TITLE CONDITIONS (SCOTLAND) BILL

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POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Title Conditions (Scotland) Bill introduced in the Scottish Parliament on 6 June 2002. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 54–EN.

POLICY OBJECTIVES OF THE BILL

2. The Bill has two main objectives. The first is to achieve greater clarity in the law. The Bill therefore restates the current law in a clear, codified form. This will make it more accessible. In places, where the common law is uncertain or unsatisfactory, the Bill reforms or enhances the law. The second objective is to reduce the number of outdated conditions on land by making it easier to discharge or vary them. The Bill complements the Abolition of Feudal Tenure etc. (Scotland) Act 2002; together, they will provide a modern and simplified framework for ownership of property in Scotland. The reform will make the process of conveyancing simpler and will make it easier for those who wish to alter the conditions on their property. An underlying theme of the whole package is to ensure that people who live at a great distance from property they have sold should not be able to use property law to exercise control over it.

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

4. This private regulation of land ownership is parallel to, and separate from, the public regulation of land which operates through planning and environmental legislation. The planning system does not, however, provide the same degree of control achieved by title conditions. For example, planning law does not oblige owners to maintain their own property. There are systems of private regulation of land (in differing forms) in England, the United States, Canada, Australia and New Zealand, as well as across continental Europe.

5. The Bill is based on the draft Bill produced by the Scottish Law Commission and published with its Report on Real Burdens (Scot Law Com No 181) in October 2000. (Real
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burdens are the most common kind of title condition.) This work followed the Commission’s Report on Abolition of the Feudal System (Scot Law Com No 168) which led to the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (“the 2000 Act”). The two pieces of legislation are very closely related and they will be implemented together, on a day which is referred to in both as “the appointed day”. Land which was previously held under feudal tenure will then be absorbed into the system of ordinary ownership.

6. The general law on title conditions – both feudal and non-feudal – is common law. It has built up as a result of decisions taken in the courts on individual cases and then been interpreted and applied more generally. While the Commission was carrying out its work on abolition of the feudal system, it became aware that the general law of title conditions was unclear and confusing. As a result, the Commission recommended that the law on title conditions should be clarified and set out in a new statute.

7. The Explanatory Notes which accompany the Bill explain the effect in detail of each section in the Bill. The Commission’s Report on Real Burdens also gives a very thorough explanation of the reasoning behind these provisions. The Executive’s consultation paper on the draft Bill contains a short summary of some of its more controversial aspects. There has been no opposition to the general principles of the draft Bill, but a number of detailed provisions have been altered in the light of consultation responses. These are described in the relevant sections of the Memorandum.

8. The Commission’s draft Bill outlined a “development management scheme” which provided an optional example of good practice which developers could adopt or adapt. The scheme was intended to help make it clear where obligations and liabilities lie in relation to shared facilities, and therefore reduce the scope for conflict. The scheme provided for an owners’ association to be a body corporate, thus allowing it to have a legal personality. A body corporate is a “business association” under the Scotland Act, and is therefore one of the reserved matters under Schedule 5 to that Act. It would not be competent for the Scottish Parliament to legislate on this matter, and the relevant provisions have therefore been dropped from the final Bill. The Executive is considering, along with the UK Government, how to proceed in this matter.

9. This Memorandum contains an annex on two aspects of the 2000 Act – the “100 metre rule” and development value burdens. The Executive invited views in its consultation paper as to whether the provisions of the 2000 Act should be amended in relation to these two matters. In the event the Executive has decided to make no change, and its current thinking is explained in the annex.

Vocabulary and existing rules of the common law

10. The contents of the Bill are highly technical and readers may find it helpful to have an explanation here of some of the main terms which are used in this area of law.

11. A title condition is a condition which applies to ownership of land. The most common type of title condition is the real burden. Other types of title condition include servitudes and conditions in long leases. Title conditions are generally perpetual. When a property is sold and
then re-sold, the conditions still apply. The Bill is primarily concerned with the law of real burdens. A real burden restricts an owner’s use of his or her land or obliges him or her to do something. The law of real burdens is clear that a burden is to benefit land rather than a person. For a condition on land to be a real burden, it must benefit other land. Thus there must be two plots of land and one plot must benefit from the burden placed on the other. The first plot is called the benefited property and the second is called the burdened property. The Bill does, however, make a number of exceptions to the general rule that there must be benefited property for a burden to be valid. For convenience, these are referred to in the accompanying documents as personal burdens and they are allowed in very limited circumstances. The three main personal burdens are conservation burdens, maritime burdens and manager burdens. Conservation and maritime burdens are dealt with in Part 3 of the Bill, and manager burdens in Part 5. In each case the Executive considers that the policy justification for these burdens is sufficient to override the general rule that a burden is only valid if there is land which benefits from it.

12. The Bill classifies burdens in different ways. One important distinction is between neighbour burdens and community burdens. The term “neighbour burden” does not appear in the Bill, but it is a convenient label for a class of burdens. A neighbour burden exists where a burden has been imposed on one piece of land in favour of a neighbouring piece of land. The classic example of a neighbour burden is where an owner sells off part of his or her garden and imposes a burden which says that no double-storey house can be built on the sold-off land. Community burdens exist where four or more properties have the same burdens placed on them and where the burdens are there to benefit all the properties. All the properties are burdened properties, and all are benefited properties. An example here would be a housing estate where all the houses are bound by burdens which say that they cannot fence their front gardens.

13. All burdens, apart from personal burdens such as conservation, maritime and manager burdens, will be neighbour burdens or community burdens, but superimposed on this are other, functional ways of classifying burdens.

14. One important type of real burden is a facility burden, which obliges the owner to maintain or contribute to the maintenance of a common facility, for example the common parts of a tenement. Service burdens are concerned with the provision of services such as water to other land.

15. The term amenity burden does not appear in the Bill, but it is a convenient label for burdens other than facility or service burdens. Amenity burdens include burdens which may restrict the uses of the property, perhaps by stipulating that it can only be used as a dwelling-house. Other examples of amenity burdens are those which limit the type or number of pets that could be kept in a house, or stipulate that individual houses must all conform to a standard pattern.

16. Burdens bind the owners of property and they are set out in title deeds which are recorded in the Register of Sasines or registered in the Land Register of Scotland. These registers are open to public inspection and are maintained by the Keeper of the Registers of Scotland who is the Chief Executive of the Registers of Scotland Executive Agency.
17. If owners of properties do not observe the title conditions applying to their property, that is not a matter for the police or public authorities. The person who can normally take action to make owners observe conditions is the owner of the benefited land. He or she is the **benefited proprietor** and is said to have **enforcement rights**. In order to enforce the burden, the benefited proprietor must have **title to enforce** – in other words, it must be apparent (expressly or implicitly) from the deed creating the burden that he or she has the right to enforce the burden. But the law requires that he or she must also have **interest to enforce** – in other words, his or her property must genuinely benefit from the burden. Otherwise he or she cannot enforce it.

18. Sometimes the owner of the burdened property (the **burdened proprietor**) will wish to get rid of the burden or to vary it: this is achieved by a **discharge** or a **variation**. This can be done by applying to the **Lands Tribunal for Scotland** for a discharge or a variation of the burden. Alternatively, the owner can ask the benefited proprietor, who, if he or she agrees, will grant a **deed of discharge** (formerly known as a **minute of waiver**). Very often the benefited proprietor will charge a fee for this. If the burdened proprietor ignores the burden and acts in contravention of it without consent, this is known as a **breach**.

**PART 1, SECTIONS 1-23**

19. Part 1 of the Bill is about the general rules which apply to real burdens and in the main it simply restates the current common law. The purpose is to set out the law in a way which will make it easier to interpret and apply in future. Where the existing law is unsatisfactory or difficult to operate, some enhancements and changes are provided. This process of codification of the law and removal of anomalies will over time simplify the process of conveyancing and make it easier to use the property registers.

20. Part 1 defines real burdens. It sets out the circumstances in which they can be created; it clarifies what their content can be; it makes some provisions as to who can enforce them; and it specifies how they can be discharged. These are important matters because it is only if a condition on land is properly drawn up as a real burden that it will be subject to the general law on real burdens.

21. Section 4(2)(c) (which should be read in conjunction with section 108) is an important innovation. Real burdens have to be registered in the property registers, but it is common for them only to appear in the title of the burdened property. In future, the deed creating a burden will have to identify and be registered against the benefited property also. This will make it much easier to establish what the benefited property is and therefore who can enforce a burden. This may mean a small amount of extra work for conveyancers, but the result is 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. The proposal for dual registration of burdens received overwhelming support on consultation.

**Section 5: Extrinsic material**

22. Generally the law is that for a burden to be valid, it must include all the information on which its terms are based – in other words it must be plain to the reader exactly what the burden obliges the owner of the property to do or not do. The burden may not, for instance, refer to other documents which set out the details of the obligation. The policy of the Bill is to accept
this position, but to make one important exception. Some burdens oblige an owner to contribute to a cost, but the way of calculating the contribution is not set out in the burden. Instead, the burden refers to another document. The most common example of this kind of burden is in tenement blocks, where the different shares to be paid by the owners are based on their rateable values. The Executive believes that these burdens are so important that there should be an exception to the general rule, and the Bill therefore allows burdens of this type to contain references to external documents.

