The Committee will meet at 1.30pm in Committee Room 1.

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

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

3. **Petitions:** The Committee will consider the following petitions—

   Petitions PE532 and PE533 by Mr Ronald Smith.

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

   John Mayhew, Policy and Planning Adviser, National Trust for Scotland, Robin Stimpson, Law Agent, Anderson Strathearn, Alan Hampson, National Strategy Officer and Bob Farrington, Designated Sites Unit, Scottish Natural Heritage, and

   Jim Wallace QC MSP, Deputy First Minister and Minister for Justice.

5. **Petition:** The Committee will consider the following petition—

   Petition PE124 by Grandparents Apart Self Help (GASH).
6. **Work programme:** The Committee will consider its forward work programme.

Alison Taylor
Clerk to the Committee, Tel 85195

The following papers are attached for this meeting:

**Agenda items 1 and 4**
- Note by SPICe and Adviser (private paper) J1/02/32/1
- Submissions on the general principles of the Title Conditions (Scotland) Bill at Stage 1 from:
  - National Trust for Scotland J1/02/32/2
  - Scottish Natural Heritage J1/02/32/3
  - Memorandum from the Scottish Executive J1/02/32/4
  - Supplementary evidence from Scottish Law Commission J1/02/32/5

**Agenda items 3 and 5**
- Note by the Clerk (petition attached) J1/02/32/6
- SPICe briefing for the Committee J1/02/32/7
- Note by the Clerk (petitions attached) PE532 PE533 J1/02/32/8

**Agenda item 6**
- Note by the Clerk J1/02/32/9

**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)

**Papers for information circulated for the 32nd meeting, 2002**

- Correspondence regarding Justice 1 Committee’s legal aid inquiry from Minister for Justice J1/02/32/10
- Correspondence from the Presiding Officer to Lloyd Quinan MSP regarding the Council of the Law Society of Scotland Bill J1/02/32/11
Introduction

The National Trust for Scotland has statutory purposes relating to promoting the conservation and enjoyment of Scotland's natural and cultural heritage. Real burdens are fundamentally important to its ability to implement these purposes, because they are one way in which it can promote them over land which it does not own. The Trust therefore takes a strong interest in this Bill, particularly Part 3, Conservation and Maritime Burdens. The Trust responded to the consultation over the draft Bill in July 2001.

Title Conditions and The National Trust for Scotland

At present the Trust can impose real burdens when selling land by feu or by outright, i.e. non-feudal, disposition. It holds over 1,000 feudal superiorities; most of these have been created by the sale of land during its 70 years of existence, but some have been acquired as superiorities, usually in connection with the acquisition of other property. The Trust can also impose title conditions which are not real burdens but are analogous to them by concluding a restrictive agreement (usually known within the Trust as a 'Conservation Agreement') under Section 7 of The National Trust for Scotland Order Confirmation Act 1938, either when selling land, or by agreement with the owner of land which it has never owned.

Conservation Burdens

The Trust welcomes in principle the proposals for conservation burdens, as they will enable it and other conservation bodies to continue to have a mechanism for ensuring the conservation of important land or buildings when their sale is required for whatever reason. Indeed, as long ago as 1992, in response to the 1991 Scottish Law Commission Discussion Paper on the Abolition of the Feudal System, the Trust argued that some feudal burdens should be preserved, as they were imposed in the public interest rather than for private interests.

However, the definition of the purposes of conservation burdens at Section 37(1) of the Bill should be improved. For example, flora and fauna wrongly seem to appear rather as an afterthought to architectural or historical characteristics, and the phrases 'any other special characteristics' and 'general appearance' are unsatisfactorily vague. As a conservation organisation concerned with the integrated management of the natural as well as the cultural heritage of Scotland, the Trust proposes that there should be a more holistic definition of the purposes of conservation burdens which give equal weight to both natural and cultural heritage. This might be, for example 'to preserve or protect, for the benefit of the public, the natural or cultural heritage of any land'. Indeed, a more satisfactory definition appears in Paragraph 164 of the Explanatory Notes (for the benefit of the public, burdens which protect the built or the natural environment'). There might also be merit in including specific reference to, for example, biodiversity, landscape or public enjoyment in the definition.

The Trust raised this issue in its response to the consultation over the draft Bill, but the Scottish Executive has not addressed it in the Bill as introduced.

Conservation Burdens - Exception from Sunset Rule and Variation
Section 19 introduces a new termination procedure for real burdens which are at least 100 years old. The Trust supports the proposed exception for conservation burdens from this ‘sunset rule’, the valid argument for such exception being that the significance of land for conservation normally endures into the long term, far beyond 100 years or any other arbitrary ‘sunset’ period. In its response to the consultation over the draft Bill, the Trust requested clarification, however, that conservation burdens could be varied for good reason by agreement between the conservation body and the burdened owner. Paragraph 180 of the Explanatory Notes makes clear that such variation can indeed take place under Section 44(2), by registering against the burdened property a deed which partially discharges the conservation burden whilst otherwise leaving it in force. The Trust therefore considers that its concern over this aspect has been satisfactorily answered.

Definition of Conservation Body

The proposed definition of a conservation body at Section 37(4) appears to extend to both public and voluntary bodies, and does not specify that they must have the power to own land. It therefore appears to cover a wide range of potential bodies, including public bodies and non-landowning voluntary bodies as well as landowning voluntary bodies such as the Trust.

The proposed definition of a conservation body seems likely to result in due course in an increasing number of bodies becoming able to conclude conservation burdens, as opposed to the present situation where the Trust’s ‘Conservation Agreements’ are the only option available to a private owner wishing to conclude such an agreement with a voluntary conservation organisation. The Trust therefore welcomes this development, as it should give the owners of land or buildings of conservation significance a wider range of potential partner bodies from which to choose the most appropriate in the particular circumstances. This should broadly benefit the cause of conservation in Scotland, by providing greater opportunities for a wider range of conservation bodies to extend their influence without the expense of owning or managing land. The Trust welcomes the commitment at Paragraph 67 of the Policy Memorandum that the list of conservation bodies will be subject to scrutiny by the Scottish Parliament, although it is unclear where the Bill provides for this.

However, there are concerns that the relatively loose definition of a conservation body at Section 37(4) might allow organisations whose primary purpose is not conservation to qualify too easily as conservation bodies by adding the necessary clauses to their constitution, and then to use conservation burdens for ends which are not necessarily in the public interest. It is therefore important that more detailed guidelines on the selection procedure for conservation bodies should be set out, either in the Bill or in subordinate legislation. This could set minimum standards for a conservation body covering, for example, democratic structures, size of membership or length of time in existence.

The Trust raised this issue in its response to the consultation over the draft Bill, but the Scottish Executive has not addressed it in the Bill as introduced.

Maritime Burdens

Given the great importance of the foreshore and seabed to the public interest, for example in terms of conservation, recreation, navigation and fishing, the limited proposals for maritime burdens at Section 42 are disappointing. For example, conservation bodies should be able to conclude conservation burdens over areas of the foreshore or seabed owned by themselves, by the Crown or by others. The Crown owns most of the foreshore, but not all of it; for example the Trust owns stretches at some of its properties. The Bill represents an important legislative opportunity to enhance the conservation and management of the foreshore and
seabed, so the Trust seeks improved provisions in the Bill for the conservation and management of areas of foreshore and seabed of conservation importance, along the lines suggested above.

