The Committee will meet at 1.45pm in the Chamber, Assembly Hall, The Mound, Edinburgh.

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

2. **Convener’s report:** The Committee will consider the Convener’s report.

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

   Neil Watt, Past President, Property Managers’ Association,
   David Gill, Chairman, Homes for Scotland (and Managing Director of Cala Homes West (Scotland) Ltd); John W. Curran, Partner and John Smart, Associate, Ledingham Chalmers Solicitors,
   Alan English (FRICS), Chairman of the Title Conditions Working Group and Elaine Hook, Policy Officer, the Royal Institute of Chartered Surveyors in Scotland,

   Angela Yih, Housing Policy Officer and Euphan Todd, Housing Advice Officer, Age Concern Scotland,
4. **Work programme:** The Committee will consider its forward work programme.

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

**Agenda items 1 and 3**
Note by SPICE and Adviser (private paper) J1/02/29/1
Submissions on the general principles of the Title Conditions (Scotland) Bill at Stage 1 from:
- Homes for Scotland J1/02/29/2
- Royal Institute of Chartered Surveyors in Scotland J1/02/29/3
- Age Concern Scotland J1/02/29/4
- Sheltered and Retirement Housing Owners’ Confederation (SHOC) J1/02/29/5
- Scottish Federation of Housing Associations J1/02/29/6
- Hanover (Scotland) Housing Association J1/02/29/7
- Springbank Residents Owners’ Association J1/02/29/8
- Standard submission (sent by various owner-occupiers in retirement developments) J1/02/29/12
- Maclay Murray and Spens J1/02/29/13
- Response to the Scottish Executive on the draft Bill by Property Managers’ Association J1/02/29/14

**Agenda item 2**
Correspondence from Minister for Justice regarding Dungavel Detention Centre J1/02/29/11

**Agenda item 4**
Note by the Clerk J1/02/29/9

**Papers not circulated:**

**Agenda item 1 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](http://www.scottish.parliament.uk/parl_bus/legis.html#54)

**Papers for information circulated for the 29th meeting, 2002**
Proceeds of Crime Act 2002: Section 293 – Scottish Executive consultation on Draft Code of Practice for Cash Searches J1/02/29/10
I attach the following papers:

**Agenda Items 1 & 3**
Supplementary submission from the Scottish Law Agents Society

6th September 2002

Tony Reilly
Introduction

Homes for Scotland welcomes this opportunity to submit views to the Justice 1 Committee on the Title Conditions (Scotland) Bill and we look forward to presenting more detail to the Committee in due course. Homes for Scotland is the industry body representing house builders in Scotland. Currently our membership is around 75 companies who build 80% of all homes. Our mission is to champion an industry committed to improving the quality of living in Scotland by providing this and future generations with modern homes where people want to live.

1. Overview

The stated objectives of the Bill, namely greater clarity in the law relating to title conditions affecting land and simplification of procedures relating to the discharge and variation of obsolete title conditions, are to be welcomed by all those involved in the house building industry in Scotland.

Scotland’s system of land ownership has long been in need of overhaul. The Executive should be congratulated on implementing a comprehensive review of Scottish land law and pursuing the exhaustive recommendations contained within The Scottish Law Commission’s Reports on the Abolition of the Feudal System and Real Burdens.

The Abolition of Feudal Tenure Etc (Scotland) Act 2000 has paved the way by abolishing Scotland’s ancient feudal system of land ownership and feudal land conditions. The Title Conditions (Scotland) Bill will further improve and enhance the law relating to non-feudal land conditions.

Homes for Scotland supports the Executive’s initiatives on the reform of both feudal and non-feudal title conditions. House builders need to operate within a system which is clear, modern and workable.

2. The House Builder’s Perspective

There are two aspects to house builders’ involvement with title conditions.

Firstly, house builders need to be aware of title conditions affecting sites being purchased for development. They have to be certain that there are no title conditions prejudicial to any proposed development.

Secondly, house builders need to impose title conditions on the individual house plots when these come to be sold. This second aspect has two dimensions. Title conditions need to be imposed on individual house plots in order to protect the amenity and hence the marketability of the housing developments involved. For
example, conditions will often be imposed restricting the use of a house to a private dwelling-house for one family only. Purchasers therefore have the comfort of knowing that their neighbouring properties will not be turned into a hostel or business premises. Also, title conditions are used for apportioning liability for maintenance of common facilities within the housing development, typically parking or open space areas.

This latter aspect has become an important issue as a result of Local Authorities being less willing to take over the maintenance and upkeep of open space areas. Moreover, Local Authorities often impose strict conditions relating to the future upkeep of amenity areas when granting planning consent for housing developments. We will touch upon these issues again below.

3. Purchase of Development Sites

Although we have been asked to focus on those parts of the Bill dealing with Community Burdens, Management Burdens and the Model Management Scheme it is vital to note that the implications of the proposed Bill are as significant for house builders in their capacity as purchasers of development sites as they are in their capacity as sellers of individual house plots. Indeed we could argue that the main advantages of the Bill from a house builder’s perspective are those contained in the provisions relating to the abolition, discharge and variation of pre-existing land conditions.

Developers are hampered too often by the presence of obsolete title conditions affecting the land they wish to develop and uncertainties as to who is entitled to enforce the title conditions concerned. Often the house builder will have to pay for a title indemnity policy from an insurer because of uncertainties regarding the enforceability of old and obsolete title conditions affecting the site concerned, be they feudal or non-feudal.

Whilst house builders recognise that title conditions are a useful means of regulating the use of land and protection of amenity, our general view is that the role of private regulation of land use has largely been assumed by Local Authorities in their capacity as Planning and Building Control Authority.

From the perspective of the purchaser of development sites, house builders will particularly welcome the following provisions;

- The “sunset rule” permitting the discharge of amenity burdens more than 100 years old (sections 19 – 23). One of the major difficulties with title conditions at present is the presence of numerous obsolete conditions which were imposed to protect amenity at a time when the character of the area in question was very different to its present character. This often involves the house builder seeking a Minute of Waiver (for which a price is usually payable) or paying for a title indemnity insurance policy. We would welcome any reduction in the said 100 year period to, say, 50 years. In our view land conditions can become obsolete or irrelevant within a 50 year period and there are sufficient protections within the Bill for parties benefiting from such burdens to object to any proposed discharge by making an application to the Lands Tribunal.
• The abolition of implied enforcement rights (section 45). At present, the law is insufficiently clear as to who can or who can not enforce any given title condition and this often causes difficulties for developers who have to be sure that no party can prevent a proposed development by founding on a title condition. We would welcome any reduction in the period for preserving implied enforcement rights (say 5 years instead of 10).

• The simplification of proceedings before the Lands Tribunal (Sections 81 – 93).

• The retention of the 100 metre rule as a pre-condition of preserving feudal amenity burdens. This will assist in reducing the number of title conditions which can potentially prejudice a proposed development.

All of these reforms will aid in releasing land from obsolete title conditions and free up land up for development within planning constraints. This is particularly important at a time when there is a need for new housing.

4. Sale of Housing Plots

Homes for Scotland has been asked to comment in particular on the impact of the Bill on Community Burdens, Manager Burdens and the Model Management Scheme. All of these provisions impact upon house builders in their capacity as sellers of individual house plots.

It should be stressed that, for the main part, house builders are unconcerned with retaining any element of control over housing sites once all of the individual plots have been sold off. Indeed the opposite is the case – house builders wish to ensure that all obligations relating to future upkeep and maintenance of common areas and facilities are transmitted entirely to the owners of the individual houses. House builders are not property managers.

House builders do have an interest in controlling housing developments where not all of the plots have been sold. This is in order to protect the amenity of the housing development and hence its attraction to potential purchasers. The introduction of the “Manager Burden” (see 5 below) will enable developers to effect such control.

5. Community Burdens

Community Burdens are defined in the Bill as burdens imposed under a common scheme on four or more units where each unit is both a benefited and a burdened property (i.e. the burdens are mutually enforceable). Most burdens imposed by house builders on individual house plots will qualify as Community Burdens. Developers frequently impose burdens in a Deed of Conditions applicable to the housing development as a whole, and such Deeds of Condition often state that the conditions are mutually enforceable by the individual plot owners against each other.

Many Community Burdens pertain to matters involving expenditure for maintenance of common parts or facilities. The current rule providing that a title condition cannot contain an obligation to pay an unspecified amount of money
causes particular problems when framing provisions relating to the maintenance and upkeep of common facilities. Accordingly we welcome section 5 (1) of the Bill which clarifies that such conditions are competent.

The provisions of the Bill in relation to Community Burdens come into effect to the extent that the titles do not provide otherwise. Many Deeds of Condition will make specific provisions relating to issues such as decision-making and will hence override the provisions of the Act. However we would offer the following views on the specific provisions relating to Community Burdens contained in the Bill:

• **Majority Rule for Common Maintenance (section 27)** – This concept is welcome and improves the present law by making it clear that a majority can instruct routine maintenance and repair works without having to obtain the consent of each and every householder. We do however feel that section 27 should make it clear that “maintenance” should not include improvement, unless reasonably incidental to maintenance. A majority should not be able to bind a minority into paying for improvements as opposed to maintenance. This definition of maintenance is contained in the Model Management Scheme proposed by the Scottish Law Commission.

• **Management (section 27)** – The ability of a majority to delegate powers to a manager is an efficient way of managing Community Burdens

• **Advance Payments (section 28)** – These are sensible provisions to ensure that monies are produced in advance and that funds are properly protected.

• **Variation and Discharge of Community Burdens (sections 31-36)**

1. **Majority Rule – Default Position 1 (section 32)** – We have reservations concerning the provisions whereby a majority can vary or discharge any given Community Burden (unless the title deeds state otherwise). As we have indicated before, house builders insert amenity restrictions on individual houses in order to protect the marketability of the other houses. Individuals pay high prices for their houses partly on the basis of being secure in the knowledge that they can enforce these restrictions against their neighbours. The ability of a simple majority to vary or discharge such conditions could operate unfairly against minorities and deprive them of rights they have paid for. We are of the view that a 75% majority should be required.

   We also think that an exception should be made in relation to Community Burdens which import the provisions of planning conditions or section 75 Agreements entered into with the planning authority. Planning authorities often impose obligations to maintain amenity areas at the time planning consents are granted for developments. These would remain in force notwithstanding any decision by the majority to vary or discharge the title condition imposing the relevant planning condition on the development and this creates a potential inconsistency.

2. **Majority Rule – Default Position 2 (sections 34, 35 & 36)** – We also have concerns on the provisions whereby an individual owner seeking a discharge
or variation need only obtain the consent of proprietors within a 4-metre radius. This seems somewhat arbitrary and fails to provide adequate protection to benefited owners outwith the 4-metre radius. There is a risk of a minority group of neighbours within a community prejudicing the wishes of the majority.

3. **Intimation Procedures** –
   Whilst most of the procedures for intimating proposed variation and discharges of community burdens are satisfactory, the procedures in section 35 (2) whereby intimation can be given either by fixing a notice in a conspicuous place on the property seeking the discharge or on a nearby lamp-post cause concern. We are of the view that where the benefited properties can be identified, intimation should only be by means of sending a notice to the benefited proprietors concerned. This maintains consistency with other provisions contained in the Bill.

6. **Manager Burdens**

Homes for Scotland welcomes the approach taken by the Bill in relation to Manager Burdens. It is crucial that house builders have the ability to reserve a degree of control over housing developments which are in the process of being developed. Whilst we support the abolition of feudal tenure, this removes one of the means by which developers can exercise such control. Manager Burdens represent a suitable replacement.

As we have stated before, house builders generally have no interest in retaining control over housing developments once all properties have been sold. In the current market, individual housing plots tend to be sold off relatively quickly so Manager Burdens are unlikely to be required for long periods of time.

We would point out that as well as being the enforcing party, house builders can themselves be subject to Manager Burdens. Sometimes one developer owns a large housing development and sells parts to different developers. It is common for such Estates to be regulated by a factor appointed by the owner of the larger estate in order that different developers co-operate with each other in relation to the development of the Estate as a whole.

Homes for Scotland would offer the following views on the provisions of the Bill pertaining to Manager Burdens;

- It is essential that developers are granted the right to appoint a manager in order to enforce burdens (community or otherwise) whilst they remain the owners of any part of the housing development concerned. This protects both their own interests and the interests of other owners. We are of the view that these interests are coincidental in that the burdens concerned will usually relate to amenity or common maintenance.

- The extinction of a Manager Burden on the sale by the Developer of the last plot presents no difficulties. Most house builders would wish their managerial responsibilities to be extinguished at that stage anyway.
• The long-stop limit of ten years is acceptable. Most housing developments will be sold within that period and we recognise the need for a time limit on the imposition of such rights.

• We feel that the Bill could clarify the fact that Managers appointed under Manager Burdens can exercise such powers in relation to Community Burdens as are contained within Part 2 of the Act. The majority of burdens which developers would be interested in enforcing are Community Burdens and clarification would put the issue beyond doubt.

7. Model Management Scheme

The Model Management Scheme recommended by the Scottish Law Commission in its Report on Real Burdens has not been carried through to the Bill. We understand that this is because the setting up of the Scheme envisaged by the Law Commission would involve the creation of a corporate body or association to run the scheme. Legislation involving the creation of such bodies is out-with the scope of the Scottish Parliament.

Homes for Scotland is disappointed that the scheme could not be carried forward into the Bill. Clearly the Scottish Law Commission’s proposals had been carefully considered and we understand that the Royal Institution of Chartered Surveyors contributed valuable input.

However, we believe it is possible to overstate the case for utilising such schemes. Whilst the scheme could be useful for regulating facilities such as swimming pools and health clubs, such facilities are not generally included within housing developments at present. We do however recognise that the demand for such facilities may well increase, and that the provision of such facilities is prevalent in other countries such as the United States.

A distinction requires to be made between common facilities where the Model Management Scheme would be useful and those where title conditions and Community Burdens are sufficient. We would contend that for most shared facilities such as car parks and amenity ground there is no need for the Model Management Scheme to be utilised; house builders are accustomed to addressing these issues in Deeds of Conditions. However the case for the Model Management Scheme becomes stronger where more complex facilities become involved, perhaps involving the purchase and replacement of moveable items and the hiring of staff.

8. Open Space Areas

We have touched before on the issue of maintenance and upkeep of amenity areas. This is becoming an increasingly important issue as Local Authorities attach more importance to environmental issues at the planning stage of housing developments. Often Local Authorities will insist upon open space, woodland or other areas within housing developments being protected and managed in the future. These obligations attach to the land concerned by virtue of planning conditions or agreements.
It is becoming increasingly common for developers to transfer title to such areas to management companies such as the Greenbelt Group of Companies Limited. These companies have responsibility for maintaining the land concerned, and the individual house owners meet a pro rata proportion of their fees and costs.

Section 3 of the Bill clarifies the permitted content of title conditions. This is largely a restatement of the existing law as expressed by Lord Young in the 1840 case of Tailor of Aberdeen v Coutts. In particular sub-section 6 states that a burden must not be repugnant with ownership.

This creates a difficulty with respect to developers conveying open space or woodland areas to such companies as the Greenbelt Group of Companies Limited. In the conveyance, the developer will want to restrict the use of the land to maintenance and upkeep of the relevant areas for the Estate as a whole. This could fall foul of sub-section 6, and we feel that the Bill should make it clear that restrictions of this type are competent.

9. Conclusion

Homes for Scotland is pleased to support both the Bill and the preceding Act abolishing feudal tenure. The uncertainty and antiquities contained within the present law on land conditions creates difficulties for all property developers, including house builders. The Bill meets its stated objective of clarifying and updating the law.

We would summarise our comments on the detailed provisions of the Bill as follows;

- We would welcome a reduction from 100 years for the “sunset” rule for old amenity conditions.

- We would welcome a reduction from 10 years to, say 5 years for the preservation of implied enforcement rights.

- The definition of “maintenance” in the provisions relating to Community Burdens should specifically exclude improvements.

- A 75% majority should be required to vary or discharge Community Burdens.

- The 4-metre rule for variation of Community Burdens in individual cases should be withdrawn.

- Intimation of proposed variations should always be sent by post to identifiable benefited proprietors.

- The provisions relating to Manager Burdens should specifically state that an appointed Manager can enforce all Community Burdens.
• The rule that a title condition cannot be repugnant to ownership should be relaxed to allow conveyances of land ancillary to housing developments to management companies.

Eileen M Masterman
Chief Executive
Homes for Scotland
Thank you for your letter of 10 June addressed to my colleague Lynne Raeside, seeking comments from the Royal Institution of Chartered Surveyors in Scotland (RICS Scotland) on the Title Conditions (Scotland) Bill as introduced to the Scottish Parliament. I should like, also, to thank you for the opportunity to give oral evidence to the Committee on 10 September, which the Institution has accepted.

RICS Scotland represents some 9,000 members: 7,000 chartered surveyors, 200 technical members and 1,800 students and probationers. They practise in sixteen land, property and construction markets and represent owners, tenants, and all those who occupy, by whatever means, property for domestic or business purposes. This response is based, therefore, on the practical experience of property burdens from all aspects, and does not represent the arguments of one side or the other. Furthermore, members are regulated by the Institution’s Royal Charter which obliges them to act in the public interest. Accordingly, the Institution can be relied upon to provide a balanced and considered response to matters of public policy.

As you will be aware, RICS Scotland has submitted extensive comments on the earlier consultations on this issue. I should be pleased to supply copies of those earlier comments if that would be helpful. We continue to support the amendment of the law of title conditions, and agree that it should be rendered more transparent and modern. Our comments here focus on concerns we have previously raised and issues which, we feel, deserve further consideration in the passage of the Bill.

Interest to enforce
Section 8(2) extends title to enforce to non-registered proprietors, tenants, life renters, heritable creditors in possession, and non-entitled spouses. Although we appreciate that, in law, the interest of an owner is likely to be given greater weight than the interest of a person holding a lesser interest, such as a lease, RICS Scotland remains extremely concerned about this extension to life renters and tenants. These parties may, in fact, have a conflict of interest with the owner, who must retain a right to oppose any change.
Negative prescription
Section 17 reduces the period of negative prescription for real burdens to 5 years. RICS Scotland would like to reiterate its concern about this reduction. We agree that while, in the majority of cases, any breach will be apparent in this timescale, there is a significant minority of cases where five years is too short a period of time. For example, conservation bodies such as the National Trust for Scotland may have imposed burdens affecting the interior of a building. The conservation body might not, however, have sufficient time to inspect all its properties within a five year period to ensure that no breaches have occurred. Similarly, in the rural environment, certain activities such as timber haulage may well not take place within a five year period, to allow the opportunity for breaches to be discovered. Another example of a burden may be an obligation to fence, where a period of 5 years may be insufficient because fencing does not need to be replaced every 5 years.

It can be argued that any time limit involves an arbitrary figure, and that the nature of the burden is the crucial concern. However, appreciating that the Executive wishes to see some set term in place, RICS Scotland would suggest a compromise period of 10 years as the minimum term appropriate for negative prescription.

Majority instruction of work
Section 28 deals with arrangements for the majority instruction of work. In its response to the draft Bill last year, RICS Scotland agreed with the Scottish Executive that a deposit in advance of work is essential. We also offered some comments on safeguards for funds collected in this way. While we welcome the recognition in the Bill as introduced of the need for safeguards, we are concerned that the current proposals are, in fact, unworkable because they are too detailed. In practice, it is sometimes necessary to collect funds in advance for quite small works, depending on circumstances. For small sums, there can be problems finding a financial institution that will operate an account, as well difficulties caused by the calculation of interest on small sums for short periods. We also consider that the proposals at 28(2)(b)(i), naming a period of not less than 28 days in which a deposit should be made, and 28(7)(b)(i), saying that maintenance works should be commenced within 14 days of the date originally proposed for commencement, are impractical. There are often sound, practical reasons why the dates proposed for commencement and completion of works cannot be kept.

With these points in mind, RICS Scotland believes that it may be more practical for the Bill to propose that up to a reasonable or material sum, to be agreed by owners, these detailed arrangements will not apply. We are aware, for example, that many
registered social landlords only seek tenders for works over £3000 in cost. Above this sum, it would be acceptable for a more stringent procedure to come into play.

Notification procedures
The Bill as introduced proposes a range of notification procedures for use in cases of discharge or variation of community burdens. Of these options, we believe that obtaining the signatures of a majority of the community, and then notifying other members of the community individually, is the best way to safeguard the interests of all concerned. While it seems, on reading the accompanying Policy Memorandum and Explanatory Notes, that a burdened proprietor is to use the procedure most appropriate to the individual circumstances, RICS Scotland is concerned that the options are unclear in the Bill, and would welcome some clarification. There is a danger of a lack of consistency.

Sheltered housing
RICS Scotland, in its earlier response, proposed a definition of sheltered housing as “housing purpose built or converted for residence by older people, and supplied with an alarm system and a warden service, which is normally grouped with other dwellings”. The Explanatory Notes accompanying the Bill, at paragraph 207, are clear about these essential requirements for sheltered accommodation, and we would suggest that the definition provided in the Bill itself should be equally clear.

Conservation burdens
RICS Scotland notes that the Bill contains no right of appeal against a decision of Scottish Ministers to exclude or include a body from the prescribed list of conservation bodies, although the list will be subject to scrutiny by the Scottish Parliament. The Institution believes that it should be possible for a conservation body to transfer any burdens to a successor body prior to its demise. We would welcome some clarification on this issue.

Implied rights
The Institution would like to reiterate that, in our view, there should be scope to convert a feudal superior’s enforcement powers in some cases; we believe that not all burdens should fall simply because a superior has failed to save them. While a superior may not have had an interest, or sought to enforce a burden, a legitimate interest may subsequently arise.

Manager burdens
RICS Scotland notes that Section 58 of the Bill provides that the right to appoint a manager is extinguished with the sale of the last property unit. In addition, it is proposed that manager burdens will, in most cases, be extinguished after a maximum of 10 years, even if the developer continues to own some units. The Institution supports these provisions, since there is no justification for maintaining a manager in general private sector accommodation. However, the Bill also proposes a time limit of 30 years for local authorities and other socially rented housing sold under the right-to-buy legislation. We agree that this is extension is required given that Local Authority developments are generally sold off over longer periods. We consider that, in addition to these groups, registered social landlords dealing with owner-occupation and housing for rent in a mixed development may also need to maintain long term control.

Section 59 of the Bill describes the voting requirements for dismissal of a manager. The Institution should like to clarify that votes will relate directly to interest, that is, that there shall be one vote per unit.

**Effect of compulsory purchase**

We note that Section 95 provides that all real burdens and servitudes will be extinguished on compulsory acquisition, although acquiring authorities will have the option to save burdens or servitudes. RICS Scotland believes that it is essential that facility and community burdens can remain in place, in the event of compulsory acquisition. An example of a problem that may arise without this provision is an instance where a local authority exercises its power to acquire a flat in a tenement building. Wiping out the burdens in such a situation will make common repairs and maintenance very difficult to arrange on an equitable basis. Burdens of this nature should not be allowed to fall simply because the acquiring authority has not exercised its option to save burdens.

**100 metre rule**

While we note that the Executive has given detailed consideration to the 100 metre rule, we cannot agree with the decision to leave the rule as it stands. At present, an owner will be able to preserve certain beneficial feudal burdens but only if he has a building “used for human resort or habitation” within 100 metres of the burdened land. In our earlier response to the draft Bill, RICS Scotland argued for the removal of any distance limit, since the 100 metre rule will, in effect, exclude most rural landowners from the ability to preserve burdens. We gave some examples of the potential problems caused by the rule in that response.

The Institution is aware of instances where house properties surrounded by forestry have been sold subject to Feu Dispositions containing a number of burdens. In
these instances, there are no buildings on the forested land which are used for human resort or habitation within a mile. However, it is important that the forestry concern which sold the property is still able to exercise the rights given by the burdens. For example, in an operational forest, where there is significant haulage of timber by lorry, and other traffic movement, reasons of safety and road management dictate that there must be some control over the type and volume of traffic passing over forestry roads. In particular, these issues would arise if the original seller were unable to prevent private dwellings being developed into commercial businesses.

We are concerned that, particularly in instances such as the situation described above, there are issues of public safety and amenity to consider. Forestry Commission roads, for example, are used by a variety of recreational users, and an increase in road usage will increase road management problems. Furthermore, rural landowners must retain some element of control over the appearance and condition of properties, by making appropriate conditions in the Disposition. RICS Scotland understands that, in cases where such conditions have not been set, there have been problems of dereliction.

An additional important reservation in the rural environment, for many landowners, is the right to control deer. The use of the 100-metre rule means that many will be unable to enforce this essential requirement.

The Institution acknowledges that, under current arrangements, a superior whose land does not meet the criteria of the 100 metre rule can approach the vassal and ask that the burden can be saved; and that, in the event of the vassal’s refusal, the superior can apply to the Lands Tribunal to save the burden. This process is, however, burdensome. Furthermore, we note the Executive’s assertion that it would be difficult to draw up workable definitions of rural and urban land against the background of conveyancing law. However, RICS Scotland suggests that the justification for any limitation is the interest in the burden, not an arbitrary distance and, in view of our comments above, we would urge that this issue should be examined further.

**Development value burdens**

RICS Scotland, when considering the draft Bill, accepted the Executive’s view that development values should fall, so long as compensation were payable. We do, however, believe that the current basis for assessment of compensation is inequitable and we argued for a change in assessment rules. The Executive has not accepted these views in the Bill as introduced.
We would therefore like to reiterate that we believe that compensation should be assessed at the current development value, rather than at the value which would have pertained at the date of the original sale. The Executive believes that it would be difficult to allow for inflation, and that the Feudal Reform (Scotland) Act 1970 uses the historic basis. The Institution maintains that the principle is flawed, since, where existing use price only has been paid, the “hope” value remains with the original seller, and any growth in value should therefore be his. The calculation of present day difference would be a much simpler valuation issue than the application of inflation to an historic figure.