Alternative approaches

23. The draft Bill prepared by the Scottish Law Commission would have allowed reference in all burdens – not just the burdens on apportioning costs referred to in paragraph 22 – to statutes, public registers and records which are readily available to the public in order to remove the need to repeat the terms of these public documents at length in deeds imposing burdens. It was further proposed that this change should be retrospective.

24. The Executive was concerned that it might be difficult and expensive to get access to statutes or public registers and records. Any reference to legislation would have to relate to legislation in force at the date of the first registration of the burden. It is not a simple matter to track changes to legislation, particularly subordinate legislation. In addition, making the change retrospective might have the effect of imposing a new set of rules on property. An owner might have been advised at the time of purchase of his or her property that certain burdens were unenforceable because they were invalid under the current law.

25. The Executive does not believe that it should be possible to use extrinsic material to set out the terms of all burdens or that it should be possible to do this retrospectively. One of the aims of the Bill is to make information on burdens more accessible from the property registers. To allow burdens to be registered which contained references to material which did not appear in the register would run counter to the goal of greater transparency.

26. While a narrow majority of respondents to consultation favoured the general use of extrinsic material in burdens, it was clear that many of these responses were influenced by a desire to see the uncertainty about obligations to pay unspecified costs removed from the law and thus to have many maintenance burdens validated beyond doubt. An overwhelming majority of respondents supported that specific proposal.

27. A number of responses to consultation from conservation bodies favoured the use of extrinsic material so that real burdens could be used to refer to management plans for designated areas of land. The rationale was that the management plans could be updated over time without having to tamper with the real burdens themselves. The Executive is not attracted to this proposal since (a) it would not be clear from the terms of the real burden what the full extent of the obligation on the burdened proprietor was and (b) there might be doubt as to which version of a management plan was in force at any given time.
Section 8: Title and interest to enforce

28. Section 8 deals with the right to enforce burdens. At present people have title to enforce only if they are the registered owners of the benefited property. This excludes non-owning occupiers such as long-term tenants for whom the burden may be important. There may also be legitimate and sensible reasons why a proprietor has not registered his or her title. Section 8(2) provides that title to enforce should be extended to “owners” who have yet to register their title, tenants, life renters, heritable creditors in possession, and non-entitled spouses under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. If the benefited property is held as common property, each co-owner should have a separate title to enforce. This proposal might result in a larger number of people being able to enforce a burden but this does not disadvantage the burdened proprietor since the obligation itself has not changed.

29. Benefited proprietors cannot enforce a real burden unless they have interest to enforce as well as title to enforce. They have to be able to demonstrate that their (benefited) property does actually benefit from the burden and would suffer from a proposed breach. The question of interest is specific to each particular burden and the circumstances in which enforcement is sought. If a court is deciding whether a benefited proprietor has interest to enforce, it will do so against the background of a specific breach. The courts have found two considerations to be particularly important. The first is the distance between the benefited land and the burdened land and the second is the extent of the breach – in other words, whether the benefited property would be prejudiced by the actual breach.

30. The Bill provides a statutory restatement of the law on interest to enforce as part of the overall codification of the law on real burdens. Section 8(3) stipulates that a person has interest to enforce if:

- in the circumstances of any case, failure to comply with the burden is resulting in, or will result in, material detriment to the value or enjoyment of the person’s ownership of, or right in, the benefited property; or
- the real burden being an affirmative burden created as an obligation to defray, or contribute towards, some cost, he or she seeks (and has grounds to seek) payment of, or as respects, that cost.

Alternative approaches

31. While there was general agreement from respondents to consultation that the new statutory definition of “interest to enforce” was useful, a substantial minority expressed concern that the addition of the word “material” set too high a threshold (and changed the law). Some believed that this was advantageous in that it would discourage trivial actions and nuisance claims. Other respondents suggested different forms of words. The Scottish Law Commission concluded that the general phrase “material detriment” would be of most assistance to the courts. The Executive is content to follow this approach.

32. Some correspondents wanted guidance on interpretation since it would be some time before judicial clarification would be available. It is not appropriate or possible for the Executive to attempt to provide such guidance since, as explained above, the interest to enforce rule depends upon the particular circumstances of each case.
Sections 9 to 14

33. Sections 9 to 14 of the Bill make a number of useful clarifying reforms to the laws on real burdens. They cover the question of whom a burden can be enforced against, and various questions regarding liability and the division of properties.

Sections 16 and 17: Acquiescence and negative prescription

34. Acquiescence is a legal concept which provides that when a benefited proprietor knows that a burden has been breached, but has not taken any action to enforce it, he or she may lose the right to enforce the burden as regards the particular breach. For example, a burden might prohibit building in a garden. The owner might build a shed, and the enforcer might not object. He or she would have acquiesced - but only to the building of the shed. The owner would not be obliged to take the shed down. But that would not mean that the owner could proceed to build a double-storey extension. The Bill restates the pre-conditions for acquiescence and clears up three areas of uncertainty under the law. The Executive had some concerns that if a construction was erected over a very short period of time, a benefited proprietor might lose the opportunity to object in a similarly short period. For example a pre-fabricated building can be put up in a matter of hours. The Bill therefore allows the benefited proprietor more time within which to object. This period will be set from when the benefited proprietor first becomes aware, or is deemed to become aware, that the activity which breaches the burden is taking place. He or she will be allowed a “reasonable” period: what would constitute a “reasonable” period will depend on the circumstances of a particular case, but it will not in any case exceed 8 weeks from the substantial completion of the work.

35. Under the existing law, 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. This is called negative prescription. Section 17 of the Bill reduces this period to 5 years. In transitional cases, where a breach has occurred before the appointed day, the prescriptive period will be either the period of 5 years beginning with the appointed day or the period of 20 years beginning with the breach, whichever expires first.

Sections 19 to 23: The “sunset rule”

36. Sections 19 to 23 introduce a completely new process designed to remove outdated amenity burdens. This will not apply to facility and service burdens since an obligation to maintain common property, for example, should not be affected by the passage of time. The “sunset rule” in the Bill provides that where an amenity burden is more than 100 years old, the owner of the burdened property would be able to serve a notice of termination on the owner of the benefited property. If the owner of the benefited property does nothing, the notice can be registered in the relevant property register with the effect that the burden would be discharged. He or she may, however, apply to the Lands Tribunal for renewal of the burden within 8 weeks of receiving the notice.

37. Some reservations were expressed on consultation about the notification procedures under the sunset rule. The draft Bill proposed that the owner of the burdened property should serve a notice of termination on the owner of any benefited property within 4 metres of the burdened property. Benefited proprietors outwith the 4 metre distance would be informed by an
advertisement in a newspaper circulating in the area, but would not receive a notice. They might not know that the burden was being removed and thus would not be able to seek to renew it. They would have no right of appeal after the 8 weeks. The Bill therefore provides for the use of conspicuous notices displayed on the burdened property itself. Where there is a lamp post within 100 metres of the burdened property the notice will also be attached to the lamp post. If there is no lamp post, there will have to be a newspaper advertisement in addition to the notice on the burdened property.

PART 2, SECTIONS 24-36

38. Part 2 of the Bill is about burdens in communities. The purpose is to assist property owners where the common law says that if the title deeds do not specify how decisions can be reached on matters of interest to all owners, it is necessary for all the owners in the community to agree. It is obviously only too easy for one member of the community to stand in the way of desirable and sometimes essential matters such as repairs. This Part of the Bill also sets out in some detail the rules which will apply in future on maintenance and the appointment or dismissal of a manager (or factor). Thirdly, it provides rules for the variation or discharge of burdens in communities.

39. There are many types of community – in residential terms, a modern housing estate, a Victorian tenement, a Georgian terrace, or a modern block of flats, including sheltered housing. Communities can also be found in the commercial sector – for instance in business parks. Communities often share facilities – for example a common stair or a shared garden – but they do not always do so. The expression “community” has a particular meaning in the Bill. It is based on the expression “community burden” which is introduced in the Bill. A community burden is a burden imposed under a “common scheme” which applies to four or more units and which can be enforced by all the units to which the burden applies. All the units are burdened properties and all are benefited properties. A common scheme is simply a way of describing the situation where essentially the same burdens are imposed on a number of properties. A “community” for the purposes of the Bill is simply – and only – the collective term for the units to which the community burdens apply. It is possible for community burdens to exist in a large area that is not in any normal sense a community, but is nevertheless subject to a common scheme.

40. Burdens which regulate the maintenance, management or use of a common facility, such as a roof, common access road or a boundary wall will often be considered desirable. There are also likely to be a considerable number of burdens which, while less essential, will contribute to the general amenity of a community. Examples of these might be burdens which prohibit the building of extensions, or control the overall appearance of an estate. They may also prohibit practices such as running a business from a house, or keeping a large number of pets. Many of the burdens are unlikely to be replicated by planning laws, because they are not of sufficient importance to merit the interest of a public authority. They are a private matter for the residents.

Maintenence

41. Section 28 will allow a majority of owners of units to decide that maintenance of common facilities should be carried out and to instruct or carry out the work. Following
consultation, a number of safeguards have been provided to protect funds which are collected for common maintenance.

**Improvements**

42. One aspect of the draft Bill which caused some interest is the extent to which maintenance should include improvements. The Scottish Law Commission acknowledged that in practice maintenance may involve some element of betterment and that incidental improvement would be covered by a burden providing for maintenance. But it specifically decided against extending the provision on majority decision-making so that it would also cover out and out improvement. The Executive agrees, and has provided (in section 110) a definition of maintenance which includes some level of “improvement”.

