JUSTICE 1 COMMITTEE

AGENDA

31st Meeting, 2002 (Session 1)

Tuesday 24 September 2002

The Committee will meet at 1.45pm in Committee Room 1.

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

2. **Items in private:** The Committee will consider whether to discuss items 5 and 6 in private.

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

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

   Lorna McGregor, Legal Adviser, COSLA, Andrew Fraser, Principal Solicitor, North Ayrshire Council, Eric Leggat, Solicitor, North Lanarkshire Council and Malcolm MacAskill, Principal Estates Surveyor, South Ayrshire Council, SOLAR (Society of Local Authority Lawyers and Administrators) and ACES (Association of Chief Estates Surveyors & Property Managers in Local Government), Councillor Sheila Gilmore and Eddie Bain, Council Solicitor, City of Edinburgh Council,

   John Wright, QC, Member of the Tribunal and Neil Tainsh, Clerk, Lands Tribunal for Scotland,
5. **Public Appointments and Public Bodies etc. (Scotland) Bill**: The Committee will consider a draft Stage 1 report to the Local Government Committee.

6. **Prison Estates Review**: The Committee will discuss a draft motion for the proposed Committee debate on the Committee’s report.

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

**Agenda items 1 and 4**
Note by SPICe and Adviser (private paper) J1/02/31/1
Submissions on the general principles of the Title Conditions (Scotland) Bill at Stage 1 from:
- COSLA, SOLAR (Society of Local Authority Lawyers and Administrators) and ACES (Association of Chief Estates Surveyors & Property Managers in Local Government)
- City of Edinburgh Council J1/02/31/2
- Glasgow City Council J1/02/31/3
- Lands Tribunal for Scotland J1/02/31/4
- Bruce Merchant, South Forrest Solicitors J1/02/31/5
- Scottish Landowners Federation J1/02/31/6
- Glasgow Housing Association Limited J1/02/31/7

 supplementary evidence from Hanover Scotland J1/02/31/8
Equal Opportunities Committee Stage 1 Report to the Justice 1 Committee J1/02/31/9

**Agenda item 3**
Correspondence from SACRO (Safeguarding Communities Reducing Offending) regarding the Committee’s alternatives to custody inquiry J1/02/31/10

**Agenda item 5**
Note by the Clerk (private paper) J1/02/31/11

**Agenda item 6**
Note by the Clerk (private paper) (LATE PAPER) J1/02/31/12
Scottish Executive ‘Report of the Review Group on the Future Management of Sex Offenders within Scottish Prisons’ J1/02/31/13

**Papers not circulated:**

**Agenda items 1 and 4**
The Title Conditions (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: http://www.scottish.parliament.uk/parl_bus/legis.html#54

**Agenda item 5**
The Public Appointments and Public Bodies etc. (Scotland) Bill (and Explanatory Notes and Policy Memorandum for the Bill) are available from Document Supply or on the Scottish Parliament website at: http://www.scottish.parliament.uk/parl_bus/legis.html#56

**Agenda item 6**
Papers for information circulated for the 31st meeting, 2002

Correspondence from the Scottish Executive regarding the Committee’s alternatives to custody inquiry
I attach the following papers:

**Agenda Item 1 and 4**
Supplementary submission from Scottish Law Agents Society     J1.02.31.16
Submission by Professor Robert Rennie                        J1.02.31.17

**Agenda Item 5**
Note by Clerk (Private Paper)                                J1.02.31.11

20th September 2002                                          Tony Reilly
Introduction

As democratically elected bodies with a remit touching upon a range of functions and activities, local authorities have a key role in the strategic control of land.

Local authorities have a history as major players in the property market ranging from residential, amenity/community and commercial purposes and it is probably the case that the majority of land in local authority areas has at one time or other passed through their hands.

Local authorities are likely to continue to have a significant interest in property dealings in their areas when exercising their range of functions and duties including those as housing providers, education authorities and as significant facilitators of economic development in their areas.

Reform

It is recognised that in the 21st Century there is a need to move from an archaic and outdated feudal system to make ownership practices more relevant to modern day society and as such the fundamental reform of the system which has commenced under the Abolition of Feudal Tenure (Scotland) Act 2000 is welcomed by COSLA, SOLAR and ACES.

While a number of concerns previously raised by COSLA, SOLAR and ACES have been addressed in the Bill, a number of major items have not been addressed. The particular matters on which submissions are necessary are:

- The lack of any power granted to local authorities to impose development burdens similar to that granted to Scottish Enterprise.

- The opportunity should be taken to introduce a statutory definition of “repairs” and “improvement” to allow for there to be an enhanced element of repairs permitted in common properties to reflect modern day standards.

- The proposals in sections 77 to 79 in relation to the School Sites Act are a missed opportunity.

- Land tribunal powers in relation to Section 75 Agreements – the exclusion of these from waiver by the tribunal is welcomed but, in light of other submissions to Justice 1 Committee, there is merit in explaining the reasons
warranting such exclusion.

Compulsory purchase – the provisions in Section 95 to 97 in relation to the effect that schedule conveyances on existing burdens are confused.

Minor matters.
The registration of notices will have resource implications for local authorities and a dispensation to register certain types of notices should be given to local authorities.

Our comments on each of these matters, in turn are as follows:-

1. **Power to impose title conditions where necessary in pursuance of statutory functions.**

In Section 101 of the Bill, the executive recognises the need for the Enterprise Companies to be able to impose title conditions in certain circumstances. The existing power to do so contained in Section 32 of the Enterprise and New Towns (Scotland) Act 1990 has been preserved in an amended form.

There are a number of reasons why the Enterprise Companies required such a power and these include:-

(a) The Enterprise Companies are under a statutory obligation to sell land at full market value. Often a piece of ground which is to be sold for industrial use will have a reasonable prospect of obtaining planning consent for retail or residential use. If the Enterprise Companies were unable to impose a user restriction, it would be necessary to sell the land for a price which reflected the potential for such use. This could deter a potential developer or inward investor. Accordingly, the imposition of a use restriction as a title condition can be a means of lowering the purchase price to attract inward investment. In a competitive market this can be very important.

(b) In many cases the Enterprise Company will have used public money to acquire and to regenerate land, often moving dereliction. It is important that if public money has been spent to secure a particular use, that such a use can be enforced by a title condition.

(c) Many developments involve additional monies from Europe and other grant authorities. Inevitably these grant making bodies require that the land be used for the purposes of the grant for a fixed period (usually 10 years). If this cannot be imposed by means of a title condition, then the grant may be repayable. As the grant is given to the Enterprise Company it will be the Enterprise Company, rather than the particular industrial concern, which will have to repay the monies.

All of the foregoing applies to local authorities, with equal force. Local authorities spend public money to acquire and regenerate sites and seek to attract inward investment. Similarly, local authorities require to satisfy Europe
and other grant awarding bodies (such as the Lottery, SportScotland, National Foundation for Sports and the Arts, etc.) that the use will continue for a fixed period. If it is accepted that there is a justification for allowing the Enterprise companies to impose title conditions in pursuance of their statutory powers, then this should also apply to local authorities.

We would argue strongly therefore that local authorities should be given a power to enter into statutory agreements designed to restrict the development or use of land in the future, similar to that being afforded to Enterprise bodies. This power should accord with the new power of well being which is a power of first resort for local authorities to “do anything to promote or improve the wellbeing of the area”.

We would strongly resist any suggestion that local authorities should be granted a similar power but restricted to use for economic development purposes. There is a good case that the local authorities require a much wider power to impose title conditions than contained in Section 101. Local authorities presently impose similar title conditions for purposes other than economic development. For example:

(i) Local authorities impose restrictions on use where they sell community facilities or sports pitches to community organisations at less than market value;

(ii) The local authority receives external grant assistance from a wide range of bodies, for a wide range of statutory functions. Each of these is likely to require that the use of the properties be maintained for a defined period (usually ten years). For example, grants are available for a wide range of lottery purposes, to improve heritage and townscape and for sporting and recreational purposes.

(iii) Moreover, the Local Government in Scotland Bill imposes duties of community planning and a power of wellbeing. These envisage that the local authority will engage in a greater degree of joint working across the public, private and voluntary sectors, with flexibility through the delegation of functions from one public body to another, in order to deliver improved public services in the implementation of this Bill. Functions actually delivered by local authorities, particularly through joint ventures and partnering arrangements are therefore likely to expand. More local authority land will be transferred to such joint ventures or community organisations and there will be an increasing need for a power to impose title conditions to restrict the use of such ground.

It was understood that the Scottish Executive was prepared to consider the insertion of a clause in the Bill to grant such a power. We are disappointed to note that no such power is contained in the Bill. In our view this is essential. It has been suggested that local authorities can achieve a similar means of control by granting leases. This is not appropriate for two reasons. Firstly, the aim of the feudal system and title conditions reforms is to simplify the existing law, rather than result in a change to leasehold tenure. Secondly,
leases will often not be acceptable to either grant making bodies or investors.

It is therefore suggested that local authorities be allowed to impose title conditions which are necessary to promote or improve the wellbeing of:

(a) its area and persons within that area; or

(b) either of those.

If the Scottish Executive is concerned that this may be too wide, then we would welcome provisions to the effect that title conditions should not be imposed in respect of existing residential properties and would accept a sunset rule of 50 years for such burdens. We would also accept that any such burdens should be subject to the jurisdiction of the Lands Tribunal.

As regards existing burdens, we accept that it is difficult to define which burdens should remain. In these circumstances we would accept a provision that existing burdens which met these criteria, should only remain in force in the event that the local authority recorded a notice to this effect, within a 10 year period.

**2. Problems faced in mixed tenure estates.**

Local authorities face difficulties when factoring and managing a range of mixed tenure housing and commercial schemes and complexes. The fundamental problem facing Councils in relation to the management of mixed tenure housing schemes is persuading owner-occupiers to pay for repairs but even more so in relation to having owners participate in improvement work.

Clause 28 of the Bill will allow a majority of owners of units to effect the maintenance of common facilities. However, the Executive has rejected the argument that the majority rule should also extend to improvements. The definition of what constitutes “improvements” should be looked at so that where improvements offer better value for money than repairs, these should be enforceable by a majority of owners.

In its Policy Memorandum, the Executive concedes that real problems exist in mixed tenure estates. The Executive’s proposed solution of requesting the Housing Improvement task Force to make recommendations on how these problems may be tackled is vague and unsatisfactory.

The regulation of the management particularly of council estates is invariably effected through the title conditions and the Council will therefore have to embark on a resource intensive and complex exercise of the task of evaluating and registering the burdens or Deeds of Conditions which it is desirable to retain. The Bill should either make an exemption to preserve the feudal burdens imposed by local authorities as superiors or set out a minimum set of maintenance obligations for owners of common property.
3. **School Sites Act**

Sections 77 to 79 of the Title Conditions Bill deal with reversions under the School Sites Act 1841. It is our view that, while the sections partially address some of the existing problems, they represent a missed opportunity.

At the outset, it should be recognised that this apparently obscure piece of legislation is causing widespread and significant problems to local authorities. In some local authorities (those where the bulk of estates were subject to entail in the 19th century), almost all of the older schools will be subject to School Sites Act restrictions. Often it will be those older schools which are least suitable for modern educational provision. It will be those schools which, under any rationalisation or PFI/PPP scheme, are most likely to come under the spotlight.

There are a number of problems which have arisen from the School Sites Act, which include: -

(a) The Keeper is not willing to grant a full indemnity for the sale of any old school, even if the title does not contain any reference to the School Sites Act. We accept that the Bill provisions, by changing the reversion into a right to compensation, will remedy this problem.

(b) The history of the School Sites Act is that it provided a means whereby estates subject to entail could dispose of sites for schools. The provision for the reversion was essentially a technicality, which avoided any breach of the entail. In the 19th century, estates accepted that they lost the ground, possibly in perpetuity. There is now evidence that Superiorities are being purchased by title raiders, who lack the philanthropy that the old estates had.

(c) There remains doubt as to which titles the Schools Sites Act 1841 applies to. It has been argued that, even if the title deed contains no reference to the 1841 Act, that it may still be burdened by the reversion. For this reason, the Keeper was not willing to grant a full indemnity for deeds which contained no reference to the 1841 Act. In addition, it is often difficult to identify the person entitled to the reversion.

(d) Even if the site remains in school use, if it is intended to redevelop the site by PFI or PPP, the lenders will look for evidence of a clear title.

With the exception of the first item, the Bill has not addressed the remaining issues.

Would urge the following changes:

(1) Some sales under the School Sites Act were at value. In the case of these sales the reversions should be revoked without compensation. The purpose of the School Sites Act was to enable heirs of entail to transfer
properties. If they had already been compensated for the sale then they should not be compensated again.

(2) It is recommended that the right to compensation in terms of the reversion should not be triggered in the event that the local authority spends the capital receipt on education capital projects. Essentially this re-enacts Section 14 of the 1841 Act and puts reversion holders back into the same position as 1841. The abolition of Section 14 appears to have been an accidental and unwitting result of the repeal of the Act in 1845.

(3) Reversion holders should have a period of ten years in which to register a reversion under the School Sites Act. Thereafter all reversions would fly off. Since it is arguable as to which deeds the reversion applies to, provisions should be made for intimating any such notice to the local authority and for any disputes to be resolved, presumably by the Lands Tribunal. This solution has the advantage of allowing local authorities to plan with certainty, in the knowledge of which properties are affected by reversions.

(4) In Section 79, the prescription period is five years from the coming into force of Section 79 of the Title Conditions (Scotland) Act 2002. The five year period is welcomed, as there is doubt as to the application of prescription. Paragraph 10.52 of the Law Commission’s report on real burdens contains a useful summary of the position regarding prescription, and indicates that prescription could be 10 or 20 years. In the light of this, it is questioned why the five-year period only runs from the date of the coming into force of Section 79. Would this not create a right to compensation in respect of properties sold ten or twenty years ago, where the right to compensation had previously prescribed?

It is understood that the Scottish Executive was reticent to entirely abolish reversions under the School Sites Act 1841 in light of human rights considerations. Presumably this was in light of Article 1 of the first protocol. It should however be noted that Article 1 contains a number of qualifications, referring to the public interest and the general interest. It is recognised that interference with possessions has to be proportionate. It is submitted that the COSLA proposals are proportionate. In dealing with issues of proportionality the following points are worthwhile to bear in mind:

(a) The original purpose of the School Sites Act is to enable heirs of entail to sell or gift school sites. There was little if any, expectation that individual superiors would ever see sites returned, certainly within their lifetime. Instead the reversion was a device to ensure adequate educational provision, while getting round the restrictions of entail.

(b) As detailed in paragraph 10.50 of the Law Commissions report on real burdens, Section 14 of the 1841 Act empowered Education Authorities to sell or exchange the original site for another “more convenient and eligible site”. The repeal of Section 14 in 1945 unwittingly reduced the flexibility open to local authorities under the original Act, increasing the frequency of reversions incurring and giving Superiors an unintended windfall.
(c) Both the Scottish Executive and local authorities are keen to improve educational provision in Scotland, to maximise best value, to rationalise resources where possible and to look to more innovative ways of providing resources (such as PFI and PPP). The existence of the School Sites Act restrictions hinders these laudable policy objectives.

(d) There are many title conditions or burdens which could conceivably have a value and come within Article 1 of the first protocol. The Bill abolishes the Superior’s right to enforce these, except in limited circumstances where a notice can be recorded. In our submission, there is little difference between this legislative solution and the one proposed above.

(e) The notice provisions recommended by us have the benefit of certainty, insofar the notice procedure will provide clarification of what properties are affected by the reversion. Without the notice procedure this will remain in doubt.

(f) The evidence is that the right to enforce School Sites Act reversions is falling into the hands of title raiders, who have little if anything in common with the original estates who granted that title.

4. The Lands Tribunal and Section 75 Agreements

We welcome the Bill provisions which do not allow the Lands Tribunal to waive agreements under Section 75 of the Town and Country Planning (Scotland) Act 1997. However, it notes, with concern Professor Paisley’s evidence to the Justice Committee that the Lands Tribunal should be able to review Section 75 Agreements.

In our view the law relating to Section 75 Agreement has developed as part of planning law, rather than the law relating to real burdens. Reference should be made to Scottish Officer Circular 12/1996 on planning agreements. This notes that such agreements should only be sought where they are required to make proposals acceptable in land use planning terms. They should only be used where it would be wrong to grant planning permission without them. Effectively, they are used where the planning authority does not have the power to impose planning conditions which would otherwise make the development acceptable. An example is where a development requires road infrastructure to be installed outwith the development site. This could not be dealt with by way of planning conditions, but could dealt with under a Section 75 Agreement. In the event that the Section 75 Agreement was not imposed, the alternative would be refusal of permission.

It should also be pointed out that a Section 75 Agreement is a tripartite agreement. It is between the Council as planning authority, the owner of the ground and the person applying for planning permission. The latter two parties are often different. A condition is invariably contained in the deed to the effect that if the obligations are breached, then the Council would be able to revoke any planning permission granted without compensation. Given this
contractual relationship with the developer, and given the planning background, Section 75 Agreements do not fall comfortably within the normal law relating to title conditions.

It also appears unjust that where a developer has obtained planning permission by virtue of the existence of the Section 75 Agreement, that he should be able to apply for a variation or waiver by the Lands Tribunal. No one has ever suggested that the Lands Tribunal should have power to vary planning conditions. For the same reasons they should not have power to vary Section 75 Agreements.

5. Compulsory Purchase – Effect of Schedule Conveyances on title conditions

For Compulsory Purchase Orders, Section 95 to 97 of the Bill attempted to clarify the title condition position after the making of a Compulsory Purchase Order or schedule conveyance. Both COSLA and Scottish Enterprise had previously urged that clarification of the title position following a schedule conveyance should be inserted in the Bill. Very often a public authority is able to acquire land voluntarily and it would be a major disadvantage if they were no longer able to use schedule conveyances of a means of extinguishing previous ground burdens.

The received wisdom is that the effect of a schedule or statutory conveyance is to suspend the feudal chain upwards from the disposing proprietor to the crown during the ownership of the acquiring authority. What remained open to debate is as to the position of real burdens following disposal by the acquiring authority. The issues were thoroughly debated in articles in the journal of the Law Society of Scotland in June 1990, January 1992 and February 1992. In his February 1992 article, Professor McDonald took the view that all burdens flew off and did not revive, stating “on due recording of a valid schedule conveyance, the existing interest in the dominium utile acquired by the acquiring authority and all superiority interest intervening between that interest and the Crown are all extinguished absolutely and a new permanent statutory title is created in place thereof for the benefit of the acquiring authority and its successors and assignees whatsoever … … that leaves no conceivable basis to support an argument that, on a subsequent disposal by an acquiring authority holding on that new statutory title, an earlier land obligation affecting an interest now extinguished, whether in the form of a condition of tenure or a servitude, could possible revive and once again become enforceable”.

Section 96 of the Bill attempts to deal with this. While the aim of the Section is laudable, we feel that it is unnecessarily complex, and introduces unnecessary requirements. The Section provides that notice of the statutory conveyance should be given to the owner of any benefited property, who can then apply to the Lands Tribunal for renewal of the title condition. Two points are worth making, firstly, there is presently no requirement for an authority exercising compulsory purchase powers to notify those entitled to enforce burdens. Secondly, there is no power at present for such a benefited
proprietor to attempt to retain title conditions. As the existing law (that all burdens are extinguished on a schedule conveyance) is not amended, it is difficult to see the rationale behind these amendments. Certainly, they will result in further administrative inconvenience and delay in processing site assembly. Elsewhere, the Government is committed to increasing the speed of compulsory purchase and in simplifying it, and these steps are in the wrong direction. All that was needed was a provision to the effect that on recording of a statutory of schedule conveyance that any real burden or servitude over the land shall be extinguished in all time. Thereafter if, as at present, any benefited proprietor feels that he has a claim, then he can submit that claim to the acquiring authority.

6. Minor Matters

(a) Section 75 Agreements – Section 75(4) of the Town and Country Planning (Scotland) Act 1997 contains a reference to infeftment. Arguably this has feudal overtones and should be removed by amendment. The Title Conditions Bill would be an obvious place to make this small amendment.

Charging Orders – the abolition of the Feudal Tenure (Scotland) Act 2000 contains a provision to the effect that securities need only contain a description sufficient to describe the subjects. This is to get round the problems experienced in the Beneficial Bank case. It would also be useful to have a similar provision in relation to charging orders and notices of payment of improvement grant. The former are imposed by local authorities under a variety of statutes including The Building (Scotland) Act 1959, the Housing (Scotland) Act 1987 and the Health and Social Services and Social Security Adjudications Act 1983 (Community Care Charging Orders). The latter are imposed under Section 246 of the Housing (Scotland) Act 1987. It would be useful to have the provision in the 2000 Act applied to these Orders and Notices, since the effect of the Beneficial Bank case may be the same in relation to such orders.