RICS Scotland is concerned that, if compensation continues to be calculated in the current way, the market may be affected. Over time the circumstances relating to land change with, for example, the modification of development plans, and we suggest that there needs to be a mechanism that reflects such changes.

**Clawback**

RICS Scotland notes that the Executive has decided to make no alterations to the law on clawback arrangements, other than an amendment to the law on standard securities which will provide additional investment for them. We had suggested that it would be appropriate to create a new, “clawback” burden to protect investments and facilitate development. If these views have been rejected, the Institution cannot see a justification for enabling local authorities to protect their investment, while barring private sellers from the same protection. The Institution notes that the Scottish Executive is discussing with COSLA and other public authorities the best way to extend to local authorities the provision enjoyed by Scottish Enterprise, which permits that organisation to enter into agreements with landowners as to the future use of land. While there may be an argument that local authorities are obliged to act in the best interests of the entire community, rather than for private profit, RICS Scotland is concerned at the inequity that would then exist between public and private developers. The Institution would also seek clarification of whether these beneficial arrangements are likely to extend to private companies participating in Public-Private Partnerships.

**Development Management Scheme**

Finally, the Institution notes that the proposed Development Management Scheme has been removed from the Bill, because the Scottish Parliament is not competent to legislate on a scheme which would have involved the creation of “bodies corporate”. In view of the importance of such a scheme, RICS Scotland is disappointed that no apparent effort has been made to amend the scheme so that it does fall within the competence of the Scottish Parliament. If a means can be found around this issue, RICS Scotland would like to register its interest in the provision of
a practical development management scheme, and offer its support as the leading profession in this field.

**Conclusion**
On behalf of RICS Scotland, I should like to thank the Committee once again for inviting us to submit comments on this important piece of legislation, which will complete the abolition of feudal tenure and continue the transition to a modern framework for property law in Scotland. We look forward to the opportunity to discuss our views with members of the Committee in September. In the meantime, Please contact me if you wish to discuss any point.

*Elaine Hook*
Policy Officer
Age Concern Scotland has been working throughout the country to improve the lives of older people for nearly sixty years. Our main objectives are to ensure that older people in Scotland have their rights upheld; needs addressed; their voices heard and have choice and control over all aspects of their lives. Our membership of over 500 encompasses local and national organisations, both voluntary and professional, older people’s groups and individuals. We are an independent, registered charity dependent on public support for the continuation of our work.

Age Concern Scotland warmly welcomes the Title Conditions Bill. The Bill widens the categories, and increases the rights of those affected by conditions attached to their property. Faster and more efficient methods of amending or dispensing with conditions that are no longer necessary have been introduced. We welcome the inclusive nature of the Bill.

In this paper we focus on the aspects of the Bill which affect owner occupied sheltered and retirement housing, whose operation and existence has relied heavily on the feudal system. Age Concern Scotland welcomes the Bill’s removal of unfair restrictions on owners’ rights, and the ability to remove burdens that have been overly restrictive. Given the lack of regulation in this area of housing, we see this as a major step forward in improving rights for older people. Our concerns lie in creating a balance between empowering owners, and protecting essential elements of sheltered housing.

Our involvement with issues around sheltered housing began in the late 1980’s in response to growing concerns brought to our attention by residents. In 1999 with the support of the Scottish Executive we set up INNIS, our housing advice service for owners, managers and prospective purchasers of retirement housing. Evidence from running this service has highlighted the difficulties faced by both owners and managers when presented with an inadequate legal framework for private sheltered housing. It has also demonstrated that a culture of transparency, consultation and accountability is of the utmost importance for any successful management or factoring service. We offer the following comments on aspects of proposals in the Bill.

1. Manager burdens in sheltered housing
A basic infringement of older people’s rights in retirement housing has been their inability to change their manager, if appointed by the developer in perpetuity. The Bill’s removal of this restriction is the most important provision for owners in retirement housing, and is generally welcomed by both managers and owners. Once all units have been sold the manager burden is extinguished, or after ten years, whichever is sooner. Some owners have intimated to us that the ten year period for existence of manager burdens is overly restrictive for them. We understand that the legitimate commercial interests of developers and the ability of owners to regulate their own property have to be carefully balanced. However we would be concerned if one of the reasons for inability to sell most of the units within ten years is due to poor management of the scheme.

2. Core elements in sheltered housing

The introduction of core burdens in section 50 of the Bill addresses concerns of people who have bought into sheltered housing on the basis of the framework of conditions set out in the title deeds. Many residents were worried that if these were changed the support services might be removed. Age Concern Scotland had reservations that a simple majority would be able to vary the terms of the burdens regulating the operation and management of the complex so as to remove some of the most important aspects of sheltered housing. Many older people have chosen sheltered housing precisely because of the protection offered by the manager. They must be protected from being left without any of the support mechanisms, or freedom from maintenance worries that motivated their purchase. We are therefore pleased that the Bill offers some protection for vital elements of sheltered housing.

3. Dismissal of manager in sheltered housing

While we would not wish to see infringements on owners rights we have reservations over some of the proposals over the dismissal of the manager. As in other communities, such as tenements, there is no onus on owners to appoint a manager to ensure things like maintenance and repairs are carried out. Where there is no provision in title deeds for dismissal of manager, or where the manager has been appointed in perpetuity by the developer, a simple majority of owners of units can now dismiss the manager. They may then decide not to appoint a manager, (for example to save money), or simply be unable to find another manager. However they then require a 75% majority of the units to vary the core elements in sheltered housing. We believe it could be quite onerous for owners to maintain some of these, for example employment of the warden. Apart from our own service INNIS, there is no obvious source of independent professional advice for residents who wish to make an informed choice about the appointment of a managing agent.

As the Bill stands it allows for a simple majority, a 75% majority, or a two thirds majority, dependent on the provision, or lack of provision in the title deeds. We
would prefer a more consistent method, for example a two third majority required for dismissal unless the current title deeds specify a lower majority.

4. Model Development Management Scheme

We also have serious concerns over the future of retirement housing stock if left without an ongoing maintenance and repairs programme. The draft Bill included a development management scheme based on one contained in the Law Commission's Report on the Law of the Tenement. This would have been suitable both for blocks of flats and for sheltered housing. We believe the model development management scheme represented a major advance towards proper long term management of all common property. The provisions covered a wide area, for example the creation of a residents association as a corporate body, provision of accounts, holding of annual meetings. This is what would be expected in any well run private sheltered housing complex. Our concerns were about the amount of flexibility around the scheme, as this left developers with the option of ignoring key elements for its success. We believe certain key elements of the model management scheme should be drafted into the legislation, mandatory for all new developments and all existing private sheltered housing developments. This would not only empower owners and protect their rights, but also regulate and raise the standards of professional property management, thereby giving older people a real choice.

Unfortunately this scheme now been dropped entirely from the Bill, because certain legislative matters are reserved to Westminster. The Executive has stated that it is considering, along with the UK government, how to proceed with this matter. This is extremely disappointing considering the amount of time the Scottish Law Commission has already spent on the subject of communal management schemes.

5. Voting

Some owners have expressed discontent that voting is based on the number of units, not on the number of people voting. This is different from most accepted voting systems, for example, political elections, or transfer of local authority stock.

Furthermore it leaves some residents who do not own their property outright completely disenfranchised. It is very rare in retirement housing (or even in the social rented sector) for shared owners to own the majority share. Typically a smaller share will have been purchased in order to conserve savings. These residents will therefore have no voice in any decision about changes in the operational management or facilities for which they pay the same service charges.

6. Legal processes
Once the new system of land regulation is in force, each sheltered housing development will retain its own local rules contained within the deed of conditions. The Bill allows owners to change their deeds through the Lands Tribunal, which is highly expensive. They may still, in some cases, find themselves obliged to go down the road of litigation. This can be not only expensive but intimidating and time consuming. A balance between the desire to modernise and the need to protect might be achieved by the introduction of a system which complements the existing, expensive legal mechanisms for dealing with disputes. Housing Tribunals have been suggested as a more efficient and appropriate way to deal with issues such as rent and mortgage arrears. We would welcome such an independent, specialist system for dealing with disputes over burdens, maintenance costs, and difficulties in private retirement housing.

7. Advice and Information

Finally, although the subject is outwith the remit of this Bill, we wish to stress that the resolving of issues around home ownership in general requires the following: access to high quality information and advice to prospective buyers, support mechanisms for flat owners, and the regulation and promotion of professional managing agents. Matters brought to the attention of our advice service INNIS have demonstrated all too clearly the negative effect of the lack of such services in the area of private retirement housing.
30 August 2002

Jenny Goldsmith
Assistant Clerk
Justice 1 Committee
Scottish Parliament
Edinburgh EH99 1 SP.

Dear Jenny,

Please find enclosed our submission of several points which we wish to bring to the Committee’s attention before we give oral evidence on 10 September 2002.

I would be grateful if you would place it before the members of the Committee.

The names of those representing SHOC are:-
Mrs. Marie Galbraith, Convenor
Mrs. Margaret Reid, Executive committee member
Mr. John N. McCormick, solicitor, McSparran McCormick, Solicitors & Notaries, Glasgow.

I would also like to thank you and the other members of your team for the patience and unflaking courtesy with which my many queries have been treated. I trust that you will have a good holiday.

Yours sincerely,

Marie Galbraith
Convenor.
SHELTERED & RETIREMENT HOUSING OWNERS' CONFEDERATION

Submission to Justice 1 Committee for Oral Evidence on 10 September 2002

Firstly, we would like to thank the Committee for giving us the opportunity to give Oral Evidence since we are the only organisation in Scotland representing the views of Owner Occupiers of Retirement Housing.

1. We wish to stress that the word “retirement” must appear in the Bill because our type of housing is always marketed as “retirement” never “sheltered”, for example, in one Complex in Glasgow, the flats were advertised in newspapers and on a large board at the entrance as 1, 2, and 3 Bedroomed Retirement Flats and were purchased as such. The word “sheltered” implies some form of care whereas the criteria for purchase of this type of housing is being able to live independently.

Any inference that there is an element of snobbishness in preferring the word “retirement” to “sheltered” is completely false.

2. To avoid confusion, the word “Manager” should not be used to mean “Management Company/Association” as in many cases the title of “Warden” has been changed to “Manager”. We would ask that this should be altered.

3. Voting procedures

We would wish for an explanation of the statement that the votes of those who abstain from voting will be counted as NO votes. In many Complexes, owners, who do not wish to attend meetings or are unable to do so, can nominate, in writing, a member of their family, solicitor or neighbour to vote on their behalf.

4. We are in agreement with the concept of the “core elements” as stated in the Bill but wish there to be an additional core element to deal with accountability and consultation.

5. We would want clear guidance regarding the position where the Management Company has bought up residential units or other property in the Complex. Will the Company have a vote for such units?

In corroboration of the fact that some owners have a feeling of vulnerability and, in some instances, fear, we would direct you to two pieces of Research in this field:-
DOCUMENTATION WHICH MAY BE REFERRED TO BY THE REPRESENTATIVES OF SHELTERED AND RETIREMENT HOUSING OWNERS CONFEDERATION (SHOC) AT THE MEETING OF THE JUSTICE 1 COMMITTEE ON TUESDAY, 10TH SEPTEMBER 2002 AT 2.45PM

NOTE whilst the documentation submitted may appear substantial, it is intended only to refer to those parts of each document marked with a double black line. The remaining documentation has been submitted merely to put those matters in context.

Page 1. Undated letter received 14th July 1999 from Hanover (Scotland) Housing Association Ltd

Page 2. Letter dated 23rd August 1990 from Hanover (Scotland) Housing Association Ltd to the residents.

Page 4. Letter dated 17th October 1990 from Millbrae Gardens Owners Association to Hanover (Scotland) Housing Association Ltd


Page 7. Letter dated 7th January 1993 from Hanover (Scotland) Housing Association Ltd addressed to all residents.

Page 8. Letter dated 11th January 1993 from Hanover (Scotland) Housing Association Ltd addressed to the residents.

Page 9. Copy Land Certificate relating to Millbrae Gardens (it is intended to refer to pages 26 and 29)

Page 31. Copy Arbitration Award in the case of Mr and Mrs John Reid against Hanover (Scotland) Housing Association Ltd (it is intended to refer to pages 37, 39, 46, 50, 55 and 56).

Page 57. Copy Opinion of Lord Wheatley in the case Hanover (Scotland) Housing Association Ltd – Petition for Judicial Review (it is intended to refer to page 67 and 68).

John McCormick LL.B, MBA, LL.M
Messrs McSparran McCormick
Solicitors
19 Waterloo Street
Glasgow G2 6AH
Tel: 0141 248 7962
Fax: 0141 204 2232
E-mail: JMSMC@aol.com
ALL RESIDENTS

Dear Resident,

SERVICE CHARGE EXPENDITURE: FINANCIAL YEARS 1989/90 AND 1990/91: INCREASE IN STAFF COSTS

I am writing to advise you about an increase in Warden staff costs during financial years 1989/90 and 1990/91.

After a wide-ranging and comprehensive review the Association discovered that the salaries paid to Wardens and Assistant Wardens were significantly less than those paid to their counterparts elsewhere. Accordingly, it was decided to completely restructure their salary scales over the course of two financial years (that is, 1989/90 and 1990/91). It is hoped that this will have the desired effect of bringing their remuneration broadly into line with the levels pertaining in other housing associations and in local authorities.

As the restructuring is by way of a "catching-up" exercise it means, inevitably, that the percentage increase in expenditure on wardens' salaries will be greater than the current rate of inflation. The increase in costs involved will be reflected in your development’s service charge accounts in both 1989/90 and 1990/91. Please accept my assurance, however, that the Association will do its utmost to minimise any increase in the monthly service charge which may be required.

While the Association regrets having to incur any additional expenditure, and is acutely aware of the need to deliver the services you receive as economically as possible, there are circumstances in which it is unavoidable. In view of the disparity in salaries which clearly did exist it would have been inequitable not to have implemented the review’s conclusions.

This matter can, of course, be discussed in some detail at your 1989/90 Property Council Meeting. However, if in the meantime you wish any further information please do not hesitate to contact either your local area office, or, the housing management administration section in our head office.

Yours sincerely

James McCarrol
Assistant Housing Manager (Admin)
Mr & Mrs Fleming
4/6 Millbrae Gardens
Millbrae Road
LANGSIDE
Glasgow

23 August 1990

Dear Mr & Mrs Fleming

SERVICE CHARGE ACCOUNT ARREARS

I am writing to you as a follow up to my letter dated 11 June 1990 which advised you of an outstanding arrear in your Service Charge account.

In terms of the Deed of Conditions (Clause Ninth, Section (e) para (i)) you were advised on 3 October 1989 that the Service Charge payable would be £64.00 per month, with effect from 1 November 1989. Since that date the Association has made every effort to explain the costs incurred in respect of Millbrae Gardens to residents. Staff members of the Association visited the development on 9 April 1990 and residents who were available on that day were given the opportunity to discuss their arrears situation on an individual basis.

You have failed to pay the outstanding arrears balance as requested. Your arrears situation has now reached an unacceptable level and the Association wishes prompt settlement of the outstanding debt and regular monthly payments of the correct monthly service charge from now on.

The Association now intends to exercise its rights to charge interest on the outstanding sum due. In accordance with Clause Eleven of the Deed of Conditions the interest rate charged is the Bank of Scotland Base Rate, which has been 15% since October 1989, plus 4%, ie 19% in all.

As at 15 August 1990 the outstanding arrears balance in your Service Charge Account was £120.00. The accrued interest to this date on this amount is £9.93.

I/
23 August 1990

Mr & Mrs Fleming

I would be obliged if you would arrange to clear the arrears balance by the close of business on Friday 31 August 1990. Arrangements should also be made to pay £64.00 each month from 1 September 1990 until and including 1 October 1990. If the arrears are paid by 31 August 1990, the Association is prepared to waive its right to charge interest. If, however, the arrears situation is not cleared by that date, then the interest due will be added to the arrear and will accrue from now on, on a monthly compound basis.

I look forward to prompt settlement of your outstanding arrears situation.

Yours sincerely

[Handwritten Signature]

MRS HELEN MCLAREN
AREA HOUSING MANAGER

[Handwritten Remarks]
Your ref: RADS/44

Mr. R.A. Dingwall-Smith,
Chairman,
Hanover (Scotland) Housing Association Ltd.,
36 Albany Street,
Edinburgh, EH1 3CH. 17th October 1990.

Dear Mr. Dingwall-Smith,

With reference to your letter of 6th August 1990 which was sent to owners after our meeting on the 26th July 1990 with yourself, Mr. McClean, Dr. Kemp, Mr. Kinsman and Mrs. McLaren, we would draw your attention to the fourth paragraph. You indicated that the broad issues raised at the meeting regarding differences between residents and the warden would be taken back to the Committee of Management for consideration. Perhaps you would be good enough to let us know the decision of the committee regarding the owners' requests, both verbally and in writing, that the warden should be transferred.

Our Ad Hoc Committee met on 8th October 1990 as the undernoted issues had been raised by owners:

1. Why were fire alarms activated on 28th September 1990 without notice to owners? No unplanned visits by maintenance men (if this was the reason) should take place and if so, owners should be informed by the warden before alarms are set off otherwise we could have a 'cry wolf' situation here.

2. Why did the warden ask Mr. Baxter, Maintenance Officer (letter of 26th September 1990) to write to the owners, at this late date, to inform us of the red button?

3. Why was the temporary relief warden, who was unknown to the owners, given the task of introducing the new relief warden to some owners, prior to taking up her post? Since taking up her post, why has the relief warden introduced herself to many owners? In fact she is still now known to all owners. Surely this is contrary to Hanover's instructions in their letter of 26th June 1990 to all owners informing us of the relief warden's appointment.

4. Why were owners not informed that the warden was on holiday week-beginning 17th September 1990?

5. Some owners have complained of being 'buzzed' in the morning by the Cleaning Dept. to open bin shelters. This, we understand, should be attended to by the warden.

6. Please arrange to notify the owners, ground floor No. 2, when Guest Room occupied as it can be alarming for them to hear noises or see lights without warning. This request was made to Mr. Kinsman on 10th July 1990 after owners' meeting with him in Guest Room.

7./
7. There is a notice on the warden's office door which states -

"Office hours 9 - 11 a.m. Out with these hours Pull Cord".

There is also an In/Out sign on the wall between the warden's house and the office.

The notice and sign can be seen by only four owners. As the warden is off duty six hours per day and two days per week it would be more useful to the owners if the sign showed a time off and on duty, also if and when the relief warden is on/off duty. A duty timetable should be displayed for the convenience of all owners. At present the owners have no way of knowing if the warden is off duty for an hour or a week.

A request for a more detailed duty timetable has been made by the owners on a number of occasions.

You asked us to be specific about the problems we are experiencing with the warden. We have always been specific but in spite of this Hanover continue to condone the unhappy situation at Millbrae Gardens as outlined to you in previous correspondence. Neither the warden nor Hanover have at any time tried to resolve the problems here.

It is difficult to understand why it is necessary for the owners to bring the above items to your attention. We have been told by Hanover that your wardens are all highly trained skilled workers who have undergone intensive training but this recent list of items should have been dealt with by knowledge, common sense and courtesy. It simply reinforces our original complaint regarding the warden's attitude towards her duties and the fact that the owners will no longer accept this inferior service.

Yours sincerely,

For MILLBRAE GARDENS OWNERS' ASSOCIATION

E.H. Keith,
Secretary - Ad Hoc Sub-Committee.

cc Committee of Management.
24 October 1990

Miss E H Keith
Millbrae Gardens Owners' Association
10.6 Millbrae Gardens
Langside
GLASGOW
G42 9UY

Dear Miss Keith,

I refer to your letter of 17 October 1990.

As promised in my letter of 6 August 1990, the issues raised on 26 July have been considered by the Association’s Committee of Management. The Committee noted that each of our warden’s is employed under a contract by which she is to act as the warden of a named scheme. Because it would add greatly to the difficulty of recruitment, there is no provision for compulsory transfer between schemes; transfers arise only as a consequence of wardens applying to be considered for vacancies which have arisen elsewhere. The Committee, therefore, had to consider whether the material received from the residents disclosed a sound reason for terminating Mrs Hamilton’s employment. They came to the conclusion that it was quite inadequate for such a purpose.

I might add the personal view that, had we decided to dismiss Mrs Hamilton, it would have had to be on the grounds that certain residents had indicated, for personal reasons, a desire to remove her from the development, since they had emphasised that they wanted her transferred from the scheme, not dismissed, and by doing so had indicated that they had no grounds for criticising her competence as a warden of a sheltered development. In those circumstances, I would have expected an Industrial Tribunal to have awarded her substantial compensation, which would have been met from the service charges account and recovered from the residents. It is, of course, open to the residents to invite Mrs Hamilton to resign, with compensation paid by themselves.

Regarding the numbered paragraphs of your letter, I find it difficult to understand why it should be considered necessary to bring these matters to my attention. They are trivial, which, if they need to be pursued at all, ought to be raised with local staff, on the development or in the Area Office. Sending them to me does nothing to improve the situation, but does suggest to me that some residents are making it worse through their own intolerance.

Yours sincerely,

R A DINGWALL-SMITH
CHAIRMAN
TO ALL RESIDENTS

7th January 1993

Dear Resident

The external painting of the Development will commence on Tuesday 12th January (weather permitting) and I would request your co-operation in arranging to open your windows for the painter and leaving them open for a minimum of four hours after painting.

If you are expecting to be away from home, perhaps you could make some arrangement with the Warden to open the windows.

Yours faithfully

John McCaig
Maintenance Officer
TO ALL RESIDENTS
MILLBRAE GARDENS

11th January 1993

Dear Resident

External Painterwork

Due to the number of complaints received about leaving the windows open for four hours after painterwork has been carried out, it has been decided to postpone the painting contract on your Development until the milder weather.

I will advise you of the new date in due course.

Yours faithfully

John McCaig
Maintenance Officer
LAND CERTIFICATE

TITLE NUMBER: GLA33910

SUBJECTS: FLAT 35 MILLBRAE GARDENS, GLASGOW

This Land Certificate, issued pursuant to section 9(1) of the Land Registration (Scotland) Act 1973, is a copy of the Title Sheet relating to the above subjects.

Statement of Indemnity

In the event of any specific qualifications entered in the Title Sheet of which this Land Certificate is a copy, a person who suffers loss as a result of any of the events specified in section 12(1) of the above Act shall be entitled to be indemnified in respect of that loss by the Keeper of the Registers of Scotland in terms of that Act.

WARNING: DRAWN TO THE NOTICE OVERLEAF AND GENERAL INFORMATION ON THE INSIDE BACK COVER OF THE CERTIFICATE.
<table>
<thead>
<tr>
<th>No.</th>
<th>Proprietor</th>
<th>Date of Registration</th>
<th>Consideration</th>
<th>Entry Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>JOHN REID and MARGARET REID, both 2 Millbrae Gardens, Glasgow, equally between them and the survivor of them</td>
<td>22 JAN. 1988</td>
<td>£49,000</td>
<td>11 JAN. 1988</td>
</tr>
</tbody>
</table>

**Note:** There are in respect of the subjects in this title no subsisting occupancy rights, in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, of spouses of persons who were formerly entitled to the said subjects.
Disposition by James Mark Ballantine to Heritage Housing Limited and its successors and assignees, registered 22 May 1985, of that part tinted blue on the Title Plan, contains the following burdens:

(One) There is reserved to me and my successors in the ownership of the other ground belonging to me being 2 roods 37 poles of which the area of ground hereby disposed forms part a heritable and irredeemable servitude right of access for pedestrian traffic from the said other ground belonging to me to Millbrae Road, Glasgow along a line to be determined by the said disponee and its foresaids and (Two) the said disponee and its foresaids will be bound within six months of the date of entry (being 15 May 1985) to construct at its expense a brick or stone wall along the Northwest boundary of the plot or area of ground hereby disposed and to erect in said brick or stone wall the gateway through which I and my foresaids may exercise the servitude right hereinbefore reserved; after the said wall has been constructed and the said gateway has been erected the same shall be maintained in good order and repair in all time coming at the joint expense of the said disponee and its foresaids and me and my foresaids.

Disposition by Trustees for the Priory of Scotland of the Most Venerable Order of the Hospital of St. John of Jerusalem to Heritage Housing Limited and its successors and assignees, registered 1 Oct. 1985, of that part tinted yellow on the Title Plan, contains the following burdens:

(One) there is reserved to us, as Trustees foresaid, and our successors in the ownership of the other ground belonging to us being 3 roods 29 poles, of which the area of ground hereby disposed forms part a heritable and irredeemable servitude right to maintain in position such pipes and/or cables as are presently laid in the said area or piece of ground hereby disposed with right of access for maintenance and repair as required, declaring however that the said disponee and its foresaids will be entitled to divert the line of such pipes and/or cables provided that the efficient operation of such pipes and/or cables
is not thereby impaired, (Two) the said disponee and its
foresaid will be bound to construct at its expense along
the Northwest boundary of the said area or piece of ground
hereby dispone a wall or fence of a type and design to be
approved by us, as Trustees foresaid, before erection
which wall or fence will to the extent of one half of the
thickness thereof be erected on the said area or piece of
ground hereby dispone and as to the remaining one half of
its thickness will be erected on the said other ground
and (Three) the height of any buildings to be
erected by the said disponee and its foresaid on the said
area or piece of ground hereby dispone shall be subject
to the approval of us, as Trustees foresaid, and our
foresaid, which approval shall not be unreasonably
withheld.