**Alternative approaches**

43. A number of respondents to consultation, particularly social housing providers such as local authorities, argued that majority rule should extend to more substantial improvements. This reflected a desire among social housing providers to be able to proceed with improvement works in “mixed tenure” estates – i.e. estates where some houses have been sold under the right-to-buy legislation and others remain in the ownership of the authority. Such providers often have difficulty in obtaining the consent of right-to-buy owners (usually on the grounds of cost to these owners) and sometimes the work simply does not proceed.

44. The Executive has not accepted this view. It is important to balance the different interests involved. The Bill is about all property, not just social housing. To impose a solution to the problems of social housing providers on to the owners of other property would be unfair. For instance, the Executive believes it would not be right to allow the majority in a development to force the rest of the owners to spend money (which they may not have) on improvements which they may not want. The Executive does, however, recognise the real problems that exist in mixed tenure estates. The Housing Improvement Task Force has been asked to look at how these may be tackled and it will be making recommendations – possibly including recommendations for new legislation – next year.

**Variation and discharge of community burdens**

45. Sometimes an individual owner in a community may wish to discharge or vary one of the burdens affecting his or her own property. Sometimes a majority in a community may want to discharge or vary a burden that affects them all. Part 2 of the Bill provides two ways of discharging burdens: owners will be able to choose the most appropriate method for their particular circumstances. The rules for the enforcement of, and the variation and discharge of, community burdens will apply to all communities, irrespective of the way in which their title deeds were drawn up. This is further discussed in paragraphs 73 to 77, which are about Part 4 of the Bill.

46. An individual might wish to discharge a burden prohibiting the construction of an extension. At present the owner would have to obtain the consent of all the benefited proprietors with power to enforce, regardless of the size of the community. In practice this can prove
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extremely difficult. The owner often has little option but to apply to the Lands Tribunal for a discharge.

47. Under the Bill, the owner will have three options:
   • to apply to the Lands Tribunal as at present;
   • to obtain the signatures of all neighbours within 4 metres, and then to notify the other members of the community by conspicuous notice on the burdened property and on nearby lamp posts;
   • to obtain the signatures of a majority of the community, and then to notify the other members of the community individually.

The different notification procedures are necessary because, in the case of the second bullet above, the extent of the community may be unclear.

48. If owners wish to discharge or vary burdens which affect them all, they will have to obtain the agreement of the majority. They would have to inform the other members of the community individually.

49. The notification procedures in both the individual and majority cases would allow a dissenting member of the community to object, and to take the case to the Lands Tribunal. The Tribunal will deal with the matter in the same manner as under the termination procedure in the sunset rule, but it will apply a more stringent test because a majority (or all of the close neighbours) have agreed to the change. The benefited proprietor would have to show that the discharge or variation is not in the best interests of the community or is unfairly prejudicial to one or more owners.

50. There will be a further alternative. Section 82 allows the owners of 25% of the units in a community to apply to the Lands Tribunal to vary or discharge a community burden. This is intended to offer another route by which community burdens may be varied or discharged where a majority cannot be assembled. In this case the Lands Tribunal will notify interested parties according to their normal procedures.

Alternative approaches

51. In the draft Bill, another alternative was given to individual owners seeking a discharge. That was to obtain the agreement of a majority of members of the community, including one adjacent neighbour. It would not, however, have been necessary to inform other members of the community of the intention to discharge a burden and there was therefore a possibility that benefited proprietors might have lost possibly valuable rights without being consulted, and perhaps without knowing what was going on. The Executive has, however, decided that the agreement of a majority of the community (or the consent of all adjacent neighbours) is sufficient in circumstances where other benefited proprietors are to receive notification.

52. As in other parts of the Bill, the Executive has strengthened the notification procedures compared with the draft Bill. The Bill now provides a notification procedure for all members of
the community and an opportunity for owners who do object to take their case to the Lands Tribunal.

**Right-to-buy estates**

53. One of the most complex aspects of the Bill is the effect that it and abolition of the feudal system will have on council and other social housing estates. It has been common practice for the local authority (or other social landlord) in selling off houses to do so by creating a feudal relationship with the buyer and also in some cases to reserve to itself, as feudal superior, the right to enforce the burdens. Under the 2000 Act, all the amenity burdens in these schemes would have disappeared unless the local authority registered a vast number of notices under the 2000 Act. This was a scenario which caused considerable concern amongst local authorities and social landlords. The new provision made by the Bill will mean that the amenity burdens can be saved without the need for large numbers of notices and treated as community burdens. The following paragraphs explain how this will work in practice.

54. Where all the properties in the development, whether a tenement or a housing estate, have been sold off and are subject to the same or equivalent burdens, and therefore form part of the same common scheme, the Bill should ensure that they are all part of the community.

55. The situation is, however, more complicated where the development and the “community” in terms of the Bill do not coincide because part of a development is subject to the burdens and part is not. This will be the case in housing estates where the right to buy has been exercised for some but not all properties – which is a very common situation. In these estates the “community” for the purposes of the Bill would be those parts which had been sold off, but not those remaining in council ownership.

56. One possible solution to this problem would be to save feudal burdens imposed by local authorities as superiors. But this would in effect mean preserving the feudal system for local authorities only, a course which would be difficult to defend against charges of discrimination. It would also mean that the sold-off properties would never operate as proper communities – an arrangement which would run counter to the general philosophy of the Bill and the 2000 Act, which is to remove control from superiors and to give it to the communities who benefit from the burdens.

57. The underlying law allows for a better solution. Local authorities will be able to include themselves in a community by burdening any of the properties which they still own by registering a Deed of Conditions before the appointed day. This would be a relatively simple process. It would mean that the properties remaining in the ownership of local authorities would become part of the community. This would allow the authority to continue to enforce former feudal burdens without the need to register hundreds of notices and provide all owners in the development with the benefits of operating within a coherent community regime. The Executive will be encouraging local authorities to register Deeds of Conditions.

58. Another issue in relation to right-to-buy properties is that some title deeds drawn up by local authorities and other social landlords at the time of sale are now regarded by the authorities and some housing practitioners as unsatisfactory. For example some do not require owners to
join a factoring scheme or there may be omissions in the identification of common parts or apportionment of costs which do not add up to 100%. The problem is most severe when local authorities or social landlords have inherited or taken over housing originally owned by another predecessor body which had a different approach to the drafting of title deeds. Ideally local authorities would like to be able to modify and rationalise the title deeds. Some have argued that the Bill should be used as a vehicle to enable this.

59. The issue here is, however, not specific to former local authority housing. Poor drafting of conveyancing deeds may happen anywhere. The Bill provides mechanisms for the mass variation of community burdens which can be used to rectify poorly drafted burdens. Where local authorities take steps to include themselves in “communities”, they will be able to take advantage of the new rules for community burdens. Their votes in communities will be exactly the same as the numbers of properties that they own and to which they have applied common burdens. This may provide some help to social landlords and their tenants. The whole question of the needs of this sector is, however, being considered by the Housing Task Force and the Executive will be considering, in the light of its recommendations, whether further action is necessary.

Sheltered housing

60. Sheltered housing complexes – often called retirement developments – are a particular kind of community. There has been a great deal of interest in the Bill from residents of sheltered housing, and to assist them and developers of sheltered housing the Executive has prepared a separate document which summarises the various ways in which the Bill will affect sheltered housing. This document is available on request from the Executive, and may be viewed on its website (http://www.scotland.gov.uk/landreform/feudal.asp).

61. Briefly, however, the general effect of the 2000 Act and the Bill will be to remove control from the developer, and to give it to the owners, who will be able to appoint or dismiss a manager, and to vary the burdens which govern the complex.

62. Section 50 provides that a sheltered housing complex will be a community in terms of the Bill. The provisions for majority discharge of burdens will not, however, apply to all burdens in sheltered housing complexes. There was some concern from consultees that a simple majority should not be able to vary or discharge certain vital elements of sheltered housing such as the warden service and the maintenance of facilities. The Bill therefore provides that a majority of 75% will be required to change burdens relating to these core elements of sheltered housing. The Executive also believes that it is necessary to protect one other element of sheltered housing. It will not be possible to remove a burden which stipulates a minimum age requirement by any majority. If that requirement were removed, there would be nothing to stop younger people, perhaps with children, buying into the sector.

Counting units to form a majority

63. Some properties are owned jointly – most commonly between husband and wife. Where co-owners disagree over a decision, no vote is counted in respect of that property. This is acceptable where the split is 50:50. In some cases, however, the developer (perhaps in sheltered housing) or public authority might retain a small share of the property, perhaps 10 or 20%. If the
developer held such a share in every property in the community, they would effectively possess a right of veto. Allowing a developer to exercise an effective veto would run counter to the intentions of the Bill. It therefore provides that the owner or owners who own the majority share of the unit should be entitled to vote for that unit.

PART 3, SECTIONS 37-44

64. Part 3 deals with conservation and maritime burdens. The general purpose of this Part, along with the 2000 Act, is to allow burdens which protect the built or natural heritage and which are in the public interest to continue or to be created, even though there is no benefited land. The 2000 Act allowed some feudal burdens to be saved as a new class of burden to be called conservation burdens. Section 37 of the Bill will allow conservation burdens to be created in future. They can only be created or enforced by bodies which are designated as conservation bodies by the Scottish Ministers, or by the Scottish Ministers themselves. Local authorities can be designated as conservation bodies.