7. Resource Implications.

The effective management of the consequences of the Bill will to a resource intensive activity to search all properties held by Councils, register burdens to be preserved and Deeds of Conditions in the case of common properties, where possible or appropriate. If Councils do not effect this diligently there is scope for criticism in the event that the public purse is not adequately protected and third parties or owners take advantage of the gain in the event of certain burdens falling.
JUSTICE 1 COMMITTEE

TITLE CONDITIONS (SCOTLAND) BILL

Submission from the City of Edinburgh Council

1. Recommendations of City of Edinburgh Council

1.1 The Title Conditions (Scotland) Bill and the Scottish Executive programme of property law reform has major implications for the City of Edinburgh Council. These lie mainly in the Council’s strategic housing and landlord functions, and its planning, estates and economic development roles. The Council welcomes the Bill. However there are a number of areas which, we believe, require further investigation and possibly amendment. These include:

- The Council welcomes the principle of majority decision-making in regard to common property but favours the extension of these powers beyond that of default provisions.

- The Council urges the Scottish Executive to liaise with the UK Government to create legislation to permit the establishment of owners’ associations to provide an effective management of common property and enforcement of common obligations allied to an informal system of arbitration.

- The Bill should make provision for a minimum set of maintenance obligations for owners of common property.

- The Council seeks reassurance that the Bill will provide sufficient time for the proposed registration of Deeds of Conditions relating to mixed tenure estates.

- The Bill should be drafted so as to avoid any possible “gap” in the enforcement of amenity burdens in mixed tenure estates.

- The Bill should designate local authorities as conservation bodies entitled to enforce and create conservation burdens.

- Local authorities should be able, in the public interest, to enforce development value burdens.

- The Council welcomes the Scottish Executive’s intention to protect the interests of local authorities in relation to clawback provisions.

- The Bill should amend the application of the 100 metre rule in relation to common burdens in a master plan/estate plan area.
2. City of Edinburgh Council and property law reform

2.1 The Title Conditions (Scotland) Bill is based on a draft Bill produced by the Scottish Law Commission. The content of the Bill is closely linked with the already enacted Abolition of Feudal Tenure etc (Scotland) Act 2000. The statutory regime represented by these two Acts raises very significant issues for the Council as a landlord and in relation to its strategic housing role.

2.2 The legislation also involves the interests of the Council as planning authority particularly in relation to conservation burdens which seek to preserve or protect the architectural or historical characteristics or other special characteristics of property.

2.3 Other matters encompassed by the Bill are significant in relation to the Council’s estates and economic development functions. This is particularly the case regarding development value burdens. This is where a condition has been imposed to ensure that land sold at reduced value continues to be used only for the specific purpose for which it was conveyed. Alternatively these burdens can make provision for clawback arrangements where, for example, if planning permission is secured for a change of use after disposal the Council obtains an additional payment.

3. Common maintenance in tenements and other property

3.1 One of the most pressing challenges for property owners in the Council’s area, including the Council itself as landlord, is securing the effective common management of tenements and other jointly owned properties. Around 60% of Edinburgh’s citizens live in flats where there are shared common maintenance and repair responsibilities. Most of these properties have no effective arrangements in place to allow owners to organise and fund common maintenance.

3.2 There are about 5,500 tenements in the Council’s area which were built before 1919. Because of their age these older tenemental buildings require particular attention to ensure that they are safe and kept in a reasonable state of repair. Each year around 550 major repairs contracts, mostly on tenemental property, are undertaken as a result of the service of statutory notices by the Council in the absence of repair arrangements jointly agreed by owners.

3.3 Almost half of the Council’s housing stock has been sold under “right to buy” legislation, thereby creating mixed tenure estates where the Council as landlord, individual owners and, increasingly, private landlords need to work together to maintain and repair the common parts of these properties.
3.4 **Public safety in Edinburgh is increasingly at risk** because of inadequate maintenance of older tenemental property. Several recent incidents in Edinburgh have highlighted the potential for deaths and injuries which result from falling masonry from ageing and poorly maintained buildings.

3.5 These factors specified in the preceding paragraphs point to the need for a clear and effective legal framework for the management of common property maintenance and repair. A fundamental existing problem is the ability of one party to prevent the implementation of desirable, and sometimes essential, repair work. Sections 27 and 28 in Part 2 of the Bill seek to address this problem in its provisions relating to “community burdens” and majority voting.

3.6 There are, however, several important factors which stand in the way of the creation of a fully effective legal framework. The first, and arguably the most fundamental of these factors, is that the majority decision-making provisions of the Bill to appoint managers and instruct repairs are default provisions. They do not apply if the title deeds already make provision for decision-making on common maintenance.

3.7 Some title deeds may contain provisions which define “majority” by reference to respective values of properties or, worse still, stipulate the need for an unanimous decision on the part of owners. As the Bill is currently drafted, these title deed provisions would continue to apply.

3.8 Another important factor that stands in the way of establishing effective “communities” is the lack of a mechanism to establish owners’ associations or other form of corporate body to which flat-owners would have to belong as an obligation of ownership. Under the proposals for majority decision-making, owners in the majority who decided to appoint a factor or property manager or decided to undertake certain identified repairs would still face substantial difficulties in recovering costs from other owners in the minority who did not wish to co-operate. Owners associations or some other form of corporate body would help create a recognised framework for making decision and holding all owners to these decisions.

3.9 **Owners’ associations** could be responsible for managing common property, undertaking regular inspections and providing a mechanism for obtaining contributions from individual owners. The ability to establish such owners’ associations would also lend itself to a linked system of pre-court informal arbitration to resolve disputes amongst owners regarding common property maintenance. These proposals were included in the Council’s proposals to the Scottish Executive Housing Improvement Task Force.
3.10 The Scottish Law Commission’s draft Bill outlined a “development management scheme” which provided scope for the establishment of an owners’ association as a body corporate for new developments. Such a scheme could have been extended to embrace traditional flatted property as well as new developments. It is therefore particularly disappointing that the current Bill omits these provisions. The Policy Memorandum published alongside the Bill explains that an owners’ association would be a “business association” which is a reserved matter on which the Scottish Parliament cannot legislate. It is stated that the Scottish Executive is considering, with the UK Government, how to proceed. The Council feels strongly that the Scottish Executive should seek the enactment of legislation by the UK Parliament that would allow the establishment of owners’ associations in Scotland.

3.11 The Bill does not make provision for a minimum set of maintenance and repair obligations to be placed on owners individually or as a community. Whilst it is difficult to deny that the primary focus must be on the democratic decision of the majority in common property, there are wider community and public safety interests which do point to a need for a minimum set of obligations to ensure that property is adequately maintained. These could include a regular property inspection and a schedule of works which require to be carried out on the building.

3.12 A related issue may be that some works which may be seen by the majority of owners as desirable might be regarded in law as improvements rather than maintenance. There were suggestions during the consultation exercise on the draft Bill that the majority rule should extend to improvements. This view is rejected by the Scottish Executive, primarily on the footing that it would be wrong to allow the majority to force other owners to spend money on improvements which they do not want. The Scottish Executive points out that the definition of “maintenance” (in section 110 of the Bill) is described as including “such … improvement as is reasonably incidental to maintenance”. This is a fairly restrictive definition and there should be scope for its widening to embrace work which is reasonably necessary to ensure that common property is seen to reflect the standards of provision applying to property generally as these standards are recognised as changing over the years.

4. Mixed Tenure Estates

4.1 One of the most complex aspects of the Bill is the effect that it, and the Abolition of Feudal Tenure etc (Scotland) Act 2000, will have on local authority and other social housing estates. For many years local authorities have created a feudal relationship with purchasers reserving power to enforce burdens. In terms of the 2000 Act amenity burdens currently enforceable by the Council as feudal superior would have been lost unless the Council registered a vast number of notices to preserve
enforcement powers. The Scottish Executive has recognised the serious expressions of concern voiced by local authorities and social landlords about the magnitude of the task in registering notices.

4.2 The regime proposed by the Bill aims to provide for the saving of amenity burdens by their being treated as community burdens capable of enforcement by all owners in the community. This would be the position where all the properties in a development had been sold off subject to the same or similar burdens and therefore form part of the same common scheme.

4.3 A much more common situation is, of course, the mixed tenure estate where the right to buy has been exercised for only some of the properties. In that situation only the units which have been sold off form a “community” with the units remaining in Council ownership excluded from that community. A possible solution to that problem would be preservation of the rights of local authorities to enforce feudal burdens. That solution has been rejected by the Scottish Executive because (a) it is felt to be difficult to defend in face of accusations of discrimination and (b) it runs counter to the central philosophy of the legislation to remove feudal powers and empower communities.

4.4 The solution proposed by the Scottish Executive is to propose that local authorities should register Deeds of Conditions effectively burdening the properties which they still own with the same burdens as those affecting the properties which have been conveyed under the “right to buy” legislation. This would create communities in mixed tenure estates and provide the benefits of operating within a coherent community regime. Local authority and other social landlords would, along with other individual owner-occupiers in a community, then have an equal stake in majority voting.

4.5 The merits of this approach are recognised. Despite the description in the Policy Memorandum of the registration of Deeds of Conditions as “a relatively simple process” there is seen to be a need to scope the feasibility and logistics of the approach suggested by the Scottish Executive. This is particularly important since Deeds of Conditions require to be registered before the appointed day for implementation of the legislation. This will inevitably take substantial time and resources for local authorities and other social landlords to organise. The Scottish Executive need to ensure that the statutory regime provides sufficient time for the registration of Deeds of Conditions against local authorities own property.

4.6 The Bill’s intention appears to be that amenity burdens will be saved by being treated as community burdens. Some amenity burdens are of particular significance given that they aim to prevent use of a property
which would involve nuisance or disturbance to neighbours. The burdens must, of course, affect all the common properties in the same or similar way. In addition, however, the Bill indicates the need for an express reference in the deed to an intention to impose burdens on the properties with a common plan in mind or, alternatively, words implying the existence of a common scheme. Against this background it would seem prudent to emphasise to the Scottish Executive the need for the legislation to be structured to avoid any possible “gap” in the enforcement of amenity burdens in mixed tenure estates.

5. Conservation burdens

5.1 Part 3 of the Bill deals with conservation burdens. These burdens make provision for the purpose of protecting architectural or historical characteristics, or other special characteristics of particular land or property. Conservation burdens can only be created or enforced by bodies which are designated as conservation bodies in terms of regulations made by Scottish Ministers.

5.2 The Policy Memorandum states that local authorities “can be designated as conservation bodies”. Given the Council’s role as planning authority there would seem to be a case for the Bill itself expressly stating that local authorities will be conservation bodies.

6. Development value burdens

6.1 A development value burden is a real burden which has been imposed in exchange for a reduced purchase price. For example the Council may have sold land on the basis that it was to be used only for gardens or recreational purposes. The approach taken in the 2000 Act was that such burdens should not generally be saved but the feudal superior would be able to register a right to compensation if the burden was breached in the 20 year period following the date when the legislation came into effect.

6.2 Representations have been made that the intention of such a burden was to protect the particular use for which the property had been sold and this intention was not fulfilled by the payment of compensation. The Policy Memorandum states that the Scottish Executive has not been persuaded by these representations. The Council feels that the public interest is best served by an ability to enforce a development value burden.

7. Clawback arrangements

7.1 Clawback arrangements refer to situations where the seller of land anticipates the potential for enhancement in the value of the land being sold and seeks to achieve a share of that enhanced value. For example land may be sold at values based on agricultural land but the purchaser, or his successor in title, may subsequently obtain planning permission for
housing development. Unlike development value burdens where the seller’s intention is to restrict the use to that stipulated in the disposal, the seller’s interest is to obtain payment reflecting enhanced value. The Scottish Executive’s view is that clawback arrangements are not valid real burdens. They are aimed at protecting a financial interest and do not meet the test of benefit to other land. The Bill provides additional protection for standard securities over land supporting clawback provisions. Many public bodies have indicated to the Scottish Executive that standard securities alone do not offer sufficient protection.

7.2 The Council has made extensive use of clawback provisions in land disposals. The Council welcomes that the Scottish Executive accepts there are good arguments for allowing local authorities to protect land sales and its intention to discuss the best way of achieving this protection with COSLA and other public authorities.

8. The 100 Metre Rule

8.1 The 2000 Act makes provision for the protection of feudal burdens if the feudal superior owns a building used for human resort or habitation on neighbouring land within 100 metres of the land to which the burden relates. The burden can be preserved by registration of a notice. The special arrangements proposed for preserving amenity burdens in housing estates are referred to elsewhere in this evidence. These proposed special arrangements will not apply to the very considerable number of other feudal burdens created by the Council. The 100 metre rule will apply in these cases.

8.2 The Scottish Executive has resisted representations aimed at removal or amendment of the 100 metre rule. Nonetheless it is felt that, in one particular situation, the 100 metre rule is too arbitrary. When feuing arrangements based on an estate or master plan have been carried through the clear intention has been to establish a common and uniform system of burdens for the estate as a whole. A rigid and arbitrary application of the 100 metre rule defeats this intention when the Council does not own a building within 100 metres of all parts of the estate. In these circumstances an amendment allowing for registration of a notice when the feudal superior continues to have title to a building within the whole master plan/estate plan area or within 100 metres of any part of it would seem to be appropriate and reasonable.

Michael Thain
City of Edinburgh Council
JUSTICE 1 COMMITTEE

TITLE CONDITIONS (SCOTLAND) BILL

Submission from Glasgow City Council

The Council’s Legal Services Feudal Reform Group has considered the Title Conditions (Scotland) Bill as introduced to the Scottish Parliament. The Bill has since its inception by the Scottish Law Commission and as subsequently adapted and taken forward by the Scottish Executive been subject to discussion and comment. In its present form, as introduced to Parliament, it has been subject to welcome amendment by the Scottish Executive in reaction to previous responses. Against that background Glasgow’s current response is selective rather than comprehensive.

Glasgow, like nearly all interested parties, is supportive of the tidying up and restatement of the law concerning burdens and conditions affecting land and as will be seen one of its principal concerns relates to matters which have been discussed and set aside for consideration, but not included in the Bill.

While welcoming the modernising code, Glasgow as a large local authority and major landlord wishes to record also that the creation of saving procedures for burdens, extended research and notification in the amended compulsory purchase code and new conveyancing procedure for burdens and servitudes will increase the authority’s responsibilities and workload in various disciplines. And it may only be when the Land Register duly takes into account the effect of the changes in 10 to 20 years’ time that some savings, in human and financial resources, may accrue.

Section A below is a response to the contents of the Bill and the individual numbered parts of it and Section B covers related matters.

1.1 Section A

1.1.1 Part 1 – Real Burdens (Sections 1-23)

The Group welcomes the codification of the existing law and the clarification of the law regarding creation content and termination of burdens. Taken together with the expansion of the Land Register it will be possible in the relatively near future to determine at a glance the burdens affecting most property in Scotland.

- **Section 9.** The Group is of the view that the setting of a threshold of “material detriment” for the degree of suffering which would entitle a benefited proprietor to have an interest to seek to enforce a burden is too high. The Bill should proceed on the basis that burdens fall to be observed by those who must have heed of them. The courts have adequate powers suitably to dispose of any frivolous
action which may be raised by a benefited proprietor and thus to hear actions which are relevant without entering into debates into the scope of such a term.

- **Section 10.** As factor of Council and Right to Buy (“RTB”) homes the Council welcomes the fact that current and former owners are to be severally liable for the performance of affirmative burdens.

- **Section 19.** The Group is concerned that a period of 8 weeks (maximum) for raising objection by a benefited proprietor to a breach by a burdened proprietor may be too short a period for multi-departmental organisations like Councils within which to hold that such a benefited proprietor has acquiesced in the breach. It is suggested that the period be extended to 16 weeks. As has previously been mentioned to the Executive breaches may be carried out with ease and speed and although most major landowners will have good inspection and maintenance regimes breaches may not always be picked up on quickly – particularly in situations where occupational tenants and occupiers having early warnings but whose interests may lie in other directions do not report to benefited proprietors timeously developments which may amount to breach.

**Part 2 – Community Burden (Sections 24 to 36)**

The Group notes that the Executive recognises the difficulty in obtaining consents from co-proprietors (e.g. from RTB purchasers) in relation to improvement schemes and while recognising the rights of such RTB co-proprietors it notes that addressing the concerns of social landlords on the matter has been referred across to the Housing Improvement Task Force.

**Part 3 – Conservation and Maritime Burdens Sections 37 to 34**

The Group welcomes the fact that the Scottish Executive has recognised that local authorities can be designated as conservation bodies.

1.1.2 **Part 4 – Implied enforcement rights - Sections 45 to 53**

The Group welcomes the fact that in the various types of community situation envisaged in Sections 48 to 51 replacement enforcement rights are to be enacted in respect of common scheme burdens.

1.1.3 **Part 5 – Manager burdens (Sections 54-65)**

The Group welcomes the Executive change now to include local authority landlords who retain properties in RTB estates among those entitled to vote for the removal of the manager (which will often be the authority itself). Since a 2/3rds majority is required for removal it is not anticipated that, in practice, local authorities will be dismissed from factorage unless that factorage is very poor and therefore local authorities should be enabled in nearly all instances to continue to manage their estates successfully notwithstanding the dismissal provisions.
Part 6 – Servitude – (Sections 66-72)

The Group welcomes the proposals in the Bill which include the widening of the categories of positive servitude. This will create greater flexibility. The provisions for the conversion of existing servitudes into real burdens will achieve greater clarity.

Part 7 – Pre-emption and Reversion – (Sections 73-80)

- Sections 73-75 – The Group welcomes the amendments in relation to the exercise of rights of pre-emption.

- Section 76 – Is there a reason that compensation provisions are not included in respect of the cancellation of local authority pre-emptions concerning burgh churches?

- Sections 77-79(a) - The Group welcomes the attempt to deal with difficulties created by the School Sites Act 1841 and in particular, in the circumstances outlined in the Bill, the conversion of the right of the holder of the reversion into one to receive compensation. Those difficulties have arisen in practice because the Keeper has, in light of the activities of the title raiders, adopted a cautious approach in the categorisation of titles falling within the compass of the 1841 Act. Could it perhaps be clarified that the right of reversion which is being dealt with is one which requires to be contained in a conveyances drawn with express reference to the 1841 Act and one which is expressly created in such a conveyance, thereby inducing the benefit of the third proviso of Section 2 to the 1841 Act.

- (b) - The reversionary right is triggered by the closure of the school and although it may already be implied it is thought that it would be better to make it clear that the date of valuation for compensation purposes is the date of the closure of the school rather than any later date such as the date of assertion of the right, by which latter date valuations may, perhaps for various reasons, have altered. Although it is acknowledged that the Bill does not seek retrospectively to diminish the value of a reversion holder’s interest in respect of a claim arising prior to the Bill being enacted, the Executive is asked to consider whether there should be an allowance made in the valuation process in respect of expenditure on fabric etc necessarily incurred by an authority prior to closure.

- (c) - The compensation regime envisages payment to the reversion holder of open market value in respect of claims extant before the appointed day; and for claims after the appointed day such open market value under deduction of improvement value (which relates to value of buildings). The City’s surveyors have confirmed that a building or a closed school site may have no value or even a negative value if substantial demolition costs must necessarily be incurred. In these circumstances, the compensation regime proposed may be inadequate. To meet such circumstances, the definition of open market value should be adjusted to reflect the impact of these negative factors.
(d) - It is acknowledged for the future that the 5 year negative prescription will be helpful in clearing away uncertainty which may exist in the matter of claims by reversion holders; but (balancing the public interest against reversion holders’ rights) it is felt that it would be better and that greater clarity and certainty to the local authority would be achieved without prejudicing these reversion holders’ rights by requiring reversion holders to notify the local authority within say 2 years of the royal assent of their intention to seek preservation of that right, failing which the right would fall.

Part 8 – Powers of the Land Tribunal (Sections 81-93)

The Group recognises the requirement for a revised jurisdiction for the Lands Tribunal.

- The introduction of Section 89 of the test of reasonableness in determining applications for variation, discharge and renewal of applications (such test to be with reference to the determining factors listed in Section 90) is welcomed by the Group.

Part 9 – Miscellaneous (Sections 94-106)

- Sections 95/96. The Group recognises that human rights considerations have necessitated the express extension of the compulsory purchase code to take into account the rights of benefited proprietors and burden holders. These amendments will increase the financial and resource requirements of local authorities; and may where land can be acquired by agreement and by schedule conveyance mitigate against the early completion of title by that means where benefited burden holders require to be negotiated with. Any referral to the Lands Tribunal by a benefited burden holder, as well as creating delay, induces into the process a degree of uncertainty.

- Sections 99 and 101. The redefinition of “advance” as including “debt” is welcome; but difficulties remain in as much as if the debt is not yet due or is unquantified at the time of a sale by a postponed creditor then no sums may be due to the first ranking creditor. And if ad factum praestandum standard securities are taken, they may similarly turn out to be of little worth.

Section 101. The issue of “clawback” is referred to below.
SECTION B

2. Abolition of Feudal Tenure (Scotland) Act 2000 – 100 metre rule

The Group sees the 100 metre rule as perhaps artificial but accepts that, it having considered the matter, the Executive will continue with it.

3. Clawback reversion and development value burdens

Glasgow, like many other authorities, is engaged in major exercises and projects of economic and social regeneration and in carrying them through has had the benefit of the ownership of a significant landholding which it is able to offer up for those purposes to community groups, housing associations, commercial operators and other bodies. The prospect of change in the Scottish system of land tenure has impacted on its approach to disposals for such purposes and the Council has been exercised to secure and protect the public interest.

