The Committee will meet at 3.30pm in Committee Room 3.

1. **Item in private:** The Committee will consider whether to discuss agenda item 2 in private.

2. **Prisons:** The Committee will discuss lines of questioning for the witnesses.

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

4. **Subordinate legislation:** The Committee will consider the following statutory instrument—

   the Civil Legal Aid (Scotland) Regulations 2002, (SSI 2002/494).

5. **Prisons:** The Committee will take evidence from—

   Clive Fairweather, former HM Chief Inspector of Prisons, Rod McCowan, Deputy HM Chief Inspector of Prisons, Michael Crossan, Inspector of Prisons, HM Prisons Inspectorate and Dr Nancy Loucks, independent criminologist.

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

**Agenda items 2 and 5**  
Note by the Clerk (private paper)  
HM Prisons Inspectorate’s Intermediate Inspection report on HMP & YOI Cornton Vale (9 – 10 September 2002)  
(MEMBERS ONLY)  
J1/02/41/1  
J1/02/41/2

**Agenda item 4**  
Note by the Clerk ([SSI attached](#))  
J1/02/41/3

**Papers not circulated:**


**Paper for information circulated for the 41st meeting, 2002**

Submission from the Faculty of Advocates on the general principles of Stage 1 of the Title Conditions (Scotland) Bill  
Supplementary submission from the Law Society of Scotland on the general principles of Stage 1 of the Title Conditions (Scotland) Bill  
J1/02/41/4  
J1/02/41/5
Justice 1 Committee

The Civil Legal Aid (Scotland) Regulations 2002 (SSI 2002/494)

Note by the Clerk

The Civil Legal Aid (Scotland) Regulations 2002 (SSI 2002/494)

1. The principal objective of the Civil Legal Aid (Scotland) Regulations 2002 (attached) is to consolidate all the amendments made to the Civil Legal Aid (Scotland) Regulations 1996. The Executive has also taken the opportunity to make provision within the Regulations for a number of policy and minor technical changes to the Civil Legal Aid Regulations. The technical changes seek to update and improve the operation of the Regulations.

Background

2. The Justice 1 Committee previously considered this instrument at its meeting of 26 November. Committee members may wish to refer to previous Committee paper J1/02/40/10 for more detailed background (attached).

3. The Subordinate Legislation Committee considered this instrument at its 31st meeting of 2002 (Subordinate Legislation Committee, 42nd Report, 2002. It agreed that the Justice 1 Committee’s attention be drawn to Regulation 11 in respect of European Convention on Human Rights (ECHR) compatibility. The SLC noted that the effect of regulation 11 “Circumstances in which resources of spouse not to be taken into account and resources of cohabitees” appears to be to allow more favourable treatment of same sex couples than married or cohabiting men and women, which may have human rights implications.

4. The Justice 1 Committee agreed to write to the Scottish Executive (correspondence attached) to seek clarification on regulation 11 in regard to compatibility with the European Convention on Human Rights (ECHR).

5. The Minister for Justice has now replied (correspondence attached). The Minister states that he is fully satisfied that the Regulations are ECHR compatible but that is not his intention that the legal aid system should distinguish between cohabiting couples on the basis of their sexual orientation. He therefore proposes to bring forward an amendment to the Regulations in the near future to ensure that the assets of persons in same-sex couples are treated in the same way as those of persons who are married or live together in the same household as husband and wife.

Procedure

6. Under Rule 10.4, this instrument is subject to negative procedure which means that it comes into force and remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul the instrument and, if
such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

7. The instrument was laid on 7 November 2002 and is subject to annulment under the Parliament’s standing orders until 16 December 2002.

8. In terms of procedure, unless a motion for annulment is lodged, no further action is required by the Committee.

9. The Committee may wish to consider whether it accepts the Minister’s proposal to amend the regulations or whether a member of the Committee should lodge a motion to annul the Civil Legal Aid (Scotland) Regulations 2002 (SSI 2002/494).
Dear

THE CIVIL LEGAL AID (SCOTLAND) REGULATIONS 2002

Thank you for your letter of 27 November conveying your Committee's concerns about the compatibility of these Regulations with the requirements of the ECHR.

On the basis of my legal advice, I am fully satisfied that the Regulations are ECHR compatible. However, my aim has always been to ensure even-handed treatment for people seeking legal aid. It is not my intention that the legal aid system should distinguish between cohabiting couples on the basis of their sexual orientation.

I would therefore propose to bring forward an amendment to the Regulations in the near future to ensure that the assets of persons in same-sex couples are treated in the same way as those of persons who are married or live together in the same household as husband and wife. I hope that your Committee will agree that this is a satisfactory solution and one that would be considerably better than annuling the Regulations, which would unnecessarily delay the implementation of a range of improvements to the operation of civil legal aid, as well as causing confusion.

JIM WALLACE
Dear Jim

The Civil Legal Aid (Scotland) Regulations 2002 (SSI 2002/494)

The Justice 1 Committee considered the Civil Legal Aid (Scotland) Regulations 2002 (SSI 2002/494) at its meeting on 26 November 2002 and agreed that I should write to you seeking clarification on a point raised in relation to regulation 11 of the regulations in regard to compatibility with the European Convention on Human Rights (ECHR).

As you may be aware, the Subordinate Legislation Committee (SLC) drew the attention of the Justice 1 Committee to regulation 11 of these regulations in its 42nd Report, 2002. The SLC noted that the effect of regulation 11 (circumstances in which resources of spouse not to be taken into account and resources of cohabitees) appears to be to allow more favourable treatment of same sex couples than married or cohabiting men and women, which may have human rights implications.