The Trust raised this issue in its response to the consultation over the draft Bill, but the Scottish Executive has not addressed it in the Bill as introduced.

Ability of former superiors to nominate a Conservation Body as the benefited proprietor for burdens which are similar to Conservation Burdens

The Policy Memorandum raises, at Paragraph 66, the issue of those feudal burdens imposed in the past by private individuals for altruistic reasons, to protect some aspect of the natural or cultural heritage. These are therefore like conservation burdens, in that they were imposed principally in the public rather than private interest. In the consultation over the draft Bill, the Scottish Executive canvassed the possibility of introducing provisions to allow a feudal superior to nominate a conservation body as his or her successor as the benefited proprietor for such burdens, which would then become conservation burdens. The Policy Memorandum goes on to assert that this proposal was supported in consultation, and states that the Bill therefore includes a provision to allow this, presumably Section 102(3).

The Trust accepts that this proposal would potentially introduce an additional legal means by which it could further its statutory purposes of promoting the conservation and enjoyment of Scotland’s heritage, and is therefore greatly interested in it. However, the Trust is concerned at the likely costs of taking on this potentially large additional responsibility. It would have to consider the extent to which it could accept such burdens, if at all, without additional funding support, and whether it might be necessary to restrict such commitments to land or buildings of the highest national importance. The process of assessing each case offered against a set of criteria for acceptance as a conservation burden would potentially generate a substantial and largely unpredictable additional workload and cost, at a time when, following the passage of the Abolition of Feudal Tenure Act, the Trust is already faced with the task of assessing each of its own more than 1,000 superiorities for possible conversion to conservation burdens. The concerns raised by the Trust therefore still remain, and may well also apply to other potential conservation bodies.

The Trust raised this issue in its response to the consultation over the draft Bill. The Scottish Executive has partially addressed it in Section 102(3) of the Bill as introduced, but the Trust remains concerned over the potential additional workload and costs for conservation bodies.

Compulsory Purchase - Effect upon Conservation Burdens

Section 95 extinguishes real burdens when land is acquired by a compulsory purchase order, and Section 96 applies to cases of acquisition by agreement in circumstances where compulsory powers could otherwise have been used. The draft Bill, at Section 99(2)(c), made an exception for conservation burdens in the latter case, but this has been removed from the Bill as introduced. The Trust suggests that there should be exceptions for conservation burdens in both Sections 95 and 96. The argument for this is that the purpose of conservation burdens is to protect the conservation significance of the land concerned, despite future changes in ownership. Such significance should be protected when that land is acquired by compulsory purchase or by agreement under statutory powers, in the same way as when it is sold by a willing seller to a willing purchaser.

Relationship between Title Conditions Bill and Land Reform Bill
Part 2 of the Land Reform (Scotland) Bill gives rural communities the right to buy land under certain circumstances, when the owner of that land wishes to sell. Part 3 of that Bill gives crofting communities an absolute right to buy land under certain circumstances, even if the owner does not wish to sell. These situations raise issues similar to those raised above in relation to Sections 95 and 96 of the Title Conditions (Scotland) Bill. If a community or crofting community wishes to exercise these rights over a property over which a conservation burden is held, it seems reasonable that such a burden should not be extinguished, given that it will have been created for the benefit of the nation as a whole. Once again, the argument is that the conservation significance of the land concerned, which the conservation burden has been created to protect, is unlikely to be diminished by the acquisition of that land, and that therefore the burden should survive such acquisition.

It is unclear, presumably because neither Bill has yet been passed, whether Section 95 would apply to purchases under the Land Reform Bill. It should be made clear that the exception for conservation burdens under Section 95 proposed above should extend to land acquired under Parts 2 or 3 of the Land Reform Bill. On the assumption that the Land Reform Bill will be passed before the Title Conditions Bill, the most appropriate way to achieve this might be to amend the latter.

The Trust did not raise these issues in its response to the consultation over the draft Bill, as they have come to light subsequently following further consideration of the relationship between the two Bills and the introduction of the Title Conditions Bill.

For further information please contact:

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Dear Ms. Goldsmith

TITLE CONDITIONS (SCOTLAND) BILL

Thank you for your letters seeking SNH’s written evidence on the above Bill and inviting SNH to give oral evidence to the Justice 1 Committee on Tuesday 1 October.

Please find attached our written evidence on the Bill. The main concern that we raised in response to the Executive’s consultation last August, was about the way in which the proposed changes might affect the arrangements for registering designated sites and statutory agreements to titles to land. We have now received assurance from the Justice Department that these arrangements will not be affected. As a result, most of our submission concentrates on the issue of conservation burdens.

Alan Hampson will give evidence on SNH’s behalf on 1 October. If you wish to discuss any of the points raised in the attached response, please contact him on alan.hampson@snh.gov.uk (tel 0131 446 2745) in the first instance. We have been in contact with John Maynew at NTS over this matter and intend meeting with him before the Committee meeting.

Yours sincerely,

Ian Jardine

Chairman: John MacKinnon CBE  Chief Executive: Jan Jardine
Working with Scotland’s people to care for our natural heritage

INVESTOR IN PEOPLE
SNH WRITTEN EVIDENCE ON THE TITLE CONDITIONS (SCOTLAND) BILL

Introduction

Scottish Natural Heritage is a Non-Departmental Public Body established under the Natural Heritage (Scotland) Act 1991 to promote the care and improvement of the natural heritage, its responsible enjoyment and appreciation by the public, and its sustainable use. Much of SNH's work is achieved in partnership with others: local councils, other statutory agencies, communities and the voluntary sector.

We have recently received clarification from the Justice Department that while SSSI designation and statutory agreements can impose obligations on successive proprietors when registered against a title, they are not real burdens as defined by the Bill and are not therefore affected by the reforms being introduced by it. In the context of the Bill these mechanisms, since there is no benefited property, are classed as "statutory equivalents" to real burdens. Clarification of this point means that many of the other issues SNH raised in response to the consultation on the draft Bill are no longer relevant. The remaining issues, which mainly relate to the creation and use of conservation burdens, are outlined in the following paragraphs.

Conservation burdens

SNH supports the proposal to introduce conservation burdens as a new category of title condition. While we welcome the flexibility offered by the proposed definition of conservation burdens, further guidance will be required from Ministers on what would make a characteristic 'special'. Similarly, there is a need to set out the criteria which could be used to test the public interest. Ideally SNH would wish to see such guidance included in the legislation which creates conservation burdens.

SNH as a land owner

The use of conservation burdens by SNH to safeguard the natural heritage interest of any land it sells, may become more important as a result of the proposal in the Executive's 'Nature of Scotland' policy statement, which would give SNH the power to acquire land either voluntarily or compulsorily and to sell it on to an organisation or individual prepared to manage it appropriately.

Designated Sites

SNH recognises that under the proposals in the Title Conditions (Scotland) Bill it would only be possible to create conservation burdens on land which SNH does not own with the co-operation of the landowner. Nevertheless, we could expect that there will be cases involving conservation bodies or sympathetic private individuals, when it will be possible to secure such agreement as part of the overall negotiations about the future objectives for the site and financial assistance for its management.