Glasgow is supportive of the weakening of private control on the use and ownership of land (which was inherent in the feudal system) but it sees and thinks there is valid and significant public interest and benefit, not least financially, in seeking to devise means by which the public interest and the public purse can be safeguarded when public land is put to development.

Glasgow is not a member of COSLA but as a major player in many varied legislation projects in the City it is strongly supportive of the arguments which have been put forward for special provision being made in respect of the interests of local authorities. In particular it would wish to urge the importance of (1) early legislative amending action being taken (developed from and along the lines of Section 105 of the Enterprise and New Town (Scotland) Act 1990) in light of the increased level of disposal activity and capital receipts regeneration which is now taking place compared with that which took place in the not too distant past, and (2) local authorities being able to impose financial conditions which run with the land, in the way that is now proposed for Scottish Enterprise.

The Executive is we believe aware that enforceable securities to gain “clawback” may become ineffective or lost for example if another security holder should call up a security over the same piece of land before the amount of clawback due to an authority has crystallised or become calculable. Glasgow has sought to harness standard securities ad factum praestandum to ensure that community interest in completion of a project is secured, but has met resistance (usually from the purchaser/developer’s funders). We believe that agreements to be entered into with public authorities and which run with the lands could be used to secure clawback and, for greater security of the public interest, should be capable of providing for reversion to the authority if the contracting parties have agreed to that.

The Executive may also be aware that restrictions on the use and manner of construction of projects whether by commercial operators or social partners meets the public and community objectives in a manner which planning controls in themselves may on occasion be inadequate to achieve; and in particular use restrictions may benefit local groups and individuals with laudable objectives.
particularly if those groups are in areas of high land values were available and for “social” purposes is limited. It should also be borne in mind that authorities which have transferred their housing stock may no longer be able (as Glasgow was able) to access S15 of the Housing (Scotland) Act 1987 which enabled authorities holding housing revenue stock to enter into agreements with owners/purchasers which would run with the lands.

There will be significant benefits if local authorities can enter into agreements with landowners which are enforceable at their instance against those deriving title to the land after the original purchaser; and in the case of the public interest it must be highly arguable (as mentioned above) that a right of reversion to the local authority (subject always to adequate notice provisions and appeal procedures) should be set in place.

The Group believes that conceptually such proposals represent an extension of public control and administration in relation to the use and development of land; and are quite distinct from the private control of the use of land in the necessary and appropriate diminution of which Glasgow supports the Executive’s objectives.

3.1.1 Local Authority Acquisition by Compulsory Purchase or Otherwise

As a major landowner in Glasgow, this Council often assists developers by contributing land acquired to ensure important large-scale development or indeed by using its compulsory powers to acquire such land, which land is then conveyed on to the developers on the basis that the developers meet its costs.

This Council as a local authority (unlike Scottish Enterprise) is subject to the provisions of the Planning and Compensation Act 1991 and is required to pay additional compensation to the original owner where land acquired is subject to the benefit of more valuable planning permissions in the ten years after acquisition.

This Council would wish that in exercising its functions in respect of major development and regeneration projects that it is no longer subject to this compensation provision.

This compensation provision also applies in voluntary acquisitions by local authorities and it is submitted that the provision should also be abolished in such voluntary acquisitions, i.e. where no compulsory purchase powers are used.

David Black
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Glasgow City Council
JUSTICE 1 COMMITTEE

TITLE CONDITIONS (SCOTLAND) BILL

Submission from the Land Tribunals Scotland

The Tribunal is a judicial body and, as such, has been anxious to ensure that it expresses no views which relate, or appear to relate, to issues of policy. We accordingly did not seek to give evidence to the Committee. We appear by invitation to give such assistance as possible in relation to the possible resource implications of the Title Conditions (Scotland) Bill. We have always been willing to advise on any matters relating to the practical application of new legislation.

1. Brief Description of the Tribunal

Jurisdiction
The Lands Tribunal for Scotland for Scotland has a range of jurisdictions falling into two broad categories: those involving valuation of land; and those involving certain categories of rights to land.

Valuation:
Valuation of land taken by way of compulsory purchase.

Valuation of commercial land for the purpose of fixing rates.

Valuation of land in certain specific categories such as compensation for mining subsidence.

Rights to land:
Disputes arising out of tenants’ rights to buy their homes from public authority landlords. A typical example is the basic question of whether a particular applicants falls into the category of "secure tenant" so as to have a right to buy. Other disputes may arise as to what particular land is covered by the tenancy or what the conditions of sale should be.

Variation and Discharge of land conditions. A typical example is when someone has planning permission to build a new house or extension in his or her garden but the titles give the neighbours a right to prevent this to preserve their view. The Tribunal has jurisdiction to determine whether or not to discharge or vary the restrictive condition in question and therefore whether or not the development will be able to go ahead. The scale of such restrictions varies greatly. A current case
raises the question of whether Aberdeen Harbour Board Trustees should be allowed to prevent Railtrack from building a shopping centre on the goods yard which currently takes harbour traffic.

Appeals from the Keeper of the Register. These can involve any aspect of title to land; including determination of boundaries, title conditions, and claims for compensation against the Keeper.

In addition, the Tribunal sometimes acts, in effect, as arbiter under voluntary references, brought jointly by disputing parties. This most commonly arises in relation to various types of compensation claims.

**Members**

Because of the range of jurisdictions the workload is subject to quite distinct swings. In recent years the Tribunal has not been over-extended and, as a result of retirements, the President has been able to cut back in staffing. Currently we have Lord McGhie as President. He combines this post with that of Chairman of the Scottish Land Court. Both organisations are administered from the one building but with separate office systems. Alistair MacLeary, FRICS, is a full-time surveyor member. John Wright, QC, is a recently appointed part-time legal member and Roger Durman, FRICS, is a recently appointed part-time surveyor member. In most cases the tribunal which takes the hearing is made up of one lawyer and one surveyor.

**Administration**

The Tribunal’s administrative staff consist of the Clerk and the Deputy Clerk, each of whom is, in accordance with a practice of long standing, seconded from Registers of Scotland Executive Agency, and one administrative assistant.

**Procedure**

Although it is regarded as an “expert tribunal” it is important to keep clearly in mind that the Lands Tribunal functions in broadly the same way as a Court. The expertise allows for a quicker process – the fundamentals can be taken as understood and parties can therefore concentrate attention on the particular issues arising in the case in dispute. However, the role of the tribunal is to decide between competing parties. It is up to the parties to put such evidence as they wish before the tribunal. The task of the tribunal is to assess the evidence. It applies its expertise in this assessment but will not simply substitute its own views. The aim is to reach a decision based on the evidence presented to it. The tribunal is not an investigative body.

Our prime consideration is to deal “ judicially” with all issues coming before us. In other words to ensure that matters are dealt with fairly and impartially and with all parties having proper notice of issues and evidence. We try to conduct cases as informally as is consistent with maintenance of a proper
judicial approach. Our Clerk and clerical staff are approachable – and easily accessible by telephone to discuss procedures – and regard it as their main function to assist parties dispose of cases in the most efficient way. We try to avoid formality when possible while recognising that where serious issues are in dispute a degree of formality is necessary to avoid any suspicion of unfairness.

The Tribunal usually sits in Edinburgh. However where there is a need for inspection or where the convenience of witnesses requires, it is common for us to sit in the locality of the subjects in dispute. When possible we sit in the local sheriff court but may have to sit in council chambers, hotels or other suitable public facilities.

The Tribunal Rules oblige decisions to be accompanied by a written statement of reasons. In addition, many of the disputed cases before the Tribunal deal with specialist issues which are in the nature of test cases. Accordingly the Tribunal tends to give detailed and considered opinions, which can take some time to prepare.

2. Effect of Title Conditions (Scotland) Bill on Tribunal’s Workload

(i) In general, we find it extremely difficult from our vantage point to assess changes in the number of applications to the Tribunal, particularly the extent to which the new jurisdictions to renew and preserve conditions will be used.

(ii) It may be appropriate to keep in mind the distinction between the administrative and the adjudication workloads, although some aspects of the tribunal’s work - e.g. case management and procedural issues, span both.

(iii) Restatement of relevant factors in applications for variation or discharge (s.90). This of itself would appear unlikely to lead to any increase in the actual numbers of applications so, in this regard, the administrative workload would be unaffected. However the level of enquiries might very well increase and there may initially be a small but temporary increase in the number of cases requiring adjudication, as a result of the need to test the effect of the restatement.

(iv) It is possible that the reduction in enforceable conditions, by application of the ‘Sunset’ rule (and the general abolition, under the 2000 Act, of superiority conditions which are not successfully reallocated under Part 4 of the Act) will reduce the number of applications for variation or discharge.

(v) New jurisdiction to determine validity, etc. of real burdens. We think that this will often be ancillary to applications for variation or discharge. We would expect it to lead to some increase in both administration and adjudication. However, it may ameliorate present practical problems in
some applications where competency is in question, and in that way perhaps save some administrative time.

(vi) Certification. The ‘Sunset’ rule (s.19), and the new power to discharge or vary community burdens (ss.32, 34) involve the new procedure of certification by the Tribunal or Clerk that no application to renew or preserve has been received. In the former case, s.22(b) introduces the further complication in cases where the application to renew only partially affects the proposed termination. These procedures will undoubtedly lead to some increase in the administrative workload. We find it impossible to predict the extent of that increase. In the case of the ‘Sunset Rule’, it will depend on, among other things (a) how far solicitors go in alerting clients, and (b) how far clients decide to go in making applications – matters which are very difficult for us to predict.

(vii) Renewal (s.81(1)b – primarily, ‘Sunset Rule’) and Preservation (s.81(1)c). In these cases, ex hypothesi, there is, at the time of the application, disagreement. Again, we find it impossible to predict the numbers of such applications or the extent to which opposition will be maintained so as to require adjudication. There will certainly be some increase in both the administrative and the adjudication workloads.

(viii) We appreciate that the Bill contains some other miscellaneous new jurisdictions for the Tribunal, but the impact of these would not appear to be large.

(ix) Section 88 (entitlement to the grant of unopposed applications) requires also to be considered. We would not expect this to result in any reduction in the administrative workload: applications will still require the same substantial input at the stage of intimation procedure and in the consideration of their competency and of the form of discharge Order to be made. As far as adjudication is concerned, almost all unopposed applications are presently dealt with without a hearing. The adjudication workload will therefore be only slightly reduced.

(x) We understand that the ‘appointed day’ may be fixed approximately 18 months after the enactment of this Bill. During that period, new tribunal rules and forms will require to be drafted and consulted upon, and substantial preparation and training of staff will be required.

3. Other New Jurisdictions

(i) Abolition of Feudal Tenure Etc. (Scotland) Act 2000. This gives superiors the opportunity, prior to the appointed day, to apply to the Tribunal to reallocate or save burdens where the ‘100 metres’ rule is not satisfied, the procedure being, as we understand it, comparable to the applications to renew or preserve under the present Bill. It is, again,
extremely difficult to predict the numbers of such applications. We have noted issues raised about rural situations, and it might be that a number of contested applications testing the approach to be applied under this provision can be expected, increasing both the administrative and the adjudication workloads. Any effect will of course only last for a definite period up to the appointed day.

(ii) Housing (Scotland) Act 2001 – amendments to ‘Right to Buy’. So far as we can see, it seems unlikely that these changes will result in any significant increase in applications to the Tribunal, although there may be some tests on the new exemption provisions.

(iii) Land Reform Bill. Disputed valuations following exercise of community purchase rights may not be numerous, but may be complicated and will apparently require ‘fast-track’ adjudication. This would appear to impact primarily on the adjudication workload, with even a small number per year capable of having significant effect.

(iv) It should also be mentioned that proposed changes to the jurisdictions of the Land Court in relation both to Crofting and to Agricultural Holdings could affect the availability to the Tribunal of the President.

4. Conclusions

(i) Any conclusions can only be tentative.

(ii) At this particular point in time, the Tribunal’s workload does not cause problems, although surges in applications under the existing jurisdictions can happen, for example rating appeals following quinquennial Revaluations. The Tribunal’s present complements, both of administrative and of adjudication personnel are, however, at minimal workable levels.

(iii) Previous evidence to the Committee from experts in the field seems to suggest a substantial surge of applications under the new procedures in the 2000 Act and this Bill, with some additional workload also coming from the provisions of the Land Reform Bill.

(iv) There will clearly be some increase in the administrative workload under the new procedures, leading to a need for some increase in office staff. In this connection, we would draw attention to the advantages in the present practice of secondment from the Registers of Scotland to the Tribunal. The existing expertise and experience of such staff is enormously useful in the administration of the Tribunal on the land rights part of its work, and it is to be hoped that this practice can be continued in any additions to the Tribunal’s administrative personnel.

(v) The increase in adjudication is extremely difficult to assess, but it does seem likely that there will at some stage, perhaps shortly after the
‘appointed day’, be such an increase as to make some increase either in the membership or in the commitment of the present part-time members necessary. We think this will certainly be the case when this is taken along with the effects of other new jurisdictions.

(vi) We have noted the views of some of the experts who have given evidence to the Committee, but ourselves tend to the view that, at least looking at the net result of this Bill alone, there may not be such a significant volume of additional work as to cause any serious problem. The position might be different when the effect of other legislative changes, including those proposed in the Land Reform Bill, is also considered. Overall, however, it is difficult to predict with any certainty.

Neil Tainsh
Clerk
Land Tribunals Scotland
I have been a solicitor in private practice for over 30 years. During that time I have taken a particular interest in housing developments as well as acting for both private householders and businesses in the purchase and sale of property.

I was a member of the Advisory Group which commented to the Scottish Law Commission on its proposals. I am also a member of the Conveyancing Committee of the Law Society of Scotland.

In the following comments I illustrate my concerns regarding certain aspects of the Bill by reference to houses. However similar considerations apply in relation to other types of property including industrial and commercial buildings and land.

**SUMMARY**

1. One of the Bill’s stated objectives is to reduce the number of outdated conditions on land by making it easier to discharge or vary them. Along with the Abolition of Feudal Tenure etc. (Scotland) Act 2000 it is intended to provide a modern and simplified framework from property ownership in Scotland.

   I am of the view that there is a real risk that the Bill will fail to achieve these objectives for the following reasons:-

1.1 Breaches of conditions normally only come to light when a property is being sold. This is particularly common in the sale of private houses. [See 2 below]

1.2 The effect of the Bill will be that many house owners will now require to get the consent of numerous other house owners although they did not require to do so in the past. [see 3, 4, 5]

1.3 The combined effect of these provisions will be that a great deal of the good which is envisaged in the Bill will be nullified. [see 6]

1.4 These difficulties could be avoided by the following relatively simple alterations to the Bill:-

   Section 8 Only owners should be entitled to enforce land conditions.

   Section 48 & 52(1) a) Where there are already implied rights of enforcement, these should be restricted to properties within four metres of the burdened property; and

   b) Where there are no implied rights of enforcement at present in a Deed of Conditions, these should not be created now.
2. **Why are Title Conditions a Problem?**

2.1 It is the practice in Scotland for developers and builders selling housing to impose conditions on house purchasers. The developer or builder commonly retains the right (as a feudal superior) to enforce these conditions by inserting them in the title of each house.

2.2 An example of such a condition might be a prohibition against any external alteration to a house without the permission of the superior (i.e. the former builder or developer).

2.3 That means that if the house owner wants, for example, to erect an extension at the rear of the house, he should first obtain the consent of the superior. In practice house owners rarely ask for this consent although they will normally get planning permission and building warrant for such works.

2.4 However when the owner comes to sell, a purchaser’s solicitor will not normally accept the position because of the risk that the superior might later demand that the extension be taken down. Accordingly to get the purchaser to accept the title the seller has to go to the superior or superior’s solicitor and ask for either:-

   a) a Minute of Waiver – a formal document which is required where there is an absolute prohibition against alterations; or

   b) a Letter of Consent on behalf of the superior where the condition says that alterations can only be carried out with the consent of the superior.

2.5 The superior may demand a payment and his solicitor will make a charge for giving the consent. The seller of the house has little alternative but to accede to this arrangement because otherwise the house sale cannot proceed.

2.6 That is the simple situation where one only has to deal with one person who has the right to object. It is apparent that if more than one person has the right to object, one must communicate with each of them and their legal advisers with a corresponding increase in cost. In essence, that is the problem with certain of the provisions of the Bill.

3. **Enforcement of Conditions by other House Owners**

3.1 Sometimes house owners in a development are given the right to enforce the title conditions against each other.

3.2 These rights may be given expressly in the house owners’ titles by the builder.

3.3 In other instances they may arise by implication in accordance with complex legal rules.

3.4 If these rights exist then the problems for the house seller are multiplied as he must approach several house owners for consent instead of one superior.

3.5 These rights normally arise from the use of Deeds of Conditions.
4. **Deeds of Conditions**

4.1 Instead of repeating detailed conditions at length in the title deed of each house it has become common practice since the 1960’s for the builder or developer to record a Deed of Conditions in the Sasine Register or Land Register before selling any houses in the development. The Deed of Conditions sets out all the conditions to apply to the houses in the development. In the title for each house it is stated that the conditions in the Deed of Conditions apply.

4.2 Depending on the wording of the Deed of Conditions:-

a) Each house owner may have express rights to enforce the conditions; or  
b) Such rights may be implied by law; or  
c) There may be no such reciprocal enforcement rights.

4.3 The Scottish Law Commission recommended that for case (b) only neighbours within four metres should retain these rights but otherwise there should be no change.

4.4 It is proposed in terms of Sections 48 and 52(i) of the Bill that, where there is a Deed of Conditions affecting more than four houses, all of the house owners will have the right to enforce the conditions against each other even where they do not have any such right at present.

4.5 The proposal that conditions which are not enforceable at present by neighbouring proprietors should in future be enforceable I consider to be of great concern and potentially very damaging.

5. **Enforcement by Non-Owners**

5.1 The right to enforce conditions is also extended by Section 8 of the Bill to tenants, liferenters and non entitled spouses of the owners. This provision, which runs counter to the recommendation by the Scottish Law Commission, creates several problems.

5.2 There is no register from which one can identify tenants of houses and non entitled spouses. It is difficult enough to get consents when those entitled can be ascertained by examining a register. However if the right to enforce is to be extended in this way, this will inevitably create considerable uncertainty and expense. This alone would make the Bill a backwards step as compared with the present position.

5.3 Even if one can trace the people involved, one will be faced with the additional expense of obtaining consent from each of them e.g. there could be separate consents required from the owner, his or her spouse and their tenants.
6. **Practical Difficulties in Getting Multiple Consents**

6.1. I can think of at least one development of one hundred houses where I have acted for developers in granting feu writs. As on numerous other building developments for which I have been responsible, I specifically reserved the right to vary or waive the conditions and to depart from any development plan so that no implied right to enforce the conditions is conferred upon the neighbouring proprietors. I recently acted in the purchase of one such house within that very development where it was found that an extension had been carried out to the property. This required the consent of the superiors which the seller had simply not obtained.

6.2. If it had been necessary to obtain the consent of every neighbour (of whom there might have been 6 or 7) there would have been little or no prospect of the purchase proceeding. It would probably have been impractical and the cost would have been prohibitive. It would certainly not have been possible to obtain or dispense with the consent of all 100 owners within a reasonable time.

6.3. Firstly it would be necessary to identify house owners. This could well involve searches in the Registers with a cost in excess of £100.

6.4. Secondly some might be unable to consent within a reasonable time. Some might be confused or very elderly with no person appointed to act on their behalf.

6.5. Thirdly each house owner would refer to his, her or their solicitors who would require to investigate the matter and make a charge for doing so which would have required to have been borne by the seller. In each case this could have been in the range £50-£250. Titles would often be with lenders who will charge £40-£75 for exhibiting them.

6.6. The alternative methods of getting or dispensing with consents in Sections 32 to 35 of the Bill would be unworkable.

6.7. That of course only deals with the owners. In addition there would be the difficulty of tracing tenants and non-entitled spouses.

6.8. The system works reasonably well at present notwithstanding the theoretical difficulties arising where there are implied rights of enforcement because they are often ignored and there are few examples of enforcement.

6.9. However it requires to be appreciated that once new legislation is in place new life will be breathed into the remaining real burdens. Every purchaser’s solicitor will require to assume that any breach of a real burden or condition is unacceptable and will require to obtain a consent or waiver. As explained above it could often be impossible to proceed with a sale because such consents could not be obtained:–

a) at all;
b) quickly enough; and

c) at an acceptable cost
6.10. If new rights of enforcement are created this will have precisely the opposite effect of what the present reform is trying to achieve; the rights of feudal superiors will be enforceable by more people not fewer. The harm done will outweigh many of the benefits of the present reform.

Bruce Merchant
South Forrest Solicitors
Previous Papers

SLF incorporates in its evidence its previous Parliamentary Submission and Executive response. It adopts and repeats the points and references it makes in those papers in this evidence. Points from those papers are selected for quotation and repetition below, but that is not to take away from SLF’s positions as set out in the whole of the two earlier papers.

