from a common source, common author or his successors. It does not matter that the burdens in earlier units were imposed by A and those in the later units imposed by B provided there is some element of commonality to connect the two properties. We agree that whether there is a common scheme should be determined by considering as a whole the deeds which impose the burdens.

Gillespie Macandrew	I agree that the deeds should be considered as a whole, as to do otherwise has the potential to make this analysis quite restrictive. To suggest that the burdens have to be identical could be prohibitive.
Harper MacLeod	It was agreed that whether or not there is a common scheme should be determined by considering as a whole the deeds which impose the burden. There was a discussion of the *Russell Properties (Europe)* case and it was noted that the decision was in the context of an interdict. Nonetheless it was considered that too strict an approach had been taken. It was agreed that if there was a mixed estate of commercial and residential properties it should not be a requirement for there to be a common scheme that the burdens be identical merely that they should be appropriate to the type of property while still having a general basic common scheme of burdens e.g. maintenance of private roads, pathways, amenity areas, common maintenance etc.
Sarah King	The legislation should define common scheme. It should include in the legislation that common scheme means "subject to the same or similar burdens" which is currently in the explanatory notes only. It should also require the deeds to be looked at as a whole as proposed at para 7.14.
The Law Society of Scotland	(a) We consider that "common scheme" requires to be carefully defined. It is important that another iteration of section 53 is not created whereby principles lack clarity. We do not consider that the use of indicative examples within the legislation is sufficiently clear. We note that there are practical difficulties with requiring 'identical' burdens to meet the test of a "common scheme" – different solicitors may use different styles or draft burdens in a different manner from another solicitor, but with the same intended burden. Broadly, it is the intention behind the burdens which is sought. We appreciate that a test based on intention is always likely to carry some degree of uncertainty. This may be reduced by tightening the drafting of the concept, and dovetailing any new provision with that of section 52. (b) Yes.
Lindsays	Yes. Take for example a large landed estate where the same burdens appear in title deeds relating to properties miles apart, some of which are located on the mainland and some on distant islands. In such cases there may be title to enforce but no interest to enforce and no common scheme. Style clauses

	are used by estates for consistency but we suspect that the estate does not consider there to be common scheme in the sense envisaged in section 53.
MacRoberts	I believe it is necessary to consider the existence of a common scheme on a case by case basis but I adhere to the comments in Section 7.14 of the Discussion Paper that matters should be assessed with the clarification set out.
Lionel Most	There is merit in having a common scheme only where the burdens are exactly the same or very or mostly similar. There is no problem in cases where all the properties are burdened by the same deed of conditions but as you rightly point out, there are cases where the properties are burdened similarly without such a deed and that too justifies a common scheme. Their problem arises where only some burdens are the same or where there are only one or two burdens in the whole title (albeit the same ones). In those two cases it seems to me more difficult to justify it as a common scheme. However if the rules can be made certain then I think any objection could be overruled.
Professor Roderick Paisley	For all its complexity I think the terms of the 2003 Act was not a particularly bad attempt in defining a "common scheme". The problem is that it can mean many different things to different people. I do agree the various title deeds do require to be examined if one persists with a notion of a "common scheme". That does add cost to any title examination.
Pinsent Masons	A common scheme arises where the same or similar burdens are imposed on 2 or more properties. What is not clear is what is meant by "similar" burdens. Case law has clarified that the burdens do not need to be identical so the use restrictions for example do not need to be the same if there is a mixed use development. However we frequently come across titles where various neighbouring plots were sold off over a period of years and the conveyancing was all carried out by the same firm of solicitors. The same style split off disposition was used for each plot so some of the burdens are identical. However there was no "uniform plan" for the plots and it is just because a common style of disposition has been used that the burdens are identical. We are not sure how to advise the client in this type of scenario, has a common scheme unintentionally been created? We would generally take the view that this does not create a common scheme because there is no uniform plan but we are aware that other solicitors may take a different view.

	We agree with the proposal to consider the whole of the deeds which impose the burdens to establish if there is a common scheme. This would address the situation which we have outlined above.
Property Litigation Association	We agree with the comments in Section 7.14 of the Discussion Paper, although in practice this may lead to further uncertainty (and expense in identifying the community). Common law principles should be adhered to so far as possible.
Professor Kenneth Reid	(a) At the time of preparing the draft Title Conditions Bill, I took the view that the idea of 'common scheme' or 'common plan' was sufficiently clear and well-known to make a definition unnecessary and, arguably, unhelpful. Things that have been written and said since then have caused me to change my mind. It would, I think, still any of the doubts that have been expressed if 'common scheme' were defined as being where two of more properties are subject to the same or similar burdens. (b) I have little doubt that this is already the law, but there would be value in a for-the-avoidance-of-doubt provision.
Scottish Factoring Network	(a) Members of the Scottish Factoring Network believe the definition does provide more clarity but that it does leave space for interpretation. It is suggested using 'common interest' rather than 'common scheme' could remove any uncertainty. It was agreed that the three options were useful. (b) Members of the Scottish Factoring Network agree with this statement. It is deemed to be reasonable and not open to abuse.
Scottish Water	A "common scheme" should be defined by reference to the burdens in adjoining properties being the same or equivalent. Scottish Water agrees with the following from Paragraph 3-22 of "The Promised Land: Property Law Reform" where Professor Reid states: - "In a large majority of cases a common scheme is easy to identify. All that is needed is for neighbouring properties to be subject to the same or equivalent burdens."

	A common scheme is manifest where the same developer sells all the houses in a housing estate subject to a deed of conditions which applies the same conditions to all the houses. Whether there is a common scheme should be determined by considering as a whole the deeds which impose the same or equivalent burdens. The deeds which establish a common scheme may be multiple deeds of conditions.
Shepherd and Wedderburn	(b) We think there is merit in the suggestion that the burdens should be looked at in their totality, but do have concerns that this might serve to increase the burden of investigation of the titles, and there may be difficulties where for example there are differences in drafting, or several properties contain all the same burdens, but others in the same "community" omit some of them. There could still be an element of uncertainty about how "similar" the burdens in their totality need to be, for enforcement rights to arise. Would an omitted word be forgivable, but whole burdens missing altogether mean that that property could not be part of the scheme? Any provision to this effect must strive to provide the parameters in which similarity is to be evaluated.
Shoosmiths	(a) We would suggest incorporating elements of the law of interest to enforce into the common scheme provisions. To *create title* to enforce for proprietors of properties which are far away from the title under review, to then exclude any enforcement by way of the *interest* to enforce rules seems a little nonsensical; the rights should not be *implied* in the first place. Properties should only have implied rights of enforcement where breach of the burden would result in material detriment to the value or enjoyment of the person's ownership of, or right in, the benefited property – but that statement is not clear enough. We comment in a little more detail against Proposal 9 below. We agree that the Hislop 1 situation (same or similar burdens) is the tricky one to get to a certain answer. We do not share the same view as the Scottish Executive (as then was) as regards the requirement for a generic right to enforce; it is too wide. The most common issue we have encountered is where does your review of surrounding titles stop if you keep finding similar burdens in each new batch of titles as you move further away from the burdened property? Only the interest to enforce rules can logically stop your review; but in reviewing titles it is very difficult for a solicitor to assess whether or not there would be interest to enforce, and where the dividing line might be. We therefore believe some element of the interest to enforce rules – but with clearer rules rather than the general principle – should be incorporated in some way in the rules on implied rights to enforce. If the rules on implied

	enforcement rights are clear enough, they can be the controlling factor and interest to enforce could be limited by title to enforce rather than the other way around. (b) We had not considered this as one of the major issues in our experience (the deeds we have reviewed have tended to contain fairly similar burdens (or obviously different ones)) but agree that the deeds should be taken as a whole.

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 7.15)

Respondent	
Aberdeen City Council	Agreed.
Aberdeenshire Council	We agree with this and our comment in the answer to 4.(a) above applies.
Dr Craig Anderson, Robert Gordon University	I am broadly neutral on this proposal. Examples are fine insofar as they actually aid understanding. The examples in s. 53 do not. My only real concern about this proposal is the impossibility of foreseeing every situation, and the risk that individuals will lose enforcement rights that hindsight would say they should have kept.
Anderson Strathern	Agreed. Examples are useful but should not make up the principal expression of the rules.
Argyll Community Housing Association	Agreed, this should simplify the process and give clear rules. Examples can often be difficult to interpret if the situation does not fit clearly with another.
Brodies	Yes agreed.
Brymer Legal	Agreed. It is this very clarity which has been missing. This is essential.

Burness Paull	Agreed. Rules whilst subject to interpretation should produce a clearer more certain result than indicative examples although it is essential such rules are be clearly framed to include relevant current indicative examples and any of those as a result of judicial decisions.
Church of Scotland	Yes, we consider that a statutory list would improve matters and provide certainty.
CMS	We agree with this proposal.
Dentons	Agreed.
DLA Piper	We agree with Proposal 5.
DWF	Yes.
Faculty of Advocates	We agree.
First Scottish Group	We agree with the above proposal. Section 53 was essentially intended to equalise common schemes not meeting the Hislop rules with those which did. Because the section contains indicators of circumstances in which there is a title to enforce, this resulted in uncertainty, lack of transparency of enforcement rights and proved difficult to work on a practical level.
Gillespie Macandrew	I agree with this. S53 is very woolly, evidenced by wording such as '*might* include' before leading into a list of examples which refer to '*some* common feature'. If practitioners are not clear on the limits of this, then how are clients to understand. It is not satisfactory to have to rely on the Courts to make a judgment here.
Harper MacLeod	It was agreed that any replacement statutory provision should set out clear rules as to title to enforce rather than give indicative examples.
Sarah King	Agreed. This helps remove the main difficulty with section 53 which is that the ultimate decision on which properties have title to enforce is a value judgement to be made by the court. Parties' lawyers can only advise as to what a court may decide.