In response to this point, the Executive told the SLC that Scottish Ministers have discretion to decide whose resources are to be taken into account for the purposes of an application for civil legal aid. The SLC observes that although the Justice Department has discretion to decide how resources are to be assessed for the purposes of civil legal aid, this discretion must be exercised in accordance with ECHR. Assessment of resources has relevance to the availability of legal aid and combining the resources of married and co-habiting heterosexual couples but not those of co-habiting same sex couples may result in same sex couples having greater access to civil legal aid than couples of the opposite sex. This appears to the SLC, particularly in the light of recent case law, to be *prima facie* discriminatory within the terms of Article 14 of the Convention (prohibition of discrimination).
The SLC points out that Article 14 is, generally speaking, an ancillary provision and that cases cannot be brought for breach of Article 14 on its own. However, it also points out that civil legal aid comes into the ambit of Article 6 (the right to a fair trial). The SLC therefore drew the attention of the Committee to the regulation on the ground that there is doubt as to whether it is within devolved competence in so far as it may contravene Article 14 as read with Article 6 of ECHR.

The Committee is concerned about the SLC’s conclusion on regulation 11. It is important that there is no doubt as to the competence of subordinate legislation approved by the Parliament. I would therefore be grateful if you would write to the Committee to respond to the points raised by the SLC and outlined in this letter. Given that the regulations are subject to annulment until 16 December 2002, I would appreciate a response by Friday 29 November to enable the Committee to consider the response at its next meeting on 3 December and to take any appropriate action thereafter.

Yours sincerely,

Christine Grahame
Convener
Introduction
The Faculty has no observations to make on the policy of the Bill, but does have a number of observations to make about the drafting of particular provisions of it. By way of general comment we should also observe that in the Faculty’s response in June 1999 to the Scottish Law Commission Working Paper No 106 we suggested that the term ‘real burden’ was now rather archaic, and suggested ‘land restriction’ or ‘land restraint’ as alternative terms. Use of new terms might be thought to match the overall reform of land law of which this Bill forms part.

Section 1(3)
As community burdens are treated as real burdens (in, for example, sections 4(3) and 10(4)(a)(i), we suggest that this term ought to appear in the list in section 1(3).

Section 3(6)
We suggest that bracketed qualification “(nor must it be illegal)” might be better put “and it must not be illegal”.

Section 4
Section 4(2)(b) speaks of a deed which is “granted by or on behalf of the owner”. On one view, that usage is appropriate only for a unilateral deed. Since it is possible to conceive of burdens being created in multi-partite deeds, the wording should be amended to reflect that. Amendment to “Deed to which the owner is a party” would in our view suffice. This observation applies also to s 6(1).

Section 6
It is not clear why this provision has been separated from section 4. It deals entirely with matters arising in that section, and could be incorporated into section 4 without lengthening it unduly.

Section 8
The Scottish Law Commission in Working Paper No 106 (paras 3.58 and 3.66) suggested that where the owner has been sequestrated, the right should be exercisable by the trustee in sequestration. In our response referred to above, the Faculty agreed with that proposal. We consider that it remains a sensible change. It does not appear in this section, nor elsewhere, and we suggest that such a provision be introduced here.
Section 10
Section 10(2) refers to several liability, whilst the Explanatory Notes refer to joint and several liability. These are, of course, distinct, though related concepts. We suggest that the wording of the Bill should reflect the policy in the Notes. This point arises in a number of other places in the Bill (eg s 11(1)(a), s 11(5), s 30(a))

We suggest that section 10(3) should be made subject to contrary agreement. It may well be that in practice parties might agree that the purchaser would take the liability with an adjustment in the price being made - as often happens now in relation to repairs notices. This may be compared with the provision made in subsections 11(1) and 11(4).

Section 16
Section 16(1)(c)(i) seems to us to be potentially unfair to the benefited proprietor who discovers more than eight weeks after cessation, through no fault of his own, that an infringing activity has been going on. Whilst the subsection as drafted may be apt for neighbouring domestic proprietors in the urban setting, it is less clear that it would operate fairly in other settings. We suggest that the court or the Lands Tribunal are quite used to considering whether a period is reasonable in the circumstances, and that the parenthetic proviso containing the eight week period should simply be omitted.

Section 17
We would suggest that this section ought more properly to be amended into the 1973 Act.

Section 19
We suggest that subsection 19(4)(b) is unsatisfactory. A rather fuller explanation of the terminator’s title to apply ought to be specified, so as to provide fair notice to the recipient.

We suggest that “both (or all)” in subsection 19(6) does not best express the apparent intention of this subsection, and that intention may be better expressed by “any number of”.

Section 21
In our view there is a conceptual difficulty with this provision. If a person is subject to a legal disability or an incapacity such as to preclude his ability to attend to the execution of a deed, it may be open to argument whether they have the requisite capacity to grant the deed in the first place. It is far from clear that the proviso in subsection (2) is sufficient to address this.

Section 23
It seems to us at odds with the dual registration scheme of the Bill, which we support, that the registration should be against the burdened property only. It is conceivable that the existence of the burden may affect the market value of the
benefited property, and a purchaser of that property will be relying on the faith of the registers when forming a view about its value.

Section 28(7)(b)
Whilst we note the general policy underlying this section, we are concerned that this provision would allow a dissatisfied minority proprietor to disrupt planned maintenance by demanding return of his contribution where the works have not started timeously through no fault of the instructing majority, or even the contractor - for example on account of adverse weather.

Section 32(2)
The Faculty notes that a simple majority by number is proposed for the variation or discharge of community burdens. Whilst the Faculty welcomes the change from majority by percentage area, we are concerned that a figure as low as 50% has been adopted. In our response to the Scottish Law Commission’s Working Paper, we suggested that if unanimity were not to be the approach, a figure of 75% was more appropriate. It is suggested that the need for a larger majority would reduced the likelihood of deadlock or the possibility of abuse of the position of the minority.

Section 41
We consider that there should be a saving to cover the situation where a successor body has taken over those functions of its predecessor which qualified the predecessor as a conservation body.

Section 48
There is no definition of ‘common scheme’. Whilst the broad intent may be reasonably apparent, we suggest that the context calls for a definition.