SLF’s Interest in the Bill

SLF is the representative organisation for owners and managers of rural land of widely varying types and extents throughout Scotland. Members include many rural business people in all sectors - tourism, agriculture, and a range of diversified rural enterprises. Almost 60% of SLF members own less than 500 acres; SLF has a well informed, realistic perspective on the way the current system of tenure of land may affect a land manager whose land marches with that of a number of neighbours, and may indeed itself surround that of one or more neighbours. Members will have to operate the provisions of the new legislation on a day to day basis. Its detail is therefore of critical concern to them, and will impact directly on the financial position of farms, rural businesses of many kinds, and those holding and managing rural land for other purposes.

SLF’s Concerns about the Contents of the Bill

While SLF is pleased to see that its representations at 3.5 of its Parliamentary Submission and in discussion point 35 in its Executive Response are largely met by the provisions of Section 102 (5) of the Bill, which would insert a new Section 65A Sporting Rights in the Abolition of Feudal Tenure etc. (Scotland) Act 2000, it continues to have grave concerns about two of the subjects dealt with in the Annex to the Policy Memorandum to the Bill. These are respectively: the 100 metre rule (paragraphs 147 to 154, both inclusive) and development value burdens and claw back (paragraphs 155 to 165 both inclusive).

The 100 Metre Rule

SLF is most disappointed at the Scottish Executive’s decision not to amend the Abolition of Feudal Tenure etc. (Scotland) Act 2000 so as to remove the 100 meter rule (paragraph 154 of Annex).

SLF advanced detailed arguments against the 100 meter rule in both its Parliamentary Submission and its Executive Response.
The inflexibility of the rule, as drafted, is inappropriate. As the law stands at present, the beneficiary of a real burden which has been constituted in a disposition who seeks to enforce such a real burden must meet the test of demonstrating, qua owner of an area of land, a patrimonial (i.e., a monetary or amenity) interest to enforce. It is unlikely that such an interest could be demonstrated unless the benefited proprietor's land is adjacent to the burdened ground. But such an interest might well be demonstrable without the existence of a dwelling house within the short distance of 100 meters.

Circumstances in rural areas are so various that flexibility is essential. It may well be that it is difficult to differentiate between urban and rural areas for this purpose, but any such difficulty should not under any circumstances be allowed to become a reason for imposing upon rural areas any provision which is not adequately adapted to them and gives rise to injustice in practice.

In a rural context, the requirement for a dwelling house within 100 metres is not a relevant or applicable test. This can be well illustrated by the evidence of practical examples - for instance, the case of the working farmer who has "feued off" a cottage in the middle of his farm, but at some distance from other buildings. He undoubtedly has a very strong interest in the use to which that cottage may be put. Proprietors of burdened ground are protected by the "interest" test (see paragraph 3.3 below). The imposition of a "proximity" test, would be acceptable to the extent of being in practice a requirement to demonstrate interest, but any question as to the use of the benefited proprietor's land (e.g., for a dwelling house) should not be part of any "proximity" test. Apart from the practicalities of the situation it puts a former feudal superior at a significant disadvantage compared with an outright seller of land who faces no such test to determine the enforceability of burdens imposed by him as just explained. SLF believes that the Committee would be assisted by the opportunity of looking at evidence of illustrative examples in some detail on the ground. There cannot be anything to lose, and there could be a great deal to gain by doing this.

In many rural situations (and this must be contrasted with urban and suburban situations which will inevitably be different) the "100 meter" rule will not cover a case where a former superior has a very good reason to preserve a former feudal real burden, and the only possible option for someone seeking to do so will be to go to the Lands Tribunal - unless, of course, in a particular case, agreement can be reached.

The apparent justification for the imposition of this hurdle on former feudal superiors is the fear of indiscriminate registration of former feudal real burdens. That would of course be extremely undesirable. SLF believes it can be demonstrated by practical example that this fear is unfounded.

First, many feudal real burdens could not possibly be enforceable now, because the superior can not demonstrate the necessary interest, if he is challenged. [At present, a feu superior's interest to enforce a feudal real burden benefiting his superiority is presumed, but it can be questioned and negatived.]
Second, superiors will only go to the considerable time, trouble and expense of seeking to preserve the former real burdens that really matter, and will concentrate efforts to do so on those alone - typically, in a rural context, in the house in the middle of the farm case already mentioned. The identification of every individual feu pertaining to each superiority, and the registering of the appropriate notices in each case would involve a huge amount of work, and enormous cost. That is a very effective practical deterrent against any attempt to go for a mechanical mass preservation of existing feudal real burdens.

Third, any person seeking to enforce a former feudal real burden which has been reallocated by one of the methods set out in the Bill will have to demonstrate interest to do so. That is a severe but appropriate test. It is the test which currently has to be met when seeking to enforce a non-feudal real burden. It would be utterly illogical and quite pointless for a former superior to seek to reallocate a feudal real burden if there is in fact no prospect of enforcing it, and no former feu superior would waste his own time and money trying to do so. That fact provides a "built in" filtering mechanism.

Fourth, the "interest" test, applied to a reallocated former feudal real burden, fully meets both the policy objectives involved - that of weeding out redundant burdens, (for the reasons just given), as well as that of placing former feudal real burdens on the same footing as ordinary burdens created in dispositions. It is the only test which should be adopted to qualify a former feudal real burden which has been duly registered for preservation by reallocation (thus giving "title" to enforce) for enforceability.

It does not advance attainment of the Abolition of Feudal Tenure etc. (Scotland) Act's policy objectives to require a feu superior to pass a former feudal real burden through the distinctively different and more severe test of demonstration of "substantial loss or disadvantage" to him if the burden were to fall (or, at least, not to subsist in a modified form). The "substantial loss or disadvantage" test is not applicable at any stage in the process of seeking to establish either title, or interest to enforce a real burden constituted in an ordinary disposition. The imposition of the "substantial loss or disadvantage" test in the Act inevitably puts a superior at a disadvantage as compared with an ordinary seller of land. The Policy Memorandum on the Bill explicitly stated that such a result would be unfair. If there is to be a double test at all, and there are very strong arguments against that, then putting the very much more difficult, new test first must be to put the cart before the horse; it makes the second test ("interest") redundant.

It must be borne in mind that even if a real burden, whether a feudal burden, a former feudal burden which has been preserved, or a burden created in an ordinary disposition can be enforced, there is still a further protection for the proprietor of the burdened land. He may apply to the Lands Tribunal to have any land obligation, which includes any type of real burden however created or preserved, varied or discharged, and many such applications are wholly or partially successful.

All SLF's experience and enquiries suggest that increasingly from the end of the First World War, to the extent that it has become general practice, it is a question left to the preference of individual solicitors acting in land transactions whether missives
call for a feu disposition or an ordinary disposition. Thus, when a farmer sells off a plot of land on his farm and quite reasonably wants to ensure that the buyer can only use the plot in ways that will not adversely affect the working of his farm, it can be a matter of chance whether the burden or burdens imposed on the plot when it is sold are attached to his farm land or his superiority. In such circumstances, and many parallels arise in urban and suburban areas, it will be quite unjust if the farmer is to be put to all the trouble and expense of having to build a house within 100 metres or go to the Lands Tribunal in an attempt to preserve his protection just because one conveyancing mechanism has been used rather than another. And what happens to the burden registered under the 100 metre rule when the relevant dwelling falls into disuse, or is demolished? The land management considerations involved are precisely the same in each case.

SLF accepts that the further back one goes, the more examples will be found of burdens constituted in feudal writs in cases in which the feu superior does not also own property contiguous to the burdened property. In such cases, while the feu superior's right to enforce a burden was (and is until the relevant provisions of the 2000 Act are brought into force is) to be presumed, such a presumption has always been capable of displacement. In reality, in all but a very few cases, where the feu superior did not own land contiguous to the burdened land the presumption could have been displaced, because the owner of the burdened land would have been able to show that the feu superior did not in fact have the necessary interest.

SLF's point is that there is a very sharp distinction to be made between two classes of feudal burdens.

The first class is where the feu superior does own land immediately contiguous to the burdened land, and where as a consequence prima facie he could successfully, as a matter of fact rather than of law, rebut an allegation by the proprietor of a burdened property that he had no interest to enforce the burden. As a matter of law, under the 2000 Act, a burden in precisely similar terms could have been automatically preserved, irrespective of the existence of a dwelling on the ground if only it had been constituted in a disposition rather than a feu disposition. SLF can see no justification whether on land management or conveyancing or public policy grounds for such discrimination in the case of feudal burdens falling within this class and is of the opinion that it will give rise to ECHR difficulties.

The second class is formed by those feudal burdens where the feudal superior does not own ground contiguous to the burdened ground, and where consequently the presumption that he has an interest to enforce could readily be displaced. Further, if he attempted to create a burden by way of a disposition, he would almost necessarily lack the interest to enforce it and would be thrown back on any contract in so far as he might be able to enforce the same. It will be very unlikely that any ECHR difficulty could arise under the 2000 Act provisions on preservation in relation to burdens in this class.

There are two further points to be made. First, the Scottish Law Commission's assumption that no interest can exist without a dwelling house in the vicinity was misconceived, at least in a rural context. It would, to take an extreme example, be hard to say that the owners of the farm next to the Raychem factory near Falkirk
would not have had an interest in preventing such an activity on their boundary, if they had had the benefit of an appropriate condition. And we do not see that our contiguity test would be more liberal in an urban situation, which is where the existence of apparently (but not actually) enforceable conditions causes difficulty and, perhaps, injustice; on the contrary, the contiguity test in a town is more stringent than the 100 metre rule.

Second, no former feudal superior is going to devote the resources necessary to register burdens indiscriminately. It will only be worthwhile to register burdens in which there is a real interest to enforce, since only those burdens will be enforceable. That will require an exercise to identify the title to burdened property, and the particular burdens, before carrying out the elaborate registration process which must be done on a "case by case" basis. The cost of registration alone is unlikely to be less than, say, £300 in fees and registration dues, and the time cost of the whole exercise two to three times that, per property.

Recommendation

Accordingly SLF strongly recommends that the 2000 Act is amended so that "the 100 metre test" is replaced with the requirement that the land to which the benefit of a superior's condition must be transferred is land which is contiguous with the burdened land. Thus he can preserve it in exactly the same way as he would have been able to do if in the first place the burden had been created in favour of his land, rather than his superiority, as would have been perfectly possible. The SLF notes the arguments in favour of continuity of implied rights of enforcement for immediate neighbours in Paragraphs 86-91; a similar 4 metre test would be appropriate as a definition of "contiguous."

In the case of former feudal real burdens which benefit superiorities where the former feu superior does not own land contiguous to the burdened land, it is unlikely, as has already been pointed out, that as a matter of fact the feudal superior would be able to demonstrate the necessary interest to enforce. This critical and significant difference does justify a difference in approach and accordingly SLF believes that in the case of burdens falling within this class a former feudal superior should only be able to preserve it where the proprietor of the burdened property agrees to this course, or in what would inevitably the very rare case in which he could persuade the Lands Tribunal that he should be allowed to do so.

SLF is sure that if these recommendations are adopted the Scottish Executive would have nothing to fear from indiscriminate attempts to preserve former feudal real burdens, since only those former feudal real burdens with the same qualification for enforcement as ordinary real burdens would be eligible for automatic preservation. In all other cases, a filtering mechanism would apply, and as has been pointed out, it seems likely that many former feudal real burdens would fail to pass.

Development Value Burdens and Claw back

SLF believes that there are good reasons for the Scottish Executive to reconsider its decision not to change the 2000 Act to allow development value burdens to be saved (Paragraph 159).
In the first place, SLF believes that in cases (and there are a considerable number of them throughout the country) where superiors parted with land for a considerably reduced payment, or indeed for no payment at all, reflecting a feuing condition restricting the use of the land concerned (to give examples of such uses, those of amenity ground, sports fields, building of school houses), the feuing condition imposing the restriction should be capable of preservation on the same basis as a right to enter or otherwise make use of the burdened land or a right of pre-emption. (In some cases, the relevant restriction may continue to be enforceable in some other way, i.e. by means of a standard security, but that will by no means always be the case). Such a provision would be only fair to former superiors and their successors.

In the second place, even if a development value burden does fall as a consequence of the provisions of the Act, there certainly ought to be an effective prohibition upon former feuars becoming able to make what could be potentially very large windfall profits as a consequence of transactions (e.g. with housing developers) which were originally excluded by a restriction on use imposed in conjunction with a reduction in consideration for the grant of the feu, or indeed in a feudal grant for a nominal or nil consideration.

SLF cannot understand why the right to claim compensation is only assignable in the limited circumstances set out in Section 33 of the Act. The Scottish Law Commission stated that it did not wish to see a market in compensation rights, which is a small risk when compared with the inconvenience of a restriction on something which would otherwise be freely transmissible.

The basis of compensation must take account to an appropriate extent of the realities of present day land values and the loss of legitimate expectations to enforce particular rights. The Act does not do that.

Rights of Pre-emption

Your Clerk specifically asked us if we could offer some comments upon the merits or otherwise of rights of pre-emption. From our perspective, representing the owners of farms, rights of pre-emption enable farming families to sell plots of land to members of their families, employees and other purchasers with the facility of being able to bring the plots back into the farm where reasons exist to do this. For example, the location of a particular plot may make it entirely suitable for a family or an employee with previous involvement in or knowledge of farming and its operational requirements whereas it might not be so suitable for a general purchaser. A sale subject to a right of pre-emption might allow the farm to generate a capital receipt without the risk of operational difficulties in future. Not everyone understands the constraints of living near stock and crops and possible conflict is thus avoided.

SLF is aware that some criticism has been directed against rights of pre-emption on the grounds that where someone holding a right of pre-emption is determined to exercise it in a particular case, other offerers are bound from the start to be disappointed. However, SLF would point out that all but one offerer are bound to be disappointed in every sale, and in many cases, it may be possible for the seller and
the holder of the right of pre-emption to reach agreement, thus obviating the need to go to the open market.

SLF’s recommendation to the Committee is that given the current restrictions upon the exercise of the right of pre-emption, it should be left alone as a useful facility in a rural context.

Finally, SLF would be pleased to assist the Committee further, and looks forward to responding to the Committee's invitation to give oral evidence in due course.

Michael PG Smith W.S.
Legal Adviser
JUSTICE 1 COMMITTEE

TITLE CONDITIONS (SCOTLAND) BILL

Submission from the Scottish Landowners Federation in response to the Scottish Executive Consultation Paper on the Scottish Law Commissions Draft Title Conditions (Scotland) Bill

Introduction

SLF is responding to the Scottish Executive's consultation paper on the draft Bill from its perspective as the organisation representing owners and managers of holdings of rural land of very widely varying types, patterns of use and extents throughout Scotland. In that context, SLF's primary concern is that there should be a fair, reliable and economical system of attaching appropriate and useful conditions to pieces of land, usually at the time of sale. SLF firmly believes that the guiding principles of fairness, reliability and reasonable economy of administration, must for the sake of good land management, be applied to existing real burdens just as much as to such burdens to be created in the future.

SLF has been fortunate in having two most helpful meetings with the Scottish Executive's Bill Team on this Bill, and the following points are made in the light of discussions at those meetings.

Discussion Points 32 and 33
Do you think that the 100 metre rule should be retained?

In the Discussion Paper, the Executive has said that it considers that in the overall context of the abolition of the feudal system the different treatment of feudal and non-feudal burdens is reasonable and justifiable.

All SLF's experience and enquiries suggest that increasingly from the end of the First World War, to the extent that it has become general practice, it is a question left to the preference of individual solicitors acting in land transactions whether missives call for a feu disposition or an ordinary disposition. Thus, when a farmer sells off a plot of land on his farm and quite reasonably wants to ensure that the buyer can only use the plot in ways that will not adversely affect the working of his farm, it can be a matter of chance whether the burden or burdens imposed on the plot when it is sold are attached to his farm land or his superiority. In such circumstances, and many parallels arise in urban and suburban areas, it will be quite unjust if the farmer is to be put to all the trouble and expense of having to build a house within 100 metres or go to the Lands Tribunal in an attempt to preserve his protection just because one conveyancing mechanism has been used rather than another. And what happens to the burden registered under the 100 metre rule when the relevant dwelling falls into disuse, or is demolished? The land management considerations involved are precisely the same in each case.
SLF accepts that the further back one goes, the more examples will be found of burdens constituted in feudal writs in cases in which the feu superior does not also own property contiguous to the burdened property. In such cases, while the feu superior’s right to enforce a burden was (and is until the relevant provisions of the 2000 Act are brought into force is) to be presumed, such a presumption has always been capable of displacement. In reality, in all but a very few cases, where the feu superior did not own land contiguous to the burdened land the presumption could have been displaced, because the owner of the burdened land would have been able to show that the feu superior did not in fact have the necessary interest.

SLF's point is that there is a very sharp distinction to be made between two classes of feudal burdens.

The first class is where the feu superior does own land immediately contiguous to the burdened land, and where as a consequence prima facie he could successfully, as a matter of fact rather than of law, rebut an allegation by the proprietor of a burdened property that he had no interest to enforce the burden. As a matter of law, under the 2000 Act, a burden in precisely similar terms could have been automatically preserved, irrespective of the existence of a dwelling on the ground if only it had been constituted in a disposition rather than a feu disposition. SLF can see no justification whether on land management or conveyancing or public policy grounds for such discrimination in the case of feudal burdens falling within this class and is of the opinion that it will give rise to ECHR difficulties.

The second class is formed by those feudal burdens where the feudal superior does not own ground contiguous to the burdened ground, and where consequently the presumption that he has an interest to enforce could readily be displaced. Further, if he attempted to create a burden by way of a disposition, he would almost necessarily lack the interest to enforce it and would be thrown back on any contract in so far as he might be able to enforce the same. It will be very unlikely that any ECHR difficulty could arise under the 2000 Act provisions on preservation in relation to burdens in this class.

There are two further points to be made. First, the Scottish Law Commission's assumption that no interest can exist without a dwelling house in the vicinity is misconceived, at least in a rural context. It would, to take an extreme example, be hard to say that the owners of the farm next to the Raychem factory near Falkirk would not have had an interest in preventing such an activity on their boundary, if they had had the benefit of an appropriate condition. And we do not see that our contiguity test would be more liberal in an urban situation, which is where the existence of apparently (but not actually) enforceable conditions causes difficulty and, perhaps, injustice; on the contrary, the contiguity test in a town is more stringent than the 100 metre rule.

Second, no former feudal superior is going to devote the resources necessary to register burdens indiscriminately. It will only be worthwhile to register
burdens in which there is a real interest to enforce, since only those burdens will be enforceable. That will require an exercise to identify the title to burdened property, and the particular burdens, before carrying out the elaborate registration process which must be done on a "case by case" basis. The cost of registration alone is unlikely to be less than, say, £300 in fees and registration dues, and the time cost of the whole exercise two to three times that, per property.

**Recommendation**

Accordingly SLF strongly recommends that the 2000 Act is amended so that "the 100 metre test" is replaced with the requirement that the land to which the benefit of a superior's condition must be transferred is land which is contiguous with the burdened land. Thus he can preserve it in exactly the same way as he would have been able to do if in the first place the burden had been created in favour of his land, rather than his superiority, as would have been perfectly possible. The SLF notes the arguments in favour of continuity of implied rights of enforcement for immediate neighbours in Paragraphs 86-91; a similar 4 metre test would be appropriate as a definition of "contiguous."

In the case of former feudal real burdens which benefit superiorities where the former feu superior does not own land contiguous to the burdened land, it is unlikely, as has already been pointed out, that as a matter of fact the feudal superior would be able to demonstrate the necessary interest to enforce. This critical and significant difference does justify a difference in approach and accordingly SLF believes that in the case of burdens falling within this class a former feudal superior should only be able to preserve it where the proprietor of the burdened property agrees to this course, or in what would inevitably the very rare case in which he could persuade the Lands Tribunal that he should be allowed to do so.

SLF is sure that if these recommendations are adopted the Scottish Executive would have nothing to fear from indiscriminate attempts to preserve former feudal real burdens, since only those former feudal real burdens with the same qualification for enforcement as ordinary real burdens would be eligible for automatic preservation. In all other cases, a filtering mechanism would apply, and as has been pointed out, it seems likely that many former feudal real burdens would fail to pass.

**Discussion Point 34**

SLF supports the principle of the amendment proposed. However, it must again be said that where a feudal real burden could perfectly well have been constituted and enforced as an ordinary burden, because the feu superior owns ground contiguous to the burdened ground, it would be discriminatory to disadvantage the former feudal superior merely because of the way in which conveyancing has been done, and in that case - the first class referred to above - a former feudal superior should not have to go to the Lands Tribunal to save his enforcement rights. However, SLF accepts that this would be a
reasonable requirement in the case of feudal burdens falling within the second class referred to above, and in that case, it is reasonable that the test for preservation of entitlement should be the same as the test for enforcement.

**Sporting and Fishing Rights**

**Discussion Point 35**

SLF has already drawn attention to the formidable difficulties involved in attempting to preserve a feudal burden of sporting rights as an ordinary burden. This matter has already been fully treated in SLF’s submission on the 2000 Act Bill. While conversion of sporting rights into positive servitudes might be a satisfactory solution in some cases, unfortunately it still does not cover the case where the former superior does not own any ground at least nearly adjacent, if not contiguous, to the burdened subjects.

