These documents relate to the Title Conditions (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 6 June 2002

TITLE CONDITIONS (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Title Conditions (Scotland) Bill introduced in the Scottish Parliament on 6 June 2002:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 54–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND

4. The first part of the Executive’s programme of property law reform, the Abolition of Feudal Tenure etc. (Scotland) Act (the “2000 Act”), received Royal Assent on 9 June 2000. The 2000 Act will abolish the feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior. Land previously held feudally will be owned outright. Superiority interests will disappear.

5. The abolition of feudal tenure will have a profound effect on the way in which property is held in Scotland. The vast majority of land is held at present under feudal tenure and many real burdens were created in feudal deeds. Together with the second Bill in the programme of property law reform, the Title Conditions (Scotland) Bill, the 2000 Act will provide a modern and simplified framework for property ownership in Scotland.

6. Most feudal burdens (i.e. obligations in title deeds to perform a particular act such as to maintain a common facility or a prohibition not to do a specific thing) will cease to be enforceable by superiors. The rights of enforcement of third parties, for example other proprietors in the same housing estate or tenement whose properties are protected by the same burdens, will not be affected. In most cases, however, the superior’s right to enforce burdens will be ended. The feudal burdens that survive abolition will be converted into ordinary, non-feudal burdens. As a result, there is a close interaction between the 2000 Act and the Title Conditions (Scotland) Bill.

7. The Scottish Law Commission estimate that only around half of all real burdens affecting property in Scotland are imposed in feudal deeds. Equivalent real burdens can be and are created in ordinary dispositions. These non-feudal real burdens will not be affected by abolition of the feudal system. The Title Conditions (Scotland) Bill will reform the general law on all real burdens for the future and for all existing burdens, whether or not they were always non-feudal ordinary burdens or have survived feudal abolition by conversion into ordinary real burdens.

8. Although the 2000 Act has been passed, much of it has not yet been commenced. Feudal burdens will disappear along with the feudal system, but the 2000 Act allows some feudal burdens to be converted into ordinary burdens. They will be assimilated into the law of real burdens, and it is desirable that this assimilation forms a single process along with the reform of
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The law on title conditions. Once the Title Conditions (Scotland) Bill has been enacted, it and the remaining parts of the 2000 Act will be commenced simultaneously on a date which is referred to as the **appointed day**. This will result in a significant clarification of the law. To allow time for transitional arrangements to be put in place, the appointed day is likely to be about 18 months after the Title Conditions (Scotland) Bill is enacted.

**THE BILL**

9. The Bill will largely implement the recommendations of the Scottish Law Commission Report on Real Burdens (Scot Law Com No 181), published on 26 October 2000. It will provide a re-statement and clarification of the law of real burdens. The Bill stipulates rules for the creation, enforcement and extinction of real burdens, and special rules for community burdens and manager burdens. Burdens validly created under the old law will remain valid burdens – the legal effect will remain the same. No valid burdens will disappear as a result of the Bill, though it provides a mechanism for getting rid of obsolete burdens. It should become easier to find out who has the right to enforce burdens.

10. The Bill achieves greater clarity in the law. It reduces the number of outdated burdens by making it easier to discharge or vary them. It creates a framework for the way in which individuals may impose their own controls on property. The Bill provides default rules for a number of areas where property may not be fully regulated by title deeds. This is intended to improve the management of property in order to allow repair work to be carried out when required.

11. The Bill is in 10 Parts:

**Part 1 – Real burdens: general**

12. This Part codifies the existing law and introduces some changes such as a ‘sunset rule’ (with the option of renewal) for burdens over 100 years old. It sets out how to create a real burden, what its contents may be, and how it may be terminated. These rules apply to existing burdens as well as burdens to be created in the future.

**Part 2 – Community burdens**

13. This Part deals with burdens which apply to communities in the sense of groups of properties which have a common scheme of burdens. These communities have common or similar burdens which apply to all the units within them, and which can be mutually enforced.

**Part 3 – Conservation and maritime burdens**

14. This Part sets out the rules for conservation and maritime burdens. These burdens are of public benefit.
Part 4 – Transitional: implied rights of enforcement

15. Part 4 abolishes enforcement rights implied by common law but provides a preservation procedure and recreates some of these rights with a statutory basis. In future it will not be possible to create implied rights.

Part 5 – Real burdens: miscellaneous

16. This Part deals with a variety of different issues. They include the power to create a new legal category of burden called a manager burden. This burden will allow a developer to keep control of a group of properties while they are being developed.

Part 6 – Servitudes

17. This Part of the Bill realigns the boundary between servitudes and real burdens.

Part 7 – Pre-emption and reversion

18. This Part of the Bill modifies the rules for pre-emption, and rights of reversion arising under various statutory provisions.

Part 8 – Title conditions: powers of Lands Tribunal

19. This Part of the Bill sets out the powers of the Lands Tribunal. The existing jurisdiction is restated, with some modifications.

Part 9 – Miscellaneous

20. This Part of the Bill contains miscellaneous provisions, including provision on compulsory purchase powers. It also amends the existing legislation on the ranking of standard securities.

Part 10 – Savings, transitional and general

21. This Part of the Bill lists the various savings and transitional arrangements pertaining to the Bill, and the interpretation, short title and commencement provisions.

COMMENTARY ON SECTIONS

PART 1 – REAL BURDENS: GENERAL

Section 1 – The expression "real burden"

22. Section 1 defines ‘real burden’, and introduces the terms ‘benefited property’ and ‘burdened property’.

23. Subsection (1) re-states, but does not change, the current law concerning real burdens. A real burden is an obligation affecting land or buildings. It is a condition of ownership which
runs with the land. The word ‘real’ is used to distinguish this sort of obligation from a ‘personal’ obligation, such as a contract.

24. The land that benefits from the condition, and whose owner is able to enforce the burden, is called the **benefited property**. Except for the special types of burden listed in subsection (3), there must always be a benefited property; and the holder of a burden is the person who for the time being is the owner of that property. Viewed from the position of the holder, a real burden is a real right. The benefited property must be ‘land’ (defined in section 110(1)). The benefited property will commonly be neighbouring land. Following the abolition of the feudal system it will no longer be possible for real burdens to be created for the benefit of feudal superiors.

25. **Subsection (2)** gives names to the properties affected, or benefited, by real burdens. The land subject to the burden will be known as the **burdened property**.

26. **Subsection (3)** provides 5 exceptions to the rule expressed in subsection (1) that burdens must be in favour of other land. It will be possible in future to create burdens that directly favour a person without reference to a benefited property. These are conservation burdens, maritime burdens, and manager burdens. Personal pre-emption burdens and personal redemption burdens cannot be created in the future. They exist as a limited category of former feudal burdens converted by notice registered under section 18A of the 2000 Act. Conservation and maritime burdens are the subject of part 3 of the Bill, while manager burdens are regulated by section 58. These are new types of burden, although conservation and maritime burdens are provided for in the 2000 Act.

**Section 2 – Affirmative, negative and ancillary burdens**

27. **Section 2** is concerned with the type of obligation which can be created as a real burden. In future all real burdens will be either **affirmative** burdens, **negative** burdens or **ancillary** burdens.

28. **Subsections (1) and (2)** provide that in future new real burdens must be either obligations to do something (an affirmative burden), such as to use the property for a particular purpose, or to maintain a building, or obligations to refrain from doing something (a negative burden), such as to build on the property, or to use it for commercial purposes. It is rare under the current law for a real burden to take the form of any other type of obligation than affirmative or negative. It is possible under the current law, to create a real burden as a self-standing right to enter or make use of property. This could be to walk or drive over property, or to run a pipe through it. It is more usual for such rights to be constituted as positive servitudes. In future it will only be possible to create this sort of obligation as a positive servitude, and any existing real burdens in this form will be converted into positive servitudes by section 72.

29. **Subsection (3)** provides a degree of flexibility to the rule in subsection (1). It is sometimes necessary for a burden to reserve a right of access or use. This is not a right of access of itself: that would be a servitude. It is instead a right to enter or use a burdened property for a purpose ancillary to other obligations imposed by real burdens. For instance, a burden might oblige an owner to maintain property. An ancillary part to this burden could be to allow the benefited proprietor to access the property to inspect the maintenance work.
30. **Subsection (5)** prevents the rules set out in section 2 being avoided by labelling a burden as something that it is not. Whether an obligation falls within the permitted categories will be judged by the effect of the words rather than the words themselves.

**Section 3 – Other characteristics**

31. **Section 3** sets out the rules that a burden must comply with concerning the *content* of an obligation. Real burdens affect land. Subsections (1) to (4) re-state what is known as the praedial rule. This rule provides that real burdens must affect, and relate to, a burdened property for the benefit of the benefited property.

32. **Subsections (1) and (2)** re-state the rule that a real burden must affect the burdened property. This is known as the praedial rule. However, as subsection (2) makes clear, if the *only* link between the burden and the property is that the burden is imposed on the person who owns that property, the praedial rule is not complied with. The requirement of praedial benefit does not apply to conservation and maritime burdens or personal pre-emption and personal redemption burdens as there is no benefited property in these cases.

33. **Subsection (4)** makes a special provision for community burdens so that the praedial test for a community burden will be satisfied if it confers a benefit on the community or any part of the community. Community burdens are defined in section 24. Certain burdens, such as for management structures and service charges, will clearly be in the community’s interest, and subsection (4) will accordingly make them praedial, regardless of their relationship with an individual property. The subsection also allows for an exception for communities in special circumstances. In a normal housing estate a prohibition on occupation by residents over the age of 60 would probably not normally be praedial because it would not benefit the property. It would consequently be invalid. However, the special needs of certain types of community, such as a sheltered housing complex where the housing is specifically adapted for occupation by the elderly, would allow for an exception. This sort of condition would be for the benefit of the community as a whole.

34. **Subsection (5)** provides that a right of pre-emption is the only type of option to acquire land that may be created as a real burden in the future. The present law also allows redemption and reversion options to be constituted as real burdens. Pre-emption entitles the holder to first refusal in the event of the property coming up for sale. The decision by the owner to sell is the only thing that can trigger the pre-emption. Redemption does not depend upon the decision of the owner. It is a right to repurchase triggered by a specified event such as death of an owner or the granting of planning permission. Reversion is similar, but does not necessarily require the payment of money or value. Further provision for rights of pre-emption is made by sections 73 to 75. Although the Bill (section 1(3)) recognises personal pre-emption burdens and personal redemption burdens it is not possible to create such burdens under the Bill. These burdens are by definition (see section 110) only capable of arising by the conversion of a former feudal burden under section 18A of the 2000 Act, introduced by section 102 of the Bill.

35. **Subsection (6)** re-states the rule of the common law that a real burden must not be illegal nor contrary to public policy. The illegality requirement would include a purported burden that attempted to breach race or sex discrimination laws. There are 3 main categories of public
policy prohibitions. A burden cannot be repugnant with ownership, i.e. it could not be so restrictive that the value of ownership would be lost. In addition, a burden cannot form an unreasonable restraint of trade. There is no bar, however, on a general prohibition, for example from carrying on a business in a housing estate. The third category is that a burden must not create a monopoly. This is dealt with by subsection (7).

36. **Subsection (7)** makes clear that a real burden cannot create a monopoly, except where the contrary is expressly permitted by the Bill. Despite the reference in paragraph (a) to manager appointment, a temporary monopoly is permitted elsewhere in the Bill: see sections 25(1)(d) and 58.

**Section 4 – Creation**

37. **Section 4** explains how a real burden is created after the appointed day. In summary, a burden is created by a deed (known as a ‘**constitutive deed**’) granted by the owner of the burdened property and registered in the Land Register or Register of Sasines against both the benefited and the burdened properties.

38. **Subsection (1)** restates the current law that a real burden is created by registration of a constitutive deed. By section 110(1) “registration” means registration of the real burden in the Land Register or recording of the constitutive deed in the Register of Sasines. These property registers record ownership of land in Scotland. The time of creation is usually the time of registration, but where the constitutive deed is a deed of conditions, it is permissible under the present law to prevent the creation of burdens on registration of the deed of conditions by disapplying section 17 of the Land Registration (Scotland) Act 1979 (section 17 is repealed by Schedule 14 to the Bill). In this case the burdens are created on the date of registration of a subsequent conveyance into which the deed of conditions is incorporated. For instance, a builder might create a deed of conditions over an entire development, but choose to postpone the activation of the real burdens on each unit until it is sold. The sale of the unit is the subsequent conveyance: that is the point at which the burdens will affect that part of the development. Subsection (1) allows the continuation of this practice (by paragraph (b)) but by different means and also allows (by paragraph (a)) a more straightforward postponement to a specifically specified date. After the appointed day the constitutive deed must itself provide for a delay in the effectiveness of a real burden. The postponement must be in accordance with subsection (1). If the deed is silent, the burden will take effect immediately upon registration.

39. Under the current law the terms of a real burden must be set out either in a conveyance or a deed of conditions. **Subsection (2)** abandons this limitation. In future it will be possible to create a real burden using any deed, provided that the deed complies with the three conditions set out in paragraphs (a) to (c).

40. Paragraph (a) of subsection (2) should be read together with section 5 (which qualifies the rule that the terms of the burden must be set out in full). The requirement that the term “real burden” (or “community burden” etc.) be used is new.

41. Paragraph (b) of subsection (2) restates the rule that only an owner can burden land. “Owner” includes a person who has right to the property but has not completed title by
registration (section 111(1)(a)). Where title has not been completed and the land is not already on the Land Register, there must be a deduction of title. This is further explained in the note on section 55. Where property is owned in common, both (or all) pro indiviso owners must grant. This is indicated by the use of the definite article (“the” owner). If the constitutive deed is a conveyance of the burdened property, the granter satisfies paragraph (b) on the basis that he continues to own until the time of registration, and in such a case transfer of ownership and creation of the real burden occur simultaneously. An owner “grants” a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act.

42. Paragraph (c) of subsection (2) requires nomination and identification of both the benefited and the burdened property. With conservation burdens, maritime burdens and (usually) manager burdens, there is no benefited property, and the requirement is merely to identify the person in whose favour the burden is created. Subsection (4) contains an exception in respect of community burdens where it is only necessary to identify the community. Where this is done section 26 provides that each unit in the community is both a burdened and benefited property.

43. Many burdens are given special names by the Bill. Subsection (3) makes clear that such special names can be used in the constitutive deed instead of “real burden”. Examples of these include community burdens, facility burdens, conservation burdens, maritime burdens and manager burdens.

44. In community burdens, each benefited property is also a burdened property. Taken together, each of these units forms the “community” which is being regulated by the burdens (section 25(2) defines ‘community’ as any units subject to community burdens). Since it would be pointless to describe the same land twice, subsection (4) modifies subsection (2)(c) by requiring merely that there is nomination and identification of the community to which the burdens are to apply.

45. Subsection (5) provides for dual registration of the constitutive deed. At present registration is required against only the burdened property. It will now be required that registration occurs against both the burdened and the benefited property (or properties). Registration against the benefited property is excused where there is no such property (as with conservation, maritime and manager burdens) or where the property is not in Scotland (for which see section 104). This subsection should be read in conjunction with section 108, which makes it clear that in future a deed creating a new burden cannot be registered against one property only: it will have to be registered against both properties.

46. It is unclear at present whether a real burden can be created over, or in favour of, a mere pro indiviso right to land that is where land is undivided but held in common by more than one owner. Subsection (6) puts the position beyond doubt by disallowing such burdens.

47. In certain circumstances real burdens can be created by the Lands Tribunal (section 81(6)). Section 4 does not then apply. This exception is acknowledged by subsection (7).
Section 5 – Further provision as respects constitutive deed

48. Section 4(2)(a) restates the common law rule that the terms of a real burden must be set out in full in the constitutive deed. Section 5 introduces an exception to that rule.

49. Section 5 means that it should not be necessary to specify the amount payable towards an obligation to pay some cost provided that some method is provided for calculating liability. This is applied to existing burdens. Although this may not in fact change the existing law, it will remove a current uncertainty. The provision is retrospective in order to ensure the validity of existing burdens which make this sort of provision. If the method of calculating liability makes reference to extrinsic material, for example the valuation roll, this will not invalidate the burden. This is a change to the current law.

Section 6 – Further provision as respects creation

50. Section 6 makes a necessary, if limited, provision for the creation of burdens by reference to a deed of conditions registered before the appointed day. Schedule 14 of the Bill repeals section 32 and Schedule H of the Conveyancing (Scotland) Act 1874 which are the statutory provisions under the current law which allow burdens to be set out in a deed of conditions and then to be imported by reference into a subsequent conveyance. Section 4(1) makes a different but equivalent provision for the future. Section 6 allows deeds imposing real burdens after the appointed day to do so by reference to a deed of conditions registered before the appointed day. “Deed of conditions” is defined in section 110(1).

51. Subsections (1) and (2) allow an owner of the land which is to become the burdened property to create a real burden by importing the terms of the burden into the deed to be registered after the appointed day from a deed of conditions. “Owner” is defined in section 111. The definition of deed of conditions in section 110(1) makes it clear that this term is used only to refer to deeds executed under section 32 of the 1874 Act which are registered before the appointed day. It is sufficient when importing burdens to use the form of words in schedule 1. It should be noted that schedule 1 is cast in the language of the Bill and differs somewhat from the form of words in Schedule H of the 1874 Act (to be repealed by schedule 14 to the Bill). The same considerations however arise in completing the reference and the amendment to section 8(5) of the Conveyancing (Scotland) Act 1924 by paragraph 3 of schedule 13 to the Bill applies the same notes for completion to the new form set out in schedule 1 as were applied to the form it replaces.

52. Subsection (3) provides that, as for section 4, it is not competent to create a burden over a right of ownership a right of ownership held pro indiviso.

Section 7 – Duration

53. Section 7 re-states the existing rule that real burdens are perpetual, unless they have been extinguished by one of the methods recognised by law. Extinction of burdens is provided for by sections 15 to 23. The section also makes clear that the constitutive deed can provide for a shorter duration, if desired.
Section 8 – Right to enforce

54. Section 8 identifies the person who has right to enforce a real burden.

55. Subsection (1) sets out the rule, familiar from the common law, that a benefited proprietor cannot enforce a real burden unless he has both title and interest to enforce. Establishing title is a matter of proving that the property is the benefited property by virtue of the deed that constituted the burden. The concept of interest to enforce is a question of whether a breach of the burden would have a detrimental effect upon the benefited property. Subsection (2) details who has title to enforce, and subsection (3) specifies the interest requirement.

56. Subsection (2) provides a change to the current law. The main person with title to enforce is the owner of the benefited property, for it is the owner who is holder of the real burden (see section 1(1)). The meaning of “owner” is given in section 111. The owner has the primary role in the enforcement of burdens, but subsection (2) extends title to enforce to tenants, liferenters, heritable creditors in possession, and non-entitled spouses under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. These categories, set out in paragraphs (a) and (b), comprise the holders of such real (or quasi-real) rights as give a right to possession of the benefited property. The idea is that a possessor should be able to protect their interest by founding on the real burden. Paragraph (c) allows former owners (or right holders) to recover certain costs. Section 15, on discharging burdens, continues the rule that it is the owner’s prerogative alone to agree to the discharge of a condition.

57. If a right is held by two or more people as co-owners, each has an independent entitlement to enforce the real burden. In subsection (2) this is indicated by the use of the indefinite article (“an owner”, “a person”, and so on). So if the benefited property is owned in common by a husband and wife, each could enforce without reference to the other.

58. Subsection (3) provides a statutory restatement of interest to enforce. The question of interest is specific to each particular burden and the circumstances in which enforcement is sought. Paragraph (a) clarifies the meaning of interest to enforce. The opening words (“in the circumstances of any case”) emphasise that whether interest arises depends on the nature of the particular breach. Though interest to enforce is in many ways related to the praedial rule outlined in section 3, there is a distinction. The praedial rule is merely a test of whether a burden is capable of benefiting certain land in general.

59. The interest of an owner is likely to be stronger than that of a person holding a lesser right, such as a lease. For example, if a breach affects the value of the benefited property but not its enjoyment, a tenant might not have interest to enforce. For in such a case the value of the lease might be unaffected.

60. Paragraph (b) sets out a special rule for payment of maintenance and other costs. In such a case a person has interest only if he has some ground for seeking payment – for example, he has paid for a repair or other shared expense and is trying to recover the cost from the other owners. In such a case, the detriment arising from a refusal to pay would be to that person rather than to their property.
61. It would be inappropriate for anyone other than the owner to exercise an option to acquire. These options are discussed further in the note on section 3. Subsection (4) restricts title to enforce in respect of pre-emptions, and other options to acquire, to the owner of the benefited property. The use of the definite article (“the” owner) indicates that, contrary to the rule set out in subsection (2), pro indiviso owners do not have independent rights. In future it will not be possible to create as real burdens options other than pre-emptions: see section 3(5).

62. Some special types of real burden do not have benefited properties. These are conservation burdens and maritime burdens (see sections 37 and 42), manager burdens (see section 58(9)) personal pre-emption burdens and personal redemption burdens (see section 102). Subsection (6) indicates that these burdens have special rules.

Section 9 – Persons against whom burdens are enforceable

63. In the past it was unclear whether liability extended to parties connected with the burdened property other than the owner. Section 9 resolves this doubt by identifying who has liability in respect of a real burden. The terminology (“affirmative”, “negative” and “ancillary” burdens) is explained in the note on section 2.

64. Subsection (1) provides that burdens which provide for an obligation to do something (an affirmative burden) should only be enforceable against the owner of the benefited property.

65. Subsection (2) provides that burdens other than affirmative burdens (negative or ancillary burdens) should be enforceable against anyone having use of the burdened property.

Section 10 – Affirmative burdens: continuing liability of former owner

66. In most cases only the owner of the burdened property can be liable in respect of an affirmative burden (section 9(1)), which means that liability is lost when ownership transfers, but a former owner will retain liability for the performance of a ‘relevant obligation’ in the circumstances detailed in section 10. The section clarifies and develops a rule of the existing law. ‘Relevant obligation’ is defined in subsection (4). A person ceases to be “owner” (in the sense meant here) on delivery of a conveyance by virtue of section 111(1).

67. The effect of subsection (1) is that the former owner retains liability in respect of any obligation which was already due for performance at the time when the property was sold on. As well as obligations becoming due during the period of ownership, this includes obligations attributable to an earlier period (for which see subsection (2)).

68. Under section 9(1), affirmative burdens are enforceable against the owner of the property. As a result, an incoming owner (B) is also liable for any ‘relevant obligation’ incurred by the former owner (A). Subsection (2) provides that a benefited proprietor trying to enforce an affirmative burden could seek to do so against either A or B or both.

69. Subsection (3) makes clear that while the liability of former and new owners is joint and several, the underlying liability rests with the former owner. A benefited proprietor could
enforce an obligation liable during the ownership of A against a subsequent owner B. B would then have the right to recover the cost from A.

70. **Subsection (4)** explains which type of obligation is ‘relevant’ for the purposes of section 10, i.e. obligations for which a subsequent owner could become liable in conjunction with a previous owner. It also explains when an obligation becomes due for performance. Paragraph (a) deals with expenditure (typically for maintenance) incurred by virtue of a community burden. Usually such expenditure will be sanctioned by some collective decision-making process, whether under the titles or in terms of section 28. If so, the obligation to contribute to the expenditure is treated as becoming due when the decision is made and not when the expenditure occurs. Paragraph (b) sets out a (necessarily) general rule for other cases.

