TITLE CONDITIONS (SCOTLAND) BILL

CONSULTATION

MAY 2001

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SCOTTISH EXECUTIVE

DRAFT TITLE CONDITIONS (SCOTLAND) BILL

CONSULTATION PAPER

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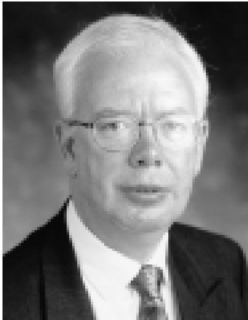
Foreword by the Deputy First Minister



I am delighted to present a further Bill in the Executive's wide-ranging programme on land reform. This Bill is called the Title Conditions Bill. It is associated with the Abolition of Feudal Tenure etc. (Scotland) Act, which was passed by the Scottish Parliament in June 2000. Since the feudal system is about to give way to a system of simple, outright ownership, the time is right for reform of the general law on conditions affecting land. Together, the two pieces of legislation will provide a modern and simplified framework for property ownership in Scotland.

What are title conditions? This may sound like a very technical term, but in fact it describes a very simple concept, and one which affects all householders. Those of us who own houses or other forms of property will almost certainly have some kind of conditions attached to our ownership. We may be restricted as to how we can alter our property – for instance we may not be allowed to erect a building in the garden. We may be restricted as to how we can use our property – for instance we may not be allowed to use a house to run a business, or we may not be allowed to keep more than one pet. We may be obliged to do something to our property – for instance to keep it in good repair. We may be obliged to let other people have access to our property – for instance if they need to cross it to get access to their own property. These conditions will be set out in the legal documents, or titles, which prove our ownership of the property. They are title conditions.

The general law on title conditions 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. The Scottish Law Commission have studied the state of the law, and has concluded that it is unclear and confusing. They have therefore recommended that the law on title conditions should be clarified, and set out in a new statutory law. The draft Bill which is attached to this Consultation Paper has been drawn up by the Commission. It restates the current law in a clear, codified form. In places, where the common law is uncertain or unsatisfactory, it proposes reforms or enhancements of the law. The Consultation Paper draws attention to issues raised by the draft Bill. The Executive would welcome views on these issues before finalising its own policy proposals for legislation.

The general effect of the Bill will not be to change the social structure of Scotland, but to move to a modern and simplified system of property ownership. This is a reform from which all householders will benefit. It will make the process of conveyancing simpler, and will make life easier for those buying or selling property and for those who wish to alter the conditions binding their ownership of property.

I should like to pay tribute to the diligent and exhaustive work which the Scottish Law Commission have carried out in reviewing the law relating to title conditions and in suggesting modernising reforms. Scotland is well served by its Law Commission and it is a source of great satisfaction to me that the Scottish Parliament now provides a legislative avenue by which the Commission's recommended reforms may be implemented.

I look forward to receiving comments on the draft Bill.

Jim Wallace

Jim Wallace, MSP

Contact Points

Comments on the draft Bill should be sent by 23 July 2001 to:

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As usual, copies of replies received will be made available to the public on request, unless respondents state that all or part of their response is confidential.

All comments received on these proposals will be carefully considered, and will help the Scottish Executive to prepare the Bill to be introduced to Parliament.

Consultation Paper on Title Conditions: Introduction

1. Title conditions are conditions which apply to land ownership. In this context 'land' means land and the buildings which stand on it. Title conditions affect most land in private ownership, as, when a plot of land or an individual house is sold, the seller may place conditions in the title to the land. For instance, the purchaser might have to contribute to the cost of a service; or he might have to maintain the property; or he might be forbidden from carrying out certain activities on the property. These are title conditions. This private regulation of land ownership is parallel to and separate from the public regulation of land ownership which operates through planning and environmental legislation.

2. The purpose of this Consultation Paper is to set out the Executive's plans for the reform of the law on title conditions, and to invite views on it. A draft Bill is attached at Annex C, which is the second volume of this Consultation Paper. It has been prepared by the Scottish Law Commission, a statutory body which is charged with promoting reform of the law of Scotland. The draft Bill was published by the Commission in October 2000, as part of their Report on Real Burdens (Scot Law Com No 181). Both the Report and the draft Bill are available at http://www.scotlawcom.gov.uk

3. Before the Commission published their Report, they issued a Discussion Paper (Discussion Paper No 106) in October 1998, on which they held a wide consultation exercise. The Commission's Report gave a very thorough account of the reasoning behind the draft Bill. This Consultation Paper does not duplicate that. It does, however, reproduce the Commission's detailed notes on the effect of each section of the Bill. These are interleaved with the relevant sections of the Bill in Annex C.

4. The Executive intends to introduce the Commission's Bill. There are, however, a number of provisions where the Executive has some reservations about what is proposed, or which it regards as controversial. These issues are highlighted in this Consultation Paper and the Executive would particularly welcome views on them. The points for discussion are given in the Paper in **purple type.** They are also reproduced at the end of the Paper in Annex A. The subject matter of the Paper is highly technical, and different parts of it will be of interest to different sectors. **Please do not feel obliged to answer all the questions.** The Executive will also, of course, take account of any other more general comments which you wish to make.

Vocabulary and basic rules of the common law

5. The contents of the Bill are highly technical. A glossary is attached at the end of the Consultation Paper at Annex B. But the reader may find it helpful to have a brief explanation here of the main terms which are used in the Paper.

6. A **title condition** is a condition which applies to land ownership. The most common type of title condition is a **real burden**. Other types of title condition include servitudes and conditions in long leases. The draft Bill is primarily concerned with the law of real burdens. A real burden restricts the owner's use of his land, or obliges him to do something. 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.

7. While not a term which appears in the Bill, the term **amenity burden** is a convenient label for other burdens. Amenity burdens include burdens which may restrict the uses of the property, for instance by stipulating that it may not be used for keeping more than one animal, or that it can only be used as a dwelling-house. Amenity burdens might provide that only a single-storey house could be built on the land, or that individual houses must all conform to a standard pattern.

8. The burdens which bind the owners of a property are set out in deeds which are recorded in the **Register of Sasines** or registered in the **Land Register**. These registers are maintained by the Keeper of the Registers and are open to public inspection. The burdens regulate the way property is used and the obligations they impose are conditions of ownership. The owner of the property is the outright owner – but he has accepted that he owns it subject to conditions. When he sells the property, the burdens will still apply to it. In theory, burdens are perpetual. **They run with the land.**

9. 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**.

10. If the owner of a property does not observe his title conditions, that is not a matter for the police or public authorities. But there will usually be someone who can take action to make him keep to his conditions. That person is the owner of the benefited land. He is the **benefited proprietor**. He has **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 has the right to enforce the burden. But the common law is clear that he must also have **interest to enforce** – in other words his property must genuinely benefit from the burden. Otherwise he cannot enforce it.

11. Sometimes the owner of the burdened property (**the burdened proprietor**) will wish to get rid of the burden or to vary it: this is called a **discharge** or a **variation**. He can do that in two ways. He can apply to a special court known as the **Lands Tribunal for Scotland** for a discharge or variation of the burden. Or he can ask the benefited proprietor, who, if he agrees, will grant a **minute of waiver**. Sometimes benefited proprietors charge a fee for this. If the burdened proprietor ignores the burden, and acts in contravention of it without permission, this is known as a **breach**.

Main purposes of the Bill

12. The draft Bill has two main objectives. The first is to achieve greater clarity in the law. The second is to reduce the number of outdated burdens by making it easier to discharge or vary them. This will make it possible to update the property registers over time and to achieve greater clarity about the burdens and enforcement rights applying to owners. The Bill creates a regime for the way in which land will be held in the future, and also makes transitional arrangements for burdens and rights which exist at present.