SNH as a Conservation Body

SNH supports the proposal in the Bill for saving feudal burdens imposed by private individuals where they have been created primarily to protect aspects of the natural
heritage (or built heritage) for the public good. We also support the proposal that it should be possible for conservation burdens to be created in a similar way to saved feudal burdens. SNH expects to qualify as a conservation body under these proposals. We do, however, have concerns over how such arrangements might work in practice.

The broad definition of 'special characteristic' and lack of guidance on what might constitute the public good, as raised above, would make it difficult for potential conservation bodies to judge which existing feudal burdens should be preserved as conservation burdens. We can envisage a situation in which SNH is faced with many approaches from land owners wishing to save existing feudal burdens, purportedly to protect the public interest but in reality to protect the amenity of their holding.

In these circumstances the task of establishing on a case by case basis that the proposed burden would indeed be in the public interest could generate a considerable workload for SNH (or other conservation bodies). There could also be considerable resource implications for SNH in enforcing burdens which it preserved at the request of the land owner.

Maritime Burdens

SNH supports the proposal that burdens created by the Crown to restrict the use of the sea bed (up to 12 miles offshore) or the foreshore should be transformed into maritime burdens where they protect the public interest. We also welcome the proposal that the Crown should be able to create new maritime burdens.

We acknowledge that only the Crown would be able to create and hold maritime burdens and that they would be non-transferable. It is not clear, however, whether the Crown would be able to create new maritime burdens over parts of the sea bed or foreshore that it does not own (similar to the proposed arrangements for conservation bodies in relation to conservation burdens). If this were to be possible, would the Crown be able to impose new maritime burdens or could they only be created in agreement with the owner?

Acquiescence and negative prescription

It can take some time for any damage to the natural heritage that may result from changes in management to become apparent. For this reason SNH does not consider it appropriate for conservation and maritime burdens to be extinguishable through acquiescence or negative prescription. In the case of acquiescence, SNH may wish to consent to a certain activity for a limited period of time or on a trial basis to assess what effect it may have on the interest in question. The proposals under Section 16 are likely to deter such a flexible approach.

Extinction of conservation burdens following purchase by agreement under statutory powers

SNH supported the proposal in the draft Bill that conservation and maritime burdens should not be extinguished when land is acquired by agreement under statutory powers (where compulsory powers would otherwise have been used). This provision
has been removed from the Bill as introduced. We would like to see it re-introduced to give a continuing degree of control over the protection of the conservation interest of the land in question, for example where land is purchased by statutory undertakers.

Scottish Natural Heritage
September 2002
Justice 1 Committee

Note from Spice and the Committee Adviser

Memorandum from the Scottish Executive on the Title Conditions (Scotland) Bill

Introduction

The purpose of this Memorandum is to provide the Committee with some further explanatory material in relation to some of the points made about the Bill by interested parties either in written submissions or in oral evidence. The Bill Team hopes that this material will assist the Committee in preparing its Stage 1 report.

Part 1: Real Burdens: General

Title to Enforce

Several witnesses questioned the extension under section 8 of rights to enforce to life renters, non entitled spouses with occupancy rights and tenants. The main objection was that the approach was too extensive, particularly in respect of non-entitled spouses. It was suggested that where the spouse was not in occupation and was clearly not going to return, they could raise an issue of enforcement purely out of spite.

This proposal received overwhelming support in the Executive’s consultation exercise. It is difficult to envisage how having another person exercise their enforcement rights could prejudice the owner. If anything, it means that their property interests are being protected despite their inactivity. It should perhaps be stressed that the burden is not being enforced against the owner. The person given rights by section 8 is enforcing a burden benefiting the owner's property, but affecting other land. As a result, the enforcement would be highly unlikely to prejudice the owner, even if it were done out of malice.

The only example given of where an owner would not wish a burden to be enforced was where he had come to an informal understanding with the burdened proprietor. We think that any potential difficulties caused in such a situation are outweighed by the general benefits of the change. The section will allow a tenant to respond immediately to a breach of a burden that harms the property. Under the existing law a concerned occupier would have to contact the owner and persuade him to take enforcement action. An absentee owner might be difficult to trace and unwilling to undertake the necessary action. The reform should therefore facilitate the enforcement of conditions in situations where a breach would be an annoyance to a tenant but an irrelevance to an absentee landlord. In the unlikely event that an owner would be prejudiced by the enforcement of a condition, it would be open for them to discharge their enforcement rights. A tenant, as the party in occupation of the property, is likely to have an immediate concern as to whether a breach of a condition is likely to harm the property. This is true regardless of the length of their period of tenure.
There was some concern that a person seeking to have a particular burden varied, waived or discharged would not know on whom to serve the notice because there would be no public record of the existence of any of the various non-owners enabled by section 8. This is not an issue, because the Bill is only giving enforcement rights to additional parties: the discharge of an enforcement right remains the sole prerogative of the owner alone (section 15(1)).

Part 2: Community Burdens

Some witnesses were worried that the 4 metre rule would mean that enforcement right outside 4 metres would be lost. We think that these witnesses may have been commenting on the original Bill rather than the one which is before the Committee. The 4 metre rule in section 34 is a different rule from that of the Commission: it allows near neighbours to discharge an amenity burden provided that they are in unanimous agreement – but it also provides (in sections 35-36) a notification procedure for neighbours outwith the 4 metre distance. This gives them an opportunity to object to the proposed discharge. The discharge rule is designed as a counterweight to the extension of enforcement rights to every member of the community. The 4 metre distance does not include any intervening road of less than 20 metres in width (section 113). Any extension of the 4 metre distance would risk increasing the number of properties required to agree to such levels as to make unanimity practically impossible to achieve.

Part 4: Transitional: Implied Rights of Enforcement

Using Deeds of Conditions to Burden Unsold Properties in Right to Buy Estates

Professor Paisley of the University of Aberdeen commented on the Executive’s proposal for a local authority to include its unsold properties as a part of the community by registering a deed of conditions over its retained units. He doubted that the Executive’s proposal would work for two reasons:

The first reason was highly technical. The essence of the Executive’s proposal is that local authorities could register a deed of conditions to impose burdens on their retained properties in order to obtain enforcement rights under section 48 of the Bill and to include their properties in a community of community burdens. Professor Paisley suggested that section 32 of the Conveyancing (Scotland) Act 1874, under which deeds of conditions are made possible, did not permit the creation of burdens over a property where there was no intention to sell. He quoted the relevant part of section 32, which says that a deed of conditions may be used where a proprietor “is to feu or otherwise deal with or affect his lands”. He suggested that this phrase requires a juristic or legal transaction, such as a sale of the property. In other words, the authority could only place a Deed of Conditions over its retained land when a sale was envisaged.

The Executive appreciates the reasoning behind Professor Paisley’s argument. The Scottish Law Commission, in their Discussion Paper on Real Burdens (No 106, pp 183-5) considered whether deeds of conditions could be used as self-standing deeds to impose burdens were there was no prospect of a sale of the land, and were unable to reach any definite conclusion. However, the Executive does not think that
Professor Paisley’s point is correct. This is for essentially two reasons, the first general and the second particular to the situation under discussion. The general reason is that Professor Paisley in making his comment makes no reference to section 17 of the Land Registration (Scotland) Act 1979. Since that section came into force a burden set out in a deed of conditions becomes a “real obligation affecting the lands to which it relates” (i.e. the sold and unsold properties in a development) from the date on which it is registered. This is the case unless the deed of conditions itself expressly disapplies the operation of section 17. The deed of conditions will therefore be effective as long as section 17 is not disappplied when the council takes the necessary action to include its properties in the community. The second, more particular, reason is that the houses under discussion and which are to be burdened are subject to a statutory right to buy. There is therefore always a realistic prospect that any of the properties could be sold. The local authority must sell if the tenant wishes to buy.