**Section 11 – Affirmative burdens: shared liability**

71. The first four subsections of **section 11** specify who is liable for an affirmative burden when the burdened property is divided into two or more parts. Subsection (5) apportions liability where the burdened property is owned in common. An affirmative burden is an obligation to do a specific thing: see section 2(2)(a). Internal liability is the liability between each owner for the burden: the owner of a smaller property might have a lesser share of liability. External liability is where the benefited proprietor is attempting to enforce the burden against one or more of the burdened proprietors.

72. **Subsection (1)** clarifies and develops the existing law. If a burdened property is divided, the owner of each part is jointly and severally liable for any affirmative burdens. An enforcer would have a choice of debtors. If one owner performed the burden at the instigation of an enforcer, a share of the cost would be recoverable from the other owner(s). The liability of owners would be determined by the respective sizes of their part of the property. This would be calculated by area. Since the effect of division is to create two separate burdened properties (see section 13), subsection (1) would be applied again if either burdened property were further divided. Subsection (1) applies even where the division took place before the appointed day (i.e. the day on which most of the Bill comes into force: see sections 110(1) and 117(2)).

73. **Subsection (2)** introduces a necessary exception. Some affirmative burdens are, by their nature, restricted to a particular part of the burdened property. It might only be possible for an affirmative burden to be performed in one part of the burdened property. In such a case, the other part, if separated, would not be subject to the burden. For example, a burdened property comprising a house and a garden might be divided so that the garden was sold separately. In such a case, the owner of the garden should not be liable for maintenance of the house.

74. **Subsection (3)** introduces a special rule for tenement flats in relation to calculation of internal liability. Measurement of liability shares will be by the floor area of each flat.

75. **Subsection (4)** allows contracting out from the rules set out in subsection (1). The rules of external liability can be varied only in the constitutive deed.

76. **Subsection (5)** does not deal with division. Instead it regulates both external and internal liability in a case where the burdened property is owned in common. If the property is owned in
common, each owner should be liable jointly and severally, but subject to a right of relief proportionate to the size of the shares.

Section 12 – Division of a benefited property

77. Sections 12 and 13 are concerned with division of the properties.

78. If a benefited property is divided, the current law confers on each part the status of an independent benefited property. The result is an, often unwelcome, multiplication of benefited properties. Subsection (1) changes the rule in respect of divisions of property made by a deed registered on or after the appointed day. If A divides his land and conveys part to B, then only the part retained by A will be the benefited property – unless the conveyance provides otherwise. It will be possible for the break-off deed to provide either for both properties or just the part being sold will be benefited properties. Subsection (1) will apply again if the new, reduced, benefited property comes to be divided at a later date.

79. Sometimes it may be desirable to provide that certain burdens are enforceable by the owner of the retained land and certain others by the owner of the conveyed land. Subsection (2) makes clear that this is permissible.

80. Paragraphs (a) and (b) of subsection (3) explain the method by which contrary provision is made. Paragraph (c) restricts choice in the case of pre-emption and other options. In such a case there is only to be one benefited property. If the default rule (that the retained land is to be the benefited property) is disapplied, the only alternative provision which may be made is that the conveyed property is to be the benefited property.

81. Subsection (4) disapplies these rules in certain cases where they would be inappropriate. Sections 48 to 50 provide special rules for the identification of benefited properties in relation to common scheme burdens created before the appointed day. Paragraph (a) ensures that the rules operate regardless of division. Community burdens are designed for the benefit of the entire community, regardless of the number of units that it may be divided into. In a community each property is both a burdened and a benefited property. Paragraph (b) follows the principle that it is undesirable that any unit in the community should be deprived of enforcement rights. If the burdens are set out in a deed of conditions, each sale will amount to a division of benefited property and so, under the above rules, the part conveyed would cease to be a benefited property. Paragraph (c) disapplies these rules so that in each sale there is no requirement to make the special provision referred to in subsection (1). Paragraph (c) refers to a “common deed of conditions”. This is not a “deed of conditions” as defined by section 110(1) and could be a constitutive deed registered after the appointed day which sets out the terms of burdens to be imposed on a number of properties.

Section 13 – Division of a burdened property

82. This section makes clear that, on division of a burdened property, each part is treated as a separate burdened property. This means, for example, that the owner of a part may make an application to the Lands Tribunal under section 81(1)(a) in respect of that part only. Liability for
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affirmative burdens (obligations to do a particular thing), following division, is regulated by section 11.

**Section 14 – Construction**

83. Section 14 overturns the rule that real burdens are to be interpreted more strictly than other comparable obligations, such as servitudes.

**Section 15 – Discharge**

84. The remaining provisions of Part 1 are concerned with the manner in which real burdens are extinguished.

85. The standard method of discharging or varying real burdens is by obtaining a minute of waiver from the benefited proprietor(s) and registering it in the Land Register or Register of Sasines. Section 15 re-states the current rules for this voluntary discharge mechanism.

86. Section 15 provides that a real burden is discharged by registration of an appropriate deed granted by or on behalf of the owner of the benefited property. As subsection (1) makes clear, the discharge is effective only in respect of the benefited property whose owner has granted it. As a result, any other benefited properties are unaffected. An owner can only discharge a burden in relation to their own property: the effect of a benefited proprietor discharging their enforcement rights means that the burden no longer benefits their property. It does not mean that the rights of the owner of any other benefited property are affected. A burden is not completely ‘extinguished’ until the owner of every benefited property has discharged their enforcement rights. Even though section 8 will extend enforcement rights beyond owners (to tenants etc.), a discharge by an owner will remove the right of these parties to enforce. The Bill makes separate provision, in section 44, for some burdens which do not have a benefited property (conservation, maritime burdens, personal pre-emption burdens and personal redemption burdens).

87. This discharge procedure has to be carried out by or on behalf of the owner. Unlike under the present law, ‘owner’ includes a person who has right to the property but has not completed title by registration (section 111(1)(a)). Where property is owned in common, all pro indiviso owners must grant a deed (subsection (1) refers to ‘the’ owner). The owner ‘grants’ a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act. There is no requirement for a grantee (the owner of the burdened property) to be specified (section 64(1)). By section 110(1) ‘registration’ means registration of the discharge in the Land Register or recording of the deed of discharge in the Register of Sasines; and while registration is required only against the burdened property, the Keeper has power to make a corresponding entry against the title sheet of the benefited property (section 94). No particular deed or form of deed is specified.

88. Subsection (2) makes clear that partial discharge is included.
Section 16 – Acquiescence

89. The three paragraphs of subsection (1) restate the pre-conditions for acquiescence. Paragraph (c) provides for either active or passive consent. There is no specific form of words that active consent must take: a casual word exchanged over the garden fence would be sufficient, if awkward to prove. Passive consent requires knowledge (actual or constructive) of the activity coupled with an absence of opposition. In both cases (and by contrast with section 15) the consent is to the activity itself rather than to the breach of the burden. Neither party need know that the burden is being breached.

90. By contrast with the rules for voluntary discharge (set out in section 15), consent is required from all enforcers (including tenants and others with subsidiary rights under section 8(2)(a) and (b)), and in respect of all benefited properties. This means that a burden cannot be extinguished in respect of some enforcers, or benefited properties, but not in respect of others. If all those able to enforce a burden do not acquiesce, then the burden cannot be discharged by section 16, even in respect of those who have given their consent. The two types of consent may be mixed, so that some enforcers give active and others merely passive consent.

91. Because of the difficulty in establishing acquiescence under the existing law, subsection (2) introduces a presumption that after the expiry of 8 weeks from the substantial completion of the activity breaching the burden those entitled to enforce the burden knew of the breach, but did not make any objection. This presumption could be rebutted by a benefited proprietor.

Section 17 – Negative prescription

92. Section 17 makes an alteration to the law on prescription. The existing law of negative prescription provides that if a burdened proprietor breaches a burden, and the benefited proprietor takes no action, the burden will fall (to the extent of the breach) in 20 years. The prescription is interrupted if the breach is challenged by the benefited proprietor or acknowledged by a burdened proprietor. The change is made by a self-standing provision rather than (as in section 79) by amendment to the Prescription and Limitation (Scotland) Act 1973. But prescription is to operate in substantially the same way as under that Act, and subsection (3) applies some of the 1973 Act provisions.

93. Subsection (1) provides for extinction if a breach is unchallenged for a period of five years. As with acquiescence (section 16), the extinction is only to the extent of the breach. Paragraph (b) repeats the rule of the existing law that a claim or acknowledgement will interrupt the prescriptive period.

94. Subsection (2) provides a modification to the rule for pre-emptions and other options to acquire. For these obligations a single failure to convey (or, with pre-emptions, to offer to convey) results in the complete extinction of the burden. Any sale in breach of a right of pre-emption will extinguish the pre-emption within 5 years by virtue of negative prescription. This differs from the standard position in subsection (1) in that the obligation will be completely removed, and not merely to the extent of the breach.
95. **Subsection (3)** applies the definition of ‘relevant claim’ and ‘relevant acknowledgement’ (terms used in subsection (1)) used in the Prescription and Limitation (Scotland) Act 1973. Paragraphs (a) to (c) specify that for the purposes of section 17, the specified definitions in the 1973 Act will be modified so as to relate to real burdens and those with right to enforce them. The definition of ‘relevant acknowledgement’ in section 10 of the 1973 Act states that the burdened proprietor will be regarded as having acknowledged that the burden is still in force if he has acted to implement the obligation or has given a written acknowledgement that it subsists.

96. **Subsection (4)** applies to subsections (1) and (2) section 14 of the Prescription and Limitation (Scotland) Act 1973. Section 14 contains rules for the computation of prescriptive periods, for example, that such periods commence on the day following the event which triggers the prescriptive period, if that event falls at a time other than the beginning of the day. Subsection (1)(a) of section 14 is however excluded because it makes provision for time occurring before the commencement of the 1973 Act to be included in the computation of prescriptive periods. There is special provision in subsections (5) and (6) for computing the prescriptive period in respect of any breach of a real burden which occurred before the appointed day when this section comes into force.

97. **Subsection (5)** relates to breaches of real burdens that occur before the appointed day when this section comes into force. Instead of 5 years, the prescriptive period for such breaches is to be the period described in subsection (6).

98. **Subsection (6)** provides that the prescriptive period for breaches of real burdens that occur before the appointed day is to be 20 years, computing the period from the date of the breach, or 5 years, computing the period from the appointed day, whichever period expires earlier. This means that where a breach occurred more than 15 years before the appointed day, the prescriptive period will still be 20 years but no longer. If the breach occurred less than 15 years before the appointed day, the prescriptive period will expire 5 years after the appointed day.

### Section 18 – Confusio not to extinguish real burden

99. A real burden (usually) requires both a burdened and a benefited property (section 1(1)), but there is no requirement that the properties be in separate ownership. The term ‘confusio’ is used to describe the situation where the benefited and burdened proprietors are the same person. Section 18(a) resolves a doubt by making clear that a burden is not extinguished by confusion. This means that the owner of both properties will be able to enforce an obligation against a tenant under section 9(2). Paragraph (b) gives an equivalent rule for conservation burdens, maritime burdens, manager burdens, personal pre-emption burdens and personal redemption burdens.

### Section 19 – Notice of termination

100. Sections 19 to 23 introduce a completely new termination procedure for real burdens which are at least 100 years old. **Subsection (1)** of section 19 sets out the essential criteria. The burden must be at least 100 years old. The 100 years would run from the date of registration of the constitutive deed. Normally this would be the date of registration of the disposition or feu disposition creating the burden but if the constitutive deed is a deed of conditions the 100 year
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period would begin on the registration of the deed of conditions even if the burdens are not in fact imposed until a later date. For this purpose variations or renewals (whether by charter of novodamus or judicially, under section 81(1)(b)) are disregarded. If, for example, a burden was created in 1900 and renewed or waived to a certain extent in 1950, the relevant date would still be 1900. The procedure may be used by any owner of the burdened property (including a pro indiviso owner) or any other person (such as a tenant) against whom the burden is enforceable. It comprises two stages: intimation is given under section 20 of an intention to register a notice of termination, and the notice is then executed and registered under section 23. If there are no applications to renew the burden the notice of termination may be submitted for registration. A notice of termination cannot be registered unless a certificate is endorsed on it by the Lands Tribunal under section 22. The form of notice of termination is provided in Schedule 2.

101. Subsection (2) makes clear that an owner (or other person) can continue with a termination process initiated by a predecessor in title. An owner might begin the process of termination, but sell their property before it is complete. The new owner would be able to step into the process. ‘Terminator’ is used throughout this group of sections to refer to the person who is currently using the procedure.

102. The termination procedure is not available for all burdens. Subsection (3) sets out the exclusions. They include facility burdens (defined in section 110(1)). These burdens regulate the maintenance, use or management of a common facility. Conservation, maritime, and service burdens are also protected. Paragraph (e) excludes the title conditions that are excluded from the jurisdiction of the Lands Tribunal under section 81(2). These are specified in Schedule 10.

103. Subsection (4) specifies the content of a notice of termination. A statutory form is given in Schedule 2. Paragraph (c) makes clear that partial termination is permitted (and see also section 23(1)). Paragraphs (e) and (f) require information about intimation, both in general terms and also in the form of a list of those to whom intimation was sent. There is no requirement to identify the benefited property or properties, and in practice these may often be unknown to the terminator.

104. Subsection (5) provides that the renewal date stipulated in the notice must be not less than eight weeks after the date of last intimation. The renewal date is, ordinarily, the last day on which the notice may be opposed, by application to the Lands Tribunal for renewal of the burden. An application can only be made after the renewal date with the consent of the terminator (section 81(2)(a)) and then must still be made before the Lands Tribunal have endorsed a certificate on the notice (section 81(3)(b)). The renewal date must have previously appeared in the notice which is sent for the purposes of intimation.

105. Subsection (6) makes clear that a single notice can be used in respect of more than one burden even if the burdens are not contained in the same deed.

Section 20 – Intimation

106. Intimation is the first stage of the termination procedure.
107. **Subsection (1)** imposes a requirement to intimate the proposal to terminate the burden. Intimation must be given to the owner of all the benefited properties and, if the terminator is not the owner (or is only one of the owners), to the owner of the burdened property.

108. **Subsection (2)** explains the permissible methods of intimation. It may be difficult to identify all of the benefited properties. Method (a) involves sending a copy of the proposed notice (with an explanatory note). A form for this explanatory note is contained in schedule 2. Section 112 details the various methods of ‘sending’ the notice. The notice must be substantially complete, but should not be signed. Method (b) requires the posting of the intimation on the burdened property and on lamp posts in the neighbourhood. The intimation must contain a list of the names and addresses of all those to whom individual intimation is to be made. This will allow recipients to contact each other and consider the possibility of a joint challenge.

109. **Subsection (3)** provides that the first method of intimation (directly sending a copy of the intimation) will have to be used to give intimation to both the owner of the burdened property and the owner of any benefited property which is within four metres of the burdened property. For other benefited proprietors, the terminator has a choice of which method to use. In the measurement of the four metres there is to be disregarded (i) pertinents and (ii) any road if of less than twenty metres in width (section 113).

110. **Subsection (4)** sets out the content of the lamp post notice used in method (b). A copy of the lamp post notice should be retained so that it can be given to the Keeper when the notice is to be registered.

111. **Subsection (5)** obliges the terminator to provide a copy of the proposed notice to any owner of the benefited or burdened properties on request. This will mainly be necessary where intimation has been by lamp post (see subsection (4)(c)).

**Section 21 – Oath or affirmation before notary public**

112. This and the following two sections are concerned with the second (and final) stage of the termination procedure, namely the execution and registration of the notice of termination.

113. **Section 21** deals with execution. **Subsection (1)** provides that before the terminator signs the notice, he must swear or affirm before a notary public that the information in the notice is true, and that the notice has been duly intimated. In the normal case this must be done by the terminator personally, but subsection (2) sets out some exceptions. Subsection (2)(b) should be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. ‘Notary public’ is given an extended meaning, in relation to overseas execution, by section 110(1).

**Section 22 – Prerequisite certificate for registration of notice of termination**

114. When the notice of termination is registered, the burden will be extinguished to the extent provided by the notice. A notice of termination cannot be registered if it is opposed (other than opposed in part). A notice is opposed by making an application to the Lands Tribunal under section 81(1)(b) for renewal of the real burden (or burdens). For the Keeper to register the
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notice, he will have to be satisfied that there has not been an application for renewal. As a result, section 22 requires the Lands Tribunal to certify on the notice that no application of renewal has been made. Where an application for renewal has been received, but it relates to only some of the benefited properties or to only some of the burdens, the Tribunal will be able to certify the notice to the extent that it has not been opposed.

115. Subsection (1) provides for the Lands Tribunal certificate. A certificate may be given if there has been no application for renewal by the renewal date, or if a renewal application has been made but then withdrawn. Even if an application for renewal has been made in respect of some of the burdens or only some of the benefited properties, the Lands Tribunal may still execute the certificate. Where there are several benefited properties, not all of their owners will necessarily apply to renew the burden. Alternatively, where there are several burdens in the notice of termination, a benefited proprietor applying for renewal might be content for some of the burdens to fall and so only apply in respect of certain of the listed burdens. In either case, the application for renewal does not encompass the entire notice of termination: it only applies to some of the burdens or benefited properties. As a result, the notice of termination has not been fully opposed, and may be registered to the extent that it has not been contested. The certificate given by the Lands Tribunal under section 22(1)(b) will list the burdens and the relevant properties that are subject to applications for renewal. These will be excluded when the notice of termination is registered. If an owner does not make an application for renewal, then his property will cease to be a benefited property in relation to the burden, regardless of what other owners do. The meaning of ‘renewal date’ is given in section 19(4)(d) and (5) as the date by which an application to renew must be made. The reference in paragraph (b)(ii) of subsection (1) to ‘probably or possibly’ reflects the difficulty, under the current law, of making an accurate identification of the benefited properties.

116. Subsection (2) allows a notice of termination to be withdrawn at any time before the certificate is endorsed.

Section 23 – Effect of registration of notice of termination.

117. Section 23 explains the effect of registration. Registration extinguishes the burdens, subject to any qualifications (i) in the notice itself or (ii) in the Lands Tribunal certificate endorsed on the notice.

118. If, at a later time, opposition was withdrawn by a benefited proprietor, subsection (2) allows a further certificate (under section 22(1)(a)) and a second registration. This second registration will rely upon the second certificate. If, however, the opposition (partial or full) was not withdrawn but the application for renewal was instead refused by the Lands Tribunal and the burden discharged, the proper procedure is to register the Tribunal’s order in terms of section 93(2). The notice itself cannot be registered because no certificate can be given under section 22(1).
PART 2 – COMMUNITY BURDENS

Section 24 – The expression “community burdens”

119. This section introduces Part 2 of the Bill, which is concerned with community burdens. The label ‘community burden’ is a new term, but the types of burden that can be included under this name already exist in large numbers. The rules in Part 2 for community burdens are essentially designed to allow burdens affecting communities to be governed by majority rule. ‘Communities’ can take a variety of forms, for example, modern housing estates, tenements, terraces, sheltered housing and business parks. The term community is used in the Bill in a technical sense (for which see section 25(2)). A community is a group of four or more properties all subject to the same or similar burdens and which can be mutually enforced. Mutually enforced means that the owner of each property in the community will be able to enforce all or at least some of the burdens against each other. Part 2 applies to all community burdens, whether created before or after the Bill comes into force (section 107(10)).

120. Subsection (1) defines ‘community burdens’. Its essence is the mutual enforceability of common burdens. A common scheme refers to the imposition of burdens that are normally, but not necessarily, exactly the same for each property. Community burdens only exist where burdens are imposed under a common scheme on four or more units and each of those units can enforce all or some of those burdens against the others. The meaning of ‘unit’ is given in section 110(1).

121. Subsection (2) is included to ensure that there is no doubt that where burdens have been imposed under a common scheme in relation to a sheltered housing development the fact that no burdens may have been imposed on a unit retained for special use, typically as a warden’s flat, would not prevent the whole development from being subject to community burdens and therefore a community for the purposes of Part 2 of the Bill. Section 25(2)(b), which defines the term ‘community’ in the legal sense used by the Bill expressly provides that a unit, such as a warden’s flat, that is not subject to community burdens (and therefore not a burdened property) is nevertheless part of the community. This is an exception to the general rule that to form part of the community it is necessary for the unit to be a burdened property under the common scheme as well as a benefited property.

Section 25 – Creation of community burdens: supplementary provision

122. Community burdens are real burdens and are generally subject to the same rules as other real burdens. Section 2 makes general provision as to what a real burden may do. Subsection (1) amplifies those provisions by giving a non-exhaustive list of possible content for community burdens. This is in recognition that communities may require a degree of regulation and management to put it beyond doubt that certain obligations can be validly created as community burdens. There is an equivalent provision in section 3(4) to make it clear that a community burden may be for the benefit of the community rather than individual units. The meaning of ‘manager’ is given in section 110(1).

123. Subsection (2) defines ‘community’. This refers back to the definition of “community burdens” in section 24. A community is made up of units all burdened with obligations imposed under the same common scheme. It comprises the units which can enforce or are burdened by
Section 26 – Effect on units of statement that burdens are community burdens

124. This section introduces a conveyancing shortcut. The effect of using the term ‘community burdens’ in a constitutive deed will be to create reciprocal enforceability. That is one of the two criteria for community burdens set out in section 24(1). Notwithstanding the use of the term, however, the burdens will not qualify as community burdens unless the other criterion (common scheme burdens imposed on four or more units) is also met. The term ‘community burden’ will not have to be used in order to make a community burden. It could simply be called a real burden: the criteria in section 24 are the decisive factors in every case.

Section 27 – Power of majority to appoint manager etc.

125. This is the first of a group of sections (sections 27 to 30) which set out some basic rules for the management of a community. The rules are default rules – or in other words, they apply only to the extent that alternative (or contrary) provision is not made in the titles.

126. Section 27 itself confers on the owners of a majority of units various powers in relation to managers. The meaning of “manager” is given in section 110(1).

127. Subsection (1) sets out the powers in question. Since acts carried out under paragraphs (a) and (b) bind both the dissenting minority and also successors (section 29), it is necessary – through paragraphs (c) and (d) – to allow the acts to be undone if a different majority can be assembled. Although paragraph (a) permits the majority to specify the terms of a manager’s appointment and paragraph (b) permits a majority to confer powers exercisable by a majority on a manager, this has to be read alongside the opening paragraph of the subsection which provides that it is subject to the terms of the community burdens. This means that paragraphs (a) and (b) do not permit a majority to interfere through a manager with the basic management regime set out in the titles. There is no limit on who can be appointed as a manager under paragraph (a): it could be one of the owners or a professional property manager. The reference to section 50(5)(a) means that in sheltered or retirement housing a majority of at least three quarters of the units will be required in order for them to use the power under paragraphs (b) or (c). The ability of a majority to dismiss a manager under paragraph (d) is to apply only where the title deeds do not provide for an alternative majority (but this should be considered alongside section 59 which provides for a default majority for dismissal that overrides the title deeds). The power to dismiss a manager under paragraph (d) will not be operational where a valid manager burden is in existence, hence subsection (1) is subject to section 58(8).