13. The draft Bill has 11 Parts. This

Consultation Paper is therefore divided into chapters – one for each Part of the draft Bill, apart from Part 11 which is in a single chapter with Part 10. There is also a chapter on the effect that the Bill will have on sheltered housing, and one on the relationship of the Bill to the Abolition of Feudal Tenure etc. (Scotland) Act 2000, which is referred to in this Paper as the **2000 Act**.

14. The abolition of feudal tenure will have a profound effect on the way in which property is held in Scotland. The vast majority of land is held at present under feudal tenure and many real burdens were created in feudal deeds. Although the 2000 Act has been passed, much of it has not yet been commenced. Most feudal burdens will disappear along with the feudal system, but the 2000 Act allows some feudal burdens to be saved. They will be assimilated into the law of real burdens, and it is desirable that this assimilation forms a single process along with the reform of the law on title conditions. Once the Title Conditions Bill has been enacted, it and the remaining parts of the 2000 Act will be commenced simultaneously on a date which is referred to as the **appointed day**. This will result in a significant clarification of the law and the removal of outdated burdens. To allow time for transitional arrangements to be put in place, the appointed day is likely to be about 2 years after the Title Conditions Bill is enacted.

Contents of the Bill

15. Part 1 of the Bill codifies the existing law and introduces some changes such as a 'sunset rule' (with the option of preservation) for burdens over 100 years old. It sets out how to create a real burden, what its contents may be, and how it may be terminated. These rules apply to existing burdens as well as burdens to be created in the future.

16. Part 2 deals with burdens which apply to communities in the sense of groups of properties which have a common scheme of burdens. There are many types of community – communities exist in modern housing schemes and in Victorian terraces and Georgian developments; in tenements and in sheltered housing complexes. There are also non-residential communities in commercial developments such as business parks. These communities will have common or similar burdens which apply to all the units within them, and which can be mutually enforced. Part 2 coins a new term – **community burdens** – for burdens of this type, and sets out the rules for existing and new community burdens.

17. Part 3 sets out the rules for conservation and maritime burdens. The concept of conservation and maritime burdens was introduced in the 2000 Act. They are types of burden that are of public benefit.

18. Some burdens do not specify who has enforcement rights. However, because of the way in which the title deeds have been drawn up, the rights have been created by implication. Part 4 abolishes implied enforcement rights subject to a preservation procedure, and prohibits their creation in future. Some of these implied rights of enforcement can be preserved – with the condition that in future the benefited property would have to be specified. Part 4 also recreates implied rights of enforcement in common schemes subject to a distance qualification.

19. Part 5 is a miscellaneous Part which deals

with a variety of different issues. Amongst the most important is the power to create a new legal category of burden in future. This is a **manager burden**, which would allow a property developer to keep control of a group of properties while he is developing them, and for a limited period afterwards.

20. Part 6 of the Bill outlines a model development management scheme. This scheme is based upon the Management Scheme B contained in the Law Commission's Report on the Law of the Tenement (Scot Law Com No 162). The scheme provides an example of good practice intended for developers, and is optional. The scheme is not confined to tenements, and can be adapted for use in other developments with shared facilities.

21. Part 7 is about a different type of title condition – the **servitude**. Servitudes are a special class of title condition which generally give the owner of the benefited property the right to have access or otherwise make use of the burdened property. The Bill does not undertake a review of the law on servitudes, but it does realign the boundary between servitudes and real burdens. In the future, it will be a much simpler task to identify whether a particular obligation is a servitude or a burden. Servitudes created in writing will not have to belong to the existing fixed list.

22. Part 8 deals with technical aspects of the law relating to rights to acquire property. The rules for pre-emption are modified, and the procedure is streamlined to operate more efficiently. New provisions are made for rights of reversion arising under the School Sites Act 1841.

23. Part 9 sets out rules for the Lands Tribunal. These restate the existing rules and also make some changes. The jurisdiction of the Tribunal is extended to allow it to consider the validity and enforceability of burdens. There is a special provision for the variation or discharge of community burdens, and provision for the granting of unopposed applications for discharge or renewal of burdens.

24. Part 10 outlines certain miscellaneous provisions, the most important of which concerns the effect on title conditions of compulsory purchase or the acquisition by agreement of land by an authority which could have used compulsory purchase powers. Part 10 also amends the existing legislation on the ranking of standard securities.

25. Part 11 lists the various savings and transitional arrangements pertaining to the draft Bill, and the interpretation, short title and commencement provisions.

Chapter 1 – Real Burdens: General

26. Part 1 of the Bill is about the general rules which apply to real burdens. In the main it simply restates the current common law. It sets out the law in the form of a code, which will make the law easier to interpret and apply in future. In some places, however, the Scottish Law Commission have found the existing law unsatisfactory and difficult to operate. They have therefore suggested some enhancements to the law, and some changes to it.

The Executive agrees with the Commission that putting the law into a straightforward form will simplify the process of conveyancing. It will make it easier to use the property registers.

27. Part 1 of the Bill 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. Sections 1 to 3 of the Bill deal with the definition and characteristics of burdens. The definition of real burdens includes pre-emptions, but excludes redemptions and reversions. This specific point is discussed in Chapter 8 of this Consultation Paper.

Registering against both benefited and burdened properties

28. Sections 4 and 5 cover the creation of burdens, and largely restate the common law. Section 4(2)(c) 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.

29. This section should be read in conjunction with section 112, which makes it clear that in future a deed creating a new burden will not be registrable against one property only: it will have to be registrable against both properties. 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.

Discussion Point 1

The Executive believes that the requirement to register burdens against both properties is a far-reaching reform which will lead to a significant improvement in the transparency of the registers, and the efficiency of the conveyancing system. Do you agree?

Content of burdens

30. The Commission have proposed that the basic rules on minimum content of burdens should remain unchanged. The relevant deed must set out the terms of the burden which must be framed in such a way that successors to the original parties can understand the nature and extent of the obligation. The Commission have, however, recommended a substantial change and a significant clarification to the existing law on the incorporation of extrinsic material. These are set out in sections 5(a) and 5(b) respectively.

31. Under the existing law, the full terms of a burden must be shown in the deed and then

reproduced in the property registers. There must be no extrinsic material. But many purported burdens do contain extrinsic references. An example is the numerous burdens which refer to rateable value. The full terms of the burden are not shown in the deed – it is necessary to find out what the rateable value was. The common law seems to indicate that these burdens may be invalid. The Commission have proposed, in section 5(a), that it should be permissible in future to refer in burdens to statutes, public registers and public 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.

32. The Executive is concerned that this proposal may cause difficulties. There would inevitably be a temptation for conveyancers to import more references to other documents in future deeds imposing burdens. While there may be economies of time and cost in drawing up deeds which refer to provisions in statute, or to a document in a public register, rather than setting out the desired provisions at length, there may be practical disadvantages and possibly greater costs caused to those who wish to establish the full terms of burdens in the future. An enquirer may not have easy access to statutes (particularly secondary legislation) or public registers and records, perhaps because he lives in a remote place. There may also be additional costs associated with accessing certain public registers. Local authorities may not be in the habit of making old records such as the valuation roll readily available for public scrutiny. There are also more technical problems. In the case of references to statute, an enquirer will have to determine whether the provision is still in force or has been amended. Which provisions were in force on what date? Can future statutory amendments be imported into current deeds imposing burdens? The current system has the great advantage that the complete terms of burdens must appear on the face of the deed and thus in the property registers.

Discussion Point 2

The Executive is concerned that the proposal to allow extrinsic material to be included in future burdens would cause difficulties of interpretation. Do you think that extrinsic material should be included in future burdens?

