The Committee will meet at 1.45pm in Committee Room 3.

1. **Items in private**: The Committee will consider whether to discuss items 2 and 6 in private, and whether to discuss lines of questioning for witnesses on the Title Conditions (Scotland) Bill in private at future meetings.

2. **Title Conditions (Scotland) Bill**: The Committee will discuss lines of questioning for witnesses.

3. **Title Conditions (Scotland) Bill**: The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   Professor Roddy Paisley, School of Law, University of Aberdeen,

   Kenneth Swinton, Convener of Conveyancing Committee and Ian McLeod, Member of Conveyancing Committee, Scottish Law Agents Society, and

   John MacNeill, Member of Conveyancing Committee and Lindsey Lewin, Deputy Director, Law Society of Scotland.

4. **Public Appointments and Public Bodies etc. (Scotland) Bill**: The Committee will consider the Public Appointments and Public Bodies etc. (Scotland) Bill.
5. **Petitions:** The Committee will consider the following petitions—

   PE29 by Alex and Margaret Dekker,

   PE55, PE299 and PE331 by Ms Tricia Donegan,

   PE111 by Mr Frank Harvey, and

   PE347 by Mr Kenneth Mitchell.

6. **Witness expenses:** The Committee will consider whether to approve travelling expenses for witnesses.

   Alison Taylor
   Clerk to the Committee, Tel 85195
The following papers are attached for this meeting:

Agenda items 2 and 3
Note by SPICe and Adviser (private paper) J1/02/28/1
Summary of submissions received on the general principles J1/02/28/2
of the Title Conditions (Scotland) Bill at Stage 1 (LATE PAPER)
Submissions on the general principles of the Title Conditions (Scotland) Bill at Stage 1 from:
Professor Roddy Paisley J1/02/28/3
Scottish Law Agents Society J1/02/28/4
Law Society of Scotland J1/02/28/5
Correspondence regarding the Title Conditions (Scotland) Bill J1/02/28/6
from Minister for Justice to Convener of Equal Opportunities Committee
SPICe Briefing on the Title Conditions (Scotland) Bill J1/02/28/13

Agenda item 4
Note by the Clerk J1/02/28/7

Agenda item 5
Note by the Clerk J1/02/28/8
Note by the Clerk J1/02/28/9

Agenda item 6
Note by the Clerk (private paper) J1/02/28/10

Papers not circulated:

Agenda item 2 and 3
The Title Conditions (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: (http://www.scottish.parliament.uk/parl_bus/legis.html#54)

Agenda item 4
The Public Appointments and Public Bodies etc. (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: (http://www.scottish.parliament.uk/parl_bus/legis.html#56)

Papers for information circulated for the 28th meeting, 2002

Correspondence regarding Prison Estates Review from Stop: J1/02/28/11
Closure of Peterhead Prison Officers Partners Committee
Correspondence regarding Prison Estates Review from J1/02/28/12
Minister for Justice
I must commend the Scottish Parliament and all involved for producing such a useful and well thought out bill. I do not wish to see large additions or variations to the draft as it now exists but set out a number of comments below.

1. Statutory Agreements - Not Just Planning Agreements

The most important defect in the Bill is one of the limitations of the jurisdiction of the Lands Tribunal in **Part 8**. The Lands Tribunal will be empowered to discharge in full or in part “real burdens” (**Section 110(1)(a)** and **Section 1**). The definition has the effect of including certain title conditions where there is no dominant tenement such as “conservation” and “maritime” burdens and agreements with the National Trust for Scotland in terms of National Trust for Scotland Order Confirmation Act 1938, 2 & 3 Geo. 6, c.iv, Schedule 4, section 7. Unfortunately it excludes the following some of which are very common:

(a) agreements with planning authorities;¹
(b) access agreements with Scottish Natural Heritage and planning authorities;²
(c) management agreements with Scottish Natural Heritage and planning authorities;³
(d) forestry dedication agreements;⁴
(e) agreements with the roads authority restricting the use of land near a road;⁵
(f) agreements relative to ancient monuments;⁶ and
(g) agreements with a National Park authority.⁷

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¹ Town and Country Planning (Scotland) Act 1997, s.75;
² Countryside (Scotland) Act 1967, ss. 13 and 16 as amended.
³ Countryside (Scotland) Act 1967, s.49A.
⁴ Forestry Act 1967, s.5.
⁵ Roads (Scotland) Act 1984, s.53.
⁶ Ancient Monuments and Archaeological Areas Act 1979, s.17.
⁷ National Parks (Scotland) Act 2000, asp 10, s.15(5)-(10).
The matter of planning agreements under 1997 Act, s.75 (but not the other statutes) was addressed by the Scottish Law Commission in their Report on Real Burdens, para 6.34. On balance they were minded not to recommend that planning agreements could be capable of discharge by the Lands Tribunal. They took some comfort from the fact that in para (g) of the definition of the term “title condition” in Title Conditions Bill, s.110(1) that the definition may be expanded to include such other condition relating to land as the Scottish Ministers may, for the purposes of this paragraph, prescribe by order”.

I am of the view that this matter needs immediate reconsideration in the Title Conditions Bill to include all these agreements in the power of discharge. The power to prescribe other statutes may be used for future statutory developments or omissions:

(a) The range of statutes in addition to 1997 Act, s.75 was not expressly considered by the Scottish Law Commission. The problem is much bigger than they thought. The category of public bodies with power to enter into such agreements is likely to expand in the future. It seems unwise to have so many local authority bodies and quangos having a potential stranglehold on development of land.

(b) As regards planning agreements some authorities refuse to grant planning permission unless an agreement is entered into. In sensitive sites it is possible for this agreement to restrict development to the precise use specified in the planning permission. This excludes all future development without the consent of the planning authority. A ransom situation is thus created for all changes of use. With the advent of Land Registration throughout Scotland it will be possible to prepare and register a style planning agreement within minutes. The ease of doing so will massively increase their use. This will gradually create immense power on the part of the local authority which will cause major difficulties.

(c) There is no appeal procedure for planning agreements or the other agreements so far as I am aware. It does not appear to have been considered whether this may leave some of these agreements as constituting a breach of ECHR Article 1, Protocol 1 in a question with a singular successor who did not originally agree to the restriction. Even in a case with the party entering the agreement there is an issue of some notion of economic duress. In any event the lack of an appeal procedure will enable the various authorities to grow a system similar to the feudal system as it existed pre 1970. In short, the failure to grant a power to discharge these obligations could set back process of feudal reform not only the reform of title conditions. I am of the view that the problem has been massively underestimated.
(d) The jurisdiction of the Lands Tribunal will be well suited to the discharge of these conditions as the Tribunal is directed to have regard to the extent to which the condition confers benefit on the public where there is no benefited property. *(Title Conditions Bill, s.90(b)(ii)).*

2. **Title to Apply to Lands Tribunal**

The power to apply for discharge to the Lands Tribunal is restricted to “an owner of a burdened property or any other person against whom a title condition … is enforceable”. *(Section 81(1)(a)).* This excludes a party who has entered into a contract to purchase the burdened land. A very common situation in practice is where a developer enters into missives to purchase land where the contract is suspensively conditional upon the obtaining of a certain offending title condition. It would be useful to expand the title to apply to the Lands Tribunal to a party who has obtained the consent of any of the parties listed in *Section 81(1)(a).* This would enable a developer to obtain the consent of the owner in terms of missives and then run the application for discharge in his own name. This would parallel the possibility of a developer applying for planning permission in respect of land which is still owned by the seller.

3. **Repairs of Servitude Roads**

One of the most common causes of disputes between neighbours is the issue of repairs to a servitude road. The *Title Conditions Bill* can be improved to deal with this by a small adjustment.

Imagine a situation of a servitude road leading to a quarry. The quarry trucks are causing damage to the road but the servitude expressly allows access by such trucks. The quarry owner is not willing to reduce his use (because this will affect his legitimate business) and is unwilling to repair the road. The servitude deed - as is very common - makes no provision for repairs or maintenance.

In such a case both the servient proprietor have a power but no obligation to repair the road. Neither party can force the other to repair the road or share in the costs. This often leads to complete stalemate and the road deteriorates as the use continues.

In such a case the servient proprietor may apply to the Lands Tribunal to discharge partially the servitude to exclude heavy trucks. The Tribunal may not be willing to do this as it may not be reasonable to require the quarry owner to diminish his business.

I would suggest it is appropriate to add a power on the part of the Lands Tribunal to impose an obligation of repair (but not improvement) on the servient and/or
dominant proprietors in such fractions as are just in the circumstances. Either
dominant or servient proprietor should be entitled to apply. Suitable provision can
be made for situations where the tenements are leased so that the obligation will
fall on them too. This power could enable the quarry owner to continue his use
but to have a suitable condition for repairs attached to his servitude as an
affirmative/positive servitude condition. At present the **Title Conditions Bill**,
**s.110(1)** is drafted to allow the dominant proprietor (the quarry owner) to apply
for variation of an affirmative obligation. In short, he could seek a lessening of
any existing repairing obligation on him. The defect in the present proposals are
(a) the dominant proprietor cannot seek that some liability is to be placed on the
servient owner or others having servitudes; and (b) the servient proprietor cannot
seek to increase the liability of the dominant proprietor. More flexibility is needed.
I would not recommend that the provisions go so far as to allow massive
upgrading of the road as this seems too invasive of private rights and should be
considered in a separate bill on ransom strips and encroachments. (See below).

4. **Resources of Lands Tribunal**

I appreciate that the role of the Lands Tribunal is central to many of the reforms
presently anticipated in the **Title Conditions Bill**. The work load of the Tribunal
is likely to increase. I have the highest regard for the dedicated and hardworking
staff at the Lands Tribunal who carry out their duties efficiently and with great
skill. I am concerned, however, that they may be swamped with work and have
insufficient resources to deal with it.

So far as I am aware it is not yet possible to apply to the Lands Tribunal for
discharge of a title condition by electronic means. I would regard this as a pre-
requisite of the role of the Tribunal in the 21st Century. Some investigation should
be carried out to see if this is to be possible soon.