65. Maritime burdens were also identified as a special category of burdens under the 2000 Act. The Crown has in the past sold parts of the seabed or (more frequently) the foreshore for various purposes including the construction of piers, harbours and bridges. Burdens restricting these parts of the seabed or foreshore may have been imposed when the land was sold. The Crown’s right to enforce these “maritime burdens” was preserved in the Act because these burdens are of public benefit. Section 42 will allow maritime burdens to be created in the future on the same basis as the saved feudal burdens.

66. Some feudal burdens which were imposed in the past by private individuals rather than conservation trusts or other public or private bodies may have been imposed for altruistic reasons to protect some historic or architecturally significant building or buildings or perhaps an area of natural beauty or interest. They are therefore like conservation burdens since they were imposed principally to preserve land or buildings for the public good. Unless they can be saved under the general provisions of the 2000 Act, these burdens will be lost. During consultation on the draft Bill, the Executive canvassed the possibility of introducing provisions which would allow a superior to nominate a conservation body as his or her successor as the benefited proprietor for these burdens which would then become fully fledged conservation burdens. Obviously the conservation body would have to consent to becoming the benefited proprietor of the burden. This proposal was supported in consultation, and the Bill therefore includes a provision to allow this.

Alternative approaches

67. A number of respondents wanted the criteria for conservation bodies to be more specific and also advocated a right of appeal in relation to designation by Scottish Ministers. The Executive believes that if the criteria for conservation bodies were more tightly drafted, this might actually have the effect of excluding some bodies. Although it is not proposed that there should be a right of appeal against a decision of the Scottish Ministers to exclude (or include) a body from the prescribed list of conservation bodies, the list will be subject to scrutiny by the Scottish Parliament.
PART 4, SECTIONS 45-53

68. Part 4 is a transitional Part which is about rights of enforcement of the different kinds of existing burdens. The purpose is to clarify who can enforce a burden. This will make it easier for owners who wish to discharge a burden: they will know whom to approach and what steps they have to take. It may be worth repeating that there are different ways to classify burdens. There are functional burdens: facility, service, and amenity burdens. Overlying these is the distinction between neighbour burdens and community burdens. All burdens (other than personal burdens) are either neighbour burdens or community burdens, but they will all also fall into one of the functional categories.

Facility and service burdens

69. Rights to enforce all facility and service burdens – whether they are neighbour or community burdens – are automatically saved (by section 51). In future they will be enforceable by the owners of those properties which benefit from the facility or service. Clearly these are particularly important burdens, and the purpose of saving the enforcement rights automatically is that there should be no doubt that these burdens will survive.

Section 46: Implied rights of enforcement in neighbour amenity burdens

70. As explained earlier, the classic case of a neighbour burden is where a person has sold off land close to his or her own home – possibly part of the garden – to protect the amenity of the retained property. The burdens may specify that only a house of one storey should be built, or that no more than a certain number of houses should be built. These burdens will appear in the title of the property which has been sold, making it the burdened land, but they may not specify what the benefited land is. It is therefore not clear to the owner of the burdened land whom he or she must approach to discharge or vary the burden, perhaps to get permission to build an extra storey on to the house.

71. In cases like this, the courts have decided that the benefited land is the land which was retained when the original plot was sold. The burden may be enforced by the owner of that land. He or she has an implied right of enforcement. If parts of this retained land have subsequently been sold off separately, then each of these plots carries a right to enforce the burdens over any land sold beforehand. This means that a large amount of historical research may be required to identify the extent of the original benefited property, and which of the plots that have been sold have enforcement rights over the others.

72. One of the primary aims of the Bill is to achieve greater transparency in the property registers. Section 46 therefore provides that although an owner of land who benefits from a neighbour burden may keep his or her right to enforce the burden, a notice will have to be registered to preserve the enforcement rights. The notice would have to identify the benefited and the burdened property. The owner would have 10 years (from the date on which this Part of the Bill comes into force) to register the notice. If this was not done within that timescale, the enforcement rights would be lost. This will involve property owners in some work, in identifying burdens which are useful to them, and then registering the notices. But the benefit will be a much clearer and more transparent record of rights affecting property ownership. This proposal was generally supported on consultation.
Implied rights of enforcement of community amenity burdens

73. The second type of situation where there are implied rights to enforce is in common schemes. A burdened property is sometimes one of a number of properties subject to the same or similar burdens. The courts have decided, unless there is a contrary indication in the title deeds, that where the burdens were imposed under a common scheme they were intended to be for the mutual benefit of the properties, and therefore the owners of these properties should be entitled to enforce the burdens.

74. The Executive has decided that in these cases, the enforcement rights should be treated in exactly the same way as those where the enforcement rights are expressly stated. This was discussed in paragraph 45 in relation to Part 2. The Executive has also decided that enforcement rights in another type of common scheme should be treated in the same way. This third type of common scheme exists where a feudal superior, often the developer of the estate, has reserved the enforcement rights to himself or herself. If the superior did not – or could not under the terms of the 2000 Act – save these enforcement rights before the appointed day, no-one may be able to enforce the amenity burdens, and they would disappear.

Alternative approaches

75. The Scottish Law Commission had proposed different treatment for the three types of common scheme (apart from the case of tenements and sheltered housing developments which would be treated in the way set out in Part 2). It proposed that the first type of common scheme, where the title deeds set out expressly who could enforce the burdens, should be subject to the rules on community burdens set out in Part 2. For the second common scheme, where the rights were implied, the Commission proposed that enforcement rights should be abolished, but then re-created for neighbours within 4 metres. It did not propose to re-distribute or retain the rights for the third common scheme.

76. The Executive had two main concerns about this treatment. First, it was concerned that there would be different treatment for three apparently identical developments, such as modern housing estates, when the difference might only be because of the personal preference of the individual conveyancer. Secondly it was concerned that owners outwith the 4 metre distance would lose their enforcement rights without having the opportunity to object.

77. A large majority of respondents to the consultation paper was opposed to the proposed different treatment of the three common schemes. Many argued for a uniform approach. Others commented that it should make no difference how a burden was constituted. In relation to the suggestion that superiors’ rights of enforcement of amenity burdens in a common scheme should be transferred to neighbours, there was a narrower majority in favour. It was pointed out that at present the superior often enforces burdens on behalf of vassals and this was a justification for giving enforcement rights to neighbours. Some respondents, while stating that there should be no general transfer of superiors’ rights, nevertheless conceded that there could be an adverse effect on the condition of housing estates generally if amenity burdens could not be enforced by neighbours.
PART 5, SECTIONS 54-65

78. Part 5 deals with a variety of miscellaneous and technical matters affecting real burdens. It does, however, contain provisions on one major topic – manager burdens.

79. The minor topics covered by Part 5 include the effect on outstanding court proceedings of the extinction of a burden, the requirements to grant a deed where the owner has not completed title and the duty on former burdened proprietors to disclose the identity of the owner of the property. The purpose here is to clarify the law. Section 62 abolishes the right of irritancy. Irritancy means that, in certain cases, if the burden is breached the whole of the burdened property may revert to the ownership of the owner of the benefited property. This is clearly a draconian response to a breach, and the Bill makes it clear that this cannot happen in future. It will not be possible to create irritancies in future and it will not be possible to enforce any which were created in the past.

Manager burdens

80. The major provisions in Part 5 are, however, those which deal with manager burdens. The Bill provides a new framework for burdens which can be used by property developers in situations where they would previously have been able to use feudal burdens to control a site while they were developing it. The policy is to provide a mechanism for the orderly development of a site.

81. Burdens providing for the appointment of managers are commonly used. The Bill makes it clear that these are valid burdens and provides rules as to how they are to operate. Part 2 of the Bill contains provisions for the management of communities. Manager burdens are different. When property managers develop a site, they sometimes appoint a manager to manage the site, and to administer and enforce the burdens imposed. If the developer wishes to retain control of the site, he or she will sometimes reserve the power to appoint a manager. While the developer is still selling properties, the manager is there principally to protect the interests of the developer, not to provide a way for the community to manage itself. The residents may well benefit from the enforcement of the burdens, but they do not themselves have control over the appointment or dismissal of the manager. Sometimes the owners may regard the imposition of a manager as oppressive. For example, in some sheltered housing complexes, the individual owners often resent the power of the manager and would like to appoint someone else.

82. The Executive believes that it is acceptable for the power of appointment of a manager to be reserved whilst a site is being developed. This is because a builder has a strong interest in the condition of the development that he or she is trying to market. There should, however, be some limitations on this power. Section 58 therefore defines manager burdens and provides conditions limiting their use.

83. The first condition which would apply to manager burdens is that the right to appoint a manager would be extinguished with the sale of the last property unit. This is to meet concern that developers retain control over schemes after they have ceased to have a real connection with the development. The Bill makes special provision to prohibit the developer from retaining control artificially by permanently holding on to a flat used by the warden in sheltered housing.
84. The second restriction in section 58 is that the manager burden would generally be extinguished after a maximum of 10 years even if the developer continues to own some of the units. This prevents developers retaining control for excessive periods. It would be possible to provide for a shorter period in the constitutive deed. The period would run from the date of registration of the first deed setting out the burden. The time limit would, however, be 30 years for local authority and other socially rented housing sold under the right-to-buy legislation. Local authority sales often occur over a long period, so 30 years would allow councils and other social landlords to ensure that repair and maintenance of common areas such as roofs and stairs were managed on a coherent basis, despite individual sales under right-to-buy.