33. The Commission have also proposed that this change should be retrospective. This would mean that it would apply not only to future burdens but also to those which already exist. This would remove any doubt as to whether the burdens are enforceable. There are circumstances, however, in which a purchaser may have been advised before buying a particular property that a burden was unenforceable and may have proceeded with the purchase only because of that understanding. The Commission argue that in spite of this the public interest in the adequate maintenance of property is such that these purported burdens imposing an obligation to contribute to the cost of maintenance and apportioning that cost should be enforceable. The Executive acknowledges the importance of such burdens. But the Executive is concerned that to extend the principle of retrospection to all burdens may cause difficulties where the effect of the change will be to impose a new set of rules on property.

Discussion Point 3

The Executive agrees that the law should be clarified so that existing burdens imposing an obligation to contribute to the cost of maintenance and apportioning that cost can be enforced, but the Executive has reservations about the proposal to allow extrinsic material to be included in other burdens. What are your views?

34. Section 5(b) is the second area where a change is proposed. Some titles set out an obligation to pay a cost, but do not specify what the cost is as the cost is not yet known. An example of this type of burden is the way in which many modern developments set out mechanisms for the collection of service charges which will include the costs of cleaning and maintenance of the common facilities. Specifying the exact figures in advance is not possible as the costs of maintenance and of service charges change each year. It is not clear whether burdens of this sort are enforceable under the common law. The Commission have recommended that it should not be necessary to specify the amount payable towards an obligation to pay maintenance and other costs provided that some method is stipulated for calculating liability. So the failure to specify the costs would not nullify the burden.

35. The Commission have again recommended that this change in the law should be made retrospectively. Although this second proposal may not in fact change the existing law, it will remove the current uncertainty.

Discussion Point 4

The Executive believes that it would be helpful to make clear that an existing burden would not be invalid because it contains a provision on unspecified costs. Do you agree? As for the future, it will be clear to conveyancers that if a burden of this sort is to be valid, its terms must be clear as to how liability is to be calculated.

Title to enforce

36. Section 7 of the draft Bill deals with the right to enforce burdens. Section 7(2) proposes a change to the current law. At present a person has title to enforce only if he is the registered owner of the benefited property. The Scottish Law Commission's view is that this rule is too narrow. It 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 title. As a result, the Commission propose 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.

37. The Commission recognise that this proposal might result in a larger number of people being able to enforce a burden. They conclude that this does not impinge unfairly on the burdened proprietor, as the obligation has not changed.

Discussion Point 5

The Executive agrees that title to enforce burdens should be extended to non-registered proprietors, tenants, proper life renters and non-entitled spouses. Do you agree?

Interest to enforce

38. A benefited proprietor cannot enforce a real burden unless he has interest to enforce as well as title to enforce. He has to be able to demonstrate that his (benefited) property does in fact benefit from the burden and would suffer from the 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.

39. In determining whether a benefited proprietor has interest to enforce, 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. A breach of a burden which prohibited building in a garden would as a general rule be more prejudicial to the benefited property if the breach were to be the building of a two-storey extension rather than the building of a small conservatory. It is likely that the benefited proprietor would find it easier to establish interest to enforce in the case of the two-storey extension and if his own land was close to the burdened land.

40. The Commission have recommended that there should be a statutory restatement of interest to enforce. There were differing views during their own consultation as to whether it would be helpful to have a statutory definition, or whether it would be better to leave the courts to interpret the common law in the light of the particular circumstances of individual cases. The Commission concluded, however, that the question of a statutory definition of interest to enforce should be seen in the light of the over-arching reform of real burdens. If the law on real burdens as a whole is to be put onto a statutory footing, it would be very odd to leave out a definition of interest to enforce. The draft Bill therefore contains a definition of interest to enforce in Section 7(3).

The Executive agrees that a definition of interest to enforce should form part of the restatement of the law on real burdens.

41. The definition of interest to enforce which appears in the Bill is 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 seeks (and has grounds to seek) payment of, or as respects, that cost.

The Executive agrees with the second part of this definition. There can be no reasonable objection to a definition of interest which is

based upon a cost which a burdened proprietor has agreed to be liable for.

42. The first part of the definition hangs upon the phrase 'material detriment'. The Commission have considered this with great care. In their Discussion Paper, they covered very fully the various possibilities. They sought the views of others on the use of the word 'detriment' and on whether that word should be glossed in any way. They thought that the addition of the word 'material' might raise the threshold for interest to enforce too high. In that case, the definition would not be a re-statement of the law, but an enhancement of it. The Commission canvassed the possibility of a definition which instructed the courts, in assessing detriment, to take account of the distance between the benefited and burdened properties, and the seriousness of the breach. In the event, however, the Commission decided that the general phrase 'material detriment' would be of most assistance to the courts.

Discussion Point 6

Do you agree with the definition of interest to enforce given in Paragraph 41, and in particular the use of the phrase 'material detriment'? Do you think that 'material' would be too high a threshold?

Sections 8 to 13

43. Sections 8 to 13 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.

The Executive agrees with these clarifications.

Terminating burdens

44. The remainder of Part 1 deals with the methods of terminating burdens. Some of it, for instance section 15, on **acquiescence**, (the disappearance of a burden after the benefited proprietor has ignored a breach) is essentially a development and clarification of the existing law. Other sections introduce reforms.

The Executive agrees with the provision on acquiescence and with the other minor clarifications in sections 14 and 17.

45. Section 16 makes an alteration to the law on prescription. The law already provides that if a burdened proprietor breaches a burden, and the benefited proprietor takes no action, the burden will fall (to the extent of the breach) in 20 years. That is called negative prescription. The qualification that the burden will only fall to the extent of the breach is of course important. A burden might stipulate that there should be no building in a garden. The owner might ignore it and build a shed. The benefited proprietor might take no action, and after 20 years his right to object to the shed would have been lost through prescription. If the owner wished to replace it with another shed he would be free to do so. But he would not be free to build a double storey extension. The Commission have now proposed that the relevant period for prescription should be reduced to 5 years. The effect of the transitional provisions is to extinguish with immediate effect enforcement rights in respect of breaches which are 5 years old at the time of the appointed day.

Discussion Point 7

The Executive agrees that the period for negative prescription should be reduced to 5 years. Do you agree?

46. Sections 18 to 22 introduce a completely new process for removing burdens. The Commission believe that there should be an easier way to remove burdens which have become outdated. They have therefore recommended a sunset rule which would apply to old amenity burdens. (Other types of burden, such as burdens covering maintenance of common facilities, would not be subject to a sunset rule).

47. The sunset rule would provide that where a burden is more than 100 years old, the owner of the burdened property should 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 with the effect that the burden would be discharged. He may, however, apply to the Lands Tribunal for renewal of the burden. The effect of this proposal is to reverse the roles of the parties in a case that goes to the Tribunal. At present the owner of the burdened property goes to the Tribunal if he wants to have the burden removed. In future, if he received a termination notice, the owner of the benefited property would go to the Tribunal if he wanted to save his burden. If he did nothing, the burden would be removed.

48. The Commission considered an automatic sunset rule, which would have removed all burdens over a certain age, which could have been 100 years or some other figure. That would clearly have been a very radical approach, which would have removed many burdens. In the event, however, the Commission decided that too many valuable burdens would have been lost, and they opted for the more selective approach described above.

The Executive agrees that there are too many burdens which have become outdated because of changes in the nature of the property or because of changes in social habits. It therefore supports the Commission's objectives. The Executive generally welcomes the concept of the sunset rule, but it has some doubts about its detailed workings (in particular the notification procedures), and about the extent to which it would be used in practice. These are discussed below.