Section 54
We consider that, as presently framed, section 54(c) is unacceptably wide having regard to its retrospective effect. In our view, as a matter of constitutional propriety, legislative provisions over-riding orders of the court ought to be framed as sharply as possible. Having regard to the policy set out in the Explanatory Notes, the intent may be achieved by wording the paragraph: “any decree ad factum praestandum or interlocutor granting interim interdict or interdict already pronounced…”

Section 65
Whilst this provision is sound in its intention, it appears to create a right without prescribing a remedy. It may be possible to address that by amendment of section 1(1A) of the Administration of Justice (Scotland) Act 1972.

Section 66
We consider the wording of section 66(2) unsatisfactory, in that it does not state in terms when a servitude apparently created by such a deed is actually created.
This could be of significance in, for instance, the running of negative prescription. We would suggest that the wording be changed to: “shall be created as a real right only on the respective properties ceasing to be owned by the same person in the same capacity.”

**Section 75(1)(b)**
In line 2, we suggest that “an offer” should be replaced by “a reasonable offer”. Whilst the need for the offer to be reasonable, is referred to later (in subsection (4)), in our view this is a point of such importance that the wording of this subsection ought to make the point expressly.

**Section 77**
The phrase ‘education authority’ is a closely defined term in the 1980 Act. In our view the exception introduced in section 77(6) is of considerable width, and includes persons who are not education authorities. This is not canvassed in the Explanatory Notes. In our view the scope of the exception ought to be clarified.

**Section 84**
We are concerned that subsection 84(2)(b) appears to authorise the Lands Tribunal to make a decision on whether a benefited proprietor has an interest to enforce the real burden without hearing that person. It further appears to us odd that the Tribunal is entitled to take that decision at a stage where it has not determined the substantive application, since the provision, of course, appears in the context of the notification of the application. In our view, the provision sits ill with paragraphs (a) and (c), which appear quite appropriate, and should be deleted.

**Section 90**
In our view section 90(a) may be unduly subjective in its practical application: changes in the character of benefited and burdened property are more subjective than changes in the character of a neighbourhood. We find it difficult to envisage a change in the character of the burdened property which would be a legitimate consideration and which would not fall under one of the other provisions.
Justice 1 Committee

Title Conditions (Scotland) Bill

Response by the Faculty of Advocates to the Scottish Law Commission
Discussion Paper No. 106 on Real Burdens

1. **Community burdens**
The Faculty agrees in principle, as it seems wholly appropriate to allow for regulation for those living in close proximity with each other. However, as the Commission has identified, hybrids exist and some burdens might not be easy to categorise. The Faculty is not convinced that there is a pressing need for categorisation either in itself or by reference to different rights, obligations and remedies.

2. **Neighbour burdens**
The Faculty agrees with this suggestion.

3. **Negative servitudes**
The Faculty agrees with the proposal that it should no longer be possible to create negative servitudes. The arguments put forward by the Commission, in particular with regard to registration, appear to the Faculty to be persuasive.

4. **Existing negative servitudes**
The Faculty is opposed to the proposal of automatic extinction of real burdens after a set period of time (as will be seen in paragraphs 23 and 24 of this Response). In such circumstances, the Faculty does not agree that a similar "sunset rule" should apply to existing negative servitudes. Accordingly, the Faculty considers that option (a) is the more appropriate course of action to adopt. Whilst option (b) is probably more easily accomplished, the number of instances likely to be encountered would appear to be so small that ease of accomplishment should not be the deciding factor.

5. **Real burdens in favour of a property and not a person**
The Faculty agrees. To create a new category of real burden in favour of an individual rather than a property would undo much of the benefit in abolishing feudal real burdens.

6. **Conservation burdens**
The Faculty Agrees, subject to the proviso that clear identification of those entitled to benefit from such burdens is required. The Commission requires to address fully the issues it has raised in paragraph 2.59 before any firm view can be taken upon this matter.
7. **Implied rights**
   (1) This appears logical and sensible and the Faculty agrees with the proposal.
   
   (2) The Faculty agrees - to transform this type of feudal burden into one which is, in effect, a community burden seems a practical way to overcome the difficulties which might arise as a result of the abolition of feudal burdens.
   
   (3) This proposal has practical implications which do not appear to the Faculty to be well focused; for example, how is it proposed to broadcast the requirement to register to those who will be affected? That said, the arguments put forward in favour of this proposal appear to be well founded.
   
   (4) The Faculty agrees.
   
   (5) The Faculty agrees.

8. **Proposed scheme for implied rights to enforce**
   (1) The Faculty agrees. The requirement for registration of such rights is evident in light of the circumstances highlighted in the Paper. The Faculty considers that notification upon the servient tenement should be required.
   
   (2) The Faculty has some reservations about the period of five years; see the response to 7(3) above. If the period were longer and allowed the position to be considered routinely at the time of property transfer, this might ensure that any person to be affected would be unlikely to be prejudiced by being unaware of the requirement to register. If, however, suitable steps are taken to publicise the requirement to register, then five years would be adequate.
   
   (3) The Faculty agrees. This allows certainty for both tenements.
   
   (4) The Faculty agrees. Registration should be by the owner of the tenement which benefits from the burden.
   
   (5) The Faculty agrees with the principle set out here but questions whether 50% is the correct watershed. Each case will differ on its merits but the Faculty is inclined to the view that if a significant minority, for example 25%, are in favour of retaining the burden, that would not be an inappropriate proportion. In this respect, an obvious analogy is with company law where a majority in excess of 75% is required for the passing of a special resolution.
   
   (6) Again, the Faculty agrees with the principle of respecting small communities, but finds it difficult to identify what should be the smallest community which requires unanimity of approach. The Faculty is inclined to the view that, perhaps, ten units would be an appropriate figure to consider.

9. **The rule in Mactaggart**
   The Faculty agrees. This should then avoid the anomaly identified in
paragraph 3.14.

10. **Right to enforce a real burden**
   (1) The Faculty agrees.
   (2) The Faculty agrees. It is clear that the Trustee has the immediate interest in the property after sequestration.
   (3) The Faculty agrees. It is in the interests of the heritable creditor to preserve the amenity of the property prior to re-sale, so the right is one which requires to be exercised by him rather than the owner who may not be willing to do so.
   (4) The Faculty agrees. This right should remain with the registered owner.