The Law Society of Scotland	Yes, see our answer to question 4(a) above. The effects of the indicative examples are not clear.
Lindsays	To draft rules to cover every situation is perhaps not feasible given the geographical diversity of Scotland. Within both rural and urban Scotland there is a large diversity of settlement patterns and therefore rules and indicative examples would assist practitioners in applying the rules.
MacRoberts	I agree that the current legislation which sets out 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.
Lionel Most	Agreed.
Professor Roderick Paisley	I agree with this.
Pinsent Masons	Agreed. We need clarity and certainty to be able to advise our clients. With indicative examples it is easy to advise if your client's transaction falls within the example but tricky to advise where the situation falls outside the examples.
Property Litigation Association	The indicative examples have caused difficulties in practice; clear rules would be preferable.
Professor Kenneth Reid	This is the key proposal in the Discussion Paper. I warmly welcome it. The greatest difficulty with s 53 is that the four examples mentioned in subsection (2) are both unweighted and non-exhaustive. Are properties 'related' if only *one* of the examples applies? Can properties be 'related' if none applies – and, if so, what other kinds of other example might there be? A series of bright-line rules solves the problem.
Scottish Factoring Network	Members of the Scottish Factoring Network support this proposal.
Scottish Water	The replacement statutory provision should set out clear rules as to the circumstances in which there is title to enforce, rather than indicative examples.
Shepherd and Wedderburn	Agreed.

Shoosmiths	We agree. As things stand Sections 52 and 53 do not confirm rights of enforcement which can confidently be relied upon – clear rules will assist both burdened and benefited proprietors.

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

(Paragraph 7.16)

Respondent	
Aberdeen City Council	Agreed but see our comment at Proposal 4.
Aberdeenshire Council	We agree with this proposal.
Dr Craig Anderson, Robert Gordon University	Agreed. Indeed, tenement buildings are such a special case that, in certain circumstances, there should be title to enforce even in the absence of a common scheme. Maintenance obligations are the obvious example, although I appreciate that they are considered in relation to proposal 8.
Anderson Strathern	Agreed, subject to the definition of "common scheme".
Argyll Community Housing Association	Yes, this should be in place to benefit all residents within the block.
Brodies	Yes agreed.
Brymer Legal	Absolutely.
Burness Paull	Agree. This is not controversial and is what the ordinary property owner would expect to be the case. Owners would still need to demonstrate interest.
Church of Scotland	Agreed – co-owners living in the same building ought to have the right to enforce a common scheme of real burdens against each other; indeed they are entitled to expect this to be the case. It is noted,

	however, that the Tenement Management Scheme exists to fill in the gaps if title deeds in a tenement contain conflicting provisions or are silent on provisions for maintenance and repair (but not improvements).
CMS	We agree with this proposal.
Dentons	Agreed, subject to the definition of 'tenement' being appropriately set. For example, what would the definition of 'tenement' be in a large flatted development with several stairwells and entrances? And what about a flatted building with commercial units on the ground floor and flats above?
DLA Piper	We agree with Proposal 6.
DWF	Yes.
Faculty of Advocates	We agree.
First Scottish Group	We think flats in the same tenement are obviously related to one another because of their physical connection and treated as a single community by the deeds in which the burdens are imposed and therefore agree with the above proposal.
Gillespie Macandrew	I agree with this; it would be difficult to dispute.
Harper MacLeod	It is agreed that owners of flats in the same tenement should have title to enforce a common scheme against each other.
Keeper of the Registers of Scotland	No comment.
Sarah King	Yes. Tenements are a clear and obvious example of a community.
The Law Society of Scotland	Yes, we consider that this is logical.

Lindsays	Yes, but this should still be subject to a requirement to prove an interest to enforce. Many city dwellers will have encountered the tenement busybody.
MacRoberts	I agree that this proposal is uncontroversial and should be adopted.
Lionel Most	Agreed.
Professor Roderick Paisley	I agree with this but note that there is sometimes difficulty in identifying what is contained within a single tenement as this too requires an examination of facts and titles.
Pinsent Masons	Agreed. Here there is clearly a mutuality of interest in observing the real burdens so all of the owners need to be able to enforce the real burdens against each other to ensure that the tenement is maintained and the amenity of the tenement is protected.
Property Litigation Association	We agree; the community is clearly easy to identify.
Professor Kenneth Reid	Yes. As the Discussion Paper said, this proposal is uncontroversial.
Scottish Factoring Network	Members of the Scottish Factoring Network agree with this statement. It is the role of factor to maintain common areas and not to get involved in issues between owners. Owners meetings can be held to take a decision on whether the factor can take action, but owners must cover costs.
Scottish Water	Scottish Water agrees with this proposal.
Shepherd and Wedderburn	Agreed.
Shoosmiths	We agree.

7. 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.

(Paragraph 7.18)

Respondent	
Aberdeen City Council	Agreed but see our comment at Proposal 4.
Aberdeenshire Council	We think this should apply only to management burdens and not, for example, to burdens that relate to other matters – in accordance with the distinction made in paragraphs 7.19 and 7.20.
Dr Craig Anderson, Robert Gordon University	Agreed. However, see my response to proposal 9. I would suggest that this should be seen rather as part of the definition of the term "common scheme". In other words, the existence of real burdens providing for common management should be conclusive of the existence of a common scheme.
Anderson Strathern	Potentially, yes. But this is subject to the view taken on proposal 4(b). Would the "common scheme" include every burden, or only those relative to common management? And if "common" means "two or more" would the recognition of a common scheme mean that some common management provision common only to two properties in a much larger development was enforceable against the owners of those properties by some neighbour not so burdened (subject to having interest to enforce)?
Argyll Community Housing Association	Agreed, however this may not go far enough to address the issues where titles differ within what would be assumed to be a community.
Brodies	Yes but in large estates that could mean a large number of owners. It may be that interest to enforce will have to be used to determine limits but again that is quite vague. Again a distance requirement may assist here (see our comments below at 9 (a)).
Brymer Legal	Agreed. Property Factors/Property Managers routinely have difficulty in enforcing real burdens on behalf of a clearly defined community in lay terms but where that is not so easy to determine according to the titles.
Burness Paull	Agree. This would we meet expectations of property owners that they are within a community for the enforcement of burdens, however, how would this sit with any proposed definition of community?

Church of Scotland	Agreed – owners of properties e.g. in residential housing developments and industrial estates, titles to which contain the same or similar real burdens should have title to enforce a common scheme to preserve the amenity of the development.
CMS	We agree with this proposal.
Dentons	Agreed.
DLA Piper	We agree with this Proposal. As noted in paragraph 7.18 of the Discussion Paper, provisions of this nature should provide a clearer mechanism for determining the extent of a community. Even if this test were to result, on occasion, to situations where a particular community covered a large area and some properties within the community were a considerable distance from each other, it would not necessarily result in the owners of distant properties being able to enforce real burdens in relation to each other's properties, as the interest to enforce hurdle would still need to be overcome. The improvement resulting from implementation of this proposal would be much greater certainty (than under the current law) in relation to which properties had the benefit of title to enforce.
DWF	Yes.
Faculty of Advocates	We agree.
First Scottish Group	This situation relates to a community undertaking the same management obligations and therefore this strongly indicates a common scheme- so yes.
Gillespie Macandrew	In principle yes, but my difficulty with this is there could be situations where developers have built in phases, so proprietors that are part of the same larger development but governed by different Factors due to separate deeds of conditions wouldn't have title to enforce (although in theory they could be neighbours). The same situation could arise where different developers have built in adjacent areas within a wider development, but again having separate deeds of conditions. This seems to be more common nowadays, but I'm sure there are pre-2004 examples.

Harper MacLeod	It was agreed that owners of property subject to real burdens providing for common management in respect of a community should have title to enforce a common scheme against each other.
Sarah King	Yes. Common management provisions are a good indication of a community and give a clear limit to that community. This clarity is lacking in the current law.
The Law Society of Scotland	Yes, although we note a potential difficulty in assessing what is a common scheme.
Lindsays	Yes, but again the issue is one of community. It is questionable whether all owners within a large housing scheme of hundreds, if not thousands, of houses should have title to enforce even though a Deed of Conditions burdens every property. This is possibly analogous with the large landed estate where it is convenient to burden every property with the same conditions irrespective of whether they apply or not.
MacRoberts	I agree that it makes sense that those properties within a housing estate should be considered to be a community. Accepting the difficulty in defining with sufficient precision the extent of a housing scheme, the proposal made to define this by reference to common management provisions makes sense since this will generally be covered by a deed of conditions defining the housing scheme and the community and appointing common factors/managers etc. The proposal also provides clarity based on actual conveyancing practice.
Lionel Most	Agreed but please consider the following. I live on a modern development in the west end of Glasgow which was laid out in three phases. Each phase has its own deed of conditions drawn up by the same firm (who did not discharge themselves well I might add) with very similar if not identical burdens. I have no practical interest in enforcing the conditions in relation to properties, for example, on Phase 1 at the other end with whom we have no practical connection and would certainly not want them enforcing burdens in relation to my property. While they might have a remote interest (a change of use may cause an increase in vehicles and impinge on their ability to park cars) we do not in practice consider them to be part of our community. The distance rule might help in this case if the rule were that the neighbour could only enforce if their property fell within the distance provided in the legislation as well as being part of the common scheme. And it would be useful if the legislation could acknowledge that different