The second point is that the owners of the properties already sold could prevent the local authority from obtaining enforcement rights over their properties by renouncing their own rights to enforce the burdens imposed by the local authority on properties still in the ownership of the local authority.

It is possible for owners unilaterally to renounce their own rights to enforce burdens imposed on other properties and by this mechanism to fracture the uniformity of enforcement rights in a development with the result that the burdens may not become community burdens for all the properties. But it is difficult to see what possible advantage any proprietor could gain from such a course of action. The proprietor would simply lose rights to enforce and would not be freed of any obligation. This course of action would not prevent the local authority from obtaining enforcement rights against burdens imposed on properties already sold subject to the same common scheme of burdens. Section 48 operates to the effect that where a property is burdened by the common scheme other properties obtain enforcement rights. Those properties already burdened cannot discharge the burdens imposed on their properties by their own unilateral act and therefore will not be able to evade the operation of section 48 in the manner suggested.

It is true that the owners of a simple majority of the units may use the majority rule provisions in the Bill to discharge the burdens applying to the community. But this is a matter of choice, and is consistent with the aim of the Bill to provide for majority decision making. If a minority owner (i.e. the local authority) objected to the proposed change, then it could object at the Lands Tribunal and argue against the proposals.

Bruce Merchant gave a highly developed critique of the change which the Executive has made to the Commission’s Bill in relation to implied rights to enforce. This is a difficult aspect of the Bill, to which the Executive drew particular attention in its Consultation Paper. A majority of respondents supported the change. The typical scenario is a housing estate where the disappearance of the feudal superior, as a result of the 2000 Act would have meant that there was no-one to enforce the amenity burdens. The balance of opinion in the consultation exercise was that there could be an adverse effect on housing estates generally if amenity burdens could not be enforced by neighbours. This could have a particularly marked effect in estates
which include former social housing, and where amenity burdens regularly include such matters as obligations to maintain the individual property.

**References in Deeds to Feudal Terminology**

Alison Thompson, supporting the Scottish Federation of Housing Associations, was concerned that some amenity burdens would be lost on feudal abolition because of the way in which they are worded. She gave two examples of burdens which she thought would be lost when the feudal system was abolished:

- A burden prohibiting alteration without the consent of the superior,
- A burden prohibiting uses which would constitute a nuisance and stating that what constituted a nuisance would be determined by the superior.

The Executive's view is that it is unlikely that the second of these provisions would actually qualify as a real burden either before or after the appointed day, as the obligation to be observed by the burdened proprietor is not set out and determinable from the title of the burdened property. The extent of the obligation depends upon the attitude of a superior from time to time: this is just too unspecific to be a valid condition.

The first type of provision is relatively common and would probably be a valid burden. There is however a distinction to be made between the obligation itself and the right to waive it by giving consent. In the example there is an obligation not to alter the property, in respect of which the superior has unilaterally reserved a right to waive. The superior will of course lose his enforcement rights with the abolition of feudal tenure. But the restriction would not necessarily disappear.

This is either because neighbours may already enjoy a right to enforce the burden or because the abolition of feudal tenure will generally transfer control from superiors to neighbours. The effect of feudal abolition on provisions such as those mentioned has been carefully considered by the Executive in liaison with the Scottish Law Commission and the Keeper of the Registers of Scotland. Indeed the amendment of section 73 of the 2000 Act by Schedule 12 of the Bill is partly a result of a concern that the existing section 73 would not have made this sort of translation in relation to the Land Register.

**Superior’s Reservation of a Right to Vary Plans/Give Consent**

Another aspect to the sort of provision discussed by Ms Thompson is the way in which it relates with wording in section 52. Section 52(1) states that in determining whether a property is a benefited property, the effect of a reserved right to waive or vary the burden shall be disregarded. This provision is in response to existing case law which supports the view of the law that where a builder/superior reserves the right to vary a condition, no incidental rights of enforcement can be impliedly created in favour of neighbouring properties. Professor Paisley commented that a reserved right might be worded in such a way as to not be included by the wording in section 52 (“any reservation of a right to vary or waive”). For example, he suggested that a term in a deed that read “you shall not build except if I, the superior, say so/approve the plans” would not be the same as ‘vary or waive’.

The Executive’s intention is that this sort of phrase would be caught. In addition, section 52 does not really affect deeds granted by a superior, as all feudal common
schemes are covered by section 48, which is the general provision recreating enforcement rights over common schemes. Several witnesses referred to the interaction between section 48 and section 52, but they may have overestimated what section 52 actually sets out to do. The section is intended for a very technical and limited purpose, and it will only apply to a small proportion of common schemes.

Essentially, section 52 closes a legal loophole which might have resulted in common schemes created by a non feudal deed being excluded from the recreation of enforcement rights under section 48 to 51. It is only of significance when applied to non feudal common schemes where the developer reserved a right to vary or waive burdens. Where this happened, it is arguable that at the very least the final unit sold by the developer would not be burdened, and consequently would be excluded from any community. The rest of the units would be burdened, but only the owners of certain other properties would have enforcement rights, the identity of whom would depend upon the order in which the units were sold. Trying to identify a community in these circumstances would be extremely difficult. It is only in this instance that section 52’s reference to a reserved right to vary or waive has a real effect: section 48 would still recreate enforcement rights over a feudal common scheme if section 52 did not exist, regardless of whether there was a reserved right to vary or waive. This is further explained in paragraphs 212 and 213 of the Explanatory Notes.

Sheltered Housing
John McCormick on behalf of the Sheltered and Retirement Housing Owners’ Confederation (SHOC) criticised the concept of core burdens in sheltered housing. This appears to contradict the SHOC written evidence. Paragraph 4 of their submission of 10 September reads: “We are in agreement with the concept of the “core elements” as stated in the Bill but wish there to be an additional core element to deal with accountability and consultation”. More generally, the concept of core burdens was supported by the responses to the consultation exercise. The Executive would be interested to hear further views on the appropriate level at which the majority should be set.

Part 5: Real Burdens: Miscellaneous

Manager Burdens
Linda Ewart of the Scottish Federation of Housing Associations questioned why the safeguard of the 30 year period for local authority manager burdens could be overridden by the two thirds default dismissal rule in section 59. The following extract from the Executive’s Policy Memorandum (at paras 87-88) deals with this point:-

“Section 59 provides that even if the title deeds specify a larger majority or even unanimity, a manager may be dismissed by a two-thirds majority of owners, regardless of the terms of the title deeds. Where the properties are right-to-buy properties this will apply even before the expiry of the time limit (30 years maximum). In other cases it will not be possible to dismiss a manager until after the end of the time limit (10 years maximum). The Bill has been changed since the draft to allow the owners of two-thirds of related properties on right-to-buy estates to dismiss a manager even where a manager burden is in place (before the 30 year period has expired). This change is in response to the views of some consultees that the
30 year period was unfair to right-to-buy owners in mixed tenure estates. They believed that local authorities had a conflict of interest and lacked accountability where they appointed themselves as factors while they continued to own some (or any) of the property. A local authority or other social landlord could be argued to have little remaining interest if it has sold most of the properties. Early purchasers might never have the opportunity to appoint or influence a manager and this could be held to be a disproportionate interference with their property rights. This change will not affect non-local authority manager burdens which are subject to a 10 year time limit. It is not thought to be necessary because of the shorter time period involved.