I would urge the Parliament to consider carefully the role of the Tribunal and if
necessary to expand its staff. The ideal turn round period for an application for
discharge is a timespan as close as possible to that of a normal conveyancing
transaction. I do not really think this will be possible to achieve in the near future
but it is important to make the period of time for a Lands Tribunal application as
short as possible to (a) elide delays in conveyancing transactions - offending title
conditions are a major source of this problem; and (b) remove the possibility of
ransom demands for voluntary discharges. The longer the period in the Lands
Tribunal the larger the demands will be. Quite simply, time is money.

5. **Timeshare Rights**

I would urge the Parliament to consider expanding the definition of real
conditions to permit the creation of timeshare rights. These are not restricted to
salmon fishing timeshares but also extend to matters of commercial concern such as carparking, common gardens, use of pipelines and low cost housing provision where a party purchases 50% of a house with 50% owned by an authority. Such title conditions in such contexts regulate time and manner of use and repairs.

If the Scottish Parliament are minded to do this they should reconsider the rule that a pro indiviso share in a property cannot be the dominant and servient tenement in a title condition. (Title Conditions Bill, s.4(6)).

6. Standard Securities

The abolition of the feudal system and the reform of title conditions has led to the creation of many devices to retain control over land. Some of these involve standard securities securing a contractual obligation. There are various difficulties with such an approach which will probably merit a full consideration in a wholly new bill relative to standard securities. To prevent incoherence and avoidance of the provisions of the Title Conditions Bill I would suggest two immediate reforms to be incorporated into the Title Conditions Bill:-

(a) A standard security should be stated to be capable of securing a negative obligation as well as a positive obligation. At present the former appears not possible. (Conveyancing and Feudal Reform (Scotland) Act 1970, s.9(8)(c) - reference to obligation ad factum praestandum) As a result it seems a standard security can secure an obligation to build a house but not an obligation not to build a house. This is simply ridiculous.

(b) Where a standard security secures an obligation intended to mimic a title condition there should be a maximum duration on its existence (and possibly also a right to obtain an earlier discharge from the Lands Tribunal). If not there will be a massive switch to these devices as there is no jurisdiction in the Lands Tribunal to discharge contractual obligations (secured or not). A model may be found in the statutory right to redeem a security after 20 years where it relates to a dwellinghouse. This appears to relate to monetary debts only. It needs expanded. (Land Tenure Reform (Scotland) Act 1974).

6. Ransom Strips and Encroachments

There is nothing in this bill to deal with ransom strips and encroachments. I would recommend that these issues are given early attention but that this should be done in a separate bill.
The Scottish Law Agents Society was established by Royal Charter in 1884. It is the largest voluntary association of Scottish Solicitors from all branches of the profession and from all parts of Scotland. We have some members practising abroad. The Society does not have any responsibility for regulation but its objects include the promotion of legal services in Scotland.

SLAS is active in responding to consultative documents issued by the Scottish Executive, the Scottish Law Commission and others and is generally interested in the good government of Scotland. The Society has a number of specialist committees including a Conveyancing Committee.

The Society publishes a legal journal called the Scottish Law Gazette published six times a year with articles on professional practice and developments in the law and the Memorandum Book published annually containing valuable information for practitioners.

The Society welcomes the opportunity to give evidence to the Justice 1 Committee on the Title Conditions Bill.

**Overall assessment of the proposed legislation**

The Title Conditions Bill forms a central pillar of the work done by the Scottish Law Commission in relation of reform of the law relating to heritable property. There are three pillars to the SLC proposals the Abolition of Feudal Tenure, which has now been enacted in the Abolition of Feudal Tenure (Scotland) Act 2000, the Report on Real Burdens which included the draft Title Conditions Bill and the Report on the Law of the Tenement. The SLC published a revised Tenements Bill earlier this year. This removes the potential overlap between the Tenement Bill and the Title Conditions Bill regarding development management schemes.

The SLC originally envisaged that there would be a two year period of transition between the passage of the Abolition Act and the appointed day when the majority of its provisions will come into force. More than two years has already elapsed and it seems likely that the Title Conditions Bill will only become law in 2003. A transition period will still be required. Our view is that solicitors have, to date, done little to advise clients and make preparations for the appointed day on the basis of continuing uncertainty as to the terms of the Title Conditions Bill and its passage and coming into force.

As the appointed day can only be a term day of Whitsun or Martinmas it would be useful if the Executive could give early guidance as to likely date of the appointed day.
Further it would be useful for the Executive to state whether or not it is committed to the introduction of the Tenement Bill and a proposed timescale.

The Title Conditions Bill is generally welcomed by the Society. It affords an opportunity to restate in statutory form rules derived from common law and provides a means of clarifying court decisions which may not be entirely clear and in some cases are contradictory. Redefining the perimeters of real burdens and servitudes is a welcome and sensible proposal. The concept of dual registration in the titles of benefited and burdened property is an excellent innovation. We welcome the prohibition on the creation of new rights of reversion and redemption. Such rights have created a number of unpleasant surprises for owners in recent years.

Part 1 of the Bill
S1 No comment

S2 No comment

S3 Prohibition on new redemption rights and reversionary rights is welcome. The case for prohibition of pre-emption rights as well was made in the SLC Discussion Paper. Such rights can be exercised only on the first sale of the property over which they are constituted and look more like personal contractual rights rather than real rights. Such rights could be secured over the property by way of standard security and this approach is in our view preferable. The prohibition on supply burdens and limited prohibition on manager burdens is welcome.

S4 The ability to create burdens which have future effect may give rise to certain problems. At present burdens become real either by recording/registration as part of a disposition or by operation of s17 of the Land Registration (S) Act 1979 in relation to a deed of conditions. It is possible to record a deed of conditions contract out of s17 and rely on the provisions of s32 of the Conveyancing (S) Act 1874. The burdens are potentially real but require to be made real by subsequent incorporation into a deed under the first rule mentioned. This already causes a difficulty. Where the owner of a registered property executes and records a deed of conditions but contracts out of s17 no new real burdens are created. They should therefore logically not enter the title sheet as the Keeper is entitled to register only subsisting real burdens in terms of s6(1)(e) of the 1979 Act. As the burden is not subsisting it should not be noted but if the event which makes it real is the subsequent conveyance then it becomes real the Keeper then notes it. The purchaser could be unaware of the burden until he receives his Land certificate but presumably the Keeper would not be liable as he has neither rectified or refused to rectify. The problem seems to be the same where a burden takes effect at some future time. There appears to be no amendment proposed to the 1979 Act which might give the Keeper a way of dealing with this. It might be that the Keeper could
cover the problem by noting the future burden by noting it on the title sheet under s6(1)(g) as other information. The Keeper does have discretion but the point could usefully be clarified in the Bill.

It is noted the s4(6) prohibits real burdens over pro indiviso shares. The SLC report para3.2 noted that there may be a temptation to use such burdens to regulate the parties rights. As the SLC state common ownership may not be longlasting and any such rights/burdens may be of no advantage when the property subsequently passes into one ownership. We are of the view however that while it should not be possible in general to create real burdens between pro indiviso owners there is a case for permitting rights of pre-emption between pro indiviso owners. As noted above we are not convinced that there is a need to retain pre-emption rights as real burdens but if they are to be retained it would be useful if one pro indiviso owner could have a pre-emption right over the other's share, should it come to be sold. If the logic for retaining pre-emption rights over neighbouring properties exists then surely it is even more logical over other shares in the same property. Cases such as Steele v Caldwell 1979 SLT 228 [where husband sold his 1/2 share to a third party] and Smith v MacKintosh 1989 SLT 148 [where a daughter sold her own property to live with and nurse her mother on the understanding that the mother's house would be put into joint names and the survivor which it was but the mother made over her share inter vivos to a son and defeated the daughter's reasonable expectations] illustrate where such a pre-emption right might have been useful between pro indiviso owners.

S5 We welcome the drafting adopted in the Bill which will cure any defect that exists in many tenement titles where the burden of sharing repairs costs is stated by reference to rateable value or assessed rental or some similar formulation. This is narrower than the SLC formulation which would have permitted reference to extraneous matter in all cases. If a burden is being created then apart from this exception our view is that the burden should appear at full length on the record.

S6 No comment.

S7 No comment.

S8 In s8(2)(b) our view is that this is too widely stated. The scheme of s1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 is that a non-entitled spouse automatically has occupancy rights. If that spouse is not in occupation of the property there should be no right to enforce the burden in our view. This could be remedied by adding in (2)(b)(ii) and is exercising those rights. It may be that the provisions for interest to enforce in s8(3) would be sufficient to argue that a non-entitled spouse not in occupation would have no interest to enforce but in our view the matter could be put beyond doubt with the proposed amendment.
We have certain concerns about this section. The decision in *David Watson Property Management v Woolwich Equitable Building Society* 1992 SLT 430 dealt with the liability of a heritable creditor for common repairs charges which had been incurred in relation to a tenement flat by the owner before the property was repossessed. The rule in the case however is wide enough to cover sale and purchase of property as well. As a result of the case any works which are carried out and become an actual cost are personal and can only be recovered from the owner. Such costs do not transmit to new owners because they fail the tests in *Tailors of Aberdeen v Coutts* 1840 1 Rob App 296. A purchaser will be liable for future repairs costs but not those incurred before his ownership. Agents acting for purchasers can be satisfied that their client is not incurring liability for former repairs. That rule is being reversed by s10. Agents may be able to make inquiries of the seller's agents but will not be able to guarantee the position if the seller tells untruths. A right of action against the seller is only of value if the seller can be traced and has money to pay. Again there may be factors involved who can supply the information but where owners instruct repairs without factors getting information may be difficult. Clearly a balance has to be struck between those who carry out the work and do not get paid and purchaser who may become liable. It is superficially attractive to adopt the scheme in s10 but contractors can protect themselves by requiring payment in advance. A purchaser cannot protect himself in the same way. In our view the inconvenience for purchasers outweighs the benefit for contractors and factors. We have no doubt that factors would welcome the change but not every property with such obligations is factored and our preference would be to leave the existing rule in place. Factors can also protect themselves by requiring payment in advance of instructing the works and their completion.