128. Subsection (2) gives a non-exhaustive list of the powers that might be conferred on a manager. Paragraph (b) of subsection (1) provided that only “their” powers (i.e. the powers of a majority, whether collectively or individually) may be conferred on a manager. The majority
would obviously be unable to confer on a manager the power to do something that they themselves could not. The powers mentioned in paragraphs (a) and (c) in subsection (2) are collective powers of a majority, and include powers given by virtue of sections 28 and 31 to 36. The power mentioned in paragraph (b) is an individual power: it is of the very essence of a community burden (section 24(1)(b)) that the owner of each unit has a right to enforce. The conferral of powers may be subject to qualification. The extent of the powers delegated is a matter for the majority’s discretion. Section 50(5)(a)(ii) provides that power to discharge or vary under paragraph (c) may only be delegated to a manager in a sheltered or retirement housing complex if the burdens are not core burdens (as defined by section 50(4)).

129. **Subsection (3)** makes provision for voting in a case where a unit is owned in common. The most frequent example of this is where husband and wife own the property together, but it is possible for other arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. Subsection (3) means that the owner of more than a one half share of a unit, would be able to exercise the vote in respect of the property for the purposes of subsection (1). If several co-owners taken together owned more than a one half share of the unit, then they would be able to collectively exercise the vote attached to the unit (provided, of course that they shared the same voting intention). Where, however, the unit is held in equal shares and the owners who wish to use section 27 do not own a majority share of the unit, that unit would not count towards a majority. Where husband and wife own equal pro indiviso shares in a unit they would both have to agree for the unit to be included in the calculation of the majority.

130. **Subsection (4)** allows the powers in subsection (1) to be used for managers appointed in some other way (i.e. other than by a majority of owners). Thus a manager might have been nominated in the constitutive deed either as a first manager (under section 25(1)(d)) or by virtue of a manager burden (under section 58).

**Section 28 – Power of majority to instruct common maintenance**

131. **Section 28** applies where there is no provision in the title deeds of a particular community for decision making on common maintenance. It provides a default mechanism to allow the owners of a majority of units to arrange for maintenance expenditure to be carried out and paid for. In order for this to be fully effective, the section provides that a majority would be able to require each owner to deposit a contribution in advance of that person’s estimated share of the cost. ‘Maintenance’ is defined in section 110 and includes repairs. However, the section does not apply to improvements as distinct from maintenance. ‘Unit’ is also defined in section 110.

132. As **subsection (1)(a)** makes clear, section 28 is concerned with common maintenance, that is to say, with maintenance obligations imposed by community burdens. Paragraph (a) makes clear that there must be a community burden providing for common maintenance in the title deeds for section 28 to operate. The section is only concerned with majority enforcement of these burdens: it is not creating new maintenance obligations where none existed previously. Paragraph (b) of subsection (1) requires the cost of carrying out the works to be fully apportioned by the community burdens.

133. **Subsection (2)** sets out a list of powers. These are exercisable, not by a majority of units in the community, but by a majority of the units subject to the particular maintenance obligation.
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(which may not be the same thing). The powers allow the majority to require each owner to deposit a contribution in advance based on an estimate of that person’s share of the cost. Paragraph (b) allows the money to be collected in advance of the repair. Paragraph (e) allows owners to change their minds. The powers are default provisions and the community burdens may provide for different mechanisms to apply.

134. **Subsection (3)** makes provision for voting in a case where a unit is owned in common. The most frequent example of this is where husband and wife own the property together, but it is possible for other arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. Subsection (3) means that the owner or owners of more than a one half share of a unit would be able to exercise the vote in respect of their property for the purposes of subsection (2).

135. Subsection (2) requires a notice to be sent to each owner detailing the sum of money to be deposited. **Subsection (4)** provides that when this happens owners must be given certain additional details in order to provide them with information regarding the nature of the works, the cost, and timescale for the works, and the apportionment of the cost and how and where the monies collected will be held.

136. **Subsection (5)** provides that the monies must be held in an interest bearing bank or building society account. The money is to be held by the account holders in trust for owners who have deposited money (subsection (8)). The account holders do not have to be owners of units within the community: the account holder could be, for example, a solicitor acting as agent or a manager. The account should only be operable by those authorised by the majority to do so in terms of paragraph (c) of subsection (2).

137. **Subsection (6)** requires the owners to be notified of any modification or revocation that affects the information given under subsection (4).

138. **Subsection (7)** makes provision for exhibition of tenders received for the works and for a refund if the work has not commenced within a certain period. If, however, the works have commenced before the demand for a refund is received, then there is to be no obligation to repay the monies even if work did commence after the date stated in the timetable.

139. **Subsection (8)** makes provision for the refunding of any monies left over after the work has been completed. In the absence of alternative written agreement, each owner should receive the amount contributed by him or her plus accrued interest less his or her share of the cost of the works.

**Section 29 – Owner’s decision binding**

140. **Section 29** confirms the principle of majority rule. Decisions, and acts (such as the appointment of a manager), bind both the dissenting minority and also incoming owners. An incoming owner would, for example, be liable for maintenance costs which had already been agreed to (and see sections 9(1) and 10). The section is not confined to the default code but applies also to decisions and acts carried out in terms of the title deeds.
Section 30 – Remuneration of manager

141. If a professional manager is used, a fee will be due, probably at regular intervals. The amount is a matter for negotiation with the manager. Section 30 apportions that amount equally among owners in the community (subject to different provision in the titles). The second half of section 30 provides rules for apportioning liability between co-owners. The manager is entitled to payment in full from a co-owner. The co-owners are only liable in a question amongst themselves for a share equal to their share of ownership of the unit.

Section 31 – The expressions “affected unit” and “adjacent unit”

142. An individual owner, or a small group within the larger community, may wish to discharge or vary one of the burdens affecting their property. Alternatively, a majority group within the community may wish to vary or discharge the burdens affecting the whole community, for example, to update or correct an existing deed of conditions. Section 32 and section 34 provide two different default mechanisms which may be used to vary or discharge a community burden in circumstances where this is not provided for in the relevant title deeds. Section 31 explains some of the terminology used in sections 32 to 35. ‘Communities’ consist exclusively of ‘units’ (section 25(2)). For the purposes of these sections ‘affected unit’ is used to describe the property/properties for which the burden is to be changed, i.e. the burdened property. An ‘adjacent unit’ is one that is near to an affected unit: it must be within 4 metres of the unit. The 4 metre distance is subject to section 113, which makes provision for disregarding certain land in the area. ‘Discharge’ is the extinction of a burden, while ‘variation’ (section 110(1)) includes the imposition of a new burden. Under the present law, a deed of variation or discharge, even for a single unit, must be granted by the owners of all the units in the community. A deed of discharge or variation under section 32 is particularly suitable where there are changes to be made to the burdens affecting all of or a lot of the units. A deed under section 34 is more suited to a variation or discharge of a burden affecting one or a few units only.

Section 32 – Majority etc. variation and discharge of community burdens

143. The procedure in section 32 allows a community burden to be discharged or varied in relation to any or all of the units in a community. Essentially the procedure involves: signature of a deed by the owners of a majority of the units; notification of the proposal to those owners who did not sign; a period of 8 weeks in which those owners can raise the matter in the Lands Tribunal and if they do not, the endorsement of an oath by the proposer and a certificate by the Tribunal. The deed can then be registered and is effective against the whole community. The unit(s) which are to have the burden modified or removed - ‘affected units’ - will each require to have the deed of variation or discharge registered against them. Subsection (1) prescribes those who will have to grant the deed, and how this must be achieved. Paragraph (a) provides that an express provision in the title deeds specifying those who may grant a discharge will apply. Paragraph (b) ensures that where the titles do not make provision, subsection (2) will operate. An express provision in the title deeds nominating certain properties would have to comply with the requirements of section 3 on what constitutes a valid real burden. The procedural requirements set out in section 33 only apply to deeds granted under subsection (2) and do not apply where there is express provision in the constitutive deed for owners to vary or discharge burdens as envisaged by section 32(1)(a).
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144. **Subsection (2)** provides that variation and discharge is granted either by the owners of a majority of units or, where authorised to do so, by the manager. Authorisation to the manager might be contained in the constitutive deed (section 25(1)(c)), or might be given following a decision by a majority of owners (section 27(1)(b) and (2)(c)). Paragraph (a) ensures that the majority must always consist of at least 2 owners, regardless of the number of units one owner may have.

145. **Subsection (3)** ensures that if the owner(s) of the affected unit(s) (i.e. the grantee(s)) sign, their unit(s) count for the purposes of assembling a majority.

146. **Subsection (4)** ensures that an owner (or owners collectively) owning more than half of a property owned in common can grant the deed for the purposes of section 32. Where, however a benefited property is held in equal shares and the owners who sign the discharge do not own a majority share of the unit, that unit would not count towards a majority. It is possible for other ownership arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. Unlike under the present law, ‘owner’ includes a person who has right to the property but has not completed title by registration (section 111(1)(a)); but (section 55(1)) there must then be deduction of title (other than for units on the Land Register). A manager, however, need not deduce title (section 55(2)). The owner ‘grants’ a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act. A grantee is not required (section 64(1)) but would be normal in practice. No particular deed or form of deed is specified. Registration can be by a granter as well as by a grantee (section 64(2) and (3)); and while the deed need only be registered against the affected unit, the Keeper has power to make a corresponding entry against the title sheets of the other units in the community (section 94).

147. **Subsection (5)** refers to the provisions in section 50 for ‘core burdens’ within sheltered housing. The effect is that a deed under section 32(2) can only vary and not discharge a “core burden” as defined in section 50(4). Furthermore, a three quarter majority would be needed rather than a simple majority. In relation to non-core burdens the provisions of section 32(2) apply.

Section 33 – Variation or discharge under section 32: intimation

148. **Section 33** provides for the intimation of a proposal to vary or discharge a community burden by a deed signed in accordance with section 32.

149. **Subsection (1)** requires notification of a proposal to discharge a burden under section 32 to all the owners of benefited properties who did not grant the deed. This could include a minority owner who did not grant the deed (see section 32(4)) notwithstanding that the unit counts towards the assembly of a majority.

150. **Subsection (2)** provides for the intimation of the notice. A copy of the executed deed and an individual written notice in, or near to, the form in schedule 4 must be sent to each owner of units in the community that did not grant the deed. Rules for sending are given in section 112. The notice advises owners of their right under subsection (3) to make an application to the Lands Tribunal to preserve the burden. Such an application is made under section 81(1)(c).
151. Subsection (3) allows any owner of a benefited property in the community who did not grant the deed to apply to the Lands Tribunal for its preservation, provided the application is made within eight weeks of the date of the last intimation under section 33(1). A successful application will prevent the burden being varied or discharged for the minority who did not sign the deed. Intimation is ‘given’ by being sent; and a document, if sent by post or electronic means, is treated as sent on the day of posting or transmission (section 112(3)). Unlike a notice of termination under sections 19 to 23, a successful application for preservation preserves enforcement rights for all those benefited properties whose owners did not all sign the deed of discharge or variation regardless of whether or not a particular owner of such a benefited property actually made an application for renewal to the Tribunal. Where all the owners of certain benefited properties have signed the deed of discharge it operates and can be registered under section 15 as a valid, discharge in respect of the enforcement rights of those properties.

152. Subsection (4) adopts the provisions in subsections (2) to (4) of section 36 subject to the referencing modifications in subsection (5). This means that a deed of variation or discharge is not effective as a discharge under section 32 unless when registered it has endorsed on it a certificate from the Lands Tribunal. A certificate would only be endorsed after the expiry of the 8 week period in which applications for preservation can be made and would only be available if no application is made (or all applications made have been withdrawn) or if applications received do not seek to preserve all the burdens which form the subject matter of the deed. The application of subsection (4) of section 36 means that the person who proposes to register the deed has to swear or affirm that the intimation requirements in subsections (1) and (2) of section 33 have been carried out and also provide under oath/affirmation, the date on which the 8 week period expired. It should be noted that all this is only required before registration but in practice it will have to be endorsed before sending the deed to the Lands Tribunal for a certificate as the Tribunal will only in some cases know of the existence of the deed and the final date for application from the terms of the deed submitted.

153. Subsection (6) provides for where the granter is unable to grant in person.

Section 34 – Variation and discharge of community burdens by owners of adjacent units

154. Section 34 introduces a second default mechanism for the discharge and variation of community burdens. It will permit the benefited proprietors of properties lying within 4m of the burdened property to discharge a burden subject to a notification procedure. The procedure is essentially the same as for a deed of variation or discharge granted under section 32. In this case the deed must be signed by the owners of those units lying within a 4m radius of the burdened property. Notification is then given to other owners within a community who have 8 weeks in which to raise the matter before the Lands Tribunal if they wish to preserve the burden. If this is not done then after an oath/affirmation is endorsed on the deed and a certificate from the Tribunal the deed may be registered and is effective against the whole community.

155. Subsection (1) provides that a burdened proprietor wishing to vary or discharge a community burden may do so by obtaining a discharge from all ‘adjacent units’. Adjacent unit is defined in section 31 as those within 4 metres of the burdened property (see further section 113 which makes additional provisions for the measurement of distance). Paragraphs (a) and (b) provide for some circumstances in which the procedure cannot be used. Paragraph (a) prevents a section 34 discharge from affecting facility or service burdens or burdens imposed on sheltered
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housing development. Paragraph (c) requires notification under section 35 of a proposal to use section 34 to all the other benefited proprietors in the community.

156. **Subsection (2)** ensures that an owner (or owners collectively) owning more than half of a property owned in common can grant the deed for the purposes of section 34. Co-owners who did not sign the deed would require to be notified under the procedure in section 35. If under section 36 the Lands Tribunal finds in favour of preservation so that the deed cannot be registered as effective against all units, it could still be registered as an “ordinary” discharge against the signatories but only if it complies with section 15, which would require the signature of all owners of each unit.

**Section 35 – Variation and discharge under section 34: intimation**

157. **Subsection (1)** requires notification of a proposal to discharge a burden under section 34 to all the owners of benefited properties who did not grant the deed. This will include any benefited properties that are not adjacent units (i.e. are outwith the 4 metre distance) and also any minority co-owners of adjacent units that did not sign the deed.

158. **Subsection (2)** provides for the intimation of the notice. A choice may be made to use either (or indeed a mixture of both) of the methods in paragraphs (a) and (b). The methods are by either individual written notice or by both a conspicuous notice affixed to a clearly visible part of the burdened property and lamp post notices. The form of notice to be used varies depending on the method. Paragraph (c) ensures that where it is not possible to display lamp-post notices, notice would require to be given by newspaper advertisement.

159. **Subsection (3)** provides for the required details of any advertisement used under subsection 2(c).

160. **Subsection (5)** adopts the provisions in section 20 on affixing a notice to the burdened property and to the appropriate lamp posts.

**Section 36 – Preservation of community burden in respect of which deed of variation or discharge has been granted as mentioned in section 34(1)**

161. **Subsection (1)** allows any owner of a benefited property (or a minority owner of the burdened property: see the note on section 35(1)) who did not grant the deed to apply to the Lands Tribunal for its preservation, provided the application is made within 8 weeks of the date of the last intimation under section 35(2). A successful application means that the burdens cannot be varied or discharged by the deed for the whole community.

162. The deed of variation or discharge will discharge the community burden in respect of any property whose owner has granted it, or if there are several co-owners, where they have all granted the deed. In respect of benefited properties whose owners did not grant the deed (or for properties where there was a dissenting co-owner), **subsection (2)** provides that the burden will not be varied or discharged unless a certificate is endorsed on the deed by the Lands Tribunal stating that no application for preservation has been received by the Tribunal (or all such applications have been withdrawn) or the application only relates to some of the burdens referred
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to in the deed. The Tribunal cannot give a certificate until after the 8 week period has expired. For practical purposes the oath or affirmation required by subsection (3) will need to be endorsed before sending the deed to the Tribunal in order to provide the Tribunal with sufficient information as to the date the 8 week period expired.

163. **Subsections (3) and (4)** provide that a person before submitting a deed of variation or discharge under section 34 for registration must swear or affirm before a notary public that the notice has been duly intimated. The provisions of section 21(2) are adopted in relation to circumstances in which the grantor is unable to grant in person.

**PART 3 – CONSERVATION AND MARITIME BURDENS**

164. Part 3 of the Bill is concerned with two new classes of burden called conservation burdens and maritime burdens. These classes of burdens were first created by the 2000 Act. The 2000 Act allowed some feudal burdens to be preserved under these classes. The purpose was to preserve, for the benefit of the public, burdens which protect the built or natural environment. Both conservation burdens and maritime burdens are personal burdens. A benefited property is not required. These burdens cannot however be created in favour of any person. A conservation burden may only be created in favour of a conservation body or the Scottish Ministers (a maritime burden may only be created in favour of the Crown). Part 3 comes into force on the day following Royal Assent (section 117(3)).

165. The provisions in the present Bill are based on those in the 2000 Act. The provisions on the nomination of bodies as conservation bodies and the operation of conservation burdens in the future supersede those in the 2000 Act. Sections 26 and sections 29 to 32 of the 2000 Act are essentially repealed and re-enacted by the Bill. The provisions in the Bill thus apply both to new conservation burdens created under section 37 of the Bill, and also to former feudal burdens converted into conservation burdens under the 2000 Act (see the definitions of ‘conservation burden’ in section 110(1)).

**Section 37 – Conservation burdens**

166. **Section 37** allows the creation of new conservation burdens. This section along with the rest of Part 3 comes into force the day after the Bill receives Royal Assent. **Subsection (1)** sets out the type of burden which may be created and in favour of whom it may be created. A conservation burden may be created by anyone but may be created only in favour of a conservation body or the Scottish Ministers. A conservation burden is one which preserves or protects, for the benefit of the public, the architectural or historical characteristics of the land or any other special characteristics of the land (including, without prejudice to the general rule, a special characteristic derived from the flora, fauna or general appearance of the land). Subsections (2) to (6) provide for the establishment by the Scottish Ministers of a list of conservation bodies. Names may be added to or removed from the list.

167. **Subsection (2)** provides that if someone other than a conservation body or the Scottish Ministers wish to create a conservation burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden.
168. **Subsection (3)** provides for the Scottish Ministers to prescribe by subordinate legislation a list of conservation bodies who will be entitled to hold the right to enforce conservation burdens preserved (under the 2000 Act) or created in their favour. In addition to the bodies on this list, the Scottish Ministers will in terms of **subsection (1)** be entitled to hold the right to enforce conservation burdens preserved or created in their favour.

169. **Subsection (4)** sets out the criteria for a body to be included on the list. The definition of the type of body which may be prescribed as a conservation body is intended to be broad enough to catch all the bodies who have a function or object of preserving or protecting for the benefit of the public the architectural, historical or other characteristics of land.

170. Since trusts are not separate legal persons, **subsection (5)** makes it clear that in relation to a trust the conservation body would be the trustees.

171. **Subsection (6)** allows bodies to be removed from the list.

**Section 38 – Assignation**

172. Since a conservation burden is a personal burden the right to enforce is not tied to a benefited property. Provision is therefore made for the transfer of the right to enforce a conservation burden. This is done by assignation. **Section 38** provides that the benefit of a conservation burden can be assigned to another conservation body or the Scottish Ministers and assignation will be completed by registration of the assignation.

**Section 39 – Enforcement where no completed title**

173. A real burden may be enforced only by a person who has both title and interest to do so (section 8(1)). **Section 39** is concerned with title. The relevant conservation body will have title to enforce the burden even if its right has not been registered. The meaning of ‘holder’ is given in section 110(1) as the person who has right to the title condition. The holder of a conservation burden is thus the relevant conservation body or, as the case may be, the Scottish Ministers.

**Section 40 – Completion of title**

174. Where title to enforce a conservation burden passes to a successor body on the reorganisation of that body the new holder can complete its title as holder of the burden under section 40. Standard cases are likely to be the assumption by a conservation body of new trustees or a reorganisation of a body by statute. The appropriate conveyancing procedure is then to use a notice of title, and paragraph (a) allows this. A notice of title is unnecessary in the case of conservation burdens registered in the Land Register (see section 3(6) of the Land Registration (Scotland) Act 1979 (as amended by schedule 13, paragraph 7(3) of this Bill)). Paragraph (b) allows an unregistered holder to grant assignations and discharges. Section 15(3) of the 1979 Act (as amended by schedule 13, paragraph 7(5) of this Bill) dispenses with deduction of title in cases where the conservation burden is registered in the Land Register, but otherwise deduction of title is necessary.
Section 41 – Extinction of burden on body ceasing to be conservation body

175. This section makes clear that a conservation burden is extinguished if the holder ceases to be a conservation body or if the holder ceases to exist.

Section 42 – Maritime burdens

176. Section 42 allows the creation of new maritime burdens. Subsection (1) states that it is only competent to create a maritime burden in favour of the Crown and over land which is part of the seabed or the foreshore.

177. Subsection (2) applies both to new maritime burdens created under subsection (1), and also to former feudal burdens which survive under section 60(1) of the 2000 Act (see the definition of ‘maritime burden’ in section 110(1)). Its effect is to prevent alienation by the Crown.

Section 43 – Interest to enforce

178. A real burden may be enforced only by a person who has both title and interest to do so (section 8(1)). Section 43 provides that such interest is presumed in the case of conservation and maritime burdens.

Section 44 – Discharge

179. This section is based on section 15. That section provides for the discharge of real burdens by obtaining a deed of discharge from the benefited proprietor(s) and registering it. This mechanism is available for the discharge of conservation, maritime, personal pre-emption and personal redemption burdens. The term “holder of the burden” includes a person who has right to the burden but has not completed title by registration (section 110(1)), but deduction of title may then be necessary (section 40(b)). No particular deed or form of deed is specified.

180. Subsection (2) makes clear that partial discharge is included. For example, a prohibition against building on a conservation site could be varied to allow the construction of a bird watching hide. The condition would still be in force, and would prevent any other types of construction.

PART 4 – TRANSITIONAL: IMPLIED RIGHTS OF ENFORCEMENT

181. Part 4 of the Bill contains a number of transitional provisions on the subject of implied enforcement rights. Under the current law the deed imposing a burden may expressly state who can enforce the obligation. If it does not the law may operate to read in enforcement rights by implication. Section 45 extinguishes implied rights, other than those which may be preserved under section 46. Section 45(1) prevents enforcement rights arising by implication in the future. In their place sections 48 to 51 create a new body of statutory implied rights. With only one exception (section 48(1)(b)), the provisions are confined to real burdens created by deeds registered before the appointed day.
Section 45 – Extinction

182. Subsection (1) of section 45 abolishes, with effect from the appointed day, the common law rules by which the right to enforce real burdens may arise by implication. Other provisions of the Bill deal with the consequences. Thus for new burdens (i.e. those created by deed registered on or after the appointed day) the benefited property must be nominated and identified in the constitutive deed (section 4(2)(c)), while for existing burdens (i.e. those created by deed registered before the appointed day) sections 48 to 51 provide replacement rules for identifying the benefited property. The meaning of ‘appointed day’ is given in section 110(1).

183. Subsection (2) postpones by ten years the abolition of implied rights in cases where the enforcement rights can be preserved under section 46. Ten years is the period allowed under section 46(1) (or section 71(2)) for registration of the appropriate notice. Section 71 deals with the conversion of negative servitudes into real burdens.

Section 46 – Preservation

184. Section 46 deals with implied rights other than those which arise in relation to a burden imposed under a common scheme affecting both burdened and benefited property (see subsection (6)). In effect this means that the notice of preservation procedure in section 46 is available for what can informally be described as neighbour burdens. This is a convenient shorthand term, but not one used in the Bill. A neighbour burden is a burden where the benefited property is not also subject to the burden and typically arises on the sale of part of a larger area of land. These burdens will appear in the title of the property which has been sold, the burdened property, but they may not specify what the benefited property is.