11. **Interest to enforce**
   (1) It appears only fair and proper that interest be demonstrated by the person seeking to enforce a real burden.
   (2) The issue of title and interest is one which has in recent years exercised the Courts, particularly in the field of judicial review, c.f. Bondway Properties Limited v. City of Edinburgh Council 1999 SLT 127. The Faculty is inclined to the view that statutory reformulation would be unlikely to provide an effective answer and that, accordingly, the matter should be left to the Courts to develop.
   (3) Superseded.

12. **Liability and ownership**
   (1) The Faculty agrees.
   (2) The Faculty agrees. The liability of an owner for maintenance costs incurred during his period of ownership should not be removed by cessation of his ownership. The joint and several liability of the new owner ensures that in a situation where one individual has arranged the maintenance on behalf of the others and expended sums to pay for it, he or she has the right to recover the relevant share from the owner of the property. This is sensible as the vacating owner’s whereabouts are probably more readily ascertained by the new owner rather than a neighbour.
   (3) Agreed.
   (4) On balance, the Faculty agrees with this proposal, for the reasons set out in the Discussion Paper; albeit problems could well arise in respect of “fictional” dates of entry and subsequent arguments as to actual liability by reference to the date when the right was in truth acquired.

13. **Interpretation**
   Agreed.

14. **Irritancy clauses relating to real burdens**

3
Agreed. The argument of such irritancies being out of proportion to the wrong appears very valid and justifies cessation of their effect.

15. **Variation and discharge of community burdens by minute of waiver**

The Commission’s proposal in this regard proceeds upon the basis that “It seems self-evident, both that a universal waiver of burdens should follow on from a decision of the community as a whole, and that that decision should not require to be unanimous.” We accept the first proposition. It appears to us however that the second proposition is far from “self-evident”. The proprietor of a property which has the benefit of (and is itself burdened by) community burdens has purchased his property on the footing that the value (both subjective and objective) of his property is protected by those burdens. It is one thing to provide that he may lose that benefit by virtue of the decision of an independent judicial body such as the Lands Tribunal after a hearing at which he may state his objections. It is quite another to provide that the majority of his neighbours may deprive him of the benefit. The mere fact that he takes a minority view on the desirability of the continuation of a particular community burden does not of itself mean that he has no valid interest to protect. It appears to us that deprivation at the hands of a majority and without judicial intervention of rights which an individual or minority regard as valuable would not conduce to good neighbourliness.

15. **Percentage of community required**

(1) It follows that in our view a figure of 50% of the land area of the community is far too low a figure. If any figure other than unanimity is to be adopted, then something more than a bare majority should be required. We would suggest a figure of 75%. This observation applies equally to question 15(3). Likewise we consider that the figure of 20% mentioned in question 15(5)(a) is far too low. In any event we disagree with the suggestion that the appropriate percentage should be measured by reference to land area. Measurement by reference to property units appears to us to be considerably simpler. The use of land area could see decisions turning on precise measurement of individual property boundaries.

(2) **Special rule for small communities**

If, in general, a figure other than unanimity is adopted, we agree that an exception should be made for small communities. It appears to us that the rationale set out in paragraph 5.14 applies to small communities which are larger than three units. We would suggest that a number of the order of ten units would be more appropriate.

(6) **Special rule for large communities and for older burdens**

We do not agree with these suggestions. It does not appear to us that the size of the community affects the nature of the interest of particular individual proprietors or minority
groups of proprietors. Indeed it appears to us that in many cases, if the community is large, the individual proprietor will be particularly interested in the local effect on his property and therefore in the continuation of burdens on other properties close to his own. Nor do we consider that there is any necessary link between the desirability of a burden and its age. We address this further below, where we oppose the introduction of a sunset rule and suggest that a more appropriate approach would be the reversal of the onus of proof in questions of discharge of older burdens.

(7) **Express rules for discharge**
We agree.

16/17 **Variation or discharge of community burden in favour of an individual**

We agree with proposal 16 subject to the observations which we have made in relation to proposal 15. We do not agree with proposal 17. It appears to us that it would be unnecessarily complex to have different rules for discharge of a community burden in favour of an individual unit as opposed to discharge generally. Equally proposal 17 is likely to lead to a breakdown of the community which the Paper is attempting to encourage. Each member of the community is likely, in deciding whether or not to agree to a waiver in relation to a distant member of the community to have in mind that the next application could be next door.

18. **Appropriate signatories of minutes of waiver; effect of registration**
We agree with the three proposals set out in this question.

19. **Prescription of community burdens**
We agree with these proposals with one qualification. In our view the two year period in the case of burdens which take the form of a restriction should run from the date when the dominant proprietor knew or should have known of the breach in question. It does not appear to us to be unreasonable that, once he knows, he should take reasonably prompt action to deal with the problem. But it appears to us that two years would be too short if he is reasonably ignorant. A two year period in the case of burdens of the type mentioned can also be justified in the interests of improving certainty in the case of transactions involving the burdened tenement.

20. **Abandonment of community burdens**
We agree with proposal 20(3). In effect the discharge of a community burden in relation to some properties will make the community smaller. That being the case, it does not appear to us that proposals 20(1) and
20(2) are appropriate. A member of the now smaller community may well have a substantial interest in maintaining the burden in respect of his neighbours. Of course the discharge of the burden in respect of other members of the (former) community might well be of relevance if the matter were before the Lands Tribunal. Moreover, it appears to us that proposals 20(1) and 20(2) could result in uncertainty.

21. **Extinction by confusion**
We agree with this proposal.

22. **Extinction by compulsory purchase order**
We agree with this proposal on the basis that it is essentially a clarification of the existing law.