We do however welcome the change for the timing of liability to the time the work is instructed rather than when it crystallises into a cost presumably on the rendering of an invoice after the work has been completed.

If a burden is a negative burden then it would be enforced by an action of interdict, if an affirmative burden then enforcement would be by action *ad factum praestandum*. For both types of action before the court will make any order it must be framed in a sufficiently precise way as to be intelligible. If it cannot be so framed then no order will be
made. [Grosvenor Developments (Scotland) Ltd v Argyll Stores Ltd 1987 SLT 738] As a result s14 is unlikely to have much impact in our view.

S15 No comment.

S16 We note that the Bill limits the statutory concept of acquiescence as the expiry of such period as is reasonable which is then long-stopped to 8 weeks after the activity has been substantially completed. We are concerned that the long-stop provision become the norm and that a very long construction period may have preceded the time of substantial completion when acquiescence at common law might already have been established. This might be obviated by providing a period of 8 weeks after substantial and obvious works have been carried out on the site whether complete or not.

S17 We welcome the reduction of the prescriptive period for all types of breach being reduced from 20 years to 5 years. Again the transitional provisions now included in s17(5) and (6) which did not appear in the draft are welcome.

S18 No comment.

S19 We remain unconvinced of the need for so-called ‘qualified sunset rules’ for burdens over 100 years old.

S20 We note that a new mode of service of notices is provided for in s20(2)(b) which did not appear in the draft Bill. Such notices may be useful for members of the public in relation to licensing applications in alerting them to a proposal but an owner might only drive past a lamp post and never read a notice or may not use the road on that side of the property at all. We can see no reason why newspaper advertisement as provided for in s20(2)(c) should not be the default mechanism rather than lamp post notice.

S21 No comment.
S22 No comment.
S23 No comment.

Part 2 Community burdens

We generally welcome the provision for community burdens in part 2 of the Bill.

S24 No comment.

S25 No comment.

S26 No comment.

S27 We prefer the more sophisticated drafting of the Bill where is unit is owned by more than one person providing for majority voting rather
than any owner being permitted to exercise the power to vote under the SLC formulation.

S28 The specification of a maintenance account in s28(2) and (5) and (8) is preferable to rather vague proposals of the SLC. We have concerns with s28(4). This appears to be an absolute requirement which has a detailed specification. Nothing is said as to the validity of a notice which complies substantially with but not completely with the requirements of s28(4). Is the notice nonetheless valid or is it invalid. The combined effect of s28(4) which requires a proposed timetable and s28(7) may give rise to difficulties. S 28(7) permits an owner to demand repayment of sums where work has not commenced within 14 days of the proposed timetable. There may be a variety of good reasons why work does not commence within 14 days of the timetable specified in the s28(4) notice. It would too easy for a non-consenting owner to get out of payment on this basis.

S29 No comment.

S30 No comment.

S31 We accept the use of the 4 metre rule is an appropriate method of defining an adjacent affected unit.

S32 We prefer the rafting of this provision to that of the draft Bill.

S33 We are concerned as noted above about lamp-post notification which we regard as a dilution of service requirements rather than an enhancement.

S34 We welcome the new provision of s34 which will allow amenity conditions to be discharged by all the neighbouring units.

S35 No further comment.

S36 The right of a non-consenting owner to object within eight weeks to the Lands Tribunal is a useful introduction.

**Part 3 Conservation burdens**

We recognise that the right to create new conservation burdens may be required as the Abolition Act only preserves existing burdens.

S37 We welcome the inclusion in s37(2) the provision that the conservation body must consent before the burden contained in the constitutive deed is registered. It would appear that the consent does not require to be *in gremio* of the constitutive deed. We would prefer that the consent was *in gremio* so that the conservation body was clearly aware of the
context in which the conservation burden was created. A separate letter of consent might be too easy to obtain and there is no evidence that the full context has been considered by the conservation body.

If this is not done then there is a possibility of a further difficulty. A deed may contain burdens some of which are neighbour or community or facility or service burdens and can come into effect immediately but the conservation burdens contained in the same deed may not come into force until a later date when the consent of the conservation body is obtained. The problem is really one for the Keeper with burdens having different effective dates

S38 Unlike real burdens where there is a benefited property conservation burdens are not attached to a property. If an assignation of the right to enforce a conservation burden takes place the burdened proprietor may not be aware of the assignation and would have no means of tracing which conservation body to apply to for a minute of waiver should this prove necessary. A requirement to register the assignation of the burden with the Keeper would be an advantage.

S39 No comment.

S40 We do not see how the holder of a conservation burden can register a notice of title when of its nature the conservation burden is personal and does not attach to any specific heritage. This links to our comments in respect of s38 assignation. Presumably what is intended is that the registration is over the burdened property.

S41 No comment.

S42 No comment.

S43 We wonder whether a presumption of interest to enforce is enough for conservation burdens. Conservation burdens are designed to protect some sort of public interest. At present superiors are presumed to have interest to enforce but this can be shown to have been lost by prior acquiescence or the discharge or variation of burdens in adjoining properties. Neither of these criteria would apply to conservation burdens nor would the neighbour burden rules apply where the conservation body owns no other property in the neighbourhood. It is not clear on what basis that a loss of interest to enforce might be demonstrated but equally it is not clear what interest the conservation body has to enforce. S43 does not expressly exclude s8(3) which determines interest to enforce in the general case as demonstrating material detriment to the value or enjoyment of the neighbouring benefited property. As the conservation body will not necessarily have neighbouring property, on this basis they would never be able to enforce. A conservation body may not be able to show any financial loss unless the breach may lead to the clawback of grant monies paid to the conservation body [see SLC Report para 9.10. If it is not
necessary to show a financial interest then it must be a sort of public interest but this is never mentioned in the Bill. There is a danger that unless there is the possibility of grant repayment the conservation body would have no interest to enforce in the public interest. Either guidance should be provided in the Bill as to how interest to enforce might be lost or the language used should be changed to give the conservation body an automatic right and interest to enforce rather than merely a presumption of such interest. We note that the Lands Tribunal in deciding to discharge or vary a burden can take into account the extent to which benefit is conferred on the public but this has no application where say the ordinary courts are considering an action to enforce a burden or otherwise.

**Part 4 Implied rights**
The law of implied rights to enforce real burdens has grown up in a haphazard way and involves interpretation of difficult and at times conflicting court decisions. We agree that in general implied rights to enforce lead to uncertainty and that it falls outwith the scheme of the Bill to permit such rights to come into being in the future. In other word drafting will require to be done with precision and care will be necessary to identify the benefited property.

*S45* No comment.

*S46* We suspect that few people are aware of implied rights to enforce. Agents acting for purchasers are unlikely to undertake the necessary examination of adjoining titles when purchasing to ascertain whether there are any such implied rights to enforce and are therefore unlikely to advise purchasers of the potential for the existence of such rights. We do not expect that many notices of this nature will be registered. The costs of the investigation necessary to therefore support an application for preservation are probably such as to deter many owners from seeking to preserve such rights.

*S47* The ten year transition period for the Keeper is probably necessary.

*S48* No comment.

*S49* No comment.

*S50* We are concerned that the use of the word ‘a’ in s50(1) may restrict the definition. In our experience there is often a warden flat and a guest flat which constitutes two other units and not ‘a’ unit. This should be amended to include the plural.

We are surprised by s50(5)(c) . In our view purported burdens restricting the age of the occupants are not real burdens. They do not describe any facility or feature of the property and are purely personal. They are not in our view enforceable against singular successors of the first purchaser. S50(5)(c) invests such burdens with a character which they do not possess and should be removed.
S51 No comment.

S52 The technique of preventing the creation of implied rights by reserving power to vary or waive a burden is widely used by conveyancers. The result of s52 will be to create rights to enforce which do not exist at present. We do not think that this should happen. Para 213 of the explanatory memorandum appears to confuse the rule in Hislop v MacRitchie regarding implied rights to enforce where there is a common scheme and the so called rule in Mactaggart v Harrower. In many cases where there is a development using dispositions for split-offs the last property is sold by exception and no burdens are imposed at all. If the rule in Mactaggart v Harrower applies then each property will have different rights to enforce.

Assume a piece of ground is developed with 6 houses and each is sold off by disposition with similar burden then the position would be as follows:
 units b-f
 Unit a burdens can be enforced by the remaining parts of the whole
 Unit b burdens can be enforced by units c-f but not a
 Unit c burdens can be enforced by units d-f but not a and b
 Unit d burdens can be enforced by e-f but not a-c
 Unit e burdens can be enforced by f but not a-d
 Unit f burdens cannot be enforced at all.

The reservation of a right to vary by the disponer will make no difference to this rule.

If on the other hand the rule in Hislop v MacRitchie’s Trustees applies and it applies equally to properties disposed by disposition as it does to those which are feu’d then the implied rights to enforce will apply to all properties as they are sold and the right to enforce will vest in all the remaining parts. If power to vary the burdens is retained by the seller then there are no implied rights at all and nothing depends on the order on which are sold.

Our view is that there is no need for s52 which did not appear in the SLC draft Bill. It creates rights which do not exist at present.

S53 No comment.

Part 5 Miscellaneous provisions

S54 No comment.

S55 No comment.

S56 The explanatory memorandum states that an obligation after the appointed day can be either contractual or a real burden but it cannot be both. This does not square with the SLC Report para 3.40-3.45. A
potential real burden will be able to be enforced as a matter of contract until it is registered but contrary to what is said in the explanatory memorandum it will remain enforceable where for example there is an antecedent contract under that contract unless the contract makes provision other than that contained in s2 of the Contract (S) Act 1997 which provides a statutory non-supersession rule. Given the obvious confusion it might be better to add a new paragraph to s56 to the effect that this new rule is entirely without prejudice to s2 of the Contract (S) Act 1997.

S57  No comment.

S58  We remain unconvinced that local authorities and registered social landlords should be permitted to remain as managers for a period of 30 years. If they are doing a good job factoring property they will be retained but if they are not and there is a majority wishing to remove them we see no need to give them special protection.

S59  No comment.

S60  No comment.