185. Section 46 allows an owner of land who benefits from a neighbour burden of this kind to save the right to enforce. Any owner (including a pro indiviso owner) of property, to which enforcement rights attach, may preserve those rights by registration of a notice of preservation during the ten years immediately following the appointed day. It provides a scheme by which owners may register a notice preserving their enforcement rights. The notice would have to identify the benefited and the burdened property. If no notice is registered within that timescale, the right of enforcement would be extinguished by section 45 at the end of the ten year period.

186. Subsection (1) provides that, where a notice is duly registered, the enforcement rights are preserved, and the property retains its status as a benefited property at the end of the ten year period.

187. Subsection (2) specifies the content of a notice of preservation. A statutory form is given in schedule 7. As paragraphs (a), (b) and (d) make clear, a notice may be restricted to certain burdens only, or to a certain part of the benefited or burdened properties. A title completed by registration is not required (see the definition of ‘owner’ in section 111(1)), but in that case paragraph (c) requires that the midcouples be listed. The meaning of ‘midcouples’ is given in section 110(1). Paragraph (e) requires, in effect, an explanation of why the land is considered to be the benefited property under the current law.
188. Consistently with section 4(5) (for new burdens), subsection (3) requires dual registration against both the benefited and burdened properties.

189. Subsection (4) provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done by the owner personally, but subsection (5) sets out some exceptions. Subsection (5)(b) should be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. ‘Notary public’ is given an extended meaning, in relation to overseas execution, by section 110(1).

190. Subsection (6) excludes from the section implied rights which have arisen in relation to common scheme burdens, for which separate provision is made by sections 48 to 50.

191. Section 103, referred to in subsection (7), makes further provision as to notices of preservation (and of converted servitude).

Section 47 – Duties of Keeper: amendments relating to unenforceable real burdens

192. Burdens which are currently enforceable by virtue of an implied right (almost always under the rule in J A Mactaggart & Co v Harrower (1906) 8 F 1101) where no notice is registered under section 46 will cease to be enforceable by anyone under section 45. In that case the burdens fail, through want of a benefited property (see section 1(1)), and should be deleted from the Land Register. Section 47 makes clear that this will not happen at once.

193. The section has two main purposes. First, it makes clear (in subsections (1) and (2)) that the Keeper has no immediate duty to delete failed burdens from the Land Register but can wait until deletion is requested or ordered by the court or Lands Tribunal.

194. Secondly, subsection (2) gives the Keeper temporary relief for a period of ten years after the appointed day. There is no obligation to delete burdens during this period, even on request; and subsection (3) enables the Keeper to deal with applications for registration of an interest in land without having to make a judgement as to whether or not a burden had been extinguished. After the end of the 10 year period, deletions can be requested at any time.

195. Although the Keeper will be entitled to remove extinguished burdens from the register at his discretion, subsection (4) and (5) make clear that he will not be able to do so when the burden in question is the subject of a notice which is before a court or the Lands Tribunal for a decision on its eligibility for registration. This would occur where a notice of preservation or converted servitude was rejected by the Keeper and the rejection is under challenge (see section 103(6)-(8)).

Section 48 – Common schemes: general

196. Rights to enforce implied by common law are abolished by section 45. Sections 48 to 51 introduce a number of replacement enforcement rights in respect of existing burdens. The first three sections (sections 48 to 50) apply only to common scheme burdens, and so are a replacement for the common law rules. The new rules are based on, but simplify, the old.
Section 51 is concerned with burdens which provide for the maintenance and regulation of facilities. The new provisions are not mutually exclusive, and some real burdens will be subject to more than one provision. Further, they are additional to, and not in substitution for, enforcement rights expressly created (which are untouched by the Bill). Sections 49 and 50 introduce special rules for tenements and for sheltered housing.

197. **Section 48** sets out a general rule which applies to all cases where burdens are imposed under a common scheme whether enforcement rights are conferred expressly or by implication. Common schemes exist where there are several burdened properties all subject to the same or similar burdens.

198. **Subsection (1)** of section 48 creates new enforcement rights which essentially replicate the current law. In relation to any particular unit, the burdens can be enforced by the owners of any other units subject to the same or similar burdens provided that it is evident from, or can be implied from, the deed setting out the burdens that it was the intention that the burdens were imposed on burdened properties with a common plan in mind. The requirement for an express reference to, or words implying the existence of a common scheme means that the section will only confer enforcement rights where there is notice in the title of the burdened property that a common scheme exists. It is not sufficient that the burdens imposed are the same or similar. This reflects the current law. The meaning of ‘unit’ is given in section 110(1). Enforcement rights are, with one exception, only conferred by subsection (1) on units burdened under the common scheme and where the burdens are imposed before the appointed day. The only case in which section 48 confers enforcement rights where burdens are imposed after the appointed day is where the burdens are imposed by importing their terms by reference to a deed of conditions registered before the appointed day. Section 6 allows deeds imposing real burdens after the appointed day to do so by reference to a deed of conditions registered before the appointed day. “Deed of conditions” is defined in section 110(1). The definition of deed of conditions in section 110(1) makes it absolutely clear that this term is used only to refer to a deed executed under section 32 of the Conveyancing (Scotland) Act 1874 which is registered before the appointed day. Schedule 14 of the Bill repeals section 32. Section 107(3) makes it clear that the repeal of section 32 of the 1874 Act does not affect the construction of the expression “deed of conditions”. Section 6 does not, unlike section 4, require the benefited properties to be nominated. The deed of conditions may do so expressly or it may not. Section 45 prevents enforcement rights arising by implication but section 48 will confer enforcement rights on units subject to the common scheme even if the deed imposing the burden registered after the appointed day does not make any express nomination of the benefited properties nor does the deed of conditions. If there is no benefited property there is of course no enforceable burden. It is desirable for any deed imposing burdens after the appointed day to make such an express nomination, section 48 provides a limited safeguard where this is not done.

199. **Subsection (1)** does have the effect of creating community burdens where there are four or more units subject to the common scheme.

200. In two respects the section may, in some common schemes, create enforcement rights that were not implied under the existing common law. Section 48 will create enforcement rights in common schemes created before the appointed day even if originally before that date there were no implied rights because of a reservation of a right of waiver by a feudal superior or disponer. The new rights created in section 48 are without any regard to a reserved right of waiver. The
second change is that it will no longer be necessary for title to have been obtained from a common granter.

201. The reference to section 110(2)(ii) in subsection (2) ensures that rights to enforce obligations to maintain or reinstate (typically public roads or sewers) assumed by a local or other public authority are not recreated by section 48.

**Section 49 – Tenements**

202. The test in section 48 for new enforcement rights in common schemes in general required the existence of a common scheme combined with express or implied notice of the scheme in the title deeds. *Section 49* provides a watered down version of this test for tenements because of their special characteristics. The individual flats in a tenement are especially interrelated. It is possible that in some cases there may not be sufficient notice in the titles of all the flats of a common scheme of burdens to obtain enforcement rights under section 48. The reduced test is therefore purely one of whether there is a common scheme, i.e. whether essentially the same burdens exist in each unit’s title deeds. No notice is required. If in terms of subsection (1) all the units in a tenement are subject to a common scheme they shall, on the appointed day, be benefited and burdened properties. The burdens will be mutually enforceable within the tenement. In this case the burdens will be community burdens, unless the tenement has only three flats or fewer (section 24(1)). Tenements are defined by section 110(1)).

203. The reference to section 110(2)(ii) in subsection (2) ensures that obligations to maintain or reinstate assumed by a local or other public authority are not real burdens affected by section 49.

**Section 50 – Sheltered housing**

204. This section creates enforcement rights in relation to burdens imposed on sheltered housing in essentially the same way as does section 49 for tenements. The only point of distinction from section 49 is that an allowance is made for units used in ‘some special way’ (typically as a warden’s flat). Although not subject to the burdens, such units are given the status of benefited properties and, by section 25(2)(b), are part of the ‘community’. Burdens falling under section 50 are community burdens (section 24(2)). The section also makes special provision with regard to a number of core elements that that give this sort of housing its special character. The provisions on community burdens will operate for sheltered housing if burdens have been imposed under a common scheme on all the units (other than any unit used in a special way) within a sheltered housing development. Where this is the case, each property in a scheme will be both a benefited and a burdened property in respect of the real burdens. This means that the same conditions will apply to each property and each owner will be able to enforce those conditions against other owners.

205. The reference to section 110(2)(ii) in subsection (2) ensures that obligations to maintain or reinstate assumed by a local or other public authority are not real burdens affected by section 50.
206. **Subsection (3)** defines sheltered housing developments. It should be stressed that although the section refers to ‘sheltered’ housing, this should not be taken as excluding residential accommodation for the elderly known by other terms such as ‘retirement housing’. The contents of the definition are the important consideration, with its emphasis on special facilities and features for the elderly.

207. **Subsection (4)** defines a core burden for the purposes of subsection (5). The “core burdens” in a sheltered housing development are burdens which regulate the use, maintenance, reinstatement or management of any facility or service which makes the sheltered housing development particularly suitable for occupation by elderly people (or by people who are disabled or infirm or in some other way vulnerable) or which regulate facilities substantially different from those of ordinary dwellinghouses. In practice these features and facilities are likely to include the provision of a warden service, an emergency alarm system and safety features such as grab rails and ramps. The warden service and these other facilities are the core elements of the definition of sheltered housing requiring special protection.

208. **Subsection (5)** specifies the protections for core burdens. Paragraph (a) modifies section 27 of the Bill (on the power of a majority to appoint a manager). The relevant paragraphs referred to in section 27(1) allow a majority to confer powers on a manager (and to revoke those powers). For these powers to be used in a sheltered housing development will require a majority of three quarters of the units. Sub-paragraph (ii) ensures that it will not be possible to use section 27 to confer on a manager the power to discharge any burdens in a sheltered housing development and that the manager may only be given the authority to vary non-core burdens.

209. Paragraph (b) of subsection (5) provides that it will not be possible to remove the core burdens in sheltered housing by the default majority rule provisions in section 32 of the Bill. The core burdens are protected by increasing the majority required to make changes to burdens affecting them. It is not possible to discharge any “core burden” by majority discharge under sections 32. The owners of a majority of 75 per cent of the units, as opposed to a bare majority, are be required to sign any majority variation of a core burden under these provisions.

210. Paragraph (c) of subsection (5) stipulates that burdens relating to age restrictions should not be capable of majority discharge or variation under the default provisions in section 32. Such a restriction might be to the effect that no person under the age of 60 could reside in the complex. This provision applies to burdens created in constitutive deeds registered after the appointed day as well as to those in constitutive deeds registered before the appointed day.

**Section 51 – Facility burdens and service burdens**

211. This section is based on, and replaces, section 23 of the 2000 Act (which is repealed by schedule 14). It extends the rule introduced by section 24 of the Bill from feudal to non-feudal burdens. The meaning of ‘facility burden’ and ‘service burden’ is given in section 110(1). The broad effect of section 51 is that facility and service burdens are enforceable by the owners of those properties which benefit from the facility or service in question. By contrast to sections 48 to 50, there is no requirement that the benefited properties be subject to like burdens.
Section 52 – Further provision as respects implied rights of enforcement

212. **Section 52** makes a highly technical provision to ensure that sections 48 to 51 operate as intended. Essentially these sections will recreate enforcement rights which already exist. Sections 48 to 51 operate, with the sole exception of section 48, in cases where burdens have been imposed before the appointed day. For a burden to be imposed it must be enforceable by the owner of a benefited property. If there is no benefited property under the current law there is no burden imposed. If there is no burden imposed before the appointed day the provisions of sections 48 to 51 do not operate.

213. If as the law currently stands it is true that a power to vary or waive reserved in favour of the disposer excludes the possibility that owners of other properties subject to the common scheme can obtain enforcement rights by implication, the consequence would be that not all units in a common scheme of non-feudal burdens would be subject to the burdens as for at least the last unit to be sold there would be no benefited property. The question only arises in relation to non-feudal burdens as for feudal burdens the superiority forms an implied benefited property.

214. **Subsection (1)** provides that when determining for the purposes of section 24 and sections 48 to 51 whether a property is a benefited property (and therefore whether it enjoys the right to enforce a burden and therefore in turn whether a burden may have been imposed on another property) a reservation of a right to vary or waive which would have prevented enforcement rights arising is to be disregarded. The effect of this is that an obligation is treated as having been imposed under a common scheme for the purposes of sections 48 to 51 and section 24 notwithstanding that before the appointed day the obligation may not have been enforceable as a real burden. This is, however, only the case if the reason why the burden may not have been enforceable is due to the absence of a benefited property and the reason why there was no benefited property is due to the operation of a rule of law which prevented enforcement rights arising by implication as a result of the existence of a reservation of a right to vary or waive the real burden.

215. **Subsection (2)** makes it clear that subsection (1) does not confer enforcement rights under those sections in respect of anything done or omitted to be done by the burdened proprietor which contravened the terms of the real burdens before the appointed day. Subsection (2) also makes it clear that where the Keeper has, before the appointed day, removed a burden from the title sheet of a burdened property the owners of units upon whom rights of enforcement are conferred under sections 48 to 51 will have no greater claim on the Keeper’s indemnity under section 12(1) of the Land Registration (Scotland) Act 1979 after the provisions came into force than they had before.

Section 53 – Duty of Keeper to enter on title sheet statement concerning enforcement rights

216. This section is designed, so far as possible, to make the new implied enforcement rights apparent from the Land Register. This section imposes a duty on the Keeper of the Registers of Scotland where he has satisfactory information regarding enforcement rights created by Part 4 or of by section 60 of the 2000 Act to set out information on the Land Register.
PART 5 – REAL BURDENS: MISCELLANEOUS

Section 54 – Effect of extinction etc. on court proceedings

217. Part 5 contains provisions on a number of miscellaneous matters affecting real burdens. The first of those, section 54, provides that real burdens cannot be enforced after (or to the extent that) they have been extinguished even although the breach in question occurred prior to extinction. Paragraphs (a) and (b) prevent benefited proprietors from attempting to enforce burdens that have been extinguished. It makes no difference if the breach occurred before the appointed day. Paragraph (c) makes clear that an interdict, or order for specific implement, will be deemed to have been reduced or recalled when the burden is discharged. There is a partial exception for proceedings concluding for the payment of money, whether in relation to a debt or by way of damages. Decrees for payment of money (for example in relation to the cost of common repairs) obtained before the day on which the burden is discharged will continue to be enforceable thereafter.

Section 55 – Grant of deed where title not completed: requirements

218. Section 55 introduces a requirement of deduction of title in cases where the owner granting some types of deed does not have a registered title. This means that the person’s ownership must be traced back from the last owner whose title was registered, listing any other unregistered owners who held the property in the intervening period. Subsection (1) will require an unregistered owner who wishes to create, discharge or vary a real burden to establish ownership in this way. ‘Owner’ in this section does not include a heritable creditor in possession (section 111(3)(a)). Section 4 provides the rules for granting a constitutive deed and deeds of variation or discharge are granted in terms of sections 15, 32 and 34 (a deed of discharge under section 44 is not granted by an ‘owner’ and so does not come within section 55). The relevant land is the burdened property in the case of constitutive deeds, and the benefited property in the case of deeds of variation and discharge. The meaning of ‘midcouple’ is given in section 110(1), and deduction of title should in practice follow the style set out in schedule A form 1 to the Conveyancing (Scotland) Act 1924. Deduction is not necessary where the property is already on the Land Register (Land Registration (Scotland) Act 1979 section 15(3), as amended by schedule 13 paragraph7(5) of this Bill).

219. Subsection (2) makes clear that, if a deed of variation or discharge is granted by a manager, it does not matter if the owners (or some of them) do not have a completed title. No deduction of title is needed, nor, in Land Register cases, need midcouples be produced to the Keeper under section 15(3) of the 1979 Act.

Section 56 – Contractual liability incidental to creation of real burden

220. When a burden is created (whether as a feudal or a non-feudal burden) it also operates as a contract between the parties. Section 56 prevents dual validity as both a contract and a real burden. In future an obligation will be either a burden or a contract, but it cannot be both. When the deed containing the obligation has been duly registered, the contractual liability will cease to the extent to which it is duplicated by the real burden. A disposition imposing burdens by reference to a deed of conditions is the leading example of a deed into which a constitutive deed is incorporated. The section does not apply in cases where, notwithstanding registration, no real
These documents relate to the Title Conditions (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 6 June 2002

burden is created (e.g. because the obligation does not comply with rules as to content of a real burden set out in section 3). Nor (section 107(7)) does the section apply to constitutive deeds registered before the appointed day, except where the burdens are community burdens.

221. Contractual effect will be extinguished for community burdens regardless of when they were created.

222. Schedule 12 amends the 2000 Act to put beyond doubt that contractual obligations which were incidental to feudal burdens should only remain enforceable between the original parties.

Section 57 – Real burdens of combined type

223. This section acknowledges the fact that the same obligation may be constituted as, for example, both a community burden and as a burden enforceable by someone outside the community. Other combinations are possible. Where it is necessary to do so, a combined burden is to be treated as two separate burdens. If, however, the benefited property is a unit in the community, the burden can only be enforced as a community burden or as one of the ‘personal’ burdens i.e. conservation burden, maritime burden, manager burden, personal pre-emption burden or personal redemption burden.

224. The issue is particularly relevant for community burdens. It is possible, for example, that a real burden may be enforceable by the owners of the units within the community against each other and also by the owner of nearby land which does not form part of the community. The owner of this land would be able to enforce the burden as a “neighbour burden”. If the community, for example using new discharge mechanisms provided by Part 2, were to discharge the burden the discharge would only affect the rights of the owners of the community to enforce the burden and would not affect the right of the nearby owner to enforce the burden as a neighbour burden.

225. Subsection (2) makes it clear, however, that the owner of a unit within the community cannot enforce an obligation set out in an ordinary real burden other than as a community burden. This avoids any possibility that an owner within the community may be able to claim dual rights to enforce the same obligation as “distinct” burdens. If however a person entitled to enforce a personal burden (i.e. of the type described in section 1(3)), such as a conservation burden, is also an owner of a unit in the community that person would be able to enforce the obligation as a personal burden independent of any right to enforce it as an ordinary community burden. Essentially where the right to enforce the burden is tied to a unit within the community the burden is only enforceable as a community burden and it is treated as a single obligation but where the right to enforce is either tied to land outwith the community or is not tied to land at all, then the obligation will be treated as both a community burden and as another distinct type of burden.

Section 58 – Manager burdens

226. Section 58 identifies a new category of real burden known as a manager burden. The category is new, but the burden itself is already familiar from current practice, and the section applies to existing real burdens as well as to those created after the section comes into force the
day after Royal Assent (section 117(3)). A manager burden is typically used to allow a developer to appoint a manager in a development. It stipulates who has the power to appoint or to act as the manager for the scheme and to administer and enforce the burdens imposed. This section confirms that this is a valid burden, and provides rules as to how it should operate.

227. Subsection (1) defines a ‘manager burden’ as one which confers the power to act as, or to appoint or dismiss, a manager. Typically such power would be conferred on a developer during the initial years of a housing or other development. ‘Related properties’ is defined in section 61. Subsection (1) is a qualification of the rule, stated in section 3(7), that a real burden must not have the effect of creating a monopoly. The meaning of ‘manager’ is given in section 110(1). This section applies to both existing and new burdens. If an existing burden provides for the nomination of a manager in perpetuity, it will become subject to the limitations in subsections (2) and (4).

228. The length of time that the rights granted under a manager burden will survive is specified in subsections (4) and (5). But even during those time periods, the power cannot be exercised unless its holder owns at least one of the properties being managed. This is provided by subsection (2). In some manager burdens the power to appoint may be tied to one of the properties in particular. Much more usually, however, the power will be conferred on a person without any reference to a benefited property. This is because typically developers will not know which of the properties on the estate will be the last to be sold. These manager burdens resemble other personal burdens such as conservation burdens in that they are in favour of a person. But unlike conservation and maritime burdens, the benefited proprietor must still own a property within the scheme: it is just that no one unit need be singled out as benefiting from the manager burden. As a result the effect of subsection (2) is to provide what is virtually a floating benefited property.

229. Subsection (3) makes clear that the holder of a manager burden may assign their right. Registration is not required, but there must be intimation to the owners of the rest of the scheme.

230. The normal rule under subsections (4) and (5) is that a manager burden comes to an end after ten years. It would be possible to provide for a shorter period in the constitutive deed. Paragraph (a) of subsection (5) provides for a special period of 30 years for local authority housing.

231. Subsection (6) allows a duration of thirty years where the burden was imposed in a sale under the right-to-buy legislation for council houses, or otherwise in a sale by a local authority (or similar) to its tenant. The subsection does not include property outwith right-to-buy situations.

232. Subsection (7) describes how the period of a manager burden is to be calculated. Where the manager burden is created in a deed of conditions affecting all of the related properties, the manager burden will be extinguished for all of them on the same day, 10 years after registration of the deed of conditions. If, however, the manager burden is created in a series of dispositions containing the same burdens, the duration of the burden will be calculated from the registration date of the first constitutive deed that created a manager burden in respect of one of those related properties, i.e. the first sale.
233. Subsection (8) prevents dismissal of the manager under the dismissal provisions in section 27 of the Bill as long as a manager burden is in operation. In theory the titles might confer an independent power of dismissal on the owners of the managed properties.

234. Subsection (9) imports the provisions on interest to enforce and discharge which apply to conservation and maritime burdens. The holder of a manager burden will therefore have a presumed interest to enforce the burden.

235. Subsection (10) makes clear that a manager burden imposed in a grant in feu is not extinguished with the abolition of the feudal system. Instead it will be extinguished in accordance with subsection (4); and until that occurs the former superior will be able to exercise the power under the burden.

Section 59 – Overriding power to dismiss and appoint manager

236. The general rule, for properties governed by community burdens, is that the manager may be dismissed by the owners of a majority of the units (section 27(1)(d)). But this rule can be altered in the titles, and a higher threshold imposed. Section 59 restricts that threshold. Whatever the titles may say, the owners of two-thirds of units can always dismiss the manager. The meaning of ‘owner’ is given in section 110. The section is not confined to communities and community burdens, and applies to any group of related properties.

237. The rule in section 27 of the Bill for dismissal of a manager by a simple majority will not come into play whilst a manager burden is still in effect. As a consequence, dismissal by a simple majority under section 27(1)(d) will not be possible until either the last unit is sold or the 10 or 30 year period has elapsed. In a similar way the two-thirds rule provided by section 59(1) could not be used until the time period has expired or the last unit is sold, with one exception. This exception is that the owners of two-thirds of the properties in estates subject to the 30 year period provided for in section 58(5) (purchasers in right-to-buy sales) can remove a manager at any time, i.e. before the expiry of the 30 year period. In all other schemes (those subject to the ten year limit), the two-thirds dismissal rule would not be available while the manager burden was exercisable.

Section 60 – Manager: transitory provisions

238. Not all management provisions in title deeds are valid; and quite a number of burdens containing management provisions would in any case be extinguished on the appointed day under section 17(1)(a) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Section 60, as a transitional measure, ratifies any appointment made under such provisions. The manager will then be able to continue to act after the appointed day unless or until dismissed under sections 27(1)(d) or 59.