The choice of any time period for the duration of all right-to-buy manager burdens is a question of balance. The above change gives this by providing a mechanism to remove a manager. Where a certain percentage of sales have been reached, it would be possible for the owners to dismiss the manager, bringing the manager burden to an end. Allowing the two-thirds rule to be available at any time should allow this flexibility. Where an estate is sold quickly, the owners of two-thirds of the properties would be able to dismiss the manager. Where the local authority or other social landlord continued to own a substantial minority, for the owners to obtain the two-thirds vote would require a high level of concerted action which is only likely to occur where there is serious and widespread dissatisfaction with the management of the estate.”

25 September 2002
From the Secretary

Ms Christine Grahame MSP
Convenor
Justice 1 Committee
The Scottish Parliament
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Your ref: A/5/9/3
Our ref: 1102/32
20 September 2002

Dear Ms Grahame

REVIEW OF THE LAW ON STANDARD SECURITIES

We have noted with interest the comments made recently by witnesses giving evidence to the Committee on the Title Conditions (Scotland) Bill about the need for a review of the law on standard securities. In particular, we welcome the way in which the matter has been raised and drawn to our attention.

We are aware of the difficulties in this area. While we are not able to give any commitment at this stage, I confirm that the matter will be considered for inclusion in our next Programme of Law Reform, which will succeed our current Sixth Programme due to run until the end of 2004.

Yours sincerely

JANE L McLEOD
Secretary

Secretary: Jane McLeod
JUSTICE 1 COMMITTEE

Petition PE124 by Grandparents Apart Self Help Groups (G.A.S.H.)

Note by the Clerk

Background

Grandparents Apart Self Help Group (GASH), which had 115 members on 8 March 2000, was set up in 1996 to provide support for grandparents across Scotland who have lost contact with their grandchildren. GASH is a registered charity and aims to promote a network of support groups across Scotland, promote a “buddy” network and to network with other support services.

This petition (attached) calls for the Scottish Parliament to amend the Children (Scotland) Act 1995 to name grandparents in the act as having an important role to play in the lives of their grandchildren. At the moment grandparents are not mentioned in the Children (Scotland) Act 1995.

The Justice and Home Affairs Committee considered the petition on 7 June 2000 when it was agreed to defer consideration of the petition pending the publication of the Scottish Executive’s White Paper on the reform of family law. However, the Scottish Executive’s White Paper on the reform of family law – Parents and Children: a White Paper on Scottish Family Law does not include any proposals to create new rights for the grandparents. The Scottish Executive can see no case for introducing a new procedure to provide grandparents with Parental Responsibilities and Rights (PRR). The Committee is therefore invited to reconsider this petition in the light of that information.

The current position

Members are invited to consider the attached SPICe paper on grandparents rights in relation to grandchildren for information (including comparative information).

Under current Scots Law the grandparent is not automatically granted PRR but may seek PRR under section 11 of the Children (Scotland) Act. The provisions within section 11 of the Act make no specific reference to grandparents but states that various people can make applications under the section for such orders, including a person who does not have PRRs in relation to the child but nevertheless “claims and interest”. This would allow other relatives of the child, and anyone else with a connection to or legitimate concern for the welfare of the child, to apply. When considering orders under section 11 of the Children (Scotland) Act the court is obliged to regard the child’s welfare as paramount.

In regard to the intimation of court actions the procedural rules governing the civil court actions either allow or require intimation of cases to other interested parties though no provisions are made specifically in relation to grandparents.
Procedure

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

Options

The Committee may wish to decide to:

- write to the Minister for Justice to establish whether it will be possible to amend the Children (Scotland) Act through the forthcoming Family Law Bill;

- write to the Sheriffs’ Association asking them whether they can provide information on the number of applications received and granted to grandparents under section 11 of the Children (Scotland) Act;

- note the petition and take no further action.
GRANDPARENTS – RIGHTS IN RELATION TO GRANDCHILDREN

FRAZER MCCALLUM

This research briefing considers the law relating to parental responsibilities and rights (PRRs), including the right to have contact with a child, in the context of petition PE124 submitted by Grandparents Apart Self Help and the Scottish Executives White Paper on the reform of family law - Parents and Children: a White Paper on Scottish Family Law.

Petition and Executive’s White Paper

Petition PE124, submitted by Grandparents Apart Self Help, calls for the Scottish Parliament to consider amending the Children (Scotland) Act 1995 (the ‘1995 Act’) to specifically refer to grandparents as having an important part to play in the lives of their grandchildren. It would appear from the petition that Grandparents Apart Self Help is concerned to strengthen the position of grandparents who are seeking contact with their grandchildren. The petition notes that there are some cases where it is not in the best interests of a child to have contact with his/her grandparents. However, it goes on to state that these represent a minority and that grandparents are, as the law currently stands, often faced with lengthy court actions in order to obtain contact.
The Justice and Home Affairs Committee considered the petition on 7th June 2000 and agreed to defer further consideration of the petition pending the publication of the Scottish Executive’s White Paper on the reform of family law.

The White Paper – *Parents and Children: a White Paper on Scottish Family Law* – was published by the Executive in September 2000. The White Paper covers a wide range of family law topics, including proposals to reform certain aspects of the law relating to PRRs (those affecting unmarried fathers and step-parents). It does not, however, include any proposals to create new legal rights for grandparents:

“We appreciate that the extended family, and grand-parents in particular, plays an important part in the welfare of children. However, as discussed in our proposals below on step-parents, we do not propose to create new legal rights for grand-parents or other relatives. The existing law already allows them to obtain formal rights by court order where appropriate.”

The Executive went on to state that it could see no case for introducing a new procedure to give PRRs to relatives other than unmarried fathers and step-parents, arguing that:

“Family structures vary greatly and it would be a recipe for confusion and disputes if a range of family members could acquire PRRs by some automatic or agreement procedure. It would not be in the interests of children for this to happen. Where there is a special case, such as where an adult other than a parent or step-parent becomes the primary carer of a child, it is open to a court to grant PRRs to recognise the particular facts of that case.”

**Current Scots law**

*Acquisition of parental responsibilities and rights*

Section 1 of the 1995 Act outlines what is meant by parental responsibilities. These are the responsibilities, in so far as compliance is practicable and in the interests of the child, to:

- safeguard and promote the child’s health, development and welfare;
- provide the child with direction and guidance;
- maintain personal relations and direct contact with the child; and
- act as the child’s legal representative.

Section 2 of the 1995 Act outlines what is meant by parental rights. Parental rights reflect the parental responsibilities listed above. The exercise of these rights is only valid in so far as it directed towards fulfilling one or more of the parental responsibilities. They are the rights to:

- regulate the child’s residence;

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2 *Ibid*, para.2.44.
• direct or guide the child’s development and upbringing;
• maintain personal relations and direct contact with the child; and
• act as the child’s legal representative.