85. These proposals apply to both existing and new burdens. So if an existing burden provides for the nomination of a manager in perpetuity, it will fall if the last unit of the development has been sold, or if the burden was first registered more than 10 years ago (30 for former public housing stock). Thus, if the manager burden was created 5 years ago, and the developer still owns at least one unit, the developer’s power to appoint the manager would have at most 5 years to run.

**Dismissal of a manager**

86. The present position is that owners cannot dismiss a manager while a manager burden is enforceable but they are free to do so thereafter. If there is no manager burden, they are free to dismiss a manager at any time. When a manager burden expires, a simple majority of owners will be sufficient to dismiss the manager under the proposals on community burdens (where there is no contrary provision in the title deeds). Section 59 provides that even if the title deeds specify a larger majority or even unanimity, a manager may be dismissed by a two-thirds majority of owners, regardless of the terms of the title deeds. Where the properties are right-to-buy properties this will apply even before the expiry of the time limit (30 years maximum). In other cases it will not be possible to dismiss a manager until after the end of the time limit (10 years maximum).

**Alternative approaches**

87. In the draft Bill it was proposed that units retained by a developer or local authority should be excluded from the calculation of the two-thirds majority. The Bill now allows properties owned by anyone who at any time was the holder of a manager burden (including local authorities and other social landlords) to be taken into account when calculating the two-thirds majority required to dismiss a manager. The Bill thus allows the authority’s units to be counted in calculating the two-thirds majority, and should ensure the protection of landlord or developer interests. A majority of consultees thought that this change should be made.

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

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

PART 6, SECTIONS 66-72

90. Part 6 of the Bill is concerned with servitudes and is highly technical. A servitude is similar to a real burden, in that it requires both a benefited and a burdened property, and it is an obligation that runs with the land. Servitudes are, however, limited to a fixed list of certain types of obligation. Unlike burdens, servitudes do not have to be recorded, and it is possible for them to arise by implication or prescription, for example where a right of access has been exercised without challenge over an extended period. The Bill does not rewrite the common law on servitudes, but it does provide a number of changes to align the law of servitudes with the reformed law of real burdens. The main objective of this Part of the Bill is to remove the overlap between servitudes and burdens.

PART 7, SECTIONS 73-80

91. The purpose of Part 7 is to clarify the law on options to acquire property and to make some simplifications to the procedures. Sometimes when property is sold, the seller makes it a condition of sale that he or she would in certain circumstances have an option to get the property back. The main types of conditions of this kind are pre-emption, redemption and reversion. Pre-emption entitles the holder to first refusal in the event of a property coming up for sale and usually he or she only has one chance to buy. The decision by the owner to sell is the only thing that can trigger 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 the death of an owner or the granting of planning permission. Reversion is similar, but does not require the payment of money or value.

92. Rights of pre-emption, redemption and reversion can be, and are, imposed as real burdens. This allows the obligation to run with the land, rather than being simply a contract between the original parties, which could cease to have effect if the property changes hands or the holder dies. The Commission considered prohibiting pre-emptions from being real burdens and reducing them to the nature of contracts. The Executive agrees with the Commission’s conclusion that this would achieve little and might prove counter-productive, leading to strengthened contracts stipulating more severe forms of pre-emption.
93. Section 3(5) provides that redemptions and reversions cannot be constituted as real burdens in the future, though existing rights will survive. The Executive does not believe that it is appropriate for successors of the original owner to be under an obligation to give up property, sometimes without compensation.

94. Non-feudal pre-emptions made before 1 September 1974 are not restricted to a single offer, but it is envisaged that the general proposals for burdens in the Bill should reduce the extent of these rights. In addition, section 17(2) provides that any sale in breach of a right of pre-emption will extinguish the pre-emption within five years by virtue of negative prescription. The effect of this is that where the holder of a pre-emption has not challenged any breach of the right, and the property has been sold, he or she would lose their right five years after the sale.

Reversion under the School Sites Act 1841

95. The School Sites Act 1841 created a statutory right of reversion in favour of landowners (or their successors) who sold or donated land for the building of schools and schoolhouses. It provided that if the land is no longer used for educational purposes, then it would revert to the estate of the original granter (“the reversion holder”). This reversion reduces the marketability of school sites and can result in difficulties for subsequent purchasers of a disused site in registering their title which might be challenged by a reversion holder. Reversion holders are entitled to the land, including any buildings on it. If it has been sold, and the reversion holder cannot get title to the land, he or she may be able to claim compensation (including the value of the buildings) from the education authority.

96. Section 77 clarifies the law and provides that it will not be possible for a reversion holder to evict a third party who had purchased land from an education authority in breach of a reversion. Instead, the reversion holder will be able to claim compensation from the education authority. The compensation will be based on the value of the land excluding any buildings on it where the use changed after the appointed day.

97. It has been suggested that where the education authority still owns the land but it is no longer used for educational purposes, the authority should be able, if a reversion is claimed, to choose to retain the land and to pay compensation to the claimant. The Executive agrees that that there is a public interest argument in favour of giving this option to the education authority. Although the land may no longer be required for educational purposes, it may be expensive and disruptive for the authority to have to relocate whatever facility is then on the land. The Bill therefore now allows local authorities the option of conveying the land and paying the compensation.

Entail Sites Act 1840

98. This Act also allowed the granting of small areas of land from entailed estates for public-spirited purposes. The Executive believes that rights arising under the 1840 Act should be treated in the same way as reversions arising from the School Sites Act and the Bill therefore now provides that the compensation scheme under section 77 will apply also to claims which would have arisen under the 1840 Act.
PART 8, SECTIONS 81-93

99. Part 8 of the Bill deals with the powers of the Lands Tribunal for Scotland, which hears applications for the variation or discharge of title conditions. Section 81 of the Bill restates the powers which were originally given to the Lands Tribunal by the Conveyancing and Feudal Reform (Scotland) Act 1970 and makes some additions and 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.

100. Section 88 provides a new fast-track procedure for applications to the Tribunal which are not opposed by providing that if an application is not opposed, the Tribunal must grant it. The procedure will not be available for facility or service burdens or core burdens in sheltered housing. Under the 1970 Act, the Tribunal is bound to consider the merits of all applications, even if unopposed, and may grant an order to vary or discharge a burden only where it is satisfied that the statutory grounds have been met.

101. A number of respondents to consultation expressed concern about the shortness of the period for objection (21 days) and also about the need for proper notification to benefited proprietors. 21 days is, however, the normal period of notice for other court actions, although there is often a facility for late objections or lodging of defences. Moreover, 21 days is the usual period allowed for objections to applications to the Lands Tribunal at present. The Tribunal has discretion to accept late representations. Under its present procedures, when an application for discharge of a burden is received, the Tribunal notifies benefited proprietors and others identified as possibly having an interest by means of recorded delivery post. The Executive has therefore decided not to change the Bill in relation to the fast-track procedure.

102. Sections 89 and 90 make new provisions on the grounds on which the Tribunal must decide on opposed applications. The existing grounds do not balance possibly competing considerations. Each is self-contained and, if pled, must be considered separately by the Tribunal in spite of the obvious overlap between them. Success under one of the grounds means success for the whole application. The Bill provides that the present grounds should be amended and treated as a series of indicators as to whether or not an application should be granted. There will be a unified test of reasonableness which will 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 or renew a title condition.

PART 9, SECTIONS 94-106

103. Part 9 is concerned with miscellaneous topics such as compulsory purchase, amendments to legislation and other topics. Again, the purpose is to clarify the existing common law and make consequential changes to other statutes. Some changes have been made to the 2000 Act.

Compulsory purchase

104. There are two mechanisms of compulsory purchase: compulsory purchase order (CPO) and purchase by agreement under statutory powers. Either method of compulsory purchase is thought to extinguish all real burdens and servitudes. This Bill puts this into statutory form, but it gives acquiring authorities the option of saving the burdens or servitudes. The Bill also provides
that benefited proprietors should be notified when burdened land is acquired under compulsory purchase procedures. They would be able to object and to be heard at a public local inquiry. The policy here is to ensure that benefited proprietors do not lose the benefit of a burden without the opportunity to object.

**Alternative approaches**

105. The draft Bill made some exceptions to the general rule that burdens and servitudes should be extinguished by compulsory purchase. It proposed that conservation and maritime burdens should be excepted where a purchase was by agreement. It proposed that facility burdens and pipeline servitudes should be excepted whether the purchase was by agreement or by CPO.

106. The Executive considered that these exceptions would cause difficulty. The Keeper of the Registers and the bodies using compulsory purchase all take the view that under the current law a CPO or statutory conveyance by agreement simply extinguishes all the burdens affecting the land being acquired. All the burdens are accordingly removed from the Land Register by the Keeper.