Deed of Conditions, registered 6 Aug. 1987, by Heritage
Housing Limited, proprietor of subjects edged red on the
Title Plan (hereinafter referred to as "the Property")
sets forth burdens &c. as in the following terms:

WHEREAS the building erected on the property comprises
Thirty six dwellinghouses, Guest Suite and three Lock-up
garages as shown on the Layout Plan of the Property
annexed and executed as a reference hereto; And WHEREAS (a)
one of the said dwellinghouses is to be used as a
residence/office for a warden; (b) one of the said Lock-up
garages is to be for the use of the warden, (c) one of the
said Lock-up garages has been or is to be sold to the
proprietor of the subjects known as Number Twenty five
Mansionhouse Road, Glasgow, and (d) the remaining thirty
five dwellinghouses are to be used for the purpose of
providing sheltered housing accommodation for the elderly
and (e) the remaining Lock-up garage is to be sold along
with one of the said lastmentioned dwellinghouses; And
WHEREAS we are about to convey the said dwellinghouse
which is to be used for the purpose of providing
accommodation (including office accommodation) for the
warden and the Lock-up garage which is to be for the use
of the warden; AND WHEREAS we intend to feu, sell or otherwise deal with the said thirty five dwellinghouses which are to be used for the purpose of providing sheltered accommodation and the one remaining Lock-up garage and to execute feu dispositions, dispositions or other conveyances thereof in favour of various feuars and purchasers and it is desirable that we set forth in writing the conditions and real burdens under which all proprietors thereof shall be held and the rights and obligations of the said dwellinghouses, the Lock-up garage and others are to be held by the proprietor or proprietors thereof and his or their executors, dispensers and successors whomsoever contained in this Deed, FIRST In this burdens and others contained in this Deed, (1) "Building" means the two blocks comprising the said thirty six dwellinghouses, Guest Suite and the said Lock-up garages with the whole plant, equipment, fixtures and fittings therein. (2) "Warden's accommodation" means the dwellinghouse which is situated on the ground floor of the building and shown marked "Warden" on the Layout Plan and (b) the Lock-up garage situated on the Lower Ground floor of the building and shown delineated and coloured red on the Layout Plan which is to be used as a residence and garage for the Warden and as a Warden's office with the walls and ceilings enclosing the same and shall include (a) the window frames and glass in the windows of said dwellinghouse, the lighting equipment, entry phone apparatus and all radiators, pipes, ventilation ducts, cables and others situated in the said dwellinghouses and in the said Lock-up garage and serving exclusively the said dwellinghouse or said Lock-up garage and (b) the carpets, furnishings in that part of the Warden's accommodation which forms the Warden's office. (3) "Guest Suite" means the accommodation situated on the Lower Ground floor of the Building and shown marked "Guest Room" on the Layout Plan which is to be used in accordance with the provisions of Clause SEVENTH hereof and shall include (a) the window frames and glass in the windows in the said accommodation, the lighting equipment, entry phone apparatus, and all
radiator, pipes, ventilation ducts, cables and others situated therein and serving exclusively the said accommodation and (b) the carpets and/or other floor coverings on and the furniture and furnishings in the said accommodation and the walls and ceilings enclosing the same (4) "Dwellinghouse" means any one of the remaining thirty five dwellinghouses (other than the Warden's accommodation and the Guest Suite) under exception of the parts hereinafter defined as the Common Parts in the Building sold or to be sold by us and shall include the window frames and glass in the windows of a dwellinghouse, the lighting equipment, entry phone apparatus and all radiators, pipes, ventilation ducts, cables and others situated therein and serving exclusively a dwellinghouse, "Dwellinghouses" shall be construed accordingly. (5) "Lock-up" means either of two Lock-up garages sold or to be sold by us and shall include the lighting equipment and all cables and others situated therein and serving exclusively the Lock-up garages. "Lock-ups" shall be construed accordingly. (6) "Curtailage" means the said plot or area of ground, so far as not occupied by the building together with all access roads and paths, steps and ramps, parking spaces, walls, railings, gates, fences, hedges, but in the case of any of such walls, railings, gates, fences or hedges which are mutual to the extent only of one half thereof), drying areas if any, and poles and other equipment thereon, garden and amenity ground and all growing plants and shrubs thereon, and (in so far as not taken over by the Local Authority) the roadways, footpaths and sewers ex adverso the Building but only in so far as we have right thereto, and subject always to any access rights and obligations and servitudes pertaining thereto as may be specified in the feu disposition to be granted by us as aforesaid. (7) "Common Parts" means the whole parts of the Property which are used by or serve more than one dwellinghouse and, without prejudice to the foregoing generality includes: (a) the scum on which the Building is erected and the following parts of the Building, videlicet: (i) the foundations, (ii) the structural floors whether of concrete and/or other materials, (iii) the outside walls and cladding thereof, the window frames and window glass of all apartments which are common and of entrance halls, passageways, common stairways, landings and alcoves (but not the window frames and glass in the windows of the dwellinghouses or of the Warden's accommodation or of the Guest Suite), (iv) all load
D. BURDENS SECTION

Specification

bearing walls and/or columns whether situated within a dwellinghouse or within a Lock-up or within the Warden's accommodation or the Guest Suite or not; but where situated within a dwellinghouse or within a Lock-up or within the Warden's accommodation or the Guest Suite excluding the Screening, plasterwork and finishes thereof, (v) the roof, roof spaces and hatchways leading thereto, the attics, if any, and all erections on the roof, (vi) the entrance halls, passageways, common stairways, landings and alcoves together with the carpets or other floor coverings thereon and the walls and ceilings enclosing the same, and the railings thereof, (vii) all apartments or areas used for storage, except such apartments or areas as are contained within a dwellinghouse or within the Warden's accommodation or the Guest Suite, (viii) the Warden's alarm system and entry phone system, (ix) main water supply pipes, including main risers and lateral mains and all branch pipes leading to the dwellinghouses and to the Warden's accommodation and to the Guest suite, storage tanks, break tanks, cisterns, feed pumps and overflows, (except insofar as situated within and serving exclusively any one dwellinghouse or the Warden's accommodation or the Guest Suite), (x) all heating installations, radiators, pipe and cables (except insofar as situated within and serving exclusively any one dwellinghouse or the Warden's accommodation or the Guest Suite), (xi) electrical switch gear and all main electric cables and conductors (but excluding electric cables and conductors so far as enclosed within and serving exclusively any one dwellinghouse or any one Lock-up or the Warden's accommodation or the Guest Suite), (xii) mechanical ventilation ducts (except insofar as situated within and serving exclusively any one dwellinghouse or the Warden's accommodation or the Guest Suite), (xiii) fire fighting equipment (if any) and smoke check doors and any fire alarm and fire warning and/or detection systems including the machinery and apparatus and all wires, cables, hoses and pipes used in connection therewith, (xiv) drains, soil pipes and sewers of every description, rhones, gutters and conductors, drainage traps and manholes, except insofar as serving exclusively any one dwellinghouse or any one Lock-up or the Warden's accommodation or the Guest Suite, (xv) television aerials and television outlets up to the point where the outlet enters the socket serving a dwellinghouse or the Warden's accommodation or the Guest Suite, (xvi) lightning
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conductors, (xvii) drying areas within the Property if any, and any walls or fences enclosing the same and poles or other equipment thereon, (xviii) refuse areas and (xix) the carpets or other floor coverings and the furniture and furnishings in the Guest Suite and in that part of the Warden's accommodation which forms the Warden's office and (xx) lighting equipment for the Curtilage and for all entrance halls, passageways, stairways, landings, and alcoves and flood-lighting equipment, if any. (b) the Curtilage. (b) "Common Charges" means and includes:— (a) the whole expense incurred from time to time in respect of the repair, maintenance (including redecoration) and renewal and any authorised improvement of the Common Parts, (b) a reasonable provision (to be determined by the Factor) for future costs of repair, maintenance (including redecoration) and renewal of the Common Parts and of that part of the Warden's accommodation which forms the Warden's Office and of the Guest Suite, (c) the whole expense incurred from time to time in respect of the insurance, repair, maintenance (including redecoration) and renewal of the Warden's accommodation and of the Guest Suite, and any Local rates exigible thereon, (d) all Local Rates, taxes, charges, assessments and other outgoings payable from time to time in respect of the Common Parts, (e) the remuneration of the Factor and the reimbursement to him of any expenses properly incurred by him in performing his duties in relation to the Property, (f) the remuneration of the Warden and the cost of providing for him any benefits and emoluments and the reimbursement of any outlays due to or incurred by him in performing his duties in relation to the Property, (g) the premiums for effecting the insurance in terms of Clause TENTH (a) and (b) hereof, (h) any expense incurred by us or our successors in the Superiority of the Property in the exercise of the rights under this deed, (i) the cost where appropriate of heating, lighting and cleaning the Common Parts, (j) the cost of heating, lighting and cleaning the Guest Suite and that part of the Warden's accommodation which forms the Warden's office, (k) any other expenses, however arising, in relation to the Property which in the opinion of the Factor should properly be borne by all the proprietors of dwellings houses including, without prejudice to the foregoing generality, all expenses incurred by the Superiors for gardening and other operations on the Curtilage, (l) "Lock-up Charges" means and includes:— (a) the whole expense incurred from
time to time in respect of the insurance, repair, maintenance (including redecoration) and renewal relating exclusively to that part of the building which comprises the Lock-ups. (b) a reasonable provision (to be determined by the Factor) for future costs of repair, maintenance (including redecoration) and renewal relating exclusively to that part of the building which comprises the Lock-ups and (c) any other expenses, however arising, in relation to the Property which in the opinion of the Factor should properly be borne exclusively by the proprietors of the Lock-ups. (10) "Minerals" means the whole metals, minerals and other substances in and under the Property which are or may become workable commercially other than petroleum as defined in the Petroleum (Production) Act 1934 and coal and mines of coal and rights annexed thereto as defined in the Coal Act 1938 and now vested in the National Coal Board by virtue of the Coal Industry Nationalisation Act 1946. (11) "month" means a calendar month. (12) "year" means the period from the First day of April to the Thirty first day of March following. (13) "the Supeiors" means us and our successors in the Superiority of the Property. (14) "Association" means the Hanover (Scotland) Housing Association Limited or any housing association registered under the Industrial and Provident Societies Acts in force from time to time with which the said Hanover (Scotland) Housing Association Limited may amalgamate or become associated. (15) "proprietor" means a person or persons who has/have purchased a Dwellinghouse or a Dwellinghouse and (a) Lock-up or a Lock-up and includes, where a proprietor is deceased, his or her executor or, where the estates of a proprietor have been sequestrated, his or her trustee in bankruptcy or where a proprietor has granted a trust deed for behalf of creditors the trustee acting thereunder and generally any person for the time being legally entitled to a Dwellinghouse or a Dwellinghouse and a Lock-up or a Lock-up and "proprietors" shall be construed accordingly. (16) "Factor" shall be the person (who may be an officer of the Association), firm or company appointed in accordance with the provisions of Clause THIRTEENTH of this Deed. (17) "Warden" shall be the person appointed as warden in accordance with the provisions of Clause FOURTEENTH of this Deed. (18) "Property Council" means the body constituted in accordance with Clause FIFTEENTH of this Deed. (19) "Arbiter" means any Arbiter appointed in accordance with Clause SIXTEENTH of this Deed. (20) Words importing the
masculine shall include the feminine. SECOND The Mines shall so far as belonging to the Superiors shall be reserved to the Superiors with full power to the Superiors and any person to whom they may communicate the right to search for, work, win and carry away the same and any metals, minerals and substances in and under adjacent subjects, in such manner as the Superiors or their assignees or lessees may in the uncontrolled discretion of the Superiors think proper, save that there shall be no entering upon or breaking of the surface of the Property for the purpose of any such workings, but the proprietors shall be entitled to recover compensation for all damage that may be done to their interests in the Property thereby from the Superiors or their assignees or lessees, declaring that the Superiors shall take any such assignees or lessees bound to satisfy all such claims, in which event the claims shall be presetable only against such assignees or lessees; and all questions as to the liability for and the amount of any such compensation shall, failing agreement, be determined by arbitration as specified in Clause SIXTEENTH of this Deed. THIRD (a) The Superiors shall have:— (i) a right of access to and use of the Property or any part thereof for the construction and installation of any electricity mains and cables, gas supply mains and water mains and supply pipes, sewage disposal pipes, drainage outlets, television or radio connections or apparatus and any other services for the benefit of the Property; (ii) a right of access to and use of the Property or any part thereof necessary or desirable to enable the Superiors to carry out the duties imposed on the Superiors in terms of Clause TWELFTH hereof; and (iii) a right of access to the Property and any part thereof at all reasonable times for the purpose of inspection of the same and of the state of maintenance thereof. The rights reserved to the Superiors by the contractors employed by the Superiors or by the Factor may be exercised by the Factor and by tradesmen and may be exercised by the Factor and by tradesmen and contractors employed by the Superiors or by the Factor. There are reserved (i) a servitude right of using any electricity mains or cables, gas supply pipes and ducts, water supply pipes, sewage disposal pipes, and drainage pipes or outlets at present laid in, over or under the Property although not serving the Property or not serving the Property exclusively in favour of the subjects served thereby and the proprietors thereof, and of access thereto at all reasonable times for the purposes of repairing and maintaining and renewing the same, (ii) any servitude right of wayleave or access granted or that may be granted
by the Superiors or their predecessors in title in favour of the Post Office, British Telecommunications PLC, the Electricity Supply Authority, the Gas Supply Authority and other Statutory Undertakers, for placing and maintaining wires and telegraph and telephone poles, stays, ducts and other cables, pipes, sewers, drains and others in, over or under the Property and (iii) any servitude right of way/lave or access over the Property granted or that may be granted by the Superiors in favour of the proprietor of the subjects known as Number Twenty Five Mansionhouse Road, Glasgow to be exercised by said proprietor in connection with the Lock-up garage which has been or is to be sold by the Superiors to the said proprietor. FOURTH (a) Each dwellinghouse shall be held by the proprietor thereof in all time coming subject to the conditions of this Deed, (b) Subject always and without prejudice to the provisions for the repair, maintenance and renewal of the Common Parts contained in Clause NINTH hereof, the proprietor for the time being of each dwellinghouse shall be responsible for the repair and maintenance of such dwellinghouse and the fittings and fixtures therein and for the renewal, if and so far as necessary, of any part or parts thereof at his own expense. If in the opinion of the Factor it is necessary or desirable for the protection, appearance or for the general amenity of the Building that any works of repair, maintenance or renewal be carried out on any dwellinghouse or any part or parts thereof he may serve notice upon the proprietor thereof requiring the performance of the such works as are specified in the notice within the period stated. The proprietor of such dwellinghouse shall be entitled within twenty one days of the receipt of such notice to appeal to the Arbiter to decide whether the works specified or any of them are necessary or reasonably desirable for the purposes above mentioned, and, if the Arbiter considers that such works or any of them are so necessary or desirable, to determine in the period within which they shall be performed. In the event of failure by the proprietor of such dwellinghouse to perform such works within the period specified in the notice or in the determination of the Arbiter as the case may be, the Factor shall be entitled to have the said works carried out and to recover the cost thereof from the proprietor of such dwellinghouse. (c) The proprietor of any dwellinghouse shall be bound to permit access at all reasonable times to and through such dwellinghouse to the factor and the proprietor of any other dwellinghouse and
to any tradesmen employed by his or them for the purpose
of executing any repairs, maintenance or renewals of the
Common Parts or any part thereof or of the Warden's
accommodation or of the Guest Suite or of any of the
Dwellinghouses. (d) All the Dwellinghouses shall be used
and occupied in all time coming as sheltered housing, that
is to say, housing specifically designed for the elderly
or infirm and incorporating a resident warden's service.
None of the Dwellinghouses shall be used for any other
purpose whatever nor sub-divided or used as a shop or
workshop of any description or for the purpose of teaching
music, singing or elocution or as a private school or for
the carrying on of any profession, trade or business
whatever. Each of the two roomed Dwellinghouses shall be
used and occupied by not more than two persons both of
whom shall be capable of leading an independent life and
one of whom shall be of pensionable age, that is to say,
in the case of females a person who has attained the age
of sixty years and in the case of males a person who has
attained the age of sixty five years or is eligible to
receive a Government pension in respect of disablement;
each of the three roomed Dwellinghouses shall be occupied
by not more than three persons all of whom shall be
capable of leading an independent life and at least one of
whom shall be of pensionable age (as before defined) or
eligible to receive a Government pension in respect of
disablement; the four roomed Dwellinghouse shall be
occupied by not more than five persons all of whom shall
be capable of leading an independent life and at least two
of whom shall be of pensionable age (as before defined) or
eligible to receive a Government pension in respect of
disablement; provided always that the Superiors on cause
shown may agree to relax this condition either wholly or
partially for such period or periods and on such
conditions as they may determine. (e) No structural or
external alterations shall be made to any Dwellinghouse or
to any part of such Dwellinghouse except with the prior
consent in writing of the Superiors. (f) The proprietors
of the Dwellinghouses shall not be entitled to paint,
decorate, or in any way alter the external appearance of
the portion of the Building to which they have right or
the windows or the outside doors thereof, nor shall they
be entitled to paint, decorate or alter the appearance of
the Common Parts it being expressly provided that in order
to preserve the uniformity of the outward appearance of
the Building and of the Common Parts all painting thereof
and all alterations or repairs thereon shall only be dealt with in the manner herein provided for with regard to common or mutual operations or repairs. (g) There shall not be erected or affixed to or allowed to depend from the outside walls or windows of any Dwellinghouse any notice-plate sign or other device except with the prior consent in writing of the Superiors. (h) There shall not be kept in or about any of the Dwellinghouses or in any other part of the Property any animal or bird of any kind except the one dog or one cat or one bird (kept in a cage) may be kept in each Dwellinghouse but then only provided such dog, cat or bird shall not prove a nuisance; declaring that the Factor shall be the sole judge as to whether or not any such animals or birds are or may become a nuisance. (i) None of the Dwellinghouses shall be let or used for any purpose or in such way as may in the opinion of the Superiors constitute a nuisance or affect adversely the amenity of the Property. (j) In the event of any Proprietor desiring to sell or otherwise dispose of his Dwellinghouse or to make any change in the use of occupancy thereof he shall be bound to notify the Superiors of his intention. Such notification must be in writing sent by registered post or recorded delivery to the Factor on behalf of the Superiors. No proprietor shall be entitled to sell or otherwise dispose of his Dwellinghouse or to make any change in the use or occupancy thereof unless the Superiors are satisfied and have given their approval in writing to the proprietor that on such sale or disposal or change the Dwellinghouse will be used and occupied in accordance with the provisions contained in Sub-clause (d) hereof. The Factor and the Superiors shall be obliged to discharge their duties in terms of this Sub-clause expeditiously in order not to jeopardise such sale, disposal or change. FIFTH (a) The Lock-up which has been or is to be sold to the proprietor of the subjects known as Number Twenty five Mansionhouse Road, Glasgow, shall be used as a private Lock-up garage for the garaging of one private motor car only belonging to the said proprietor and shall not be occupied or used for the garaging of commercial vehicles or for the purpose of carrying on any trade or business of profession. (b) The remaining Lock-up shall be used as a private Lock-up garage for the garaging of one private motor car only belonging to a proprietor of a Dwellinghouse in the Property and shall not be occupied or used for the garaging of commercial vehicles or for the
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purpose of carrying on any trade, business or profession.  
(c) No structural or external alterations shall be made to 
either Lock-up or to any part of a Lock-up without the 
prior consent in writing of the Superiors.  (d) The 
proprietors of the Lock-ups shall not be entitled to 
paint, decorate or in any way alter the external 
appearance of the Lock-ups or the doors therein it being 
expressly provided that in order to preserve uniformity in 
the external appearance of the Property all painting of 
and all meliorations or repairs to either of the Lock-ups 
shall only be dealt with in the manner herein provided for 
with regard to common or mutual operations or repairs.  (e) 
There shall not be erected or affixed to or allowed to 
depend from the outside walls of either Lock-up, any 
notice, plate, sign or other device, except with the prior 
consent in writing of the Superiors.  (f) Neither of the 
Lock-ups shall be let or used for any purpose or in any 
such way as may in the opinion of the Superiors constitute 
a nuisance or affect adversely the amenity of the 
Property.  

SIXTH (a) The Dwellinghouse which forms part of 
the Warden's accommodation shall be used and occupied in 
all time coming to provide residential and office 
accommodation for the Warden and for no other purpose 
whatever except with the prior written consent of the 
Superiors and the consent of the Property Council; and the 
Lock-up garage which forms part of the Warden's 
accommodation shall be used as a private Lock-up garage 
for the garaging of one private motor car only and shall 
not be used for the garaging of commercial vehicles or for 
the purpose of carrying on any trade, business or 
profession.  (b) No structural or external alterations 
shall be made to the Warden's accommodation except with 
the prior written consent of the Superiors and the consent 
of the Property Council.  (c) No change shall be made in 
the colour scheme or mode of decoration or finish of the 
exterior of the Warden's accommodation and all painting 
thereof and meliorations or repairs thereon shall only be 
dealt with in the manner herein provided for with regard 
to common or mutual operations or repairs.  (d) There shall 
not be erected or affixed to or allowed to depend from the 
outside walls or windows of the Warden's accommodation any 
notice, plate, sign or other device, except with the prior 
written consent of the Superiors.  SEVENTH (a) The Guest 
Suite may be used to provide accommodation for any relief 
warden or other temporary servant of the Superiors but 
shall otherwise be used in all time coming only to provide
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Temporary accommodation for guests of a proprietor of a Dwellinghouse on terms and conditions to be laid down from time to time by the Superiors and for no other purpose except with the prior written consent of the Superiors and (b) There shall not be erected or affixed to or allowed to depend from the outside walls or windows of the Guest Suite any notice plate, sign or other device, except with the prior written consent of the Superiors.

EIGHTH Any compartments in the Building which are not used exclusively as residences or as the Warden’s accommodation shall be used in all time coming as ancillary buildings or amenity ground in connection with the Curtilage or as residences or as Lock-up garages and the Curtilage shall be used in all time coming as ancillary buildings or amenity ground in connection with the Curtilage. No buildings of any kind whatsoever shall be erected on the Curtilage. The drying areas, if any, forming part of the Curtilage shall be used only for drying or bleaching clothes. The parking areas in the Curtilage shall only be used for parking private cars and no commercial vehicles shall be parked thereon at any time. All access roads and paths forming part of the Curtilage shall be kept clear and free from obstruction and shall not be used for the purpose of parking vehicles of any kind whatsoever or other objections. The Superiors shall be entitled to carry out any gardening and cleaning operations on the Curtilage, and shall not consider necessary or desirable and the expenses thereof shall form part of the Common Charges.

NINTH (a) Subject to the right of use which we have granted or may grant to the proprietor of Number Twenty-five Mansionhouse Road in the Feu Disposition of the Lock-up sold or to be sold to him, the Common Parts shall belong to each of the proprietors of a Dwellinghouse from time to time to the extent of a one thirty seventh share and to the Association (or other proprietor of the Warden’s accommodation and the Guest Suite) to the extent of the remaining two thirty seventh shares. (b) The authority to instruct and have executed from time to time the works for the repair, maintenance or renewal of the common parts or any part thereof, as they in their judgement shall consider necessary to implement their obligations and duties in terms of this deed, provided
always that in the case of major work (being a work the cost of which is estimated by the Factor to exceed Six Thousand Pounds or such greater amount as may from time to time be fixed by the Property Council) the Factor shall, before instructing the same, report the matter to the Property Council and such work shall be undertaken only if it is authorised by the Property Council, whose decision shall be final and binding on the Superiors and on all the proprietors. Notwithstanding the foregoing provisions the Factor shall be entitled forthwith to instruct and have executed such work which shall include a major work as he considers necessary for the interim protection or safety of the Property or any part thereof or of any person. (c) The proprietor of each Dwellinghouse shall be liable, jointly with the proprietors of all the other Dwellinghouses for payment of the Common Charges in the proportion of a one thirty fifth part in respect of each dwellinghouse and of any Value Added Tax or other tax which is or may from time to time become legally payable thereon. (d) The proprietor of each Lock-up shall be liable jointly with the proprietor of the other Lock-up for payment of the Lock-up Charges in the proportion of a one half part and of any Value Added Tax or other tax which is or may from time to time become legally payable thereon. (e) As soon as reasonably practicable after the Thirty first day of March in each year the Factor shall prepare a statement of the Common Charges and of the Lock-up Charges incurred in respect of the year to that date and shall furnish a copy thereof to each proprietor. Each proprietor shall make payment to the Factor of the proportion of the Common Charges and of the Lock-up Charges payable by him as follows:— (i) On the First day of each month in each year a sum notified by the Factor to the proprietor from time to time, approximately equivalent to a one-twelfth proportion of the share of the Common Charges and/or Lock-up Charges estimated by the Factor as payable by such proprietor in respect of that year (hereinafter called "the monthly instalment") and (ii) within fourteen days after the receipt from the Factor by the proprietor of a copy of the statement of the Common Charges and Lock-up Charges for that year, the amount (if any) by which the share of Common Charges and/or Lock-up Charges ascertained in accordance with the said statement exceeds the total of the twelve monthly instalments paid for that year. Any amount by which the said total exceeds the amount ascertained in accordance with the said
statement shall be retained by the Factor and taken into account by him in determining the monthly installment for the subsequent year. Any dispute or difference as to the amount payable by any proprietor as shown in the said statement shall be determined by the Arbiter on application by such proprietor or the Factor but the amount so shown and any arrears of monthly installments due shall be paid by such proprietor before the matter is considered by the Arbiter and the adjustment thereof, if any, shall be made and settled within seven days after the Arbiter’s decision has been intimatned to the parties. 