49. If the principle of the sunset rule is agreed, there are several points of detail to be considered. The most important of these is who should be notified of the proposed removal of the burden. The Bill provides that the procedure should work as follows:

- 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. If there are benefited properties further away, an advertisement should be placed in a newspaper circulating in the area.
- The owner of the benefited property would have a minimum of 8 weeks in which to apply to the Lands Tribunal to keep the burden.
- If no application is made, the owner of the burdened property could send the paperwork to the Registers of Scotland. The register will be amended and the burden will be removed.

50. The reason for the 4 metre rule is the belief that if the closest neighbours do not wish

to save the burden then it is unlikely that those further away would wish to do so. It is important to note that what is suggested is not that all neighbours within a 4 metre radius should be served with a notice – it would only be those within a 4 metre radius who had title to enforce. In other words, the owner of the burdened property would still have to find out who had benefited property. He would have to serve the notice on anyone who had benefited property which was within 4 metres. But he would not have to serve a notice on neighbours within 4 metres whose property was not a benefited property.

51. Owners of benefited property which is more than 4 metres away from the burdened land would not receive a notice. They might not even know that the burden was being removed. They therefore might not have an opportunity of seeking a renewal of the burden. They would have no right of appeal.

Discussion Point 8

The Executive has concerns about the detail of the notification procedure for termination of a burden. What are your views?

52. If there is to be a sunset rule, that clearly means that some time limit has to be set. The Commission have recommended a period of 100 years.

Discussion Point 9

Do you agree that 100 years is the best cut-off for the sunset rule?

Unopposed applications to the Lands Tribunal

53. In considering the proposals for the sunset rule, the Executive would be grateful if consultees could consider it alongside the provisions for dealing with unopposed applications to the Lands Tribunal which are made in Part 9 of the Bill (section 92).

54. The way that this would work is as follows. The owner of the burdened property would, as at present, simply apply to the Tribunal. If the application was not opposed, the Tribunal would not be obliged to consider the application on its merits, but must just grant it.

55. Allowing the Tribunal effectively to fast track unopposed applications may diminish the attractiveness of the sunset rule – a point which was acknowledged by the Commission. The sunset rule is designed as a speedy way of extinguishing obsolete burdens. But it is arguable that the normal process of applying to the Tribunal is faster, and indeed, if the application is not opposed, much faster.

56. The advantage, however, for the burdened proprietor in proceeding by means of the sunset rule provisions is that he can issue the notices without going to the Tribunal, and this may be more attractive and economical.

Discussion Point 10

Do you think the sunset rule is necessary or attractive as an alternative to simply applying to the Tribunal in all cases?

Chapter 2 – Community Burdens

57. Part 2 of the Bill is about burdens in communities. It provides some default rules for majority decision-making, in three areas: maintenance, appointment or dismissal of a manager and discharge of burdens. They would apply where the title deeds make no provision on these matters.

58. There are many types of community – in domestic 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. Very often communities share facilities – for example a common stair or shared garden – but they do not always do so. In the Bill, 'community' has a particular meaning. It is based on a new term which is introduced by the Bill – the **community burden**. A community burden is a burden which applies to a number of 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. This is sometimes called a common scheme. A **community** 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.

59. Burdens which regulate the maintenance, management or use of a common facility, such as a roof, common access road or a boundary wall are obviously highly 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 undesirable 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.

60. Part 2 sets out the rules for how community burdens would operate in future. If a burden does not meet the definition of a community burden, then it would not be governed by these rules. The rules would apply to all community burdens, whether they were created before or after the Bill comes into effect. Section 23(1)(a) provides that communities of under four units will be excluded from the definition of community. Majority rule has no place in a community of two and seems potentially oppressive in a community of three. Section 23(3) clarifies that burdens in sheltered housing schemes are community burdens if there is a common scheme. Section 45 in Part 4 of the Bill clarifies that tenements will normally be treated as communities.

Discussion Point 11

Do you agree with the exclusion of communities with less than four units? Would any variation of the deed of conditions after sale of the first units cause problems? Do you foresee any potential difficulties posed for developers during the course of completion and sale of a development which will become subject to community burdens? Are there any particular difficulties here for local authorities when they have sold some but not all of the units?

61. Section 23(2) differentiates between burdens created with express rights of enforcement and those created with implied rights of enforcement. In some common schemes, the terms of the legal documents make it clear who has the enforcement rights – the rights are express. But in others, the enforcement rights are not set out formally. This does not mean, however, that they do not exist. They can be deduced from the terms of the deeds which created the burdens. These are called implied rights of enforcement. Part 4 of the Bill makes provision for implied rights of enforcement, and this Consultation Paper invites views in Chapter 4 on the treatment of implied rights of enforcement.

Section 27: majority rule for common maintenance

62. Communities which were built a long time ago often have no provision for a management structure. This can create serious difficulties in arranging maintenance and recovering costs in respect of common facilities. The Commission recommend that if there is no provision in the title deeds of a particular community, the arrangements set out in section 27 would apply. Basically, that means that a majority of owners of units should be able to arrange maintenance expenditure. It is important to note that this is limited to maintenance obligations shared with other units such as an obligation to maintain a driveway or a common stair – it does not apply to the maintenance of individual units. Nor does it apply to improvements as distinct from maintenance. It would, however, make it much easier to arrange common repairs in, for instance, many tenement blocks. The community will be able to appoint a manager if they wish.

Discussion Point 12

The Executive endorses the concept of majority rule for common maintenance. It believes that this would be an important reform which would assist householders. A single owner would find it more difficult to prevent essential repairs to common facilities from being carried out. Do you agree?

63. The Commission have also recommended that the majority would be able to require each owner to deposit a contribution in advance of an estimate of that person's share of the cost. The advantage of this proposal is that it would make it easier to carry through maintenance work. Contractors will have to be paid and the owners may not be willing to enter into a contract to carry out work without a firm assurance that each of their fellow owners will pay his share. Collecting the money in advance solves the

problem. But there are a number of potential difficulties. Owners would be required to deposit their share of agreed maintenance expenditure, but there would be no guarantee of when or if the work would begin, even if a manager was taking the lead in negotiating with contractors. Where would the funds lie meantime?

Discussion Point 13

The Executive is concerned about the requirement to deposit money in advance with no guarantee of when or if the work will be done, but on balance it supports the proposal. Do you agree? What safeguards would you like to see?

Variation and discharge of community burdens

64. Sometimes an individual owner may want to discharge or vary one of the burdens affecting his own property. Sometimes the community as a whole may want to discharge or vary a burden that applies to them all.

65. Section 31 makes provision for the mass discharge or variation of burdens – in other words the removal or variation of burdens from at least half of the properties in the community. It is proposed that this should be possible by majority decision. The Commission have, however, acknowledged that the majority might act unwisely or unfairly, and it has proposed that the owner of an affected unit could apply to the Sheriff Court or the Court of Session to reduce the deed of variation or discharge. This gives an unhappy burdened proprietor the option of judicial review if burdens in his title are to be altered. It does not, however, allow the minority of benefited proprietors the right to object. The effect of this can probably best be seen by using an example. There might be 10 houses in an estate. Some of the owners might wish to discharge a burden which prohibited the parking of lorries in the driveways. It would be possible for 6 owners who wanted to park lorries just to agree amongst themselves that the practice was to be allowed. Because they can form a majority they can go ahead, and there is no need for them to consult the others. They could either discharge the burden just for their own 6 properties or for all 10. If they discharge it for all 10 and any one of the minority is adversely affected by the removal of the burden, he can apply to the Sheriff Court to have the burden reinstated. But if the burden is discharged only for the 6 properties, none of the 4 remaining proprietors would have recourse to the courts, although they might feel adversely affected.

Discussion Point 14

The Executive agrees that a mechanism for mass discharge or variation would be a useful reform. Do you agree? The Executive, however, has concerns over the detail of the proposals. Do you think that benefited proprietors should be notified and have an opportunity of objecting prior to the discharge or variation of the burdens in question?