107. If facility burdens were to survive automatically, they would have to be expressly identified and reflected in the Land Register. The acquiring authority would have to carry out a detailed examination of the title deeds in order to ascertain whether or not the land was subject to any facility burdens. Even though this would be straightforward in some cases, in others it would be very time-consuming, especially where there were many burdened properties (such as in a road-building scheme). At the moment, the burdens are effectively lost, and the procedure is quicker and involves much less investigation. In addition there would always be difficulties as to the extent to which a surviving burden can be ignored. Problems would arise if the purposes for the acquisition changed or the land use changed at a later date.

108. The rationale for preserving facility burdens is that, where, for example, a number of properties are subject to an obligation to contribute to the maintenance of a common facility, one of those properties should not be exempted simply because it had been acquired by compulsory purchase powers. This assumes that the common facility will remain in place and that the aim of the compulsory purchase was simply to transfer the title of existing property to allow continued use of it rather than to put land into public ownership for development. In some situations compensation may be an adequate, or preferable, alternative for all parties. The Executive does not therefore believe that there is sufficient justification for all facility burdens to be saved.

109. The Executive also believes that the preservation of pipeline servitudes after acquisition would cause difficulties. If the land is at some point in the future used for a different purpose other than that for which it was compulsorily acquired, then such a servitude will again become enforceable. It might not be possible to know if such servitudes exist from the Land Register (as they do not have to be entered on the Register in order to subsist) nor might it be very easy to establish that they exist from an examination of the site. In many cases the services will have been re-routed and therefore there would be no real purpose in saving the old servitudes along redundant routes.
110. The draft Bill made provision for compensation where the extinction of a real burden or servitude results in loss. It was intended that this would simply be a restatement of the principle that compensation is due. But unlike the rules for the constitution of real burdens (which are common law rules and would benefit from codification), the rules on compensation for land are set out in statute as interpreted by the courts. The provision did not codify the law and it might have been interpreted in such a way as to alter it. The draft section has therefore been removed from the Bill. The effect is not to remove the existing right of compensation from owners of benefited properties, but rather to avoid the possibility of extending the circumstances in which a claim could arise. The Bill does, however, provide for compensation for the extinction of a personal burden, since these are new creations and are therefore not covered by the existing compensation code.

Clawback

111. Section 99 makes an amendment to the legislation governing the ranking of standard securities. This is to facilitate the use of standard securities in relation to “clawback” arrangements. The Executive consulted as to whether further changes should be made in relation to clawback arrangements, and the associated issue of development value burdens, for which provision was made in the 2000 Act. In the event it decided to make no change to the 2000 Act. The Executive is, however, discussing with various public bodies whether an amendment to the 2000 Act to protect their interests should be made. The background is described in the annex to this Memorandum.

Personal pre-emption burdens and personal redemption burdens

112. Section 102 amends the 2000 Act to make it clear that there is no need for benefited land in the case of feudal pre-emption and redemption burdens. Holders of these burdens will be permitted to save them by registering notices in the same way as for former feudal burdens.

Nomination of conservation body

113. The 2000 Act has been amended in section 102 to give effect to the policy described in paragraph 66 of this Memorandum.

Sporting rights

114. Sporting rights exist where a feudal superior sold land but reserved the right to shoot or fish on that land. There is some doubt as to the legal classification of sporting rights since it can be argued that they are real burdens, servitudes, or some other form of right, such as a feudal privilege or pertinent. The Scottish Law Commission believed that they should be treated as real burdens and accordingly the 2000 Act allows superiors to save sporting rights as burdens. In view of the doubt about their classification, section 102 amends the 2000 Act so that these rights can be saved as a self-standing right, rather than a burden. There is no change to the policy of the 2000 Act which is that these rights should be capable of preservation.
PART 10, SECTIONS 107-117

115. Part 10 of the Bill deals with savings, transitional and general expressions, including interpretation, the expression “owner”, short title and commencement. “Owner” is defined to mean anyone who has right to property whether or not title has been completed.

SCHEDULE 12: ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000

116. During the passage of the 2000 Act, the Executive made it clear that some amendment to the Act might be necessary in the light of the Scottish Law Commission’s work on title conditions. Schedule 12 contains amendments to the 2000 Act.

Section 20 of the 2000 Act: test for Lands Tribunal

117. In its Consultation Paper the Executive canvassed views as to whether the test which should be applied by the Lands Tribunal under section 20(7)(a) of the 2000 Act should be changed so that it matches the criterion which will be required under section 8(3) of this Bill. This proposal was generally supported by consultees, and the Bill accordingly gives effect to it. This means that a superior who goes to the Tribunal to attempt to save his or her enforcement rights to a burden will have to prove that his or her property would suffer material detriment from the loss of the burden. The test in the draft Bill was that the property would suffer substantial loss or disadvantage from the loss of the right.

Contractual rights

118. When a burden is created (whether a feudal or non-feudal burden), it also operates as a contract between the parties. Under contractual law, a contract is only binding upon the original parties to it. So if land is sold, and a burden imposed, that will also be a contract – but only until the land is sold again. At that point, the real burden subsists, but the contract disappears. The Scottish Law Commission took the view that this rule applied to both feudal and non-feudal burdens, but opinion is divided as to whether it is indeed the case that the contract disappears in the case of feudal burdens. There is a view that the feudal relationship operates as a continuing contract between the superior and the current vassal. As explained in the next paragraph, the Bill now puts the position beyond doubt.

Feudal neighbour burdens

119. The policy of the 2000 Act is that a neighbour burden should remain contractually enforceable as between the original parties. The rationale is that an arrangement which two parties voluntarily entered into should not be set aside. So these feudal neighbour burdens which were abolished by the Act will still be enforceable between the original parties as a contract. Clearly, however, it was not the intention that all feudal burdens would continue to be enforceable as contracts even if the land was no longer owned by the original purchaser. That would have meant the perpetual continuation of the feudal system. The intention is that the right to enforce should not continue after the first sale. Since there seems to be some doubt as to whether the 2000 Act has this effect, the Bill now makes it clear that contractual obligations which were incidental to feudal burdens should only remain enforceable where the original buyer is still the owner of the property. This is a transitional arrangement since even contractual
agreements associated with feudal neighbour burdens which survive after the appointed day will gradually die out as the land is sold.

**Feudal and non-feudal community burdens**

120. The situation is less clear for community burdens, because in addition to the relationship between the feudal superior and the vassal, there is also a relationship between the vassals. The Bill provides new regimes for former vassals to reach decisions among themselves. Broadly speaking, the policy of the legislation is to remove power from superiors and to replace it with majority rule for communities. Clearly this arrangement would be complicated if some members of the community were still under contractual obligations to their former superior, while newer members of the community were not. The former superior might in this way still be able to interfere with the management and regulation of the community and in these cases the community would not be able to govern itself. The situation where this comes into sharpest focus is in sheltered housing, where there is a clear intention – and expectation – that on the appointed day the residents will be able to take control of their developments. Virtually identical arguments apply where the seller of land has opted for an ordinary rather than a feudal disposition. Even though the seller would not be a superior, the community would not be able to govern itself if he or she had a contractual relationship with some, but not all, of the owners. The Bill therefore now provides that contractual arrangements which are incidental to feudal and non-feudal community burdens should be extinguished on the appointed day.

**CONSULTATION**

121. The Scottish Law Commission consulted widely on its *Discussion Paper on Real Burdens* (Scot Law Com DP No 106), which was published in October 1998, and also commissioned two separate empirical studies. One of these surveyed attitudes to real burdens in housing developments in seven locations throughout Scotland, while the other studied deeds of conditions of differing ages and from different locations. The Commission reconsidered the issues raised in the Discussion Paper in the light of these studies and the responses it received. It also took the views of an advisory group of professionals and academics who have experience in this field. All of this consultation fed into the Commission’s final *Report on Real Burdens* which had annexed to it the draft Title Conditions Bill.

122. The Executive issued a consultation paper based on the Commission’s draft Bill in May 2001. The Paper indicated where the Executive was inclined to accept the recommendations of the Commission, but also highlighted the areas where it had reservations about what was proposed or which it regarded as controversial. The paper identified 39 specific discussion points on which the views of consultees were particularly sought. Although the 12 week consultation period officially ended on 23 July, responses were accepted throughout August and September due to the difficulty which some organisations had in responding during the holiday period. Some 1,400 copies of the paper were distributed and 119 responses were received.

123. The Executive also held meetings to discuss the legislative proposals with the following organisations: COSLA, the Law Society of Scotland, the Royal Institute of Chartered Surveyors in Scotland, Age Concern Scotland, Hanover Housing (Scotland), the Sheltered and Retirement Housing Owners’ Confederation, Scottish Enterprise, Scottish Environment LINK and the central legal service of the Health Service in Scotland. In addition, presentations were given by
This document relates to the Title Conditions (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 6 June 2002

officials to the Chartered Institute of Housing and the Scottish Federation of Housing Associations.

124. All the points raised in responses to the consultation period and in meetings with officials were considered, and the observations made have informed the development of policy on the Bill, with the result that some changes have been made to the final version.