23. **Sunset rule for old burdens**
We disagree with this proposal. As the Commission itself observes: “old is not necessarily bad. A burden from the Victorian period may continue to protect some essential interest of the dominant proprietor or provide for the proper maintenance of some shared facility” (paragraph 6.36). Indeed “[with community burdens, age is not usually the main factor which makes a burden unsuitable. A new burden may as easily be unsatisfactory as an old one” (paragraph 5.16). The Commission quotes research to the effect that there is no strong correlation between the age of a burden and the desire of a servient proprietor to have it discharged (paragraph 5.71). Under such a proposal “Good burdens will perish as well as bad ones, and some bad burdens will survive merely because they happened to be created in the recent past” (paragraph 5.71). If there are bad or obsolete burdens in existence, then that is an argument for having a ready procedure by which those burdens can be identified and discharged and not an argument for putting in place an arbitrary rule.

The Commission (in our view correctly) observes that “If the choice lies between abolishing too much or too little we would prefer to abolish too little. The survival of obsolete burdens seems a reasonable price to pay for the survival of burdens which have continuing validity” (paragraph 5.78). If a burden is truly obsolete, then it is unlikely that the dominant proprietor will seek to rely on it. If he should do so, then the Lands Tribunal will discharge the burden. This system satisfies the Commission’s stated view on policy which we have just quoted and with which we agree. The addition of a “sunset rule” could well result in the abolition of burdens which have continuing validity. In the case of Georgian townhouses and Victorian villas and tenements this would almost certainly be the case (cp para. 5.71). The survival of obsolete burdens which in practice are not relied on and which in practice would readily be discharged if an issue were to arise appears to us to be a reasonable price for maintaining burdens which have continuing validity.
On the other hand there may be a case for reversing the burden of proof in applications for discharge of burdens of a certain antiquity. This would discourage dominant proprietors from objecting to discharge of obsolete burdens simply to make money, while avoiding the clear disadvantages of a generalised “sunset rule” and the complexities which, as is apparent from the Law Commission's proposals, are attendant upon it. We would suggest that 60 years would be an appropriate point at which to reverse to reverse the onus of proof. This is likely to be beyond the occupancy of proprietors who were in possession when the burdens were created.

24. **Sunset rule for old burdens**

(1) We have dealt with this under question 23.

(2) **Period to be applied for sunset rule**

It will be apparent that we regard the proposal as objectionable in itself. It appears to us that the very length of the sunset periods mentioned tends to support our view. The Commission is not proposing any fundamental change in the notion that land may be burdened over a very long tract of time. We note that in other jurisdictions mentioned by the Commission, the period adopted is much shorter than those suggested by the Commission. It appears to us that a system which treats all burdens as essentially temporary (with a relatively short life of only 30 or 40 years) is quite a different one from one which permits burdens to subsist over a long tract of time. The Commission does not propose any fundamental change in this regard. Its stated aim is not to reform the law in principle by moving to an entirely different concept of burdens on land but merely to get rid of burdens which are truly obsolete. This is reflected the length of the periods mentioned. But the effect of the proposal for a sunset rule will not merely be to remove burdens which are truly obsolete but to throw out the good with the bad.

24(5) to 24(13): **Renewal of burdens subject to sunset rule**

We consider that the proposed scheme for renewal also tends to reinforce our objections to the proposal. The proposed arrangements are complex. Moreover, any scheme for renewal requires a perhaps unrealistic degree of vigilance on the part of the benefited proprietor. The importance of a particular real burden will become apparent to him probably only when he is faced with some development on his neighbour's property which interferes with his amenity or is otherwise harmful to the enjoyment of his property. It is in that context that he is likely to look to his title. In practice, he is unlikely to have been aware when burdens in his titles were in danger of imminent expiry by passing over the horizon set by the sunset rule and accordingly may well have lost rights the importance of which to himself (and indeed perhaps to other neighbours) only becomes apparent in specific circumstances.
25(a) Expenses
The Faculty considers that the Tribunal’s current practice on expenses should not be altered. We doubt whether the current practice on expenses discourages a person with a good case. Nor do we consider that the current practice encourages objectors, whether the objection is well founded, speculative or trivial. Objections are sometimes made by individuals without the benefit of legal advice; it does not necessarily follow that such objections are without merit. The expenses of such objectors would be relatively low. If an objector acted unreasonably, then an award of expenses could be made against him. It is readily understandable that a person whose rights might be taken away should choose to defend them particularly where these rights are recently created in an arm’s length transaction. An application to the Lands Tribunal for variation or discharge of a land obligation is not on all fours with a court action for payment, damages, implement or reduction, where the object is to redress a perceived breach or wrong on the part of the defender. We consider that the Lands Tribunal is sufficiently astute to be able to determine circumstances where an award against an objector would be appropriate.

25(b) The Faculty agrees that a fee should be payable by objectors. We also agree that it should be lower than the fee payable by the applicant. If possible, it should be set at a figure that does not discourage the impoverished but genuine objector.

26 Unopposed Application granted as of right
We consider that in unopposed applications, the Tribunal should nevertheless consider what we loosely describe as the competency of the application. By this we mean not only competency in its strict sense but also whether the application truly focuses on the correct obligation; and, in relation to an application for variation, whether the precise terms of the proposed variation make sense; we appreciate that the Tribunal does not adjudicate on enforceability. We do not see this as considering the full merits of the application. The grant of a discharge or variation may have long term consequences; inappropriate wording may create further dispute in the future and the need for further applications to the Tribunal. We consider that the Tribunal can and should perform some form of scrutiny at this stage in order to minimise difficulties in the long term. This, we believe, is what is done at present.

27 The Grounds for Variation or Discharge
The Faculty has difficulty in seeing how the age of the burden should of itself be considered a relevant or determinative factor in such applications. Apart from this qualification, the Faculty is in favour of the proposal. We agree that the three statutory grounds have created difficulties of the type highlighted by the Commission, particularly in
relation to overlap. From a practical point of view, this can create
difficulties in preparation and presentation as well as in relation to advice
as to which ground provides the best prospect of success. The
approach based on reasonableness, having regard to a number of
identified factors, with the flexibility to take into account other material
circumstances, has a number of practical advantages. Identification of
what may be regarded as the more important factors makes the
evaluation of the merits of an application easier; and therefore easier to
advise on prospects of success; the existence of statutory factors should
focus the presentation of evidence. Moreover, an adjudicating body will
generally find it easier to determine the merits of an application where
Parliament has given a list of factors [albeit not all the factors] which
may have to be considered. In narrow cases, the weight to be given to
each factor may be a nice question. However, in most cases, as the
evidence develops, it will be clear which factors are likely to be
determinative of the application.