66. Section 86 of the Bill allows the owners of 25% of the units in a community to apply to the Lands Tribunal to vary or discharge a community burden. This is intended to offer another route by which community burdens may be varied or discharged in circumstances where a majority cannot be assembled to act under section 31.

The Executive agrees with the provision in section 86.

67. Section 30 is more complex. It deals with the case where it is proposed to discharge or vary burdens affecting less than 50% of the units in the community.

68. At present a proprietor who wishes to discharge a burden must obtain the consent of all the benefited proprietors with power to enforce, regardless of the size of a community. In practice this can prove extremely difficult. The proprietor often has little option but to apply to the Lands Tribunal for a discharge. The Commission have proposed that in future an owner who wishes to obtain a discharge or variation should no longer have to obtain the consent of all his co-proprietors. Instead, he would have to obtain the consent of a majority of them. But the majority would have to include at least one close neighbour – in other words, one neighbour within 4 metres of his property. Crucially, there is no requirement that anyone else should be informed. In the absence of notification, it is possible that a proprietor, even a next door neighbour, might lose the right to enforce a burden without knowing anything about it.

69. This proposal would help an owner who wants to make a change to his property which would be in breach of a burden – for instance a burden prohibiting building in the gardens. The owner might want to do something fairly unobjectionable, like erecting a small porch. The position at present is that he might get permission from all the other owners, but then be thwarted by one dissenting neighbour. Section 30 would allow him to proceed if he could get the consent of a majority of his neighbours, including one close neighbour. Life would be easier for him, and the erection of his porch might not cause offence to his neighbours. But the breach which he had in mind might not be so minor. He might want to erect a pigeon loft and keep racing pigeons. He might be able to persuade one of his close neighbours that this was a good idea. It is easy to see how the other near neighbours might feel. They would have lost their rights of enforcement. Perhaps the majority (who might live in a relatively distant part of the estate) would object. But the near neighbours might not want to rely on that.

Discussion Point 15

The Executive is concerned about the loss of enforcement rights for the minority in a community, particularly when they are close neighbours. What are your views? Do you think that benefited proprietors should be notified and have an opportunity of objecting prior to the discharge or variation of the burdens in question?

70. One aspect of seeking a discharge of a community burden which is important is the size of the community. If the community consists of 100 houses, it is in practice going to be nearly as difficult to get 51 signatures as to get 100 signatures. It will not matter much what provision is made. It may well just be easier for the burdened proprietor to go to the Lands Tribunal to get his discharge. This point is discussed again in Chapter 4, where consultees are invited to express a view on the maximum number of signatures which are likely to be sought before going to the Tribunal.

Chapter 3 – Conservation and Maritime Burdens

71. Part 3 of the Bill deals with conservation and maritime burdens.

Conservation burdens

72. The 2000 Act allowed some feudal burdens to be saved as a new class of burden to be called conservation burdens. The purpose was to preserve, for the benefit of the public, burdens which protect the built or natural environment. A conservation burden was defined as a burden which has the purpose of preserving or protecting –

- the architectural or historical characteristics of the land (which includes buildings); or
- any other special characteristics of the land (including, a special characteristic derived from the flora, fauna or general appearance of the land).

73. Conservation burdens can only be enforced by bodies which are designated as conservation bodies by Scottish Ministers, or by the Scottish Ministers themselves.

Maritime burdens

74. 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.

75. The proposals for conservation and maritime burdens were generally welcomed during the passage of the 2000 Act.

76. The Scottish Law Commission have now recommended that it should in the future be possible to create conservation and maritime burdens on the same basis as the saved feudal burdens.

Discussion Point 16

The Executive believes that it should be possible for conservation and maritime burdens to be created in the future. Do you agree?

77. 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 not imposed principally to protect the feudal superior's own land but rather 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 the passage of the 2000 Act the Executive canvassed the possibility of introducing provisions which would allow a superior to nominate a conservation body as his successor as the benefited proprietor for these burdens, which would become fully fledged conservation burdens. Obviously the conservation body would have to consent to becoming the benefited proprietor of the burden.

Discussion Point 17

Do you think it would be helpful to allow former superiors to nominate a conservation body as the benefited proprietor for burdens which are similar to conservation burdens?

Chapter 4 – Implied Rights

78. Part 4 of the Bill is about implied rights of enforcement. Burdens are legal obligations, and they have to be set out in the title deeds of individual properties. They restrict what an owner can and what he cannot do to his property. There will always be someone – often more than one person – who can make sure that the owner keeps to his obligation. That person is normally the owner of the property that benefits from the burden. He is the **benefited proprietor**. He has **enforcement rights**. But title deeds do not always expressly specify who has enforcement rights. In these cases the courts have, over many years, developed rules of common law for determining who has enforcement rights. These are **implied enforcement rights**. Section 41(1) provides that in future it will not be possible to create implied enforcement rights**.** The Bill also abolishes existing implied enforcement rights, but it allows some to be re-created.

The Executive believes that it should not be possible to create new implied rights of enforcement.

79. Section 41 abolishes all implied enforcement rights on the appointed day, other than for neighbour burdens (this term is defined in paragraph 82), which continue for a further 10 years. Section 42 provides a mechanism for the preservation of implied rights to enforce neighbour burdens beyond the 10 year period, and sections 44 to 47 save some enforcement rights by allowing them to be re-created.

80. Rights to enforce facility and service burdens are saved, and in some cases created, under section 47. In future they can be enforced by the owners of those properties which they benefit. Special provision is made in sections 45 and 46 to save enforcement rights in tenements and in sheltered housing where there is a common scheme of burdens imposed on all the units. In each case, all the properties in the tenement or the scheme will become benefited properties and will have enforcement rights. This could be the case even if a property did not enjoy enforcement rights already.

The Executive agrees that facility and service burdens should be saved, and welcomes the arrangements for sheltered housing and tenements.

81. It is possible to distinguish between two main types of implied enforcement rights, first, where the right is to enforce a **neighbour burden**, and second, where it is to enforce a burden imposed under a **common scheme**.

Implied rights of enforcement in neighbour burdens

82. The term neighbour burden does not appear in the Bill, but is a convenient shorthand term. The classic case of a neighbour burden is where a person has sold off land close to his own home – possibly part of his garden – to protect the amenity of his own property. He may have placed burdens on the land, perhaps to specify that only a house of one storey should be built on it, or that no more than a certain number of houses should be built on it. 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 must approach to discharge or vary the burden, perhaps to allow him to build an extra storey on to his house.

83. 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 has implied enforcement rights. 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.

84. The Commission consider it essential for the identity of benefited proprietors to be ascertainable in the future. As more properties are over time registered in the Land Register, it will become increasingly difficult to establish the identity of benefited proprietors by historical research. This is because the Land Register is not – unlike the Register of Sasines – a historical record of land transactions. The Commission have therefore proposed that parties who wish to retain their enforcement rights will have to act to preserve them.

85. Section 42 would allow an owner of land who benefits from a neighbour burden of this kind to save his right to enforce the burden. It provides a scheme by which he may register a notice preserving his 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 takes effect) to register the notice. If he did not do so within that timescale, he would lose his enforcement rights. 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.

Discussion Point 18

The Executive believes that the requirement for a notice to be registered in order to preserve implied enforcement rights for neighbour burdens is a valuable reform. It believes that the benefits to be gained from ready identification of benefited proprietors justify the amount of work which will be required to register the notices. Do you agree? Do you think that the period of 10 years required to register a notice is appropriate? Should a deadline for registration be nominated instead by Scottish Ministers after the Bill has been passed?