	common schemes having the same conditions albeit in different deeds of conditions were not necessarily all one common scheme but could be individual ones.
Professor Roderick Paisley	I agree.
Pinsent Masons	Agreed. This is a situation where it is clear that there is intended to be a common scheme and we concur with the SLC's view that this should be limited to where there are real burdens providing for common management.
Property Litigation Association	We agree; this would accord with mutuality. Title and interest to enforce are of course separate issues as stated above.
Professor Kenneth Reid	Yes. I doubt whether this is controversial either. The provision, however, will require careful drafting.
Scottish Factoring Network	Members of the Scottish Factoring Network agree with this statement. Common interest is what is relevant here so the change of term would be helpful for factors. It is believed this would tighten up the 'title' element. As described above there can be challenges for housing associations or other owners maintaining and repairing common parts, so a requirement to enforce burdens in the common interest would help ensure owners met their responsibilities to manage and maintain common parts.
Scottish Water	Scottish Water agrees with this proposal.
Shepherd and Wedderburn	This makes sense, and common management is a good indicator of an element of mutuality. Consideration should be given to how this might work in mixed use developments – commercial properties in a mixed development, which are subject to the same management arrangements, will have different management requirements.
Shoosmiths	We agree and this reflects the practice of housebuilders we act for in putting in place deeds of condition with extensive amenity burdens and providing for mutual rights of enforcement amongst the owners within the housing development. It would need to be clear, however, that the burdens can only be mutually enforceable if they were actually intended to be imposed on that development specifically and in relation to specific shared open spaces or landscaping, or perhaps to ensure houses in the development have a consistent appearance. It is not unusual for a housing developer's amenity rules

	to look very similar to another housebuilder's amenity rules and if the requirement is only that there are real burdens providing for common management the drafters will need to take care to exclude the possibility of adjoining, but distinct, developments which happen to have similar burdens being able to enforce the terms against each other's development. Some of the same issues may arise here as they do in the general Section 53 issue – if the housing development is large and/or has similar but distinct developments adjacent to it there is a risk that the extent of those with title to enforce could be way beyond what is suggested within the Discussion Paper. It must be made clear that e.g. the burdens relate to the same area of open space, or the same road, or that for example the housing design is such that it is clear the houses within the development were built at the same time by the same developer, rather than simply containing the same generic obligations to maintain walls, build fences no higher than 1m etc. Perhaps consideration could also be given to limiting each unit owner's implied rights of enforcement to, for example, only the other units within its street (so as to avoid the issue of trying to enforce against someone on the other side of a large development) although this may become a bit over-engineered and it may be best leaving that part to the rules of interest to enforce. Alternatively interest to enforce rules could be incorporated here to limit the extent of the implied enforcement rights within the development.

8. Should owners of properties

(a) subject to real burdens providing for common maintenance, or

(b) which share common property,

have title to enforce a common scheme of real burdens against each other, in the absence of common management provisions?

(Paragraph 7.20)

Respondent	
Aberdeen City Council	Yes.

Aberdeenshire Council	Yes. 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 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.
Dr Craig Anderson, Robert Gordon University	Like the Commission, I am not entirely convinced. However, I incline to the view that these matters are suggestive of the presence of a common scheme, and should be viewed in that light.
Anderson Strathern	Generally agree with SLC inclination: if (b) is covered by Rule 3, it can be excluded from the scope of Rule 2.
Argyll Community Housing Association	Yes, however concerns about inconsistent titles still apply.
Brodies	Giving all owners of properties subject to real burdens which provide for common maintenance of items title to enforce a common scheme of real burdens against each other in the absence of common management provisions could potentially give rise to many more common schemes. We wonder if title to enforce should only be conferred in such situations where there is provision for maintenance of items which are not already the subject of a facility or service burden. For example, opening up common schemes to common maintenance of facilities such as boundary walls and fences could create a huge number of common schemes when these are already dealt with under common law and facility burdens. The same comment applies to common property. Some burdens to preserve amenity may not deal with common property or common maintenance but may be important to retain for the sake of surrounding proprietors. Use restrictions in particular and provisions relating to design and decoration.
Brymer Legal	Yes.
Burness Paull	In some circumstances that would meet the owners' expectations but there would always be exceptions e.g. where the common maintenance is no longer the responsibility of the property owner due to other

	statutory provisions e.g. the adoption of a road or services which could be provided for if this was to apply. It would not necessarily be the case that the sharing of common property such a fence would evidence a common scheme or even a community. The proposed rule on proximity would presumably provide and any changes would do well to avoid similar provisions which might muddy the waters. If this was to apply if a common scheme was established we consider it should be limited to the enforcement of the burdens relating to maintenance only and not establish a right to enforce other burdens such as use restriction. However, if the whole deed is used to establish the common scheme it would need to be clear that that would not apply to enforcement when certain of the burdens were not the same e.g. use.
Church of Scotland	We consider that management is "marginal" evidence of a community and shouldn't therefore be the sole qualification for title to enforce.
CMS	We agree with this proposal.
Dentons	Yes.
DLA Piper	We also incline to the view expressed in paragraph 7.20 of the Discussion Paper that the common management provisions test should be sufficient for proposed rule 2, and (a) or (b) above should not be considered to be evidence of a community.
DWF	Differing views are held on this proposal.
Faculty of Advocates	We incline to the view that such owners should have title to enforce. We note the SLC's provisional view that title to enforce should not arise in such situations, because they are "*much more marginal evidence of a community"* (paragraph 7.20). However, we would caution against giving too much weight to the concept of 'community'. Whilst common maintenance or common property provisions may indeed be marginal evidence of a community, that is rather beside the point. The issue is whether, in the context of the burdens in question, there is a sufficient relationship to justify mutual enforcement. In our view, the fact that two properties (*ex hypothesi* already subject to a common scheme of burdens) are subject

	to burdens requiring maintenance of the same property would be a factor tending to suggest that mutual enforcement is appropriate. We should add that it is not wholly clear to us what is meant in this context by "common maintenance". It could mean a shared obligation to maintain the same item of property, or equivalent obligations to maintain distinct items of property of the same kind. We would further add that this example highlights a difficulty in drafting a general legislative rule for application to the myriad burdens which exist in practice. In a case where the only burdens affecting the relevant properties are those concerned with common maintenance, it would verge on the absurd for there not to be mutual title to enforce. On the other hand, where common maintenance burdens are only a small proportion of dozens of burdens, the case for mutual title to enforce the entire corpus of burdens may be weakened if, for example, there is no strong indicator of mutuality in relation to any of the other burdens.
First Scottish Group	In the absence of common management provisions, we think that where owners of properties are subject to the same real burdens providing for common maintenance and share a common property then this shows a strong indication of a common scheme- so yes.
Gillespie Macandrew	The purpose of this reform would seem to be to gain real clarity, but to include this provision might actually muddy the waters. Rule 3 (if applied) goes some way to covering this in any case.
Harper MacLeod	It was agreed that owners of properties subject to real burdens provided for common maintenance or would share common property should have title to enforce a common scheme against each other.
Sarah King	Proposal by commission to leave this to rule 3 (proposal 9) seems sensible.
The Law Society of Scotland	Yes, we consider that in these circumstances, owners should have title to enforce.
Lindsays	Yes, but the difficulties in enforcing burdens may deter many people from going down this route if there are no clearly defined management provisions.

MacRoberts	I agree in light of the proposed rule 3 that in this situation there should be no title to enforce a common scheme of real burdens in the absence of common management provisions.
Lionel Most	I do not feel that one should automatically be in a common scheme just because one shares burdens. 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 a common scheme.
Professor Roderick Paisley	I think this makes sense. Please note my comments above about the overlap with the enforcement of servitude conditions by dominant proprietors in servitudes affecting the same servient tenement. There is also potentially some overlap with the rules of common property and the instruction of necessary repairs with the recovery of costs by co-owners outwith a tenemental situation. Both these sets of rules should be expressly preserved. In addition to this I think the rule that a pro indiviso share in an area of land cannot form the dominant or servient tenement in a real burden – contained in 2003 Act, Part 1, - should be abolished. This would enable real burdens to be used to regulate the use of commonly owned areas (such as a car park in a residential development) and avoid problems with the application of the 4 metre rule.
Pinsent Masons	No.
Property Litigation Association	Our members differed on this. Some agreed with the proposed rule 3 that in this situation there should be no title to enforce a common scheme of real burdens in the absence of common management provisions. Others considered that, as a matter of fact, common property requires regulation of the relationship of co-owners, title to enforce a common scheme (in the absence of management provisions) would be desirable.
Professor Kenneth Reid	Such owners will already have title to enforce any common maintenance burden by virtue of s 56. Beyond that, I do not think that common maintenance should be taken as a sufficient indication of community to confer title to enforce *other* burdens. Often, the only shared maintenance concerns the

	wall or fence between two properties. On the basis of proposal 8, this would result in a series of overlapping 'communities' of two properties – which makes little sense in the context of a common scheme which extends to a group of, say, 20 or 40 properties. (A similar objection can be made to proposal 9, but that proposal has other things to be said in its favour.).
Scottish Factoring Network	Members of the Scottish Factoring Network support this proposal. This would be helpful in ensuring maintenance of common parts where there is not a common management scheme in place.
Scottish Water	Scottish Water agrees with this proposal.
Shepherd and Wedderburn	Again, we think that common management arrangements are a good indicator of mutuality of interests.
Shoosmiths	Yes; in our view the same arguments apply as for Proposal 7 above (and our same concerns and suggestions for limiting the extent apply). Older deeds may not be as comprehensive as modern deeds of condition and may not have set up a scheme for common management albeit the intention may well have been to impose common maintenance obligations.

9. (a) Owners of properties which are close together should have title to enforce a common scheme of real burdens against each other.

(b) If consultees agree with this proposal, how close should the properties require to be for this rule to apply?

I If consultees agree with this proposal, should it be subject to a requirement that there must be notice of that scheme on the title of the property in respect of which the burden is to be enforced?

(Paragraph 7.25)

Respondent	
Aberdeen City Council	Agreed.