Section 61 – The expression “related properties”

239. Section 61 gives an indicative definition of related properties, that is those properties for which a manager might be appointed in terms of section 58. These are properties which might
be conveniently managed together because of shared property or facilities or membership of a common scheme.

240. The effect of subsection (2) is to prevent the requirement of ownership of a managed property (imposed by subsection (2)) from being satisfied merely by ownership of a common facility or, in the case of a sheltered housing development, of a unit used in some special way (for example, the warden’s flat). This is where the warden’s flat is not subject to the same conditions as the rest of the community.

**Section 62 – Discharge of rights of irritancy**

241. Irritancy in this context means confiscation of the (burdened) property as a penalty for non-compliance with a real burden. Section 62 abolishes the remedy, with effect from the day after Royal Assent (section 117(3)).

**Section 63 – Requirement for repetition etc. of terms of real burden in future deed**

242. In imposing real burdens there is sometimes added a requirement that the burdens be repeated in all future transmissions of the land on pain of nullity. The enforceability of this requirement is open to question; but special statutory provision (section 9(3) and (4) of the Conveyancing (Scotland) Act 1924) has been made for curing a failure to comply. Section 63 dispenses with any requirement to repeat burdens. The opportunity is also taken, in schedule 14, to repeal section 9(3) and (4) of the 1924 Act. This is a technical change only, and no change of practice is envisaged. In Sasine transactions and first registrations, dispositions will continue to list the burdens writs in order to avoid a claim in warrandice in respect of latent burdens.

**Section 64 – Further provision as respects deeds of variation and of discharge**

243. This section makes additional provision in respect of extinctive deeds.

244. **Subsection (1)** makes clear that such a deed need not be granted in favour of any particular person. This removes the current uncertainty in the law. However, there would be no objection if a grantee were named.

245. **Subsection (2)**, in effect, allows anyone who is subject to a real burden — including a tenant or other temporary possessor (see section 9(2)) — to procure a discharge or other extinctive deed and to register it in the property register. This will allow anyone against whom a burden is enforceable to seek a discharge.

246. The normal rule is that only a grantee can register: see the Abolition of Feudal Tenure etc. (Scotland) Act 2000 section 5(1) (Register of Sasines), and rule 9(1) of the Land Registration (Scotland) Rules 1980 (Land Register). **Subsection (3)** allows registration by a grantor in cases where the deed is granted by a majority of owners, by a manager. In at least some of these cases the grantee might oppose the deed and would not therefore be willing to register. In other cases allowing a manager to register is administratively convenient.
Section 65 – Duty to disclose identity of owner

247. Usually, affirmative burdens are enforceable only against the owner of the burdened property (section 9(1)); but since an ‘owner’ includes a person whose title has not been completed by registration (section 111(1)), the identification of the current owner may not always be easy. Section 65 assists the enforcer by requiring any previous owner to pass on information. See section 8(2) and (4) for a list of those who have title to enforce a real burden.

PART 6 – SERVITUDES

248. Part 6 of the Bill does not attempt to rewrite the common law on servitudes: the provisions of the part are narrow and focused. However, the Bill does provide a number of changes to align the law of servitudes with the reformed law of real burdens. Under the existing law servitudes can exist in two categories: positive and negative. A positive servitude permits limited use of a property, such as a right of access or the running of a pipeline. In theory it may also have been possible to create this type of servitude as a real burden. Negative servitudes are uncommon and thought to be confined to restrictions on building, especially for the protection of light or prospect. Section 70 provides that it should no longer be possible to create negative servitudes. Obligations of this type will have to be created as real burdens in the future. The terminology employed reflects the more modern language used in the rest of the Bill: ‘benefited property’ and ‘burdened property’ rather than the traditional ‘dominant tenement’ and ‘servient tenement’.

Section 66 – Creation of positive servitude by writing: deed to be registered

249. Servitudes are similar to real burdens, in that they require both a benefited and a burdened property and they are obligations that run with the land. Unlike burdens, servitudes do not have to be recorded.

250. Section 66 provides that in future a deed that creates a positive servitude will always have to be registered and that this will have to occur against both the benefited and burdened properties. Under the present law, the right to a servitude created in a deed can be completed by either possession or registration against either property. Subsection (1) requires registration against both properties, in a similar way to the new requirement for real burdens (for which see section 4(5)). Possession is no longer sufficient. By section 110(1) ‘registration’ means registration of the servitude in the Land Register or recording of the deed in the Register of Sasines. The requirement is expressed negatively, and no rule is given as to the time of creation. The subsection does not provide rules for the constitution of the deed, though both properties will have to be sufficiently described for registration to occur. Subsection (1) has no effect on servitudes created by other means, such as by positive prescription (for which see subsection (3)), or by implication in a deed. Nor (section 107(8)) does it apply to deeds executed before the appointed day.

251. Subsection (2) removes the common law rule that benefited and burdened properties must be in separate ownership at the time of registration. In future the servitude will not necessarily be created at registration – it will lie dormant until the burdened and benefited properties come into separate ownership (contrary, in Land Register cases, to section 3(4) of the Land Registration (Scotland) Act 1979).
252. Subsection (3) makes two qualifications to the requirement of dual registration set out in subsection (1). Section (3)(1) of the Prescription and Limitation (Scotland) Act 1973, referred to in paragraph (a), allows a servitude to be created by unregistered deed followed by twenty years possession. Paragraph (a) ensures that section 66 will not preclude the creation of servitudes by prescription. Paragraph (b) exempts pipeline servitudes from the registration requirement on the basis that such servitudes may affect a substantial number of properties.

Section 67: Disapplication of requirement that positive servitude created in writing be of a known type

253. Unlike burdens, servitudes do not have to be recorded, and it is possible for them to arise by implication or prescription. To regulate their use, servitudes are restricted into certain types and categories by a fixed list (numerus clausus) that has been derived from Roman law. Because registration is not currently required, the list offers some assurance that any possible servitudes on land are limited in type. As registration will now be required for servitudes created by deed, section 67 provides that these servitudes will not have to fit into the list. The fixed list remains in place for deeds not created by registered deed.

254. Even without the fixed list, the question of what may constitute a valid servitude is subject to a number of limitations. Subsection (2) prohibits the creation of a servitude that is repugnant with ownership. This mirrors the provision for real burdens contained in section 3(6).

Section 68 – Positive servitude of leading pipes etc. over or under land

255. There has been a doubt over whether a right to lead a pipe, cable, wire or other such enclosed unit over land could be constituted as a positive servitude. Section 68 deems this always to have been the case. Pipeline servitude is to be included in the fixed list of servitudes.

Section 69 – Discharge of positive servitude

256. Under the present law a deed discharging a servitude does not have to be registered. Section 69 introduces a requirement of registration where the servitude appears on the register against the burdened property. The discharge need not be registered against the benefited property, but section 94 gives the Keeper discretion to make consequential amendments to the benefited property’s title sheet. Registration will be required for any servitude that appeared on the title sheet of a burdened property, regardless of how the servitude had come to be entered on the title sheet (i.e. if it had been noted in the title sheet as anticipated by paragraph (b) of the section). Section 69 does not apply to discharges executed before the appointed day (section 107(8)). Further, it does not affect other methods of extinguishing a servitude, such as negative prescription or confusion.

Section 70 – Prohibition on creation of negative servitude

257. Negative servitudes are uncommon and thought to be confined to restrictions on building, especially for the protection of light or prospect. This sort of obligation is more typically imposed as a real burden. Section 70 prevents the creation of negative servitudes on or after the appointed day. Obligations of this type will have to be created as (negative) real burdens in the future: see section 2(1)(b). All servitudes in the future will therefore be positive in nature.
Section 71 – Negative servitudes to become real burdens

258. This is the first of two transitional provisions consequential on the realignment of the boundary between real burdens and servitudes. Section 71 provides for the conversion of all existing negative servitudes into real burdens.

259. Subsection (1) provides for the automatic conversion of negative servitudes into negative burdens (section 2(2)(b) defines a negative burden as an obligation to refrain from doing something). This real burden is referred to as a ‘converted servitude’ in section 71.

260. Subsections (2) and (3) provide for the extinction after ten years of all negative servitudes (now negative burdens) which were not, before the appointed day, registered against the burdened property. The delayed extinction is to give the opportunity to register a notice under subsection (4).

261. Subsection (4) provides the mechanism to preserve a converted servitude during the ten years beginning with the appointed day. This is achieved by the owner of the benefited property registering a notice of converted servitude in approximately the same form as contained in schedule 8. Registration of this notice means that the converted servitude is not extinguished under subsection (2). Any owner, including a pro indiviso owner, may register. This procedure is used where the converted servitude is not already registered against the burdened property at the appointed day. Where the servitude is already registered, subsection (3) will apply to preserve it.

262. Subsection (5) specifies the content of a notice of converted servitude. A statutory form is given in schedule 8. The notice may be restricted to a part only of the benefited or burdened properties (see paragraphs (a) and (b)). A title completed by registration is not required (see the definition of ‘owner’ in section 111(1)), but in that case paragraph (c) requires that the midcouples be listed. In Land Register cases the Keeper will no doubt wish to inspect the midcouples. The meaning of ‘midcouples’ is given in section 110(1) (as a link in title used in a deduction of title under the Conveyancing (Scotland) Act 1924). Paragraph (f) is the equivalent of section 46(2)(e) and avoids the need for a separate notice of preservation under that provision.

263. Consistent with section 4(5) (for new real burdens), subsection (6) requires dual registration of a notice against both the burdened and benefited property.

264. Subsection (7) imports the requirement of section 46 that the notice be sworn or affirmed before a notary public.

265. Section 103, referred to in subsection (8), makes further provision as to notices of converted servitude (and of preservation).

Section 72 – Certain real burdens to become positive servitudes

266. In general obligations allowing limited use of the burdened property are positive servitudes. Subsection (1) converts real burdens consisting of a right to enter or make use of the burdened property into positive servitudes after the appointed day. This is the partner to the
conversion of negative servitudes into burdens in section 71. Section 2(1) prevents the creation in future of rights to enter or use property as real burdens.

267. Paragraph (a) of subsection (2) makes clear that section 72 does not apply to feudal burdens which are extinguished on the appointed day by section 17(1) of the 2000 Act. Paragraph (b) excludes by far the most common case of real burdens of entry and use, namely those burdens (‘ancillary burdens’: see section 2(4)) whose purpose is ancillary to some other type of real burden. The exclusion is made necessary by the fact that ancillary burdens are permitted in the future by section 2(3). These ancillary rights exist where the right to enter or use the burdened property is incidental to another condition.

PART 7 – PRE-EMPTION AND REVERSION

268. Part 7 of the Bill is concerned with rights of pre-emption imposed as real burdens. Sections 77 and 78 deal with specific forms of reversion created under two pieces of 19th century legislation. Section 8(4) states that only the owner of a benefited property may enforce a right of pre-emption.

Section 73 – Application of sections 74 and 75

269. The effect of section 73 is to apply the provisions of section 74 and 75 to the same types of pre-emption that are covered by section 9 of the Conveyancing Amendment (Scotland) Act 1938 (“the 1938 Act”) (as amended). These are the pre-emptions that are restricted to a single opportunity to accept or refuse an offer to sell. This restriction applies to all pre-emptions ever created in feudal burdens and all other pre-emptions created after 1 September 1974. Either the holder of the right of pre-emption must accept the offer (normally mirroring the terms of a bid from a third party) or the pre-emption is lost.

270. ‘Title condition’ is defined in section 110(1). It is wider than real burden and includes, for example, pre-emptions created in long leases.

271. The scope of paragraph (a) is likely to be limited. Many feudal pre-emptions have already been extinguished under section 9 of the 1938 Act. Those which remain will be extinguished on the appointed day by section 17(1) of the 2000 Act unless reallocated under sections 18, 18A, 19 or 20 of that Act.

Section 74 – Extinction following pre-sale undertaking

272. Subsection (1) allows the owner of the burdened property to obtain, in advance of a sale, an undertaking that a right of pre-emption will not be exercised for a specified period and subject (if desired) to specified conditions. The ‘holder’ of a right of pre-emption is the owner of the benefited property (section 8(4)) or, in the case of a pre-emption in a lease, the landlord. A statutory form of undertaking is set out in schedule 9. If the sale then takes place within the specified period, and if the other conditions are met, the pre-emption is extinguished on registration of the conveyance. If the sale does not occur, then the pre-emption would revive after the specified period.
273. Subsection (2) makes clear that successors of the holder are bound by the undertaking.

Section 75 – Extinction following offer to sell

274. This provision is based on, and replaces, section 9 of the Conveyancing Amendment (Scotland) Act 1938 (“the 1938 Act”) (which is repealed by schedule 14). It applies to the pre-emption mentioned in section 73 (i.e. all feudal pre-emption and all other pre-emption created after 1 September 1974).

275. Subsection (1) provides that a pre-emption is extinguished if, on sale or other trigger event, the property is offered back to the pre-emption holder. It makes no difference whether the offer is accepted or rejected. As with section 9 of the 1938 Act the extinction is for all time. The constitutive deed might specify a trigger event other than sale.

276. Subsection (2) specifies the form the offer must take for the pre-emption to be extinguished. This does no more than give effect to section 1(2)(a)(i) of the Requirements of Writing (Scotland) Act 1995, which requires a granter to subscribe the relevant deed. A verbal offer, therefore, would be insufficient.

277. Subsection (3) provides that the offer lapses after a maximum period of 21 days from the date on which it is sent. An offer which is posted or transmitted by electronic means is taken to be sent on the day of posting or transmission (section 112(3)). If the constitutive deed provides for a period of less than 21 days, then that period will be used.

278. If the constitutive deed sets out terms under which the land would be sold to the pre-emption holder, then these will be applied. It is, however, more usual for the constitutive deed to provide for the offer back to be made on the same terms as any offer received from a third party which the owner wishes to accept. These are terms ‘provided for’ in the sense of subsection (4).

279. Where no terms are set out in the constitutive deed the terms of the offer must be reasonable, and unreasonable terms should not be included in the offer back. The subsection also allows additional terms to be inserted.

280. Subsection (5) provides that if the pre-emption holder does not indicate within 21 days that the offer is unreasonable then the offer is deemed to be reasonable. An offer which was found to be unreasonable would not extinguish the right of pre-emption. The pre-emption holder will have to give reasons why the offer is unreasonable.

281. Subsection (6) makes provision for the case where the pre-emption holder cannot be identified.

Section 76 – Ending of council’s right of pre-emption as respects certain churches

282. Schemes for burgh churches made under section 22(1) of the Church of Scotland (Property and Endowments) Act 1925 may, by section 22(2)(h) of that Act, include a right of pre-emption in favour of local authorities in the event that the church is to be sold. The effect of
section 76 is to extinguish any such pre-emptions. Section 22(2)(h) of the 1925 Act is repealed by schedule 14 of the Bill.

Section 77 – Reversions under School Sites Act 1841

283. The School Sites Act 1841 created a right of reversion in favour of persons (or their successors) who granted land for the building of schools and schoolhouses. The existence of the reversion has caused difficulties in practice.

284. The Bill converts all rights of reversion created by the School Sites Act 1841 in existence when this provision comes into force on the day after Royal Assent (see section 117(3)) into rights available under section 77 except that there is no conversion where the right has already been claimed, compensation has already been paid or the reversion holder has already completed title to the land. Claims made before that day would continue to be dealt with under the old regime.

285. Subsections (2) to (4) set out rights which replace the reversion. Under the existing law the reversion holder is entitled to the entire property. Subsection (2) provides that where a third party has already purchased the property from the local authority, the authority shall pay to the reversion holder open market value of the land. If the closing of the school takes place after this provision comes into force, ‘improvement value’ as defined in subsection (6) will be deducted.

286. Subsection (3) provides that where the education authority has not sold the property on, the reversion holder may choose to require the education authority to perform one of the obligations detailed in subsection (4). Essentially, the holder may choose to ask for the land to be conveyed (as would be their entitlement under the original reversion) or for payment of the open market value of the land. Paragraph (b) places a restriction on this: if the holder wishes a conveyance of the land rather than compensation, then the authority can choose to keep the land and instead pay compensation under subsection (4)(a)(ii) or (b)(ii). The authority’s choice would have to be ‘timeous’, which is defined in subsection (8) as notified to the holder no longer than 3 months after the holder requested a conveyance of the land under subsection (3).

287. Subsection (4) details the options available to the reversion holder. A distinction is made depending on whether the event which gives rise to the reversion, i.e. the closure of the school, occurs before or after this section comes into force. If it occurs before this provision comes into force then either the land is conveyed to the holder or the authority pays the holder the current open market value of the land without deduction for improvement value. Otherwise improvement value is deducted from the holder’s entitlement either by reducing the compensation payable or by requiring payment from the holder of the improvement value when a conveyance is made to the holder. ‘Improvement value’ is defined in subsection (6).


289. Subsection (6) defines ‘improvement value’. The definition classifies improvements as structures erected on the land, excluding those made before the property was originally conveyed under the School Sites Act for educational purposes.
290. The proviso in the School Sites Act giving rise to the reversion was applied by the School Sites Act 1852. Subsection (7) construes references to the School Sites Act 1841 as including other enactments which apply it.

Section 78 – Right to petition under section 7 of the Entail Sites Act 1840

291. Section 78 adopts the provisions of section 77 for claims under the Entail Sites Act 1840. This Act permitted the granting of small areas of land out of entailed sites for public spirited purposes. The heir of entail in possession could reclaim the land if it was not used for these purposes.

292. The 1840 Act is repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, which also automatically disentails any remaining entailed land on the appointed day. This means that heirs of entail in possession lose that status involuntarily on the appointed day and would be prevented from petitioning for the return of land conveyed under the 1840 Act. If owners of previously entailed estates would have had a right to claim back the site but for the provisions of the 2000 Act, then the subsection gives them a right to a claim under section 77. Rights arising under the 1840 Act will be treated in the same way as reversions arising from the School Sites Act. The compensation regime of section 77 of the Bill applies to claims which would have arisen under the 1840 Act. Paragraph (b) of subsection (1) mirrors section 77(1)(b) by excluding any reversion holder who had already applied to the sheriff for a declarator or had accepted an offer of compensation by the appointed day.

293. Subsection (2) provides for some modifications to the school sites procedure that was adopted by subsection (1). Paragraph (a) accounts for the fact that the Entail Sites Act allowed land to be conveyed or leased to a wider range of bodies than merely education authorities.

294. The repeal of the 1840 Act does not affect the trust in which the land is currently held. Subsection (3) provides that the land need no longer be held for the trust purposes referred to in the 1840 Act after a claim has been paid or any claim has prescribed.

Section 79 – Prescriptive period for obligations arising by virtue of 1841 or 1840 Act

295. This section applies the five year negative prescription to obligations arising by virtue of the rights of reversion under the School Sites Act 1841 or right to petition for forfeiture under the Entail Sites Act 1840. Time occurring before this provision comes into force (which is the day after Royal Assent in respect of the School Sites Act and the appointed day in respect of the Entail Sites Act) does not count towards the prescriptive period. Its effect is that, if a right lies unclaimed for five years after the event which led to its becoming due no claim can be made under section 77(1) or 78(1). See the note on section 17 for prescription in general.

Section 80 – Repeal of Reversion Act 1469

296. This section repeals the Reversion Act 1469. This Act, together with the Registration Act 1617 meant that reversions run with the land provided that they have been registered under the 1617 Act. Any rights of reversion which still survive are preserved by subsection (2).
PART 8 – POWERS OF THE LANDS TRIBUNAL

Section 81 – Powers of Lands Tribunal as respects title conditions

297. Part 8 introduces a revised jurisdiction for the Lands Tribunal in relation to the discharge of real burdens, servitudes, and other title conditions. The Lands Tribunal is responsible for hearing applications for the variation or discharge of title conditions. Its powers to discharge are currently set out in the Conveyancing and Feudal Reform (Scotland) Act 1970. Section 81 of the Bill restates these powers and makes some additions or alterations to them. The main changes to the existing law are to allow the Tribunal to determine the validity of a burden, and to extend its jurisdiction so that it can deal with the new termination procedures in the Bill. It replaces sections 1 and 2 of the 1970 Act (which are repealed by schedule 14 of the Bill). Subsections (1) to (3) of section 81 set out the revised jurisdiction of the Lands Tribunal.

298. Subsection (1) confers three separate jurisdictions on the Lands Tribunal, only the first of which exists under the current law. Under paragraph (a)(i) the Tribunal can discharge a real burden, servitude, or other title condition. Under paragraph (a)(ii), it can pronounce on the validity and enforceability or interpretation of a real burden (only). Under paragraphs (b) and (c), it can deal with applications to renew or preserve a right to enforce a burden, following intimation of a proposal under (a) section 19 to execute and register a notice of termination, and (b) section 96(4) to register a conveyance or (c) sections 32 or 34 to register a discharge under sections 32 or 34.

299. Paragraph (a)(i) of subsection (1) permits the Tribunal to rule in favour of a burdened proprietor (or anyone else against whom the burden is enforceable) who applies for the discharge of a title condition in relation to the burdened property. The term ‘discharge’ includes partial discharge and so carries the same sense as ‘vary or discharge’ under the present legislation (section 1(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970). An example of partial discharge would be where a prohibition against building in the back garden was waived in respect of constructing a garage. The meanings of ‘benefited property’, ‘burdened property’, and ‘title condition’ are given in section 110(1). Paragraph (a)(ii), which allows the Tribunal to rule on the validity, applicability, enforceability or construction of a title condition is qualified by subsection (9).

300. Paragraph (b) permits the Tribunal to give effect to an application for renewal of a burden which is threatened by either the ‘sunset rule’ termination procedure or by extinction under section 96(1). Paragraph (c) permits the Tribunal to give effect to an application to preserve a right to enforce a burden under threat by a discharge granted under sections 32 and 34.

301. An application under paragraph (a) may be brought by anyone against whom a title condition is enforceable (for which see section 9). By contrast, an application under paragraph (b) or (c) may be brought only by an owner of the benefited property (and so not by those holding subsidiary enforcement rights under section 8(2)(a) and (b)). ‘An’ owner includes individual pro indiviso owners. The effect of a discharge or renewal is confined to the particular property in respect of which the application was brought.
302. **Subsection (2)** excludes certain title conditions of a minor nature. These are currently excluded from the jurisdiction of the Tribunal by the 1970 Act. These are specified in full in schedule 10 and (in brief) include obligations relating to minerals; obligations created for naval, military or air force purposes; obligations created or imposed for civil aviation purposes or in connection with the use of land as an aerodrome; obligations created in relation to a lease of an agricultural holding, a holding within the meaning of the Small Landholders (Scotland) Acts 1886 to 1931, or a croft.

303. **Subsection (3)** imposes time limits in respect of applications for renewal or preservation.

304. Subsections (4) to (8) allow the Tribunal to pronounce certain ancillary orders. The provisions are based on section 1(4) and (5) of the 1970 Act, and incorporate five minor changes.

305. **Subsections (4) and (5)** concern compensation for discharge. Only the owner of the benefited property or holder of the condition is eligible for compensation, and not those holding subsidiary enforcement rights. The grounds on which compensation may be awarded are set out in subsection (5) and are the same as under the current legislation. **Subsection (7)** ensures that compensation can be awarded only if the person who is to pay agrees; but if he does not agree the Tribunal may decide not to grant the discharge. Compensation cannot usually be awarded if the application for discharge is unopposed (section 88(1)).