S61  We welcome the more detailed guidance given in s61 compared with that of the original draft Bill.

S62  This provision is particularly welcome given that feudal irritancies were abolished on the date of the Royal Assent of the Abolition Act.

S63  Is welcomed.

S64  No comment.

S65  We do not welcome this provision. Firstly there is no sanction for non-compliance and it appears to us to be simply unenforceable. Secondly a person who his right to enforce could seek to require a person who owned the burdened property many years ago to give the names and address of the current owner. That owner may be a successor of the person to whom the person sold the property and the person selected has no information. In our view this section will achieve no useful purpose and should be omitted.

Part 6 servitudes

We welcome the clear demarcation of the boundary between real burden and servitudes. Further we welcome the removal of any doubt as to whether servitudes can be created for fluids other than water and permitting these and servitudes for cables as well retrospectively. We welcome the disapplication of the existing rule to known types of servitude. This will permit a right to park motor vehicles, the absence of which right has been a considerable difficulty to conveyancers.
We have no comments to make on the drafting of any the sections 66-72

**Part 7 Pre-emptions etc**

We welcome the modernisation of the law in relation to subsisting pre-emption rights. As such rights can be exercised on one occasion only in general terms we can actually see no need for their preservation when they could be replaced by personal contractual rights which could be secured by standard security if required. However if that view is not accepted modernisation ought to take place.

S73 No comment.

S74 The power to extinguish such rights in advance of a sale is welcome. The regularises what is often done in practice and that may otherwise not extinguish the right.

S75 This modified version of s9 of the 1938 Act is welcomed.

S76 No comment.

S77 Reversionary rights under the School Sites Act 1841 have caused considerable problems over the last 20 years as the result of operations of certain so-called title raiders. They have been acting completely legally however and any scheme which abolishes the rights or reversion must make corresponding provisions for compensation for the loss of those rights. In our view the deduction of the improvement value of any buildings erected on the site is a suitable compromise. We note that in s77(3)(b) there is a reference to para (a)(ii) where in fact there is no such provision in s77 of the Bill We note that the Bill omits the definition of the net proceeds of a sale of a site which was contained in the draft Bill. We would welcome a definition of net proceeds being included to avoid ambiguity.

S78 We agree the Scheme in s77 should be extended to the Entail Sites Act 1840.

S79 No comment.

S80 The Act appears to have fallen into disuse and it should be repealed.

**Part 8 Lands Tribunal**

S81 We welcome the extension of the powers of the Lands Tribunal to include those burdens which may in fact not be effective [McCarthy & Stone (Developments) v Smith 1995 S.L.T. (Lands Tr) 19 illustrates the difficulties which may occur]. We are not convinced that the power to discharge and partially discharge burdens is the same as the power to discharge or vary which presently exists under the 1970 Act. An example might make this clearer. An existing burden might oblige an
owner to build a boundary wall with stone and lime not exceeding 6 feet in height with a suitable coping. This could be discharged wholly; it might be partially discharged to require the wall to be four feet in height or it might be varied to allow the building of a wall with concrete blocks or artificial stone. This is not the same as a partial discharge. We would therefore prefer to retain the power to vary as well as discharge or partially discharge an obligation.

S82  No comment.

S83  We see nothing wrong with the fixed two year period in the 1970 Act and remain unconvinced of the need for change.

S84  No comment.

S85  No comment.

S86  No comment.

S87  No comment.

S88  One of the strengths of the current Lands Tribunal system is that all applications whether opposed or not are scrutinised. That is in fact very odd for what is to all intents a court. It has to be anticipated that the work of the Tribunal will be greatly expanded by the Bill and that a more normal role for the Tribunal should be adopted namely that where there is no opposition to an application there should be no scrutiny by the Tribunal except in those situations proposed in the Bill.

S89  We note that the word variation appears here and not the words partial discharge. See our comments on s81 above.

S90  The first ground on which discharge etc may be granted is change in circumstances. The examples given are admittedly examples but change in circumstances have been considered wider such as changes in social circumstances Manz v Butter’s Trustees and others 1973 SLT (LT) 2. [In 1924 there was a strong temperance movement which had disappeared by the 1970s]. There is a danger in the giving of examples that such wider considerations are not given effect to. We wonder whether the examples might simply be dropped. We welcome the additional grounds specified in(d) (e) and the separating out in (f) of the ground of having planning consent from (c).

S91  No comment.

S92  No comment.

Part 9 Miscellaneous

S94  No comment.
The issue of the effects of compulsory purchase on subsisting real burdens and servitudes has for too long been a matter of conjecture. The Scheme adopted by the Bill is a useful compromise whereby all such obligations will be extinguished unless saved by the authority. The position of further saving them where the conveyance does not include the consent of those in right of the obligations is a useful protection. We note and welcome the wide definition given to conveyances which will have this effect.

We note the extension of the principle to land acquired by agreement where compulsory powers could have been used and consider that this is appropriate. We have reservations about the lamp post notice which were elaborated earlier.

We note the extension of the principle to land acquired by agreement where compulsory powers could have been used and consider that this is appropriate. We have reservations about the lamp post notice which were elaborated earlier.

The problem with the ranking provisions under s13 of the 1970 Act is well known. This fixing of the problem is not related to title conditions at all but is a useful and welcome change in the law.

There are no comments.

The introduction of changes into the Abolition Act before large parts of it come into force will have to be accepted. If the Act is to be changed it would be useful if the terminology used in the Abolition Act could be harmonised with the Bill. The Abolition Act used the old terminology of dominant and servient tenement whereas the Bill uses benefited and burdened property. That change could usefully be applied retrospectively to the Abolition Act as well.

We recognise that superiors may not own any property adjacent to the property burdened with a pre-emption right and that the right of pre-emption might be valuable and that the superior should be entitled to convert this into a personal right. We again wonder whether registration of any assignation is meaningful when the right to enforce will be personal.

We wonder why this is necessary. Conservation burdens were thought up because of lobbying from conservation bodies. Now the concept is being extended for existing burdens where there is no conservation body presently involved. The explanatory memorandum does not explain why this extension is thought necessary.

No further comment
New s65A  This is wholly new and appears to be an extension of the existing law. At present sporting rights cannot be a separate tenement with the exception of salmon fishings. We note that the intention is to replace the original provisions of the 2000 Act regarding these being burdens. Salmon fishings have been a separate tenement at common law. There is probably no good reason for other fishings or shooting rights not being created as separate tenements.

S103  This section might usefully be included in Part 6

S104  No comment.

S105  We welcome the clarification that pecuniary real burden will not be competent after the date of the Royal Assent. As there is doubt whether it has been competent to create a pecuniary real burden since the 1970 Act the formulation used seems to give force to such burdens when the probability is that they have not. This might be made clearer by a rewording.

S106  No comment.

Part 10

We have no comments to make on the saving transitional and general provisions.

Schedules

We have no comment to make on the Schedules to the Act
Law Society of Scotland

Title Conditions (Scotland) Bill

Comments by the Law Society of Scotland’s Working Party (a sub-group of the Conveyancing Committee)

The Law Society of Scotland’s Working Party has already commented on the Scottish Law Commission Report on Real Burdens and on the Title Conditions (Scotland) Bill Consultation Paper dated May 2001. We have however been asked by the Justice 1 Committee of the Scottish Parliament to submit written evidence on the general principles of the Bill by 7 August 2002. We note that comments are invited as to whether the Bill adequately addresses concerns raised by respondents to the Scottish Executive regarding the Law Commission’s draft Bill and we note that it would be helpful to provide a clear description of how the Bill will affect the organisation responding. In this regard we have commented on how the Bill will affect the solicitors’ profession.

These are the Working Party’s comments on the Bill in general. A separate detailed paper commenting on some of the changes resulting from the Consultation Paper is in course of preparation and will be sent to the Executive within the next few weeks.

Comments

The comments which follow represent additional observations on the Bill that have occurred to the Working Party since the date of the submissions already made. The Working Party do not consider that there is anything to be gained by repeating these submissions but copies of the relevant papers are attached.

1. The Working Party welcomes the Bill and considers that when it is enacted there will be a significant improvement to the law of real burdens in Scotland. The Working Party considers that clarification of the law of real burdens is helpful since it is an area which is in many respects currently uncertain and complex. The Working Party also welcomes codification in itself. This is helpful because after enactment of the Bill all the law will then be found in two places, namely the Bill and the 2000 Act.

2. The Working Party considers that one of the benefits of the Bill is that it will bring in the requirement to register burdens against both the benefited and burdened property. They consider that this, over time, will make the conveyancing process much simpler.

3. The Working Party considers that the sunset rule is a welcome addition to the conveyancing process as it provides a facility for removing obsolete and irrelevant burdens from titles to land.

4. The Working Party notes and welcomes the retention of the 100-metre rule, again in the interests of certainty.

5. The Working Party has some concerns that the current law favours benefited proprietors. They would not wish the balance to tilt too much in favour of burdened proprietors but consider that there are detailed provisions in this Bill (for example regarding acquiescence), which may potentially shift the rights of the enforcer to the rights of the enforee excessively. A more detailed note is being sent to the Executive regarding this point.
6. The Working Party welcomes the Executive's attempt to enable the majority of proprietors in a community to change various burdens – this is contained within Section 28 of the Bill. However, the Working Party is concerned by some of the provisions of Section 28 because they require very detailed information to be produced, some of which may be difficult for members of the public to obtain. In particular the Working Party has concerns about the provisions of Section 28(4). The Working Party will be giving detailed commentary about this Section to the Executive.

7. As far as the legislation affecting the Society is concerned the Working Party have looked at this in the context of it affecting the profession and in this regard the Working Party does have some concerns regarding the practical effect of having the same Appointed Day for the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Bill. The concern is that if they both come into force on the same Appointed Day it will be very difficult for solicitors who act for superiors to cope with the amount of work involved. It is therefore suggested that consideration might be given to there being two Appointed Days, perhaps one year apart.