PRRs can be gained in a number of ways. For example, the child’s mother and father (the father must have been married to the mother at the time of the child’s conception or subsequently) are given PRRs under section 3 of the 1995 Act. Grandparents are not automatically granted any PRRs. They may however seek PRRs under section 11 of the 1995 Act.

Section 11 of the 1995 Act deals with court orders relating to PRRs. A court may make a wide range of orders, including:
• an order imposing upon a person parental responsibilities and giving that person parental rights; or
• an order regulating the arrangements for maintaining personal relations and direct contact between a child and a person with whom the child is not, or will not be, living (known as a “contact order”).

Various people can make applications under section 11 for such orders, including a person who does not have PRRs in relation to the child but nevertheless “claims an interest”. It is clear that this could include a grandparent. However, the provisions contain no specific reference to grandparents and would also allow other relatives, and anyone else with a connection to or legitimate concern for the welfare of the child, to apply.

It is important to note that the court is obliged to regard the welfare of the child concerned as its paramount consideration when deciding whether to make an order under section 11 of the 1995 Act. This means that an applicant seeking such an order will have to satisfy the court that it will be in the best interests of the child involved.

Procedural rules relating to the intimation of court actions

In addition to actively seeking PRRs, a grandparent may have an interest in receiving intimation of any court actions initiated by someone else that affect a grandchild.

Procedural rules governing civil court actions either allow or require intimation of cases to other interested parties in a number of situations. However, there are no provisions specifically relating to grandparents. For example, a sheriff has a general power in any family action to order intimation of the action to any person the sheriff thinks appropriate. The sheriff may decide (i.e. the sheriff has a discretion) to order intimation following a request from a party to the action, but may also make such an order without being asked to do so. In addition, there are a number of circumstances where court rules generally require intimation of family
actions to certain persons. These include various situations involving the possibility of the court making an order under section 11 of the 1995 Act involving PRRs:

“Where, in an action of divorce or separation, the sheriff may make a section 11 order in respect of a child: (i) who is in the care of a local authority, intimation must be made to that authority; (ii) who is a child of one party to the marriage, has been accepted as a child of the family by the other party to the marriage, and who is liable to be maintained by a third party, to that third party; or (iii) in respect of whom a third party in fact exercises care and control, to that third party”. (Macphail, Sheriff Court Practice (vol.1) para.22.15)

Where someone has received intimation of an action in which he/she has an interest, that person would be able to apply by minute to be sisted as a party to the action. Alternatively, that person could intimate his/her views by way of a minute or more informal document (such as a letter) to the court.

Rights of grandparents in other countries

Other European Countries

It would appear that the position in England in relation to the acquisition of parental rights is, apart from one point, effectively the same as in Scotland. The difference is that grandparents in England do not have an automatic right to seek parental rights. They can, however, apply to the court for authorisation to seek an order for such rights.

In relation to the rest of Europe, discussions with a number of experts in the field of family law indicate that (like the legislation in Scotland) relevant legislation across most of Western Europe is now largely framed in terms of what is in the best interests of the child. Some of the experts contacted did suggest that some systems may draw a distinction between: (a) grandparents and others defined as close family members; and (b) other persons seeking parental rights, when deciding on what is in the best interests of the child. However, it has not been possible to obtain any concrete examples of Western European countries where grandparents are given special rights or responsibilities in relation to their grandchildren. There is little readily available comparative research on how grandparents are treated in this respect in other European countries.

Australia

Under the Family Law Act 1975 (as amended) proceedings in children’s matters can in general be instituted by either or both of the child’s parents, the child, a grandparent of the child or any other person concerned with the care, welfare or

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3 The need for intimation may be dispensed with where the address of a person on whom intimation is otherwise required is not known and cannot reasonably be ascertained.

4 Information about the position in Australia was obtained from the Australian Parliament – Information and Research Services, Department of the Parliamentary Library.
development of the child. Explicit mention of grandparents was first inserted by amendments contained in the Family Law Reform Act 1995. Before this time, grandparents could and did apply for orders in children’s matters as persons with an interest in the welfare of a child. However, they were not entitled to make an application simply by virtue of their status as grandparents. The amendments contained in the Family Law Reform Act 1995, together with subsequent amendments in the Family Law Amendment Act 2000, changed this – explicitly stating that grandparents could apply for a range of orders relating to their grandchildren.

Thus, the status of grandparents is explicitly recognised in certain respects. However, grandparents do not have any automatic rights or responsibilities under Australian federal law in relation to their grandchildren. The Family Law Act 1975 (as amended) is not, in fact, written in terms of the ‘rights’ of parents or others in relation to children. Instead it talks about ‘parental responsibilities’. ‘Rights’ under the Act are children’s rights to contact on a regular basis with both their parents and with significant ‘others’ (except when this is contrary to the child’s best interests).

The best interests of the child are explicitly made the paramount consideration for a court dealing with many children’s matters under the Family Law Act 1975. For instance, the ‘best interests’ principle explicitly applies as a ‘paramount’ principle to the making of parenting orders (including residence and contact orders), in relation to setting aside parenting plans, and in making location orders, recovery orders and welfare orders. The best interests principle is also mentioned in other provisions relating to children’s matters without expressly making it a ‘paramount’ principle (e.g. the registration of parenting plans or when a court considers whether to grant leave for adoption proceedings).

In relation to the intimation or notification of court proceedings, there are some general provisions in the Family Law Act 1975, and in the Family Law Rules (made by the Family Court), which enable certain people to be made parties to a range of proceedings under the 1975 Act and for certain people to be notified in particular circumstance (e.g. where an allegation of child abuse is made during proceedings – notification to the alleged abuser). However, there is nothing that specifically enables or requires grandparents (simply on the basis of their status as grandparents) to be notified of proceedings, under the 1975 Act, involving their grandchildren.

Canada

Grandparents, under both federal law and most provincial family law statutes, can apply for access to their grandchildren. Most often, such applications are determined on the basis of the best interests of the children. In most provinces,

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5 Information about the position in Canada was obtained from the Canadian Parliament – Parliamentary Research Branch (Law and Government Division).
family relationships are relevant to the determination of a child’s best interests, and in at least one grandparents are specifically referred to:

“Family Services Act, Statutes of New Brunswick, 1983
Section 1 - Definitions:
‘best interests of the child’ means the best interests of the child under the circumstances taking into consideration
(a) the mental, emotional and physical health of the child and his need for appropriate care or treatment, or both;
(b) the views and preferences of the child, where such views and preferences can be reasonably ascertained;
(c) the effect upon the child of any disruption of the child’s sense of continuity;
(d) the love, affection and ties that exist between the child and each person to whom the child’s custody is entrusted, each person to whom access to the child is granted and, where appropriate, each sibling of the child and, where appropriate, each grandparent of the child;
(e) the merits of any plan proposed by the Minister under which he would be caring for the child, in comparison with the merits of the child returning to or remaining with his parents;
(f) the need to provide a secure environment that would permit the child to become a useful and productive member of society through the achievement of his full potential according to his individual capacity; and
(g) the child’s cultural and religious heritage”.