Implied rights of enforcement in common schemes

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

87. Implied rights to enforce in common schemes are widespread. They exist in many residential schemes, for instance in Georgian and Victorian terraces, and in modern housing estates. In spite of this, many people who have implied rights of enforcement are totally unaware of the fact.

88. Similarly, the owner of a burdened property may have no idea who has the right to enforce burdens against his property. He may also have no idea how many people have such rights. This is important if he wants to seek a discharge or variation of the burden.

89. The Commission have proposed that, in the case of implied rights in a common scheme, the enforcement of burdens should be left to the closest neighbours. In a tenement, or a sheltered housing development, that would mean anyone. But in other cases, section 44 provides that only the owners of properties which lie within 4 metres of the boundary of the burdened property will be able to enforce those burdens. Not all owners with properties within 4 metres would have enforcement rights. It would only be those who have them at present and are within 4 metres. The distance of 4 metres was chosen because in planning law only proprietors within 4 metres have to be given written notification of planning applications. The measurement of 4 metres is not to take account of any road which is of less than 20 metres in width. The definition of road excludes the verge.

90. Broadly, this means that all the adjoining proprietors who have enforcement rights will retain these rights. The 4 metre rule will give some leeway so that for instance people across the road or where some common land separates properties will also be included. All other owners with implied rights of enforcement, i.e. those outwith 4 metres, will lose their rights. They need not be notified of any proposal to discharge a burden, and they will have no right of objection.

91. The case for the 4 metre rule is that it assists a burdened proprietor to identify a maximum number of benefited proprietors whom he has to approach to obtain discharge or variation of a burden in his title. Life is made easier for him. Against this, the rights of more distant neighbours are extinguished. An aggrieved neighbour who loses his enforcement right may consider that the permanent inconvenience he might suffer is a high price to pay for the greater convenience enjoyed by the burdened proprietor.

Discussion Point 19

While the Executive believes that close neighbours have the greatest interest in a burden, it recognises that other, more distant, neighbours also have an interest. The Executive is concerned that the current proposals for implied rights of enforcement in common schemes do not sufficiently take into account the interests of the more distant neighbours. What are your views?

92. An important consideration is the number of neighbours that a person seeking a discharge would approach before it becomes simpler to apply to the Lands Tribunal. Even under the 4 metre rule, a party might have to seek consent from 8 or more near neighbours for permission. If all the neighbours were to agree only after having charged a fee for minutes of waiver, it might be better to go to the Tribunal. The proposals for fast-track procedures at the Lands Tribunal (in Part 9) might offer a more straightforward solution.

Discussion Point 20

How many neighbours would you approach in seeking the discharge of a burden? At what point would you find it easier to go to the Lands Tribunal?

Properties without enforcement rights

93. There are some burdens in common schemes where neighbouring properties do not have enforcement rights. The burdens can only be enforced by the feudal superior. This situation may occur in old common schemes, but also in modern ones. It is relatively common for a property developer to sell off the individual properties, and to reserve to himself the right to enforce the burdens. When the relevant part of the 2000 Act is commenced, the developer will lose his status as the feudal superior. There may therefore be no-one to enforce the burdens unless the developer is able to act, and acts, to save the enforcement rights. The 2000 Act saved facility and service burdens in this situation, but not amenity burdens. The owners of the individual properties may consider that regulation of the amenity of the development by burdens is desirable, and they may regret the fact that they will not be enforced in future.

94. There is therefore an argument that enforcement rights in relation to amenity burdens now held solely by superiors and imposed under a common scheme should be given to all proprietors of properties in the common scheme. This would effectively create new enforcement rights, but this sort of innovation is not in itself undesirable. The proposal discussed in paragraph 80 concerning facility and service burdens would also create new enforcement rights, but is nevertheless welcomed by the Executive. A more pressing concern is that this would increase the regulation of the land and would increase the number of people with rights of enforcement. For this reason, the Commission have not recommended that there should be a general transfer of superior's rights to neighbours, or a general creation of enforcement rights.

Discussion Point 21

The Executive is inclined to accept that there should not be a general transfer of superior's rights to neighbours. Do you agree? Alternatively, should it be possible in future for amenity burdens in a common scheme to be enforceable by neighbours where they could not previously do so? The draft Bill already provides for this in the case of tenements and sheltered housing schemes, and it would be possible to extend it to common schemes generally.

95. In considering this, it may be helpful to the reader to imagine three modern housing estates, all apparently identical. In the first, the title deeds set out clearly that the burdens are mutually enforceable. In that case, the burdens are community burdens and are covered in Part 2 of the Bill. The burdens would in future under these proposals be able to be enforced by all the owners but, as the Bill currently stands, discharged by a majority of the owners, including one close neighbour. In the second scheme, the burdens exist, but it is not stated in the deeds who can enforce them. Under the current law it is likely that all the owners have implied enforcement rights. The Bill proposes, however, that rights to enforce amenity burdens should be abolished except for the close neighbours (within 4 metres), all of whom would have to consent to any discharge or variation of the burdens. In the third scheme, the developer has reserved enforcement rights to himself alone, as the feudal superior, and no rights were given to owners of

properties on the estate. When the feudal system is abolished, he may lose his enforcement rights. Then no-one will be able to enforce the amenity burdens.

Discussion Point 22

Do you agree with the proposed different treatment of amenity burdens where there are express rights of enforcement, implied rights or perhaps only a superior's right of enforcement (and none following commencement of the 2000 Act)?

Chapter 5 – Miscellaneous

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

97. 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. Section 56 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 can not 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.

The Executive welcomes these useful proposals.

Manager burdens

98. The major provisions in Part 5 are, however, those which deal with manager burdens. The Commission have suggested 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.

99. Burdens providing for the appointment of managers are currently commonly used. The Bill makes it clear that they are valid burdens, and provides rules as to how they should operate. Part 2 of the Bill contains provisions for the management of communities. Manager burdens are different. When property developers are developing 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 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 burdens, but they do not themselves have control over the manager or his appointment. Sometimes the owners may regard the imposition of a manager as oppressive. For example, in some sheltered housing complexes, the individual owners resent the power of the manager, and would like to appoint someone else.

100. The Commission believe 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 is trying to market. They have recommended, however, that there should be some limitations on this power. Section 53 of the draft Bill defines manager burdens and provides conditions limiting their use. Section 55 makes it clear that the existing appointment of managers under current manager burdens is valid.

The Executive agrees that it should be competent to create manager burdens.

101. 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 the concern that developers retain control over

schemes for excessive periods, and that some residents do not have sufficient say in decisions over charges etc. The proposals in this area are designed to answer these complaints. Section 53(8) 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.

102. The second restriction in section 53 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. It would be possible to provide for a shorter period in the constitutive deed. The period would be increased to 30 years for local authority housing sold under the right to buy legislation. Both periods run from the date of registration of the burden. 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.

103. 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 registered more than 10 years ago (30 for former public housing stock). 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.

Discussion Point 23

Do you think the set period of 10 years for manager burdens is right? Would 5 or even 3 years be better? Is the condition of continuing to hold a unit available for sale acceptable? Do you agree that local authority developments should be subject to a different time limit, and if so is 30 years a suitable period?

Discussion Point 24

Manager burdens are likely to be utilised for business parks, sheltered housing developments, residential housing estates and local authority housing. Do you foresee their use in other circumstances? Will they operate satisfactorily in your situation?

Dismissal of the manager

104. If there is a manager burden stipulating that a developer can appoint a manager, the owners cannot dismiss the manager while the manager burden is enforceable (until the last unit is sold or the 10 or 30 year period is up). But they are free after that to dismiss him if they wish. If there is no manager burden, they are free to dismiss a manager at any time.