8. On a practical level looking at the wording of Section 3 of the Act which defines the characteristics of real burdens, the Working Party considers that the common law as laid down by the Court of Session in Tailors of Aberdeen v. Coutts (1840 1 Rob. App. at p.307) should in fact be repeated and statutorily enacted under Section 3. Section 3(6), for example, in the view of the Working Party does not give enough specification to guide those seeking to create real burdens after the Appointed Day and it is suggested that in order to make the legislation more workable greater guidance should be given. The Working Party also considers that although the implication is clear enough it should be specifically enacted that for a burden to be “real” it must “run with the land”.

9. As regards enforcement of real burdens generally, on reconsideration the Working Party is concerned by the proposed extension of the right to enforce to tenants and non-entitled spouses of benefited proprietors. There are, of course, no public registers of either tenants or non-entitled spouses and the Bill is silent on how burdened proprietors are to establish who is or may be entitled to enforce real burdens in any given case.

10. Implied Rights of Enforcement. The Working Party welcomes the clarification provided by Part 4 of the Bill dealing with implied rights. However, they have concerns about the statutory means of preserving these implied rights. The Working Party will be writing to the Executive in detail on this matter but there is a concern that the process which relies upon completion of forms and serving notice may easily result in a burdened proprietor failing to object to a notice prior to registration. The Working Party also has concerns that the extension of the implied right to enforce burdens to owners of properties within 4 metres of the burdened property will result in the burdened proprietor requiring to seek a waiver or consent from a number of house owners as against only the feudal superior at present (unless the right of enforcement by proprietors within a community inter se is express). The new provisions are bound to give rise to additional delay and expense in obtaining the necessary waiver or consent.

11. The Working Party while reserving their position on the detail of Section 95 welcome clarification of the law to the effect that except in defined circumstances real burdens are extinguished by compulsory purchase orders.

12. With regard to the powers of the Lands Tribunal the Working Party welcomes the procedure whereby if an application is unopposed it will go through on the nod. They also welcome the provisions regarding expenses.
13. Development Value Burdens. As previously indicated in past papers, the Working Party feels very strongly that Development Value Burdens should be capable of being saved and in this regard, the Working Party refers you to their comments on recommendation 77 in the list of recommendations in the SLC Report on Real Burdens. A copy of this is attached. The Working Party considers that if a clawback burden were to remain enforceable in accordance with its terms this would be a satisfactory method of dealing with clawback arrangements. However, they accept that following abolition of the feudal system it is difficult to ensure that such burdens “run with the land” and that the only way of securing them for now on is by means of a Standard Security which many purchasing companies, particularly developers, will refuse to grant. At the very least clawback provision should be enforceable between the original parties to the constitutive deed, by contract.

9/8/02.
Dear Kate,

TITLE CONDITIONS (SCOTLAND) BILL

Thank you for your letter of 18 June in which you requested further information on the Title Conditions (Scotland) Bill. It might be helpful if I put the background law into context.

Title conditions affect most land in Scotland. They are imposed on a plot of land (or an individual house) in the relevant title deeds, almost invariably when it is first sold. The conditions form part of the agreement of sale: they are stipulated by the sellers and are accepted by the buyers who should be advised of their content by their solicitors. The conditions may, for example, oblige the buyer to contribute to the cost of a service; or to maintain the property; or he or she may be prohibited from carrying out certain activities on the property. This private regulation of land ownership is parallel to, and separate from, the public regulation of land which operates through planning and environmental legislation.

The Scottish Executive shares with the Parliament and the Equal Opportunities Committee a strong and clear commitment to equality. The Executive’s approach is outlined in its Equality Strategy, published in November 2000. That strategy is based on research, consultation and expert advice and is underpinned by mainstreaming. This is a long term approach, which recognises that effective change requires that equality issues are built into the policy process from the earliest stages and that responsibility for equality lies with everyone.

The Executive is developing tools and guidance to develop effective mainstreaming of equality issues. These are still being developed for roll out across the Scottish Executive. In the meantime, our starting point has been to use the set of six questions developed by the Equal Opportunities
Commission, the Commission for Racial Equality and the Disability Rights Commission as a framework for assessing our work.

Your letter states that the framework of the six questions would form an acceptable starting point for the Committee’s discussion and therefore these have been used to respond to the Committee’s questions. We hope that this is helpful to the Committee and that it will assist both the Executive and the Parliament to progress their shared agenda.

Your letter also seeks clarification on some specific issues which mainly relate to the sending and receipt of notices under provisions of the Bill and the display of "conspicuous" or lamp post notices.

In relation to the receipt of a notice by a blind or visually impaired person under the provisions of the Bill, there is no financial burden being imposed by the Bill. It is a matter of choice for individuals as to whether they wish to seek legal advice. Blind people will normally have arrangements in place for some trustworthy person to read their mail. There is of course a difference between knowing what a document says and understanding what it means. The notices which will be issued under the various provisions of the Bill contain explanatory notes which can also be read to the blind person. But since the notices affect property rights such as the right to restrain anyone from continuing a condition affecting the relevant property, many recipients are likely to wish to seek legal advice as to the actual effect of a notice and whether they should consent or object to what is proposed. In these circumstances, however, blind and visually impaired people are in exactly the same position as non-disabled people.

It is worth pointing out at this stage that all notaries public are solicitors. Notarial execution will therefore be carried out by a solicitor and there is no question of having to employ separate and additional professional assistance.

With regard to the sending of notices under the Bill, or the display of "conspicuous" or lamp post notices, this will usually be carried out by the solicitor acting on behalf of the person who wishes to vary or discharge a condition affecting the relevant property. This will normally arise when someone wishes to alter or extend their property in contravention of a provision in their title deeds. Blind and non-disabled people alike will almost certainly have to seek legal advice if they wish to alter the property rights and obligations affecting their properties.

My officials are consulting the Disability Rights Commission and the Royal National Institute for the Blind to discuss how blind and visually impaired people are currently advised as to their property rights. In this regard, they will raise the issue of whether notices issued under the Bill should be made available in alternative formats such as Braille, large print or audiotape. We may need to balance different interests here, since any moves which tend to prolong procedures (and alternative documentation would inevitably have this effect) would impact on non-disabled neighbours who receive a copy of the same notice.

The question around alternative formats is not of course confined to this Bill. There is no statutory requirement to make the document available in alternative formats in relation to notices used in relation to planning applications and for road management purposes. In addition, the procedures will in the vast majority of cases be used by private individuals dealing with other private individuals (rather than corporate, including public, bodies) and I am anxious that no unnecessary expense is caused to those who wish to take advantage of the Bill’s procedures. In view of what I have said above about people wishing to seek legal advice about property rights, it may be that a personal explanation is more what is required than the provision of the documentation in alternative format. I note in passing that duties created under the Disability Discrimination Act 1995 do not come into play in this context, where individuals are transacting with each other and where there is no ‘service provision’ to modify.
It may be that the best option might be to decide upon best practice which can be pursued and encouraged through the various equality organisations rather than to seek to add further and possibly impractical provisions into the Bill.

I am grateful to the Committee for raising this matter and I accept that the issue of how a blind or visually impaired person is made aware of a “conspicuous” or lamp post notice (or for that matter a notice in the press) is a genuine problem (though not one unique to this Bill). The problem may also not be confined to blind people since other disabled people may have difficulty in reading such notices. My officials will therefore also consult the Disability Rights Commission and the Royal National Institute for the Blind to ask how blind people currently become aware of the contents of such existing statutory notices and how best, and most practically, we can ensure that they are able to exercise the rights proposed or confirmed under this Bill.

A response to the six questions is attached in the Annex. I hope this is helpful. I am copying this letter to the Clerks of the Equality Opportunity and Justice 1 Committees and to the Departmental Committee Liaison Officer.

JIM WALLACE
1. What is the policy for? Who is the policy for? What are the desired and anticipated outcomes?

The Bill is intended to improve the law relating to the private regulation of property by means of burdens and conditions contained in the title deeds of individual properties. The identity of the person selling and imposing the conditions, or the person who subsequently owns the land, is irrelevant. One of the basic principles of the Bill is that in future conditions on land will only be valid if they benefit other land – they are not personal to the individual who originally imposes them. Conditions will be enforced by the owners of the land which benefits from the burden (in their capacity as owners, not as individuals) on the owners of the land which is subject to it.

The Bill has two main objectives. The first is to achieve greater clarity in the law. The Bill therefore restates the current law in a clear, codified form. This will make it more accessible. In places, where the common law is uncertain or unsatisfactory, the Bill reforms or enhances the law. The second objective is to reduce the number of outdated conditions on land by making it easier to discharge or vary them. The Bill complements the Abolition of Feudal Tenure etc. (Scotland) Act 2000: together, they will provide a modern and simplified framework for the ownership of property in Scotland. An underlying theme of the whole package is to ensure that people who live at a great distance from property they have sold should not be able to use property law to exercise control over it.

2. Do we have full information and analyses about the impact of the policy upon all equalities groups? If not, why not?

The Executive has considered the impact of the Bill on all equalities groups and believes that it is not discriminatory on the basis of gender, race, disability, marital status, religion or sexual orientation.

Special consideration has been given to the position of sheltered housing since this is the one area where title conditions have been used to provide for the use of certain property by elderly people. The stipulation that particular property is to be occupied only by people above a certain age will almost certainly be set out as a condition in the title deeds of that property. The Executive’s consultation paper had a separate chapter specifically devoted to sheltered housing issues. Officials met Age Concern Scotland, the Sheltered Housing Owners’ Confederation and Hanover Housing, one of the main providers of this form of housing in Scotland. As a result of those meetings and of the large number of responses received from sheltered housing residents, the Bill has been amended to take into account the main thrust of the concerns expressed.

A 12 week public consultation was undertaken. Copies of the consultation paper including the draft Bill were sent to the Disability Rights Commission, the Equal Opportunities Commission, the Commission for Racial Equality and the Equality Network, but no responses were received from these bodies. Further enquiries are now being made with the Disability Rights Commission and the Royal National Institute for the Blind in the light of the queries which have been raised by the Committee.
Steps were also taken to ensure that individuals had access to the consultation via the Scottish Executive website and a news release was also issued. All the responses to the consultation exercise are now also lodged on the Executive’s website.