At the federal level, the chief objection of grandparents’ groups is that legislation requires them to apply for leave before they may proceed with an application for access. This subject has come up several times in Canada in recent years. In 1998, the Special Joint Committee on Child Custody and Access published a report that included consideration of the position of grandparents – For the Sake of the Children. The Committee’s discussion of the Federal Government and the Divorce Act included a section on grandparents’ applications for parenting orders (see chapter 4 of the report):

“Another issue that was raised often but will require a response at the provincial level is applications by grandparents for parenting orders. Parliamentarians have long been aware that grandparents’ groups are dissatisfied with the current provisions of the Divorce Act, which allow them to apply to the court for access to or custody of a grandchild, but require that they first apply for leave to do so. This leave application requirement is considered an unnecessary and costly burden on grandparents.

The testimony of grandparents denied contact with their grandchildren following the divorce, separation or death of their own child was particularly painful for Members, many of whom are grandparents themselves and could readily empathize with witnesses. However, amending the Divorce Act to remove the leave application requirement would be of assistance only to grandparents whose child is currently involved in a divorce. Other grandparents would have to continue to rely on provincial statutes, most of which already allow them to apply without leave. …

The report of the Special Joint Committee on Child Custody and Access (For the Sake of the Children, 1998) is available online at http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sicarp02-e.htm.
Because federal jurisdiction in family law is restricted to matters of marriage and divorce, including corollary relief, the idea of making grandparents automatic (or even almost automatic) parties to divorces has been seen as constitutionally problematic. … The Committee found the testimony of grandparents and their representatives extremely compelling. The Committee also heard moving testimony, however, about the importance of siblings, stepsiblings and other extended family members in the lives of children. Other important people in the life of a child might well be family members or friends, and many Members of the Committee felt there should be no legislative presumption that grandparents have a different standing in parenting applications relative to those other important people.

A solution for recognizing the important role of grandparents, and one that is thought to be less susceptible to constitutional challenge, would be to include mention of the importance of grandchild-grandparent relationships to children’s well-being in the proposed list of criteria concerning the bests interests of the child. This would reflect the principle articulated by a number of witnesses that children’s established relationships with grandparents should be safeguarded and that the presence of grandparents can enrich a child’s life. Such a criterion could be weighed against any potential risk to a child posed by a particular grandparent, or any perceived interference with a parent’s, or both parents’, decision-making responsibilities with respect to a child. …

**Recommendation**

21. This Committee recommends that the provincial and territorial governments consider amending their family law to provide that maintaining and fostering relationships with grandparents and other extended family members is in the best interests of children and that such relationships should not be disrupted without a significant reason related to the well-being of the child.”

**New Zealand**

There are two principal Acts in New Zealand covering care of children in respect of custody, access etc. These are the Guardianship Act 1968 (esp. sections 23-30) and the Children, Young Persons and their Families Act 1989 (esp. sections 121-124). The welfare of the child is paramount in New Zealand law.

Anyone can take a case to a court seeking custody/access. Grandparents do not have special rights in this respect. The following quotes from the New Zealand Herald (article of 27th May 2000) underline grandparents’ lack of specific legal rights:

“The principal Family Court judge, Patrick Mahony, says that under the Guardianship Act grandparents do not have the same status in law as parents in custody cases. … The Government has signalled that it intends to review the legislation, he says, and it ‘may well be’ that grandparents will receive greater recognition. … The Family Court, he says, does have the discretion to make a grandparent the guardian of a child, and to award custody to a grandparent. …

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7 Information about the position in New Zealand was obtained from the Parliamentary Library of the New Zealand Parliament.
What is in the best interests of the child is the paramount consideration in each case.”

If you have any comments or questions about this SPICE Briefing, please contact Frazer McCallum on extension 85189 or frazer.mccallum@scottish.parliament.uk.

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JUSTICE 1 COMMITTEE

Petitions PE532 and PE533 by Mr Ronald Smith

Note by the Clerk

Background

Petition PE532 (attached) calls for the Scottish Parliament to amend Part 2 of the Title Conditions (Scotland) Bill to restrict voting with regard to community burdens to the resident proprietors. Petition PE533 (attached) calls for the Scottish Parliament to take the necessary steps to prevent the implementation of the Title Conditions (Scotland) Bill from being excessively delayed following its enactment.

Petition PE532 is prompted by the petitioners’ concern as to the provisions contained in Part 2 of the Title Conditions (Scotland) Bill which will allow voting on community burdens, such as shared maintenance and repairs, to be exercised on the basis of per owned units. The petitioners argue that such provisions, which aim to allow burdens affecting communities to be governed by majority rule, are open to abuse by those absent landlords who own and let a number of properties within one sheltered/retirement housing development. The petitioners express concerns that such landlords could be appointed as managers of the development and agree the terms of this appointment, by holding the majority of votes required, or by influencing their tenants to secure these votes. It is argued that restricting voting regarding community burdens to resident proprietors would avoid the situation whereby rules and conditions could be imposed on them by an absent landlord/manager.

Members may wish to note that rights in relation to real burdens have traditionally relied on ownership of benefited land (not ownership and occupation) and that this is the basis on which the rest of the Bill proceeds. It is also worth noting that the majority rule proposals for community burdens affect a wide variety of communities. For example, a 'mixed' community of council houses where half are in local authority ownership and half are in private ownership are going to fall under the community burden regime according to the Executive's proposals and the absentee owner there believes it has strong policy reasons for maintaining control in such communities.

The petitioners refer to their own experiences where the management agent of the sheltered housing complex in which they reside has the power to review the service charge in an upwards direction at any time provided that it gives 3 months notice to the residents. The petitioners argue that managing agents should be required to follow the Executive’s ‘Framework Code of Management for Owner-Occupied Sheltered Housing’ and to meet with the owners on a regular basis to discuss budgetary, maintenance and related issues.

Furthermore, they express disappointment that the Executive decided to omit the “development management scheme”, which was to provide ground rules to which owners and managing agents should abide, from the final draft of the Title Conditions (Scotland) Bill. The Explanatory Note for the Bill outlines the rationale behind the decision to drop these provisions, i.e. that it would not be competent for the Scottish Parliament to legislate on the matter. However, the Executive confirms that it is considering, along with the UK Government, how to proceed this matter further.
Petition PE533 is prompted by the petitioners’ belief that there will be a two-year delay following the enactment of the Title Conditions (Scotland) Bill, before its provisions and those of the Abolition of Feudal Tenure etc. (Scotland) Act, which received royal assent in June 2000, are put into place. This, the petitioners claim, is an unjustifiable delay, particularly as those bodies with an interest in the Bills will have had sufficient time to prepare for the introduction of any new working arrangements resulting from their enactment.

Members will be aware that the Title Conditions (Scotland) Bill is currently being considered at Stage 1 by the Committee. The Explanatory Note for the Title Conditions (Scotland) Bill states that the two pieces of legislation will be implemented on a day which is referred to in both as the “appointed day”, as they are so closely related. The Note confirms that the “appointed day” is likely to be about 18 months after the Title Conditions (Scotland) Bill is enacted in order to allow time for transitional arrangements to be put in place.