306. **Subsection (6)** concerns the imposition of replacement title conditions. There is no requirement that the replacement condition be of the same type as the condition which is being discharged. **Subsection (8)** requires the consent of the owner of the burdened property. If consent is not given, the Tribunal may decide not to grant the discharge. Replacement conditions cannot be imposed if the application for discharge is unopposed (section 88(1)).

307. Applications under paragraph (a)(ii) of subsection (1) (for a ruling on validity etc) will often be accompanied by applications under paragraph (a)(i) (for discharge). Where they are not, the matter could as well be disposed of by the ordinary courts, and the Tribunal is given a discretion, by **subsection (9)**, to decline jurisdiction.

**Section 82 – Special provision as to variation or discharge of community burdens**

308. **Section 82** of the Bill allows the owners of 25% of the units in a community to apply to the Lands Tribunal to vary or discharge a community burden or the community burdens as they reflect the whole community. The special jurisdiction conferred on the Tribunal allows it to vary or discharge community burdens as they affect all or part of a community. The meaning of ‘community burdens’ is given in section 24, and of ‘unit’ in section 110(1). By contrast with the jurisdiction under section 81(1)(a)(i), the Tribunal is empowered to ‘vary’ burdens, thus allowing the imposition of new obligations (section 110(1)).

309. **Subsection (3)** enables the Tribunal to award compensation, on the same basis as under section 81.
Section 83 – Early application for discharge: restrictive provisions

310. This section allows parties to agree to a moratorium of up to five years on Lands Tribunal applications. This would typically involve the constitutive deed stipulating a period of at most 5 years in which no application to the Tribunal could be brought to vary or discharge a title condition. It replaces the fixed two year period contained in the current legislation (Conveyancing and Feudal Reform (Scotland) Act 1970 section 2(5)).

Section 84 – Notification of application

311. Once an application has been received, the Lands Tribunal must notify interested parties. Section 84 sets out the list of those who are to be notified and the means by which notification should be given. The meaning of ‘send’ is given in section 112. Section 85 prescribes the content of the notice.

312. Subsection (1) sets out the list of those who are to be notified. Paragraph (a) deals with applications to discharge or establish the validity of a burden under section 81(1)(a) and applications by the owners of 25% of the units in a community under section 82. In these cases, the owner of the burdened property, and if there is one, the owner of the benefited property, must receive notification. Where the burden is a personal burden, the holder of the burden must be notified. Paragraph (b) provides that in an application under section 81(1)(b) to renew a burden threatened by the sunset rule, the owner of the burdened property and the terminator or acquiring authority, as the case may be should be notified. There is no need to notify other benefited proprietors (they should have already received notification under the termination procedure).

313. Usually notice must be sent individually, but this requirement is waived in the cases mentioned in subsection (2), which provides that notification can be given by advertisement or any other method the Tribunal thinks appropriate. These cases are where the relevant person cannot by reasonable enquiry be identified, appears to lack interest to enforce, or the Tribunal feels that individual notification is impracticable.

314. As a general rule, notification is restricted to owners and does not extend to those holding subsidiary enforcement rights (for which see section 8(2)(a) and (b)). However, subsection (3) adds a discretion to notify others.

Section 85 – Content of notice

315. Whether the notice under section 84 is given individually or in some other way, it requires to contain the information set out in section 85. These requirements include a summary of the application, the date for representations to be made by, the fee and, if appropriate, that if unopposed the application may be granted without further inquiry. Where the Tribunal is giving written notice, such notice should in terms of paragraph (b), give the names and addresses of the other parties who are receiving that notice so that, if desired, they can join forces to make representations. The requirement to state in the notice what fee should accompany any representations (sub-paragraph (iii)) is new. Sub-paragraph (iv) refers to section 88.
Section 86 – Persons entitled to make representations

316. The class of those entitled to make representations, set out in section 86, is wider than the class of those to whom notice must be given under section 84. So far as real burdens are concerned, section 86 should be read together with sections 8(2) and (4), 9, 10 and 39 (which describe those with rights and liabilities). In principle those entitled to make representations should be any person with title to enforce the title condition or against whom the condition could be enforced. Depending on the circumstances, this could include owners who have yet to register their title, tenants, liferenters, pre-emption holders, heritable creditors in possession, and non-entitled spouses under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

Section 87 – Representations

317. Section 87 explains how representations are to be made. In general, representations must be made within the 21 day (or other) period specified in the Tribunal’s notice (section 85(a)(ii)). Representations are ‘made’ by being sent with the requisite fee (subsection (2)); and a document, if sent by post or electronic means, is treated as sent on the day of posting or transmission (section 112(3)). Nonetheless the Tribunal has a discretion — as it has at present — to accept late representations (subsection (3)). Representations must be made in writing and an ordinary letter is sufficient.

Section 88 – Granting unopposed application for discharge or renewal of real burden

318. Under the existing law, all applications must be considered on their merits, whether opposed or not. Section 88 provides an automatic discharge procedure for certain applications to the Lands Tribunal if not opposed. Unopposed applications for the discharge, renewal or preservation of certain real burdens (only) are to be granted without further inquiry. The Tribunal will retain a role in receiving the application, notifying the appropriate owners, checking that it had been properly made, checking that it does not relate to an excepted type of burden such as are described in subsection (2) and granting the appropriate order discharging the burden. It is not competent to award compensation in such a case or to impose a substitute real burden.

319. Under the current law, the Tribunal can only grant an order to vary or discharge a burden if it is satisfied that the statutory grounds are satisfied, even if an application is unopposed. Subsection (1) provides that if an application is not opposed and does not relate to an excepted type of burden, the Tribunal must grant it, and makes clear that no ancillary orders under section 81(4)(a) or (6) (for compensation or a replacement title condition) may be made where an application for discharge is unopposed. An application is ‘duly made’ if it complies with section 81 (or section 82). The reference in paragraph (b) to a renewal is to a renewal application under the sunset rule, an application under section 81(1)(b)(i) or in response to notification of a proposal to register as section 96 conveyance (an application under section 81(1)(b)(ii)).

320. Subsection (2) excepts facility and service burdens (defined in section 110). Subsection (2) also excepts an application made under section 82 (i.e. by the owners of 25% or more of the units in a community) if that application relates to a burden imposed on a sheltered housing development.
321. Subsection (3) explains what is meant by ‘unopposed’. Representations must comply with section 87. Only representations by owners of benefited properties or holders of a personal burden would be treated as opposition to an application for discharge. Only representations by the terminator or the acquiring authority would be treated as opposition to an application for renewal and only representations by the person proposing to register a discharge under sections 32 or 34 would be treated as opposition to an application for preservation. A representation accepted late under section 87(3) would qualify as opposition. An application would count as unopposed if representations were subsequently withdrawn.

322. Expenses, for the most part, are dealt with in section 92. The purpose of subsection (4) is to allow the Tribunal to award expenses against a terminator or person seeking to register a discharge under sections 32 or 34 or conveyance under section 96 who does not oppose an application for renewal or preservation made under section 81(1)(b) or (c). Such a person is not a party to the application, but their actions have resulted in the benefited proprietor making the application for renewal. The subsection operates to stop such a person avoiding an award of expenses by failing to become a party to the application: the Tribunal will have a discretion to award expenses against them.

Section 89 – Granting any other application for variation, discharge, renewal or preservation of title condition

323. Apart from certain categories of unopposed application (section 88), the Tribunal must consider applications for variation, discharge, preservation or renewal on their merits. Section 89 imposes a general test of reasonableness. Paragraph (a) provides that in the case of most applications the Tribunal should consider the factors set out in section 90 and paragraph (b) provides that where the application relates to an application to preserve a right to enforce a burden in the face of a proposal to register a discharge under sections 33(3) or 36(1) the Tribunal are to consider the factors set out in section 89(b) rather than section 90.

Section 90 – Factors to which the Lands Tribunal are to have regard in determining applications etc.

324. In considering the reasonableness of an application in terms of section 89, the Tribunal must have regard to the factors set out in section 90. This is an innovation on the previous law where the grounds for a ruling by the Tribunal were distinct and one ground could be considered in isolation. Section 90 amends the grounds used under the Conveyancing and Feudal Reform (Scotland) Act 1970 and treats them as a series of indicators as to whether or not an application should be granted. There is a unified test of reasonableness which would be assessed by reference to a number of specific factors. The Tribunal will evaluate all of the relevant factors to determine whether it is reasonable to discharge, vary, preserve or renew a title condition. Not all factors will be relevant to every application. Nor — see factor (g) — are they intended to be exhaustive.

325. Factor (a) focuses on change in circumstances. The next three factors compare the benefit conferred (factor (b)) with the burden imposed (factors (c) and (d)). Factor (e) considers age, and factor (f) planning permission and other regulatory consent.
Section 91 – Referral to Lands Tribunal of notice dispute

326. This section gives the Lands Tribunal jurisdiction to resolve disputes in relation to notices which may be served under section 46 (Preservation) and section 71 (Negative servitudes to become real burdens). The Tribunal will therefore be able to adjudicate in circumstances where it is desired to preserve rights to enforce burdens using these provisions. The Tribunal will be able to make an order discharging or restricting the effect of a disputed notice.

Section 92 – Expenses

327. This section reaffirms the rule that the Lands Tribunal has a discretion as to expenses, but directs the Tribunal to have some regard to the principle that expenses follow success (i.e. that the successful party should not bear the expenses).

Section 93 – Taking effect of orders of Lands Tribunal etc.

328. Once a Tribunal order has taken effect (other than an order under section 81(1)(a)(ii) in relation to validity etc), the order may be registered. It is only on registration that the title condition is affected in the manner provided for in the order. An order declaring whether a condition is valid under section 81(1)(a)(ii) is not registrable.

329. Section 81 permits the Lands Tribunal to vary or discharge a ‘purported title condition’ so that it will be possible for an applicant to remove an invalid burden. This enables the Tribunal to discharge an obligation without first having to determine whether or not it is a valid real burden. If a burden was not valid (i.e. it is a purported burden) it could still be valid and enforceable as a contract. The contractual relationship would only cease when the property changed hands. Subsection (3) makes clear that a discharge by the Tribunal of a purported real burden has no effect as regards any incidental contractual liability even if the basis for the contractual liability is not set out in any other document.

PART 9 – MISCELLANEOUS

Section 94 – Alterations to Land Register consequential upon registering certain deeds

330. This section introduces Part 9, which is concerned with a number of miscellaneous topics. Section 94 extends a power which is already conferred by section 5(1) of the Land Registration (Scotland) Act 1979.

331. Section 5(1) of the 1979 Act empowers the Keeper to make such consequential amendments in the Land Register as are necessary when carrying out a land registration process. This means that where a burden is discharged or varied, the Keeper may alter the title sheet of a benefited property to indicate that the enforcement rights have changed. The 1979 Act only allows the Keeper to do this where both the burdened and benefited property are on the Land Register (and each, as a consequence, has a title sheet). The effect of subsection (1) is to apply the same rule to the case where the initial registration process is in the Register of Sasines. In other words, the Keeper may now make consequential changes to the title sheet of a benefited property when burdens that were in its favour are discharged or varied, regardless of whether the burdened property is on the Land Register or the Register of Sasines. If the benefited property
were also on the Register of Sasines, then no consequential amendments could be made, as there would be no title sheet to amend.

332. For the purposes of the present Bill, this power to make consequential amendments is required only in the two circumstances set out in subsection (2). The first concerns, mainly, deeds and other documents which vary or extinguish burdens (the reference in paragraph (a) to ‘renews or imposes’ refers back to section 93(2)). Under the Bill such deeds require to be registered against the burdened property alone. But if the burden also appears on the title sheet of the benefited property, the Keeper might wish to make a corresponding amendment there. As indicated in the preceding paragraph, section 94 allows the Keeper to do so. The second situation concerns division of the benefited or burdened property. If, as sometimes, division affects the distribution of rights or, as the case might be, liabilities in relation to real burdens (for which see sections 12 and 13), the Keeper might wish to note the change on the title sheet of property other than the one which is being conveyed.

Section 95 – Extinction of real burdens and servitudes on compulsory acquisition of land

333. This is the first of a group of provisions (sections 95 to 98) which are concerned with the effect of compulsory purchase on real burdens and servitudes. Section 95 deals with the effect of a compulsory purchase order on real burdens and servitudes affecting the land acquired. Section 96 is concerned with the effect of an acquisition by agreement.

334. The effect of compulsory purchase on real burdens and servitudes is disputed under the current law. Section 95 provides a clear rule. In general (subsection (1)), all real burdens and servitudes are extinguished on registration of the conveyance (defined in subsection (4)). This applies to any conveyance which is registered on or after the appointed day, regardless of the date of the compulsory purchase order but not to a conveyance registered before the appointed day (section 107(9)).

335. Section 95 will only apply to compulsory acquisition authorised by a compulsory purchase order. A “compulsory purchase order” is defined by section 1(1) of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947.

336. Subsections (1) and (2) together allow the acquiring authority to disapply the extinctive effect of section 95(1) and to save or vary the burdens. It is in terms of subsection (1) possible for this to be done either by provision in a compulsory purchase order or in the conveyance (as defined in subsection 95(5)). It is possible in terms of subsection (2) to disapply section 95(1) for certain burdens only, or for parts of the burdened property only or in respect of the rights of certain benefited proprietors to enforce the burdens.

337. It is not a necessary pre-requisite for the inclusion in the subsequent conveyance that a provision has been included in the compulsory purchase order to disapply section 95(1). The conveyance would not in terms of subsection (3), without the consent of the benefited proprietors, extinguish burdens under section 95(1) if section 95 had been disapplied in the compulsory purchase order.
338. Subsection (4) gives a wide definition of “conveyance”. A conveyance includes both the familiar “schedule A” conveyance (or “statutory conveyance”) and general vesting declaration. In addition it includes an ordinary disposition which includes a reference to the application of section 95(1), or if the conveyance follows on an acquisition by agreement a reference to the application of section 96(1) - see the definition of conveyance in section 96(10). The effect of paragraph (a)(i) is that it will cease to be necessary to use a “statutory conveyance”, though such use will remain competent in order to extinguish real burdens. However, such a disposition etc is not in other respects the equivalent of a statutory conveyance.

Section 96 – Extinction of real burdens and servitudes where land acquired by agreement

339. Section 96 applies to cases of acquisition by agreement in circumstances where compulsory powers could have been used.

340. The effect of registration of a conveyance under section 96 is, unless the conveyance provides otherwise, to extinguish all burdens and servitudes.

341. Section 96(4) imposes a notification requirement upon a person acquiring land under section 96 (“the acquiring authority”).

342. A benefited proprietor is entitled to make an application for renewal to the Lands Tribunal within 21 days of the notice. The notice will in terms of subsection (6) have to state the name of the acquiring authority, describe the land being acquired, the effect of the conveyance in extinguishing real burdens imposed on that land (and any disapplication of that effect) and that the benefited proprietor can take the matter to the Lands Tribunal within 21 days.

343. The notice given by the acquiring authority triggers a 21 day period in which the benefited proprietor could apply to the Lands Tribunal for renewal of the burden.

344. The registration of the conveyance alone would not have the effect of extinguishing the burdens. For the conveyance to extinguish the burdens it would also be necessary to register a certificate from the Tribunal. The certificate would be received following an application made by the acquiring authority to the Tribunal.

345. The certificate would state, as with sections 22 and 23, that no objection had been timeously received or that all such objections had been withdrawn or that objections only related to certain burdens or were only made by certain benefited proprietors.

346. It would be possible to register a conveyance notwithstanding that no certificate has been obtained from the Tribunal. The lack of a certificate would not prevent registration of the conveyance but only the extinguishment of the real burdens by the conveyance. It is not necessary to give notice before registering a conveyance without a relevant certificate. Subsection (4) only applies where registration is in accordance with section 96(1)(b), i.e. is registration of a conveyance with a certificate.
347. Burdens would be extinguished, as with sections 22 and 23, only in accordance with the terms of the certificate obtained from the Tribunal.

348. The certificate is a separate document obtained from the Lands Tribunal upon application. There is a prescribed form of application for a certificate in schedule 11.

349. To extinguish real burdens and servitude under section 96(1) the conveyance must be registered along with a relevant certificate (annexed to the conveyance). If the conveyance had already been registered then it would be possible to re-register the conveyance with a certificate and as with section 23(2) it would be possible to re-register the conveyance again with a further certificate. The burdens are extinguished from the date on which the conveyance with the annexed certificate is registered.

Section 97 – Amendment of Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947

350. This section extends the notification requirements under paragraph 3(b) of the First Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. The effect of the amendment is to impose a duty on an acquiring authority, in the case of a compulsory purchase order, to notify a benefited proprietor or the holder of a personal burden that a compulsory purchase order has been made and is about to be submitted for confirmation.

351. Notification to benefited proprietors is only be required to the extent that the compulsory purchase order could have the effect of extinguishing real burdens imposed on the land to be acquired. If section 95(1) were disapplied there would be no requirement to notify benefited proprietors. A benefited proprietor or holder of a personal burden who objects will be treated as a “statutory objector” and will be entitled to be heard, usually, at a public local inquiry.

Section 98 – Amendment of Forestry Act 1967

352. Section 98 is concerned with the Forestry Act 1967. This Act confers powers of compulsory acquisition exercisable by means of a compulsory purchase order by the Scottish Ministers. The 1967 Act does not incorporate the compulsory purchase procedure of the 1947 Act but rather provides for its own procedure in Schedule 5. The amendments in section 98 will bring Schedule 5 to the 1967 Act in line with the 1947 Act. The amendment reflects the changes made by section 97 in relation to paragraph 3 of Schedule 1 to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947.

353. The effect of the amendment inserted by subsection (2) is to impose a duty on the Scottish Ministers when making a compulsory purchase order to notify a benefited proprietor or the holder of a personal burden that a compulsory purchase order has been made and is about to be submitted for confirmation.

354. Paragraph 3(2) of Schedule 5 to the 1967 Act imposes a duty on the confirming authority to cause a local inquiry to be held. Subsection (3) ensures that this will not apply where the acquiring authority gives an undertaking in the form of paragraph 6B as inserted by subsection
(4). Similarly, the special parliamentary procedure requirement contained in paragraph 4 of Schedule 5 will not apply when an undertaking is given.

355. The procedure in paragraphs 3 to 6 of schedule 5 to the 1967 Act is different from the procedure in paragraph 4 of schedule 1 of the 1947 Act. Subsection (4) provides the procedure to be followed when objections to a compulsory purchase order are received in the context of section 98 in terms of form, content and procedure (including the registering, effect and operation of the undertaking and the requesting of information from objectors about benefited property). These are the equivalent to those in section 97.

Section 99 – Amendment of Conveyancing and Feudal Reform (Scotland) Act 1970

356. Section 99 amends section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 which regulates the ranking of standard securities following service of a notice by a subsequent security holder. Under the existing law, it is possible that when a later creditor gives notice under section 13, their debt will gain precedence over the possible claim to be made by the seller under a clawback agreement secured by a standard security. Typically a clawback agreement may provide that if a certain event occurs (such as planning permission for change of use) the seller will get a further financial payment. This is because the 1970 Act stipulates that security holders will only be ranked in respect of ‘advances’ made before subsequent securities. In the case of a clawback agreement, the standard security does not secure ‘advances’ but rather a future debt.

357. By replacing ‘advances’ with a wider term, ‘debt’, the amendment makes clear that section 13 applies to debts of all kinds (including, for example, clawback). The amendment takes effect on the day following Royal Assent (section 117(3)).

Section 100 – Amendment of Land Registration (Scotland) Act 1979

358. This amendment presupposes the amendment which is made to section 9 of the 1979 Act by section 3 of the 2000 Act. Both amendments come into force on the appointed day. Section 3 of the 2000 Act makes some technical amendments designed to ensure that obsolete material left on the Land Register as a result of feudal abolition will be safely eliminated over time.

359. The effect of section 100 is substantially the same as that of section 3 of the 2000 Act, but in a different context. It allows the Keeper to rectify the Land Register to take account of the listed provisions, and also in respect of things done (such as the registration of notices) in response to those provisions. No indemnity is then payable. The listed provisions are concerned only with transitional matters (such as implied rights of enforcement).

Section 101 – Amendment of Enterprise and New Towns (Scotland) Act 1990

360. The effect of this amendment is to remove a possible repugnancy between sections 8(6) and 32 of the 1990 Act. Section 32 allows Scottish Enterprise or Highlands and Islands Enterprise to enter into an agreement analogous to a real burden that will run with the land and bind it. There was a measure of uncertainty whether the agreement could be made with merely ‘a person having such interest as to bind the land’ (in practice, the owner) or whether all those
with such interest had to agree (e.g. including heritable creditors). The amendment makes it clear that the first position is to apply: that it can be with any person with an interest in the land. The amendment takes effect on the day after Royal Assent (section 117(3)). The new version of section 32(1) is based on section 75 of the Town and Country Planning (Scotland) Act 1997.

**Section 102 – Amendment of Abolition of Feudal Tenure etc. (Scotland) Act 2000**

361. *Section 102* introduces 4 new sections to be inserted into the Abolition of Feudal Tenure etc. (Scotland) Act 2000. The underlying policy of the 2000 Act was to allow feudal superiors the opportunity to save valuable rights. This was generally achieved by requiring the superior to register a notice in the property register prior to the appointed day. These new sections add to mechanisms already in the 2000 Act to allow superiors to preserve certain feudal rights as personal real burdens after the appointed day (i.e. as burdens without a benefited property). In the case of sporting rights (section 65A) existing rights will be converted into a separate tenement in land.

362. *Subsection (2)* introduces the new *section 18A* into the 2000 Act. This is concerned with personal pre-emption burdens and personal redemption burdens. The explanatory notes on Part 7 of the Bill offer an explanation of rights of pre-emption and redemption. Section 18 of the 2000 Act allowed a superior to preserve a right of pre-emption or redemption by registering a notice that nominated specific land owned by the superior as a new benefited property. Section 18A offers an alternative route for superiors to preserve rights to pre-emptions and reversions. It will allow superiors to convert all rights of pre-emption or redemption which they could enforce prior to the appointed day into personal burdens by the registration of a notice. This would avoid the requirement in section 18 of having to nominate land owned by the superior as the benefited property.

363. Subsection (1) of section 18A makes it clear that the superior may choose to preserve their right to a pre-emption or redemption by either section 18 or 18A. A superior who owned land and wished to fix the right of enforcement to that land (rather than risk the ownership of the right and the land becoming separated at some point in the future) might wish to use the section 18 notice procedure. The subsection allows a superior to register a notice in the form contained in schedule 5A of the 2000 Act (inserted by schedule 12 of the Bill) to convert a right of pre-emption or redemption into a personal pre-emption or redemption burden. The right of pre-emption or redemption must be valid before the appointed day in order to be converted. Registration must occur before the appointed day.

364. *Subsection (2)* provides for the content of the notice of conversion.

365. *Subsection (3)* adopts the requirement in section 18(4) of the 2000 Act for the superior to swear or affirm before a notary public that to the best of their knowledge all of the information contained in the notice is true. The sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true.

366. *Subsection (4)* adopts the provisions in section 18(5) of the 2000 Act to allow a legal representative of the superior to sign on their behalf if by reason of legal disability or incapacity they are unable to swear or affirm for the purposes of subsection (3). Similarly, the subsection
also adopts the provision of the 2000 Act allowing an authorised person to sign on behalf of a superior who is not an individual (i.e. a company).