3. Has the full range of options and their differential impacts on all equality groups been presented?

It is not considered that there would be any differential impact on the basis of gender, race, marital status, religion or sexual orientation irrespective of the various policy options which have been considered in relation to the Bill. This is because the Bill is concerned principally with land and property rights rather than with the individuals who happen to own these.

As indicated above, substantive discussions have taken place with organisations connected with the welfare of the elderly and the Bill has been amended in the light of those discussions. A considerable range of detailed options has been considered in this regard. The general effect of abolition of the feudal system and of the Bill will be to remove control from the developer who initially builds the complex and to give it to the owners. It is worth restating that apart from the sheltered housing provisions, the age of a person imposing, or subject to, title conditions is wholly irrelevant (as is their gender, race, disability, marital status, religion or sexual orientation).

Further options are now being considered in conjunction with the Disability Rights Commission and the Royal National Institute for the Blind in connection with the notice provisions in the Bill.

4. What are the outcomes and consequences of the proposals? Have the indirect, as well as the direct, effects of proposals been taken into account?

Both the direct and indirect outcomes and consequences of the proposals have been fully taken into account. The Bill will introduce a comprehensive framework for real burdens recommended by the Scottish Law Commission in which the various parts complement and mirror each other. In so far as possible the Executive has attempted to anticipate the direct and indirect consequences of the proposals on equality groups.

The main outcomes and consequences of the reform will be to make the law on title conditions clearer and more accessible, since it will be set out in a modern, codified, statutory form. The process of conveyancing will become simpler and it will become easier to alter the conditions on property. The number of outdated conditions on property will be reduced over time since it will become easier to vary or discharge burdens. The Bill will introduce reforms to the property registers which will make it easier to find out who has rights to enforce conditions on property. As a result of the default rules on majority voting within communities of property units which are subject to the same conditions, it should become easier to have maintenance and repair work carried out in relation to common property.

5. How have the policy makers in the Executive demonstrated they have mainstreamed equality?

The policy makers have demonstrated that they have mainstreamed equality by seeking internal advice to ensure that the provisions of the Bill fitted in with the Executive’s wider Equality Strategy, together with ensuring that statutory and voluntary bodies were included in
the consultation exercise. At the same time, as outlined above, the impact on equality groups of the provisions and alternative means of achieving the policies of the Bill have been considered.

6. How will the policy be monitored and evaluated? How will improved awareness of equality implications be demonstrated?

Because of the long term (indeed in most cases perpetual) nature of burdens and conditions on property, and the infrequency of variations thereto, it is unlikely to be possible to judge the effectiveness of the provisions of the Bill within a short period of time. A major part of the Bill is simply a codification of the existing common law with some enhancements where the law is uncertain or unsatisfactory. The Bill does not impose any new regulations as such; rather it provides a set of rules governing the imposition of private conditions on land ownership.

It is expected, however, that within a few years of the legislation being in force there will be considerable amount of academic research and consideration of the impact of the Bill. The Scottish Executive Central Research Unit (CRU) will undoubtedly be involved in such research. One of the most important factors to be considered will be the extent to which the provisions have permitted more repair and maintenance work to be carried out to common property.

Before commencement of the legislation, the Executive intends to issue guidance on the effect of not only the Title Conditions Bill but also the closely related Abolition of Feudal Tenure etc. (Scotland) Act 2000, which together will bring about a fundamental overhaul of the system of land tenure in Scotland and the rules pertaining to the ownership of property. This guidance will highlight equality implications, particularly for issues such as sheltered housing. It is expected that bodies such as Age Concern Scotland as well as the other statutory and voluntary equality bodies will bring any issues or problems to the attention of the Scottish Executive and awareness of equality issues will be demonstrated in this way.
Background

The Public Appointments and Public Bodies etc. (Scotland) Bill was introduced in the Parliament on 17 June 2002. The 4 objectives of the Bill are:

- to establish a Commissioner for Public Appointments in Scotland;
- to abolish 6 non-departmental public bodies, including the Scottish Conveyancing and Executry Services Board (SCESB);
- to grant limited notarial powers to conveyancing and executry practitioners; and
- to create a new body – the National Survey of Archaeology and Buildings of Scotland – which would take on the functions as laid down in the Bill of the Royal Commission on Ancient and Historical Monuments of Scotland.

The SCESB was established to introduce competition with solicitors in relation to conveyancing and executry services. According to the Executive’s policy memorandum, the decision to abolish the SCESB was reached because “it has had very limited success”. Of the 11 practitioners registered with the Board at the time of the review of public bodies in Scotland in June 2001, only 2 were practising independently of solicitors’ firms. The Executive believes that it is unlikely that income from registration fees payable by practitioners, and their contribution to insurance premiums, will fully fund the cost of the Board in the future. The Executive proposes to transfer regulatory responsibility for qualified conveyancers and executry practitioners registered by the Board to the Law Society of Scotland.¹

Scottish Ministers have agreed that both the professions of executry practitioner and qualified conveyancer should be retained, but with the effect that from the date of transfer of responsibility no new independent qualified conveyancers should be registered. Ministers have agreed that independent qualified conveyancers should be provided with limited notarial powers with direct relevance to their conveyancing duties. This is intended to put them on a level playing field with solicitors.²

The Local Government Committee is the lead Committee on this Bill. The Justice 1 Committee has been named as a secondary Committee on the Bill. This is because the abolition of the SCESB and granting of limited notarial powers to conveyancing and executry practitioners comes under the Committee’s remit.

¹ Public Appointments and Public Bodies Etc. (Scotland) Bill, Policy Memorandum, p3, para 7
² Ibid, p4, para 11
Evidence

The Local Government Committee issued a general call for evidence on 4 July 2002. The deadline for written submissions was 23 August 2002. No written submissions have been received to date in relation to the SCESB, although a written response is expected from the Board itself. In addition, the Convener has received correspondence from Irene McGugan outlining concerns about the provisions contained within the Bill.

The Justice 1 Committee took evidence from the SCESB in the course of its inquiry into the Regulation of the Legal Profession. The official report of that evidence session is attached for information. The Board also submitted written evidence to that inquiry.

The Local Government Committee is due to publish its Stage 1 report on the Bill on 4 October. If the Justice 1 Committee chooses to report to the Local Government Committee, it would be required to do so by 26 September. Given that the Committee is currently considering the Title Conditions (Scotland) Bill at Stage 1, there is no time available in the Committee’s schedule to take any further oral evidence on the Board and its abolition before that date.

Report

The Committee is invited to consider whether it wishes to report to the Local Government Committee on the Bill. This could be in the form of a letter from the Convener outlining the Committee’s views, based on evidence received by the Committee in the course of its inquiry into the Regulation of the Legal Profession and on written evidence received in relation to the Bill. A draft response could be considered at a future meeting of the Committee.
Background

1. The Committee (and the former Justice and Home Affairs Committee) has considered 5 petitions about road traffic offences resulting in a fatality. In its initial consideration of these petitions, the Committee agreed to defer consideration of these petitions until the publication by the Department of Transport, Local Government and the Regions of a report into the application of road traffic legislation by the police, prosecutors and courts.

2. Three of the petitions were concerned about drivers being charged with the seemingly lesser offence of careless driving rather than causing death by dangerous driving. The former Justice and Home Affairs Committee considered PE29 and PE55 on 2 May 2000. Justice 1 Committee considered PE331 on 27 February 2001:

   PE29 – Alex and Margaret Dekker calling for action to be taken in relation to the Crown Office’s decisions and considerations in prosecuting road traffic deaths;

   PE55 - Tricia Donegan calling for the Scottish Parliament to conduct an investigation to establish why the full powers of the law are not enforced in all cases which involve death by dangerous driving;

   PE 331 – Tricia Donegan calling for the Scottish Parliament to investigate why drivers who have made deliberate decisions when driving which cause risk to the lives of others are classed as careless drivers when prosecuted, even in the event of a fatality.

3. The Committee considered another petition on 27 February 2001 concerning a case where a driver had knowingly broken the law by driving without insurance, a current MOT and whilst holding only a provisional licence, and had caused the death of another driver:

   PE 299 – Tricia Donegan calling for the Scottish Parliament to investigate whether the additional driving offences of failure to possess the correct licence, MOT or insurance documentation should be taken into consideration at court hearings concerning a fatality caused by dangerous driving.
4. On 7 June 2000, the former Justice and Home Affairs Committee considered a petition that concerned road accidents which may be caused by the police while responding to emergency calls:

PE 111 - Mr Frank Harvey calling for the Scottish Parliament to order a public inquiry into road accidents involving police responding to 999 calls.

**Dangerous Driving and the Law: Report by the Department of Transport, Local Government and the Regions (DTLR)**

5. Dangerous Driving and the Law: Report by the Department of Transport, Local Government and the Regions (DTLR) was published in January 2002. The Justice 1 Committee considered the recommendations in the report at its meeting on 16 April 2002. At that meeting, the Committee agreed to write to the Minister for Justice regarding the following:

- seeking confirmation as to whether the Minister had discussed the recommendations contained within the report with colleagues at Westminster and if so, the outcome of these discussions;

- expressing the Committee’s support for the recommendation that a consultation exercise be undertaken to assess how the introduction of an intermediate offence, to sit between the current offences of dangerous driving and careless driving, would be received by agencies responsible for implementing road traffic legislation and other concerned groups;

- stating that the Committee supports the recommendation that the current offence of causing death by dangerous driving should be extended to include severe injuries and asking that the Minister make representations to the UK Government that this recommendation be implemented;

- seeking to establish whether the Minister is content that the situation in Scotland has been adequately investigated or whether there is a need for specific research to be carried out in Scotland, and

- expressing its support for there to be a requirement for convictions for bad driving offences to be kept by the DVLA to assist in monitoring re-offending.

6. In his response (attached), the Minister noted the points raised by the Committee and explained that the policy and legal implications of the recommendations in the DTLR report are being considered by an official steering group (comprising representatives of relevant Government and Executive Departments), which will provide advice to Ministers ahead of a wider consideration of the report by other Government departments and the Judiciary. The Minister has passed on the views of the Committee to the steering group.