28 Cessation of Two Year Rule
We see no reason to change the existing rule. We are not aware of the
rule creating hardship or difficulties in practice. Even if the age of the
burden is one of the factors to be taken into account, as to which we
have already expressed reservation, this provides no reason for
removing the existing rule. It seems to us odd that in theory an
application for variation or discharge could be made as soon as the ink
is dry on the contract made by the applicant.

29 New Grounds
On balance, we consider that the proposals made are likely to improve
this branch of the law. We agree that if the change proposed in
paragraph 27 is introduced, it should apply to all land obligations. The
greater or lesser importance of the enumerated factors to different types
of land obligation would soon become apparent; we do not see this as
causing any difficulty.

30 Burden of Proof
Save as indicated in our response to questions 15(6) and 23 we agree
that there should be no change in the burden of proof. We do not
consider that there should be any policy positively to encourage the
making of applications to discharge land obligations. Nor do we
consider that there should be any policy to the effect that the mere
making of an application creates a presumption that it is desirable that
the land obligation should be discharged or varied. We also refer to our
response to proposals 15(6) and 23 above.

31(1) Who should be Applicants
We consider that this questions falls to be answered in tandem with
question 10. Thus we agree that an application for the variation or
discharge of a neighbour burden, or a community burden in respect of a particular property, should be brought by (a) the registered owner(s) of the burdened property, (b) by a trustee in sequestration or (c) by a heritable creditor in possession.

31(2) Community Burdens variable etc by owners of more than 10% of the area of the community.

The Faculty considers that the principle that a proportion of a community may apply for the discharge of a community burden affecting the whole community is a sound one. However, we consider that the proposed figure of 10% is far too low. Moreover, in large modern developments with houses and plots of different sizes, it may be difficult to calculate the relevant percentage of land area. Areas held in common by different parts of the same community may have to be taken into account. Although house sizes will differ, they are unlikely to differ so radically so as to make it unfair for each owner to have one vote on the question of variation or discharge. Owners in common, such as husband and wife, which may be the norm, would, together, have one vote. Provision would have to be made for couples who are separated or hold different views. The variation or discharge of a community burden may concern very important issues for the community affected by them. We suggest that 75% of the owners should be required to apply for discharge or variation, before the community in question can be affected by the variation or discharge.

32 Affected Proprietors
The Faculty considers that this category or a similar category should be retained. For aught yet seen, there may be circumstances in the new regime and the new conveyancing world after the abolition of the feudal system, in which a residual category of persons can justifiably claim to have title and interest to be heard in opposition to an application. Such an approach would accord with the Commission’s approach to achieving as much flexibility in the new regime as possible.

33 Notification
33(1)-(3) Agreed.

34 Validity of Burdens
We agree with the proposals. It seems sensible that the Tribunal’s expertise in this area should be used in this way.

35 Jurisdiction to Enforce and Discharge or Vary Real Burdens
The public interest generally lies in the avoidance of a multiplicity of actions. On balance, the Faculty considers that the ordinary courts should be given the power to vary or discharge, but only in the context of
an action to enforce a real burden. The Faculty has no statistics on how common actions to enforce real burdens are in the Court of Session or the Sheriff Courts, but it would be interesting to ascertain how frequently this problem is likely to arise. We suspect that it will not arise very often. Accordingly, the ordinary courts are probably more able to accommodate the jurisdiction to discharge or vary than the Tribunal is able to accommodate enforcement proceedings and the ancillary applications likely to arise therefrom.

36 **Tribunal Jurisdiction over Planning and Conservation Burdens**

This would constitute a significant enlargement of the Tribunal’s jurisdiction. It would also amount to a radical change in the legislative philosophy relating to the control of development. It would remove that control in part from the hands of local government and place it into the hands of the Tribunal and, on appeal, the courts. At present, we do not see the need for such a radical change. Any such change should, we think, be made in the context of a review of the law relating to town and country planning, rather than in the present context.

37(1) **Real Burdens should continue to require writing and registration**

Agreed. In order to achieve certainty and transparency, it is important that everyone can readily identify which burdens affect which subjects. We note that the whole of Scotland should be covered by the Land Register by 2003. By collecting together all real burdens on a separate sheet, it is a much more efficient system than that provided under Sasines registration.

(2) **Positive servitudes which are created expressly in writing should become real rights only on registration**

Agreed. The logic of requiring registration before a real right is created is the same for both positive servitudes and real burdens.

(3) **By registration is meant registration of the Land Register or, as the case may be, the Register of Sasines against both the dominant and the servient tenements**

Agreed. It seems anomalous that under the present system, the presence of burdens is only entered in the title of the servient tenement. If the owner of the dominant tenement is unaware of his rights, then they will not be enforced.

38(1) **A condition should not be effective as a real burden unless its duration is specified in the constitutive deed**

We are not in favour of this proposal. The Faculty has already expressed its disagreement with the introduction of a sunset rule and
this proposal is another means whereby such a rule could be given effect.

(2)-(6) Superseded in the light of our answer to (1)

39(1) **A condition should not be effective as a real burden unless the words "real burden" or "community burden" or "neighbour burden" are used in the constitutive deed**

This answer should be read in conjunction with our answer to Q63. We believe that the term "real burden" should always be used. It may become practice for conveyancers to use in addition the terms "community burden", "neighbour burden", or "common facility burden". We do not believe, however, that there should be any legislative requirement to use any of these subsidiary terms.

39(2) **Subject to (1) and to proposal 38, there should be no statutory form for the creation of real burdens, and no requirement that burdens created in conveyances be placed in a separate schedule.**

We tend to favour the use of a schedule in which to place any real burdens which are being created by the deed. Such a requirement would clearly identify the restrictions in question. Standing, however, (a) the existence of the separate section of the title sheet in the Land Register dealing with real burdens; and (b) the fact that a schedule would have implications for the form of dispositions (which are not the subject of this reform) we are disposed to agree with this recommendation.