367. Subsection (5) stipulates that if the requirements of subsections (1) to (3) are complied with and the burden is enforceable by the superior immediately prior to the appointed day, the burden shall be converted into a personal pre-emption burden or personal redemption burden on the appointed day. The *dominium utile* is the burdened property in respect of the obligation.

368. Subsection (7) provides that the new personal burdens should be capable of assignation or transfer. The assignation to be effective would have to be registered. It should be noted that it will not be possible after the appointed day to create a right of pre-emption as a personal burden. New pre-emption rights will require a benefited property. Section 3(5) of the Bill prevents a right of redemption being created even as a ordinary real burden after the appointed day.

369. Subsection (8) provides for deduction of title where the holder of the burden does not have completed title (i.e. it is not registered). No deduction of title would be required once the burden was registered in the Land Register. ‘Midcouple’ is defined in section 110.

370. Subsection (9) makes section 18A subject to sections 41 and 42 of the 2000 Act on registration of a notice. Section 41 requires the superior to give notice to the burdened proprietor of the attempt to reallot the burden. Section 42 stipulates that where a superior has a choice of several of the procedures under the 2000 Act that may be used to save a burden, the various courses open to the superior are mutually exclusive. A choice must be made as to which mechanism would be used though this would not necessarily be final. A different option could be pursued later, before feudal abolition, provided the appropriate steps are taken to deal with the notice or agreement first sent. In other words it would not be possible to save a pre-emption as a personal burden under section 18A and then save it again under section 18.


372. Subsection (1) of section 27A enables superiors who are not prescribed as conservation bodies to transfer the right to enforce a burden which meets the criteria for conservation burdens in section 27 of the 2000 Act to a conservation body or the Scottish Ministers. The definition of conservation burdens in section 27(2) of the 2000 Act is repeated in section 37(1) of this Bill. The superior would have to register a notice in the form contained in schedule 5A of the 2000 Act (inserted by schedule 12 of the Bill).

373. Subsection (2) requires the consent of the conservation body (or, where the nominee is the Scottish Ministers, the consent of the Scottish Ministers) that is being nominated before the nomination can become effective.

374. Subsection (3) states that the notice must comply with section 27(3) of the 2000 Act. This requires the notice to set out the title of the superior; describe the land subject to the real burden (or any part of that land); the terms of the real burden; and any counter-obligation to the real burden enforceable against the superior.
375. Subsection (4) incorporates the terms of sections 41 and 42 of the 2000 Act on registration of a notice.

376. Subsection (4) of section 102 provides for the new section 28A of the 2000 Act. This section is similar to section 43 of the Bill and section 28(1) of the 2000 Act. It ensures that the conservation body being nominated under section 27A will have presumed interest to enforce the re-allotted burden. The section requires that the burden being transferred by the superior would have been enforceable by the superior immediately before the appointed day.

377. Subsection (5) of section 102 provides for the new section 65A of the 2000 Act. This section is concerned with sporting rights. These are fishing and game rights that the superior has reserved when feuing the land to the vassal. This section permits sporting rights which are enforceable by a superior prior to the appointed day to be converted into separate tenements in land by the registration of a notice.

378. Subsection (1) of section 65A allows a superior to register a notice in the form contained in schedule 11A of the 2000 Act (inserted by schedule 12 of the Bill) to convert sporting rights enforceable by a superior into a separate tenement in land. This tenement is not the same as a real burden in favour of a benefited property, or even a personal burden such as a conservation burden. As a separate tenement it would be regarded as an independent, self-standing property right. The sporting right must be valid before the appointed day in order to be converted. Registration must occur before the appointed day.

379. Subsection (2) provides for the content of the notice of conversion.

380. Subsection (3) adopts the requirement in section 18(4) of the 2000 Act for the superior to swear or affirm before a notary public that to the best of their knowledge all of the information contained in the notice is true. The sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true.

381. Subsection (4) adopts the provisions in section 18(5) of the 2000 Act to allow a legal representative of the superior to sign on their behalf if by reason of legal disability or incapacity they are unable to swear or affirm for the purposes of subsection (3). Similarly, the subsection also adopts the provision of the 2000 Act allowing an authorised person to sign on behalf of a superior who is not an individual (i.e. a company).

382. Subsection (5) stipulates that if the requirements of subsections (1) to (3) are complied with and the sporting right is enforceable by the superior immediately prior to the appointed day, then it shall be converted into a tenement in land on the appointed day. The dominium directum is the superiority interest of the superior.

383. Subsection (6) makes clear that nothing in the new provisions confers an exclusive right to sporting rights on the former superior. The section will not give a former superior an improved right to the one that existed before feudal abolition. A non-exclusive right would remain non-exclusive.
384. Subsection (7) treats each part of the \textit{dominium utile} that is in different ownership as a separate unit. For example, where the original \textit{dominium utile} had been split into 5 different units, 5 separate notices would be required and 5 separate tenements of sporting rights would be created.

385. Subsection (8) ensures that any counter-obligation that the superior was obliged to perform prior to the appointed day as a consequence of the sporting right shall continue. The reference to section 47 of the 2000 Act entails that on the extinction of a sporting right, any counter-obligation which is a counterpart of the right is also extinguished.

386. Subsection (9) provides a simple definition of sporting rights, superseding that in the definition of “real burden” in section 49 of the 2000 Act, which is repealed by schedule 14.

387. Subsection (10) makes section 65A subject to section 41 of the 2000 Act on registration of a notice. This will require the superior to give notice to the owner of the servient tenement of the attempt to reallocate the sporting right.

388. Subsection (11) applies subsections (1) and (2)(a) of section 43 of the 2000 Act to a notice made under section 65A. Section 43(1) provides that the Keeper of the Registers need not determine whether the superior has notified the owner of the dominium utile as required by section 41(3). Subsection (2)(a) of section 43 states that the Keeper will not be required to determine if the Superior had the ability to enforce the right in question. Subsection (5) of section 65A requires the sporting right to be enforceable by the superior immediately before the appointed day. The reference to section 43(3)(a) of the 2000 Act means that the Keeper need not make this determination.

389. As the 2000 Act will no longer treat sporting rights as real burdens they will not be extinguished by section 17 but rather by section 54 if no notice is registered before the appointed day. The adoption of section 46(1), (3) and (4) of the 2000 Act by subsection 12 means that the Keeper need not remove sporting rights extinguished by section 54 from the register unless there is an application for registration or rectification or the Keeper is ordered to remove it by the Lands Tribunal or a court. The Keeper also cannot remove a sporting right which is subject to proceedings in a court or the Lands Tribunal.

390. Subsection (6) of section 102 introduces some minor amendments to the 2000 Act, detailed in schedule 12. The amendments take effect on Royal Assent (section 117(3)), and hence before the relevant provisions of the 2000 Act come into force.

Section 103 – Further provision as respects notices of preservation or of converted servitude

391. This section contains some supplementary rules in relation to notices of preservation (section 46) and of converted servitude (section 71).

392. Subsections (2) and (3) are based on section 41(3) and (4) of the 2000 Act. They impose a duty, in the normal case, to send a copy of the notice (and explanatory note) to the owner of the burdened property. Normal service will be by post and must precede registration. The notice
must contain a statement about service, or an explanation as to why service was not reasonably practicable. Further provisions about sending are contained in section 112.

393. **Subsection (4)** allows all real burdens or servitudes contained in any particular constitutive deed to be included in a single notice.

394. **Subsection (5)** is based on section 43(1) of the 2000 Act and relieves the Keeper from having to verify that the notice was duly sent to the owner of the burdened property.

395. A notice which is incomplete or inaccurate may be rejected by the Keeper. Such a rejection might be challenged in the Lands Tribunal or the courts. **Subsections (6) to (8)** are based on section 45 of the 2000 Act. They allow registration outwith the ten year period in circumstances where a notice has been wrongly rejected by the Keeper. The notice would have to be registered within two months of the determination that the notice was in actual fact registrable.

**Section 104 – Benefited property outwith Scotland**

396. This section reaffirms the common law rule that a benefited property (but not a burdened property) can be outside Scotland. It also makes clear that, in such a case, there is to be no requirement of registration against the benefited property (for example, under sections 4(5), 46(3) and 71(6)).

**Section 105 – Pecuniary real burdens**

397. A pecuniary real burden is a heritable security constituted by reservation in a conveyance. Where property was being conveyed, a right in security in respect of an existing obligation could be reserved. It is unclear whether it is still competent to create pecuniary real burdens. **Section 105** removes the doubt by disallowing new pecuniary burdens. The provision comes into force on Royal Assent (section 117(3)).

**Section 106 – Common interest**

398. Common interest comprises rights and obligations arising by operation of law between owners of certain properties typically flats in a tenement. The right of common interest bears a resemblance to real burdens as it runs with the land. Normally common interest arises simply by force of law: it is implied and it is open to question whether such a right can be created by express agreement. If express creation were possible, common interest could be used as a substitute for real burdens and hence as a means of avoiding the provisions of this Bill. Accordingly, **section 106** makes clear that common interest cannot be expressly created. Section 106 comes into force on Royal Assent (section 117(3)).
PART 10 – SAVINGS, TRANSITIONAL AND GENERAL

Section 107 – Savings and transitional provisions etc.

399. The savings and transitional provisions contained in this section have, for the most part, already been discussed in the appropriate context. Only a few need be mentioned here.

400. As subsection (1) acknowledges, the division between the old law and the new is, usually, the time of registration of the deed in question. Burdens discharged, varied or created by deeds registered before the appointed day are governed by the old law. Deeds registered on or after the appointed day are governed by the provisions of the Bill. Section 4(1), for example, provides that a real burden is created ‘by duly registering’ the constitutive deed. Similarly, section 15(1) provides that a burden is discharged ‘by registering’ a deed of discharge. Sometimes, as with the creation of real burdens, the new law imposes more exacting standards than the old; but, as subsection (1) makes clear, the new standards are to apply only prospectively.

401. The Bill, following the common law, requires the use of a deed for a number of juridical acts in relation to real burdens — most notably creation, variation and discharge. Strictly, section 3(1) of the 1979 Act does not: in other words, if a real burden is entered on (or deleted from) the Land Register, the entry or deletion is legally effective under that provision notwithstanding the absence of a valid underlying deed. The Register would then be inaccurate, however, and vulnerable to rectification under section 9 of the Act. The purpose of subsection (2) is to preserve this rule of land registration.

402. Section 10 provides for circumstances in which a former owner will retain liability in respect of an obligation due when that person ceased to be owner. Subsection (5) disapplies this new rule where the transfer of ownership took place before the appointed day.

403. Subsection (6) provides that a breach of a real burden occurring before the appointed day cannot be subject to the new provisions for acquiescence made by section 16.

404. By virtue of subsection (7), contractual liability will continue to exist in parallel to the terms of a real burden created in a deed registered before the appointed day. However, community burdens are excepted from this: any incidental contractual liability that duplicates a community burden will cease, regardless of the date of creation.

Section 108 – Requirement for dual registration

405. This section prevents a deed which requires, under the Bill, to be registered against both properties, from being registered against one property only. The provision is aimed particularly at dispositions containing new real burdens. If the disponee were able to register against the property being conveyed only (as under current practice), the effect would be to transfer the property free of the burdens.
Section 109 – Crown application

406. This section makes it clear that the Bill applies to all land owned by the Crown in Scotland, including property belonging to Government Departments as well as the private estates of Her Majesty and His Royal Highness The Prince of Wales.

Section 110 – Interpretation

407. Only a small number of the definitions require explanation here.

- **appointed day.** This is the date on which most of the 2000 Act comes into force, and on which the feudal system is abolished. Section 117(2) provides that some of the Bill will also come into force on this day. The day is to be fixed by the Scottish Ministers by order.

- **facility burden.** This definition substantially replicates the (unnamed) definition in section 23(1), (3) and (4) of the 2000 Act (which is repealed by schedule 14 of this Bill). The purpose of subsection (2) is to exclude obligations, typically in relation to roads and sewers, which have been assumed by a local authority or other public body since the maintenance of the common facility is covered already without the need to transfer the right to enforce the burden. The list of facilities in subsection (3) is intended to be illustrative and not exhaustive.

- **holder.** The words ‘has right’ import the idea that the title might not have been completed by registration. See for example section 39.

- **land.** The definition includes separate tenements such as minerals and salmon fishings. The exclusion of *dominium directum* (feudal superiority) is to prevent any argument that, for example, a superiority could be the subject of a notice of preservation under section 46 (All superiorities will be extinguished on the appointed day under section 2(2) of the 2000 Act).

- **maintenance.** The definition ensures that maintenance includes repairs. This does not include out and out improvement, but there is a concept of ‘betterment’ in which a facility is replaced or repaired using a more modern technique. In their Report on the Law of the Tenement (Scot Law Com No. 162), the Scottish Law Commission express the opinion that “it is maintenance of a tenement to replace lead piping with copper, or to replace Victorian pull-bells with an entryphone system.” Converting a flat roof into a pitched one might be considered to be an improvement rather than maintenance or repair.

- **manager.** The reference to a firm is made necessary by the fact that the definition of ‘person’ in schedule 2 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, SI 1999/1379 states merely that “‘person’ includes a body of persons corporate or unincorporate”.

- **personal pre-emption burden and personal redemption burden.** Rights of pre-emption or redemption which were enforceable by a superior prior to the appointed day may by the registration of a notice be converted into personal burdens (i.e. burdens without a benefited property). See the note on section 102.
These documents relate to the Title Conditions (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 6 June 2002

- **service burden.** This definition substantially replicates the (unnamed) definition in section 23(2) of the 2000 Act (which is repealed by schedule 14 of this Bill).

- **title condition.** This definition follows the substance, though not the form, of the definition of ‘land obligation’ given in section 1(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which is repealed by schedule 9 of this Bill). ‘Title condition’ is the replacement term for ‘land obligation’. Paragraphs (c) and (f) are not currently covered by the term ‘land obligation’. Paragraph (g) allows the Scottish Ministers to add to the list.

Section 111 – The expression ‘owner’

408. This section defines ‘owner’. The first half of **subsection (1)** sets out the general rule. An owner is a person who ‘has right’ to property (a term familiar from sections 3 and 4 of the Conveyancing (Scotland) Act 1924). A person ‘has right’ if he is grantee of a delivered conveyance (or equivalent). Registration is not required.

409. More than one person might be owner within this definition. If ownership is held concurrently, as with *pro indiviso* owners, this presents no particular difficulty. But the position is, or may be, different, with consecutive owners. The second half of subsection (1) deals with this problem. If two or more people acquiring rights consecutively are capable of falling within the definition, the ‘owner’ is to be the last of them (paragraph (b)) — except for the purposes of the provisions listed in paragraph (a) relating to the creation or discharge of burdens.

410. **Subsection (2)** introduces a special rule where a heritable creditor is in possession of the property. A heritable creditor in possession is to be the owner in substitution for the debtor except when burdens are being created, varied or discharged, where the heritable creditor is treated as one of the owners.

411. The effect of paragraph (a) of **subsection (3)** is to exclude heritable creditors in possession from section 55(1) (which is concerned with deduction of title).

Section 112 – Sending

412. Paragraph (a) of **subsection (1)** makes clear that it is sufficient if the thing to be sent is sent to the person’s solicitor or other agent. Paragraph (b) provides a solution where the person’s name is unknown, and excuses the sender from attempts to discover it.

413. **Subsection (2)** explains how a thing may be sent.

414. **Subsection (3)** gives the rule as to when a thing is considered to have been sent.

Section 113 – References to distance

415. This section explains how the four metre distance (see for example sections 20(3) and 31) is to be calculated. The distance is calculated on the horizontal plane. This means that all properties are treated as being on the same level. For instance in a tenement, the flats above or
below would be treated as being zero metres away, regardless of the vertical distance between each property.

416. Paragraph (a) follows the rule for neighbour notification set out in article 2(1) of the Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224 (paragraph (d) of definition of ‘neighbouring land’).

417. Paragraph (b) ensures that measurements are taken from the property itself and not from, for example, an access roadway in respect of which the property has, as a pertinent, a *pro indiviso* share. It is the ownership of pertinents not their dimensions which is to be disregarded so measurement is taken from the property *not* its pertinent. The width of the pertinent would be counted.

**Section 114 – Fees chargeable by Lands Tribunal in relation to functions under this Act**

418. This section allows Ministers to make rules as to the fees chargeable by the Tribunal under the Act.

**Section 115 – Orders, regulations and rules**

419. At various points the Bill empowers the Scottish Ministers to make orders, regulations or rules. *Section 115* explains how this is to be done.

**Section 116 – Minor and consequential amendment, repeals and power to amend forms**

420. This section deals with minor amendments and repeals. The details are set out in schedules 13 and 14.

**Section 117 – Short title and commencement**

421. *Subsection (1)* gives the short title.

422. *Subsection (2)* provides that most of the Bill is not to come into force until the appointed day, i.e. the day on which the feudal system is abolished (section 110(1)). See the explanatory note on the term ‘appointed day’ in section 110.

423. The provisions set out in *subsections (3) and (4)* come into force on the day after Royal Assent. Part 3 deals with conservation and maritime burdens.

**Schedule 1 – Form importing terms of title conditions**

424. This is the form of words referred to in section 6(2) for importing title conditions by reference to a deed of conditions. The deed which imports the conditions is itself the constitutive deed in terms of section 6(2).
Schedule 2 – Form of notice of termination

425. This is the statutory form of notice prescribed by section 19(1) for the termination of real burdens which are at least 100 years old. The schedule includes an explanatory note and notes for completion of the notice. See further sections 19 to 23 of the Bill on the termination procedure.

Schedule 3 – Form of affixed notice relating to termination

426. Section 20 provides 3 different mechanisms for the intimation of a ‘sunset rule’ application proceeding under section 19 of the Bill (for the termination of real burdens that are at least 100 years old). The statutory form of intimation in schedule 3 is to be used with the mechanism outlined in paragraph (b) of subsection (2). The schedule includes notes for completion of the notice.

Schedule 4 – Form of notice of proposal to register deed of variation or discharge

427. This is the statutory form of notice for where a community burden is to be varied or discharged by the owners of a majority of units under section 32 in relation to one or more burdened properties. Under section 33(2) a notice in, or as near as may be in, the form of schedule 4 must be sent to the owners of the units that have not granted the deed. The schedule includes an explanatory note and notes for completion of the notice.

Schedule 5 – Further form of notice of proposal to register deed of variation or discharge of community burden: sent version

428. This is one of the 2 statutory forms of notice for where a community burden is to be varied or discharged by a deed granted by the owners of the units adjacent to a burdened property under section 34. Under paragraph (a) of section 35(2) notice may be given in, or as near as may be in, the form of schedule 5 by sending it along with the deed to the owners of the other benefited properties in the community. The schedule includes an explanatory note and notes for completion of the notice.

Schedule 6 – Further form of notice of proposal to register deed of variation or discharge of community burden: affixed version

429. This is the second statutory form of notice for where a community burden is to be varied or discharged by a deed granted by the owners of the units adjacent to a burdened property under section 34. Under paragraph (b) of section 35(2) notice may be given in, or as near as may be in, the form of schedule 6 by a conspicuous notice affixed to each affected unit and such lamp posts as may be required by the paragraph. The schedule includes notes for completion of the notice.

Schedule 7 – Form of notice of preservation

430. This is the statutory form of notice prescribed by section 46(1) for the preservation of the status of benefited property in circumstances where that status is currently implied by common law. The schedule includes an explanatory note and notes for completion of the notice. See further sections 46 and 103 of the Bill.
These documents relate to the Title Conditions (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 6 June 2002

Schedule 8 – Form of notice of converted servitude

431. This is the statutory form of notice prescribed by section 71(4) for the preservation of certain of the negative servitudes which were converted, on the appointed day, into real burdens. The schedule includes an explanatory note and notes for completion of the notice. See further sections 71(4) to (8) and 103 of the Bill.

Schedule 9 – Form of undertaking not to exercise right of pre-emption

432. This is the statutory form of undertaking not to exercise a right of pre-emption, prescribed by section 74(1)(a). A pre-emption holder who did not wish to exercise their right to purchase could be approached to sign this undertaking. The schedule includes notes for completion of the undertaking. See further sections 73 and 74 of the Bill.

Schedule 10 – Title Conditions not subject to discharge by Lands Tribunal

433. This schedule lists those title conditions which are not subject to discharge by the Lands Tribunal under Part 8 of the Bill. The list is based on the equivalent list in schedule 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which is repealed by schedule 14 of this Bill). Paragraph 1 of that list (obligation to pay rent) has been incorporated directly into the definition of ‘title condition’ (for which see section 110(1)).

Schedule 11 – Form of application for relevant certificate

434. This schedule provides the form of certificate defined in section 96(11). The certificate is to provide for any title conditions that are not to be extinguished (or not to be extinguished in relation to a particular benefited property) where land has been acquired by agreement. The schedule includes notes for completion of the application. See further section 95 of the Bill.

Schedule 12 – Amendment of Abolition of Feudal Tenure etc. (Scotland) Act 2000

435. Schedule 12 contains amendments to the 2000 Act. The amendments come into force on the day after Royal Assent (section 117(3)).

Paragraph 2

436. Section 17(1) extinguishes superiors’ rights to enforce real burdens, subject to some savings. The amendments add further savings. Sections 18A (on personal pre-emption burdens and personal redemption burdens) and section 27A (on conservation burdens) are new sections inserted by section 102 of the Bill. Sections 48 to 51 of the Bill create new enforcement rights for existing burdens in place of the implied enforcement rights which are extinguished by section 45 of the Bill. Section 51 replaces section 23 of the 2000 Act (which is repealed by schedule 14). The saving for manager burdens is the counterpart of section 58(10).

Paragraph 3

437. Sub-paragraph (a) makes consequential reference to the new provisions inserted by section 102 of the Bill. The insertion of subsection 6A by sub-paragraphs (b) and (c) ensures that registration of a notice to reallocate a feudal burden under section 18 of the 2000 Act does not
preserve a right to enforce a manager burden. Sub-paragraph (d) excludes sporting rights from the category of rights described as “rights to enter, or otherwise make use of, property” in section 18(7)(b)(i).

Paragraph 4

438. This alters the test to be applied by the Lands Tribunal when determining whether a superior may preserve a right to enforce a feudal burden by converting it into an ordinary burden under section 20 of the 2000 Act. The test is derived from the test for interest to enforce in section 8(3) of the Bill.

Paragraph 5

439. Section 25 provides that on reallocation of a real burden the right to enforce is subject to any counter-obligation. The reference to reallocation under section 23 of the Act (to be repealed) is replaced by a reference to reallocation under section 51 of the Bill. A reference to reallocation of manager burdens is added.

Paragraph 6

440. The amendment to section 27(3)(a) is consequential on the repeal (by schedule 14 of the Bill) of section 26 of the 2000 Act and its replacement by section 37 of the Bill. Section 27A is a new section inserted by section 102 of the Bill.

Paragraph 7

441. The amendments to subsections (1), (3) and (4) are consequential to the introduction by section 102 of the Bill of new sections 18A and 29A into the 2000 Act. Section 42 of the 2000 Act provided that where a superior has a choice of several of the procedures under the 2000 Act that may be used to save a burden the various options are mutually exclusive. The new subsection (5) mirrors section 104 of the Bill and permits feudal burdens to be preserved in favour of land outwith Scotland.