In the event of any monthly installment or other sum due and payable in terms of this Deed by any proprietor remaining unpaid for a period of sixty days after a demand for payment thereof has been issued by the Factor the Factor shall sue for and recover the same in his own name on behalf of the Superiors and of the remaining proprietors. If payment is not received by the Factor or the amount of any such installment or other sum and of the expenses as awarded by the Court of obtaining a decree for payment therefor within twenty one days after the date of the decree for payment or, in the event of an installment decree for payment after the date when the last installment became due, the amount of such installment or other sum and expenses shall be paid by the remaining proprietors jointly to the Factor, each such proprietor contributing in proportion to his appropriate share of the original costs and the remaining proprietors will be entitled to demand enforcement of the said decree against the defaulting proprietor. 

TENTH (a) In the event of damage to or destruction of the Property or any part thereof the proprietors shall be obliged to restore or rebuild the same and repair the damage. The Superiors through the Factor shall effect insurance of the Property and of all furniture and furnishings forming part of the Common Parts against damage or destruction by fire and other risks normally covered by a comprehensive insurance of residential property for the full reinstatement value. The amount for which such insurance is effected shall be determined from time to time by the Superiors. The insurance shall be effected by a common policy in name of the Superiors and the Factor for benefit of the Association (or the other proprietor of the Warden’s accommodation and the Guest Suite) and the whole proprietors. In the event of damage to or destruction of the Property or any part thereof the proceeds of a claim or claims under the said
common policy shall be held in trust by the Superiors and the Factor and shall be used and applied at the sight of the Superiors and the Factor in or towards the reconstruction, rebuilding or repair of the Property. (b) The Superiors through the Factor shall also effect an insurance by a common policy in name of the Superiors and the Factor for behalf of the Association (or other proprietor of the Warden’s accommodation and the Guest Suite) and the whole proprietors against property owners’ liability arising from ownership of the Property, the indemnity for which shall not be less than One Million Pounds in respect of any one accident. ELEVENTH All sums payable by any proprietor which are not paid punctually on the due date or within twenty one days thereafter shall bear interest at the rate of 4% per annum above the Base Rate charged from time to time by the Bank of Scotland or any bank with which it may associate or amalgamate from the due date until payment. TWELFTH (a) The Superiors through the Factor shall be responsible for the general management and administration of the Property as a sheltered housing scheme and, without prejudice to the foregoing generality, will be responsible for the supervision of the Warden and for arranging inter alia the repair, maintenance and renewal of the Common Parts and of the Warden’s accommodation and the Guest Suite, the cleaning, redecoration and lighting of the Common Parts, the cleaning, redecoration, heating and lighting of the Guest Suite and of that part of the Warden’s accommodation which forms the Warden’s office, the insurance of the Property and the payment of rates, taxes, assessments and other outgoings in respect of the Property other than those exigible in respect of the dwellinghouses and Lock-ups. (b) On the written requisition of the proprietors of all the dwellinghouses being presented to the Superiors or the Factor on their behalf the Superiors shall be bound (i) to obtain a Disposition ad rem of the Warden’s accommodation and of the Guest Suite and (ii) to transfer the title of the Warden’s accommodation and of the Guest Suite to a nominee or nominees of the Property Council, the whole costs thereof to be met by the proprietors of the Dwellinghouses in the proportions hereinbefore provided for in respect of Common Charges. THIRTEENTH (a) The Factor shall be appointed and his appointment may be renewed or terminated by the Superiors. (b) The remuneration of the Factor and the terms and conditions of his appointment shall be determined from
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time to time by the Superiors. (c) The factor shall have the powers conferred on him and perform the duties imposed on him by this Deed and by the Superiors and any other functions assigned to him in relation to the Property by the Superiors. (FOURTEENTH) (a) The Warden shall be appointed and his appointment may be renewed or terminated by the Superiors. The Warden shall be employed exclusively in connection with the Property or in conjunction with caretaking duties in relation to any other property or properties. (b) The remuneration of the Warden and the terms and conditions of his employment shall be determined from time to time by the Superiors. (FIFTEENTH) (a) The Property Council shall comprise the Superiors, the Association, or other proprietor of the Warden’s accommodation and the Guest Suite, and the proprietors of all the dwellings provided always and when more than one person is included in the term "proprietor" only one of such persons may be a member of the Property Council. (b) Subject as aforesaid, the Property Council shall have power:— (i) to instruct the factor to have executed any works of repair or maintenance and any renewals, and also any improvements, of the Common Parts or any part thereof and of the Warden’s accommodation and the Guest Suite; (ii) to make any regulations which may be considered necessary or desirable for the preservation, use, cleaning or enjoyment of the Common Parts or any part thereof and of the Warden’s accommodation and the Guest Suite; and (iii) to carry out the duties and functions assigned to it in accordance with the provisions of this Deed provided always that the Property Council shall not be entitled (a) to order to be executed any works whether of repair, maintenance or renewal or any other works of whatever nature which the Superiors consider unnecessary or (b) to prevent the execution of any works upon the Common Parts or any part thereof or upon the Warden’s accommodation or the Guest Suite, which the Superiors consider necessary for the performance of their obligations or duties to one or more of the proprietors and the expenses of any such works shall form part of the Common Charges. (c) A meeting of the Property Council (hereinafter called the Regular Meeting) shall be convened by the factor to be held in November in each year. The factor shall also convene a special meeting of the Property Council to be held at such reasonably convenient time and place as the factor shall determine either on his own initiative or upon receipt of a requisition signed by
or on behalf of the Superiors or by Ten or more proprietors of dwellinghouses. Notice of the time and place of any meeting of the Property Council shall be given in writing by the Factor to the Superiors, to the Association or other proprietor of the Warden's accommodation and the Guest Suite and to all the proprietors of dwellinghouses as appearing in the Factor's records at the time and such notice shall be given not less than fourteen days prior to the date of the meeting. (a) At any meeting of the Property Council (i) The Superiors and the Association, as proprietor of the Warden's accommodation and the Guest Suite, may be represented by the Factor, (ii) the proprietor of a Dwellinghouse may be represented by any other person as his or their mandatory appointed by written mandate to attend, vote and act on behalf of the proprietor granting the mandate, (iii) the Superiors or the Factor on their behalf and the proprietors of not less than one third in number of the Dwellinghouses present in person or represented by a mandatory shall be a quorum; (iv) the Chairman of the meeting shall be appointed by those present and entitled to vote, (v) all matters shall be determined, where necessary, by a majority of votes. (vi) The Superiors or the Factor on their behalf shall be entitled to one unit of voting power in respect of the Superiority of the Property and one unit of voting power in respect of each Dwellinghouse which has not been sold by the Superiors; the Association, or the Factor on its behalf, or other proprietor of the Warden's accommodation, and the Guest Suite shall be entitled to one unit of voting power in respect of the Warden's accommodation and one unit of voting power in respect of the Guest Suite; and the proprietor of each Dwellinghouse present in person or represented by a Mandatory shall be entitled to one unit of voting power in respect of the Dwellinghouse owned by him and (vii) in the event of an equality of votes the Chairman shall be entitled to an additional or casting vote. (z) Subject to the proviso to sub-clause (b) of this clause all decisions and regulations regularly made at any such Meeting shall be binding upon the Association (or other proprietor of the Warden's accommodation and the Guest Suite) and upon each and all of the proprietors whether or not present in person or represented at such meeting and whether or not consentors thereto unless the Association (or other proprietor of the Warden's accommodation and the Guest Suite) or any of the
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D. Burdens Section

Specification

Proprietors shall within thirty days of the making of any such decision or regulation refer the matter to arbitration in accordance with Clause SIXTEENTH of this Deed. SIXTEENTH (a) ALL QUESTIONS, disputes or differences which may arise between or among the Superiors, the Factor, the Association (or other proprietor of the Warden's accommodation and the Guest Suite) and the proprietors or any of them arising directly or indirectly from the provisions of this Deed or generally in relation to Property or any part thereof shall be referred to the decision of an Arbiter to be appointed by the Chairman for the time being of the Scottish Branch of the Royal Institution of Chartered Surveyors on the application of any person interested. (b) The Arbiter may appoint an assessor and may order the execution of works and allocate the expense of works and the costs of the reference and decide accordingly. (c) The decision of the Arbiter shall be final and binding upon all concerned and the application of Section 3 of the Administration of Justice (Scotland) Act 1972 is expressly excluded. SEVENTEENTH The whole conditions, provisions, obligations, stipulations, declarations, servitudes and others contained in this Deed are hereby created real burdens and conditions affecting the Property and any part thereof and shall be enforceable by us and our successors in the Superiority of the Property, by the Association (or other proprietor of the Warden's accommodation and the Guest Suite) and by any one or more of the proprietors and shall be binding upon us, upon the Association (or other proprietor of the Warden's accommodation and the Guest Suite) and upon all the proprietors in all time coming, but the Superiors shall have the right to waive or vary any or all of the said burdens (and others) with the consent of a majority of those voting at a meeting of the Property Council called for the purpose.

Note: A copy of the said Layout Plan annexed to the foregoing Deed of Conditions is included in this Title Sheet as a Supplementary Plan to the Title Plan.

Feu Disposition by Heritage Housing Limited to John Reid and another and their assigns, registered 22 Jan. 1988 of the subjects in this Title, contains no new additional
The Claimants ask the Arbiter:

To find and declare that the Respondents were/are jointly and severally liable for the full amount of common charges, including any increases therein, invoiced to them by the Claimants in the period 1 November 1989 to date and relating to the subjects known as and forming 2/6 Millbrae Gardens, Langside, Glasgow, owned and occupied by the Respondents; and to find the respondents liable in expenses.

AWARD

I find that the common charges raised by the Claimants for the period from 1 November 1989 to date have been correctly apportioned in accordance with the terms of the Deed of Conditions as it currently stands.

I therefore direct that the Respondents pay said common charges in full to the Claimant. In relation to expenses, I find no expenses due or by either party.

The award of the charges in full does not indicate that I am satisfied with the financial management of the property at 2/6 Millbrae Gardens. I am satisfied from the evidence given by Mrs Reid and by Mr James Morrison witness for Mr & Mrs Reid that the withholding of payment was a means to an end rather than the principal object of the exercise.

Consideration of the financial management and proposed changes are discussed at length in my award in relation to Crave 9 in the arbitration at the instance of Mr & Mrs Reid. This is solely to avoid duplication of answer.

In regard to the matter of expenses, I have made the above award for two reasons.

The first reason is that the issue of the outstanding common charges was not disputed as to fact and very little time was spent by either party on this aspect of the case, indeed as is stated above the withholding of payment was a means to an end.

The second reason is that this matter is still to be finally settled in Court where the action is currently stated. The costs of that action are a matter for the Court.
Hanover (Scotland) Housing Association Ltd are Superiors and Factors of a Sheltered Housing Development at Millbrae Gardens, Langside, Glasgow. Mr & Mrs John Reid are owner occupants of Flat 2/6 at Millbrae Gardens, Langside, Glasgow. A Deed of Conditions dated 22nd July 1987 relates to the Development (Production H4 for Hanover). In terms of the Deed of Conditions, Mr & Mrs Reid are to pay a service charge to Hanover (Scotland) Housing Association Ltd. A dispute arose between the parties in relation to payment of the service charge. Court proceedings were raised by Hanover (Scotland) Housing Association Ltd against Mr & Mrs Reid. Clause SIXTEENTH of the Deed of Conditions allows questions and disputes between the parties to be submitted to arbitration. The Court action was sisted to allow the matter to proceed to arbitration. A joint Deed of Submission dated 14th September and 28th October 1993 was entered into between the parties referring a number of questions to me as Arbiter.

Detailed written pleadings were prepared by the parties and Closed Records were lodged in Process. The Closed Record number 16 of Process sets out the orders sought by Hanover (Scotland) Housing Association Ltd and the Closed Record number 17 of Process sets out the orders sought by Mr & Mrs Reid. Whilst a number of minor factual statements were admitted in the pleadings, parties did not enter into a Joint Minute of Admissions. At the commencement of the arbitration the parties solicitors advised that the terms of all productions lodged had been agreed; that it had been agreed that copy productions should be treated as principals and that it was agreed that letters were sent to the addressee and were received by the addressee in the normal course of post.

Before dealing with the individual claims by Mr & Mrs Reid and of Hanover (Scotland) Housing Association Ltd it is relevant to comment on the background to the matter and to interpret what has, in my opinion occurred.

The dispute centres around the rights and obligations of owner occupiers in a sheltered housing complex and rights and obligations of the superior and of the factor in this same complex.

The relationship between the superior and the factor is as important in this context as their relationships with the owners. The perception as to what these relationships are is in my opinion a crucial element in the dispute and I shall spend some time expanding upon this aspect later in my award.
In any residential property in multiple occupancy the management of the property may be controlled by a Deed of Conditions. This itself may be affected by conditions contained in a feu charter or in the title deeds of the dwelling units. In other cases, all or some of these documents may not be in place and the apportionment of responsibility will depend upon the Law of Tenement of Scotland.

In the case in question a Deed of Conditions does exist and it and the wording thereof and the interpretation of that wording is central to the dispute.

Another matter which has a major bearing upon the dispute is communication, in the sense of the transmission of knowledge and an understanding of the message from the other party. There has been a very extensive transfer of letters, telephone calls and of meetings at various levels but little sign that either side was able to conclude that their message was received and understood. I shall again deal with this matter later.

The last major problem encompasses the question of money; the accounting for moneys collected and held and also the manner in which the charges for the management are computed and the form in which that information is relayed to the residents. This topic will also be dealt with in some detail in the following pages.

I will begin with the relationships which exist within the property at Millbrae Gardens. At the beginning of the development of this property there was the organisation which conceived the idea namely HERITAGE HOUSING LTD which was as stated in the sales brochure (Production Hanover H1) "promoted by Hanover (Scotland) Housing Association Ltd with the object of developing and building sheltered housing for sale". It then continues by stating that "Hanover (Scotland) takes over the management on completion". Hanover (Scotland) Housing Association Ltd are thus clearly established as the managers.

The residents are also clearly identified as OWNER OCCUPIERS as opposed to tenants or leaseholders or licensees. This term and the meaning thereof was known to the purchasers, Mr & Mrs Reid, of the house in Millbrae because they were already owner occupiers within the city of Glasgow. The rights and obligations of that form of property tenure encompass the right to question the property manager on how and why money was being spent on their property; - their money and their property.
What Mr & Mrs Reid patently did not know and understand, nor would it appear
did any legal advisor they employed, was what was altered in this well established
and natural right when they purchased into Millbrae Gardens.

The document which contained the essential information was the Deed of
Conditions (Production Hanover H4).

Within the deed certain terms are used which are common currency in residential
property documents and indeed are widely used and understood by owners and
practitioners of property management and of conveyancing, in Glasgow in
particular, although they are well defined in Scots law in general.

These terms are firstly "Superior" this is taken to be the owner of the feudal
dominium directum a position which gives the right to have a direct interest in the
land and any action which might adversely affect its value . The superior retains the
right to sue and to enforce title conditions. In the majority of properties held under
the feudal system in Glasgow the superiority is confined to restrictions on use,
development and alteration to the subject property. The Superior also extends
protection to the interests of the vassal (the occupier of the property and holder of
dominium utile) against adjoining proprietors, for example.

The second term used is "Factor" a name used to describe the managing agent,
appointed in wholly owner occupied properties by the owners themselves.
Historically in properties where there was a residual Landlord the right to appoint
the factor, whilst the landlord retained any direct ownership title (not superiority
rights). was often, but not always, built into Titles and Deeds of Condition.

The factor of tenanted properties where the factor is agent for the landlord/owner
of the property has much greater powers than those which can be exercised by the
factor over owner occupied properties. The latter's rights of access are virtually
removed and he must obtain a mandate from the owners for each and all
expenditure over the property. He is after all the agent for those owners who are the
persons who pay him.

In the period after the Second World War, 'factors' that is the traditional Scottish
urban 'House Factor' or 'Landlord's Property Agent', went through a very difficult
and salutary experience. They were, as landlord's agents, used to having very
considerable autonomy, substantial authority, unquestioned power of access and
were without any need to explain, let alone justify, their actions to the residents of the properties they managed. This is not to say that these powers and that authority were necessarily abused but, at best, factors were undoubtedly patronising and frequently arrogant.

With the end of the war the sale of tenement flats became at first a trickle with only a minority of flats in any tenement sold. In these situations the factor’s role and attitude changed but little - so long as the landlord retained a majority of the flats in any one tenement. Later when the sales of flats speeded up, tenements became owner occupier controlled and the whole ethos of management was required to undergo a fundamental change. Meetings with proprietors who issued instructions and who required actions and justification for actions; who required due and proper accounting and who expected competitive management fees; this became the norm.

The factor or more accurately now the property manager became, and remains, the agent of the owner occupiers.

The third term used in the Deed of Condition is the “Proprietor” that is the inhabitant occupier who has purchased one of the flats within the development at Millbrae Gardens. As the owner of a residential unit Mr & Mrs Reid are or should be entitled to all the rights and obligations of normal owner occupation with additionally certain extra benefits created by the “sheltered housing” aspects of that property. This aspect will be examined in course.

In Millbrae Gardens the use and interpretation of these terms has been subtly adjusted and altered in a manner which has patently caused confusion and misunderstanding to be created between the proprietors, Mr & Mrs Reid and the Superiors, Hanover (Scotland) Housing Association Ltd.

This confusion and misunderstanding has also been exacerbated by the clear suggestion that certain checks and balances had been introduced in order to allay any concerns about the increased powers created or retained by the Superior and by the Factor. I am of the opinion that these suggestions of check and balance were deliberately introduced with a view to create confidence and to reassure purchasers of the property in a management structure which never existed nor was ever intended to exist. If they were not introduced for that purpose then they nevertheless achieved that effect.
In the Millbrae Garden's Deed of Conditions the role of the Superior is extensively increased over that normally anticipated in residential property. The Superior retains the ownership and also control over the use of the warden's flat, office and garage and also the guest suite. In addition the Superior retains very extensive rights over the property beyond those that are normally retained. These include rights of access to all parts for constructing and installing electrical and gas services etc (Clause third). The Superior also retains control over whatever building works are deemed necessary for maintenance and repair. Although there is an apparent safeguard built into Clause Ninth (b) whereby the Property Council (Defined in Clause Fifteenth) has powers of review and restraint, this safeguard is in fact illusory.

The Factor's role is stated to be that of the Superior's agent, subject to control and supervision by an apparently independent employer. However we were told by Mr Kinsman, the Chief Executive of Hanover (Scotland) Housing Association Ltd that it was always intended that Hanover be the Factor. That is to say that although two separate detailed definitions are given in the Deed of Conditions, one for the Superior and one for the Factor only one entity actually exists or was ever intended to exist.

The reality of the Proprietors role is effectively that of a tenant who has purchased a lifelong lease with no right of succession of tenancy, with a variable payment in lieu of rent, calculated without any real right of input or control. They have no right of sale without the sanction of the Superior to the choice of the prospective purchaser. In exchange for this loss of natural property rights the 'Proprietor' is provided with certain limited albeit useful advantages. These are stated to be freedom from "the traditional problems of property ownership", the provision of a Warden Service, and the provision of a central alarm system and the freedom from working in a garden. These provisions and their advantages may very well be of sufficient value to a large percentage of the residents. Indeed through time they may be of great benefit to ALL the proprietors in turn, to compensate them for that which they have given up. At the same time there are proprietors for whom the worry about other people spending their money, often a limited resource if not a scarce one requires that they KNOW and indeed INFLUENCE what is happening. Not all the proprietors, even those of advanced years are necessarily incapable of exercising sound judgement on matters affecting their money and their homes.
If Hanover (Scotland) Housing Association Ltd are to exercise all these powers which they have reserved for themselves and which are normally enjoyed by the individual then it must be seen to be exercising these powers fairly and equitably and seen very clearly and openly. There must be controls over the actions of the managers be it as factor or superior. These must satisfy those proprietors capable and interested in following these matters and even more so must there be protection for those proprietors who are neither capable nor interested.

At the present time it is clear that Hanover (Scotland) Housing Association Ltd is working on the assumptions and under the culture of providers of tenanted accommodation and not as providers of services to proprietors who are in reality their employers. It is equally clear that the motives of Hanover (Scotland) Housing Association Ltd are not in doubt. They genuinely are the caring providers of sheltered accommodation which they claim to be but their interpretation of what PROPRIETORS are entitled to has been ill considered. I see a very close parallel between the experience of the Glasgow factors in the post war period with that of Hanover (Scotland) Housing Association Ltd in this case.

The opportunity now arises for this unfortunate conflict of interests and of communication to be, at least in some ways, addressed and hopefully alleviated.
The Claimants ask the Arbitrator-

Crave No 1

To order Hanover to transfer the superiority or to resign as factors for the property, there being an inherent conflict of interest.

Crave No 2

To direct that the superiority and the office of factor should not vest in the one organisation.

AWARD

I find that there is a conflict of interest where the Superiors acting as in this case as an interested proprietor and employer serves in the office of Factor. This duality of function denies the Proprietors, the end users and the parties who finance the services supplied, any point of appeal against wrong, bad or unfair decisions. It is correct that arbitration is made available in some circumstances but that is a cumbersome and unrealistic avenue to follow in resolving disputes and difficulties, many of which are quite small or even outwith the scope of the Deed. It is important that when the necessary variations in the Deed of Conditions are agreed that more rather than fewer checks and balances are introduced. The Superior must become more remote and the Factor must become a great deal more responsive to the interests of the Proprietors. The Factor must become the agent of the Proprietors and NOT the agent of the Superiors. The Superiors have sufficient resources to ensure that their interests are adequately and efficiently protected.

I do not foresee any difficulty in maintaining the provision of the additional services associated with sheltered housing within such a framework.

I do however foresee that a mechanism requires to be created within the existing Deed of Conditions to enable the Property Council to operate in conjunction with a Factor. Such a mechanism would give the comfort and protection needed by the least able Proprietor whilst at the same time allowing the more active and aware Proprietors a real say in the running of THEIR property.

The greatest need is for a change in attitude within Hanover (Scotland)Housing Association Ltd if it continues to act in one or other of the two functions.
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Evidence was led on a number of matters such as the disputed defects occurring in the house of Mr & Mrs Reid, the matter of the former Warden, a Mrs Hamilton and others of a non-fiscal nature. Had there been a second level of appeal, that is from the Factor to the Superior or in the case of the Warden, to the Factor to seek support for the complaints, an opportunity for independent review might well have and indeed should have resolved these matters to the satisfaction of the proprietors.

As it currently stands Hanover (Scotland) Housing Association Ltd act as both Judge and Jury, a most difficult duality of roles at any time. The position is not improved by the patronising attitude demonstrated by Hanover (Scotland) Housing Association Ltd throughout the correspondence and the oral evidence. It is not correct to assume that Hanover (Scotland) Housing Association Ltd does know better - it must be shown, questioned and then proved.

I therefore direct that the offices of Superior and of Factor should not be held by one organisation and that the relationship between these two parties should be an 'at arms length' professional one. I direct that Hanover (Scotland) Housing Association Ltd transfer either the Superiority or the office of Factor to an independent third party and that the transfer should take place no earlier than the day following the Property Council Meeting to be held in relation to Crave 8 and no later than 14 days after the said meeting of the Property Council to be held in terms of my award in respect of Crave 8.
The Claimants ask the Arbiter:

Crave No 3

To order Hanover to consult with the residents on all key issues and to call regular (quarterly) meetings of the Property Council.

Crave No 4

To order the Respondents to comply with the resolutions of the Property Council.

AWARD

The question of 'Key' issues was raised in correspondence from an early date.

For the purposes of removing doubt I will now state those areas which I consider to be the "key issues" which should be open for debate between the Proprietors, through the Property Council and the Factors and the Superiors. Whether or not such discussions take place is for the Property Council to determine.

1. The appointment of the Factor - subject to the Superior being satisfied that the proposed Factor is technically and professionally competent to manage Sheltered Housing. Any dispute being open to arbitration.

2. Items of proposed expenditure over the common parts of the property ie the common charges, subject to the provisos below.

   - The discussions should include the justification for the Factor wishing to spend the money. Or where emergency works have been carried out justification for that action.

   - The consideration of expert reports ie Architects, Building Surveyors, Maintenance Managers from the Factor etc

   - The comparison of competitive estimates.

3. Estimates of central expenditure planned by the Factor.
PART IV

The discussions should include proposed management fees and comparative figures from other Factors. The Factor does require to justify his fees against competition.

Other central charges including details of Warden's salary to be charged to the property, charges for alarm system etc should be reported and discussed for justification and information only and not for veto, delay or alteration.

4. The use and level of provision for reserves. The Factor will require to justify his proposals on these items.

5. Complaints as between Proprietors and Factor and or Superior on level of service, defects, or any other matters of mutual interest.

6. Matters of concern arising at the instance of the Factor and/or the Superior which affect proprietors and which discussion and consultation could resolve.

7. Any other matters of mutual interest.

Matters fundamental to the core intent and aim of sheltered housing are, the provision of a warden service, the provision of a central alarm system, the pre-selection of residents. These are not matters for the Property Council, except as to the cost of their implementation and the way they operate. In other words it would be against the ethos of the scheme for the Property Council to vote out the warden service on a majority if even one owner did not freely agree to this.

In relation to Crave 3 I direct that consultation should take place at Property Council Meetings amongst the parties in relation to Key Issues as defined above.