SLF’s enquiries in representative areas of the country - Aberdeenshire, Perthshire, and Dumfriesshire - reveal that there are cases, particularly where estates, or parts of estates, were sold off in comparatively small lots in the 1920s and 1930s, where the feu superior will no longer own property in favour of which a positive servitude could be constituted. In such cases, which are difficult to quantify, but fully deserving of proper treatment, the proposed arrangement would not work and valuable rights would be lost. This would undoubtedly give rise to ECHR considerations, in the absence of proposals for adequate compensation.

SLF thinks that a possible solution which should be considered would be the constitution of these rights as a burden directly in favour of a person, on the same basis as burdens in Part 3 of the Bill. Such a solution would appear to meet the needs of all the various cases which could arise. SLF would be pleased to discuss this particular proposal in further detail.

**Pre-emption & Reversion**

**Discussion Point 27**

The Scottish Executive’s Bill team specially asked for SLF’s views on this point.

This proposal does not appear to have any potential to put the holder in any worse position than if he had decided not to match an offer after the seller had gone to the market, and accordingly SLF believes that it would in allowing the seller to accept an offer as normal after a close set in the usual way, be a useful reform.

**Discussion Point 28**
SLF thinks that in principle at least this reform would be useful. However, SLF fears that if a question as to what was or was not reasonable arose, market offers would have gone away long before it had been resolved.

Accordingly, for the reform to be as useful as it might be in certain circumstances, there would have to be resort to a very speedy dispute resolution process.

**Discussion Point 6**

The Scottish Executive Bill team particularly asked for SLF’s views on Section 7 (3) (a).

SLF believes that interest is already sufficiently and well defined in case law and that on the whole it would be a mistake to complicate matters by attempting what is after all not simply a statutory statement of a definition, but a statutory redefinition. Inevitably it would lead to litigation, and to some degree of uncertainty until a new corpus of case law had been established. There is already a great deal of new territory in both the 2000 Act and the Bill for all concerned, not least the end users, namely the land owners and managers, to assimilate and work with, and where there are serviceable existing definitions, they should be retained.

On the particular redefinition proposed, the SLF believes that "detriment" is a sufficient test without it necessarily being material. The purpose of a real burden is to protect the benefited ground, and if it is only protected against material detriment, the protection is incomplete. The SLF agrees with the Commission's conclusion in Paragraph 42 that flexibility to take account of differing circumstances is important and further tests would not be right.

**Discussion Point 5**

The SLF has reservations about this proposal, particularly in the case of tenants. The tenant does not really have a separate interest from the owner - if the land is threatened by some detrimental action both have an interest in stopping it.

If on the other hand one is prepared to agree to a change in a burden, and the other is not, where stands the burdened proprietor?

**Discussion Point 17**

Yes.

**Discussion Point 26**

Yes and No.
SLF’S INTEREST IN THE BILL

SLF is the representative organisation for owners and managers of rural land of widely varying types and extents throughout Scotland. Members include many rural business people in all sectors – tourism, agriculture, and a range of diversified rural enterprises. Almost 60% of SLF members own less than 500 acres; SLF has a well informed, realistice perspective on the way the current system of tenure of land may affect a land manager whose land marches with that of a number of neighbours, and may indeed itself surround that of one or more neighbours. Members will have to operate the provisions of the new legislation on a day to day basis. Its detail is therefore of critical concern to them, and will impact directly on the financial position of farms, rural businesses of many kinds, and those holding and managing rural land for other purposes.

SLF’S APPROACH TO THE PRINCIPLE OF THE BILL

As long ago as February 1996, on a consideration of the Scottish Law Commission’s 1991 consultation paper, SLF Law and Parliamentary Committee resolved to support the principle of the abolition of the remaining features of the feudal system, subject to appropriate safeguards for the preservation of existing and the creation of future useful permanent conditions on land. In particular, the Committee took the view that anyone seeking to enforce a real burden should have to demonstrate interest to do so. Further, SLF strongly supports the stated policies of placing the superior in the same position as the ordinary disponer of land, and the “filtering out” of feudal burdens which no longer serve any useful purpose or could not be enforced for lack of interest to do so. Accordingly, SLF supports the broad policy objective of the Bill.

SLF’s Views On The Detail Of The Bill

SLF does have some serious concerns about the way in which certain provisions of the Bill, as they are presently drafted, would work in practice. It asks the Committee to look at these in detail, and to obtain and consider evidence about how they would work, not just from legal and other experts, but from the people who will have to operate them and will be affected by them.
The main provisions and matters of concern to SLF are: -

**Section 17 (7) (a) – “100 Metre” Rule**

The inflexibility of the rule, as drafted, is inappropriate. As the law stands at present, the beneficiary of a real burden which has been constituted in a disposition who seeks to enforce such a real burden must meet the test of demonstrating, qua owner of an area of land, a patrimonial (i.e., a monetary or amenity) interest to enforce. It is unlikely that such an interest could be demonstrated unless the benefited proprietor's land is adjacent to the burdened ground. But such an interest might well be demonstrable without the existence of a dwelling house within the short distance of 100 metres. Circumstances in rural areas are so various that flexibility is essential. It may well be that it is difficult to differentiate between urban and rural areas for this purpose, but any such difficulty should not under any circumstances be allowed to become a reason for imposing upon rural areas any provision which is not adequately adapted to them and gives rise to injustice in practice.

In a rural context, the requirement for a dwelling house within 100 metres is not a relevant or applicable test. This can be well illustrated by the evidence of practical examples – for instance, the case of the working farmer who has “feued off” a cottage in the middle of his farm, but at some distance from other buildings. He undoubtedly has a very strong interest in the use to which that cottage may be put. Proprietors of burdened ground are protected by the “interest” test (see paragraph 3.3 below). The imposition of a “proximity” test, would be acceptable to the extent of being in practice a requirement to demonstrate interest, but any question as to the use of the benefited proprietor’s land (e.g., for a dwelling house) should not be part of any “proximity” test. Apart from the practicalities of the situation it puts a former feudal superior at a significant disadvantage compared with an outright seller of land who faces no such test to determine the enforceability of burdens imposed by him. SLF believes that the Committee would be assisted by the opportunity of looking at evidence of illustrative examples in some detail on the ground. There cannot be anything to lose, and there could be a great deal to gain by doing this.

**Section 18 – Reallotment by Agreement**

SLF supports the principle of reallotment by agreement, wherever that is possible; it is the ideal solution, when it can be achieved. But its limitations should be fully explored. For example, the former vassal's land may already be subject to a standard security, the terms of which would prevent him entering into an agreement burdening his land even where he is perfectly willing to do so.
Section 19 - Reallotment of real burden by order of Lands Tribunal.

In many rural situations (and this must be contrasted with urban and suburban situations which will inevitably be different) the “100 metre” rule will not cover a case where a former superior has a very good reason to preserve a former feudal real burden, and the only possible option for someone seeking to do so will be to go to the Lands Tribunal – unless, of course, in a particular case, agreement can be reached.

The apparent justification for the imposition of this hurdle on former feudal superiors is the fear of indiscriminate registration of former feudal real burdens. That would of course be extremely undesirable.

SLF believes it can be demonstrated by practical example that this fear is unfounded.

First, many feudal real burdens could not possibly be enforceable now, because the superior can not demonstrate the necessary interest, if he is challenged. [At present, a feu superior’s interest to enforce a feudal real burden benefiting his superiority is presumed, but it can be questioned and negatived.]

Second, superiors will only go to the considerable time, trouble and expense of seeking to preserve the former real burdens that really matter, and will concentrate efforts to do so on those alone – typically, in a rural context, in the house in the middle of the farm case already mentioned. The identification of every individual feu pertaining to each superiority, and the registering of the appropriate notices in each case would involve a huge amount of work, and enormous cost. That is a very effective practical deterrent against any attempt to go for a mechanical mass preservation of existing feudal real burdens.

Third, any person seeking to enforce a former feudal real burden which has been reallotted by one of the methods set out in the Bill will have to demonstrate interest to do so. That is a severe but appropriate test. It is the test which currently has to be met when seeking to enforce a non-feudal real burden. It would be utterly illogical and quite pointless for a former superior to seek to reallocate a feudal real burden if there is in fact no prospect of enforcing it, and no former feu superior would waste his own time and money trying to do so. That fact provides a “built in” filtering mechanism.

The “interest” test, applied to a reallotted former feudal real burden, fully meets both the policy objectives involved – that of weeding out redundant burdens, (for the reasons just given), as well as that of placing former feudal real burdens on the same footing as ordinary burdens created in dispositions. It is the only test which should be adopted to qualify a former feudal real burden which has been duly registered for preservation by reallocation (thus giving “title” to enforce) for enforceability.
It does not advance attainment of the Bill’s policy objectives to require a feu superior to pass a former feudal real burden through the distinctively different and more severe test of demonstration of “substantial loss or disadvantage” to him if the burden were to fall (or, at least, not to subsist in a modified form). The “substantial loss or disadvantage” test is not applicable at any stage in the process of seeking to establish either title, or interest to enforce a real burden constituted in an ordinary disposition. The imposition of the “substantial loss or disadvantage” test in the Bill inevitably puts a superior at a disadvantage as compared with an ordinary seller of land. The Policy Memorandum on the Bill explicitly states that such a result would be unfair. If there is to be a double test at all, and there are very strong arguments against that, then putting the very much more difficult, new test first must be to put the cart before the horse; it makes the second test (“interest”) redundant.

It must be borne in mind that even if a real burden, whether a feudal burden, a former feudal burden which has been preserved, or a burden created in an ordinary disposition can be enforced, there is still a further protection for the proprietor of the burdened land. He may apply to the Lands Tribunal to have any land obligation, which includes any type of real burden however created or preserved, varied or discharged, and many such applications are wholly or partially successful.

Summary of SLF Submissions on Reallotment of Former Feudal Real Burdens in General Cases

The “100 metre” rule should be dispensed with, but if it is not, it must be radically modified to provide the flexibility which would be very necessary under rural conditions.

If the “100 metre” rule is dispensed with, there is no need to provide for the complex and expensive procedure for reallocation by order of the Lands Tribunal; if, however, that procedure is to be adopted, the test to be applied should be one of demonstrating an interest to enforce, and not that proposed.

Section 17 (7) b(i) and c(ii) Reallotment of Real Burden By Nomination of New Dominant Tenement – A Special Rural Issue

SLF has serious concerns that the Bill as drafted, either directly or indirectly, will destroy shooting and fishing rights (other than salmon fishings rights) reserved to the Superior. This is a not infrequent situation. It is an issue of significance to the important sporting tourism industry. The Bill treats such rights has being real burdens affecting the feu. It is appreciated that this is the advice which the Executive has received from the Scottish Law Commission, but the Scottish Law Commission’s view, with all respect to them, is not one which is universally held. Even if the Commission is correct, the rights in question are in jeopardy because of the terms of the Bill for the reasons explained in Appendix 1. There is also attached as Appendix 2 the Opinion of the Solicitor General dating from 1962 which is relevant. Particular

Burdens Ancillary To Minerals and Salmon Fishings

Provisions should be made in the Bill so that burdens ancillary to rights to minerals and to salmon fishings are preserved without need to proceed to registration. Rights to minerals and salmon fishings are, in effect, no less than ordinary neighbouring properties. Such rights may well have been, and very often will have been, sold off to other parties by former superiors. Owners of such rights would not be alerted to the need to register such burdens in order to preserve them, if such a need arose, because the feu they will nominally have benefited is nothing to do with them. It may be added that the same principle applies to any other former feudal real burdens which are clearly conceived to be for the benefit of an already identifiable area of ground. Such burdens should continue to be enforceable by the proprietor at the time of minerals and salmon fishings without any need for registration.

Section 32 to 38 - Compensation: “Development Value” Feudal Real Burdens

It needs to be emphasised that land has often been feuded at less, and much less than market value, or for no consideration at all for purposes in the general community interest or to benefit specific groups in some way e.g. sports teams.

In the first place, SLF believes that in cases (and there are a considerable number of them throughout the country) where superiors parted with land for a considerably reduced payment, or indeed for no payment at all, reflecting a feuing condition restricting the use of the land concerned (to give examples of such uses, those of amenity ground, sports fields, building of school houses), the feuing condition imposing the restriction should be capable of preservation on the same basis as a right to enter or otherwise make use of the burdened land or a right of pre-emption or of redemption, as currently provided for in Section 18 (7) (b) of the Bill. (In some cases, the relevant restriction may continue to be enforceable in some other way, i.e. by means of a standard security but that will by no means always be the case). Such a provision would be only fair to former superiors and their successors.

In the second place, even if a development value burden does fall as a consequence of the provisions of the Bill, there certainly ought to be an effective prohibition upon former feuars becoming able to make what could be potentially very large windfall profits as a consequence of transactions (e.g. with housing developers) which were originally excluded by a restriction on use imposed in conjunction with a reduction in consideration for the grant of the feu, or indeed in a feudal grant for a nominal or nil consideration.
SLF cannot understand why the right to claim compensation is only assignable in the limited circumstances set out in Section 33. The Scottish Law Commission stated that it did not wish to see a market in compensation rights, which is a small risk when compared with the inconvenience of a restriction on something which would otherwise be freely transmissible.

The basis of compensation must take account to an appropriate extent of the realities of present day land values and the loss of legitimate expectations to enforce particular rights. The Bill does not do that.

SECTION 65

SLF believes that the term should be increased to 200 years. Many financial institutions are not prepared to grant commercial loans over leases any less than 150 years.

Conclusion

SLF would welcome an opportunity to be heard on these detailed points, and would do its utmost to assist the committee in an enquiry into the way in which provisions would work in practice. It would particularly welcome an opportunity to provide the Committee with witnesses who could speak to the way in which the legal machinery involved might be expected to function.

Appendix 1.

Rights to Shoot and Fish Attached to Feudal Superiorities

SLF has serious concerns about the continuation of rights to shoot and fish attached to feudal superiorities. Although Section 47 does define a real burden as including a non-exclusive right of fishing or game, provided that it is constituted as a real burden, SLF believes that the prior question arises to whether or not such a right is in law a real burden. Even if it is a real burden, there is still the question as to whether it could be enforced as such in future. Whether the right is regarded as a pertinent of the superiority interest, or as a real burden enforceable by the superior, the critical point is that as matters stand at the moment the superiority interest exists in the same land as the land over which the right is to be exercised, and hence there is the superior’s interest as such to enforce it, even if the right is properly classified as a real burden. But if the title to enforce, (always assuming that the rights concerned can be real burdens), is transferred to adjoining ground it would appear that interest to enforce would automatically be lost, because the loss of such a right would not in any way adversely affect the value or amenity of the ground to which the right to enforce the burden is attached i.e. no patrimonial interest would be at issue, and if the right is not properly classified as a real burden but as a full part of the superiority interest, that right will be lost with the abolition of the superiority. Accordingly, for a former superior’s right to shootings and fishings to survive, this subject requires more extensive treatment in the Bill than it has received at the moment. Otherwise, many
former superiors will find that they have been deprived of a valuable right. *If such rights are lost, then a right to compensation must arise.*

Appendix 2.

**OPINION**

For

THE DIRECTOR OF FORESTRY (SCOTLAND)

Re

SHOOTING LEASES

I agree with the view expressed in the Memorial that there is conflict in the authorities, and that if the most recent statements be accepted, then this questions would fail to be answered in the affirmative. Unfortunately these recent judicial *dicta* and text-book statements do not mention and appear to have overlooked the bind Whole Court case of *Leith v. Leith and others* 1862 24D.1059, and certain subsequent cases proceeding thereon. That case is entered in the Faculty Digest only under “Entail” and “Expenses”, which may have contributed to the omission of reference to it in the more recent books and *dicta*. It was concerned with whether or not shootings fell to be valued for certain entail purposes. The Whole Court, however, in order to determine that question had to consider as part of their ratio decidendi whether or not a lease of shootings was a mere delegation of a personal privilege (as had been held in various cases hitherto), or whether it was a true separate estate in land enjoying the common law reality of an agricultural lease. By a majority of 6 to 5 the Whole Court discarded the previous view. Lords Mackenzie and Kinloch, two of the majority, in their joint Opinion at p. 1967, said that till a comparatively recent period shootings had not, in our law, the character of property. They then mentioned *Pollock, Gilmour & Co.*, 1828, 6913, and Inner House case to the contrary, and described how the law has moved since then to regard shootings as real leases, and as property in themselves, a not as mere delegated privileges. This decision of the Whole Court was quoted to, and followed (as it had to be, there being no option), by the first Division in *Stewart v. Bulloch* 1881 8R. 381. At p. 383 Lord President Englis said, “if indeed it was the Law that a right of shootings was a mere personal franchise as at one time the Court appeared inclined to hold – there would be a great deal to be said against the application of the words of the Statute to a lease of the shootings, but I think it has now been laid down in a series of decisions that this is not the nature of a right of shootings, but that what the tenant receives under such a lease is a right of occupation of land, as much as in the case of an agricultural tenant.” This observation is the more significant as Lord President Inglis, along with the Lord Justice Clerk, 19 years earlier had been among the five dissentions in *Leith* who had been in favour of the old view that a shooting lease was merely a delegated privilege. In *Marquis of Huntly v. Nicol* 1896 23 R. 610, the First Division held that a right of game shooting was capable of being real, and was so in that particular case, and binding on successors. The decision is not quite in point, however, as the right arose not by lease but by a real condition contained in the
infeftment. It is however, a further nail in the coffin of the Institutional Writers’ view that shooting rights cannot be more than mere franchises.

In my Opinion the conflicting line of authority cannot prevail, upon examination. Pollock, Gilmour & Co., 1828 6S 913 though an Inner House case was considered by the Whole Court in Leith in 1862, in the context of being part of the older law over-ruled by them. Birkbeck v. Ross 1865 4R 272 though reverting to the old law, was only an Outer House case. Lord Barcaple in reporting to the Second Division, considered at p. 274 (Note) the effect of Leith to be that it was of no importance whether or not the shootings were let, and he considered Pollock, Gilmour & Co still to be law. This, however, can only have proceeded on accepting the views of the over-ruled minority of five Judges in Leith, an easy mistake, as they are printed first in the Report. It may not be without significance that the Second Division, who acquiesced in his Report, included the Lord Justice Clerk, Lord Benholme, and Lord Neaves, all of whom were in the dissenting minority of the Whole Court in Leith, and who might therefore be predisposed to distinguish it if at all possible.

In the century following the Whole Court case and its followers-on (e.g. Stewart v Bulloch) there have been several dicta favouring the old view, both in cases and in text-books, but in none has the dictum been necessary as part of the binding ratio decidendi, and in none of these adverse cases had Leith been cited as a reminder to the Court in argument or commented on or referred to in the judgements.

Thus in Campbell v. McLean 1870 8M. (H.I.) 40, a case concerning pasturage, Lord Chancellor Matherley at p. 44 stated that a shooting lease was a mere privilege, not binding on singular successors. In Earl of Galloway v. Duke of Bedford 4F. 851 at 861, Lord President Kinross said “It is, like the right of shooting, merely a delegation of a personal privilege not capable of being made real, and not binding …. upon a singular successor.” This too was obiter, as the decision concerned trout fishings, not shootings, and again the binding Whole Court decision was not even cited in argument, presumably because of its obscure position in the Digest. A similar criticism can made of Lord Glasgow’s Trustees v. Clark 1889 16R 545, where at p. 549 Lord President Inglis said that shootings were only a “so-called” lease, and were a mere personal franchise. (A reversion to his dissent in the Whole Court case). In Beckett v. Bisset 1921 2 S.L.T. 33, it was held in the Outer House that a right to shootings could not be made effectual against singular successors by the particular machinery of a real burden in a Disposition. This was a correct result, as a right to shootings can be conferred on a person living far from the lands in question and thus packs the “neighbourhood” characteristic which is an essential of all real burdens in Dispositions other than those for a fixed sum of money. Leith was referred to by the Lord Ordinary but he disregarded it, although such was not necessary for the decision of the case. In the more recent case, Marner v. Flaws 1940 S.L.T. 150, in the Outer House Lord Robertson held that as with shootings in Beckett a right to trout fishing could not be made a real burden a disposition. He made certain observations on shootings to the effect that there might be a
distinction between the law applicable to them and to trout fishings. Leith was not among the many cases he considered.