	Proximity should be decided on a case by case basis. Agree that it should be subject to the requirement outlined in (c).
Aberdeenshire Council	**(a)** Yes, we agree with this. **(b)** We think the 4 metre rule would be appropriate provided that it was not the only criterion and that owners of properties further away who have an interest could potentially qualify under one of the bright-line alternatives mentioned in our answer to 4.(a) above. **(c)** No. We think that if the bright-line alternatives are used, there should not be any need for notice.
Dr Craig Anderson, Robert Gordon University	(a)/(b) A four-metre rule would be familiar and easy to apply. However, I am concerned that these proposals and suggestions duplicate the work of the rule requiring interest to enforce. That rule is both flexible in its application to individual circumstances and, in broad terms, relatively straightforward to apply in most cases. (The difficulties with the existing definition and its application are well known and are, moreover, outside the scope of this Discussion Paper, so there is no need to go over them here.) The point is that a significant criterion for picking a particular distance is bound to be: who is close enough, that the effect of breach of the burden will be significant enough, that they should be allowed to enforce the burden? One objection to that approach is to say that the answer to that question will vary depending on the nature of the breach and of the surrounding area. For example, in a development of scattered, rural properties, there may be no benefited property at all that is within (say) four metres. Another objection is that, while it will often be that a closer neighbour will take action against the breach, there are many good reasons why this may not happen. Perhaps the immediately neighbouring properties are vacant, or the immediate neighbours are indifferent to the breach. Perhaps the immediate neighbours are unwilling to bear the uncertainty of litigation, or are unwilling or unable to bear the expense of that course of action. However it may be, it is not clear to me why a more distant neighbour should be barred from enforcement solely on the basis of distance (as opposed to being barred because, in the circumstances of the case, the distance leads to a conclusion that there is no interest to enforce). Suppose that I own a property that is part of a common scheme. The owner of a property twenty metres away breaches a

	burden imposed as part of the common scheme. If the breach causes me no material detriment, I will be unable to enforce it under the current law, because I will have no interest to enforce. In that case, the restriction of title to enforce to those within a predetermined distance adds nothing. Alternatively, if I do suffer material detriment from the breach, it is not clear that there is any good reason to deny me title to enforce. In other words, whatever distance is chosen, it is likely to be redundant in many cases given the existence of the requirement for interest to enforce. In cases where it is not redundant, then it requires neighbours outside that distance to bear a material detriment to the value or enjoyment of their property, which they would not have to bear under the present law. The imposition of such a requirement requires, I would suggest, the clearest and most compelling justification. With respect, it does not appear to me that the Commission has given such a justification. I would suggest that a simpler alternative would be to say that any property subject to the same common scheme (however defined) has title to enforce. The requirement for interest to enforce would then operate to restrict enforcement to those neighbours materially affected by a breach of a burden. If greater certainty is sought, then I would suggest that a presumption of non-interest for those outside (say) four metres would be better than an absolute bar on enforcement by the owners of such properties. I have no strong view on this. However, I would note that, under the current law, the requirement for notice adds little of value. It requires only that there be notice that the common scheme exists, not that there be notice of the extent of that community. For that reason, on balance I am inclined to favour dropping this requirement.
Anderson Strathern	(a) Yes, subject to determination of the definition of “common scheme”. (b) 4 metres. (c) No, subject to the definition of “common scheme”.
Argyll Community Housing Association	(a) Yes (b) In line with planning regulations e.g. extensions, walls etc.

	(c) No
Brodies	(a) Yes we agree provided that no additional rights are created which did not exist before the reform. To this end we would suggest that a distance limit could assist proprietors to establish a common scheme where the other rules do not apply and that it could also be used to restrict the reach of a common scheme. (b) In principle we agree that a distance limit between properties would greatly assist in bringing clarity to common schemes. However, we have struggled to decide on what that distance might be as no one suggestion seems to cater for all types of properties. Perhaps one distance could be prescribed and in addition a preservation scheme made available to those outwith the prescribed distance but within a certain radius? (c) Yes agreed.
Brymer Legal	I was, at the time, and remain now, in favour of the 4 metre rule referred to in para 7.23. • (a) – Yes • (b) – as above • (c) I am inclined to be against notice.
Burness Paull	(a) Yes. It would meet expectations of owners of close properties that they should have title to enforce against near neighbours. (b) The question of proximity is difficult since being impacted might not be a linear distance as such but take account of height/views/noise etc. Could other considerations for "close" be considered in any definition so that it is not limited to linear distances? Whilst existing planning law and policy (applied at local government level) is certainly a good way to define this (and the reference should be to planning law and policy so that if it changes the proximity would adjust accordingly rather than set a proximity that would potentially be out of step with planning law and policy in the future. Could planning law and policy also supply the necessary tests for other factors too as it would provide rules relating to other factors.

	I In the interests of simplicity there should be no notice provision. It is not essential that the reforms to s.53 tie to existing s.52.
Church of Scotland	a) Agreed. b) The suggested distance of 4m (excluding roads not exceeding 20 metres in width), which is consistent with planning law, seems sensible for some real burdens e.g. restricting development but in case of amenity burdens a greater distance might be required e.g. to prevent parking of commercial vehicles. The distance should not however be too great – the greater the distance between properties, the less likely there is to be interest to enforce. c) Provided there is a statutory list of what constitutes title to enforce then notice is not required.
CMS	We do not agree with this proposal. 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. If this were to be the route the SLC go down we would suggest this be limited to 4 metres (including roads) and that there would require to be express notice of the common scheme in the title deeds.
Dentons	(a) In principle yes. (b) A proximity of 4 metres may not be sufficient to cover all instances where parties may have an interest to enforce community burdens. For example, buildings built to the same specification. Therefore the appropriate distance depends on the nature of the burden, which makes it very hard to choose a fixed distance. (c) No.
DLA Piper	We agree with proposal 9(a). In relation to 9(b), in our view there is merit in making this distance 4 metres, excluding roads not exceeding 20 metres. On point 9(c) were are of the view that there should be a requirement for notice in the title of the property in respect of which the burden is to be enforced.

DWF	(a) Yes (b) This depends on whether owners of properties subject to real burdens providing for common maintenance, or which share common property are given title to enforce a common scheme of real burdens against each other, in the absence of common management provisions. If such proprietors are given title to enforce, a short distance may be appropriate for rule 3. If not, a longer distance is more likely to be appropriate. (c) No
Faculty of Advocates	As we understand paragraphs 7.21 to 7.25 of the SLC paper, they envisage that the rights presently preserved by section 52 would be subject to a limit which does not presently affect them – that implied title to enforce would arise only if one of the three 'community' rules proposed by paragraphs 7.16 to 7.25 was satisfied. Whilst these rules are, in our view, useful in defining the extended class of properties to be given title to enforce (i.e., in replacing section 53), we are not presently persuaded that there is a justification for delimiting in the same way the preserved common law enforcement right in section 52. This proposed rule does seem to us arbitrary, but we note that it is proposed in addition to other indicia of 'community' and would therefore not remove title to enforce which was acquired under one of the other rules. It is also relatively clear and, if well drafted, could be easy to understand and apply. We do wonder, however, whether it is adequate. For many amenity burdens, of far more relevance in practice than mere distance will be whether or not the benefited property has a direct line of sight to any infringement (or, in relation (for example) to noxious emissions, is within range of the particular emission). We are not sure whether or not the suggested distances are likely to be sufficient. We do not consider that it is necessarily helpful or relevant to refer to the distance limitations used for planning notices. It seems to us (albeit as a matter of impression rather than empirical investigation) that four metres may be too restrictive. For example, whilst roads are excluded from the four metres, does that include pavements? If not, four metres would often be used up by pavements on both sides of a street. An issue may arise for the owners of upper flats, who may not (for example) have any ownership interest

	in the garden ground or in basement voids between the tenement wall and the pavement. Both of these might use up the 4 metre limit, and deny enforcement rights to properties opposite each other on a street, or across garden space. That might apply, for example, in squares or circuses built around garden ground (e.g., Moray Place in Edinburgh). If a distance is to be used, one should be chosen which is sufficient for the policy objectives to be achieved. That would require, for example, consideration to be given to the typical layouts of Scottish towns and cities. We are inclined to agree that for enforcement by close neighbours, there should have to be notice of the scheme on the title of the burdened property.
First Scottish Group	We think proximity should be taken into account when considering enforcement rights. However, what if the immediate neighbour burdens are not the same/similar and emanate from a different author or route of title? We have concerns that this would not fit with the normal rules and law on the subject. We feel that there is no historic legal precedent for enforcement rights based on location alone; however think there may be a need to offer title to enforce in this type of situation to protect the amenity. Properties not located in the immediate vicinity and say on the edge of a builders' estate may still be adversely affected by the breach of a burden so perhaps ''material detriment'' could be considered here as well as a catch all. We think the properties should be 4m either way as regards a proximity rule. We agree that there must be a notice of the Scheme on the title of the property in respect of which burden is to be enforced. This will ensure transparency by the publication.
Gillespie Macandrew	Across the firm different people had different views here, and there was a strong contingent who would prefer rules 1 and 2 only to apply. Amongst those that thought owners of properties which are close together should have title to enforce a common scheme of real burdens, the view was that this would have to be a limited provision. The maximum distance that would seem fair is 4m given planning provisions, and surely it wouldn't be appropriate for this to be extended further.