The claim seeks to have an order given as to the frequency of Property Council meetings but I consider that the Deed of Conditions adequately covers the rights of all the parties to requisition meetings and consequently I will not make such an order.

I am unhappy that it has been found necessary to create an Owners Association as some form of pressure group. I understand the historical purpose of the
and as such a possible source of disharmony.

Instead of the Owners Association I would suggest that a Sub-committee be formed by the Property Council to act as their representatives when dealing with the Factors and the Superiors in regard to the key issues. Such a sub-committee would ideally consist of three members serving for either one or two years on a voluntary basis and would thus avoid being thought, rightly or wrongly to represent particular interests or factions. The sub-committee would be mandated to act for and in the name of the Property Council, reporting back through circulated minutes which could be homologated at periodic Council meetings. If the sub-committee felt that any matter required more general consideration they could be empowered to requisition a general meeting. Meetings would be called by either the Sub-committee or the Factor. The Property Council would approve the constitution and remit of the Sub-committee and would agree the working arrangements with the Factor.

This proposed body would enable a streamlined and manageable avenue of communication to be operated and should eliminate much of the distrust, animosity and suspicion which is sadly apparent at Millbrae Gardens, not only between proprietors and Hanover but between sections of the proprietors.

Nothing in this proposal, in my view, places any proprietor at a disadvantage nor should it place an unacceptable burden upon the Factor. Arrangements such as this are becoming regular practice in 'normal' residential properties.

As an interim measure the Property Council might consider appointing an independent 'Clerk' in the manner of the Secretary of a professional body or of a Town Clerk who will advise objectively on any matters discussed in order that proposed changes etc are legal and within the remit of the Property Council.

I will direct that the Deed of Conditions be amended to allow the Property Council to implement these proposals if it so desires.

Both the Proprietors and the Superior should be bound by the decisions of the Property Council. They are the parties bound by the Deed of Conditions. Where the Factor is not also the Superior, the Factor is not bound by the Deed of Conditions. The Factor is however appointed by the Superior in terms of clause
THIRTEENTH of the Deed of Conditions and may be instructed to do certain things by the Property Council. Were the Factor to fail to comply with properly authorised instructions, it would be open to the Superior, as the Factor's employer, to sanction the Factor, if necessary by terminating his appointment.

In relation to Crave 4, I direct that the decisions made at or authorised by a properly constituted Property Council Meeting will be binding upon each of the Proprietors and upon the Superior.
The Claimants ask the Arbiter:—

Crave No 5

To find and declare that the Respondents are in material breach of contract justifying the Claimants withholding payment of sums sought by the respondents.

Crave No 6

To order the Respondents to return money paid to them in contemplation of these proceedings.

Crave No 7

In the event that sums are due to the Respondents, which is denied, to determine the extent of said sums together with interest, if any, thereon.

AWARD

I am answering these three claims together since they are naturally linked and deal with the fiscal dispute from which these proceedings arose.

As is stated in the award in Hanover (Scotland)Housing Association Ltd - v - Mr & Mrs John Reid I accept that the powers to levy common charges and the method of computing them was as stated in the contracts between Hanover (Scotland)Housing Association Ltd and Mr & Mrs Reid. I have accepted that the increase in charges resulting from the award of salary increases to the Wardens employed by Hanover was the catalyst in this matter. The lack of consultation etc was in my view the cause of the problem and not just the exceptional (as it proved) increase.

In the arbitration at the instance of Hanover (Scotland)Housing Association Ltd against Mr & Mrs Reid I therefore awarded to Hanover (Scotland)Housing Association Ltd the full amount of the common charges levied over the period.

The arbitration could possibly have been invoked without the original Court action but that is not material.
The Respondents have been very understanding in their approach to the levying of interest in the case of the unpaid accounts of Mr & Mrs Reid and the other Proprietors. All the Proprietors were given the opportunity to and indeed advised to lodge the outstanding sums with the Respondents pending the action. I understand that Mr & Mrs Reid have lodged the sums due. No interest is therefore payable.

_I make no award in respect of Craves 5, 6 and 7._
The Claimants ask the Arbiter:-

Crave No 8

To order Hanover as Superiors for the property to vary the Deed of Conditions within a specified period subject to the consent of the majority of those voting at a meeting of the Property Council to give effect to the decisions of the Arbiter, all in terms of Clause Seventeenth of the Deed of Conditions.

AWARD

Clause SEVENTEENTH of the Deed of Conditions allows the Superiors to waive or vary any or all of the provisions in the Deed of Conditions with the consent of a majority of those voting at a meeting of the Property Council called for the purpose. It is necessary for the Deed of Conditions to be varied to enable my Award to be implemented.

I therefore direct that Hanover (Scotland)Housing Association Ltd propose to vary the Deed of Conditions within 28 days of the date of issue of my final Award and that the proposal to vary the Deed of Conditions be considered at a meeting of the Property Council to take place within a period of three months after the date of the proposal being issued by Hanover (Scotland)Housing Association Ltd.

I direct that the proposed variations to the Deed of Conditions should be as follows:-

1. In clause FIRST (9)(b) starting in the first line delete the words:-

"(to be determined by the Factor)"

2. In clause FIRST (9)(k) in the second line after the word "Factor" insert :-

"following consultation with the Property Council,"

3. In clause FIRST (10)(b) starting in the first line delete the words:-

"(to be determined by the Factor)"
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4. In clause FIRST (10)(c) in the second line after the word "Factor" insert:
"following consultation with the Property Council,"

5. In clause FIRST (17) delete the words:
"(who may be an officer of the Association)"

6. In clause FOURTH (b) in the eighth line after the word "Factor" insert:
"following consultation with the Property Council,"

7. In clause SEVENTH (a) in the sixth line after the words "Superiors" insert:
"following consultation with the Property Council,"

8. In clause EIGHTH in the penultimate line after the word "desirable" insert:
"following consultation with the Property Council"

9. In clause NINTH (b) starting in the seventh line delete the words:
"a major work......fixed by the Property Council"

and insert in place thereof:
"works to exceed such sum as shall be determined by the Property Council from time to time"

10. In clause NINTH (e)(i):

(a) In the third line delete "approximately".

(b) In the fifth line delete "estimated" and insert in place thereof "calculated"
(c) In the sixth line after the word "year" insert:

"after deduction of any sums transferred from reserves with the agreement of the Property Council".

11. In clause NINTH (e)(ii) in the first to twelfth lines delete:

"within fourteen days........for the subsequent year".

and insert in place thereof:

"A one-twelfth share of the sums agreed by the Property Council to be set aside in respect of the reserves."

12. In clause TENTH (a):

(a) In the third and fourth lines delete the words "The Superiors through".

(b) In the eleventh line delete "Superiors" and insert in place thereof:

"Factor in consultation with the Property Council and with such professional advice as is deemed necessary"

13. In clause TENTH (b) in the first line delete the words:

"The Superiors through".

14. In clause TWELFTH (a) in the first line after the word "Factor" insert:

"and in consultation with the Property Council".

15. At the end of clause THIRTEENTH (a) insert:

"with the sanction of the Property Council"

16. At the end of clause THIRTEENTH (b) insert:

"following consultation with the Property Council"
16. At the end of clause THIRTEENTH (b) insert:-

"following consultation with the Property Council."

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17. In clause THIRTEENTH (c) in the third and fourth lines after the word "Superiors" insert:-

"in consultation with the Property Council".

18. In clause THIRTEENTH add a new sub-clause (d) as follows:-

"(d) The offices of Superior and Factor shall be held by independent parties. The relationship between the Superior and the Factor shall be at arms length"

19. In clause FOURTEENTH insert a new sub-clause (c) as follows:-

"(c) The Superiors shall consult with the Property Council in relation to the duties to be performed by the Warden"

20. In clause FIFTEENTH (b)(iii) starting in the third line at "provided always" delete the remainder of the sub-clause.

21. At the end of clause FIFTEENTH (b) insert a new sub-clause (iv) as follows:-

(iv) to establish a sub-committee to deal with any specific issue deemed appropriate by the Property Council. Said sub-committee to have no more than three members, appointed by the Property Council, who shall serve for a period of no more than two years. Provided always that each member of any sub-committee shall be a Proprietor and when more than one person is included in the term "Proprietor" only one of such persons may be a member of any sub-committee."

22. In clause FIFTEENTH (c) in the fourth line after the words "Property Council" insert:-
23. In clause FIFTEENTH (e) in the third line after the words "upon the" insert:- 
"Superior, the ".

24. At the end of clause FIFTEENTH insert a new sub-clause (f) as follows:-

"(f) Where in this Deed of Conditions provision is made for reporting to or consultation with the Property Council, where reporting or consultation is required in relation to an issue in relation to which a sub-committee has been established in terms of clause FIFTEENTH (b)(iv) it shall be competent for the required reporting or consultation to take place to or with any such sub-committee instead of with the Property Council".

Postscript to Part VI of the Award

The proposals which I have ordered to be put forward to the special Property Council meeting will have a fundamental effect upon the relationships between the Proprietors, the Factor and the Superior.

The changes I propose will not in my view adversely effect the interests of any single proprietor no matter how infirm or elderly. It is my sole intention to allow those proprietors who are active and interested to have a say and indeed an influence on many aspects of their property interests at Millbrae Gardens. Their acting as watchdogs for the whole community of owners should be of general benefit.

The Factor and the Superior will become two separate bodies and the proprietors will be able to appeal to the Superior if the Factor fails in his duty and seek support from the Factor if the Superior, who will retain considerable power, particularly in relation to the Warden, acts unreasonably.

The roles of the Factor and of the Superior will change with the Factor in particular being required to consult, explain and justify his actions to the Property Council.
The changes proposed also make the Factor accountable to the proprietors in a way which has not so far occurred in this property.

The empowerment of the Property Council, of course, does not mean that it must of necessity exercise all of the powers to be vested in it but it will be up to the Property Council to use such powers as they see fit from time to time and to delegate to the Factor such powers as they see as being suitable for the efficient management of the property. The Property Council will have the right to create a sub-committee to act for them in day to day matters in dealings with the Factor and Superior and the remit, constitution and term of that sub-committee will be for the Property Council to determine.

I cannot instruct the Property Council to accept the proposed alterations and indeed I must emphasise this point, ONLY the duly constituted Property Council can make the decision to implement many of these awards. Considerable thought and careful consideration of all the relevant points must be made by each proprietor before the special meeting of the Property Council which I have ordered to be called.

I would hope that no one amongst the proprietors would feel in any way disadvantaged or threatened by these proposed changes since it is the interests of all the proprietors which have been the focus of my awards.

The decision to accept or reject the proposed changes is a very important one. If the proprietors genuinely wish to have an influence over the management of the property then they must vote for that at the meeting. They must either abstain or vote against if they prefer the present arrangements or if they are uncommitted to either camp.

Professional help and guidance should be sought where necessary.
PART VII

Mr & Mrs John Reid - v - Hanover (Scotland) Housing Association Ltd

The Claimants ask the Arbiter:-

Crave No 9

To order either party to comply with directions, recommendations or to do or desist from doing, anything which he determines necessary or expedient to resolve the dispute between the parties, within such period as the Arbiter shall determine.

AWARD

The Claimants as well as the Respondents have a duty as Proprietors to act with a view to improving communications and relationships. The Millbrae Gardens Owners Association has served its purpose and should now either be redirected into solely social activities or preferably wound up. There is clearly a divisive potential in having a body, possibly only partly representative, acting at odds with the Property Council the duly constituted consultative body for all the proprietors.

The Property Council should as soon as possible discuss and agree the terms, conditions and remit of the sub-committee proposed. I propose that the Deed of Conditions empowers the Property Council to create the sub-committee and that the rules and working arrangements are controlled by the Property Council's resolutions.

The original rules and any alterations thereto must naturally be constrained by the powers to be enjoyed by the Property Council in the Deed of Conditions.

The Property Council should for many reasons abandon it's refusal to participate in the Hanover Forum and/or similar bodies. If the Proprietors wish improved communications they must themselves communicate better.

The Factor must account properly and adequately for owners funds. The Property Council is fully entitled to see all and every voucher for moneys spent directly on behalf of Millbrae Gardens. The Property Council is entitled to full and complete accounting of all sums expended on their behalf. In particular I am unhappy about the level of surpluses which have built up, partly due to the somewhat convoluted method of computing the service charge for the Annual Accounts. This charge is calculated, if I understand the explanation given by Mr Macrae, the Finance Director of Hanover, by adding seven months of one rate of common charge to five months of a different rate of common charge. Both these figure are based on estimates of future expenditure calculated in November of each year.
PART VII

Mr & Mrs John Reid - v - Hanover (Scotland)Housing Association Ltd

I understand that the annual review date is based on the date of the first sales which took place at Millbrae.

It is important that Mr Macrae and his staff of ten appreciate that the Proprietors must be accounted to for THEIR money in a manner which they can clearly understand.

With the substantial reserves which are currently in existence I see no reason why the Factor should not now transfer accounting from a future budgeted expenditure basis to an historical actual basis. This is the basis traditionally used within the property management industry in Scotland. There the agent normally operates with a small returnable deposit which forms working capital for each property.

Such a change would obviate the very complex accounting reports currently being provided and which are not easily interpreted even by those with a lifetime working in an accounts environment as was borne out by Mr Morrison in evidence. It is appreciated that steps have been taken over the years to improve the layout and the information but these changes have, in themselves, added not subtracted from the confusion.

I propose that this change should take place at the end of the current accounting period.

A further change which I propose is that each set of accounts submitted to the Proprietors should clearly state the level of the various reserves which attach to each home. This will enable everyone to appreciate clearly what the position is and what an asset is attached to the house at the point of any sale. This should take effect from the date of the change of accounting.

I understand that Hanover (Scotland)Housing Association Ltd does not require by its Rules or by the governing legislation to hold client moneys, which includes property reserves, in separate “client accounts” and I accept that the surveillance role played by Scottish Homes may make this unnecessary.

I direct however that the Respondents shall as soon as is practicable and in any event prior to the transfer of the factorage if that course is adopted, open separate discrete and identifiable client accounts in the name of Millbrae
PART VII
Mr & Mrs John Reid v Hanover (Scotland) Housing Association Ltd

Gardens Proprietors with a major Clearing Bank. One of these accounts should be a high interest account for the purpose of holding the Property Reserves. Day to day transactions can be operated from a current account and from which any balances can be transferred to the reserves account. All interest accruing will be the property of the Proprietors. The rules governing the handling of Client funds as issued by the Royal Institution of Chartered Surveyors could serve as a suitable model.

I direct that at the end of the current accounting period or upon transfer of the factorage, whichever is the sooner, the accounting for Millbrae Gardens shall be changed from an 'estimated future' basis to an 'actual historical' basis and that at each subsequent accounting to the Proprietors a statement shall be added to the accounts showing the levels of all reserves and the value of those reserves which attaches to each dwelling house.
The Claimants ask the Arbiter:-

Crave No 10

To find the Respondents liable to the Claimants in expenses of Arbitration and to recommend that the Respondents be found liable in expenses of the Court procedure.

AWARD

The question of the apportionment of expenses was initially a major concern to me. It could appear that my award of expenses was a reflection on the merits of the cases as prepared and presented by the parties or a reflection on the quality of the evidence given orally at more than ten days of hearing and debates.

This would be quite incorrect and I have no reservations in stating my appreciation of the quality and indeed quantity of detailed evidence with which I have been provided. Similarly I have nothing but gratitude for the witnesses and the Solicitors who so clearly gave their evidence and presented their cases in clear and well defined order and with the minimum of unnecessary verbiage.

My award in respect of expenses is therefore based solely upon the merits of the cases themselves. It is my considered opinion that with more forethought and with a more sympathetic and sensitive approach to people who were seeking sheltered accommodation and not a place in a retirement home, this case would not have occurred.

Over a period of some 13 years the Hanover (Scotland) Housing Association Ltd (and its fore-runner Heritage Housing Ltd) failed to act on its own initiative to move from their original position. On the question of "negotiations" for example, the reaction throughout the lengthy correspondence has always been that the Deed of Conditions prevented any "negotiations".

Hanover (Scotland) Housing Association Ltd had however reserved to themselves the power to make adjustments, if they were required, to the Deed of Conditions. This was presumably to be used if circumstances required or if they were persuaded that it was necessary or desirable so to do.

Hanover (Scotland) Housing Association Ltd failed to appreciate that there was a conflict of interest which was seen to be unfair to the proprietors.
They failed to appreciate that the proprietors were clients and that Hanover as Factor should have been acting as their agent.

Hanover (Scotland) Housing Association Ltd also confuses non-profit making with 'economical' or even 'inexpensive' when compared with possible commercial competitors. Whether this is correct or not will be for the Property Council to test in the marketplace.

Finally Hanover (Scotland) Housing Association Ltd failed to understand that the reaction from Millbrae Gardens was not merely a tantrum from one or two troublemakers who, if ignored or talked down to, would go away or give up.

This lack of caring LISTENING is perhaps the sorriest aspect of this case.

I therefore award the full costs of the arbitration AGAINST Hanover (Scotland) Housing Association Ltd

On the question of the Costs of the Court action I would not presume to make any comment since that is a matter for the Court alone.
OUTER HOUSE, COURT OF SESSION

OPINION OF LORD WHEATLEY in
the cause HANOVER (SCOTLAND) HOUSING ASSOCIATION LIMITED
Petitioner: for Judicial Review of a decision of Michael Sandford Arbiter

Petitioner: Upton, Morison Bishop
Second and Third Respondents: Johnston, McSparran McCormick, Solicitors (Glasgow)

4 January 2002

[1] The petitioners are an association incorporated under the Industrial Provident
Societies Act 1965 and have their registered office at 36 Albany Street, Edinburgh.
They are the superiors of heritable subjects at Millbrae Gardens, Glasgow, which
consists of 36 dwelling houses, a guest suite and three lock-up garages. The subjects
are used as sheltered accommodation. The first respondent is the arbiter who decided
the dispute between the petitioner and the occupiers of the dwelling houses at
Millbrae Gardens which is at the heart of the current action. The first respondent
however intends to take no active part in the present case. The second and third
respondents are heritable proprietors of one of the dwelling houses at Millbrae
Gardens. The remaining interested parties are the other proprietors of the dwelling
houses.

[2] The houses at Millbrae Gardens are each subject to a deed of conditions which
is part of the title deeds, and which is binding upon the petitioners as superiors of the
subjects and each of the proprietors of the individual houses. The deed of conditions
is in more or less standard terms and makes provision for the regulation and
management of the property. In general terms the petitioners employed a warden to
look after the property and to perform certain duties in respect of the residents. In
addition they employed a factor to supervise repairs, maintenance and renewal of the
building. There was also a property council to which both the petitioner as superiors and the owners of the dwelling houses belonged. Clause Ninth of the deed of conditions was concerned with the arrangements for the repair, maintenance and renewal of common parts of the building and the methods by which the costs of such work would be paid. Clause Twelfth provided for the arrangements by which the superiors through the factor would be responsible for the general management and administration of the property as a sheltered housing scheme. Clause Fifteenth described the composition of the property council, its powers and responsibilities, and the way in which it would work. Clause Seventeenth provided that the provisions of the deed of conditions were to be created as real burdens and included in the burdens section of any disposition granted to the purchasers of each of the dwelling houses. The same clause further provides that:

"The superiors shall have the right to waive or vary any or all of the said burdens and others with the consent of a majority of those voting at a meeting of the property council called for the purpose and the said burdens and others shall be engrossed or validly referred to in all conveyances and instruments of or affecting the said dwelling houses and lock-ups or any of them or any part of the property otherwise the same shall be null and void."

Disputes arose between the petitioners and the proprietors of the dwelling houses, whose interests are now represented by the second and third respondents. The dispute began when the petitioner raised the management fee which they charged without consulting the respondents, citing the need to increase the wages of the warden as the reason. The respondents then withheld payment of all management charges. It quickly became clear that there was a number of other areas of disagreement between the parties, and it was accepted by both sides that they should
submit their dispute to arbitration in terms of the second clause of the deed of conditions. In terms of the subsequent joint deed of submission by the parties to the arbiter it was agreed under head (second) that the arbiter was

"to issue a final determination of this dispute between the parties (declaring that the arbiter shall be bound to give written reasons for such determination) and to order either party to comply with these directions, recommendations and generally to do or to desist from doing, anything which the arbiter shall, in his discretion, determine including payment of such sum or sums if any, as may be due by the respondents to the claimants ..."

In addition, in the introduction to the joint submission the parties also referred the question of the nature, powers and make up of the property council to the arbiter. In the closed record for the arbitration the petitioners sought a declarator that the respondents were liable for the full amount of the common charges unpaid to that date; the respondents among other things asked the arbiter to separate the employment of the factor from the other responsibilities of the superiors on the ground of conflict of interest; to require the petitioners to consult and comply with the views and instructions of the property council, to determine the financial position between the parties and to instruct the petitioners as superiors to vary the deed of conditions accordingly within a certain period of time.

[4] In his determination, issued on 1 November 1996, the arbiter directed that the respondents had to pay the common charges to the petitioners, and dealt with expenses in respect of that matter. He also found that there was a clear conflict of interest where, as in the present case, the superiors were acting as an interested party in the management of the dwelling houses and were at the same time employers of the factor, and directed that the offices of superior and factor should not be held by the
same organisation. Further, the arbiter altered the status and function of the property
council, and directed that consultation should take place at property council meetings
on key issues concerning the property. Further, he directed that decisions made or
authorised at such meetings should be binding upon both the superior and
respondents. Finally the arbiter decided that the petitioners should modify the method
of accounting used to pay for repairs, maintenance and renewals. In consequence of
all of these things, the arbiter recommended that a number of specific variations be
made to the deed of conditions. These were twenty in number. The arbiter then
directed that these proposals be considered at a meeting of the property council and on
4 March 1997 the majority of those present at that meeting voted that the deed of
conditions be varied in the terms suggested by the arbiter. The petitioners now take
objection to four of these proposed alterations and it is in respect of these that the
present judicial review is taken.

[5] The detail of the changes proposed by the arbiter to the deed of conditions as a
result of the joint deed of submissions is found in Part VI of the arbiter’s award. Of
the four proposed alterations by the arbiter which are the subject of concern to the
petitioners in the present review, the first is contained in paragraph 10 of Part VI of
his award, and directs changes to Clause Ninth (e)(i) of the deed of conditions. This
sub-clause is concerned with the method by which the proprietors of the individual
households will make their payments of their share of the common charges to the
factor. Secondly, paragraph 11 of the arbiter’s proposed alterations to the deed of
conditions deletes the first twelve lines of Clause 9(e)(ii), which formerly allocated
any excess of payments over charges to the factor to allow him to calculate the
instalments of the various charges for the following year, and substitutes a simple
requirement for proprietors to pay a one-twelfth share of the sums agreed by the
property council to be set aside in respect of the reserves.

[6] The relevant terms of Clause Ninth (e), having regard to the arbiter’s directions should now read:

“As soon as reasonably practicable after the 31st day of March in each year the factor shall prepare a statement of the common charges and of the lock-up charges incurred in respect of the year to that date and shall furnish a copy thereof to each proprietor. Each proprietor shall make payment to the factor of the proportion of the common charges and of the lock-up charges payable by him as follows:

(i) on the first day of each month in each year a sum notified by the factor to the proprietor from time to time, equivalent to a one-twelfth proportion of the share of the common charges and/or lock-up charges calculated by the factor as payable by such proprietor in respect of that year after deduction of any sums transferred from reserves with the agreement of the property council (hereinafter called “the monthly instalment”) …

(ii) A one-twelfth share of the sums agreed by the property council to be set aside in respect of the reserves ……..”

The cumulative effect of these two changes was to allow for the creation of a different reserves fund in respect of repairs, alterations and renewals and a different payment method to support it. It is clear from his award that the arbiter had become concerned about the level of reserves which had built up in the past because of the accounting methods employed by the petitioners, and had concluded that there was no reason why the traditional method of accounting for such payments should not be preferred.

[7] The third variation which the arbiter proposed and which causes the petitioners concern is described in paragraph 18 of Part VI of the arbiter’s award and is
concerned with Clause Fifteenth (b)(iii). Clause Fifteenth in general terms describes the constitution of the property council, its make up and its powers. Originally the effect of Clause Fifteenth (b)(iii) was to empower the property council to carry out the functions assigned to it in accordance with the provisions of the deed of conditions, but with the provision always that the property council was not able to order works of repair, maintenance or renewal which the superiors considered unnecessary, nor could they prevent the execution of common works which the superiors did consider necessary. The change directed by the arbiter was to remove these provisos and therefore in effect transfer control of such work from the superior to the property council. Finally, in terms of paragraph 19, the arbiter directed that Clause Fifteen (c) of the deed of conditions should be amended. This clause deals with meetings of the property council and the effect of the alteration is to allow special meetings to be convened by a sub-committee established by the property council for the purpose of doing certain things. The overall effect of these changes by the arbiter was therefore to give the property council control over the major decisions in respect of the repair, maintenance and renewal of the building, to allow them to operate a reserves account in order to arrange their finances, and to allow them to devolve matters to a sub-committee. The arbiter then directed the petitioners to put these proposals for varying the deed of conditions before a meeting of the property council.