Procedure

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

Options

The Committee may wish to decide:

- to consider the petitioner’s concerns for both of these petitions within the context of its consideration of the Title Conditions (Scotland) Bill, or
- to note the petitions and take no further action.
Just note outlining the provisional forward programme for the Justice 1 Committee for 2002-03. The programme includes two Bills: the Title Conditions (Scotland) Bill and the Council of the Law Society Bill. The Committee will also finalise its report into the inquiry into the regulation of the legal profession, conduct a short inquiry into alternatives to custody and conclude its work on legal aid. The forward programme does not cover February and March 2003. Details of the programme for this period will be made available at a later date. It is expected that this time will be utilised to draw to a close outstanding Committee business (such as petitions) prior to the dissolution of the Parliament in March. Members should note that this programme is provisional, and is likely to change according to factors such as availability of witnesses and progress of Committee business.

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

- **Alternatives to Custody inquiry:** members will be aware that normally the Executive will respond to a Committee report on an inquiry within 8 weeks of its publication. In order to receive a response before the dissolution of the Parliament, the Committee would have to publish its report on the inquiry by 3 February. However, if the Committee does not require a response from the Executive, the report could be published at a later date, which might allow for more evidence taking sessions. **The Committee is invited to consider whether it will require a response from the Executive on its report on the inquiry into Alternatives to Custody;**

- **Legal Aid Inquiry:** the Committee has agreed to return to its Legal Aid Inquiry once several outstanding pieces of work have been completed. Secondly, the Committee is invited to consider how to conclude its inquiry into legal aid. There are still some issues on which the Committee is awaiting a response:
  - increase in fees for civil legal aid work (linked to quality assurance): still being negotiated with the Law Society;
  - research on the overall impact of the fixed fees regime: work is ongoing;
  - interaction between the benefits system and the legal aid system: work is ongoing;
  - outcomes of the work of the working group on community legal services (outlined in the Review of Legal Advice and Provisions in Scotland). The working group agreed with the principle of a community legal service but established that there are still some gaps in knowledge which require to be addressed before proceeding, namely:
    - the need for a review of advice and assistance (being carried out by SLAB);
    - the need for a review of quality assurance, method of delivery; the role of non-lawyers; alternative methods of funding a community legal service, such as contracting (being carried out by the Executive);
- the need to develop “needs assessment tools” (being carried out by the Executive)
  • availability of services: the Executive hopes to publish the results of its mapping exercise of the availability of legal services (both geographical and areas of expertise) within the next few weeks.

It is proposed that the Committee will conclude its inquiry by taking evidence from the Minister for Justice on these pieces of work early next year. The Committee is invited to consider whether it is content to conclude its inquiry into legal aid by taking evidence on outstanding issues from the Minister for Justice early next year.

JUSTICE 1 COMMITTEE

Provisional Forward Programme 2002-03

Tuesday 8 October – CR4
Prisons: evidence from Alec Spencer on rehabilitation and treatment of sex offenders
Protection of Children (Scotland) Bill: oral evidence?

Tuesday 29 October

Joint meeting with the Justice 2 Committee
Budget stage 2: consider draft Budget Report

J1 Committee meeting
Regulation of the Legal Profession inquiry: consider draft report
Protection of Children (Scotland) Bill: consider draft Stage 1 report

Tuesday 5 November
Title Conditions (Scotland) Bill: consider draft Stage 1 report
Regulation of the Legal Profession inquiry: consider draft report

Tuesday 12 November
Alternatives to Custody inquiry: oral evidence session
Title Conditions (Scotland) Bill: consider draft Stage 1 report

Tuesday 19 November
Council of the Law Society Bill: oral evidence

Tuesday 26 November
Alternatives to Custody inquiry: oral evidence session

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

Tuesday 10 December
Title Conditions (Scotland) Bill: Stage 2
Council of the Law Society Bill: draft Stage 1 report
Tuesday 17 December
Title Conditions (Scotland) Bill: Stage 2
Law Society Bill: consider draft stage 1 report

Tuesday 7 January
Title Conditions (Scotland) Bill: Stage 2
Alternatives to Custody Inquiry: oral evidence session

Tuesday 14 January
Alternatives to Custody Inquiry: oral evidence session

Tuesday 21 January
Council of the Law Society Bill: Stage 2
Alternatives to Custody inquiry: consider draft report

Tuesday 28 January
Legal Aid: evidence from Minister?
Alternatives to Custody inquiry: consider draft report
Dear Johnstone,

AUTOMATIC UPRAISING OF THE DISPOSABLE INCOME AND CAPITAL LIMITS FOR ADVICE AND ASSISTANCE AND CIVIL LEGAL AID

I thought I should write to you to confirm where matters stand in relation the issue of the "automatic" upraising of the financial eligibility limits.

On 11 May, I wrote to you in connection with the Legal Aid Inquiry saying, amongst other things, that I was awaiting on legal advice on whether an "automatic" mechanism for uprating the limits on a regular basis could be established under the existing powers. I understand that the Committee raised this issue with Richard Simpson on 11 June when considering the affirmative draft regulations increasing the capital limits for both advice and assistance and civil legal aid. As legal advice had just become available, he explained the position to the Committee.

Since I undertook to write to you, I thought that it would be courteous to confirm formally the conclusions of the legal advice. I have been advised that the powers in the Legal Aid (Scotland) Act 1986 allow only replacing the amounts for eligibility in the Act. There is no scope to create a mechanism that would allow the uprating of the financial eligibility limits in a particular way, such as "automatic" uprating on annual basis by reference to a particular index, such as RPI.

In addition, the Act expressly prescribes that the financial eligibility limits can only be changed by regulations subject to the affirmative resolution procedure. The introduction of an "automatic" mechanism would therefore side-step Parliamentary scrutiny and would - I feel - be contrary to the intention behind the upraising powers and therefore ultra vires.

The existing mechanisms for uprating the disposable income and capital limits can only be changed by primary legislation. Whilst I myself would have no objections in principle to such a change,
although an opportunity for a legislative change of this nature might be some time away, I am not sure that the Parliament would be prepared to relinquish scrutiny of such changes.

I hope that this is helpful.

Sincerely,

JIM WALLACE
I am writing further to your point of order of Thursday 12 September concerning the Parliamentary Bureau motion to designate the Justice 1 Committee as lead committee and the Justice 2 Committee as a secondary committee in the consideration of the Council of the Law Society of Scotland Bill. As promised, I have reviewed the Official Report of your point of order and that of Michael Russell MSP and have taken legal advice from the Parliament’s legal directorate.

As you will be aware, Article 6 of the European Convention on Human Rights is, amongst other things, about the proper procedures for deciding disputes between parties. When legislating, members of the Parliament generally are not themselves involved in the kind of procedures that the Article seeks to address (an exception is possible when dealing with Private Bills). So, the proposed legislation in question itself may deal with such procedures, but that is an entirely separate matter.

With reference to the question of members’ interests, a member is not precluded from participating in proceedings of the Parliament (which includes committees) by reason of having an interest in a subject under review. If the Parliament were to take a different approach (e.g. barring solicitors or others with an interest from considering the Bill), then no MSP would be able to sit as a committee member dealing with the current work being undertaken by the Standards Committee on the replacement members’ interests legislation, nor would any MSP have been able to deal with the Standards Commissioner Bill which was passed by the Parliament in June 2002. In addition, Nicola Sturgeon was a member of the committee which considered her members’ bill on tobacco advertising, and contributed to all meetings related to the bill as a committee member.
In brief, neither Article 6 nor any other article of the convention affects the process of legislation and therefore there is no procedural or legal reason to prohibit the Justice 1 and 2 committees considering this Bill, as the Parliament decided they should last week.

David Steel