7. In relation to the need for specific research to be carried out in Scotland, the Minister wrote that “while experience in Scotland was an important part of the study, and of particular interest to us, it was never the intention to give it specific prominence in the context of this research”.
8. The Committee also agreed to write to the Lord Advocate outlining the following:

- the Committee’s support for the suggestion that all causing death by dangerous driving cases should be tried in the High Court (given that the majority of driving offences, including that of causing death by dangerous driving, are currently dealt with in the sheriff court);

- the Committee’s view that statistical information should be kept on the outcome of cases involving fatalities and serious injuries where these do not form part of the charge.

9. In his response (attached), the Lord Advocate explained that where a case is being considered in the sheriff court, the sheriff has power to remit a case to the High Court for sentence if he considers that his powers are inadequate. The Lord Advocate considers that the current prosecution policy allows for a flexible approach to the selection of the appropriate forum for proceedings.

10. The Lord Advocate also explained that changes have been made to the computer system which will enable all fatal road traffic cases to be identified but “at present there is no straightforward technical solution to keep track of careless driving prosecutions where there has been a serious injury”.

Options

11. Having received responses from the Minister and the Lord Advocate, the Committee may wish to pursue one of the following options:

- write back to the Minister or Lord Advocate seeking additional information (such as timescales for the work of the steering group on the DTLR report);

- wait for an announcement on the outcomes of the steering group on the DTLR report and consider the petitions again at that stage;

- alternatively, the Committee could decide copy the responses from the Minister and the Lord Advocate to the petitioners and to end its consideration of these petitions at this stage.
Background

This petition (attached) calls for the Scottish Parliament to investigate the practice of couping Clydesdale Horses and to introduce legislation to make such style of shoeing illegal unless sanctioned, for medical reasons, by a Veterinary Surgeon.

Committee members will wish to note that, regrettably, the petitioner, Mr Kenneth Mitchell, a registered farrier, has died since submitting this petition. Mr Jim Sharp is now the primary contact for this petition.

The petition has been referred to a Justice Committee because this matter is dealt with by the Justice Department of the Scottish Executive as it is responsible for criminal sanctions behind the protection of domestic and captive wild animals which is mainly covered mainly by the Protection of Animals (Scotland) Act 1912.

Couping (or Show Shoeing) is a method of shoeing horses that supports only the front of the hoof and causes the back of the hoof to drop. It is used primarily at horse shows and exhibitions to create an exaggerated version of the Clydesdale's natural stance which is regarded as a desirable feature in the show ring. The late petitioner alleged that couping can cause both short and long term medical problems and may shorten the life of the horse. He has gathered a wide range of supporters for his petition including the British Horse Society, professors in veterinary science, the British Equine Veterinary Association and various veterinary surgeons and farriers. Two motions have been lodged in the Parliament on 17 November 2000 calling for a ban of couping: S1M-1366 Dr Sylvia Jackson and S1M-1365 Nick Johnston, both of which have expired and no longer appear in the Business Bulletin.

The Public Petitions Committee has received views of the Clydesdale Horse Society (CHS), Dr Sylvia Jackson MSP, the Scottish Executive, the Scottish Society for the Prevention of Cruelty to Animals (SSPCA), the British Equine Veterinary Association (BEVA) and the Cross Party Animal Welfare Group on the issues raised in the petition. Additional correspondence from the late petitioner has also been received and considered.

The CHS believe that couping does not alter the true stance of the horse or cause long term medical problems. It has stated that its members could not condone cruelty to their horses, and it has set up guidelines with regard to the best practice for show shoeing of Clydoodles. The CHS also denies that its members are keeping these horses for profit only (as alleged by the late petitioner) by outlining the non-profitability of keeping Clydoodles.

The CHS state that Clydoodles can only be shoed by registered farriers who work to competency requirements laid down by the Farriers Registration Council set up under the Farrier’s (Registration) Act 1975. However, Dr Sylvia Jackson MSP believes that the Farriers (Registration) (Amendment) Act 1977 which came into effect in Scotland in 1981, excludes the Highland region and the Western, Orkney
and Shetland Islands. She has suggested that legislation is required to cover the whole of Scotland.

The Executive does not wish to investigate the issue of couping at this stage as it does not want to undermine the work currently being undertaken by the SSPCA in this area. The SSPCA state that it would support further research into the health implications of couping and that it opposes that practice in principle on the grounds that it is cosmetic in nature. The SSPCA have not found any evidence of unnecessary suffering but have founded a working group on couping in 2001 with the aim of helping various parties achieve consensus on animal welfare concerns. The working group comprises various groups with opposing views on the subject and included the late petitioner, the Farriers' Registration Council, the CHS and the SSPCA. After several meetings, the group agreed on several actions which have been put into practice. The CHS issued welfare guidelines for its members and horse show judges and the SSPCA started the practice of unannounced inspections at shows to assess compliance of the guidelines. In addition, it was agreed that a course should be run for farriers and their apprentices to encourage good practice. The late petitioner believed that these actions did not go far enough.

The Public Petitions Committee has received reports of the SSPCA inspections made and it transpired that it is extremely difficult for the inspectors to prove long term suffering on a given day which would be required for an inspector to report animal cruelty to the Procurator Fiscal. The SSPCA also reported that there seems to be improvements in shoeing since the CHS issued its guidelines and that owners seem to have greater awareness of welfare issues. The SSPCA also suggested that the CHS could further improve matters by encouraging judges at shows to disqualify horses that were improperly shod.

The BEVA believe that couping is unethical on welfare grounds. They believe that horses should be shown in their natural state and that couping can lead to orthopedic problems at a later stage in a horse’s life.

The Cross Party Animal Welfare Group concluded after discussion at several Group meetings that welfare concerns exist. The also agreed that legislation provided one way forward but there would be merit in building on the progress made to date with particular regard to the independent monitoring of observance of shoeing guidelines.

**Procedure**

The Standing Orders make clear that, where the Public Petitions Committee refers a petition to another committee, it is for that committee then to take “such action as they consider appropriate” (Rule 15.6.2(a)).

**Options**

The Committee may wish to decide:

- whether self regulation by the Clydesdale Horse Society is appropriate for the issues addressed in the petition, or
• whether legislation making this style of shoeing illegal might be required to deal with this matter (the Committee could write to the Minister for Justice in this regard), or

• to note the petition and take no further action.
Dear Christine,

Please find enclosed a copy of plans/costing for a prison that has recently been built in United States, United States Penitentiary, Coleman, Florida.

We the above group have managed to find this information for ourselves, so why has Jim Wallace not managed to find it, as we are led to believe that it will be more than likely that an American company will supply the new private prisons if he gives the go ahead for them.

We believe that a prison such as this could be built through the public sector at Peterhead at a far less cost to the taxpayers and in far less time than the Estates Review has implied.

I hope this information is of use to you if you do not have it already, please be aware that the prices are in US dollars.

Yours truly,
Christine Wood
Assistant Secretary.
STOP: CLOSURE OF PETERHEAD PRISON OFFICERS

PARTNERS COMMITTEE

Christine Grahame MSP
South of Scotland
Constituency Office
69 Bank Street
Galashiels
The Scottish Borders
TD1 1EL.

Christine Wood
9 Ashgrove Place
Peterhead
Aberdeenshire
AB42 2 FX

5th August 2002
01779 477150
Ctinaewood@aol.com

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Yours truly
Christine Wood
Assistant Secretary.
LOCATION
United States Penitentiary
FCC Coleman
846 NE 54th Terrace
P.O. Box 1029
Coleman, Florida 33521-1029

TYPE OF INSTITUTION
Maximum Security
(United States Penitentiary)

TOTAL ACRES OF SITE
1,400 acres

AREA OF FACILITY
54,000 square meters (581,251 square feet)

CONSTRUCTION IMPACT AREA
90 acres

SITE CONTRACTOR
Hewitt Contracting Company, Inc.

SITE WORK COMMENCED
March 1999

PROJECTED SITE WORK COMPLETION DATE
October 2000

DESIGN BUILDER
CLARK/DLR
Design Build
Tampa, Florida

CONSTRUCTION COMMENCED
March 1999

PROJECTED COMPLETION DATE
January 2001

ESTIMATED PROJECT COST
$77,500,000

= $91,128,025
OWNER
Federal Bureau of Prisons
Office of Design and Construction
Washington, D.C.

ARCHITECTURE and PLANNING
STRUCTURAL ENGINEERING
MECHANICAL / ELECTRICAL / PLUMBING ENGINEERING
CONSTRUCTION SERVICES

Clark/DLR Design/Build
Tampa, Florida

SITE and CIVIL ENGINEERING

PBS&J Inc.
Winter Park, Florida

FOOD SERVICE / LAUNDRY

Marshall Associates
San Francisco, California

FIRE PROTECTION / CODE

FP&C Consultants, Inc.
Kansas City, Missouri

SECURITY ELECTRONICS

Alta Consulting Services
Kirkland, Washington

GEOTECHNICAL and TESTING

PSI Inc.
Winter Park, Florida

RENDERING

Leigh Bohne
Tampa, Florida
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The United States Penitentiary (USP) at Coleman, Florida is a project of the Federal Bureau of Prisons (FBOP). The Maximum Security facility at Coleman provides the FBOP with a facility that respects its primary responsibility of "ensuring the custody and safekeeping of Federal Inmates". The USP represents a facility intended to confine approximately 960 high security inmates who are the Federal Bureau of Prison's most serious offenders.
The USP is sited in the northeast section of the existing Federal Correctional Complex (FCC) located in Sumter County, Florida, accessible directly from State Highway 470. The facility is located 6 miles from Coleman, Florida and 9 miles from access to Interstate 75 and 7 miles from the Florida Turnpike. The facility adds an additional 380 full-time staff to the current 650 FCC employees at Coleman, Florida. The site of the new penitentiary impacts approximately 90 acres of the USP's total 3,400 acres.
The new site for the USP is located within a wooded perimeter adjacent to County Road 501, which provides segregation from the community yet affords direct access/exit to the penitentiary from a single control point through the FCC. Six high guard towers are placed outside the secure perimeter fence strategically designed to provide maximum visibility for around-the-clock surveillance of the outside perimeter fence, inner compound/recreation yard and building roofs.
Representing approximately 54,000 square meters (581,251 square feet) the facility is divided into two primary components, inmate housing and inmate services within a secured perimeter. The housing component provides single cells within six individual mezzanine-housing units and a separated confined two level special housing unit. Inmate services provide a broad range of inmate needs which include Administration, Intake/Processing, Food Service/Dining, Medical Services, Education, Counseling/Religious opportunities and Recreation. Other features of the facility provide support to the penitentiary serving maintenance, utilities and facility transportation. With the exception of Outside Administration the entire prison is connected by an enclosed security corridor, which provides inmate movement control and maximum staff supervision of the facility. The facility complies with the Uniform Federal Accessibility Standards (UFAS) making it readily accessible and usable by persons with sensory or mobility impaired disabilities.
Two separate administration areas exist in the United States Penitentiary at Coleman.