125. A copy of responses to the consultation (other than those given in confidence) has been made available on the Scottish Executive’s website at http://www.scotland.gov.uk/landreform/feudal.asp. A copy has also been placed in the Scottish Executive library and a further copy is in the Parliament’s Information Centre.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

126. There are a number of points to be borne in mind when considering the impact of the Bill on equality issues. First, the Bill is intended to improve the law relating to the private regulation of property by means of burdens and conditions contained in the title deeds of that property. The identity of the person selling and imposing the conditions, or the person who subsequently owns the land, is irrelevant. Second, one of the basic principles of the Bill is that in future conditions on land will only be valid if they benefit other land – they are not personal to the individual who originally imposes them. So, for example, if a person wishes to sell off part of a large garden attached to a house for someone else to build a house upon, restrictions can be imposed on the use of the part sold (perhaps to specify that the plot can only be used for a single dwellinghouse). That condition will benefit the house and ground retained by the seller and it will also run with the land sold. Obviously the burden would be enforced by successive owners of the retained house, but only in their capacity as owners, not as individuals. Finally, and perhaps most importantly, there is a rule under the existing law that a burden is invalid and unenforceable if it is illegal, for example if it contravenes any existing statute such as the Race Relations Act 1976. The Bill will give this rule statutory effect.

127. The Bill’s provisions are not discriminatory on the basis of gender (and the text of the Bill is gender neutral), race, disability, marital status, religion or sexual orientation. The Disability Discrimination Act 1995 covers issues relating to the conversion of property to make it suitable for occupation by disabled people and, as explained above, any purported condition would be invalid and unenforceable to the extent that it contravened that legislation. Title conditions do not appear to have been used in the past to provide for the use of certain property by disabled people (in the same way as has been the case for elderly people in sheltered housing), but there appears to be no obvious reason why this could not be done. Copies of the Executive’s Consultation Paper including the draft Bill were issued to the Disability Rights Commission, the Equal Opportunities Commission, the Commission for Racial Equality and the Equality Network, but no responses were received from these bodies.

128. The provisions in the Bill which relate specifically to the elderly are those which concern sheltered housing complexes (apart from the sheltered housing provisions, the age of a person imposing, or subject to, title conditions is wholly irrelevant). The stipulation that particular
property is to be occupied only by people above a certain age will almost invariably be set out as a condition in the title deeds of that property. As explained in the section of this Memorandum on sheltered housing, the developer who builds the complex will in many cases create conditions to control the use of the property. Some feudal conditions give the developer the power to appoint a manager. The general effect of abolition of the feudal system and of the Bill will be to remove control from the developer and to give it to the owners.

129. The Executive’s consultation paper on the Bill had a separate chapter specifically devoted to sheltered housing issues. This was because it was felt that a number of different areas in the Bill would impact on sheltered housing and that it would make it easier for readers to understand the provisions if they were drawn together in one chapter. The paper was distributed to a large number of sheltered housing providers and occupiers. During the consultation period Executive officials met Age Concern Scotland, the Sheltered Housing Owners’ Confederation and Hanover Housing, one of the main providers of this form of housing in Scotland. As a result of these meetings and of the large number of responses received from sheltered housing residents, the Bill has been amended to take into account the main thrust of the concerns expressed.

130. It has long been the law of Scotland that property rights must be set out in writing, witnessed and registered in the property registers in order to be presumed authentic and enforceable. Any requirement involving writing might disadvantage people who cannot speak, read or write English. So far as this Bill is concerned, one should remember that it relates to the private regulation of land by individuals and others – it does not prescribe regulations or impose conditions (though some forms will be prescribed in schedules to the Bill which will be used if an individual wants to preserve, or obtain a discharge of, a condition affecting their property: these will normally be completed by solicitors on behalf of their clients). Individual sales of property and the imposition of burdens will remain a matter of freely negotiated individual contract between parties.

131. Title deeds, and thus title conditions, are not easy documents even for fluent English speakers to understand. Most people have to have their title deeds/conditions explained to them by their lawyers. The reason is that these deeds are usually written in technical, conveyancing language. Minority ethnic communities (and others who may not be able to read or write English) will usually therefore continue to rely on advice from their legal advisers along with the vast majority of the rest of the property buying population.

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

Human rights

133. The Scottish Executive is of the view that the Bill is compatible with the European Convention on Human Rights.

134. The human rights issues in the Bill relate mainly to the extinguishment or enforceability of real burdens. For the purposes of assessment of compatibility with the Convention, it is
considered that the right to enforce a real burden is a possession for the purposes of Article 1 of Protocol 1 and is a civil right for the purposes of Article 6.

135. Article 1 of Protocol 1 in substance guarantees the right of property. The extinguishment of burdens is an interference in rights of property. The loss of a right to enforce a real burden is considered to be an interference with the applicant’s right of ownership which should be treated as a control of use under Article 1 of Protocol 1. The control of use of property will comply with Article 1 of Protocol 1 if it is lawful, in the public or general interest and proportionate, i.e. strikes a fair balance between the demands of the general interest of the community and the individual’s rights. Procedural safeguards for the protection of the individual and compensation are factors in assessing proportionality of any measure.

136. The Bill contains various provisions by which a benefited proprietor may lose the right to enforce a burden without having to sign a deed of discharge. These provisions all incorporate procedural safeguards to enable the benefited proprietor to object and to have the opportunity of putting his or her case with a view to preserving his or her right to enforce the burden. Mechanisms to discharge burdens are considered to be in the general interest. Having regard to the safeguards incorporated and the availability in many cases of compensation, the mechanisms in the Bill are considered to be proportionate and to meet a fair balance between the interests of the individual and the general interest.

137. Where certain mechanisms in the Bill lead to the extinguishment of burdens, this is regarded as a determination of civil rights requiring access to an independent tribunal to be compatible with Article 6 of the Convention. Owners of benefited properties are under the procedures set out in the Bill to be given the opportunity to be heard before a fair and impartial tribunal and thus the procedures comply with Article 6 of the Convention.

Island communities

138. Island communities will benefit from the reform of the law relating to real burdens in the same way as residents of other parts of Scotland.

Local government

139. Local authorities have significant land holdings and they will benefit from the clarification of the law in the Bill in the same way as other property owners. The reforms to the effect of the School Sites Act 1841 will bring relief to 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 allows local authorities the option of conveying the land to a reversion holder or paying compensation. Local authorities will also benefit from the provisions in the Bill on conservation burdens and manager burdens. They will also be able to preserve the right to continue to enforce neighbour burdens of the sort dealt with by section 46.

140. The provisions for the enforcement of amenity burdens in common schemes will also be of particular benefit to local authorities. If they wish to continue to enforce such burdens in
mixed tenure estates, they will be able to do so by registering a Deed of Conditions before the appointed day over unsold houses in an estate which will impose the same burdens as have been inserted in the titles of those parts which have been sold. This will be much easier and more cost-effective than attempting to preserve feudal burdens by registering notices against burdened properties.

141. Local authorities are likely to have already conducted an examination of their titles to establish whether there are important amenity or other interests which they would ideally wish to protect by the preservation of certain burdens under the provisions of the Abolition of Feudal Tenure Act 2000. It became clear during the Executive’s consultation exercise that most local authorities were not going to attempt to preserve burdens against individual houses in right-to-buy estates due to the cost of registering a large number of notices to preserve the relevant burdens. The proposals for the enforcement of amenity burdens in common schemes described in the previous paragraph will help local authorities to continue to enforce burdens relating to, for example, the maintenance of individual properties (the maintenance of common property is catered for by the automatic preservation of facility and service burdens). This should provide a solution to the concerns expressed by local authorities and others about the potential deterioration of the condition of former local authority stock if councils were no longer able to enforce amenity burdens. Co-proprietors in common schemes will also be able to enforce these burdens in future even if in some cases they had no rights of enforcement before the appointed day.

Sustainable development

142. Most title conditions and real burdens have no effect on sustainable development. Even in circumstances where they might have some impact, the Bill does not alter their effect and is therefore neutral in relation to sustainable development.

143. Title conditions are a method of private, rather than public, regulation of land and if the Parliament decided to make specific provision for sustainable development in legislation, this would be a matter of public law.

Business cost compliance

144. The Bill is largely a codification and clarification of the existing common law. It will therefore benefit business in the same way that it will benefit all other owners and potential owners of property by making the law simpler, clearer and more accessible.

145. Burdens and other title conditions must relate to land (including buildings) and they run with the land, normally in perpetuity. The only restrictions on the content of burdens 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 burdens 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.
146. 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 may 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. The Bill does not prescribe how land is to be regulated – it merely provides a modern and simplified framework for the imposition of conditions on land ownership in Scotland and for this reason a Regulatory Impact Assessment is not required.

ANNEX:

ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000

The 100 metre rule

147. The general policy of the 2000 Act was to abolish feudal burdens, except those which are beneficial. One category which can be saved is the feudal neighbour burden. Feudal superiors will often own land near their own land – it may once just have been part of the garden. They may want to continue to benefit from the burdens which control what happens on the land, so that they can protect the amenity and value of their own property. There are many feudal burdens of this kind, and the policy of the 2000 Act is that it is reasonable for existing burdens, which provide a genuine protection for the superior’s land, to survive the abolition of the feudal system. The Act provides that if the superior has a building used for human resort or habitation on neighbouring land, and if that building is within 100 metres of the burdened land, the burden can be preserved by registering a notice. This is the 100 metre rule. If the superior’s land does not meet the criteria of the 100 metre rule, he or she can approach the vassal and ask that the burden should be saved. If the vassal does not agree, the superior can apply to the Lands Tribunal to save the burden.