Harper MacLeod	It was felt that owners of properties which were close together should not automatically have title to enforce a common scheme although it was noted that even if every owner of a property within the common scheme would still require to show interest to enforce in terms of Section 8 of the 2003 Act. As to proximity rules it was felt that the 100 metre rule which was used in the feudal abolition provisions might be appropriate. It was not felt that it should be necessary that there be notice of the scheme on the title of the property in respect of which the burden is to be enforced.
Sarah King	(a) Agreed that there should be title to enforce if combined with a distance requirement. (b) The distance requirement of 4 metres (excluding roads of less than 20 metres) seems sensible and is one already familiar to conveyancers. (c) Retaining a notice requirement would reduce the need for examination of other titles to check whether those properties are subject to the same or similar burdens. If there is no notice on your property's title, you are not part of a common scheme under this rule and do not need to examine other titles. From a conveyancing point of view, the notice requirement may be simpler and cheaper. Having a notice requirement would also reduce the number of enforcement rights created under this rule. If there were no notice requirement would this create burdens that do not exist under the current provisions? For example, where the burdens imposed by separate deeds are concerned not with maintenance but with preventing alterations or further development this does not fall within s 52 (due to lack of notice of a common scheme) and also might not fall within section 53 (as it does not fall within the current indicative list of relatedness).
The Law Society of Scotland	(a) Agreed. (b) We do not make any specific proposal. We note that this option could be defined easily by setting a fixed distance. Careful consideration should be given to any proposed distance due to potential impacts of land features, for example, roads and pavements. We note that a narrow test of proximity (i.e. a short distance) has the potential to narrow the class of those with title to enforce. If a wider proximity test is used, this would still be subject to the interest test thereby resulting in narrowing the scope of those who could enforce the burdens. This should be considered in light of article 1 of protocol 1 of the European Convention of Human Rights.

	(c) We agree that there should be a requirement of notice of the scheme on the title of the property.
Lindsays	a) Yes, proximity as well as community should be a determining factor. b) Properties should be close enough to be materially affected. 4 metres may apply within a housing development but is arbitrary in many other urban and rural areas. The degree of prejudice rather than the distance should be the determining factor. c) Yes, but not sure how that might work in practice.
MacRoberts	I agree with the approach set out in paragraphs 7.21 – 7.24 of the Discussion Paper. However, I consider that the proposed limit of 4 metres' distance is too short a distance and might cause unfairness. My suggestion would be 25 metres (excluding roads not exceeding 20 metres in width). I also agree that Rule 3 should have the additional requirement set out in paragraph 7.24 of the Discussion Paper that there should only be title to enforce where there is notice of the common scheme on the burdened owner's title and it should not matter that a developer has reserved the right to vary the burdens.
Lionel Most	I do agree that close neighbours should be able to enforce. The planning analogy does not take account of the planning authority being ultimate arbiter. I can object to a planning application on planning grounds but the planning officer can override that (subject to appeal of course). With title conditions you would just have to go straight to the Lands Tribunal without a disinterested intermediary. Also that involves expense. The legislation should not in any way support neighbour revenge disputes (your cat ate my rabbit in 1995 therefore I am objecting to your conservatory). On balance a four metre distance seems reasonable and presumably the objector would have to show real interest and not just object for the sake of it or because the proposed building will block a nice view of the leylandii. In the interests of certainty I would be in favour of requiring notice.

Professor Roderick Paisley	I agree with this point in (a). For simplicity sake I would avoid (c). I would be prepared to accept a rule of four metres distance as suggested in the Discussion Paper. This avoids situations better dealt with under the general law of nuisance and not the law of real burdens such as the interest arising by virtue of impact such as the Aberdeen case dealing with a fish and chip and carry out business at the junction of 529 Great Western Road and 1 Cranford Road. The case is ***Mannofield Residents Property Company Ltd v Roy Thomson*** **(1982) SLT (Sh.Ct.) 71 and Paisley and Cusine Unreported Property Cases 212**. The residents in neighbouring houses acquired the company that owned the superiority and sought to enforce a real burden precluding the use of the property in a manner that caused a nuisance. In determining whether there was a sufficient interest to enforce the Sheriff made a site visit. The key to his decision was that those properties at which the chip shop could be smelled had sufficient interest to enforce the real burden. The owner of the shop was given time to introduce equipment to reduce the smell.
Pinsent Masons	(a) We agree with this proposal. (b) We think that the properties should be adjacent/adjoining each other or within 4 metres excluding any roads as per planning law. (c) We agree that the proposal should be subject to a requirement that there is notice of the scheme on the title to the property. We agree that in considering whether there is notice of the scheme a provision in the deed creating the real burdens reserving the right for the developer to vary the burdens should be disregarded.
Property Litigation Association	We agree with the suggestions in paragraphs 7.21 – 7.24 of the Discussion Paper. However, 4 metres' distance is too short. Other factors such as whether there will be e.g. a material impact should be considered over and above the question of distance. We agree that Rule 3 should have the additional requirement set out in paragraph 7.24 that there should only be title to enforce when notice of the common scheme appears on the burdened owner's title.
Professor Kenneth Reid	On the whole, I favour this proposal, but I do not regard it as essential. Where burdens are imposed under a common scheme, there is something to be said for always giving close neighbours a title to

	enforce. But I see this as being a limitation on s 52 rather than a replacement for s 53. In my view, 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. And if the notice requirement is retained, the proposal in effect becomes a check on s 52, of practical value (as already mentioned) in *Hislop* type (1) cases. If s 52 is to be retained, the correct place for a provision based on proposal 9 would be there. I have no strong views as to distance but, for consistency with planning law, would prefer a distance of four metres. Any distance-based rule, however, has the great merit of certainty.
Scottish Factoring Network	(a) Members of the Scottish Factoring Network support this proposal. (b) As this would only apply to new build properties, as it will not apply retrospectively, the members of the Scottish Factoring Network do not believe this proposal would be relevant.
Scottish Water	Scottish Water responds to the questions as follows:- (a) yes; (b) where the properties are in a common scheme there should be no restriction because any restriction would be arbitrary and unfair; and (c) no. Scottish Water would make the comments (a) that any restrictions based on distance are arbitrary and unfair, (b) that a 4-metre restriction would be particularly arbitrary and unfair because it could easily be the case that the owner of a house 5 metres away would be almost as adversely affected as the owner of a house within 4 metres, and (c) the provisions of Section 8 of the Title Conditions (Scotland) Act 2003 would eliminate further-away properties because the owners would be unable to demonstrate interest to enforce a burden because they could not in the circumstances show that a failure to comply with a real burden was resulting in, or would result in, material detriment to the value or enjoyment of their properties.
Shepherd and Wedderburn	We have mixed views on this. Some consider that a distance criterion should not be applied, since communities can arise in a wide variety of situations and configurations, and introducing an arbitrary distance provision is likely to result in a host of anomalies, potentially increasing uncertainty. Others consider that a distance criterion would in effect reflect the likelihood of being able to establish *interest* to enforce, also required for a right to enforce to be established. Given the dual requirement for title **and** interest, and the fact that title alone is insufficient, it seems perverse to provide for property

	owners to have *title* to enforce, only for them to discover that the enforcement rights are incapable of being exercised due to lack of interest. While recognising that establishing interest to enforce is not an exact science, case law would appear to point towards the view that proximity is an important element. It can sometimes depend on the nature of the breach, how other properties could be affected. For example if the breach consists of erecting a building that is used for some purpose that adversely affects the amenity of the community, and has an adverse effect on value, then there is an argument that all properties in that community should have a right to enforce, whereas other breaches may be such that only the immediate neighbours are affected. It might be worth considering whether a 100 metre rule, something similar to the rule in the Abolition of Feudal Tenure etc. (Scotland) Act 2000 would work, if a distance is to be considered? In addition, it might be appropriate to have a rule that provides that if the property is in the same "community" but outwith the distance criterion, they might still be able to establish a right to enforce, if they can meet the interest to enforce requirements as to detriment to enjoyment or value? We think it would assist considerably in identification of enforcement rights, if there was always a requirement for notice of the scheme in the title. We also think that consideration should be given to retaining in the new rule the requirement that there be no negating provision, such as a superior retaining the right to vary.
Shoosmiths	(a) We agree – this would appear one of the more important rights of enforcement. (b) We agree with the 4m rule (as this is in addition to other enforcement rights which cover residential housing development situations) but suggest that in addition to excluding roads not exceeding 20m in width there should also be excluded open space/landscaped areas not exceeding 20m in width so that immediate neighbours have rights to enforce even though they may have a (small) expanse of grass or landscaping between the buildings (being common parts within the development, for example). By way of example, a neighbouring property should surely have title to enforce despite not being within 4m if the real burden is a restriction on building and that neighbour is nearest (though we of course agree that scattered rural properties should not fall within this and accordingly there has to be a limitation on distance). The maximum distance of 20m for any common parts area/open space/road/path which should be excluded seems sensible to repeat here.

	(c) No. If the distance is limited then there are very limited numbers of titles that would need to be reviewed to check for similar or same burdens so we do not think there should be a requirement of notice.

10. Do consultees consider that there should be other situations where there are implied rights to enforce real burdens in common scheme cases?