40(1) **For the avoidance of doubt, it should be provided that an obligation to make payments should not fail as a real burden only on the ground that no definite amount is stated**

This is a welcome clarification of the law

40(2) **This rule should apply to obligations already created as well as to obligations to be created in the future.**

Agreed. It is anomalous that doubt continues to attach to such burdens in existing deeds.

41(1) **The constitutive deed for a community burden must nominate and describe the community which is to be affected by the burden**

41(2) **The constitutive deed for a neighbour burden must nominate and describe the dominant and servient tenements in the burden**
41(3) **The description must be sufficient to identify the property**

Subject to the concerns which we have expressed about categorisation, we agree with each of these 3 proposals.

42(1) **In a conveyance, it should be competent to impose burdens on the property being retained by the granter as well as on the property being conveyed.**

If obligations are to be registered in respect of both tenements, then in our view the granter of a disposition should be entitled to impose a burden upon his own subjects, whether or not they form a part of the break-up of subjects.

42(2) **In a deed of conditions, it should be competent to impose burdens on land which is not to be conveyed**

This removes any doubt about the use of deeds of conditions where a conveyance is not contemplated.

43 **The praedial rule should be clarified and restated along the following lines**

1. A real burden must burden the servient tenement for the benefit of the dominant tenement or (in the case of a community burden) for the benefit of the community or any part of the community.

2. A positive obligation constituted as a neighbour burden must also confer benefit on the servient tenement

Subject to our dislike of the terms "dominant" and "servient" (we prefer "benefited" and "burdened"), we agree that the rule should be restated in this manner.

44(1) **A real burden should be invalid if it is**

(a) illegal, under any enactment of law, or

(b) contrary to public policy, as repugnant to the idea of ownership, or in unreasonable restraint of trade, or for any other reason

We agree that there should not be an unfettered right to create real burdens and that the familiar concepts of illegality, public policy and restraint of trade should come into play.

44(2) **Views are invited as to how the "reasonableness" of restraint of trade should be assessed.**

We believe that the existing jurisprudence on this topic should provide the framework for assessing reasonableness.
45 It should be possible for a right to make use of the servient tenement to be constituted as a real burden

There appears to be no authority against this approach, it derives support from Lord Cullen's decision in B & C Group Management -v- Haren 4 December 1992 and is welcome in principle.

46(1) A real burden should not be unenforceable only because it incorporates information which is contained in an act of parliament or a statutory instrument, public register, public records, or other document in Scotland which is available to the general public

46(2) This rule should be deemed always to have applied in the case of real burdens of maintenance

We agree with these proposals.

47 An obligation which has become enforceable as a real burden should cease to be enforceable as a contractual term

Agreed. We believe that once registered, the law of property should supersede the law of contract.

48(1) Any requirement in any deed that burdens be repeated in future deeds relating to the same property should cease to have effect, and no deed should be challengeable on the ground of failure to comply with such a requirement

48(2) Section 9(3) and 9(4) of the Conveyancing (Scotland) Act 1924 should be repealed

Once registration of title covers Scotland and burdens are registered in the title sheets of both the dominant and servient tenements, it is unnecessary to repeat burdens in future conveyances. Meantime, the repetition of burdens in non-Land Register conveyances should be retained.

49(1) Community burdens should be capable of being varied, discharged or replaced by a deed of conditions executed in accordance with proposal 15

We agree in principle that community burdens should be capable of alteration or extinction and replacement. This is subject to the views we express in our response to proposal 15 regarding the manner in which this should occur.
49(2) Alternative provision for execution may be made in the constitutive deed (or any variation thereof)

This seems to us to be an acceptable way of regulating change in any deed of conditions.

49(3) A person should be entitled to execute the deed as owner even if his right has not been completed by registration

This seems necessary for the constitution of deeds of conditions prior to first ownership/occupation.

49(4) On registration in the Land Register or Register of Sasines the deed of conditions should be effective for all purposes and should bind all those holding real rights in a unit or in any other part of the community

To be effective, a deed of conditions, once registered, must regulate the real rights of all members of the community.

49(5) If, in relation to a deed of conditions executed under this proposal or a minute of waiver executed under proposal 15, the sheriff is satisfied that-

(a) the deed is not in the best interests of the community, or

(b) the deed is unfairly prejudicial to one or more of the owners he should be able to make an order reducing the deed in whole or in part

This Answer should be read in conjunction with Answer 15. We do not agree with this proposal. In our view the scope of the proposed jurisdiction is too wide. It would enable one or more members of the community to threaten proceedings (and the consequent expense of such proceedings) in circumstances where the outcome of any application was far from certain. The Faculty also wishes to point out that actions of reduction would normally be brought in the Court of Session, rather than the Sheriff Court.

49(6) An application under (5) should be available to any owner who was not a signatory to the deed, and should be made-

(a) in a case where he was notified of the deed, within 21 days of the notification:

Superseded
(b) in any other case, within 5 years of registration of the deed

Superseded

49(7) Views are invited as to whether a model management scheme should be made available as an option for the management of communities and for the maintenance of shared facilities

We believe a model management scheme shown in Appendix 2 to be desirable and one which no doubt conveyancers will use in practice. We do not, however, believe that it requires to form part of the legislation.

50 The Reversion Act 1469 should be repealed:
The Faculty agrees.

51 Constitution of right of redemption etc. as a real burden:
The Faculty agrees.

52 Continuance of the constitution of rights of pre-emption in a real burden
The Faculty is of the view that a real burden should continue to be able to embody a right of pre-emption.

53 Practical proposals relating to exercise of the right:
The Faculty agrees with these proposals. However, in view of the obvious need to prove that the written enquiry has been made, the Faculty suggests that there should be a formal requirement for more than merely “a written enquiry”. It may be that a solicitor could certify a copy of the letter which has been sent as a true copy, and retain proof of posting such as a recorded delivery slip. Alternatively, there might be a requirement for personal service of such an important written document, by way of Sheriff Officers.