Gloag and Henderson’s Scots Law (5th Ed.) p. 336, quotes only Pollock, Birkbeck and the Earl of Galloway, omitting the all important Leith line of authority, in arriving at the author’s view. Farquharson 1870 9M 66 is also footnoted, but that is a favourable case, not supporting Gloag and Henderson’s proposition. Lord Kinloch at p.75 said “Whatever was at first held theoretically, I think the progress of society and the practice of the country have now placed shootings in the category of property, and given to a lease of shootings the proper character and legal affect of leases generally.” Burn’s Conveyancing (4th Ed.) p.180 contains a statement that a right to shootings effectual against a purchaser, cannot be created even by lease. The statement, with great respect to the late author, is somewhat misleading to the profession as the Whole Court case is not adverted to, and the sole authority footnoted by Professor Burns to support the proposition is Beckett v. Bissett 1921 2S.L.T. 33, on Outer House case which it was not thought necessary to include in the official Session Cases, and which dealt with only one type of machinery, the real burden in a disposition. That case did not purport to deal with conditions in a Feu Charter binding on successive vassal-purchasers, nor with leases binding per se by virtue of their equiperation to agricultural leases at common law in Leith, and in Stewart. Green’s Encyclopaedia Vol.9 para. 148, in the article by Professor Morrison then of the Conveyancing Chair at Aberdeen University, states that a lease for shooting purposes is good against singular successors, but in footnoting only Farquharson (supra) in support, the author founds on a case which though favourable, proceeded as ratio upon the specially that the leases land had no occupier other than a shooting tenant, and no fruits or yield other than deer and game. The Whole Court decision is again overlooked. Rankine on Leases (3rd Ed.) p.504 starts by saying that shooting leases are not valid in questions with singular successors, but on the next page goes on to consider Leith v. Leith and ends by accepting the view that shooting leases are on a par with other leases and that the earlier law no longer applies.

In these circumstances the weight authority is to the effect that shooting leases, and thus valid against singular successors, unless the ineffective machinery of trying to constitute the arrangement by real burden in a disposition instead of by lease, is attempted. The apparent statement to the contrary in dicta and text-books are each vulnerable in that they proceed on citation of superseded, and in some cases of Outer House, authority in conflict with the Whole Court decision, and such a position once having been started each author tends to follow his predecessor’s views.

I therefore answer this Question in the Negative, with the undermentioned Qualifications. While this involves departure from the advice which the Memorial states has been provisionally tendered to the Memorialist by the Agents, the position must, despite the reasons I have mentioned in support of my views, nevertheless contain a substantial degree of uncertainty. For the Court today, though technically bound by the Whole Court decision, might nevertheless be disposed to distinguish it in a manner I have not foreseen,
especially looking to the narrowness of the 6 to 5 decision, the Judges
themselves differing markedly. It would, therefore, be a question of
circumstances as to whether to risk contesting a particular case against a
given singular successor, and would depend on the value of the shootings at
stake, and the chance of obtaining a suitable substitute shoot, against the
above element of uncertainty which pervades the matter, although in my view
the chance of success would be substantially greater than the risk of failure.

Strictly this Question does not arise in view of the above Negative answer, but
in view of the qualifications attached to the answer, I deal with this Question,
as ob majorem cautelam, it would be advisable to protect shootings tenants
by a more certainly effective course than the lease itself. In my opinion only
the first method, vis:- a reservation in a Feu Disposition, would be effective. It
is quite settled that matters which cannot be made Real Burdens in an
ordinary Disposition because they may lack one or more of the elements
considerated in Taylors of Aberdeen as the leading case, can nevertheless be
effective as Real conditions when inserted in a deed where Superior and
Vassel are the parties. The principle applied, is that privity of contract is
deemed to exist between a Superior and every successor in the Vasselage.
Menzies on Conveyancing p.575. 577. Marquis of Tweedale’s Trustees. 1888
3R. 620. See also Stewart v. Duke of Montrose 1860 22D 755 per Lord Dees
at p.803 – “Almost any obligation of a definite nature however collateral –
however extrinsic … and however temporary … may be created a real burden
over the heritable estate either of Superior or Vassel.” Hemming v. Duke of
Atholl 1883 11R. 93 exemplifies a case where the Superior’s right (to shoot
deer) faired against singular successors of the Vassel for the reason that it
was not worded precisely enough. Lord Craighill at p.99 gave it as his opinion
that a properly worded shooting right could be reserved “as a condition of the
feu.” Lord Young reserved his opinion on this point. As an analogy trout
fishing rights as between singular successors where the relationship is that of
Superior and Vassel would derive their effectiveness from the national
continuing privity of contract. (Patrick v. Napier 1867 5M. 683 per Lord
President at foot of p.695). The main loophole which can exist occurs where
a vassel disposes to a purchaser who holds uninfected on a personal title, and
who is strictly thus not yet a vassal qua the Superior. The reservation of the
shootings should therefore be made expressly binding on such a person
(Menzies p.575 deals with this necessity). A Feu Contract with its bilateral
content is slightly preferable to Feu Disposition, for these purposes, but both
would, in my Opinion, be effective. There should be express reference in the
deed, to the vassal remaining bound whether the Superior retains the
shootings in his own hands or whether he delegates or alienates them (or has
already alienated them) by lease for a period:- if such necessity to recognise
delegation thus becomes a contract with the first vassal I can find no authority
to delegate from the general principle that there would be national privity with
the successors in the feu.

Only above vis:- a lease entered into with the proposed shooting tenant,
probably binding without further machinery, but fortified ob majorem cautelam
by the Superior’s right being inserted in a Feu Disposition or Feu Contract as
the instrument of “sale” to the purchaser.
This Question is superseded in view of the negative answer to Question 1, but in view of the qualification settlements may not be out of place where the sums are not large, and I therefore, deal with it. There is very little authority about the measure of damages in shooting lease cases. Critchley v. Campbell 11R. 475 concerned the value to be put upon dispossession from two beats on a shoot, but no principle can be derived from the case. It is thus necessary to look at the measure of damages in leases of other kinds, to extract such principles as would appear applicable also to shooting leases. In England, is leases generally, a measure referred to in Mayne and McGregor on Damages (12th Ed.) p.479 and 483, is the market value of the rent for the number of years of the unexpired period less the rent in fact contracted for ie. loss of the bargain. I think such a rule with the undermentioned modifications would fall within the general principles of Scots Law also, as regards measure. A low rent if enjoyed is thus an element which does not restrict damages to a low figure, but which operates to make the loss the difference between that and the larger market-value rent which the disposse tenant would have to pay to get a similar shoot elsewhere. (A comparable principle is the measure between contract price and market price and market price in a sale of Goods (Sale of Goods Act, 1893, Sec.51). This measure would probably be restricted to a period less than the outstanding duration, if there were reasonable prospec of obtaining a like favourable bargain in comparable subjects, sooner. If the breach occurred early on in a 25 years lease I think it doubtful whether more than a proportion of the outstanding period would ever be taken as the number of years by which to multiply the measured difference. For the lease is personal to one tenant and other possible terminations other than by breach would need to be allowed for. That would be a question of probable forecast for a judge to estimate, as would an element of solatium for the inconvenience of dispossession from the actual enjoyment and for the trouble of seeking elsewhere. (Rankine on Leases (3rd Ed.) p.496 and direction to the jury in Dalziel v. Duke of Queensbery 1825 4 Mur. 10, 18).

I have nothing to add.

THE OPINIION OF
(Sgd). D.C. Anderson
SOLICITOR GENERAL

Crown office
9 Parliament Square
EDINBURGH 1.
8th March, 1962.
Introduction

The Glasgow Housing Association Limited is a housing association which is incorporated under the Industrial and Provident Societies Act 1965.

Its purpose is to assume responsibility for the council housing stock presently administered by Glasgow City Council. A successful ballot on the proposed housing stock transfer was concluded in April, with a majority voting in favour of the housing stock transferring to The Glasgow Housing Association (hereinafter referred to as GHA).

As well as administering and letting approximately 82,000 houses, the GHA will require to allow applicants to exercise their Right to Buy under both the Housing (Scotland) Act 1987 and Housing (Scotland) Act 2001. There will be a significant number of tenants transferring over with a preserved Right to Buy under the 1987 Act provisions. New tenants, or tenants moving to a new house, will have the reformed right to buy contained within the 2001 Act.

In addition to those properties which will be sold under Right to Buy, it is envisaged that Glasgow City Council will appoint GHA as factor to existing Right to Buy properties, by their letter of appointment. Accordingly, any change in the law proposed in the Title Conditions (Scotland) Bill will significantly affect the GHA as they are likely to be required to carry out factoring services to a large amount of properties in the City of Glasgow and will be one of the largest Factoring Organisations in Scotland.

Financial Considerations

Whilst the reasoning behind the Title Conditions (Scotland) bill appears to be in order to provide more significant rights for the owners presently subject to factoring arrangements in tenements, four in a block houses, or where joint and common property is an issue, any changes in the law which have an impact on the rights of the factor to manage the property would impact upon the GHA’s long-term viability.

A number of assumptions in respect of factoring debt recovery have been made in the Business Plan of the GHA. If the law were to change in such a way as to impact upon the recoverability of charges, then that could have an adverse effect on the liability of the Association.
Already, initial estimates of factoring charge recovery have had to be revised downwards. Part of the reason for this is the increased uncertainty which it is thought may be brought about by the enactment of the Bill in its present form.

Accordingly, the figures have been revised as follows:

**Assumptions in GHA Business Plan (February 2002)**

| Proposed level of recovery of total charge to owners (years 1 – 10) | 90% |
| Ditto (years 11 – 30) | 75% |

**Revised Business Plan Figures**

| Recovery of total charge to owners (years 1 – 10) | 80% |
| Ditto (years 11 – 30) | 60% |

The advice we are getting from our Solicitors, suggests that this is a prudent revision to make, given the uncertainties about future factoring services which the Bill might introduce to factors such as the GHA. In our respectful submission, therefore, there is a direct financial impact on the overall Business Plan of the GHA, if the Title Conditions (Scotland) Bill is enacted in its present form.

**Perceived Difficulties for GHA as Factor as a Result of the Title Conditions (Scotland) Bill**

It is believed that local authorities who will retain their housing stock have made representations with respect to the Bill. *Mutatis mutandis*, the GHA has at least as significant an interest in obtaining the right to factor as those local authorities. In particular, where tenants still reside in a block of tenements, it is absolutely essential that the right to factor is retained. In the case of GHA, a significant programme of refurbishment and improvement is proposed over the next ten years. If Right to Buy sales have been granted, it places the factor in a precarious position, if the thrust of the proposed legislation is to remove restrictions and fetters on owner occupiers.

In particular, Clause 3(7) of the Bill provides that except where permitted in the Bill, the Title Condition must not have the effect of creating a monopoly, e.g. by providing a particular person to be or to appoint the manager of property or the supplier of any services in relation to property. Whilst some measure of relief is afforded in the Bill as presently drafted, in Clauses 58 – 61, these sections deal with what is called "Manager Burdens". Furthermore, it is retrospective in that it applies to all existing Deeds of Conditions granted by the local authority since Right to Buy has been in existence since 1980. These clauses specify that the party with
the right to act as manager, must own one of the so-called related properties. This may well be an issue in the case where Right to Buy sales have, in fact, led to the whole block being sold. At the present time, the City Council still factors and it is proposed to pass on by way of letter of appointment that right to factor to GHA. If there are no so-called related properties owned by the GHA, this would mean that the factoring arrangement could end there and then, which could be problematic in terms of the financial model outlined in paragraph 3.0 above.

Furthermore, whilst the Bill allowed local authorities in Right to Buy sales a period of 30 years to factor the property as opposed to the ten years suggested for other types of Landlord in Clauses 58(4) and 58(6), the period runs from the date of registration of the burden (Deed of Conditions). That might mean that some properties where there were “early years” Rights to Buy exercised by tenants, there may only have a decade or so to run of that period, which would place significant pressure on the assumptions laid down in the finances of the GHA Business Plan.

Proposal for Relief for Housing Stock Transfer Housing Associations

Given all of the above, it is submitted that there would be significant financial implications for landlords acquiring under housing stock transfers, if the Title Conditions (Scotland) Bill were to be enacted in its present form. Some detailed consideration should be given by the Justice One Committee of amending the Bill in order to provide financial stability for institutions such as GHA, who are constrained in the finances which they can raise, because of rent guarantees to tenants and they need to borrow at commercial rates, unlike those of the local authority. A 30 year period from the date of enactment of the Bill would therefore preserve the GHA’s right to factor and allow robust financial calculations to be made and assist in the long-term viability of housing stock transfers throughout Scotland, which is, after all, a flagship housing policy of the Scottish Executive at this time. It would represent “joined up” government if the factoring difficulties of housing stock transfer landlords were to be taken account of in the amendment of Factoring Conditions in relation to this Bill. The Committee is asked to give due consideration to this submission, therefore.

John Morrison
Interim Senior Manager (Legal)
Alison Taylor
Clerk to Justice 1 Committee
The Scottish Parliament
EDINBURGH EH99 1SP

Dear Ms Taylor

Justice 1 Committee
Submission of Additional Information

At the Justice 1 Committee yesterday, I was asked to submit additional information on two matters:

a) a more precise definition of Sheltered Housing; and
b) proposals for a mediation scheme.

I will liaise with Age Concern Scotland (who made the original proposal) and come back to you on the Mediation Scheme.

As regards the more specific definition of Sheltered Housing, I believe the existing definition in the Bill, augmented by that appearing in the Code of Practice for Owner-occupied Sheltered Housing, would go a long way towards protecting sheltered housing for the benefit of both owners and the community at large.

I suggest the augmented definition should read:

"....... "sheltered housing development" means a group of dwelling-houses which, having regard to their design, size and other features, are particularly suitable for occupation by elderly older people (or by people who are disabled or inform or in some other way vulnerable) and which, for the purposes of such occupation, are provided with facilities and services, substantially different from those of ordinary dwelling-houses, including an alarm system and a warden."

I hope this is helpful.

Yours sincerely

Stewart H Kinsman
Chief Executive
Justice 1 Committee

Title Conditions (Scotland) Bill

Equal Opportunities Committee - Stage 1 Report to the Justice 1 Committee

The Equal Opportunities Committee reports to the Justice 1 Committee as follows—

Introduction

1. The Title Conditions (Scotland) Bill¹ was introduced in the Parliament on 6 June 2002 by the Minister for Justice. The Equal Opportunities Committee has considered this Bill and, under Standing Order Rule 9.6.3, reports its views to the Lead Committee.

Mainstreaming Equality

2. The Committee has agreed to adopt the following definition of “mainstreaming”:—

“Mainstreaming’ equality is essentially concerned with the integration of equal opportunities principles, strategies and practices into the every day work of Government and other public bodies from the outset, involving ‘every day’ policy actors in addition to equality specialists.”²

3. The Committee has commissioned further research on how to ensure equality is mainstreamed into all aspects of parliamentary committee activity. As an interim measure, the Committee has agreed that, as a minimum level of scrutiny of all legislation, it will ask the relevant Bill sponsor the questions set out in Appendix 2.

4. These questions were submitted to the Minister for Justice on 18 June 2002 together with bill-specific questions via a letter from the Convener (Appendix 3). The Committee welcomes the Minister’s detailed response which is reproduced at Appendix 4.

Scope and Policy Intent

5. The Committee notes that the Bill seeks to achieve greater clarity in the law (via codification) and also to reduce the number of outdated conditions on land by making it easier to discharge them.

6. The Scottish Executive has stated that they do not consider the Bill to have a differential impact on equality groups. The Committee broadly agrees with this analysis, but comment that whilst the conclusion would appear to have been reached following a generally effective approach to the policy development process, nevertheless there remain issues related to the accessibility of documentation involved in the processes.

¹ SP Bill 54
² EOC/CRE document – Questions on Mainstreaming
7. In addition, the statement by the Minister (in response to the query regarding receipt of a notice): “Blind people will normally have arrangements in place for some trustworthy person to read their mail” is unsourced. On initial examination it would appear to be a somewhat wide-ranging assumption on which to base policy.

Accessible format

8. The Committee accepts the Scottish Executive statement that there is no differential impact on the basis of gender, race, marital status, religion or sexual orientation and further commends the detailed work done in respect of age (i.e. concerns in respect of sheltered housing). However, the fact that the issues raised over accessibility of documentation remain unclear at this stage of the policy development process is disappointing, not least to the 180,000 people in Scotland who have a serious and un-correctable sight loss.3

9. The Committee accepts that the Minister is “anxious that no unnecessary expense is caused to those who wish to take advantage of the Bill’s procedures”.

10. It further accepts the point made by the Minister that “there is a difference between knowing what a document says and understanding what it means” and “many recipients are likely to wish to seek legal advice as to the actual effect of a notice”. The issue here is not whether persons with communication difficulties or visual impairment issues should seek legal advice. Rather, it is the ability of the person to be aware of the need to consider whether to seek legal advice, based on a (to them) totally inaccessible, therefore, inappropriate communication.

11. Therefore, the Committee has concerns in relation to the statement from the Minister that “We may need to balance different interests here, since any moves which tend to prolong procedures (and alternate documentation would inevitably have this effect) would impact on non-disabled neighbours who receive a copy of the same notice”.

12. The Committee is aware that the specific duties under the Disability Discrimination Act (DDA) do not apply here. However, the Committee considers that the duties under the DDA to ensure “access to and use of means of communication, access to and use of information sources”4 have already created an entirely reasonable expectation that, in so important an area as that covered by this Bill, provision of accessible documentation should be the norm, irrespective of the source. That expectation of ability to take part is made more compelling, the Committee argues, by virtue of the fact that the area in question is being made the subject of wholesale review and further regulation by the Scottish Executive by means of this Bill.

13. The Committee does not consider that they possess any monopoly on analysis of such policy issues: to claim otherwise is to defeat the purpose of mainstreaming.

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3 RNIB Scotland statistics
4 Examples drawn from the Disability Discrimination Act 1995 (c.50), s.19(3)
Accessible formats (their pros and any cons) are issues which should have been considered at a much earlier stage in the process that delivered this Bill.

14. In addition, they are not burdens to be added into an existing system. The Committee suggests that they should have been considered within the opportunities presented by both removing outdated conditions on land and legislative codification.

15. The Committee therefore **recommends** a commitment to further exploration on accessible formats, especially given that the contents of much of the documents that must be used are already prescribed by the Bill. In order to further support the creation of a more open and accessible culture, the Committee would therefore welcome a statement from the Scottish Executive, during Stage 1, of what it considers reasonable (with regard to accessible formats) for those affected by the procedures envisaged by the Bill in its current form.

16. The Committee is of the view that the Scottish Executive concerns over the balance of time for non-disabled neighbours are insufficient. The balance to be considered here is whether there is a potential, minor, inconvenience to neighbours due to the provision of accessible formats, on request, or whether there is positive action by the Scottish Executive to prevent the disenfranchisement of up to 180,000 people within Scotland.

17. The Committee finds resonance in the quote, “You do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered.”

**Conclusions**

18. The Equal Opportunities Committee **recommends** to the lead committee further examination of the use of alternate communication methods (such as alternative formats) to ensure a consistent approach to accessible formats throughout the processes arising from the implementation of this Bill.

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5 Lyndon Baines Johnson
EQUAL OPPORTUNITIES COMMITTEE

EXTRACTS FROM THE MINUTES

14th Meeting, 2002 (Session 1)

Tuesday 10 September 2002

Present:

Kate Maclean (Convener) Mrs Lyndsay McIntosh
Mr Michael McMahon Gil Paterson
Tommy Sheridan Elaine Smith

Apologies: Cathy Peattie, Mr Jamie Stone

5. **Title Conditions (Scotland) Bill (in private):** The Committee agreed the draft report.
APPENDIX 2 – MAINSTREAMING QUESTIONS

Annex A - Equalities Checklist

Introduction

The Equal Opportunities Committee of the Scottish Parliament has endorsed the following checklist it wishes to be used when considering any policy or legislative issue.

It is important to bear in mind that the definition of equal opportunities in the Scotland Act 1998 is as follows:

“the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.”

It is therefore expected that ALL of these areas should be considered when using this checklist.

Please note that this is not meant to be all encompassing guidance on equalities proofing, but it is recommended that this be the minimum standard to be attained.

What is Mainstreaming?

- ‘Mainstreaming’ equality is essentially concerned with the integration of equal opportunities principles, strategies and practices into the every day work of Government and other public bodies from the outset, involving ‘every day’ policy actors in addition to equality specialists. In other words, it entails rethinking mainstream provision to accommodate gender, race, disability and other dimensions of discrimination and disadvantage, including class, sexuality and religion.

- It is a long-term strategy to frame policies in terms of the realities of people’s daily lives, and to change organisation cultures and structures accordingly. It puts people, and their diverse needs and experiences, at the heart of policy-making.

- It leads to better government through better informed policy-making and a greater transparency and openness in the policy process and helps to tackle democratic deficit by encouraging wider participation in the policy process through effective consultation mechanisms.

- As a process it tackles the structures in society which contribute to, or sustain, discrimination and disadvantage.

- The application of a mainstreaming approach can avoid the adoption of policies and programmes which replicate discrimination and exacerbate existing inequalities.

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EOC/CRE document – Questions on Mainstreaming
• Mainstreaming complements lawful positive action designed to address the historic and current impact of discriminatory structures and practices.”

Questions to Consider when equality proofing

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

   Does the policy properly consider the needs of diverse groups of women and men? Remember that members of the same social group may have different needs; and that some people face multiple discrimination, for example, ethnic minority women.

   Have equalities dimensions been explicitly addressed?

   Keep in mind the goals and outcomes of policies can either perpetuate or overcome existing inequities between women and men and amongst different social groups.

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

   Is the data you have been provided with broken down by gender, race and disability?

   Assume that there is an equalities impact then look for information to prove or disprove that assumption.

   Who has been consulted? There is a need for both experts and ‘ordinary’ voices to be heard. Has the fact that it is harder for some groups than others to speak out been taken into account?

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

   What is the impact of values, assumptions and stereotypes on the options presented and the options favoured?