(Paragraph 7.26)

Respondent	
Aberdeenshire Council	No. We think that the proposals in the Discussion Paper are sufficiently comprehensive to include the commonest situations. (It's an excellent paper.)
Dr Craig Anderson, Robert Gordon University	See my response to proposal 9. I consider that there should generally be title to enforce in all cases where burdens are imposed on properties as part of the same common scheme. The requirement to show interest to enforce is sufficient to limit potential enforcers to those actually likely to suffer materially from a breach of a burden, while at the same time taking into account the specific circumstances of the case.
Anderson Strathern	No.
Argyll Community Housing Association	Yes, purely from our own experience, it would be beneficial if there were provisions in place for social landlords to enforce real burdens in common schemes.
Brodies	No.
Brymer Legal	No.
Burness Paull	If other factors could be used in determining community could situations such as a single planning consent or planning agreement be used to demonstrate there is a common scheme. Both would be a

	matter of public record. It is easy to consider a housing development covered by a single consent but where the linear distance would not apply if it were of substantial luxury houses on larger sized plots.
CMS	We do not consider there to be any further circumstances where this is appropriate.
DLA Piper	We do not consider that there should other situations where there are implied rights to enforce in common scheme scenarios.
Faculty of Advocates	Section 53 presently identifies as a marker of properties being 'related' that they are subject to the common scheme by virtue of the same deed of conditions. We consider that title to enforce should continue to arise in these circumstances.
First Scottish Group	A Deed of Conditions suggests that properties are related – why otherwise would they be treated together? The deed sets out the burdens in full which apply to the housing development and also marks out the limit of the community generally although there may be a mix of houses and blocks of flats. This points to relatedness applying across the whole of the development. The matter will be put beyond doubt if say a facility is shared by all flats and houses. A Deed of Conditions can also often cover commercial units in a retail park for instance.
Gillespie Macandrew	No.
Harper MacLeod	There should not be other situations where there are implied rights to enforce real burdens in common scheme cases.
Sarah King	No.
The Law Society of Scotland	Please see our answer to question 9.
Lindsays	Don't know, perhaps scrapping real burdens makes sense after all?

MacRoberts	I do not consider that there should be other situations where there are implied rights to enforce real burdens in common scheme cases.
Lionel Most	I cannot think of any.
Professor Roderick Paisley	The short answer is no provided the common law rules for the implied right of third parties (in the form of the various dominant proprietors holding servitudes facing a single dominant tenement) to enforce servitude conditions is left untouched. Not only are they very useful with shared facilities such as roads or pipes which could run for miles away from the dominant tenements in the various servitudes. It is sensible these servitude conditions are enforceable not just by the servient proprietor who may not be bothered to do so. However, these dominant tenements could be miles away from each other. Other examples where the Common Law right to enforce servitude conditions (rather than real burdens) is useful is in relation to common pasturage where the various dominant proprietors may enforce limitations on the servitude *inter se*. *E.g.* ***Yeaman v Mathewson*** **(1898) 12 Sh.Ct.Rep. 354; (1896) 4 SLT 160**. This prevents overburdening of the pasturage or the introduction of diseased sheep and is recognised by all the institutional writers. The servient proprietor also has such a right but he may not be bothered to enforce it.
Pinsent Masons	We are not aware of any other situations where there should be implied rights to enforce real burdens in common scheme cases. In accordance with the move towards increased transparency and completion of the land register implied rights should only occur in limited clearly defined situations.
Property Litigation Association	No.
Professor Kenneth Reid	I favour an additional bright-line rule modelled on s 53(2)I but broadened (in the manner of current case law) to include burdens imposed in a deed of any kind (ie encompassing *Hislop* type (2) cases as well as deeds of conditions). The imposition of burdens in the same deed is a strong indication of community. And to provide a bright-line rule corresponding to para © of subsection (2) means that each of the four paragraphs in that subsection would have a replacement rule in the new legislation.

Scottish Factoring Network	Yes. If a factor owns an open space but not the properties who use it, as factor you would want to be able to enforce real burdens.
Scottish Water	No.
Shoosmiths	No; we believe the shorter list of more certain rules is the correct approach. We believe the above cover all that is required.

11. Should there be implied rights to enforce real burdens imposed before 28 November 2004 although the relevant common scheme only arises following a sub-division after that date?

(Paragraph 7.28)

Respondent	
Aberdeen City Council	Yes – if the whole property was subject to a particular burden, then the parts of the property should still be subject to that burden after they are separated.
Aberdeenshire Council	No. We think it would aid clarity and certainty if the parties had to create a new burden on sub-division.
Dr Craig Anderson, Robert Gordon University	No. Implied enforcement rights were abolished for good and sufficient reasons. The state of the law required that there be transitional provisions of the kind contained in ss. 52 and 53, but I would not want to introduce new categories of implied enforcement rights.
Anderson Strathern	No. After 28 November 2004 the law is clear that any new real burdens must be created in writing and by registration against all burdened properties and benefited properties. If the purpose of the implied rights of enforcement is to be a saving device for pre-28 November 2004 burdens (considered desirable to keep but which had not been created in writing and with dual registration) allowing that rule to apply beyond that temporal boundary appears to subvert the purpose of the legislation. Moreover, it appears to run contrary to the post-28 November 2004 scheme for real burdens as a whole.

Brodies	Yes there should be implied rights for the properties that were burdened and benefited before 28 November but for those "joining the common scheme" after 28 November, as far the benefit of the burden is concerned, the deeds conveying those properties should have stipulated whether they were to benefit from the burdens.
Brymer Legal	I favour the counter view.
Burness Paull	No. Parties have the ability to expressly state the position in deeds which give rise to the "new" common scheme if that is the intended position and the law should not create a common scheme by default. In the event of failure to create the position on sub-division there may be recourse to other statutory provisions such as planning.
Church of Scotland	Section 12 of the Titles Conditions (Scotland) Act 2003 requires express provision to be made for a new benefited property to be created when an existing benefited property is divided. If the rules in s.12 are followed in the conveyance creating the sub-division post -2004, there should be no need to rely on implied rights.
CMS	We consider that if the burdens were imposed before 28 November 2004 there should be no implied rights where the sub-division took place after that date.
Dentons	On balance, yes. However, it is more important for the situation to be unambiguously clarified either way.
DLA Piper	In our view, where a common scheme only arises as a result of a sub-division first occurring after 28 November 2004 there should not be implied rights to enforce real burdens imposed before that date.
DWF	No.
Faculty of Advocates	We do not think so.

First Scottish Group	We would have thought that the new rules under 2003 Act would apply in this case for transparency of enforcement rights with the benefited and burdened properties being expressly nominated and identified. Transparency of enforcement rights being one of the ultimate purposes of the 2003 Act.
Gillespie Macandrew	No – the rules are now clear post-2004 and in this example Marjory's Solicitor should have made provision for this in the Disposition in her favour.
Harper MacLeod	Those present at the Seminar were unsure as to whether there should be implied rights to enforce real burdens imposed before 28 November 2004 although the relevant common scheme arose following sub-division. It was felt that if there was a deed of conditions covering the whole area before sub-division then that would create the common scheme itself and that on balance owners of large tracts of land should be assumed to have given consideration to setting out a deed of conditions if it was intended to be a common scheme.
Sarah King	No – s 12 of the 2003 Act caters for this situation and requires specific consideration of enforcement as part of the subdivision (rather than leaving things to implication).
The Law Society of Scotland	We do not seek to pass a view on whether there should be implied rights to enforce in these circumstances. It is important that the rule is clear. As part of the sub-division, the circumstances may be capable of negotiation. This could be framed in terms that the right will apply unless specified otherwise, or that it will not apply unless specified otherwise.
Lindsays	Yes, but again issues of community and proximity need to be considered. For example where there have been sales by a large landed estate prior to 2004 and the standard estate title conditions have been imposed there may be no sense of community among the various proprietors. A community buy-out then takes place post-2004 involving subjects within which the sold-off properties are located and a community is created where one previously didn't exist. Some of those properties may have formed a crofting community within the estate but now with the community buy-out a larger community has been created. Does this larger community constitute a common scheme? We would suggest not and that although there are numerous properties with common burdens within the new community there should still be a requirement to demonstrate an interest to enforce.

MacRoberts	My view is that in the interests of fairness there should be implied rights to enforce on sub-division in the circumstances set out in paragraph 7.27 and 7.28 of the Discussion Paper even though that these arise prior to 28 November 2004.
Lionel Most	There should be consistency. If Nancy in the example needs an express provision to enforce then so should Marjory.
Professor Roderick Paisley	I think the answer is yes.
Pinsent Masons	No. It is important that there is clarity and certainty in property law. The Title Conditions (Scotland) Act 2003 was a welcome clarification of the law (with the exception of s.53) and this made it clear that when a benefited property was sub-divided after 28 November 2004 the split off disposition had to state whether the part being sold off was to remain a benefited property. To change the law to give the owner of the part split off an implied right to enforce would be to confer an unfair advantage on the new benefited owner and prejudice the burdened owner.
Property Litigation Association	Yes- as set out in paragraph 7.27 and 7.28 of the Discussion Paper. To distinguish schemes by reference to that date would create a two-tier system which would be unfair.
Professor Kenneth Reid	No. New enforcement rights should not be created after the appointed day, for reasons already given.
Scottish Factoring Network	If there were 'blanket' rules it would help. There is more to consider if you are checking dates. Members of the Scottish Factoring Network believe implied rights to enforce real burdens should apply regardless of the date of sub-division.
Scottish Water	Yes.
Shepherd and Wedderburn	No. Section 12 of the 2003 Act should regulate the position. This will provide certainty and clarity in such situations.

Shoosmiths	In dispositions of benefited property express reference must be given to the burdens writs which you seek to enforce following that split off. The purchaser of the subdivided plot should expect to be bound by the real burden but should have to nominate the split off to benefit from that real burden and the onus should therefore be on the purchaser of that subdivided plot to ensure that they make clear that their property should be in a position to enforce the real burden post acquisition. The issue will be, of course, that the seller may not be willing to grant that, and that is where the argument comes for having the law imply that ability to enforce. On balance we believe it should not be automatically implied.

12. (a) Do consultees agree that if sections 52 and 53 are replaced with a new provision along the lines set out earlier, there should be a preservation scheme under which those losing enforcement rights could preserve these by registering a notice?

(b) If so, should notices be registrable by individual owners or should a group of owners have to agree to preservation?

I What should be the duration of the period in which notices could be registered?