The Faculty considers that these rules should apply to any existing right of pre-emption created as a real burden, for the sake of consistency.

There might be scope for an extra provision, whereby the newly dispossessed holder of the right of pre-emption could apply to the Sheriff for authority to exercise his right of pre-emption, notwithstanding the passing of the period of 21 days after notice, on cause shown. The Faculty is thinking of situations were service of the original letter has been ineffectual, perhaps because the holder was away on holiday. Plainly this could only happen up until the time when title was recorded in favour of the new purchaser, but it would afford some safeguard for people who do not meet the deadline.
54 **Application to subdivision of the dominant tenement etc.:**
The Faculty agrees with these proposals.

55 **Should the sunset rule apply to rights of pre-emption etc.?**
The Faculty refers to its observations on the "sunset rule" in the context of old burdens (Part 5, Question 23-24(2) supra). Following similar reasoning, the Faculty does not support a time restriction. However, if another view is ultimately taken, the Faculty suggests that a requirement could be introduced whereby the holder of a right of pre-emption or redemption had to register a Notice of Preservation within 5 years, following the pattern suggested for neighbour burdens.

56 **Repeal of two Church of Scotland Acts:**
The Faculty is unable to make any useful comment about this.

57 **School Sites Act 1841:**
The Faculty agrees with these proposals.
The Faculty does not consider that education authorities should be under a duty to seek out and notify potential claimants, as individuals, for the reasons outlined in paragraph 8.67. The Faculty believes that title raiders may already have bought up old school buildings in anticipation of these claims.

58 **Entail Sites Act 1840:**
The Faculty agrees that the Entail Sites Act 1840 should be repealed.

59 **A maximum duration for leases should be introduced:**
The Faculty is not persuaded that there is a need for a specific time limit on leases. Those who support the principle of freedom of contract view the proposal as an unnecessary interference with that principle.

60 **Contractual chains:**
The Faculty agrees that the contractual chain should be declared unenforceable.

61 **Liability for maintenance costs in the context of real burdens:**
The Faculty agrees with these proposals. Indeed, they are particularly welcome.

62 **Pecuniary real burdens:**
The Faculty agrees that it should be plainly provided that it is no longer competent to create pecuniary real burdens.

63 **Changing the term "Real Burdens":**
The Faculty considers that the term "real burden" is archaic, and should be replaced. The Faculty suggests "Land Restriction", or alternatively
"Land Restraint".

EDINBURGH
June 1999
Justice 1 Committee

Title Conditions (Scotland) Bill

Supplementary evidence from the Law Society of Scotland

The Society's Conveyancing Committee ("the Committee") has considered the additional evidence submitted to the Justice 1 Committee of the Parliament by Mr Bruce Merchant, solicitor, Inverness (who is himself a member of the Committee). Subject to the following comments, the Committee supports Mr Merchant's position on amendments to sections 8, 48 and 52 of the Bill. The Committee hopes that the Executive will be prepared to give further consideration to these important issues and that the bill will be amended at Stage 2 on 10 December 2002. These amendments are essential to ensure the process of buying and selling houses in residential estates is not to be unacceptably delayed.

The Committee has the following additional comments to make on sections 8, 48, 52 and 99:-

Section 8

The Committee is opposed to the extension of the right to enforce real burdens to non-entitled spouses and tenants because it will be impossible to identify these categories of person from the Land Register or Register of Sasines. The Committee has no objection to the right being extended to proper liferenters whose right will always be recorded in the Sasines Register or registered in the Land Register.

As regards non-entitled spouses, the Committee repeats its earlier view that if non-entitled spouses are to have the right to enforce that right should only arise if he or she can establish that the entitled spouse (i.e. the owner) is permanently resident outwith the matrimonial home.

In the Committee's experience, the vast majority of tenants of residential properties are tenants under short assured tenancies with a maximum term of five years. It is therefore inappropriate that short term occupiers of houses should be able to enforce burdens which “run with the land” and therefore only affect the interest of the owners and his or her successors.

Accordingly the Committee would support amendments to exclude (a) non entitled spouses unless the entitled spouse is permanently resident outwith the matrimonial home and (b) tenants of residential property under leases for a term of five years or less, from those having the right to enforce real burdens.

Section 48

The Committee supports Mr Merchant's proposed amendments which are designed to restrict the number of properties benefited by a real burden to those situated within four metres of the burdened property. This will avoid the need to obtain
consent (or retrospective consent) to alterations formerly requiring the consent of the superior or discharge or variation to a breach or variation of the burden by all the proprietors in a common scheme.

Section 52

As drafted, section 52(1) will have the effect of conferring new implied rights of enforcement of real burdens where none exists under the common law. It was made clear in Hislop v MacRitchie’s Trustees (1881) 8R. (H.L.) 95 that the burdened proprietors have no enforcement rights where the granter of the constitutive deed reserves the right to vary or waive the real burdens. The Committee recommends the deletion of this sub-section which along with the proposed amendments to Section 48 will (a) ensure that no new implied enforcement rights will arise where none existed previously and (b) the number of owners whose consent or agreement to vary or discharge is required will be reduced to manageable proportions.

Section 99

Having read the Stage 1 Report by the Justice 1 Committee, the Committee accepts that there is little prospect of amendments to the Abolition of Feudal Tenure (Scotland) Act 2000 with regard to development value burdens and/or clawback arrangements. The Committee also accepts that clawback arrangements are enforceable by contract between the original parties and acknowledges that in its original comments on the Executive’s Consultation Paper it erroneously implied that such arrangements would not be enforceable in accordance with their terms after the appointed day, and that the creditor in the obligation would only be entitled to compensation in terms of the provisions relating to development value burdens.

In this connection the Committee welcomes the amendments to Section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 with regard to standard securities. The Committee welcomes the recommendation that the law relating to standard securities should be reviewed as soon as possible.