   How might your own values, opinions and experiences influence your understanding of the issue?

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

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

6. **How will the policy be monitored and evaluated? How will improved awareness of equality implications be demonstrated?**
Equal Opportunities Committee – Title Conditions (Scotland) Bill

The Equal Opportunities Committee, as part of its work on mainstreaming equality has agreed the structured scrutiny of all Bills. I am therefore writing with a request for further information on the Title Conditions (Scotland) Bill.

Given that the Bill Team may have, to date, been working on the original set of 6 questions, issued by the Equal Opportunities Committee, these would be an acceptable starting point for the discussion. I would be grateful if the Committee Clerks could receive a reply by 9 August.

An initial analysis of the Bill has also raised some specific issues the Committee would wish to receive further information on, within the same timescale, and these are set out below.

Title Conditions (Scotland) Bill – Specific Queries

There are several references throughout the Bill to “sending” and “in writing” (cf. 75 (b)2, 87(1)) and only one to “by such other means as the Scottish Ministers think fit” at 98(1)(b)(d).

The key sections in this respect would appear to be 112 Sending and, as an example, the process set out in 96(8).

The Policy Memorandum does acknowledge in para. 132 that: “So far as blind or otherwise incapacitated people are concerned, there are long established procedures in law for employing notarial execution where such a person is transacting with property. The notary public will read over (and explain) a legal document to the person before subscribing on their behalf, if instructed to do so by the client”.

However, the question of how a blind or visually impaired person would be dealt with before they require to employ a notary public is the issue. The discharge of part of the responsibility by “affixing a conspicuous notice” to the “burdened property and a nearby lamp-post” would appear unlikely to involve those people who are profoundly blind.

Similarly, there appears to be no onus upon those issuing notices to make provision upon request for documents in alternate formats such as large print, Braille or audiotape. Acknowledging that legal advisers will eventually undoubtedly be consulted, and possibly notaries public, instructed there is still the point that those involved in the discussions who are blind or visually impaired should not be financially burdened merely in order to read what they have been sent.

If there are any queries from your officials perhaps they could contact Richard Walsh, Senior Assistant Clerk to the Committee, in the first instance. As ever, a copy goes to Colleagues and clerks on the Equal Opportunities Committee and the Justice 1 Committee Clerk, for information.
APPENDIX 4 – RESPONSE FROM MINISTER

Deputy First Minister & Minister for Justice
The Rt Hon Jim Wallace QC MSP

St Andrew’s House
Regent Road
Edinburgh EH1 3DG

Kate MacLean MSP
Convener
Equal Opportunities Committee
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August 2002

TITLE CONDITIONS (SCOTLAND) BILL

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

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

The Scottish Executive shares with the Parliament and the Equal Opportunities Committee a strong and clear commitment to equality. The Executive’s approach is outlined in its Equality Strategy, published in November 2000. That strategy is based on research, consultation and expert advice and is underpinned by mainstreaming. This is a long term approach, which recognises that effective change requires that equality issues are built into the policy process from the earliest stages and that responsibility for equality lies with everyone.
The Executive is developing tools and guidance to develop effective mainstreaming of equality issues. These are still being developed for roll out across the Scottish Executive. In the meantime, our starting point has been to use the set of six questions developed by the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission as a framework for assessing our work.

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

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

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

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

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

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

The question around alternative formats is not of course confined to this Bill. There is no statutory requirement to make the document available in alternative formats in relation to notices used in relation to planning applications and for road management purposes. In addition, the procedures will in the vast majority of cases be used by private individuals dealing with other private individuals (rather than corporate, including public, bodies) and I am anxious that no unnecessary expense is caused to those who wish to take advantage of the Bill’s procedures. In view of what I have said above about people wishing to seek legal advice about property rights, it may be that a personal explanation is more what is required than the provision of the documentation in alternative format.

I note in passing that duties created under the Disability Discrimination Act 1995 do not come into play in this context, where individuals are transacting with each other and where there is no ‘service provision’ to modify.

It may be that the best option might be to decide upon best practice which can be pursued and encouraged through the various equality organisations rather than to seek to add further and possibly impractical provisions into the Bill.

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

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

JIM WALLACE

ANNEX

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

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

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

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

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

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

A 12 week public consultation was undertaken. Copies of the consultation paper including the draft Bill were sent to the Disability Rights Commission, the Equal Opportunities Commission, the Commission for Racial Equality and the Equality Network, but no responses were received from these bodies. Further enquiries are now being made with the Disability Rights Commission and the Royal National Institute for the Blind in the light of the queries which have been raised by the Committee.

Steps were also taken to ensure that individuals had access to the consultation via the Scottish Executive website and a news release was also issued. All the responses to the consultation exercise are now also lodged on the Executive’s website.

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

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

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

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

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

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

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

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

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

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

Before commencement of the legislation, the Executive intends to issue guidance on the effect of not only the Title Conditions Bill, but also the closely related Abolition of Feudal Tenure etc. (Scotland) Act 2000, which together will bring about a fundamental overhaul of the system of land tenure in Scotland and the rules pertaining to the ownership of property. This guidance will highlight equality implications, particularly for issues such as sheltered housing. It is expected that bodies such as Age Concern Scotland as well as the other statutory and voluntary equality bodies will bring any issues or problems to the attention of the Scottish Executive and awareness of equality implications will be demonstrated in this way.
Christine Grahame MSP
Covener
Justice 1 Committee
Room 3.11
Committee Chambers
George IV Bridge
Edinburgh
EH99 1SP

30 August 2002

Dear Ms Grahame,

JUSTICE 1 COMMITTEE CALLS FOR EVIDENCE ON ALTERNATIVES TO CUSTODY ENQUIRY

SACRO would like to extend an invitation to the Justice 1 Committee to visit SACRO services in relation to the Alternatives to Custody Enquiry. I appreciate that the Committee will have busy schedules but would welcome the opportunity to show them SACRO's work.

The range of SACRO services includes Victim/Offender Mediation and Reparation, Bail Supervision and Accommodation, Intensive Supervision for High Risk Offenders, Alcohol Offending Programme for Probationers and Domestic Violence and Sex Offender Groupwork programmes. SACRO Youth Justice Services include Mediation and Reparation, Restorative Justice Conference and Personal Change and Drink Drive Programmes. Different services are provided from each of our 20 offices across Scotland. We would try to tailor visits to best meet the needs of the committee members, in terms of interest and location.

Yours sincerely,

Susan Matheson
Chief Executive
Dear Ms Taylor

CIVIC PARTICIPATION EVENT ON ISSUES OF SENTENCING AND ALTERNATIVES TO IMPRISONMENT

I have read the report commissioned by the Scottish Parliament Information Centre for the Justice 1 Committee with a great deal of interest. The conclusions are revealing in relation to public acceptability of alternatives to custody, which is the area for which I am responsible within the Scottish Executive.

There is one factual mistake on page 85 of the report. In the Section headed Supervised Attendance Orders, it says that SAOs “have been used relatively rarely with only 75 orders made by the courts in 2000.” This is not correct. 2,626 SAOs were made in 2001 but the figures do not appear in the publication “Criminal Proceedings in Scottish Courts” but in the publication “Criminal Justice Social Work Statistics”. I enclose a photocopy of the relevant page (page 34).

The reason for the distinction is that “Criminal Proceedings in Scottish Courts” cover those penalties imposed directly by the courts. Most SAOs however are imposed as a result of fine default and so are not included. We accept that this is confusing and are seeking to simplify the practice for the future. But the difference between 75 and over 2,600 is clearly important.

If it would be helpful, given the Justice Committee’s impending study on alternatives to custody, I should be happy to provide an informal briefing to Professor Hutton and the Clerks to the Committee.

I understand that you indicated the members of the Committee themselves would not have time for an informal briefing with us.

Yours sincerely

[Signature]

MRS ELIZABETH CARMCHEL
## Table 33
Number of Orders, Individuals and Orders per 10,000 Population (1)

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<th>Number of Individuals</th>
<th>SAOs Per 10,000 Population</th>
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Note:
(1) Orders per 10,000 population are based on GROS mid-year population estimates for 16 to 70 year olds.
Sheltered housing and the Bill

We have already given evidence in writing and orally on 3rd September and have read the evidence which was given orally on 10th September particularly in respect of s50 of the Bill in relation to sheltered housing developments. We are concerned that the expectations of those interest groups represented may not be met by s50. The approach of the Title Conditions Bill is generalist but the issues related to sheltered housing are specific and there is a danger that the Bill falls between the general provisions and seeking to address the specific problems inherent in sheltered housing developments.

Our members have experienced a variety of problems when purchasing such housing in relation to the conditions imposed. Whether these are the proper subject of real burden or not often makes no difference to the first purchaser of the property as the conditions can be enforced as a matter of contract with the first purchaser. The Contract (Scotland) Act 1997 provides that the contract remains in force notwithstanding the delivery and recording of a disposition. The parties are free to provide otherwise but the developer may well make no other provision in the contract. S56 of the Bill provides that incidental contractual liability will come to an end on the registration of the real burden. This affects only incidental liability in our view. We noted the contradiction between the Explanatory Memorandum and the SLC report in our original written submissions. Our view remains that the SLC report paras 3.40-3.45 are in fact correct. In our view s56 can only apply to those conditions contained in a disposition which are the proper subject of real burdens and that s56 has no application to burdens which are not real.

In the experience of our members the adaptations in sheltered housing are comparatively minor with examples being wider doors, easily used taps, grab-rails in bathrooms and typically an alarm system. We are concerned that concentration on the adaptations render a unit substantially different from an ordinary dwellinghouse as is required in s50(3) of the Bill does not fully recognise what the differentiation is. What makes sheltered housing for the elderly and other groups a success is not a question of services which are provided to the property but personal services which are provided to the residents of the property. This is in our view key to understanding the problems we envisage with s50. This can be illustrated quite neatly by quoting from the intended content of a deed of conditions which featured in Sheltered Housing Management Ltd v Cairns [11th September 2002 Scottish Courts website]. In describing the duties of the warden the deed provided:
“the duties of the warden which shall be generally to look after the wellbeing and safety of the feuars and to supervise the whole of the complex and the warden shall without prejudice to the foregoing be responsible inter alia for the following: (i) respond to any emergency call and summon such assistance as may be necessary; (ii) maintain a register of occupants with particulars of next of kin or the names of such other person or persons to be contacted in emergency; (iii) maintain a register of Doctors, Dentists, Ministers, Priests et cetera with relative phone numbers; (iv) being available to assist and welcome newcomers with help and advice and assisting the feuars in organising communal activities; (v) supervision of and assistance with maintenance of gardens, amenity areas, fencing, external parts of sheltered houses and other parts of the complex; (vi) supervision of and assistance with all other works of common maintenance and repair; and (vii) such other duties as shall be specified from time to time by the supervisor; (e) supervision and administration of the use of the guest bedroom which shall be at the sole discretion of the Management Company”

It is immediately noticeable that (i) to (iv) relate to the occupants and not to the property. They therefore fail the praedial test set out in s3(1) of the Bill which is amplified in s3(2) of the Bill requiring the relationship between the burden and the property to be direct or indirect but not merely that the obligated person is the owner of the burdened property. A further illustration of the problems which are attached to sheltered housing developments can be seen from the extract of the deed of conditions read out by Mr John McCormick in his oral evidence to the committee on 10th September 2002 column 3983 of the Official Report where it was stated that 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”.

Whether a person is capable of leading an independent life cannot be determined from an inspection of the titles. It thus fails the tests which were established in Tailors of Aberdeen v Coutts (1840) 1 Rob App 296 that inter alia require the terms to appear at full length on record. This requirement was reiterated in Aberdeen Varieties Limited v James F. Donald (Aberdeen Cinemas) Limited 1940 SLT 374. The same is true of whether a person is in receipt of a pension. The Bill modifies this rule to a limited extent in s5 which permits burdens in relation to contributions to maintenance costs to be permitted where they refer to another public document such as public register or other record. This is less extensive than that originally proposed in the SLC report. It would not extent to determining whether someone is capable of independent living or in receipt of a pension.

That leaves the issue of whether an age restriction is itself the proper subject of a real burden at present or the proper subject of a real burden after the
appointed day. In our view age restrictions are purely personal and are not directed to the property at all and are not the subject of real burdens. Our members have experience of housing associations having received advice that such conditions are not enforceable and have resorted to other methods to ensure compliance with such conditions. These include (a) inserting powers of redemption at a fixed price exercisable at will which is then modified by a back letter which would be ineffective in the event of a disposal by the association and (b) the granting of a standard security by the owner in favour of the association in security of a personal obligation by the purchaser which includes an obligation to take any person to whom the property is sold bound in like manner. Such methods can be enforced and rely on a vulnerable group of purchasers taking on trust the good faith of the developer. In our members view there is already a widely held perception in the profession that such clauses cannot be enforced in their terms except as a matter of contract with the first purchaser of the property. The Bill proceeds in s 50(5)(c) on the basis that such conditions are enforceable or at least will be enforceable after the appointed day. We do not share that view. We turn again to the provisions of s3(1) and (2) regarding the praedial rule but consider that such conditions are not related in any way to the property but only to the residents in particular units.

We understand that s14 of the Bill is intended to give a more purposive interpretation to burdens but in our view this is not enough. There is a danger in the use of the word "community" in the Bill which leads to interpreting that term in a popular sense of the collective will and needs of a group of residents in a particular area. This is illustrated in the SLC report para 2.15 where it states:

"Special communities may legitimately have special needs. For example, a prohibition on occupation by residents under the age of 60, out of place in a normal housing estate would be treated as praedial in a sheltered housing complex where the houses are specially adapted for elderly people, where the services of a warden are provided, and where the viability of the whole complex would be threatened by an influx of younger people."

And again in the opinion of Lord Nimmo Smith in Sheltered Housing Management Ltd v Cairns supra where he says in para 21:

"It appears to me, from the evidence, that a cardinal feature of any sheltered housing complex is the community of interest of the residents in the facilities provided at it. They have all reached a time in their lives when they have decided that they would benefit from such facilities and they have a mutual interest in their provision and in the payment of a service charge to secure it. The extent to which residents rely on these facilities no doubt varies from person to person and from time to time - the evidence in the present case tended to show that residents come to rely more on them as they grow older - but the monthly service charge payable at the same rate by each resident may be regarded as a form of insurance premium to secure the provision of the facilities."
In both these extracts "community" is being used in the sense of the interests and needs of the persons resident in that "community" in the sense which it is used in s25(2) of the Bill. There it is no more that the totality of the units subject to the community burden. The definition of "facility burden" contained in s110(1) of the Bill does nothing to assist either. A facility burden is defined as a burden which regulates the maintenance etc of heritable property and is intended to constitute a facility of benefit to other land. The example given in s110 (3) illustrate this with private roads and sewerage, common parts of a tenement and common areas for recreation. It does not extend to personal facilities or services rendered to the occupants.

Let us assume a developer perceives a marketing opportunity to market a development for muslims, including a prayer room. The deed of conditions requires that the proprietor of each in all time coming is a muslim and is required to pay a share of the cost of maintenance of the prayer room. The community in the sense of the residents might very well feel that such a condition regarding being a muslim was a good thing but it is not in our view a valid real burden. Sharing the cost of maintenance of the prayer room would on the other hand be a perfectly valid burden.

While this may appear an extremely unlikely scenario one of our members has experience of a condition in a small sheltered housing development of a condition requiring the member to belong to the Christian organisation which developed it. This in our view is invalid. Age restrictions are in our view equally personal and not real.

Our view is therefore that an age restriction will continue to fail the praedial tests set out in s3. A simple amendment to s50(5)(c) might get round the problem by providing that notwithstanding any rule of law to the contrary a real burden prohibiting the occupation of a unit by a person based on the age of the occupant will be valid. This however would not validate the other types of conditions which are commonly attached to such developments.

One or multiple communities?
Many sheltered housing developments include a block of flats and walk-up housing. These are usually covered by a single deed of conditions. The residents in the houses do not have the same services as those in the flats which might be described in a shorthand way as 'more sheltered'. Those residents in the flats are often more vulnerable and less likely to attend meetings and vote in relation to proposals. If simple majority rule operate in such circumstances there is a danger that those requiring fewer services might vote to stop services which benefit the more vulnerable. In fact in such a development there are truly two communities bound together in a single deed of conditions. In our view the Bill does not make allowance for such situations other than the 75% rule imposed in s50(5)(a)(i) of the Bill which might not be suitable in the circumstances of a particular development where a majority might have interests opposed to the minority.

Manager burdens
It appears from Sheltered Housing Management Ltd v Cairns that there may be three types of arrangement common maintenance charges which can occur in inter alia sheltered housing developments.

**Manager burdens** as defined by Lord Nimmo Smith in Sheltered Housing Management Ltd v Cairns

**Factoring burdens** where costs are apportioned after the expenditure has been incurred; and

**Sinking fund burdens** where in addition to meeting the costs of day to day repairs funds are set aside for future planned maintenance on a long terms basis. Such burdens can be seen in Hanover (Scotland) Housing Association Petitioners [4th Jan 2002 Scottish Courts website].

The manager burden in Sheltered Housing Management Ltd v Cairns was described by Lord Nimmo Smith in these terms:

"The main feature of such schemes which is significant for present purposes is that in each case SHM fix the amount of the monthly service charge. The service charge is calculated in such a way as to cover SHM's outlays and overheads and provide an element of profit. The residents are not, however, provided with a budget or accounts, and Mr Miller has steadfastly refused to disclose, in relation to any of the complexes managed by SHM, how the service charges are calculated or what the element of profit is. This is perceived by some residents as resulting in a lack of accountability, but it appears that the vast majority of the residents in complexes managed by SHM are content with the services provided and to pay the service charges. It appears that this creates a monopoly in favour of the manager who is not obliged to account to the owners of units for costs and can manage the contributions in such a way as to produce a profit for the manager with no accountability to the owners for decisions in relation to costs". [para. 4 of the opinion]

Factoring burdens are well understood and were described by Lord Nimmo Smith in these terms:

"Under this system, residents in a complex are provided with budgets and accounts, so that they are aware of the amount of individual items of expenditure and of the fee charged by the management company. Decisions, such as whether to approve a budget, may be taken by a majority of the residents. In some instances, the residents may be able to decide to change the management company; in others, the management company cannot be changed". [para. 5 of the opinion]

Sinking fund burdens are favoured particularly by housing associations and this mirrors their practices and policies in setting rents for rented properties. Under such a scheme the lifespan of components of a building is estimated as is the cost of replacement at the end of that lifespan. Those costs are then recovered over the lifespan of the component. Under such an arrangement the costs are obviously higher than under a simple factoring arrangement.
Such a scheme has the advantage that funds should be available to carry out major works without an unpleasant financial shock to the owners when such works are required but it has the disadvantage that it will mean a greater outlay for owners in the way of service charges than under a normal cost recovery factoring scheme. In the Hanover case mentioned above the arbiter appears to have reduced the contributions to the sinking fund.

If a manager can constitute a type (a) manager burden where he manages in his own interest this is in our view not acceptable in any circumstances. It is our view that such a manager burden is unenforceable at common law as contrary to public policy but it appears, if the decision in Sheltered Housing Management Ltd v Cairns is correct, that such manager burdens could be created and be valid for a period of 10 years or 30 years where it is imposed by a registered social landlord where the sale is a right to buy sale. This is a very lengthy period to exercise a monopoly in one’s own interest and in our view manager burdens which are permitted by the Bill should be restricted to type (b) and (c) burdens.

S28 of the Bill appears to consider only type (b) burdens. The SLC rejected proposals for costs other than repair and maintenance costs to be subject to majority rule under what is now contained in s28. These were originally contained in its Discussion Paper [see para 7.35 of its report]. This is unfortunate as majority rule would not appear to apply to a type (c) burdens and unanimity would still be required where as other burdens in the deed of conditions which were of type (b) and could be varied under the majority rules. It appears that s28 envisages a situation where the depositor is to be repaid sums not immediately required for repairs. However where burdens create type (c) obligations to pay, these are outwith the scheme of the Bill altogether, as they are intended for future repairs, and an owner could demand repayment under s28. Where a type (c) burden is created it would also seem to be necessary to ensure that on a transmission of the unit the share of the sinking fund transmits to the new owner along with the property which is not the way in which s28 operates at present. Where there is a sinking fund it appears that the provisions of s28(8) apply and such funds are held in trust for depositors. As such it would appear that diligence could be done against the sinking fund and that in the event of insolvency the proportion deposited by the bankrupt would vest in his trustee thus depleting the sinking fund of the share pertaining to that unit.

Other issues
We are aware that developers of sheltered housing impose or have imposed in the past other burdens which on the face of appear to have a logic but are designed for their commercial benefit. A clause requiring any proposed second or subsequent owner to be approved by the developer as falling within the class of persons who can occupy the building is commonplace. A superior has had no power to reject a vassal since the Heritable Jurisdictions (Scotland) Act 1746 making such clauses illegal but it does not stop them appearing. What is even more indefensible is the ability conferred in such clauses to levy a charge of 1% of the sale proceeds without any reference to the actual costs involved. Again such a clause would be enforceable against
the first purchaser as a matter of contract even if the burden is not real and therefore not enforceable against subsequent purchasers. It is indicative of the way in which certain developers of sheltered housing treat what has to be seen as a potentially vulnerable group of purchasers.