(Paragraph 7.32)

Respondent	
Aberdeen City Council	Do not agree that preservation should be allowed as those losing enforcement rights under the changed provisions would likely lack interest to enforce anyway.
Aberdeenshire Council	**(a)** We agree that there should be a preservation scheme. **(b)** We agree that owners should be able to preserve their rights individually. **(c)** This might depend on whether an applicant would have to demonstrate that it was a common scheme burden before it could be preserved or whether the burden would be preserved and others left to decide whether it was enforceable. If the scheme were to follow earlier ones and the applicant would not have to demonstrate that the burden was a common scheme burden (unless, of course, where it was later challenged), then two years should be adequate. If the applicant would have to demonstrate validity in order to register a notice, especially where the burden has been the subject of a dispute prior to

	registration, then more time might be required. However, we think that applicants should not be required to demonstrate validity in order to register a notice.
Dr Craig Anderson, Robert Gordon University	(a) Yes. Whatever scheme is chosen, this would seem necessary. See however my response to proposal 9. If ss. 52 and 53 were replaced with a simple requirement for the existence of a common scheme, no special provision would be needed for the preservation of enforcement rights. I would note also that experience suggests take-up would be low. Title to enforce real burdens is not the kind of thing that the person on the street gives any thought to unless and until a dispute arises. There is therefore additional merit in a system that does not involve the inevitable consequence that valuable enforcement rights will be lost through inadvertence. (b) Individual registration should be competent. An individual should not require the agreement of another to preserve his or her rights. I A ten-year period would seem appropriate, in accordance with previous notice periods under the 2003 Act. A longer period seems necessary, given the low public awareness of real burdens.
Anderson Strathern	(a) Yes. (b) Individual owners (c) Two years.
Argyll Community Housing Association	(a) Yes, as it would provide an opportunity to address issues that may not have been done previously. (b) By individual owners, RSL's or Councils to protect the amenity of areas. I A period of five years would be more practical.
Brodies	Yes there should be a preservation scheme which can be used by individual owners. The preservation scheme should remain open for two years. Efforts should be made to explain in a straightforward manner what rights may be preserved / lost and the chance to retain these rights publicised.

Brymer Legal	(a) – yes, albeit reluctantly. I favour the view that the reform would amount to a control of ownership rights, rather than a deprivation of a rights. (b) – I prefer a collective process (as I did in the earlier Advisory Group). This might be difficult but it would at least bring the issue out for debate among owners at an earlier stage. I can see the counter argument however about the rights of the individual and, on balance, it is probably an individual right. (c) – 2 years is a reasonable compromise although I would favour 12 months.
Burness Paull	(a) Yes, it would be the consistent approach. Failure to preserve means the right would be lost (and a clear position would be established) and in all likelihood very few notices are likely to be registered. (b) Individual owners. It would be too high a bar to have a group agree for a preservation notice. © A shorter period would be preferably to move the law on to a further level of certainty if there were no notices registered against a particular property within the period. Two years seems a good balance. Could data relating to preservation of burdens support a drop off after initial period to ward off any suggestion that the period need be longer than two years?
Church of Scotland	a) Yes – although the number of those losing enforcement rights is likely to be relatively small. b) Notices should be registrable by individual owners – registration by a group of owners is likely to prove difficult in practice. c) Suggest that an appropriate period would be 2-4 years for registration of notices to preserve enforcement rights. The number of preservation notices registered under the 2000 and 2003 Acts was relatively small and it is reasonable to assume that this will be the case again but it will inevitably take some time for owners to become aware of and act on any change in the legislation.
CMS	We agree with having a preservation scheme and think 12 months would be an appropriate timescale. Preservation notices should require to be served by individual owners and dual registered against both titles.
Dentons	(a) Yes (b) Individual owners

	(c) 3 years.
DLA Piper	In relation to 12(a) we are of the view that a preservation scheme should be available. In relation to 12(b) notices should be registrable by individual owners, as requiring a group to agree would probably be unworkable in many situations, and could potentially lead to disputes. In relation to the duration of the preservation period, we are of the view that a period of one year would strike a fair balance.
DWF	(a) No strong views, particularly given that in many cases it is currently difficult to definitively assess that section 53 rights exist, but tended to the implementation of a preservation scheme, especially if owners of properties subject to real burdens providing for common maintenance, or which share common property are not given title to enforce a common scheme of real burdens against each other, in the absence of common management provisions. (b) Individuals (c) Two years
Faculty of Advocates	We are inclined to agree that there should be a preservation scheme of the type described, and that it should be sufficient for an individual owner to preserve his rights that he take the appropriate steps to do so, rather than having to depend on the agreement of the whole group of owners. We would suggest, however, that the individual owner should be required to give prior notice of his intention to the owners over whose properties he wishes to preserve enforcement rights, to give them the opportunity to maintain the mutual enforceability of their burdens. We are inclined to the view that two years is too short and that five years would be more appropriate.
First Scottish Group	Probably both but think this will be difficult to operate practically and may result in a large number of Notices. We think 10 years being the same period as the section 50 Notice.
Gillespie Macandrew	To be frank it seems futile, but if a preservation scheme is imposed 2 years would seem to be more than sufficient.
Professor George Gretton	The time-limit for registering [preservation] notices. Para 7.31 suggests a period of two years. My concern here is that this fairly short period might arouse opposition. I am not saying that the opposition

	would be reasonable. Few notices would be registered in any event, and as para 7.31 says there would be a benefit in "improving this area of law quickly". But opposition, even unreasonable, should be avoided if (reasonably) possible. Under the general law of prescription rights cannot be lost by neglect in less than five years. (Certain qualifications exist of course…) I am doubtful whether a shorter period than five years could easily be defended in the political arena. So I would go for five years. It would delay things admittedly. But if it meant that there would not be opposition, the delay would be justified.
Harper MacLeod	It was agreed that Sections 52 and 53 be replaced with a new provision. There was no real sympathy for a notice preservation scheme although it was recognised that for the purposes of human rights it was probably necessary. However it was considered that the period should be short and certainly not as long as the ten year period in respect of Sections 50 and 51. Five years was thought to be a reasonable compromise.
Keeper of the Registers of Scotland	Registers of Scotland is grateful for the opportunity to comment on the Scottish Law Commission's Discussion Paper on Section 53 of the Title Conditions (Scotland) Act 2003. Our comments relate to the proposal for a preservation scheme under which those having enforcement rights could preserve them by registering a notice within a prescribed period of time. By way of background, approximately 3000 various Notices preserving rights under the Abolition of Feudal Tenure etc. (Scotland) Act, 2000 (AFT) were registered in the permitted 13 month period allowed to do so prior to the Appointed Day for that Act, 28 Nov. 2000. Some 200 Notices of Preservation of enforcement rights relative to real burdens were registered in terms of S50 of the Title Conditions (Scotland) Act 2003 (TCA) in the permitted 10 year period following the Appointed Day for that Act, 28 Nov. 2004. Finally, 5 Notices preserving rights under ultra-long leases, which would otherwise have been lost on conversion of the rights of tenants under those long leases to ownership by virtue of S4 of the Long Leases (Scotland) Act, 2012 (the LLA) were registered in the permitted 21 month period allowed to do so prior to the Appointed Day for that Act, 28 Nov. 2015. In respect of the proposed preservation scheme, we would consider that registration of the type of notice proposed would not be a guarantee that the burden purported to be being preserved was

	actually valid. Accordingly, we share the SLC's view that the registration of a Notice itself would not guarantee the validity of that Notice nor of the preservation of the right (for instance, no rights under sections 52 or 53 may actually have been held by the person submitting the Notice). Preservation of an intended burden(s) would therefore not be achieved in such a proposed scheme if that burden could not be preserved or if the Notice itself was inept. An invalid deed recorded in the Sasine Register is an invalid deed. Equally, an invalid deed recorded in the Land Register is an invalid deed, rectifiable as a manifest inaccuracy through rectification in terms of S80 of the 2012 Act. Our view is therefore that if it is clear and beyond reasonable dispute that a registered Notice of the type proposed is invalid, then this would comprise a manifest inaccuracy which would be rectifiable. However, if there is insufficient evidence of a manifest inaccuracy, the Keeper would be unable to rectify without a legal challenge to determine a) the validity of the Notice or b) the validity of the burden to be preserved. Accordingly, we would be keen to see the dispute regimes provided for by AFT (S44), TCA (S102) and the LLA (S77) in respect of disputes concerning any aspect of the validity of a registered Preservation Notice stemming from the preservation scheme proposed replicated in that scheme, whereby the arbiters in a validity dispute would be the Lands Tribunal of Scotland and *not* the Keeper (irrespective of the complainant – burdened proprietor or non-preserving benefited proprietor – or reason). Additionally, both AFT (S43) and the LLA (S76) provided for a relaxation of the Keeper's registration duty in respect of the registration of Notices under these Acts. The Keeper would welcome a similar relaxation for any registration event evidenced in the preservation scheme proposed. Such an approach would expressly remove any obligation or expectation that RoS would be required to determine whether a S53 scheme existed before registration of any Preservation Notice could occur.
Sarah King	Agreed with the Commission's view that this would be a control on rights rather than a deprivation but appreciate that the government may wish to take a more cautious approach. The scheme set out in the discussion paper seems sufficient and sensible and previous experience of preservation schemes under the 2000 and 2003 Acts suggest that this scheme would not be well used. In the interests of managing