105. The majority required for dismissal will vary depending upon the circumstances. Under the proposals for community burdens discussed in Part 2 of this Consultation Paper, the owners of a simple majority of units may dismiss a manager, provided the title deeds make no contrary provision. But sometimes the title deeds will specify that the consent of a greater

proportion of owners is necessary – perhaps even all the owners. Section 54 provides that even if the title deeds specify a larger majority, a manager may be dismissed by a two-thirds majority of owners. The two-thirds calculation would not, as section 54(2) is currently drafted, include units still owned by the holder of the former manager burden (the developer or the local authority). This may have undesirable results where the original developer or local authority still owns most of the properties. If for example, a local authority has sold only 30% of the units on an estate, after the expiry of the manager burden the effect of the rule would be to hand the power of dismissal over to two-thirds of that 30%. They would then be able to dismiss the manager. If the burdens affected the whole development, control would thus have passed to the owners of 20% of the estate even though the local authority still owned 70% of the estate. If the burdens only affected the units which had been sold then there might be conflict between the different management regimes in the sold and unsold parts of the estate.

Discussion Point 25

The Executive would welcome views on the two-thirds majority default rule. Do you think that it is appropriate for former local authority stock? Do you think that units still owned by the developer or local authority should be excluded from the calculation?

Chapter 6 – Development Management Scheme

106. Part 6 of the draft Bill outlines a Development Management Scheme. It is based upon the Management Scheme B contained in the Scottish Law Commission's Report on the Law of the Tenement (Scot Law Com No 162). It provides an optional example of good practice which developers may choose to adopt. The scheme is not confined to tenements, and can be adapted for use in other developments with shared facilities.

The Executive believes this scheme will be a very useful model for developers, which will protect both their interest and the interests of the individual owners. It will help to make it clear where obligations and liabilities lie, and therefore to reduce the scope for conflict.

107. Section 60 of the draft Bill introduces the scheme, the rules of which are detailed in full in schedule 3. This contains a number of rules that provide for an owners' association, an advisory committee, annual meetings, and financial matters.

108. The Commission opted for a set of general principles rather than a detailed and complicated scheme which might not be used. The scheme can be fine-tuned to allow for local idiosyncrasies. A deed of application for the scheme can be registered against the whole estate (rather than the individual housing units) to provide for the maintenance and regulation of shared facilities. The owners in the development will then become members of an owners' association which manages the development. Owners can be reluctant to attend meetings or otherwise play an active part in the management of the development, so it is proposed that a manager be designated as an agent of the association.

109. Although similar, the scheme rules are not real burdens. The obligations stem from membership of the owners' association. However, because of the similarity with burdens, section 61 provides that various provisions in the Bill will apply to the Scheme. These include the rules for content, acquiescence, negative prescription, and discharge by the Lands Tribunal. This avoids possible attempts to use the scheme to circumvent the reforms of the rest of the Bill. Sections 62 to 66 contain various provisions on variation of the scheme, and section 67 provides for an application to the sheriff court for annulment of certain decisions.

The Executive believes that the proposed Development Management Scheme would be a helpful model.

Chapter 7 – Servitudes

110. Part 7 of the draft 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. However, servitudes are 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 draft Bill does not attempt to 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 the Part is to remove the overlap between servitudes and burdens.

Positive and negative servitudes

111. Servitudes can exist in two categories: positive and negative. A positive servitude permits limited use of the property, such as a right of access for transport or the running of a pipeline. In theory it may also be possible to create this type of servitude as a real burden. Negative servitudes are uncommon and thought to be confined to restrictions on building, especially for the protection of light or prospect. Section 75 of the draft Bill states that it should no longer be possible to create negative servitudes. Obligations of this type will have to be created as real burdens in the future.

The Executive believes that it should no longer be possible to create negative servitudes.

112. Section 76 will convert existing negative servitudes into real burdens on the appointed day. They will be extinguished ten years later unless they were already registered against the burdened property on the appointed day or unless a notice identifying the benefited property and the burdened property has been registered.

The Executive agrees that the registration requirement should apply to negative servitudes.

113. Generally obligations allowing limited use of the burdened property will be confined to positive servitudes. Section 77 states that a real burden consisting of a right to enter or make use of the burdened property will be converted into a positive servitude after the appointed day. Section 2 of the draft Bill, however, allows a real burden to provide a right to enter or use the burdened property for a purpose ancillary to other obligations imposed by real burdens.

The Executive agrees with the proposed realignment of the relationship between real burdens and servitudes.

Creation of new servitudes by deed

114. Positive servitudes can be created in three ways: by express provision in a deed, by implication, or by positive prescription. Only the first category is affected by the draft Bill. In line with the Commission's proposals on registration of real burdens, section 71 provides that when a servitude is created in a deed, the constitutive deed must be registered against both the benefited and burdened property.

The Executive agrees that when a servitude is created, the constitutive deed must be registered against both properties.

115. Servitudes are restricted into certain types and categories by a fixed list that has been derived from Roman law. As registration is not currently

required, the list does offer some assurance that any possible servitudes on land are limited in type. The list is very restrictive. As registration will now be required for servitudes created by deed, section 72 provides that they do not have to fit into the list. The fixed list remains in place for deeds not created by registration.

The Executive agrees that it should no longer be necessary for servitudes to be on the fixed list.

116. There has been some confusion over whether a right to lead a pipe, cable, wire or other such enclosed unit over land could be constituted as a positive servitude. Section 73 states that this will be possible in the future and be deemed always to have been the case.

Discussion Point 26

The Executive agrees that a right to lead a pipe, etc. over land can be a servitude. Do you agree? Will the retrospective nature of this section create any difficulties?

Chapter 8 – Pre-emption and Reversion

117. Part 8 of the draft Bill is concerned with options to acquire property. Sometimes when property is sold, the seller makes it a condition of sale that he 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 the property coming up for sale. 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 death of an owner or the granting of planning permission. Reversion is similar, but does not necessarily require the payment of money or value.

118. 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. However, they concluded that this would achieve little, and might even prove counterproductive, leading to strengthened contracts stipulating more severe forms of pre-emption. Section 7(4) of the draft Bill states that only the owner of a benefited property may enforce a right of pre-emption.

The Executive agrees that a pre-emption can be a real burden.

Redemptions, reversions and other options

119. Section 3(5) provides that redemptions and reversions should not be constituted as real burdens in the future, though existing rights will survive. The Commission does not feel that it is appropriate for successors of the original owner to be bound to lose property, sometimes without compensation. These rights can still be constituted in the future as a matter of contract.

The Executive agrees that redemptions and reversions should not be created as real burdens in future.

Pre-emptions limited to one offer – sections 78 to 80

120. Most pre-emption rights are restricted to a single chance to buy. This restriction affects all pre-emptions created in feudal burdens, and all other pre-emptions created after 1 September 1974. Either the holder of the right of pre-emption must accept the offer (normally mirroring the terms of a bid from a third party) or the pre-emption will be lost.

121. The Commission think that this offer back procedure causes unnecessary delay in many cases. Typically, a third party puts in a bid for the property, only to discover that the property has to be offered back to the pre-emption holder. The holder generally has 21 days to accept or refuse. This delay, or the prospect of it, can result in the third party losing interest. Alternatively, the holder may be asked informally, for example at the stage when the property is being marketed, if he wishes to exercise his right. If he indicates that he does not wish to do so, then the pre-emption may survive the sale as no formal offer has been made to him. Section 79 of the draft Bill

permits the owner of the burdened property to obtain an undertaking, possibly subject to certain conditions, from the holder that the pre-emption will not be exercised for a specified period. If the sale takes place within the specified time, then the pre-emption would be extinguished. However, if the sale does not occur then the pre-emption would revive after the specified period.

Discussion Point 27

The Executive believes that the provision for a pre-sale undertaking for pre-emption rights would be a useful reform, which would make it easier for parties in a property transaction. Do you agree?