148. Considerable concerns were raised about the 100 metre rule during the Parliamentary stages of the 2000 Act. It was argued that open land (i.e. land which does not have a building on it) requires protection, particularly if the land is agricultural or used for the leisure industry – for instance there are burdens which stipulate that the purchaser of land might not be allowed to keep dogs. The purpose of this burden would be to protect the sheep on a farm, not the amenity of the farmhouse. Similarly, if a golf club had sold land, they might have stipulated that it could only be used for residential purposes. The members would want to protect the surroundings of the course, as well as the clubhouse.

149. It was also argued that the same distance was not appropriate for urban and rural areas, and in particular that the 100 metre distance was too short in rural areas. For example, many burdens are placed to protect views, and 100 metres is not very far if the aspect is uninterrupted by other buildings.

150. Ministers (and members of the Justice and Home Affairs Committee generally) were sympathetic to these arguments and were attracted to the possibility of different treatment for rural and urban areas. They undertook to consider these matters further in the context of the Title Conditions Bill.
151. No new arguments and no significant new examples emerged from the consultation exercise. Consultees were split about whether or not the 100 metre rule should be retained although more were against it than in favour of its retention. Those arguing for it to be dropped cited its artificial and arbitrary nature. Those in favour of retention of the rule argued that it brought clarity and certainty to the law. Most responses on the detail of the 100 metre rule were in favour of amending it to allow for the protection of the amenity of open land as well as houses. In this context many respondents pointed out that 100 metres was not sufficient to protect amenity in rural areas.

**Alternative approaches**

152. The Executive has considered whether the rule could be adapted to meet these points. The main options would be to extend the distance – either across the board, or in rural areas only – or to drop the requirement that there should be a building. Extending the distance test to say 250 or 300 metres while retaining the need for a building would, however, not answer the need for protection of open land. Having a different distance for rural and urban areas would not be satisfactory. The Executive does not think that it is possible to draw up workable definitions of urban and rural against the background of conveyancing law, where it is necessary for purchasers of land to be certain what they are buying and under what conditions. Dropping the requirement that there should be a building would solve the problem of protecting open land, but could mean that very many former feudal burdens in rural estates would be saved.

153. The Executive has also looked at the option of simply abolishing the 100 metre rule. There would still have to be a process of registering notices to save burdens, and it may therefore be unlikely that superiors will attempt to save burdens unless they serve a purpose. It is reasonable to suppose that a superior will seek to avoid the cost of drawing up and registering notices unless the burden is of genuine value to him or her. He or she would also be aware that the burden would not be enforceable unless he or she had a real interest to enforce it. Nevertheless, abolishing the rule would run the risk that potentially large numbers of feudal burdens would be saved.

154. The Executive has concluded that this risk outweighs the limitations of the rule. It has therefore decided not to remove the 100 metre rule. The Executive also believes that it is necessary to keep the requirement for a building: without that, it would be possible, for instance, for former superiors with large rural estates to preserve all of the burdens on the periphery of their estates. Moreover, there has been very little evidence of need to protect open land. In any event, the former superior will have other options. It will be possible to approach the vassal to seek agreement to the preservation of the burden. If the vassal does not agree, the superior will be able to apply to the Lands Tribunal. This should provide a safeguard against valuable burdens being lost. Although the Executive has concluded that it is not possible to differentiate between rural and urban situations, this may in any case be unnecessary, since the rule is more likely to be used in rural situations. This is because in practice not many superiors own neighbouring land in towns or cities. The real question may therefore be whether 100 metres is the right distance in a rural setting.
Development value burdens and clawback

155. In its consultation paper on the draft Title Conditions Bill, the Executive raised the issue of whether the provisions of the 2000 Act on development value burdens should be amended. It has decided not to amend the Act in this area. The Executive believes, however, that local authorities and other public bodies are in a special position, and it is discussing with them whether provisions to protect their interests should be introduced at a later stage of the Bill’s passage.

156. The approach of the 2000 Act was that development value burdens created by a feudal burden should not be saved (unless they meet other criteria in the Act which would justify their saving) but the superior would be able to register a right to compensation if the burden was breached in the 5 years preceding or the 20 years following the appointed day. These burdens exist because of financial arrangements made at the time of their creation for which compensation is claimable.

157. A development value burden is a real burden that has been imposed in exchange for a reduced purchase price. Typical examples where development value burdens have been used are:

- a plot of land sold for very little on condition that it was used for a community hall or a sports field;
- land sold cheaply by a local authority to be used only for gardens or recreational purposes.

There may be no expectation or intention that the land will eventually be used for a different purpose and indeed the seller may want the land to be used for the purpose specified.

Alternative approaches

158. Most consultees were in favour of allowing former superiors to save development value burdens, rather than being able to claim compensation for their loss (while some thought that the compensation was far too low).

159. The Executive was not persuaded by this. Its general policy is that burdens must benefit other land, and the Executive did not consider that a sufficient case had been made for development value burdens to be an exception to this rule. Furthermore, it may be very difficult to determine whether a particular burden is a development value burden. The terms of the deeds will often make no reference to the fact that the land was being sold cheaply or that the imposition of burdens affected the price. The burden may therefore be indistinguishable from other feudal burdens imposing use or building restrictions. Some former superiors may therefore be tempted to claim, or assume, that the imposition of the burden did significantly lower the price paid for the land. This will be exacerbated if it is made relatively easy for the superior to save his or her burden. To allow development value burdens to be saved might therefore mean a considerable increase in the number of feudal burdens which would survive abolition of the feudal system. The Executive has therefore decided not to change the 2000 Act to allow development value burdens to be saved.
Alternative approaches: compensation

160. It was also argued by some consultees that the compensation on offer for development value burdens was inadequate. Compensation is capped at the difference in value – at the time of sale – between the price paid for the land and the price which it would have fetched had the burden not been in place. This is in line with one of the grounds of assessment of compensation following discharge of a burden by the Lands Tribunal: “a sum to make up for any effect which the obligation produced, at the time when it was imposed, in reducing the consideration then paid or payable for the interest in land affected by it” (section 1(4)(ii) of the Conveyancing and Feudal Reform (Scotland) Act 1970). This test has been applied for over 30 years.

161. In addition, the former feudal superior is likely to have had the benefit of the burden for some considerable period of time. If the superiority had changed hands, it is unlikely that the price would have been affected by the burden. To allow for inflation would be difficult and might lead to unacceptable results. The Executive agrees with these arguments and does not believe that there should be a change to the current basis of compensation for development value burdens.

Clawback

162. Clawback is the name given to the arrangement used by both public authorities and commercial firms where the seller of land (whether it is sold at or below market value) sells in the expectation that its value will be enhanced by the purchaser and wishes to receive a share of that enhanced value. Land might, for example, be sold to a developer at rates applicable to open agricultural land but envisaging that the developer may subsequently receive planning permission to build a housing estate. The selling price is not necessarily lower than the current market value. In contrast to development value burdens, the seller may not desire to restrict use, but wishes the event to occur that will trigger the additional payment.

163. Clawback transactions are complex and varied, but they regularly include two features. The primary one is a standard security in favour of the seller, which provides that if a certain event occurs (such as planning permission for change of use) he or she will get a further financial payment. The second is a feudal real burden.

164. The Executive has accepted the view of the Scottish Law Commission that if the purported burden is simply an obligation to pay money on the occurrence of a specified event, it is not a valid real burden and could not be enforced against the successor to the original vassal (although it could presumably be enforced against the original vassal as a contract). The problem is that the seller will very often not own any other land nearby. The general principle of both the 2000 Act and the Bill is that burdens must benefit other land, and it is therefore inappropriate to use them as a means of protecting a financial investment in clawback arrangements. Moreover, since burdens are open to variation or discharge by the Lands Tribunal, they are not an efficient way of protecting an investment.

165. Section 99 makes an amendment to the law on standard securities, to provide additional protection for them, but the Executive has decided to make no other alterations to the law on clawback arrangements.
Burdens imposed by public authorities: statutory equivalents

166. Local authorities and other public bodies regularly impose burdens when they sell land and they regularly do so at less than market value. The authority may be willing and indeed eager to sell the land for a useful social purpose, but it may wish to control the use to which that land is put and it may not be able to do this through planning powers.

167. Public authorities often sell land subject to clawback conditions. These provide that if a particular event happens – typically that planning permission is obtained for a change of use – an additional payment will be made. The authority’s purpose here is not to control the use of the land, but to share in any windfall. The authority is protecting its financial position and indeed it would be criticised by the Auditor General if it did not do so. Public bodies have indicated to the Executive that they do not regard a standard security alone as offering sufficient protection for public funds. If the purchaser of the land has insufficient funds, or if there is a higher-ranking security, the public authority might not get its money. Furthermore not all purchasers are willing to grant a standard security. Various public authorities have argued that they should be able to continue the existing practice of including a real burden specifying the clawback when they sell land. They contend that there is a clear public interest in seeing that public funds are protected as much as possible.

168. The Executive accepts that there are good arguments for allowing public authorities to protect land sales. At present, Scottish Enterprise is permitted to enter into agreements with landowners under section 32 of the Enterprise and New Towns (Scotland) Act 1990 as to the future use of land. Section 101 of the Bill makes amendments to the operation of section 32. The Executive proposes that similar provision should be made for local authorities and other public authorities. It is discussing with COSLA and other public authorities the best way of achieving this.
This document relates to the Title Conditions (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 6 June 2002

TITLE CONDITIONS (SCOTLAND) BILL

POLICY MEMORANDUM

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