Conclusions
We welcome the attempt to do something to assist the position of owners in sheltered housing developments contained in s50. We do not consider however that this will supply all the answers because the issue is one where there are mixed property and personal service issues and in our view property law alone cannot be an adequate vehicle to resolve those issues. The existence of a voluntary code of practice may assist future owners in controlling some of the excesses which have been engaged in by developers but it will not resolve problems encountered by current owners.
19th September 2002

Ms Alison Taylor
Clerk
The Scottish Parliament
Room 3.09
Committee Chambers
Edinburgh
EH99 1SP

Dear Ms Taylor

Title Conditions (Scotland) Bill

Thank you for your letter of 11th September. I enclose herewith my answers to the questions posed. I have had a discussion with Professor Paisley so I was aware of his general attitude to the Bill. My own attitude is also largely supportive. Should you require any further information from me or to do with any further discussion of the matter either formally or informally please let me know.

Kind regards.

Yours sincerely

[Signature]

Professor Robert Rennie

SCHOOL OF LAW
Stair Building, University of Glasgow, Glasgow G12 8QQ
Telephone: 0141-558 8855 Ext Fax: 0141-330 4000/5140
RESPONSE BY PROFESSOR R. RENNIE

TO THE QUESTIONSPOSED BY JUSTICE I COMMITTEE

ON

TITLE CONDITIONS (SCOTLAND) BILL

General

1. What are the main problems with the law relating to the title conditions and real burdens at present? Do you consider these to have been addressed by the Bill?

Anyone who considers the law relating to title conditions and real burdens is faced with all with a stark choice; either abolish real burdens and title conditions altogether and leave the regulation of the use of land and buildings to the Planning Acts, Building Acts and similar legislation or retain a system of private regulation of land and bring this up to date to suit modern society. Title conditions which regulate the use of land developed in the late 19th century. If one were to compare, for example, the new town of Edinburgh and the west end of Glasgow both of which were developed by reference to detailed title conditions relating to construction, building materials and use with the housing schemes of the 1950's and 1960's then one might say that the system of title conditions has had a considerable measure of success as a private planning system. The main function of the title condition of course was to give a party with an interest in the overall amenity of an area a right to control development. However, as the years went by feudal superiors became more remote from the land and indeed the system lent itself to abuse. The superior or other party entitled to enforce the title condition tended to demand a sum of money for a waiver of the condition rather than give proper consideration to whether an alteration to a building or a new development was in the general interests of the area. Another difficulty which has presented itself more recently is identifying the party or parties who may in certain circumstances be entitled to enforce conditions. This problem could of course become more acute with the abolition of the feudal system which removes the superior as the main focus for enforcement. It is not always clear from even a detailed examination of title or an inspection of the registers, just who can enforce a condition. It may be, for example, that there are uniform title conditions applicable to a whole housing development. This may mean that every owner can enforce as against another owner. The law here is particularly unclear at the moment, mainly because the principles of the law are derived from cases and precedents which require to be interpreted against each particular circumstance. Despite this the Scottish law of real burdens can be said, even in its present form, to be a coherent system. However, it has become over complicated and in some instances quite sensible uses of real burdens (for example the regulation of sheltered housing for elderly people)
may not fit in with the existing law. Accordingly the Bill is to be welcomed for three reasons:

(a) It sets out coherently what the existing law actually is in relation to the creation of real burdens and title conditions and,
(b) It seeks to clarify who will have rights to enforce conditions in the future and,
(c) It seeks to modernise the law and make it relevant.

‘Right to buy’ developments and deeds of conditions

2. It is common for local authorities (and other social landlords) to feu off houses under the ‘right to buy’ scheme reserving themselves the right to enforce the burden. In an estate with a mixture of private and public ownership only the part in private ownership is a ‘community’. As a solution to the problem the executive suggested the registration of a deed of conditions for the entire community prior to the appointed day. Do you think this is a workable proposal?

The answer to this question depends on how the various local authorities or housing associations have actually handled right to buy sales up to the present time. If they have already granted (as many will have done) a deed of conditions covering the whole estate or the whole block of flats then assuming that section 17 of the Land Registration (Scotland) act 1979 has not been disapproved that deed of conditions will apply to all houses covered, sold or unsold, and will continue to apply to right to buy sales after the Title Conditions Bill comes into effect. I suspect however that the problem which has been raised covers situations where no deed of conditions exists at the moment and the title conditions have been contained in individual feu of individual houses or flats by the local authority or housing association to right to buy purchasers. In that case no title conditions will apply to those parts of the development or block which are currently tenanted and unsold. As the law stands at the moment when abolition of the feudal system takes effect the local authority or housing association will lose all right of superiority and with it the right to enforce the title conditions unless prior to the second appointed day the local authority or housing association has re-allotted the burden to any properties which remain in the ownership of the local authority or housing association and qualify under the 100 metres rule. It seems to me, however, that there would be a difficulty in a local authority setting down a deed of conditions for the whole block by including those parts which had been already sold without the consent of the owner occupiers in the block. I suppose a deed of conditions could be set down which covered only the unsold properties but that of course would not have the effect of making the whole block or the whole housing development a community for the purposes of the Title Conditions (Scotland) Bill. I have had the opportunity at looking at Professor Paisley’s evidence in relation to this matter. He has taken the view that section 32 of Conveyancing (Scotland) Act 1874 cannot be used except in circumstances where the party granting the deed of conditions is about to feu or otherwise deal with or affect his lands. As Professor Paisley points out the theory behind the section is that someone who is about to sell and grant deeds can set out the title conditions in a single deed and not have to set them out
each time a plot is sold. However I did not read the section as meaning that there have to be immediate sales or disposals. I could see no reason, for example, why a local authority which knew it had obligations under the right to buy legislation and therefore might be required to sell, feu or dispose in the future could not register a deed of conditions. However that deed of conditions could only affect that part of the block which was unsold. For there to be a single deed of conditions which applies to the whole block (sold and unsold) there would require to be agreement among everybody including the existing owner occupiers and all these parties would require to grant the new deed of conditions.

Enforcement of real burdens: Implied rights to enforce

3. In relation to implied rights to enforce under common schemes, the Executive has taken a different approach to the Scottish Law Commission. It has abandoned the 4 metre rule in relation to who can enforce the burden and preserved all implied rights but re-introduced the rule in relation to the question of discharge. Which approach do you prefer and why?

One of the fears which was expressed in relation to feudal abolition was that implied third party rights would come in to sharp focus. At the present time while the feudal system is with us if there is a breach of a feuing condition then people automatically go to the feudal superior and ask for a consent or a waiver. Although neighbouring proprietors may have by law implied third party rights to enforce the same burden this is largely ignored in practice. When there is no feudal superior however people’s attention will be drawn to implied rights to enforce. My own view is that the Feudal Abolition Act and the Title Conditions Bill should not increase the number of people who can enforce burdens. I say this because, cynically, many people are quite happy to waive or discharge burdens if their palms are crossed with silver. Alternatively neighbours (as opposed to feudal superiors) may have other reasons to be difficult (take an obvious example of a neighbourhood where someone’s dog has bitten someone else’s child or some other proprietor has complained about the parking of a commercial van or a noisy motorbike). If there is a pre-existing grudge there may be a refusal on grounds which are far removed from the question of whether or not there is any property amenity to be considered. For these reasons frankly I am in favour of the 4 metre rule in connection with enforcement rights. I say this not as an academic Professor but as someone who has practised conveyancing for over 30 years and has been involved in many neighbourhood disputes where the parties will use any weapon. The law relating to titles and title conditions should relate to just that and in my view people who live outwith the 4 metre radius generally speaking would have no real amenity interest to protect. I noted that Professor Paisley’s view was to favour the Executive’s approach because it preserved existing rights and did not take them away arbitrarily. I doubt frankly if many owner occupiers are remotely aware of their third party rights and in any event one must remember that in such situations the proprietors will be benefited proprietors with rights to enforce and at the same time burdened proprietors. All owner occupiers in an estate or block covered by the same conditions
would in my view benefit by the introduction of a 4 metre rule. I do agree with Professor Paisley however that simplifying the law on third party rights, especially in relation to discharge is an absolute necessity.

4. **Our understanding is the effect of section 48, read with section 52, is to create new implied rights to enforce in certain circumstances when none existed previously. Do you think that this is a good idea?**

For the reasons I have already stated I am not in favour of increasing the number of people who have implied rights to enforce. If however that policy decision has been taken then I have no objection to the terms of sections 48 and 52.

**Enforcement of real burdens: tenants etc**

5. **Do you agree with the proposal in the Bill to extend rights to enforce to people in occupation of the benefited property other than owners, such as tenants under a lease?**

I think one would have to say that to give people other than owners of the benefited property such as tenants a right to enforce burdens is to cut across the general principles relating to title conditions as such. That of course is a purely academic point of view. From a practical point of view I cannot see any particular objection to extending rights to enforce to tenants and other parties who may after all have more practical or immediate reasons to enforce a burden than let us say a landlord who is a large property or investment company based in London.

**Discharge of real burdens: the sunset rule**

6. **Do you agree with the introduction of the ‘sunset’ rule as a method of discharging unwanted real burdens? Do you think it will operate effectively in practice? Do you agree with the selection of 100 years as the relevant period before which the rule cannot operate?**

I am all in favour of a sunset rule and I agree that it is probably sensible that the abolition of the burden is not automatic. I agree with Professor Paisley that the provisions of the Bill as they stand are well thought out. There is really no reason to have title deeds or land certificates cluttered up with a whole host of burdens going back two centuries setting out detailed proposals for roads, footpaths, sewers, drains etc. all of which have been taken over by the relevant local authority decades ago. One can of course argue for a shorter period and indeed other jurisdictions have shorter periods. Some jurisdictions have shorter periods coupled however with an almost automatic right in favour of the party entitled to enforce to extend the period. I think a hundred years is probably a reasonable figure. One could certainly not argue for any longer period.
Discharge of real burdens: negative prescription and acquiescence

7. Do you approve of the reduction in the relevant period for the purposes of negative prescription?

I am very much in favour of the reduction in the relevant period for the purposes of negative prescription. This will be a great boon for both lawyers and those parties purchasing and selling property because it will remove the need to go chasing after people who might or might not have rights to enforce and obtain waivers or discharges in the vast majority of cases.

8. In relation to acquiescence the Bill imposes a maximum limit on what constitutes a ‘reasonable period’ in which to object to the breach. Do you agree with this approach? Do you think 8 weeks is the right point to set as the maximum limit?

I again am wholeheartedly in favour of this reform. In too many cases difficult neighbours use a title condition as a means of getting back at someone else or simply extracting money. I have known cases in my own experience where a neighbour with a quarrel has watched a party build an elaborate extension without objection and then on the day that it is complete ask his lawyer to write a letter demanding that the extension be taken down because it is in breach of a title condition. That of course is quite preposterous. I tend to think that 8 weeks is a reasonable period. One cannot of course legislate for every eventuality. There will be people who for one reason or another go off for longer periods. I agree with Professor Paisley that the general law cannot police other people’s properties or their property rights. One would have thought, for example, that if someone was going away for the whole of the winter to Spain then they would have a relation or a friend or another neighbour looking after the property who would be prepared to report something such as a new extension being built next door. I accept of course that some people do go abroad on lengthy contracts and let their house out either directly or through a letting agency. There may be an obligation on the tenant to advise the landlord or the letting agent of anything that happens or in particular of any notice which might be served in relation to a planning application or a building warrant for an extension. There may be something in the arrangements between the letting agent and the owner which obliges the letting agent to inspect the premises from time to time. I do not think however that legislation can be framed to cater for these situations. Anybody who lets their property takes certain risks. For example, the tenant may leave the house without paying rent and at the same time may clear the house of furniture and disappear. I think that someone who intends to let their property on a long terms basis must be prepared to accept that things may happen when they are away over which they will have no control simply because they are not there.
Community burdens: Discharge by majority

9. As well as discharge by adjacent proprietors, the Bill provides a further method of discharge for community burdens – namely discharge by a majority of affected units. What are your views on this additional method? Do you think it is workable in practice?

I am in favour of a discharge for community burdens by majority although again it might be said to cut across general principles of property law. Frankly there is no chance of obtaining a discharge from everybody in an estate. For one thing some of them are almost bound to have just died or gone to Australia and by the time you get 95 out of 100 consents some of those who have consented will have sold on to someone else. It must also be borne in mind that the owner can obtain the signatures of neighbours within 4 metres as an alternative.

Lands Tribunal reforms: general

10. Overall the effect is to increase the role of the Tribunal in relation to title conditions. Can you foresee any difficulties with this approach?

I think that the Lands Tribunal has worked reasonably well. However one of the problems at the present time is that even an undefended application to the tribunal can take some time. I have known cases where, for example, someone entitled to a burden has demanded a ludicrous sum of money simply to discharge or waive the burden and when faced with a threat to go to the Lands Tribunal has simply said “if you want a quick solution you pay me the money”. I share Professor Paisley’s concern that the Tribunal could become inundated. I rather think that the numbers in the Tribunal would require to be increased.

Lands Tribunal: who can apply to have the burden varied/discharged?

11. In written evidence to the Committee, Professor Paisley proposed that someone who has entered into a contract to purchase land should be able to apply to the Lands Tribunal to discharge a burden in respect of that land. At present, it is likely that what would happen is the seller would be contractually obliged to the prospective purchaser to apply to the Lands Tribunal. Do you consider this approach to be inadequate?

I see absolutely no reason in principle why a purchaser under a contract of sale should not be able to apply to the Tribunal. As Professor Paisley points out the purchaser is likely to be a developer who wants rid of a title condition and even if the seller is making the application the purchaser will effectively want the major say in what is in the application and how the application is conducted.
Jurisdiction of the Lands Tribunal: jurisdiction in respect of statutory agreements

12. In written evidence to the Committee Professor Paisley suggested that statutory agreements such as s 75 planning agreements should be included in the definition of title conditions and therefore in the jurisdiction of the Lands Tribunal. What do you make of the Commission’s view that the Tribunal ands procedure are not well equipped to consider matters of public policy? Similarly, is there merit in their view that it would be better to make this reform after a review of the whole of the relevant area of law rather than as an ‘add on’ to title conditions reform?

I can see no reason why section 75 agreements should not be brought within the jurisdiction of the Lands Tribunal. The conditions in section 75 agreements run with the land in the same way as title conditions run with the land. It seems to me that there is no adequate reason for keeping section 75 agreements outwith the jurisdiction of the Tribunal. In any event as Professor Paisley has pointed out the Tribunal do deal with local authority matters such as the assessment of compensation and difficulties over right to buy purchases. There is no other way in which a section 75 agreement can be varied apart from agreement presumably with the local authority. I would have thought that most section 75 agreements would contain sensible conditions in respect of a development so initially at least I would doubt if the Tribunal would want to vary anything. There could however be a situation where after a lengthy period of time, the conditions in the section 75 agreement are wholly inappropriate.

Interaction with the Feudal Act: the 100 metre rule

13. Let us start by considering the interaction of the Bill with the Feudal Act. Having considered the matter again since the Feudal Act, the Executive has decided to retain 100 metre rule, do you agree with this approach and if so why?

Broadly I am in favour of 100 metre rule. I take the point that farmers may not be able to enforce conditions in feus to protect their livestock but I would have thought a burdened proprietor would be quite happy to maintain fencing which stopped livestock straying. It must be remembered also that in the example quoted in Professor Paisley’s evidence the farmer must have taken some sort of decision to feu rather than simply dispone or sell outright. It is the decision to retain a superiority interest which results in the loss of the right to enforce. Had the farmer simply sold and dispone without creating a feudal link then after the abolition Act he would have been entitled to enforce the burden. The critical decision was to abolish the feudal system. After that only very few and limited exceptions could be allowed. I would not be in favour of expanding the re-allotment provisions contained in sections 18 and 19 of the abolition Act. It would be open of course to farmers or developers to seek an agreement with an adjoining proprietor which kept the burden alive and failing that agreement to apply to the Tribunal under section 20 of the abolition Act.
If, for example, we were talking about a burden relating to the maintenance of a stock proof fence then the tribunal might well deem it reasonable to keep that burden in force.

14. The Scottish Landowners' Federation suggest that feudal superiors will not go to the time, trouble and expense of saving all but the most worthwhile feudal burdens and will only save those where their legal advice is there would be interest to enforce. Accordingly the protection supposedly afforded by the 100 metre rule is unnecessary. What are your views on this?

It would naïve I suppose to think anything other than that the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Bill are fundamentally anti-superior. One cannot abolish the feudal system without being anti-superior. Accordingly the rights to existing feudal superiors to re-allot burdens are fenced about by obligations to serve notices, swear oaths and the like. Even at that, the superior or former superior will still have to show there is an interest to enforce the burden. I tend to agree with the view of the Scottish Landowners' Federation that most feudal superiors will not go to the time, trouble and legal expense involved in re-allotment. Nevertheless I consider that the 100 metre rule is a good marker and one must bear in mind that the re-allotment provisions do not just relate to the 100 metres. There is also the requirement that within that radius there is a building for human habitation or resort. The point of that particular section is to protect, for example, a widow who, recently bereaved, finds that the garden is too big. In 1995 she fees off the lower half of the garden under conditions relating to the height of the boundary wall, the number of storeys to be incorporated in the new feu and the like. When abolition takes effect she loses the right to enforce these important conditions and the new owner of the feu decides that he will further sub-divide it by erecting three more houses all of which will overlook the widow's garden. In such a case the widow could if she wished re-allot the burden. That is really what is being catered for.

15. If a superior sold off part of his land and used a feu disposition he has to own a building on his neighbouring land within 100 metres of the burdened property to preserve and enforce his burden after feudal abolition. If he had instead used a disposition he simply would have to demonstrate interest to be able to enforce his burden. Isn't it unfair that a former feudal superior owning land to act as a benefited property is now subject to a more stringent test that somebody who originally used a disposition?

I take the point which is being made here. In some ways a land owner may argue that he should be in the same position as if he had simply disposed the ground rather than feued it off. There is the other valid point that before feudal abolition was ever thought of solicitors would have advised the land owner that feuing the land subject to burdens was better than simply disposing it because the title of a superior to enforce a burden is clear (it is the superiority title itself) and the interest of a superior to enforce a burden was presumed in law. However the fact of the matter is that a decision has been
taken to abolish the feudal system. A critical decision may have been taken by a land owner based on sound legal advice to place himself in the best possible position for enforcement of title conditions against the background of the law that existed at the time. That law has changed and unfortunately there are bound to be anomalies of this type. It simply cannot be catered for against the background of abolition.

Interaction with the Feudal Act: Development value burdens and clawback

16. Do you agree with the Bill’s approach to development value burdens and clawback? We are interested in the decision not to preserve existing feudal burdens of this type, the way the issue of compensation has been dealt with and whether you think amendments to the standard securities legislation are adequate.

I do agree with the Bill’s approach to development value burdens and clawback. I note that the question refers to “existing feudal burdens of this type”. I have been asked for many opinions in the past concerning this type of burden. I am aware of course that this burden can be a feature of sales by public authorities where they provide that in the event of planning permission being obtained for certain types of development or indeed planning permission being obtained for more units above a certain limit then an extra uplift payment will be made by the purchaser back to the local authority. This of course can also be a feature of ordinary sales by individual development companies who effectively carry out all the ground work for the planning application with a view to selling on at a profit. It seems to me that these are purely commercial deals and that they have no place whatsoever in a system of land tenure. These arrangements do not relate in any way to the land or the buildings to be erected on the land. Moreover it is quite clear in relation to the existing law of real burdens that where a burden relates to the payment of money then the amount must be specific. Clawback burdens of course never have a specific amount. They usually have a complicated formula based on, let us say the number of retail units, or the amount of retail food space or the like. Accordingly the actual amount of the clawback can only be calculated once the planning situation is clarified. I have therefore on a number of occasions given an opinion to the effect that a so-called clawback burden is not a real burden and accordingly does not transmit to a new owner of the burdened property. That of course does not mean that it would not be effective as a contract between the two original contracting parties and that is how it should be. I am quite happy with the proposal to allow a real burden for an uncertain sum of money where that sum of money is simply payment of a proportion of a maintenance charge which will of course vary depending on the extent of common repairs from year to year. That is not a commercial agreement between developers or local authorities and developers; it is a burden which quite clearly relates to and benefits the land or the buildings. I have never quite understood why people thought that these clawback arrangements were real burdens. They have never been real burdens. They should not be made real burdens in this Bill. Even if there was a suggestion that they might be made real burdens, in my view, this could never be made retrospective because people will have understood the law to be as I have
explained it namely, that such a burden for an uncertain clawback cannot be a real burden. I can see the argument whereby the party entitled to the clawback points out that a contract can be broken and there is no security if, for example, the person who is bound to pay the clawback is bankrupt or is a company which has gone into liquidation. The argument runs that if the clawback is regarded as a real burden then no-one can sell the land without dealing with the clawback payment. However a commercial contract can be secured by a standard security and a clawback agreement could be secured by a security on the land. I am perfectly satisfied with a compensation formula and the amendments to standard securities.