Paragraph 8

442. Section 43 of the 2000 Act provides that the Keeper of the Registers does not have responsibility for determining whether the superior has complied with the notification requirements of section 41(3) or if the superior had the ability to enforce the right in question. The amendments are consequential upon the introduction of new sections 18A and 27A by section 102 of the Bill.

Paragraph 9

443. Sub-paragraph (a) alters the definition of conservation body in consequence of the repeal (by schedule 14 of the Bill) of section 26 of the 2000 Act and its replacement by section 37 of the Bill. Sub-paragraph (b) adds the new section 27A inserted by section 102 of the Bill to the scope of section 49 of the 2000 Act. Sub-paragraph (c) inserts a definition as a consequence of section 102.
Paragraph 10
444. This paragraph provides that where a holder of sporting rights has taken action to preserve them under section 65A of the 2000 Act, they will not be extinguished under section 54(1) of the 2000 Act.

Paragraph 11
445. This amendment replaces the reference in section 56 of the 2000 Act to ‘land obligation’ with a reference to ‘title condition’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 14 of the Bill. The replacement term in the Bill is ‘title condition’ (defined in section 110(1)). The change is one of name rather than of substance.

Paragraph 12
446. Section 73 of the 2000 Act makes provision for the automatic translation of certain feudal terms which might be found in deeds or enactments dating from before the appointed day but having to be applied after that date. The amendments make some minor changes to the timing of the provisions in section 73. The amendment in sub-paragraph (b)(iii) reflects the repeal of section 23 of the 2000 Act and its replacement by section 51 of the Bill (which provides for the preservation and creation of rights to enforce facility burdens).

Paragraph 13
447. The insertion of a subsection (2) into section 75 of the 2000 Act ensures that contractual obligations which were incidental to feudal burdens will only remain where the original vassal remains the owner of the property.

Paragraph 14
448. This amendment inserts a new schedule 5A into the 2000 Act containing the form of notice to prospectively convert a real burden into a personal pre-emption burden or personal redemption burden. The schedule includes an explanatory note and notes for completion of the notice. See the new section 18A of the 2000 Act as inserted by section 102 of the Bill.

Paragraph 15
449. This amendment substitutes note 1 in the notes for completion of the notice to schedule 8 to the 2000 Act (form of notice to preserve a conservation body or the Scottish Ministers’ right to a real burden).

Paragraph 16
450. This amendment inserts a new schedule 8A into the 2000 Act containing the form of notice nominating a conservation body or the Scottish Ministers to have title to enforce a real burden. The schedule includes an explanatory note and notes for completion of the notice. See the new section 27A of the 2000 Act as inserted by section 102 of the Bill.
Paragraph 17
451. This amendment inserts a new schedule 11A into the 2000 Act containing the form of notice to prospectively convert sporting rights into a tenement in land. The schedule includes an explanatory note and notes for completion of the notice. See the new section 65A of the 2000 Act as inserted by section 102 of the Bill.

Paragraph 18
452. This corrects a technical error.

Schedule 13 – Minor and consequential amendments

Registration of Leases (Scotland) Act 1857 (c.26)
453. Following the repeal of section 32 of the Conveyancing (Scotland) Act 1874 and section 17 of the Land Registration (Scotland) Act 1979 by schedule 14 of the Bill, this amendment provides an alternative mechanism for creating conditions or stipulations which may be specified in an assignation under section 3(2) of the 1857 Act and for postponing the date of effectiveness of such conditions or stipulations.

Titles to Land Consolidation (Scotland) Act 1868 (c.101)
454. This amendment ensures consistency with the amendment to section 8 of the 1868 Act made in schedule 12 paragraph 8(4)(a) of the 2000 Act.

Conveyancing (Scotland) Act 1924 (c.27)
455. Following the repeal of section 40(3) of this Act by schedule 14, this amendment to section 40(2) makes it clear that a heritable creditor can create real burdens after the appointed day by whatever methods may be competent.

Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)
456. This amendment is made necessary by (i) the repeal by schedule 14 of the Bill of sections 1 and 2 of the 1970 Act, and (ii) the consequential repeal, also by schedule 14, of schedule 12 paragraph 30(6)(d)(ii) of the 2000 Act (which replaced the definition of ‘interest in land’ in section 9 of the 1970 Act with a definition of ‘real right in land’ as defined in sections 1 and 2 of the 1970 Act). The new definition is in substance the same as that introduced by the 2000 Act. The new subsection 2B is a consequence of the new section 18A introduced by section 102 of the Bill.

Prescription and Limitation (Scotland) Act 1973 (c.52)
457. Sub-paragraph (2) amends section 1 of the 1973 Act in the version which is substituted, from the appointed day, by schedule 12 paragraph 33(2) of the 2000 Act. The purpose is to make clear that the right to a real burden cannot be acquired by positive prescription.

458. Sub-paragraph (3) replaces the reference to ‘land obligation’ with a reference to ‘title condition’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the
Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 14 of the Bill. The replacement term in the Bill is ‘title condition’ (defined in section 110(1)) the change being one of name rather than of substance.

459. Sub-paragraph (4) makes an amendment of terminology which was overlooked by paragraph 33 of schedule 12 to the 2000 Act.

Land Tenure Reform (Scotland) Act 1974 (c.38)

460. This amendment replaces the reference to ‘land obligation’ with a reference to ‘title condition’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 14 of the Bill. The replacement term in the Bill is ‘title condition’ (defined in section 110(1)). The change is one of name rather than of substance.

Land Registration (Scotland) Act 1979 (c.33)

461. The amendments in sub-paragraph (2) are consequential on the repeal, in schedule 14, of sections 17 and 18 of the 1979 Act.

462. For the most part sub-paragraph (3) repeats an amendment made prospectively by schedule 12 paragraph 39(3)(c) of the 2000 Act (which is repealed by schedule 14 of the Bill). This is necessary because the amendment is capable of relating to Part 3 of the Bill, which comes into force on the day after Royal Assent. Sub-paragraph (3) likewise comes into force on the day after Royal Assent (section 117(3)) — and not on the appointed day, as was the position under the 2000 Act. The only addition to the earlier version of the amendment is a reference to section 40(a) of the Bill. This makes clear that it is not necessary to expedite a notice of title in the case of a conservation burden which is already on the Land Register.

463. Sub-paragraph (4) amends section 12(3) of the 1979 Act to ensure that the provisions on the Keeper’s indemnity do not extend to the enforceability of sporting rights registered in the Land Register.

464. Sub-paragraph (5) repeats an amendment made prospectively by schedule 12 paragraph 39(6)(b) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which is repealed by schedule 14 of the Bill). This is necessary because the amendment is capable of relating to part 3 of the Bill, which comes into force on the day after Royal Assent. Sub-paragraph (4) likewise comes into force on the day after Royal Assent (section 117(3)) — and not on the appointed day, as was the position under the 2000 Act.

465. Sub-paragraph (6) amends section 28(1) as a consequence of the treatment of sporting rights as separate tenements under section 65A of the 2000 Act (as inserted by section 102 of the Bill). As a result, a sporting right registered in the Land Register will have its own title sheet.
Ancient Monuments and Archaeological Areas Act 1979 (c.46)

466. Section 17(7)(b), which provides that sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 are not to apply to agreements made under section 17, is repealed as (i) sections 1 and 2 of the 1970 Act are repealed by schedule 14 of the Bill, and (ii) a section 17 agreement would not fall within the successor provisions (i.e. Part 8 of the Bill) because they are not ‘title conditions’ as defined in section 110(1).

Health and Social Services and Social Security Adjudications Act 1983 (c.41)

467. Section 23(1)(b) refers to an ‘interest in land’ as defined in section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970. That definition has now been replaced by a definition of ‘real right in land’ (see schedule 13 paragraph 4 of this Bill). This amendment makes the necessary adjustment to section 23.

468. Feudal terminology is also replaced, following the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Further and Higher Education (Scotland) Act 1992 (c.37)

469. This amendment replaces the reference to ‘land obligations’ with a reference to ‘title conditions’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 14 of the Bill. The replacement term in the Bill is ‘title condition’ (defined in section 110(1)), the change being one of name rather than of substance.

Crofters (Scotland) Act 1993 (c.44)

470. This amendment to section 16(6) replaces the reference to ‘land obligations’ with a reference to ‘title conditions’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 14 of the Bill. The replacement term in the Bill is ‘title condition’ (defined in section 110(1)), the change being one of name rather than of substance.

Standards in Scotland’s Schools etc. Act 2000 (asp 6)

471. This amendment to section 58(1) replaces the reference to ‘land obligations’ with a reference to ‘title conditions’. The term ‘land obligation’ is used in sections 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 14 of the Bill. The replacement term in the Bill is ‘title condition’ (defined in section 110(1)), the change being one of name rather than of substance.

Schedule 14 – Repeals

472. This schedule deals with the repeals that are made necessary or possible as a result of the reform of the law of real burdens and related reforms.
Registration Act 1617

473. References to reversions and regresses are removed in consequence of the repeal of the Reversion Act 1469 by section 80 of the Bill.

Redemptions Act 1661

474. The Act is wholly obsolete and is repealed with the repeal of the Reversion Act 1469 by section 80 of the Bill.

Registration of Leases (Scotland) Act 1857: section 3

475. Section 3(5) falls in consequence of the repeal of section 32 of the Conveyancing (Scotland) Act 1874 and section 17 of the Land Registration (Scotland) Act 1979 by this schedule.

Conveyancing (Scotland) Act 1874: section 32 and Schedule H

476. The first half of section 32 repeats a power that is already available at common law. The second half of section 32 (which permits the creation of a real burden in a deed of conditions) is repealed in consequence of section 4(2) of the Bill. In future it will be possible to create a real burden using any deed which satisfies the conditions set out in section 4(2).

Conveyancing (Scotland) Act 1924

477. Section 9 (and Schedule E), which exempts heritable securities from having to contain burdens and provides a mechanism for other cases where burdens have been omitted, is repealed as a result of section 63 of the Bill.

478. Section 40(3), which enables a heritable creditor to create real burdens by using a deed of conditions under section 32 of the Conveyancing (Scotland) Act 1874, is repealed following the repeal of section 32 itself. See also the note to paragraph 3 of schedule 13.

479. The repeal in Schedule B is consequential on the repeal by this schedule of section 32 of and Schedule H to the Conveyancing (Scotland) Act 1874.

480. Schedule O: warrants of registration will, in terms of section 5(1) of the 2000 Act, no longer be required.

Church of Scotland (Property and Endowments) Act 1925: section 22

481. This repeal should be read with section 76 of the Bill.

Conveyancing Amendment (Scotland) Act 1938: section 9

482. This section, which limits the effect of certain rights of pre-emption, is replaced by section 75 of the Bill.
These documents relate to the Title Conditions (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 6 June 2002

Conveyancing and Feudal Reform (Scotland) Act 1970

483. Sections 1, 2 and 7, Schedule 1: Part 8 of the Bill introduces a revised jurisdiction for the Lands Tribunal in relation to the discharge of real burdens, servitudes and other title conditions in place of the jurisdiction conferred by the provisions here repealed.

484. Section 53: The definition in section 53(4) is repealed in consequence of the repeal of those sections of the 1970 Act where the term ‘prescribed’ is found, namely section 2 (by this schedule) and section 4 (by schedule 13 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000).

Land Tenure Reform (Scotland) Act 1974: section 19

485. This repeal is in consequence of the repeal, by this schedule, of section 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

Land Registration (Scotland) Act 1979

486. Paragraph (a) of section 15(2) lists a number of provisions. Its repeal is consequential on the repeal, by this Bill, of those provisions (Paragraph (a) is amended, prospectively, by schedule 12 paragraph 39(6)(a) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, but that amendment now falls).

487. Section 17 provides that, except where the deed says otherwise, a deed of conditions under section 32 of the Conveyancing (Scotland) Act 1874 takes effect immediately on registration. It falls in consequence of the repeal of section 32 by this schedule.

488. Section 18, concerning the effect of registration of a discharge etc, is replaced by sections 15 and 44 of the Bill.

Aviation Security Act 1982: Schedule 1

489. This repeal is consequential on the abolition of feu ducties and ground annuals by Part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Housing (Scotland) Act 1987: section 72

490. This repeal is consequential on the abolition of pecuniary real burdens by section 105 of the Bill.

Aviation and Maritime Security Act 1990: section 2

491. This repeal is consequential on the abolition of feu ducties and ground annuals by Part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Enterprise and New Towns (Scotland) Act 1990: section 32

492. This repeal is consequential on the amendments made to the Act by section 101 of the Bill.
These documents relate to the Title Conditions (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 6 June 2002

Further and Higher Education (Scotland) Act 1992: Schedule 3
493. This repeal is consequential on the abolition of feuuduties and stipends by Part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Requirements of Writing (Scotland) Act 1995: section 13(2)
494. The section is repealed as it referred to section 78 of the Titles to Land Consolidation (Scotland) Act 1868, which is to be repealed by the 2000 Act.

Abolition of Feudal Tenure etc. (Scotland) Act 2000
495. The repeal of provisions in this Act comes into force on the day after Royal Assent (section 117(4)).
496. The reference in section 17(1) falls with the repeal of section 23 of the Act.
497. Section 20(8)(b) and (c) are unnecessary because of the extinguishing of feudal burdens by section 17(1) of the 2000 Act.
498. Section 23 is replaced by section 51 of the Bill.
499. Section 24: The reference falls with the repeal of section 23 of the Act.
500. Section 26 is replaced by section 37 of the Bill.
502. Section 29 is replaced by section 38 of the Bill.
503. Section 30 is replaced by section 40 of the Bill.
504. Section 31 is replaced by section 41 of the Bill.
505. Section 32 is replaced by the exclusion of ‘real burden’ from the definition of ‘real right in land’ substituted into section 9(8)(b) of the Conveyancing and Feudal Reform (Scotland) Act 1970 by schedule 13, paragraph 4 of the Bill.
506. Section 49: This definition is replaced by subsection (9) of new section 65A of the 2000 Act as inserted by section 102 of the Bill.
507. Section 60(2) is replaced by section 42(2) of the Bill.
508. Section 77: This is consequential on the repeal, by this schedule, of section 15(2)(a) of the Land Registration (Scotland) Act 1979 and paragraph 39(6) of Schedule 12 to the 2000 Act.
509. Schedule 8: The words repealed would not have been a possible outcome of sections 27 and 28 of the 2000 Act.

510. Schedule 12 to the 2000 Act contains minor and consequential amendments resulting from feudal abolition and the other reforms dealt with in the Act. As the Bill now replaces and (in this schedule) repeals some of the provisions referred to in Schedule 12, the relevant paragraphs of Schedule 12 fall to be repealed in turn. Of the repeals listed, only the following do not come into the category just described:

- Paragraph 7(6): As section 14 of the Land Registers (Scotland) Act 1868 does not relate to entails it should not cease to have effect.
- Paragraph 9(4)(d)(ii): This is a minor drafting change.
- Paragraph 30(6)(d)(ii): The words repealed are replaced by paragraph 4 of schedule 13 to the Bill.
- Paragraph 39(3)(c): The words repealed are replaced by paragraph 7(3) of schedule 13 to the Bill.
- Paragraph 39(6)(b): The words repealed are replaced by paragraph 7(5) of schedule 13 to the Bill.

511. Schedule 13 to the 2000 Act contains repeals resulting from feudal abolition and the other reforms dealt with in the Act. As the Bill now replaces and (in this schedule) repeals some of the provisions referred to in Schedule 13, the relevant parts of Schedule 13 fall to be repealed in turn. The only repeal not falling into this category is of words in section 3(6) of the Land Registration (Scotland) Act 1979. Section 3(6) is not repealed by the Bill but it is re-cast by paragraph 7(3) of schedule 13 in a way which supersedes the original repeal.

FINANCIAL MEMORANDUM

512. Title conditions are the main element in the private regulation of land ownership in Scotland which exists parallel to, and separate from, the public regulation of land which operates through planning and environmental legislation. The Bill therefore relates to the private regulation of land between individuals and bodies who are contracting freely with each other. It offers those with property rights further options as to how they wish to regulate land in future and it similarly offers new options to those who wish to alter the conditions binding their ownership of property.

513. Financial obligations may arise as a result of title conditions, but these are a matter of private arrangement for the management and maintenance of property – they do not arise as a result of this Bill. The Bill does not prescribe how land is to be regulated – it provides a modern and simplified framework for the imposition of conditions. For this reason a Regulatory Impact Assessment is not required.
514. The only restrictions on the content of title conditions are that they should not be illegal or contrary to public policy. Beyond these limitations, individuals and businesses may impose whatever controls they choose in title deeds when selling land. Purchasers need to satisfy themselves that they are content to be subject to those controls when buying: if the conditions are too onerous or oppressive, then it is unlikely that the seller will be able to find a purchaser. The system is thus self-regulating to a large extent.

515. The process of clarification and simplification of the law should ensure that title deeds will over time become more accessible and comprehensible. There will be economies of both time and resources in terms of the amount of effort required to draft and interpret title deeds. The provisions to allow for easier variation and discharge of burdens should reduce the number of obsolete burdens on property. Over time, only those burdens which are still relevant and pertinent will continue to be shown in Land Certificates issued by the Land Register. Although the removal of outdated burdens will cause the Keeper of the Registers an initial volume of work, there will be obvious benefits to the Land Register and its users if the size and complexity of the burdens section of land certificates is reduced.

516. One of the important innovations introduced by the Bill in order to increase the clarity and transparency of this area of the law is the concept of dual registration. Real burdens have to be registered in the property registers, but it is common for them only to appear in the title of the property which is subject to the obligation (the burdened property). In future, the deed creating a burden will also have to identify and be registered against the property which has the right to enforce the burden (the benefited property). This will make it much easier to establish what the benefited property is and therefore who can enforce the burden. This may mean some extra work for conveyancers and a small additional registration fee in the property registers, but the result will be that it will be clear to all concerned with a property what the conditions applying to it are, what conditions it might benefit from and who can enforce the conditions.

517. Another reform which will clarify who has the right to enforce an existing burden on neighbouring property is introduced by section 46. At present if a burden has been imposed on adjacent property, then it will again only appear in the title of the burdened property. It may not be clear at present who has the right to enforce the burden or who the burdened proprietor should approach if he or she wishes to vary or discharge the burden. Section 46 permits a benefited proprietor to register a notice to preserve the right to enforce such a burden – if this is not done within 10 years of the appointed day then the right will be lost. Clearly there will be some cost inherent in having such a notice drawn up and registered, but it is a matter of choice for the benefited proprietor as to whether the burden is preserved by the registration of an appropriate notice. It is expected that benefited proprietors will only register such notices where there is a genuine amenity interest to protect.

518. All of the costs set out above will apply equally to private individuals, public authorities or businesses. The crucial point is that although there may be additional costs for anyone making use of the provisions in the Bill, they are not obliged or required to incur those costs – it is a matter of choice. If they wish to secure a property right or terminate a burden, there will inevitably be a cost since most people will have to take legal advice about burdens, etc. Since property rights fall to be registered there will also be registration fees, but registration confers legal benefits on the property owner and his property.
COSTS ON THE SCOTTISH ADMINISTRATION

Lands Tribunal for Scotland

519. The Bill makes several reforms to the powers and jurisdiction of the Lands Tribunal for Scotland but in terms of workload and resources, its provisions may have an effect on the Tribunal in four main areas: “fast track” applications (section 88), the “sunset rule” (sections 19-23), majority discharge of community burdens and the 4 metre discharge rule (sections 32 and 34).

520. It is very difficult to quantify how much more business for the Tribunal these provisions may generate, but it seems unlikely that they will cause significant amounts of additional work. Some new work will replace old work and any increase in workload is likely to be gradual. Much of the work under the new procedures will be at an administrative level and some additional resource will be required to deal with this. It is also possible that the Tribunal may require the addition of a further part-time member. The additional costs may be of the order of £55,000 per annum, but this will not be wholly attributable to the Bill, since the Tribunal is likely to have to deal with the combined effect of a number of pieces of legislation likely to emerge in the near future from the Scottish Parliament.

Legal aid

521. Legal aid will be available both to applicants and those seeking to oppose applications to the Lands Tribunal for Scotland under various provisions in the Bill, providing the individuals meet the requisite criteria. These applications are unlikely to have much effect on the legal aid budget since very few applications involving the discharge of burdens are currently funded by legal aid (perhaps one in the last four years).

COSTS ON LOCAL AUTHORITIES

522. Local authorities have significant land holdings and they will also be affected by the clarification of the law in the Bill. It is difficult to predict the administrative costs to local authorities arising from the Title Conditions Bill separately from the work required by abolition of the feudal system. As with any other individual or corporate body, it is a matter of choice for the local authority as to what, if any, action they wish to take under the Bill. It seeks to extend the options available to property owners and does not prescribe any regulation which implies unavoidable costs for councils.

523. The reforms to the School Sites Act 1841 will assist education authorities in that many former school houses which cannot be sold at present because the authority cannot provide a clear title will become marketable. Any right of reversion under the Act will be converted into a claim for compensation. In circumstances where land ceases to be used for educational purposes in future, the Bill will allow local authorities the option of paying compensation rather than transferring the land to a reversion holder. Clearly this will have financial implications for local authorities. Where the use changes after the appointed day, compensation will be based on the value of the land excluding any buildings on it: it will thus be restricted to the basic value of the land without any improvements and may be expected to be fairly low. This may be regarded as
These documents relate to the Title Conditions (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 6 June 2002

cost neutral to the authorities, since they would always have been obliged to return the land – the Bill simply offers them an alternative of paying compensation instead.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Costs on businesses and other bodies

524. The Bill is largely a codification and clarification of the existing common law. It will therefore affect business in the same way that it will affect all other owners and potential owners of property by making the law simpler, clearer and more accessible. As noted above, the Bill seeks to extend the options available to property owners and does not prescribe any regulation which implies unavoidable costs for business.

Costs on conservation bodies

525. Sections 37 to 41 re-enact sections 26 and 29 to 32 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which are repealed) by providing for the preservation of burdens which have the purpose of preserving or protecting, for the public benefit, the built or natural heritage. Scottish Ministers will be empowered to designate a body as a conservation body if one of its objects or functions is to protect or preserve for the benefit of the public, the architectural, historical or other special interest of land or buildings. Under the 2000 Act, conservation bodies and Scottish Ministers will be entitled, before the day appointed for abolition of the feudal system, to execute and register in the property registers a notice converting a feudal burden of this sort into a new category of “conservation burden”. The Bill makes it clear that it will be possible for conservation bodies (and Scottish Ministers) to create new conservation burdens in the future.

526. Clearly if conservation bodies choose to use these provisions they will incur costs in examining existing titles in order to identify burdens which should be preserved using the notice procedure. It seems likely that conservation bodies will wish to avail themselves of the opportunity provided by the Act and the Bill both to preserve existing burdens which fall within the requisite criteria and to create new conservation burdens in the future.

Costs on individuals

527. The Bill seeks to extend the options available to individuals in relation to title conditions and does not prescribe any regulation which would lead to unavoidable costs.

528. In circumstances where individuals wish to object to the discharge of a burden under the sunset rule in sections 19 to 23 of the Bill or the variation or discharge of a community burden under section 32, they will require to apply to the Lands Tribunal for renewal of the burden. Legal aid will be available where appropriate.
EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

529. On 5 June 2002, the Minister for Justice (Mr Jim Wallace) made the following statement:

“In my view, the provisions of the Title Conditions (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

530. On 5 June 2002, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Title Conditions (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
TITLE CONDITIONS (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

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