[8] In the course of submissions at this review, the petitioners raised a number of matters about which it was claimed, there was uncertainty surrounding the arbiter’s award. In general, the petitioners claimed that they were uncertain about whether the proposals directed by the arbiter were variations of the deed of conditions, or whether they were something more. The petitioners also suggested that by placing the arbiter’s proposed variations to the meeting of the property council in March 1997, they had
done all that was required of them by the arbiter. In Part VI of his award the arbiter had directed that the petitioners should propose to vary the deed of conditions within twenty eight days of the date of issue of the arbiter’s final award and that the proposal to vary the deed of conditions be considered at a meeting of the property council to take place within the three months after the date of proposal being issued by the petitioners. The petitioners had done exactly that. It was submitted that the petitioners could not thereafter be ordered to do anything else; that would be unlawful and of no effect and thus ultra vires. The alterations described by the arbiter are incapable of being completed; express powers to vary the deed of conditions is required before the petitioners can act. Reference was made to Montgomerie Bell: *The Law of Arbitration in Scotland (2nd Ed.); Hunter: The Law of Arbitration in Scotland*, para. 15.44; Irvine: *Law of Arbitration in Scotland*, p.205; *Mitchell-Gill v Buchan* 1921 S.C. 390. In my view however there were little grounds to support this argument, which seemed somewhat disingenuous. The whole purpose of the exercise, and the award of the arbiter, was to secure a resolution of the dispute between the parties. Both the petitioners and the respondents agreed to this course, and further they both agreed to be bound by the arbiter’s conclusions. In the course of his award the arbiter makes a number of key points about the operation which he is conducting. First he makes it clear that it is necessary for the deed of conditions to be varied to enable his award to be implemented (Part VI, p.i). He also understands (Part VI, p.v) that he is not in a position to set out the mechanism by which the deed of condition is to be altered; that is a matter for the parties to accomplish in terms of their contractual arrangements. However, in order to implement the decision he has been asked to reach by the parties, in the same passage he indicates that the variations could be dealt with by the execution of a supplemental deed of conditions, and the terms of Clause
Seventeenth of the present deed of conditions specifically provides for such alterations with the consent of the majority of those voting at a meeting of the property council. It is also clear that in terms of Clause Seventeenth only the superiors can vary the conditions. In these circumstances it is, I think, wrong for the petitioners now to claim that they are unable to comply with the arbiter's award, or that they have done everything that the arbiter had asked them to do. The arbiter has asked that the deed of conditions be varied in order to implement his award. The petitioners, who have a heritable interest in the whole subjects as superiors, and who alone have power to vary the conditions in terms of the agreement, have not done so. As the proposed variations have been properly approved by the property council there is no reason why the new conditions should not now be engrossed and recorded in the Land Register by the petitioners in terms of Clause Seventeenth, which plainly contemplates future burdens as well as present ones. Indeed, as I understood the petitioners' later submissions, they would be content to write a new deed of conditions if the controversial proposals were excluded. The whole purpose and intent of the arbiter's award is entirely evident and capable of being implemented, and I can therefore find no substance in the submissions that the petitioners are somehow incapable of carrying through the arbiter's award, or that they have already done everything required of them.

[9] Counsel for the petitioner next submitted that there was a difficulty over the powers to vary the deed of conditions by the superior in terms of Clause Seventeenth. Clause Seventeenth in particular provides, in part, that the superior shall have the right to waive or vary any or all of the burdens with the consent of a majority of those voting at a meeting of the property council. While the power given in terms of Clause Seventeenth may appear to be obvious on a superficial examination, counsel argued
that there must be a limit to what can be varied. Clause Seventeenth allows for a
change of conditions on a majority of votes, thus allowing the property council to bind
dissenting householders. Accordingly a minority proprietor may be bound to a
decision without his consent. Conditions in heritance are to be viewed strictly in
favour of the proprietor of the dominium utile, not the superior; further the granter of
rights in a heritable property may not derogate from his own grant. Therefore, the
argument ran, the power to vary ends when what has been done would or could
increase the burden on, or remove the rights of, any individual proprietor. If there was
no limit in the power to vary, this would derogate from the grant. Accordingly any
changes which increase the burden on any particular proprietor is ultra vires of the
property council. Reference was made to The General Rules of Constitution of Real
Burdens (Reed: Law of Property in Scotland. Para. 386 et seq., and in particular the
principles of interpretation at para. 415 et seq.; Colquhoun's Curator Bonis v Glen's
Trustee 1920 S.C. 737). Finally, it was submitted that the imposition of real burdens
can only be imported into a deed by the proprietor of lands (Conveyancing (Scotland)
Act 1874 S.32). Accordingly in the present case new burdens have been imposed on
all of the proprietors in respect of the new powers now available to the property
council to arrange questions of repair, maintenance and renewal to the common
property.

[10] Again I found this argument had little to commend it. First of all, I cannot see
that any new burdens have been created by the proposed alterations. What in effect
the arbiter has proposed is that a more efficient and practical method of calculating the
way in which the common charges should be paid by the proprietors requires to be put
in force. The arbiter had become concerned about the level of reserves which the
petitioners had allowed to accumulate under the system that they had introduced. He
therefore proposed that a more traditional and fairer method of acquiring reserves and accounting for the monthly payments in respect of these matters should be introduced.

There can be no doubt that this was precisely the sort of matter about which the parties had disagreed and about which they had submitted their dispute to the arbiter for his decision. The fact that the common charges are to be calculated and collected on a different basis cannot be described as an additional burden; this is plainly nothing more than a different and more efficient method of discharging the present burden.

Further, I cannot accept the proposition that this procedure is invalid because dissenting minority voters at property council meetings could be bound by a majority decision. That is precisely the position which operates at present, and parties to the deed of conditions have clearly bound themselves to being subject to majority decisions in this way. I note that Professor Rennie's opinion, which was instructed by the petitioners, takes a similar view.

[11] Counsel for the respondents then criticised the individual changes proposed by the arbiter. The first two, namely those contained in paragraphs 10 and 11 at Part VI of his award were in effect a power granted to the property council to propose a levy on the proprietors of the dwelling house to create a reserve for the following year's costs. This it was said was a charge which the proprietors would have to pay and must therefore be an increase on the burdens on the householders. This detailed submission merely repeated an argument used earlier and I have already dealt with it.

The third proposed alteration by the arbiter to which objection was taken concerned the removal of the provisions in the original Clause Fifteenth preventing the property council from executing repairs, maintenance and renewal or stopping the superiors executing such work which they thought was necessary. It was submitted that this variation in particular removed the limit on the property council concerning the
instruction of works to be done and accordingly this meant that the cost of common
charges which included expenses of repair, maintenance and renewal might be
increased. It was argued that if the property council had greater powers to instruct
repairs there was the potential for greater costs to fall on individual proprietors, and
this would cause an increase in the burden on individual householders. Again I
cannot see that this alters the essential nature of the burden on the householders.

Finally, in his fourth proposed variation the arbiter has allowed for the creation of a
sub-committee to be established by the property council. It was submitted that in
terms of the deed of conditions each proprietor has the right to vote; this variation
means either that the sub-committee would have no legal authority in respect of the
terms and conditions under which it operated, in which case it is pointless, or it is
intended to act in place of the property committee in which case it necessarily
involves a dilution of the rights of each proprietor, and excludes dissenting minorities
from participation in the process. In my view this argument was also unfounded. The
sub-committee provides an obvious administrative advantage of the sort which the
arbiter was asked to look into. The petitioners bound themselves to agree to his
decision. They therefore have no grounds for objecting to this proposal. In any event,
the sub-committee has no powers and all matters for decision must be referred to the
property council, which is governed by a democratic vote. There is therefore no
question of any dilution of the rights or any greater disenfranchisement of any
individual proprietor. I therefore consider this argument without merit.

[12] I have therefore concluded that in their entirety the petitioners’ submissions
are without substance. The arbiter’s award makes it clear that his proposed variations,
if agreed by the property council, should be put into effect, and the petitioners have
sole responsibility for doing so. It is on that latter premise that the arbiter made his
award. If, as the petitioners protest, the provisions in the arbiter's decision were in any way unclear (which I do not accept) and they require authoritative directions on what they can or cannot do, I am happy to direct and authorise that in terms of the arbiter's award and the deed of conditions, the petitioners are empowered and indeed obliged to draft an altered deed of conditions as directed by the arbiter and approved by the property council in March 1997 and to have that recorded in the Land Register, on the understanding that it will apply henceforth to all proprietors present and future who are present to the deed of conditions. I should add that this should be done immediately and any further quibbling on this issue by the petitioners would be entirely unjustified. I have therefore repelled the petitioners' pleas-in-law and dismissed the petition.
JUSTICE 1 COMMITTEE

TITLE CONDITIONS (SCOTLAND) BILL

Submission from Scottish Federation of Housing Associations

1. Introduction

1.1 The Scottish Federation of Housing Associations is the representative body for Scottish Registered Social Landlords. The Federation responded to the consultation exercise in 2001 on the draft Title Conditions Bill and is pleased to have this opportunity to offer written evidence to the Justice Committee on the terms of the Bill introduced to the Parliament in June 2002. A copy of the Federation’s submission to the draft Bill is attached for information.

1.2 Registered Social Landlords have an interest in the provisions of the Bill from a number of perspectives including:

- as owners and developers of land for housing and related activities
- as providers of factoring services to owners following the exercise of the Right to Buy
- as owners, with other proprietors, of properties in tenemental blocks or other multi-owner properties
- as providers of sheltered housing
- as holders of feu superiorities following acquisition of housing stock from other public sector landlords

1.3 In general terms, SFHA is pleased to note that many of the points raised in our response to the consultation draft have been addressed in the revised Bill. The Federation is concerned, however, that the technical complexity of the Bill and its very close connection with the Abolition of Feudal Tenure (Scotland) Act make it difficult for the full implications of the proposals to be either easily understood or clearly explained. This does not fit well with the stated intention of the legislation to achieve greater clarity in the law – although this may be the end result, a considerable amount of preparation will be required to secure this result which will depend on a comprehensive understanding of both the provisions of this Bill and the provisions, as amended, of the Abolition of Feudal Tenure (Scotland) Act. SFHA anticipates that the Bill will have significant implications for RSLs and will require considerable preparation prior to enactment in order to ensure that the interests of RSLs are not adversely affected.

1.4 This submission follows the order of the Bill as set out in the Policy Memorandum issued by the Scottish Executive and makes reference to the SFHA’s submission to the 2001 consultation exercise.

2. Development Management Scheme
2.1 SFHA welcomed the proposal to make provision for the introduction of the Development Management Scheme and we suggested that consideration should be given to making this a requirement for new developments, rather than an option. The Federation is, therefore, disappointed that it has been found necessary to exclude these provisions from the Bill as introduced to the Parliament and we hope that the endeavours to address the difficulties created by the reservation of the relevant powers to Westminster can be resolved in sufficient time to secure amendments to restore them to the Bill. SFHA would be pleased to support, as appropriate, any case to ensure that these provisions are given effect through the Bill. It may be that the advantages of this approach, in terms of consistency and clarity, could be achieved without the need for an owner's association but, for example, by setting out arrangements for the calling of meetings, etc., as currently happens with some Deeds of Conditions.

3. Part One

3.1 SFHA notes the proposal to enable reference to extrinsic material in terms of the calculation of an owner’s contribution to a cost. We believe that this is appropriate. The Executive’s position on the retrospective application of these provisions is noted and is accepted. SFHA is, however, disappointed that our proposal that the period of negative prescription should remain at 20 years has not been adopted. As already indicated, the provisions of this Bill and the Feudal Reform Act are extremely complex and it is possible that this complexity may result in RSL being unable to effectively safeguard or enforce their interests. If the period of negative prescription has to be reduced, we would suggest a reduction from the current 20 years to 10 years would be more appropriate. We recognise that changes have been made to the notification procedures for terminating a burden, but we are not convinced that all of the concerns identified in our initial response have been addressed. The revised procedures will not be easily applied, for example, in multi-storey flats, where the actions of a ground floor proprietor may have a significant impact on proprietors on upper floors and the requirement to post notices on lampposts will be of limited effect in some rural areas. We do recognise and support the principle that only those with an interest in a property should have the right to enforce burdens but suggest that an appropriate balance must be sought.

4. Part Two

4.1 The Federation notes the meaning attached to the term “community” in the Bill and the proposals in respect of community burdens. We are aware of some concerns, particularly in rural areas, about the extent to which it will still be possible to impose and enforce burdens relating to the use of land and we believe that community burdens may be one way of ensuring that land disposed for a specific purpose (e.g. affordable housing) is retained for that purpose. It is a measure of the complexity of the provisions that such uncertainty exists amongst those who have an interest in the Bill’s proposals and SFHA would emphasise the need for the Parliament and the Executive to
give careful consideration to ensuring the widespread provision of clear information and the establishment of a realistic implementation timetable.

4.2 We have some concerns about the provisions of Clause 28 and suggest that, since the clause contains no requirement for a meeting of owners, it would be appropriate for these provisions to be confined to essential maintenance. Otherwise, it is possible that, in the absence of an accepted definition of maintenance, considerable cause for disagreement and dispute will be created without a practical mechanism for appeal or redress. It is noted that this section contains default provisions that will only apply in the event of existing deeds being silent. We understand that these provisions are not intended to be applied retrospectively and assume that this is because it would be possible to argue that existing rights were being removed?

4.3 SFHA is concerned that many existing amenity burdens will be swept away because they are created in Deeds of Conditions as superior burdens. Examples of these include nuisance burdens (such as “the buildings shall not be occupied or used for any purpose which may be an injury to the amenity of the neighbourhood or a nuisance to others it being at the sole discretion of the superiors to determine what constitutes such injury to amenity or nuisance”); insurance burdens (such as “all sums to be received by any feuar in respect of such insurance shall be expended only at the sight and to the satisfaction of the superiors in making good and restoring all loss or damage caused by such fire or other aforementioned risk to the said buildings”) or limitations on conducting a trade or business from a property or requirements to maintain garden ground (such as “no trade, business, profession or occupation of any kind shall be carried on in or upon any feu without the prior consent in writing of the superiors”). Such burdens should be treated as community burdens but are likely to be lost as a result of no one standing in the place of the superior. Communities may be disadvantaged as a result and it is unlikely that the Bill’s aims of achieving clarity and consistency of approach will be achieved through a reliance on the planning process because local authorities apply planning law and regulations in different ways.

5. Part Three

5.1 SFHA has no comment to offer on this section at this stage.

6. Part Four

6.1 SFHA notes that Clause 50 contains a definition of sheltered housing which differs from the definition previously relied upon in the Housing Handbook series, from that contained in the Framework Code of Management Practice for Owner Occupied Sheltered Housing and from the definition contained in the Housing (Scotland) Act 2001. It is suggested that a consistent approach would be helpful.

6.2 SFHA welcomes the provisions contained at Section 52 as being an extremely helpful means of addressing existing problems experienced by RSLs which have acquired housing stock from the former Scottish Homes.
These provisions will mean that the RSL can enforce burdens as neighbours. SFHA assumes that the intention of the legislation is that RSLs will be able to enforce, for example, community burdens in the same way as local authorities, as described in the accompanying policy memorandum.
Dear Sir/Madam

Title Conditions (Scotland) Bill

I refer to the letter dated 10th June 2002 concerning the above and enclose comments from Hanover (Scotland) Housing Association Limited on the Title Conditions (Scotland) Bill as revised by the Scottish Executive.

I hope this is of some assistance to the Justice Committee and if you have any queries regarding this enclosure please do not hesitate to contact the Mrs Helen Murdoch, Director of Housing and Care Services on telephone 0131 557 7420.

Yours sincerely,

Alison Honeyman
Housing Services Manager

Cc. Helen Murdoch
Dear Sir/Madam,

**Title Conditions (Scotland) Bill**

I refer to the letter dated 10th June 2002 concerning the above and enclose comments from Hanover (Scotland) Housing Association Limited on the Title Conditions (Scotland) Bill as revised by the Scottish Executive.

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Yours sincerely,

Alison Honeymam
Housing Services Manager

Cc. Helen Murdoch
Hanover (Scotland) Housing Association Limited

Submission to Justice 1 Committee, The Scottish Parliament

Title Conditions (Scotland) Bill

1. As a general comment we feel that the Scottish Executive has consulted widely and addressed some of the main concerns which we and other organisations expressed in our original response to the draft Title Conditions (Scotland) Bill dated July 2001 to the Scottish Executive.

2. One of our original concerns about the proposed changes to property ownership as it affects older owners in sheltered housing was, that unlike most other types of owner occupation, there are often two distinct groups of owners in sheltered housing. The first group tend to be younger, recent retired and more independent and often couples, the second group are often very much frailer and less independent.

2.1 Most of the difficulties which arise both for sheltered housing owners themselves and for the management of sheltered housing arises from balancing the often very different wishes of these two distinct groups and we are still concerned that the implementation of the Title Conditions (Scotland) Bill might inadvertently make this task even more difficult and costly for both owner and manager.

2.2. Some of these issues appear to have been recognised by the Scottish Executive as a result of their wide consultation on the Bill and we are very pleased that the Bill has been amended to identify certain core elements of 'sheltered housing' and to specify that the provisions in the Bill permitting discharge of burdens by a simple majority will not apply to these core burdens.

3. Definition of Sheltered Housing:

3.1 Hanover has concerns about the definition of sheltered housing provided in the draft Bill. At present, the definition given "...provided with facilities substantially different from these of ordinary dwellings" seems very vague and inclusive of many types of property which would not normally qualify as sheltered housing.
3.2 As suggested previously, a possible solution would be to adopt the definition provided in the 'Framework Code of Management Practice for Owner Occupied Sheltered Housing', devised by the experienced Working Group who spent a lot of time attempting to get a precise, but not too narrow definition of sheltered housing.

4. **Minimum Age Requirement:**

4.1 We strongly support the protection of the minimum age requirement as regards sheltered housing which has now been inserted in the Bill. Whilst, however, fully supporting that there should be a minimum age requirement, we would be concerned if this meant that the existing minimum age in the Deeds of Condition could never be altered.

4.2 At present for example, some of Hanover's Deed of Conditions have different ages for entry to sheltered housing for men and women, and in a modern society this might not appear equitable and we would have obvious reservations about being unable to alter this, except with 100% consent of owners.

4.3 Perhaps therefore, there should be a minimum age e.g. 55 years which would not be capable of being lowered, but above that the age could be varied with e.g. 75% consent of owners.

5. **Delegation of powers to a Manager:**

5.1 The amendment regarding the power to delegate to a Manager being subject to a majority of 75% would also seem to be an improvement on the original draft Bill as is the fact that it will not be possible for the Manager to vary a burden affecting the 'core elements'.

6. **Effect of Title Conditions (Scotland) Bill regarding the management of Hanover (Scotland) Housing Association Limited:**

6.1 Despite the Executive's recognition of the 'core elements' which distinguish sheltered housing from other owner occupied housing and the recognition that a simple 51% majority vote is not sufficient protection when voting to vary certain conditions, we do still have some concerns about the effect of the Bill.
6.2 One of the difficulties in managing the changes arising from the implementation of the Bill as far as Hanover is concerned arises from the differing/sometimes conflicting rule of Hanover as both manager for the owners and employer of the Warden and our need to remain and to be seen to be impartial when promoting and implementing change necessitated by the enactment of the new legislation.

6.3 Research seems to indicate that older owners moving to sheltered housing either do not receive, or do not fully appreciate the quite different lifestyle involved in being part of a sheltered housing development and, unlike other types of owner occupied housing, quite small changes in conditions which would not have been able to be changed prior to the changes in Property Law could lead to quite disproportionately adverse effects on some of our frailer owners. For example the possible removal of a burden allowing each owner to have one well behaved pet and perhaps have no pets could lead to great unhappiness for an elderly person.

6.3.1 Even where changes are made which require a 75% threshold this could still leave 25% of the residents feeling very unhappy.

6.3.2 At present, this unhappiness would normally be directed at Hanover (Scotland) Housing Association Limited as manager/superior but in the future this may well be directed at neighbours/friends instead, with obvious divisive results.

7. **Independent Advice Service:**

7.1 We still feel very strongly that the Scottish Executive should consider the possibility of establishing and funding an independent advice/mediation service relating to the Bill even for a time-limited period.

7.2 The Abolition of Feudal Tenure Reform (Scotland) Etc Act 2000 and the Title Conditions (Scotland) Bill are highly complex pieces of legislation and, as stated before, it does not seem to be equitable that either owners themselves nor indeed the managers of this service should have to pay for legal/financial advice on this issue.

7.3 Organisations have already spent a great deal of time and money on issues arising from the implementation of the Bill, but it has to be recognised that for charitable, ‘not for profit’ organisations, money spent in this area obviously means less resources are available elsewhere.
It is also important that owners receive independent advice since the impartiality of the manager (formally superior), will not be recognised for obvious reasons.

7.4 The longer term issue which arises is that, if the implementation of changes arising from the new legislation ultimately means that involvement in the owner occupied sector becomes economically not viable for charitable organisation and therefore obviously not for commercial managers, where does this leave the owners?

7.5 We have worked very hard to update the owners on the Implications of the Title Conditions (Scotland) Bill and indeed have sent a copy of the Executive’s excellent summary to all owners and asked for their comments.

8. Implications:

8.1 Whilst it is true to say we have not been inundated with replies, several owners have taken the trouble to give us their views and we have enclosed copies of the letters received which sum up some of our remaining reservations regarding the effects of the Bill:

i. Who will protect the interests of the very frail elderly who entered sheltered housing so as not to have to participate in meetings, decision making etc. but whose rights might now be adversely affected by the voting rights of an active possibly not very large majority of our other owners?

ii. Dismissal of the Manager - we repeat our original comment about this - it seems completely arbitrary and contrary to natural justice to have two different voting systems in operation here. There should be one voting system and we feel it should be 75% or at least 66\(\frac{2}{3}\)ths. We feel strongly that 51% to dismiss the Manager is too low a threshold as regards sheltered housing.

iii. There appears to be an assumption regarding the dismissal of the Manager that the vast majority of owners wish to get rid of their existing Managers and appoint a new one. This view seems to derive from the lobbying of vociferous – but not numerous in terms of sheltered housing owners as a whole – body of active owners. Whilst not disputing their right to hold or express their views, it has also been a concern that the views of those who chose to buy a particular sheltered housing property only because it was administered by a specific manager has not really been considered. (See letter enclosed).
iv. In common with similar Housing Associations, Hanover (Scotland) Housing Association Limited is a charitable, ‘not for profit’ organisation and as such, is subject to strict regulatory control by Communities Scotland, unlike many commercial managers. If this is one of the principal reasons for purchasing a property shared by e.g. 49% of owners, is it equitable to allow 51% to vote to dismiss the manager and choose e.g. a commercial manager who may well offer a financial incentive to encourage the change of manager? It is our experience, and for very obvious reasons, that financial considerations, often outweigh all other factors for owners operating within a very tight budget and decisions made solely for economic reasons could disadvantage other owners.

9. Appeals:

9.1 Whilst the appeals procedure does now seem less complex than before we would still like to see some sort of mediation service operating for what we feel are bound to be a proliferating number of appeals on the part of owners and not just in sheltered housing. We feel recourse to even the Lands Tribunal is quite expensive and time consuming and particularly for the elderly not a route down which most would wish to embark. There is a need for a independent mediation/appeals procedure which will be seen as non threatening or either free or easily affordable. This applies to all owners and not just sheltered housing owners.

10. Deed of Conditions:

10.1 As stated previously we are concerned with the situation where the existing Deeds of Conditions will not be adequate to cover the ‘gaps’ left when the superiority is abolished.

10.2 Our own experience, and the legal advice we have taken to date confirms that a great deal of work will require to be carried out to ‘plug’ the gaps left in our existing Deed of Conditions. This would appear to be a time consuming and a costly exercise involving the possible preparation of new Deeds of Conditions and it is obviously not equitable that this cost should be passed on to the owners through their existing management charge.

10.3 There is also the additional problem that it had been Hanover’s intention to implement new Management/Factoring Agreements to fill this gap but there is an obvious problem if 100% of the owners will not agree to these changes.
10.4 Whilst Hanover (Scotland) Housing Association Limited is very pleased that some of the original concerns which were expressed have certainly been addressed, there are still outstanding issues which cause concern, to manager and owner alike.

Alison Honeyman
Housing Services Manager
Ms Alison Honeyman,
Housing Services Manager,
Hanover (Scotland) Housing Association Limited,
36 Albany Street,
Edinburgh EH1 1QH.

Dear Ms Honeyman,

Title Conditions (Scotland) Bill

First, congratulations on your appointment as Housing Services Manager. Second, before we leave tomorrow for a visit to friends and family in Canada, a few hurried thoughts on the subject you raised in your letter of the 29th.

It is difficult for us lay people to understand fully what the Bill is all about and how it will, or could, affect us here at Muirfield House on enactment. And we have, as you will have deduced, no time to acquire, or get advice on, the Explanatory Notes before your deadline of the 15th of July. But here, for what they are worth, are some observations.

COMMON BURDENS.
The concept of a sheltered housing complex such as, we assume, Muirfield House is, being a "community", seems attractive.

CORE ELEMENTS
A threshold of 75% agreement among owners for any change is not in our opinion too high.

MINIMUM AGE REQUIREMENT.
It should not be capable of change. We think it right to observe that most, if not all, of the residents here came here for a peaceful quiet existence in what they expect – or at least hope – will be their last homes. The admission of young and – is lively the word? – householders would affect that wish and lead to arguments and friction. Cf Saga’s raison d’être!

DELEGATION OF POWERS TO A MANAGER.
A manager should not have the power to vary a burden affecting a core element.

MANAGER BURDENS IN SHELTERED HOUSING
Is this of relevance to us at Muirfield House? The development of Muirfield House ceased many years ago did it not? We do not think a developer should have the power to control the appointment of a manager after the development has been completed.

DISMISSAL OF A MANAGER
Dismissal of a manager by a majority of owners seems reasonable but we think that majority should again be 75%
That higher majority than one of two thirds would add strength to justification of the dismissal. May we add that what we think are very desirable in a manager’s qualities are both efficiency and caring – and caring beyond the formal terms of the contract of employment?