	expectations, the scheme should make clear that registering a preservation notice does not necessarily mean a right to enforce exists. Related to this is the ability of the potential benefited proprietor to challenge a notice. Would the potential burdened proprietor need to challenge the notice within a certain time frame? What would the legal result be if no challenge were made? Would this result in the person registering the notice having title to enforce? Would a challenge to a notice require an application to the Lands Tribunal? Or could a challenge be raised when an enforcement question arose (e.g. the burdened proprietor seeking a discharge or the person who registered the notice seeking to enforce the burden when faced with a potential breach)? Given the uncertainly around s 53 as it currently stands, my view is that it may put an unreasonable burden on the potential burdened proprietor to require them to challenge a preservation notice when it is registered under the preservation scheme, especially if this could involve a potentially costly application to the Lands Tribunal.
The Law Society of Scotland	(a) We consider that there should be a preservation scheme. (b) We consider that it would likely be more practical to allow individuals to do this because the administration and organisation for a larger scheme would be difficult. We would comment that we do not think that another proprietor should be allowed to rely on preservation by a neighbour or proprietor in their title. Accordingly, an individual should be able to preserve for their title only**.** I We suggest that the period is fairly short in duration to ensure that there is certainly, although recognise that a reasonable period must be identified to ensure compliance with the European Convention of Human Rights. We suggest that a two year period for registration may be appropriate.
Lindsays	a) Yes b) Both should have the ability to register if that is feasible c) The preservation scheme should be similar in terms of timescales and procedures as with feudal preservation notices.
MacRoberts	I agree that there ought to be a preservation scheme as set out in paragraphs 7.29 – 7.31 of the Discussion Paper and that it should be open to individual owners to serve notice given the ECHR

	provisions. I also agree that a short period to serve notice of preservation should be allowed and a 2 year period would seem appropriate.
Lionel Most	a. Agree to preservation scheme. b. Individually preferred. c. Two years is adequate.
Professor Roderick Paisley	(a) I think yes. (b) I think individuals should be able to preserve the right. (c) A year after enactment is sufficient.
Pinsent Masons	No- given the difficulties with establishing if someone has an implied right of enforcement under s.53 this could lead to owners seeking to preserve enforcement rights which could be disputed. Any disputes about whether there is a valid right to enforce would need to be referred presumably to the Lands Tribunal. The new law will set out a clear approach to common schemes and give those that need it a right to enforce. Preserving implied rights of enforcement which were never intended to exist is not consistent with the new proposals.
Property Litigation Association	The interests of fairness would require a preservation scheme as set out in paragraphs 7.29 – 7.31 of the Discussion Paper. We would suggest a 2 year period.
Professor Kenneth Reid	A preservation scheme seems essential. For it to be workable, it is necessary to allow individual owners to register notices. The suggested period of two years seems sufficient. Experience with previous schemes of this nature suggests that, however long the period, most notices will be registered at the last minute.

Scottish Factoring Network	Members of the Scottish Factoring Network do not object to this provision being included. However, we do not feel it is particularly relevant to housing as it is unlikely anyone would do this.
Scottish Water	Scottish Water responds to the questions in the proposals follows: - (a) yes; (b) individual owners; and (c) six months.
Shepherd and Wedderburn	We agree that, to avoid any Human Rights issues, a preservation period makes sense. It would be most workable if rights could be preserved on an individual basis, but in some communities, it could make sense for a group application for preservation to be made, so the provisions should not preclude this. Given the difficulties section 53 poses for conveyancers and their clients, we are tempted to say that the preservation period should be as short as possible, to get to the position where there is greater clarity as soon as possible. That of course has to be balanced with the rights of benefited owners, and the fact that in many cases they may not be aware of the precarious nature of such rights. Previous experience has shown us that, regardless of the period allowed, most registrations of preservation notices occur towards the end of the period. For that reason, we think a two year period ought to be ample.
Shoosmiths	(a) Yes – because some less obvious situations may be missed in the above and it should be open to those who are relying on implied enforcement rights for a certain real burden or set of burdens to be able to preserve those. We agree with the views of the Scottish Law Commission that it is likely that the number of preservation notices is likely to be relatively low. Although there are many real burdens which would potentially fall into the category of a common scheme, there will presumably be a much lower number of people who are (i) aware of their implied enforcement rights and (ii) with a sufficient desire to do something about preserving them. Preservation could presumably pick up the housing association/local authority enforcement issue raised elsewhere in the Discussion Paper. (b) Individual owners. If it necessarily limited it to groups of owners it would be much less useful/much less likely to be used. On the basis that there would be notice of any new section 53 coming into effect then we agree that 2 years from coming into effect would be sensible.

General comments

Respondent	
Aberdeenshire Council	**<u>General Policy</u>** (P41 of the Discussion Paper) • We agree that Section 53 should be replaced and not repealed. • We agree that there should be mutual enforcement rights for the owners within an identifiable community only and that this should not be disturbed by reform. • We agree with the conclusions of paragraphs 7.6 and 7.7. • We think that there are cases where 'distant' owners would have an interest to enforce mutual burdens and should be entitled to do so. For example, in the case of a row or terrace of houses, as in the *Thomson's Exr, Applicant* case, which, in our view, results in too narrow an entitlement. **Facility Burdens and Service Burdens** We agree with what is said in paragraphs 7.33 and 7.34.
Argyll Community Housing Association	As a RSL who acquired properties and common areas by stock transfer, we have encountered a number of difficulties in relation to maintaining common estate ground. While the discussion paper is mainly in relation to Section 53; Sections 52, 56 and 57 tend to have more effect on our particular situation in defining schemes and estates. Our issues stem from inconsistent titles, a variety of different estate maps and different areas of common ground, no clear definition of what the estate is, no consistent burdens and no consistent maintenance obligations. This means we have difficulty in terms of time and cost involved with obtaining and assessing every title deed within estates – when attempting this in smaller areas it still does not give definitely answers. The main issue for us is in relation to staff time, legal advice costs, recharging

	owners and pursuing unpaid invoices where the cost of the exercise greatly outweighs the cost of grounds maintenance costs. We therefore have to make decisions regarding the standard of maintenance work to the detriment of all residents.
Brymer Legal	I believe that reform of Section 53 is necessary in order that we might have a more transparent system of land ownership whereby owners and others may know with a reasonable degree of certainty who might potentially have both title and interest to enforce a real burden in their title. This was an objective of the Property Law Reform Package and is also a goal to which Registers of Scotland endorse as part of their digital transformation programme. The way in which Section 53 was introduced into the 2003 Bill was unfortunate. Section 53 has not worked well in practice and, while recalling the arguments presented by the Minister at the time, I was never convinced that the enacted solution would deal with the problem referred to. Instead, it created more problems, delay and uncertainty among the legal profession and their clients alike.
DLA Piper	The Discussion Paper is very well structured and clearly presents the case for reform of section 53.
Edinburgh Conveyancers Forum	General view was that by the nature of what we generally do i.e. buy and sell houses usually on an individual basis, s 53 rarely impedes on that process – it was felt if anything to be a developers issue not a housebuyers. Personally I can only recollect one occasion when it was an issue but that was 8 or 9 years ago in the context of development of a town house. So overall, whilst all agreed there was a lack of clarity most felt it wasn't actually an issue causing difficulty in our sector.
Faculty of Advocates	We have reservations about whether it will prove possible to draft legislation which is both sufficiently clear to be an improvement on the existing law, and sufficiently broad that it is capable of applying satisfactorily in relation to all of the different burden schemes that will fall within its ambit. The danger, to be avoided, is that the attempt to cover all possible varieties of burden scheme will lead to complicated drafting which will prove difficult to understand and apply in all circumstances. Whether or not the correct

	balance can be achieved can only be assessed once draft text is produced. The objective should, so far as possible, be to produce legislation which is clear and concise.
First Scottish Group	The proposed reform of sections 52 and 53 is intended as a fix to the problem of implied enforcement rights which were partly replaced with new statutory rights in sections 52 to 54 but we feel this exercise will be extremely difficult to square with the law as it stands on the subject. The main difficulty is replacing the Superiors' rights qua superior which disappeared on feudal abolition. Perhaps the introduction of another section (like section 56) to cover amenity type burdens with a list of examples should be considered?
Professor George Gretton	Well done for a good piece of work. Most interesting to read. I support the proposals, and where there is a question I agree with the implicit steer.
Harper MacLeod	The Seminar was attended by solicitors from various arms of our Property Department (residential, commercial, rural, agricultural etc.).
Sarah King	All comments in this response represent my own views and not the views of the University of Dundee.
The Law Society of Scotland	A number of our members report practical difficulties in assessing what constitutes a common scheme under section 53 of the Title Conditions (Scotland) Act 2003 and welcome clarification in this area. Others consider that the provisions of section 53 are useful and effective. We note that there has been some clarification by the court in recent cases such as *Russel Properties (Europe) Ltd* v *Dundas Heritable Ltd*[1] and *Thomson's Executor, Applicant*[2].
MacRoberts	My general view is that the Discussion Paper comprehensively reviews Section 53 and suggests proposals for reform which have been well thought through and are sensible reforms. In light of that, the comments I have made in the response form above are reasonably brief as I substantially agree with the recommendations for reform set out in Chapter 7 of the Discussion Paper.

[1] [2012] CSOH 175
[2] Lands Tr (Scot), 8 August 2016

Lionel Most	I think it is important that the legislation has as much certainty as possible. People need to know what they are getting into and be able to weigh up clearly what the effects of the relevant burden are.
Shoosmiths	Professor Kenneth Reid's comment that the rights are held now, whatever the demerits or otherwise of Section 53 are noted but we would suggest that in a lot of cases those who potentially have the right to enforce are not aware that they have such a right and even if they are aware then they are often not confident enough to enforce it, even with the advice of solicitors, because the drafting of Section 53 is so unclear. The majority of examples we have relate to reports on title in the context of acquisition of property, and consequent title investigations and/or title indemnity insurance. Reports on title generally tend to be non-committal on the subject given the lack of clarity in Section 53. Solicitors on the burdened and the benefited side are in similar situations; quite often one cannot confidently advise a potential burdened proprietor that they are not burdened (even if you feel it's perhaps unlikely) but likewise cannot advise a potential benefited proprietor that they definitely have a right to enforce. The provision is so uncertain that it assists very few.