One administration area is a stand-alone building along the southeast side of the facility primarily located outside the secure perimeter, straddling the fence line. This "Outside Administration" building provides the facility's visitor reception, waiting areas, the penitentiary's Control Room as well as other administrative functions required for the facility.

The second administration area or "Inside Administration" is provided inside the secure perimeter. Designed to accommodate functions within the prison, it has a lobby, Correctional Services, the Associate Warden and Intake Receiving and Discharge.
General Housing Units for inmates have been designed to diffuse tensions and frustration from institution living. Effective security measures and the proper allotment of inmate privacy was the design intent for each of the six housing units. A typical housing unit consists of two separate wings, each with a separate secure entrance flanked by spaces dedicated to unit management. Inmates are housed in wet-cells on two levels in each module, consisting of 64 cells providing a total of 128 total individual cells within each housing unit. Cells are clustered around the triangular "dayroom" space. This provides a central focal point in each module allowing supervision of the inmates by the unit officer from the dayroom space on the first level. The housing units are equipped with inmate showers, inmate laundry facilities, and inmate recreation space. Individual inmate cells are provided with an exterior window, toilet, lav, single bunk, desk, and locker.
The penitentiary provides spaces and resources for inmate education by maintaining and operating a general library, and providing materials and information for career/employment opportunities to the inmates. Religious services include opportunities for inmates of all faiths with equitable possibility to pursue individual religious beliefs and practices.

The kitchen and dining areas provide the penitentiary an operation that is capable of efficiently feeding several thousand meals each day at the USP with a typical 20 minute turn-around for as many as 300 inmates per sitting. The kitchen and food preparation areas include a bakery, meat and vegetable preparation, cooking/frying/steaming areas and dessert preparation space as well as dry storage, perishable food storage, supplies and cleanup areas.

The USP provides the facility with health services for essential health care for inmate medical, dental and dietary needs. A fully equipped medical clinic includes records, pharmacy, dental, laboratory, exam rooms and X-ray facilities.

A Federal Prison Industries (UNICOR) factory is located at the Coleman, Florida USP. The factory provides approximately 4,413 square meters (62,100 square feet) of space that will employ inmates in the manufacture of products for sale to federal agencies.
Dear Minister,

SCOTTISH PRISON SERVICE ESTATES REVIEW – ACCOUNTING PRACTICE

Thank you for your letter of 17 June 2002.

The accounting policies of the Scottish Prison Service are as published in its Annual Report and Accounts 2000-01. The accounts are prepared in accordance with the Resource Accounting Manual and, in respect of the Private Finance Initiative contract for HMP Kilmarnock, the accounting treatment is in accordance with the guidance in paragraph 5.19 of Treasury Task Force, Private Finance, Technical Note (Revised).

The same document contains the ‘Auditor’s Report to the Scottish Parliament and the Auditor General for Scotland’. This includes the opinion of the Chief Auditor, Audit Scotland, that:

‘the financial statements give a true and fair view of the state of affairs of the Scottish Prison Service at 31 March 2001 and of the deficit, recognised gains and losses and cash flows for the year then ended and have been properly prepared in accordance with the Public Finance and Accountability (Scotland) Act 2000 and directions made thereunder by the Scottish Ministers’.

Included in this document is a report by the ‘Auditor General for Scotland under section 22(3) of the Public Finance and Accountability (Scotland) Act 2000’. A copy is attached for ease of reference. Again, the Auditor General emphasises that the Scottish Prison Service has complied fully with the current accounting guidance. The purpose of this report is to bring the ‘accounting treatment’ for a Private Finance Initiative contract to ‘public notice’. It also states that the effect of the accounting treatment adopted is that HMP Kilmarnock does not appear as a property asset on the balance sheets of either the Scottish Prison Service or Kilmarnock Prison Services Ltd. The Scottish Prison Service balance sheet does however recognize the reversionary interest value of the property asset.’
In response to the questions asked in your letter:

1) Whether officials when sanctioning such an arrangement were aware of a precedent anywhere for a prison's details not appearing on the books of one or other parties concerned?

The officials concerned did not sanction such an arrangement. The accounts were as required prepared in accordance with the relevant guidance for Private Finance Initiative contracts. HMP Kilmarnock is the only PFI prison contract in the UK to achieve off balance sheet status. This was known to SPS at the time that the accounts were prepared.

2) If not, why did the Executive adopt this practice in this case?

Not applicable - 1 above refers.

3) Did the Executive seek advice from HM Treasury, Partnership UK or any other relevant party before doing so?

The Executive's accounting policies are stated in the Resource Accounting Manual (RAM) which SPS used to prepare its accounts. This constitutes the relevant advice as the RAM is the authoritative statement of resource accounting principles against which departmental resource accounts must be prepared and audited. This manual is based on UK generally accepted accounting practice (GAAP) adapted where appropriate to take account of the public sector context. As such, HM Treasury and other relevant accounting advice is incorporated in the guidance.

Advice was also taken from the then National Audit Office (NAO) in 1996 (prior to contract award) in relation to the likely accounting treatment of the proposed contract for HMP Kilmarnock. At that stage, NAO provided an 'interim indication' that whilst it would be for the Prison Service to decide whether sufficient risk has been transferred, they 'would expect a fully serviced prison (including custodial services) .... to be treated as off balance sheet treatment ....'. NAO also advised that reversionary interest associated with the asset being owned by SPS at the end of the contract should be included in the SPS's balance sheet. The NAO confirmed this 'indicative view' of the off balance sheet accounting treatment following a review of the proposed contract at the point of contract award in 1997.

In the context of your consideration of the Estates Review, you may also be interested to know that NAO also provided advice in 1996 that a 'similar project...but with the Prison Service providing custodial services...make it unlikely that such a package would fail to be treated as off balance sheet'. This would equate to the private build, public operate model referred to in the Executive's Estates Review.

4) Can you advise whether this approach is congruent with the advice of the Accountancy Standards Board (ASB) and also whether it represents best practice in the context of Cabinet Office guidelines?

The pronouncements of the ASB are incorporated in the UK GAAP, which in turn are incorporated in the RAM. It represents current best practice.

5) Is there a requirement for Premier Prisons to notify your Department of any change in ultimate ownership of the asset?
The prison asset is owned by Kilmarnock Prison Services Limited (KPSL) until the end of the contract period, at which point it is owned by SPS. Under the terms of the HMP Kilmarnock contract, KPSL must notify SPS of any change of control.

- Have such circumstances arisen, if so when do you have any power to influence the ultimate ownership of the asset?

The approval of SPS is required for any change of control in KPSL. Such a change has been sought on one occasion.

I hope that the above information will assist in your consideration of the Estates Review.

I have copied this letter to the Minister for Finance and Public Services.

[Signature]

JIM WALLACE
A REPORT BY THE AUDITOR GENERAL FOR SCOTLAND UNDER SECTION 22(3) OF THE PUBLIC FINANCE AND ACCOUNTABILITY (SCOTLAND) ACT 2000


1. I have received the audited accounts of the Scottish Prison Service for the year ended 31 March 2001. The auditor’s report on the accounts is not qualified but the auditor has drawn my attention to the accounting treatment for a Private Finance Initiative contract.

2. I submit these accounts and the auditor’s report in terms of sub-section 22(3) of the Public Finance and Accountability (Scotland) Act 2000, together with this report which I have prepared under sub-section 22(3) of the Act.

3. The Scottish Prison Service procured the provision of a 500-place prison at HMP Kilmarnock through a Private Finance Initiative contract. The contract provides for Kilmarnock Prisons Services Ltd to design and construct the prison and to finance, operate and manage it for a 25-year period commencing March 1999.

4. In submitting the Scottish Prison Service’s accounts to me the auditor has referred this matter to me in the following terms:

   “In forming my opinion on the 2000/01 accounts, I have considered the adequacy of the disclosures and the assessment of the estimates and judgements made by SPS for Private Finance Initiative transactions. In reviewing the qualitative factors, which form the basis of the accounting treatment, I sought supporting evidence from the operator’s published accounts. This revealed that neither party is recognising HMP Kilmarnock as an asset with both parties claiming to have transferred substantially all the risks and rewards associated with ownership of the asset to each other. In view of this situation, I consider it should be drawn to your attention but given that SPS have complied with HM Treasury guidance, my opinion contained in the formal audit certificate is not qualified in this respect.”

5. The Accounting Standards Board’s Financial Reporting Standard (revised) requires the substance of transactions: Private Finance Initiative and Similar Contracts sets out guidance for purchasers and providers in accounting for assets associated with such contracts. The Treasury has issued additional guidance to public sector bodies on the application of the Standard from the purchaser’s viewpoint. This additional guidance does not apply to private sector partners and there is no requirement to ensure consistency of treatment between purchaser and provider.

6. The purpose of this report is to bring the situation to public notice. The effect of the accounting treatment adopted is that HMP Kilmarnock does not appear as a property asset on the balance sheets of either the Scottish Prison Service or Kilmarnock Prisons Services Ltd. The Scottish Prison Service balance sheet does however recognise the reversionary interest value of the property asset.

7. I wish to emphasise, however, that the Scottish Prison Service have complied fully with the current accounting guidance.

ROBERT W BLACK
Auditor General for Scotland