In haste, Yours sincerely,

For David and Margaret Watson
RECEIVED 6 JUL 2002 4th July, O2.

Dear Mr. McKeown,

Title Completion (Scotland) Bill

Thank you for your letter of 2nd June. You stated that we had not heard from you since you were in Glasgow last week.

I just wish to say that I served in the Holmeston Court 25 years ago, the main reason being

The property is maintained by American owners. This is a pleasant device and I don’t see

This is a magnificent view of Edinburgh.
These factors contribute to one,
emerging as fulfilled and rounded life style.
In a very place the adolescent develops,
and the meaning of school life continues
to not present.

Yours sincerely,

H. Donaldson
Miss Alison Honyman,
Housing Services Manager,
36 Hanover Street,
Edinburgh.

13 Finchfield House,
Gullane,
East Lothian.
EH31 2EL

Dear Miss Honyman,

Thank you for sending me a copy of the Tenancy Conditions (Scotland) Bill.

After reading it several times, I think I am too old to get involved, at 90 plus years.

Wishing you all the best as Housing Service Manager, at Hanover’s Edinburgh office.

Yours Sincerely

G. M. Hamilton.
Thank you for your letter to the residents at Ashley grove, Aberdeen. I am writing to you on behalf of my mother, Mrs Alice Ewen.

Having read through the proposed changes suggested by the Scottish Executive, we have a concern: Core Elements - item 7 - suggests a 75% majority be able to vary these elements. Given that these dwellings were purchased with very particular facilities, it seems quite dangerous to allow variations without 100% agreement.

Our concern is the situation where a large majority of residents may be in quite different circumstances from a small minority, and therefore be willing to reduce costly elements - to the detriment of those for, perhaps, only one or two residents. Often these are the very people for whom the elements were originally conceived.

I can quote one example from the complex. A proposal that the "live-in" warden be replaced by a non-resident post, and the warden flat sold, was vetoed by one member only (and not, as it happens, one of the more elderly!). Everyone seemed to agree that this was only fair as, indeed, the presence of a resident warden was the basis and reason for that lady's original purchase.

We appreciate that the Executive is trying to provide adequate protection for a very vulnerable group, but think that they are not going far enough. You will be aware of how difficult it is to involve this group in active participation of the management of their homes, and it surely needs to be remembered that financial concerns can over-ride common sense in some cases! EG what might be the case where a manager was dismissed before a suitable replacement was appointed?

Finally, we note that the terminology can lead to some confusion, especially the term "manager" in item 10 - ie noting that Hanover has replaced the term "Warden".

Thank you ... Freda Hasler
Tel: 01324 636520

Mr Dennis Canavan MSP
Constituency Office
37 Church Walk
DENNY
FK6 6DF

Dear Mr Canavan

Title Conditions (Scotland) Bill

Thank you for forwarding me an information copy of the Effect of the Bill on Sheltered Housing.

Core Elements
I note that the Bill has been amended to specify certain core elements of sheltered housing. The core elements appear to be centred on the following items:

- Warden Service
- Maintenance of facilities
- Emergency Alarm System
- The age factor

If the above are considered to be core elements, then the owners who are required to pay for these facilities should be considered. As you are aware, some servicing agents do not provide any form of transparent accountability for the fees the owners are required to pay, do not hold Annual General Meetings or consultations, at which major items affecting the complex could be freely discussed and acted upon in an open and democratic way.

Several documents have been produced by The Scottish Executive, The Law Society and others, extolling the virtues of good management practices, but they are being totally ignored by certain managing agents, who state, that they will not adhere to these principles unless they are legislated to do so. I believe that the time has come to do something about this matter and include it as one of the core elements.

Would you kindly pass on these views to The Justice 1 Committee, and when the Title Conditions (Scotland) Bill comes before Parliament.

- It should be mandatory for Managing/Servicing Agents to prepare transparent accountability for services they provide for owners and to consult with them over major issues affecting the complex.

Thanking you, best wishes

Yours sincerely

Ronald R Smith, Secretary, Springbank Residents Owners’ Association
This note outlines the provisional forward programme for the Justice 1 Committee for 2002-03. The programme includes two Bills: the Title Conditions (Scotland) Bill and the Council of the Law Society Bill. The Committee will also finalise its report into the inquiry into the regulation of the legal profession, conduct a short inquiry into alternatives to custody and conclude its work on legal aid. The forward programme does not cover February and March 2003. Details of the programme for this period will be made available at a later date. It is expected that this time will be utilised to draw to a close outstanding Committee business (such as petitions) prior to the dissolution of the Parliament in March. Members should note that this programme is provisional, and is likely to change according to factors such as availability of witnesses and progress of Committee business.

Members are invited to consider the forward programme set out below. In particular, members are invited to consider the following:

- **Alternatives to Custody inquiry:** members will be aware that normally the Executive will respond to a Committee report on an inquiry within 8 weeks of its publication. In order to receive a response before the dissolution of the Parliament, the Committee would have to publish its report on the inquiry by 17 January. However, if the Committee does not require a response from the Executive, the report could be published at a later date, which might allow for more evidence taking sessions. The Committee is invited to consider whether it will require a response from the Executive on its report on the inquiry into Alternatives to Custody;

- **Legal Aid Inquiry:** the Committee has agreed to return to its Legal Aid Inquiry once several outstanding pieces of work have been completed. It is proposed that the Committee will conclude its inquiry by taking evidence from the Minister for Justice on these pieces of work early next year. The Committee is invited to consider whether it is content to conclude its inquiry into legal aid by taking evidence on outstanding issues from the Minister for Justice early next year.

**Tuesday 17 Sept (Joint meeting with Justice 2 Committee)**
Taking stock: oral evidence from the Minister for Justice

**Tuesday 24 Sept**
Title Conditions (Scotland) Bill: oral evidence

**Tuesday 1 October**
Title Conditions (Scotland) Bill: oral evidence
Wednesday 2 October (Joint meeting with Justice 2 Committee)
Budget Stage 2: oral evidence from Minister for Justice and Lord Advocate

Tuesday 8 October
Regulation of the Legal Profession inquiry: consider draft report

Tuesday 29 October
Budget Stage 2: consider draft report (Joint meeting with Justice 2 Committee)

Alternatives to Custody inquiry: oral evidence

Tuesday 5 November
Alternatives to Custody inquiry: oral evidence session
Title Conditions (Scotland) Bill: consider draft Stage 1 report

Tuesday 12 November
Alternatives to Custody inquiry: oral evidence session

Tuesday 19 November
Law Society Bill: oral evidence

Tuesday 26 November
Alternatives to Custody inquiry: oral evidence session

Tuesday 3 December
Title Conditions (Scotland) Bill: Stage 2

Tuesday 10 December
Title Conditions (Scotland) Bill: Stage 2
Law Society Bill: consider draft stage 1 report

Tuesday 17 December
Title Conditions (Scotland) Bill: Stage 2

Tuesday 7 January
Title Conditions (Scotland) Bill: Stage 2
Alternatives to Custody Inquiry: consider draft report

Tuesday 14 January
Legal Aid inquiry: evidence from the Minister for Justice?

Tuesday 21 January

Tuesday 28 January
Law Society Bill: Stage 2
Dear Consultee

PROCEEDS OF CRIME ACT 2002: SECTION 293
CONSULTATION ON DRAFT CODE OF PRACTICE FOR CASH SEARCHES

1. The Proceeds of Crime Act 2002 received Royal Assent on Wednesday 24 July 2002. This Act contains a comprehensive package of measures focusing on the recovery of the proceeds of crime. Its provisions include a scheme for the recovery of cash in summary proceedings; this is contained in Part 5 Chapter 3 of the Act. That scheme includes a new search power. The Scottish Ministers are required under Section 293 of the Act to publish a draft Code of Practice in relation to the exercise by constables in Scotland of that search power. The Home Secretary is similarly required to publish a draft Code of Practice in relation to constables in England and Wales and Northern Ireland, and to Customs Officers throughout the United Kingdom.

2. This letter invites views on that draft Code of Practice, a copy of which is attached. The deadline for responses is Friday 15 November 2002.

3. Provisions relating to the recovery of cash are not new. Part III of the Criminal Justice (International Co-operation) Act 1990 introduced a power for police and Customs officers to seize cash discovered on import or export which is reasonably suspected of being derived from or intended for use in drug trafficking. An application could be subsequently made to a sheriff for the forfeiture of the cash. No conviction is required for the forfeiture of the cash to be ordered; cash forfeiture proceedings are civil proceedings and the civil standard of proof applies. These provisions were later consolidated into Part II of the Drug Trafficking Act 1994, which applies on a United Kingdom-wide basis.

4. The Proceeds of Crime Act expands and replaces the existing drugs scheme. The new scheme extends to cash related to all unlawful conduct and also provides for the seizure of such cash inland.

1.
Search power

5. Unlike the previous legislation, the Act contains a specific power of search to support the powers to seize cash. Under previous legislation, Customs officers could rely upon their general powers of search which they have at the borders under the Customs and Excise Management Act 1979. Under the Proceeds of Crime Act 2002, the power to seize cash now extends inland and to constables, hence the new Code of Practice.

6. Before the Code of Practice can be brought into force, the Scottish Ministers have to make an order which has to be laid in draft before the Scottish Parliament and approved by resolution. The Code of Practice has to be in force before the cash scheme can be commenced.

Consultation Process

7. Section 293(2) of the Act provides that when the Scottish Ministers propose to issue a Code of Practice they must prepare and publish a draft; consider any representations made to them; modify the draft as appropriate; and lay it before the Scottish Parliament for approval. For the purposes of this process, the consultation exercise has been arranged to allow interested parties to be aware of this new power and to make any representation regarding the content of the Code of Practice. The Code of Practice is intended to be self-explanatory and so we would particularly welcome views on any passages that are confusing, ambiguous or lack clarity.

8. A copy of this letter and the draft Code is available on the Scottish Executive website, at:
http://www.scotland.gov.uk/views/views.asp

If you do not have access to the web, please telephone the number at the top of this letter to request any further copies.

9. A copy of the Act is available at:

10. The Scottish Executive invites your comments on the draft code. It is standard practice within the Executive to make responses to consultation exercises publicly available after the closing date, unless the respondent specifically and clearly requests otherwise. They are usually placed in the Scottish Executive Library, Saughton House, Edinburgh, where members of the public may make an appointment to view them.
11. Please send your comments on the draft Code to the address below by week ending Friday 15 November 2002.

By post: POCA Cash Code Consultation
         c/o Christine Dora
         Criminal Justice Division
         Scottish Executive Justice Department
         IWR
         St Andrew’s House
         Regent Road
         Edinburgh
         EH1 3DG

By email: cashcode@scotland.gsi.gov.uk

12. We look forward to hearing your views.

CHRISTINE DORA

Criminal Justice Division
CODE OF PRACTICE FOR CONSTABLES IN SCOTLAND UNDER THE PROCEEDS OF CRIME ACT 2002

Introduction

1. This code of practice is made in connection with the exercise by constables in Scotland of the search powers conferred by section 289 of the Proceeds of Crime Act 2002 ("the Act"). The code is made under section 293 of the Act. There is a separate code of practice, made by the Secretary of State for the Home Department, in relation to constables in England and Wales and Northern Ireland and to customs officers throughout the United Kingdom.

2. The code applies exclusively to searches conducted under section 289 of the Proceeds of Crime Act 2002. If searches conducted under Part 8 of the Act, under other legislation or at common law result in cash being seized under section 294, the provisions of this code do not apply.

3. The code should be available at all police stations for consultation by the police and members of the public. It should also be available at police offices at ports where the powers are, or are likely, to be used.

4. In this code:

   reference to a person's rank includes a person acting temporarily in that rank

   “cash” means notes and coins in any currency, postal orders, cheques of any kind (including travellers' cheques), bankers’ drafts and bearer bonds and bearer shares found at any place in the United Kingdom The definition of ‘cash’ can be amended by an order made by the Secretary of State under section 289(7) – constables should be made aware of any such order made.

General

1.
5. The right to respect for private life and home - and the right to peaceful enjoyment of possessions - are both safeguarded by the Human Rights Act 1998. Powers of search may involve significant interference with the privacy of those whose premises and persons are searched and therefore need to be fully and clearly justified before they are used. In particular, constables should consider at every stage whether the necessary objectives can be achieved by less intrusive means. In all cases constables should exercise their powers courteously and with respect for the persons and property of those concerned. The possibility of using reasonable force to given effect to the power of detention and search should only be considered where this is necessary and proportionate in all the circumstances.

6. Powers to stop and search a person must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. The Race Relations Act 1976 as amended makes it unlawful for police officers to discriminate on the grounds of race, colour, or ethnic origin when using their powers.

**Scope of the search powers**

7. The Act provides power for constables to search for cash where:

   (a) the constable is lawfully on any premises and has reasonable grounds for suspecting that there is on the premises cash which satisfies the conditions below; or

   (b) the constable has reasonable grounds for suspecting that a person (the suspect) is carrying cash which satisfies the conditions below.

8. The conditions are that:
the cash is recoverable property (i.e. it is obtained through unlawful conduct or represents property obtained through unlawful conduct) or the cash is intended for use in unlawful conduct; and

the cash does not amount to less than the minimum amount specified under the Act (currently £10,000 — this amount can be amended by an order made by the Secretary of State under section 303 — constables should be made aware of any such order made)

9. Where the power to search a person is exercised, the Act requires that the constable may require the suspect - so far as he thinks necessary or expedient - to permit:

(a) a search of any article he has with him; or

(b) a search of his person.

A constable may detain the suspect for as long as is necessary to search his person.

10. The powers conferred are civil in nature and exercisable only so far as reasonably required for the purposes of finding cash. The powers do not include the power to enter premises.

Reasonable grounds for suspicion

11. In order to exercise the search power a constable must have reasonable grounds for suspecting that cash meeting the conditions set out in paragraph 6 will be found.
12. Whether there are reasonable grounds for suspicion will depend on the circumstances in each case. There must be some objective basis for that suspicion based on facts, information and/or intelligence. The constable should take into account such factors as how the individual or premises were identified, previous intelligence on persons or premises, previous involvement with the persons or premises, and suspected links with criminal activities, whether here or overseas.

13. Reasonable suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned. For example, a person’s race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people being more likely to be involved in criminal activity. It should normally be linked to accurate and current intelligence or information.

Authority to search for cash

14. Any decision to search for cash under the Act must, if practicable, be approved by a sheriff. Judicial approval is only likely to be impractical because of the immediacy of the circumstances of the case. This is more likely to be the case in relation to the search of a person than the search of premises. But constables must assess each case on its merits. There can be no assumption that judicial approval is impracticable for all searches of a person—constables must carefully consider any decision not to obtain such approval.

15. In order to obtain approval from a sheriff, a constable will need to make telephone contact with the clerk of the sheriff court, to arrange a hearing which can be held without notice and in private. The constable will need to:

- identify himself to the sheriff (giving name, rank, any warrant or other identifying number, and home station or place of work)
- lodge his written application
- explain to the sheriff the reasonable grounds he or she has for undertaking the search
- answer any questions that the sheriff may have.

16. If judicial approval for a search is impracticable, a police officer of the rank of Inspector or above (a “senior officer”) should provide approval for the said search.

17. If an application for an authority is refused (either by the judicial or senior officer process) the constable must not make a fresh application for a search of the same person or premises unless he has new information.

18. Authorisation to search should be obtained prior to the actual search itself where practicable. The constable should explain to the senior officer the reasonable grounds he or she has for undertaking the search. The authority should only be given where the senior officer is satisfied that the necessary grounds exist. The senior officer should make a written record of such reasons. Oral authorisation should be supported by written authorisation as soon as that is reasonably practicable.

19. If approval by a senior officer for a search is impracticable, a search may be conducted without approval. It is unlikely that senior officer approval will be impracticable unless there is some problem making contact with an appropriate officer. However if a search is conducted without any prior approval, the officer must give an explanation of the reasons for the search to a senior officer as soon as that is reasonably practicable. The senior officer should take a written record of such reasons.

Reports to the “appointed person”

20. If a search is conducted without prior judicial approval - whether with or without senior officer approval the constable is required under section 290 of the Act to prepare a report in the following circumstances:
- if the search does not result in the seizure of cash, or
- if cash is released before the matter proceeds to a detention hearing, or
- if the court at a detention hearing does not authorise the detention of the seized cash for more than 48 hours after it was initially seized.

21. This report must set out why it was not practicable to obtain prior judicial approval and why circumstances led him to believe that the search powers were exercisable. These factors could include why the constable was on the premises where the search took place, what aroused his/her suspicion and why there was a need for an immediate search. If the prior approval of a senior officer was obtained, the report should state this, with the senior officer’s reasons for approval, if practicable.

22. The report must be submitted to the independent person appointed under section 290 of the Act by the Scottish Ministers. The post holder’s address is [...].

23. The report should normally be submitted within 7 days of the exercise of the search powers.

Steps prior to search

24. If the constable suspects that the person has cash concealed on his or her person, the constable must take the following steps:

- inform the person that he has reasonable grounds for suspecting that he or she has cash on their person which is more than the minimum amount and is recoverable property or is intended by any person in unlawful conduct

- inform the person that he has the power to search them under section 289 of the Act for the purposes of finding such cash

- produce any document authorising the search (if applicable)
25. Before any search for cash takes place the constable must take reasonable steps to give the person to be searched, or the occupier of the property the following information:

- the constable’s name (unless the constable reasonably believes that giving his or her name might put him or her in danger, in which case a warrant or other identification should be given)

- the fact that the search is being carried out under section 289 of the Proceeds of Crime Act 2002, and

- a clear explanation of:

  (i) the purpose of the search; and

  (ii) the grounds for the reasonable suspicion

26. Constables not in uniform should show their warrant cards or other suitable form of identification.

27. If the person to be searched does not appear to understand what is being said or the constable has doubts as to the person’s ability to speak and/or understand English he or she should take reasonable steps to ensure that the person understands. Where necessary and practicable someone who can act as an interpreter should be identified.
Search of a person

28. The minimum amount of cash that may be seized is currently [£10,000]. This is set out in a statutory instrument [name and reference]. The statutory instrument should be available with the code. This amount can be amended by a statutory instrument made by the Secretary of State under section 303 – constables should be made aware of any such order made and it should be made available with the code. There is no maximum amount of cash that may be seized.

29. All searches should be carried out with courtesy, consideration and respect for the person concerned. The co-operation of the person to be searched must be sought in every case, even if the person initially objects to the search. A forcible search may be made only if it has been established that the person is unwilling to co-operate. Constables might want to consider the possibility of using reasonable force as a last resort if this appears to be the only way in which to give effect to their power of detention and search.

30. The length of time for which a person may be detained must be what is necessary to carry out the search and kept to a minimum. The thoroughness and extent of a search must depend on what is suspected of being carried and by whom.

31. By virtue of section 289(3)(b) the search powers include the power to search a person. However this power does not extend to requiring a person to undergo an intimate or strip search. An intimate search is one involving a physical - and not just visual – examination of a person’s body orifices. A strip search is any search that involves the removal of an article of clothing that:

- is being worn (wholly or partly) on the trunk and
- is being so worn either next to the skin or next to an article of underwear.
32. A person must not be asked to remove any clothing in public other than an outer coat, jacket or gloves. A search in public of a person's clothing that has not been removed must be restricted to superficial examination of outer garments. This does not, however, prevent a constable from placing his hand inside the pockets of the outer clothing, or feeling round the inside of collars, socks and shoes if this is reasonable or necessary in the circumstances.

33. If on reasonable grounds it is considered necessary to conduct a more thorough search this must be done out of public view. Any search involving the removal of more than an outer coat, jacket, gloves, headgear or footwear, or any other item concealing identity, may only be made by an officer of the same sex as the person searched. It may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it.

34. If the constable discovers cash during a search he or she should give the person who has possession of it an opportunity to provide an explanation of its ownership, origins, purpose and destination.

Search of premises

General

35. No right of entry is conferred by section 289 of the Proceeds of Crime Act 2002. In order to search for cash on premises a constable must be lawfully on premises. This would include a search of premises undertaken with the consent of the person entitled to grant entry to the premises. It would also include a search carried out when a constable has exercised a power of entry conferred by common law or by a search warrant granted in some other connection or power of entry conferred under some other legislation and circumstances subsequently lead him to believe that there is cash on the
premises. A search must be made at a reasonable hour unless this might frustrate the purpose of the search.

36. If it is proposed to search premises with the consent of a person entitled to grant entry to the premises the consent must, if practicable, be given in writing before the search takes place. The constable must make any necessary enquiries in order to be satisfied that the person is in a position to give such consent.

37. Before seeking consent the constable in charge of the search shall state the purpose of the proposed search and its extent. This information must be as specific as possible. The person concerned must be clearly informed that they are not obliged to consent.

38. A constable cannot enter and search premises or continue to search premises if the consent has been given under duress or is withdrawn before the search is completed.

Conduct of searches

39. Premises may be searched only to the extent necessary to achieve the object of the search. A search may not continue once the object of the search has been found - and no search may continue once the officer in charge of the search is satisfied that whatever is sought is not on the premises. (This does not prevent a further search if new information comes to light justifying such a search.)

40. Searches must be conducted with due consideration for the property and privacy of the occupier of the premises searched and with no more disturbance than necessary.
Recording requirements – searches of a person

41. A constable who has carried out a search in the exercise of any power to which this Code applies must make a written record of it at the time, unless there are exceptional circumstances that would make this wholly impracticable. If a record is not made at the time the constable must do so as soon as practicable afterwards. There may be situations in which it is not practicable to obtain the information necessary to complete a record, but the constable must make every reasonable effort to do so.

42. The constable must ask for the name, address and date of birth of the person searched, but there is no obligation on a person to provide these details and no power of detention if the person is unwilling to do so.

43. The following information must always be included in the record of a search even if the person does not wish to provide any personal details:

- the name of the person searched, or (if it is withheld) a description
- a note of the person's self-defined ethnic background, or that this information was withheld
- the date, time and place that the person was first detained
- the date, time and place the person was searched (if different)
- the grounds for making the search (and of any necessary authorisation if give)
- if a search is conducted without prior judicial approval, the reason for not obtaining such
- the outcome of the search (e.g. arrest, seizure of cash, no further action)
- a note of any injury or damage to property resulting from the search
- the identity of the officer making the search (subject to paragraph 21).

44. A record is required for each person searched, if more than one person is searched at the same time. The record of the grounds for making a search must, briefly but informatively, explain the reasons for suspecting the person concerned, by reference to the person's behaviour and/or other circumstances. If a person is detained with a view to performing a search, but the search is not carried out due to the grounds for suspicion being eliminated as a result of questioning the person, a record must still be made.

**Recording requirements – search of premises**

45. Where premises have been searched in circumstances to which this Code applies the constable in charge of the search shall make or have made a record of the search on returning to his normal place of work. The record shall include:

- the address of the premises searched
- the date, time and duration of the search
- the authority under which the search was made, including whether prior judicial or senior officer approval was obtained
- the name of the officer in charge of the search and the names of all other constables who conducted the search
- the names of any people on the premises if they are known
- details of any damage caused during the search and the circumstances in which it was caused
- whether any cash was seized.
DUNGAVEL DETENTION CENTRE

I refer to your letter of 14 September which would appear was not received by my office and has only now come to light when followed up by your office.

I note the point your Committee make regarding the inspection of Dungavel. As you will know, a cross party group on refugees and asylum seekers posed the question you raise and visited Dungavel following which they produced a report.

You may therefore find it helpful to have the enclosed copy of a letter of 22 May from the Minister of State at the Home Office who has responsibility for Dumgavel. As you see the sixth paragraph answers the point your Committee raised.

Yours sincerely,

JIM WALLACE
I am responding to Lain Gray’s letter of 2 May with which he enclosed a copy of the report on Dungavel Removal Centre by the Cross-Party Group on Refugees and Asylum Seekers further to their visit on 16 April.

The Report details ten areas of concern and I will address each of these in turn. However, before doing so I must express some concern about this Report. I am aware that the Medical Officer at Dungavel has written to the Chairman of the Standards Committee of the Scottish Parliament and to Shona Robison MSP about a range of factual inaccuracies and misrepresentations contained in the Cross Party Group’s report following their visit in April.

Such inaccuracies are not helpful. They distort the wider debate about immigration policy and detention. They fail to give credit where credit is due in respect of the very professional and dedicated work done by those who work in removal centres, whose primary concern is always the health and welfare of those in their care.

Let me now move onto the areas of concern raised in the Report. Firstly, the Cross-Party Group is concerned generally about the detention of children. Whilst the detention of families and children is very regrettable this is sometimes necessary. Families are accommodated in dedicated family rooms so as to ensure that family members are not separated, and, so far as practicable within the constraints of detention, are able to maintain family life. I am confident that the emotional and academic needs of the children who stay at the centre are met.

There is no lack of accountability for the service provision by Premier. As in the case of all other removal centre contractors, Premier is accountable to the Secretary of State for the service provision under the terms of their contract. An Immigration Service contract monitor is in place at Dungavel. The contract monitor has a statutory duty to keep under review the running of the centre and to report to the Secretary of State. The contract monitor also has a duty to investigate and report on any allegation made against the contractor or staff. In addition the independent Visiting Committee have a statutory role to oversee the condition of the centre and the treatment of detainees.
The Group has suggested that Dungavel should become subject to inspection by the Chief Inspector of Prisons in Scotland. This is unnecessary and, like other areas of the report, reflects a basic lack of factual checking by the author. The centre, like all other removal centres, is already subject to inspection by HM Chief Inspector of Prisons under section 152(5) of the Immigration and Asylum Act 1999.

Dungavel is a designated place of detention under the Immigration Act 1971. As such, persons may be detained there for any reason provided for in that Act and not just pending removal as the Group have implied. Detention under the Immigration Acts is not time-limited but must be for the shortest period necessary. However, it must be remembered that detainees can very often prolong their own detention by, for example, refusing to co-operate with attempts to secure documentation or by lodging last minute appeals.

Detention is used sparingly and must be considered necessary in each case. Indeed, detention is considered on a case by case basis and continued detention is regularly reviewed.

The Group has raised concerns about the lack of information available about particular detainees. Regular statistical information is provided in the Home Office quarterly immigration and asylum statistical bulletin. Immigration Service staff are present at Dungavel itself and are also based at various ports in Scotland. It is surely right that information about individuals in detention is not made available to anyone who asks. The privacy of these individuals must be respected.

Information about the centre is given to all detainees as soon as they arrive and the staff at Dungavel are always available to help. In addition, detainees are free to choose their own legal representatives but all are advised of the free, expert services provided by the Immigration Advisory Service and the Refugee Legal Council. As for detainees receiving information about the progress of their case, as the status of any particular case changes rapidly, detailed information about individual case status is not held at the centre. However, the immigration staff at the centre will obtain this on request and detainees receive regular updates on the progress of their case.

The Cross-Party Group has also raised concern about the transfer of detainees and the information they are given when they are moved. Detainees are advised about transfers subject to operational and security requirements. Because of these requirements it may not always be appropriate to advise detainees in advance of such a move.

I am unclear about the point made by the Group about risk assessment. Removal centres are secure custodial facilities. It necessarily follows that there are restrictions on freedom and movement but these are kept to the minimum necessary to ensure the maintenance of security and control.

The Group's final area of concern is in respect of the independence of the Visiting Committee. The Visiting Committee is independent and clearly needs to be seen to be such. We are not aware of any grounds for concern in this regard for the Committee at Dungavel.

I do hope you are reassured about the standard of operation, management and care that is provided at Dungavel. There have been some wildly inaccurate and unhelpful media stories about the centre recently. Detention is an emotive issue and I accept there will always be some opposition to it. However, I do take issue with misrepresentation of the facts. Such an approach
contributes little to rational and objective debate. In this regard, the Cross Party Group's report is disappointing, particularly after they were given access to Dungavel and received reassurances on their original area of concern.

JEFF ROCKER
Dear Ms Grahame,

The Title Conditions (Scotland) Bill

I write as an owner in an Owner occupied home in a retired people’s Complex. I know that I will be affected when the Bill becomes an Act and would ask you to give some consideration to the following concerns:

Our complex is administered by a Management Company. Some of the Companies treat their residents in a rather cavalier fashion. I would like the Act to require Management Companies/Associations to meet their owners regularly (even once a year would be an improvement in many cases), to publish regular Financial and other accounts and be required to seek Owner’s agreement to any proposed change.

My occupancy of my home is governed by a Deed of Conditions existing when I purchased it. My neighbours and I would like to feel able to change one or more of these conditions if in future we feel some improvement could be made. Should such an option not be open to existing Owners, we may find a complex where new Owners have different conditions. This could cause difficulty in matters affecting communally owned facilities.

The necessary procedures for obtaining any improvements would inevitably be costly in money, stamina and time which for Senior Citizens are limited. I hope that the Committee will keep these factors in mind, especially when considering the figure for a “majority”.

Some obligatory monitoring system for Management Companies/Associations is essential if the bad experiences of some Retirement Housing Owners are to be eliminated. The Voluntary Code of Practice could be easily flouted or not subscribed to.

Difficulties may arise if the Act speaks only of “Sheltered Housing”. An expression like “Sheltered or Retirement Housing” would help avoid confusion, or an introductory explanation could make it clear that both Sheltered and Retirement properties are covered unless the Act says otherwise for specific situations.

Yours sincerely.
Ms J Goldsmith  
Assistant Clerk, Justice 1 Committee  
Room 3.11, Committee Chambers  
The Scottish Parliament  
Edinburgh, EH99 1SP

2 September 2002

Dear Ms Goldsmith

Title Conditions (Scotland) Bill

I refer back to your letter of 10 June. I very much apologise for the delay in replying but work levels have so far prevented me from dealing with this matter. I have now had the opportunity to read the explanatory notes and the draft Bill. I enclose with this letter a copy of my letter of 25 September 2001 to Joyce Lugton.

I do not think that the Bill does particularly deal with the concerns which I expressed in my letter to Joyce but I appreciate that one has to look at the wider scheme.

In particular with reference to paragraph 1 of my letter namely control by the developer during the settling down period I note that in fact the development management scheme which was included in the original draft Bill (part 6 of the original Bill) was in fact not included at all in the actual Bill as presented. I think this is a pity because the draft produced by the Law Commission would I think be a very useful basis on which to proceed. However, I hope practitioners who specialise in this field can get together and work out a generally acceptable framework so as to make these matters easier and less time consuming.

I note that no amendment has been made to the timeframe contained in clause 84 of the draft Bill (section 81 of the Bill as laid before the Scottish Parliament). I think this is a problem and it could have an adverse affect on investment.

I think there are potential problems in relation to the mechanics of notification. In general, as I have said in my earlier letter to Joyce, I think the Law Commission have done an excellent job in addressing this difficult area of law and suggesting logical and comprehensive solutions. I do have a concern however on the question of notification because it will be difficult for a benefited proprietor who holds the property as an investment and who is not in or represented in the direct locality, to be aware of notices affixed to lamp posts. I cannot however see any better way of dealing with it and I think that those of us who are involved in commercial property investment will simply have to advise our clients of this possibility and try to develop practical ways to deal with it.
I am interested that so much reliance is being placed by the Lands Tribunal on oaths being sworn by parties. I am particularly interested in this because the Keeper’s experience of relying on affidavits in relation to servitudes constituted by prescriptive use has obviously been such that the Keeper feels unable to accept affidavits as evidence enabling the Keeper to include such servitudes in the title section of the land certificate. Should there be a period after which any certification issued by the Lands Tribunal and any registered deed can be open to challenge/rectification if it can be shown that any oaths have been improperly sworn? I appreciate that this cuts across the need for certainty and I also appreciate that what is proposed is probably as good as can be achieved in order to obtain the certainty which is sought but I do wonder whether a short period of challenge might be worth considering. It may well be that such a period is built into the various timescales as contained in the draft Bill but that was not the impression I had when reading it.

I am interested to note in the explanatory notes that the additional work in the Lands Tribunal may not be significant. I think that it might be quite significant and certainly very important during the period of 10 to 15 years and obviously it is important to ensure that there are sufficient people on the Lands Tribunal who have got experience of commercial as well as residential and agricultural property because I think that commercial property will feature more and more in the decisions of the Tribunal.

Subject to these relatively small comments I very much commend what the Title Conditions (Scotland) Bill is seeking to achieve and the way the Law Commission have dealt with the issues.

From a practical point of view the biggest risk which I see is the risk that land registration is not carried out quickly enough and that the system which is proposed in the Title Conditions (Scotland) Bill will not be properly effective unless and until all transactions which are registrable have been registered. I am aware that the Keeper and his staff are doing a tremendous job here and my comment is in no way a criticism of the Keeper or his staff. I suppose it might be a suggestion that more resources are required in order to ensure that the information which is necessary to enable the Bill to work properly is available sooner rather than later.

If there are any matters you wish to discuss please do not hesitate to telephone. I again apologise for my delay in dealing with this.

Regards

[Signature]

Ian S Quigley
Partner

cc Joyce Lugton, Scottish Executive
cc Kenneth Reid, Scottish Law Commission

enc
Mrs E J Lugton  
Scottish Executive  
Justice Department  
DX ED 20  
Edinburgh  

25 September 2001  

Dear Joyce  

Title Conditions (Scotland) Bill  
Scottish Executive Consultation Paper  

I refer back to my letter of 4 May and very much regret my delay in coming back to you. I fear I may be too late.  

I really have very little to say about the Law Commission Report and the draft Bill other than that I am very impressed by both of them, and think they are a great contribution to the clarification and development of the law in this area. I have only the following comments:-  

1. I am not convinced that the manager burden gives sufficient control in favour of the developer to allow a settling-down period for the development because there could well be a benefit in having some control in favour of the developer, even when the last bit of development land has been sold. I recognise however that the circumstances in which this may arise might well be limited, and that it is likely that a Deed of Conditions with a management company or a Development Management Scheme will have been put in place by that stage.  

2. I am concerned about clause 64 of the draft Bill, which appears to give the Lands Tribunal the right to vary the terms of a long lease on the application of a tenant. I appreciate that there is a five-year safety period, and that the Discharge will only be granted if the Tribunal is satisfied that it is reasonable to grant the application. I know that there is an argument that Section 1(1) and 2(6) of the 1970 Act already provides for the possibility of a tenant applying to the Lands Tribunal on the basis that a tenant's interest in a long lease is an estate or interest in land. The counter-argument is that a long lease is not an estate in land, but is a contract which happens to run with the land in that it binds the heritable proprietor. Clause 85 appears to put the matter beyond doubt, but I am not convinced that it has moved in the correct direction. I think that for a lease of up to, say, 30 years the parties should be bound by the terms of the lease (to the extent and insofar as it varies the common law).  

I think that clause 85 could have an adverse effect on investment property in that it may create uncertainty. As I understand it the Tribunal is entitled to have regard to the effects of the title condition on the benefited property and the level to which it "impedes enjoyment of the burdened property" and whether the costs of compliance are "reasonable". Could this not cut across the whole essence of the full repairing lease, where a tenant is obliged not only to repair but also to renew and rebuild where that is a method of repair, and where the tenant is obliged even in the case of latent or inherent defect. I have had a brief conversation with the Law Commission about this and the person I
spoke to was absolutely clear that that was indeed the intention, namely that the Lands Tribunal could interfere to that extent. If possible I would like the opportunity to discuss this in more detail.

As you will see, therefore, my only comments are at the margins of the Bill, albeit I think they are relevant in the context of commercial property development, and I repeat that I think that the work done by the Law Commission and yourselves on this area of law is extremely valuable.

I look forward to hearing from you.

Kind regards.

Yours sincerely

Ian S Quigley
Partner
INTRODUCTION

Property Managers Association Scotland Limited, 2 Blythswood Square, Glasgow, G2 4AD ("PMAS") welcomes the opportunity to provide comments to the Scottish Executive on the Title Conditions (Scotland) Bill ("the Title Conditions Bill"). PMAS views the proposals contained in the Title Conditions Bill as a further logical step in taking forward the proposals for reform of Land and Conveyancing Law in Scotland. PMAS recognises that the creation and enforcement of a suitable range of Title Conditions through legislation will provide for ongoing and suitable arrangements for management and maintenance of property.

PMAS represents the majority of professional Property Managers responsible for management of owner occupied housing units in Scotland and its Members currently have under management in excess of 90,000 units of housing accommodation in Scotland together with a substantial number of units of commercial and industrial property.

COMMENTS ON THE CONSULTATION PAPER

PMAS largely supports the proposals contained in the Title Conditions Bill. In this paper where no comment is offered on a particular discussion point, it can be taken that PMAS offers no view either positive or negative on the discussion point.

PMAS responds to the discussion points as follows using the numbering in the discussion paper:-

1. PMAS agrees that transparency in the Registers will be of benefit to the conveyancing system and to all who require to have recourse to the conveyancing system and the Land Register and/or the Register of Sasines.

2. PMAS believes that extrinsic material should be included in future burdens. Members of PMAS have extensive experience of dealing with liabilities for common charges which are to be fixed in accordance with the Valuation Roll. Notwithstanding the abolition of domestic rates for properties where such an allocation exists in terms of the Deed of Conditions, Local Authorities still maintain historic records of Valuation Rolls which can be accessed. Even in exceptional circumstances where possibly a commercial property is converted to residential property which results in a requirement to reallocate liability, the historic evidence of the Valuation Rolls as at the date of abolition can provide extrinsic material which enables an appropriate apportionment to be made. Provided the extrinsic material is readily available in the public domain PMAS considers that there would be no difficulty in such extrinsic material being included in further burdens. However such extrinsic material would require to be material which is within the public domain and readily available.

3. PMAS would repeat its comments in Number 2 above.
4. This issue is fundamental to the continued ability of the Members of PMAS to offer a viable system of management of common property. For some time it has been a matter of considerable concern to the Members of PMAS that Conditions in Deeds of Conditions could be held to be invalid by the Courts because they contain a provision on unspecified costs. However it is fundamental to a burden which imposes an obligation to contribute to maintenance, repair and renewal of common parts that it must of necessity be a burden which is in respect of unspecified costs. Provided that the terms of the burden must be clear as to how the liability is calculated there can be no prejudice to an owner of property if such a burden is made valid.

5. PMAS feels some concern that while the title to enforce may be available to non-registered proprietors, tenants, proper life-renters and non-entitled spouses, there could be confusion if the entitled proprietor did not wish to enforce burdens. Has the Executive given consideration to who should be entitled to enforce where there are conflicting proposals?

6. PMAS agrees that the test should be "material detriment". If the test was reduced to a lesser level this would give cause to considerable additional litigation.

7. PMAS believes that it is inappropriate for the period of negative prescription for burdens to be reduced from twenty years to five years. In particular PMAS expresses concern in relation to absconding owners who fail to implement burdens. It may take in excess of five years for the position to be determined and action taken.

8. PMAS feels concern that the four metre rule is too proximate. It is considered that a more appropriate distance would be fifteen metres.

9. PMAS is not entirely convinced that it is appropriate that there should be a sunset rule. PMAS takes the view that the existing legislation which permits an application to be made to Lands Tribunal for the discharge or variation of a land!

10. PMAS would repeat its comments to discussion point 9.

11. On the basis that the exclusion of communities with less than four units is simply where title deeds make no provisions for such matters as maintenance, appointment or dismissal of Manager and discharge of burdens, PMAS would agree with the exclusion of communities with less than four units.

PMAS is concerned about the variation of the Deed of Conditions after the sale of early units. PMAS considers that there are major difficulties for developers if a majority of the proprietors can vary Deeds of Conditions before the development is complete.

Later in the Discussion Paper PMAS expresses the view that variations of Deeds of Conditions, title conditions, discharge of title conditions etc. should require a 75% majority. PMAS believes that a qualified majority of 75% is appropriate. PMAS believes that the right to vary Deeds of Conditions prior to completion should be reserved to the developer. With regard to Local Authorities, if the 75% majority position was adopted then this would not cause a Local Authority difficulty even in a long term sale scenario.

12. PMAS entirely endorses the view that the concept of majority rule for common maintenance should apply.
13. PMAS have considerable experience of dealing with major repairs and maintenance where advance funding requires to be collected. PMAS believes that the requirement to deposit money in advance with no guarantee of when or if the work will be done is a appropriate but agrees that safeguards are desirable. Monies deposited should be ring-fenced and held in a designated client account.

14. PMAS believes that the majority which should be required for a mass discharge or variation should be 75% of affected proprietors.

15. In the interests of justice PMAS believes that all benefit proprietors should be notified and have an opportunity of objecting prior to the discharge or variation of burdens.

18.-

22. In common with the PMAS views on Chapter 2 the view of PMAS is that all proprietors should be notified of the discharge or variation of implied tights.

23. PMAS believes that the appropriate period for manager burdens should be five years. If a developer or Local Authority continues to hold property they should be treated as an owner and have a single vote in common with other owners in the property. The same situation should apply for Local Authority developments and accordingly the period of five years should apply.

24. PMAS does not envisage manager burdens being used in circumstances other than those suggested.

25. PMAS believes that the appropriate qualified majority is 75%. Voting should be on the basis of ownership of units and not number of owners. This would allow a Local Authority or developer to continue to influence matters until they were reduced below 25% of ownership.

While there is no discussion point on Development Management Schemes, PMAS wishes to record its approval of the proposals of the Management Scheme contained in the draft Bill.

26. PMAS agrees that a right to lead a pipe etc. over land can be a servitude. It is not anticipated that the retrospective nature of this section will create difficulties.

30. PMAS agrees that the twenty one day period for objections to applications to the Lands Tribunal is adequate.

31. PMAS agrees with what is proposed for the exclusion of pipeline servitudes and facility burdens from the operations of sections 98(1) and 99(1).

35&

37. PMAS has no comment to offer on these points but members of PMAS who are also members of RICS will be seeking to make their views on these points known through RIGS.

36. PMAS believes that it is unjust that development value burdens should fall with compensation paid along the lines of the 2000 Act and that compensation should be based on up to date values.

38.&

39. The view of PMAS on these points is the same as the views stated in the responses to discussion points 23 and 25.

We trust that our comments on the Discussion Paper will be of some assistance to the Scottish Executive in its consideration of the terms of the Title Conditions Bill. We
confirm that PMAS has no objection to its views being circulated to other consultees and interested parties.
SUPPLEMENTARY SUBMISSION FOR THE TITLE CONDITIONS (SCOTLAND) BILL

Professor Paisley's suggestion that the Bill be extended to cover inter alia s75 agreements under the Town and Country Planning (S) Act 1997

There is considerable force in what Professor Paisley says regarding s75 agreements stultifying future development because there is no existing mechanism for review. The Title Conditions Bill is concerned with private rights rather than public rights which s75 agreements deals with exclusively. There is of course the exception of conservation burdens and maritime burdens in the Bill. Nevertheless our view is that this might prove contentious and we would not wish to see the current bill held up as a result of this issue. It is a point which might require further reflection and it seems possible to us that additional grounds of jurisdiction could be given to the Lands Tribunal at a later date by legislation designed for that purpose. Professor Paisley perhaps suggested a partial solution himself by reference to ECHR Protocol 1 Art 1 which might lead to a review of a local authority's actions either under the Scotland Act or the Human Rights Act.

Professor Paisley's suggestion of the extension of the Act to what he refers to as timeshares.

Insofar as his suggestions refer to rights of pre-emption between pro indiviso owners they coincide with our own. Beyond this we do not consider that there is any good reason for extension as suggested by Professor Paisley

Professor Paisley's suggestions re servitudes regarding roads and the ability of the Lands Tribunal to make orders determining shares of repairs.

Our experience is that maintenance obligations in respect of servitude rights over roads frequently lead to disputes and his suggestions here are most welcome.

John McNeill's suggestions regarding the suspension of the appointed day for the Title Conditions Bill

The scheme of reform carefully constructed by the SLC has to be adhered to. We can foresee only disadvantage in separating the appointed day for feudal abolition and reform of title conditions when the two are intimately linked. There is no convincing case for this suggestion.

Reform of standard securities

In our oral evidence we suggested that the SLC be asked to review the law relating to standard securities. Among the reasons are:
(a) the fragmentation of the existing law, the 1970 Act, the 1971 Act, the Heritable Securities Act 1894, amendment in the 2000 Act, further amendment in the Title Conditions Bill, together with the uncertainties created by the very poorly drafted Mortgage Rights (S) Act 2001 This is a classic case for consolidation into a single coherent code. However the code needs to be reconsidered as a whole.

(b) the standard conditions in Schedule 3 to the 1970 Act, which were intended to be standard, are substantially departed from in contemporary practice. SC 5 regarding insurance does not reflect insurance practice [market value/reinstatement value] and SC6 relating to the competing relationship between creditors and tenants of the borrower as interpreted by the Trade Development Bank cases does not appear to produce satisfactory results. A lender knowing the business of a borrower is the letting out of properties can defeat the legitimate interests of tenants without having to show any detriment. Borrowers such as housing associations end up negotiating complex side agreements to protect their tenants’ rights when resorting to private finance.

(c) Whether s25 of the 1970 Act imposes a single duty to obtain the best price or whether it a duty to advertise and to get the best price. The tests as applied by the courts do not require a high standard from creditors where there is development potential in the repossessed subjects and which potential may have been taken into account by the creditor in reaching the decision to lend in the first place.

(d) uncertainty exists regarding the right of redemption and the extent to which this is controlled by inter alia the Consumer Credit Act 1974 and the Unfair Terms in Consumer Contract Regulations 1999 as amended and general contract law. These appear to conflict with the language used in the 1970 Act

(e) The extent to which a creditor under a security calling up the security has to take account of diligence executed by unsecured creditors is unclear.

(f) the inter relationship between standard securities and floating charges and respective ranking rights requires clarification.

(g) the uncertainties introduced by the Mortgage Rights (S) Act 2001 should be revisited.

(h) the perimeters of the principle in Smith v Bank of Scotland require clarification particularly when the 1970 Act s9 permits third party securities without any apparent limitations and without the imposition of a requirement of good faith on the lender.

(i) the definition of debt and whether, as suggested by Professor Paisley, this could be extended to negative obligations.
(j) The problems inherent in ranking pecuniary obligations and obligations *ad factum praestandum*.

**Development value burdens and clawback provisions**

There has been a great deal of ill informed comment about development value burdens. That has largely been because the term development value burden has been much misunderstood. The terminology was introduced by s33 of the Abolition Act. For a burden to qualify as such then at the time when the property was first conveyed and the burden imposed either there was no consideration or the consideration was significantly lower than it would have been had the burden not been imposed. It covers situations where a superior say gave off ground for no consideration or little consideration where the ground was to be used for say community purposes. An example might be giving off ground for a bowling green or a tennis court. [Gorrie and Banks v Musselburgh Town Council]. Development value burdens as defined in the Abolition Act cannot be satisfied in a situation where a farmer sells of fields at agricultural value to a developer and enters into an agreement with the developer to share the future development value where the developer subsequently obtains planning consent for development within an agreed period. The reason is that there is value at the current use value and not for no consideration or one significantly lower than might have been paid had the burden not been imposed. In any event this rather artificially expects the developer to accept a burden to use only for agricultural purposes. This requires subsequently to be waived and if this route is followed it tends to be set out in a fairly elaborate contract.

Further under the existing Lands Tribunal rules in relation to compensation which are largely replicated in the Bill compensation can be paid on the basis of the difference in value which existed at the time the burden was imposed comparing the price paid, if any, with that which could have been obtained. This was the basis on which compensation was awarded in Gorrie and Banks above and has been the established basis for over 30 years without any significant objection. Interestingly the Bill itself adopts a similar approach in relation to compensation for the loss of reversionary rights under the School Sites Act 1841. This approach we feel is correct.

The Bill makes no further provision for development value burdens

What are referred to as clawback arrangements in the Explanatory Memo para356 are not for the reasons given above development value burdens. Essentially the arrangement is a contractual one. If the creditor in a contractual obligation has concerns about the ability or willingness of the debtor in a contractual obligation he may wish additional security for performance of those obligations. Such a security may take the form of a security over the subjects sold but equally might take the form of a bank guarantee.
The developer who purchases the property may require to finance the purchase and may require to grant a standard security over the property to a bank. Normally the seller is required to take a second charge postponed to the lender and the lender is happy that a second charge is granted. As the first security is typically an all sums due and to become due security the seller is the party at risk as second charge holder. The point made in para 356 is to that extent wrong. The person in right of the clawback is already ranking second the provisions regarding intimation in s13 of the 1970 Act.

The issues are fully discussed and well summarised in the SLC Report para 9.30 et. seq.

We are not aware of any problem with developers not being prepared to grant securities. It is a matter for contractual negotiation in each case. Developers are keen to secure property for their land bank and, in our experience, understand the issues and are fully prepared to grant postponed securities. These may require to be adjusted with the financing institution to ensure a satisfactory ranking arrangement.

The problem with the 1970 Act s13 in relation to 'advances' is well known and often results in elaborate ranking provisions to get round the deficiency in many circumstances as well as clawback situations. We consider the replacement of 'advances' with 'debt' will significantly improve all the situations particularly as this will have the effect of bringing in the extended definition of 'debt' in s8(8)(c) of the 1970 Act.

We have heard views expressed that real burdens can be used to secure clawback arrangements. This is incorrect, such burdens require to be for a fixed sum to satisfy the precision test expressed in Tailors of Aberdeen v Coutts and typically not expressed as a fixed sum but as a proportion of the increased value once consent has been obtained. Secondly there is already considerable doubt as to whether pecuniary real burdens of this type remain competent - that of course is removed by the express prohibition on pecuniary real burdens in s105 of the Bill.

With regard to local authorities disposing of property at less than market value the provisions of s75 of the Town and Country Planning Act 1995 give them significant flexibility in securing performance of obligations which are less restrictive than the rules for the constitution of real burdens and adequately protect the public interest in such matters.

The power to vary or waive burdens: s52 of the Bill
For there to be an implied right to enforce a burden under a common scheme the tests set out in Hislop v MacRitchie's Trs as interpreted in subsequent cases apply. Such a right on third parties may be express which is comparatively rare and therefore the implied right is of importance. "There requires unless it appears from the titles under which he holds his feu that such similarity of conditions and mutuality of interest among the feuars either had been or was meant to be established." This reciprocity may be
demonstrated by a common plan [either a map or a common intention] and a common intention may be shown by an obligation to insert like conditions in other titles of part of the development.

It is well understood that by reserving the power to vary or waive burdens in the constitutive deed there can be no implied power to enforce the burdens vested in third parties. This method of preventing the creation of implied rights is regularly resorted to by conveyancers and their intentions are thwarted by s52 of the Bill. This section was not in the draft bill and we do not welcome it.

A purchaser may buy on the basis that a superior is unlikely to object to a future extension to a house but if neighbours are given rights under s52 where none presently exist then that purchaser's present legitimate expectations may be thwarted by the provisions of s52. It seems to us that the underlying policy behind the Bill of removing unenforceable and redundant burdens is being wholly reversed by s52 for reasons which are unconvincing to us.