122. If the deed creating the pre-emption does not set out on what terms the offer is to be made to the holder then section 80(4) of the draft Bill requires that the offer shall be made on such terms as are reasonable in the circumstances. The intention is to avoid the current situation where the holder is presented with an offer containing terms which a reasonable purchaser might wish to qualify. At present, the holder must usually either accept or reject the offer without qualification. The problem is that there may be genuine disagreement over what constitutes a reasonable term.

Discussion Point 28

Do you agree that an offer to a pre-emption holder should be made on reasonable terms?

Other pre-emptions

123. Non-feudal pre-emptions made before 1 September 1974 are not restricted to a single offer. The Commission envisage that the general proposals for burdens should reduce the extent of these rights. In addition, section 16(2) of the Bill 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 exercised his right, and the property has been sold, he would lose his right 5 years after the sale.

The Executive agrees with the provision in section 16(2).

Reversion under the School Sites Act 1841

124. The 1841 Act applies to sites granted for educational purposes by private individuals, often without payment and now held by education authorities. It provided that the land was to be held by the grantees only for as long as it was used for the original purpose. This reversion reduces the marketability of school sites, and can result in misfortune for subsequent purchasers of a disused site. There may be difficulties in ascertaining who has right to the reversion if the original benefited land has fragmented and also whether it is the original benefited proprietor's personal successors or those who now own the benefited property who have the right. The reversion probably does not affect any site resold before 1 January 1947.

125. Section 82(3), (4) and (6) provide that in any circumstances where payment is due, the claimant will not receive the value of any improvements that have been carried out on the

property. Where the land is still in the possession of the local authority, and has ceased to be used as a school, the holder of the reversion may elect to receive either compensation for the value of the site or a conveyance of the land, after paying to the authority a sum to reflect improvement value. This is a reform of the current position, where it is thought that the holder is entitled to the entire property. Where a third party has purchased the property, the education authority, not the third party, will pay the compensation.

126. Section 83 makes the obligation arising under the right of reversion subject to five year prescription.

Discussion Point 29

The Executive supports the conversion of reversion rights held under the School Sites Act into claims for compensation. Do you agree? Does the provision on prescription present any problems?

Chapter 9 – Powers of the Lands Tribunal for Scotland

127. Part 9 of the Bill deals with the Lands Tribunal which is the court that is responsible for hearing applications for the variation or discharge of title conditions. The Lands Tribunal's powers to discharge real burdens are set out in the Conveyancing and Feudal Reform (Scotland) Act 1970. The 1970 Act uses the phrase 'land obligations': the Bill refers to 'title conditions'. Section 85 of the Bill restates these powers and makes some additions or alterations to them. The main changes to this part of 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 (which are discussed in Chapter 1 of this Paper).

The Executive broadly supports the re-statement and enhancement of the law relating to the jurisdiction of the Lands Tribunal.

128. Sections 85 and 88 to 91 set out the provisions as to who can apply to the Tribunal, who can make representations to it, who must be notified as to the application, and what information must be contained in the application.

The Executive agrees with the provisions on application and representation.

Unopposed applications

129. Section 92 of the Bill makes a change to the existing law. It provides a new fast-track procedure for applications to the Lands Tribunal which are not opposed. This procedure, which will provide for automatic discharge of unopposed applications, will not, however, be available for facility and service burdens.

130. 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. Section 92(1) provides that if an application is not opposed, the Tribunal must grant it. This would bring savings of both time and resources.

131. An application would count as unopposed if representations were subsequently withdrawn. Only representations by owners of benefited properties or holders of the real burden would be treated as opposition to the application. The Tribunal would still have a role in receiving the application, notifying the appropriate owners, checking that the application has been properly made and granting the appropriate order discharging the burden. It would not be competent to award compensation in such a case or to impose a substitute real burden.

132. Although the Executive is attracted to the idea of a fast-track procedure for unopposed applications to the Lands Tribunal, it does have some concerns. If no representations are received by the Tribunal, rights to enforce possibly desirable amenity burdens would be discharged with no consideration of the merits of the application at all. This contrasts with planning applications where each application is considered by the planning authority in relation to the local planning scheme even if there are no objections. Questions also arise in relation to the proposed timescale. At present, a party wanting to object to an application usually has 21 days to do so. 21 days is a relatively short period of time, yet if no representations were received by the Tribunal, the application would be granted automatically. An owner of benefited property

could easily be absent from his property on holiday for such a period.

Discussion Point 30

The Executive favours the proposed fast-track approach for unopposed applications to the Lands Tribunal. Do you think the 21 day period for objections is adequate?

Grounds for disposal of applications

133. Sections 93 and 94 make new provisions on the grounds on which the Tribunal must decide on opposed applications.

134. Under the 1970 Act, a discharge may only be granted if the Tribunal is satisfied that:

- by reason of changes in the character of the land affected by the obligation or of the neighbourhood thereof or other circumstances which the Tribunal may deem material, the obligation is or has become unreasonable or inappropriate; or
- the obligation is unduly burdensome compared with any benefit resulting or which would result from its performance; or
- the existence of the obligation impedes some reasonable use of the land.

135. The Commission believe that these 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.

136. The Commission have suggested that the present grounds should be amended and treated as a series of indicators as to whether or not an application should be granted. Under its proposals, there would be a unified test of reasonableness which would be assessed by reference to a number of specific factors. The Tribunal would evaluate all of the relevant factors to determine whether it is reasonable to discharge, vary or renew a title condition. The proposed factors – which are set out in section 94 – are:

- Any change in circumstances since the condition was first created, including changes in the character of the benefited and burdened properties and of the neighbourhood thereof.
- The extent to which the condition confers benefit on the benefited property.
- The extent to which the condition confers benefit on the public (where there is no benefited property).
- The extent to which the condition impedes enjoyment of the burdened property.
- The cost and practicability of compliance with an obligation to do something.
- The age of the condition.
- Whether appropriate consents (including deemed consents) from planning or other regulatory authorities have been given.
- Any other material circumstances.

The Executive agrees that the grounds for disposal of applications to the Lands Tribunal should be based on a reasonableness test assessed by reference to the indicators set out in paragraph 136.

Recent title conditions

137. The Bill provides that the existing rule that no application for discharge of a title condition can be made until the condition has been in place for 2 years should be abolished. The Commission suggest that it should be possible, however, to stipulate in the constitutive deed that no such application can be made during a period of up to 5 years after creation (section 87).

Chapter 10 – Miscellaneous

138. Part 10 of the draft Bill is concerned with miscellaneous topics such as compulsory purchase, amendments to legislation, and other topics.

Compulsory purchase – sections 98 to 101

139. Compulsory purchase of land is thought to extinguish all real burdens and servitudes. Doubts have, however, been expressed as to whether or not this is a true reflection of the current law. Sections 98 and 99 provide that where land is acquired following a compulsory purchase order or purchase by agreement under statutory powers, most burdens or servitudes on the land will be extinguished. Facility burdens and pipeline servitudes will not, however, be extinguished, and if the purchase is by agreement, then conservation and maritime burdens will survive. The purchaser or his successor in title may, however, ignore any pipeline servitude or facility burden if using the land for the purposes for which it was acquired.

Discussion Point 31

The Executive agrees that the effect of compulsory purchase on real burdens and servitudes should be clarified, and favours the approach set out in sections 98 and 99. Do you agree with the exclusion of pipeline servitudes and facility burdens from the operation of sections 98(1) and 99(1)?

Clawback – section 102

140. The Commission have recommended an amendment to the legislation governing the ranking of standard securities for clawback provisions. This matter is discussed further in Chapter 11 of this Consultation Paper, on the relationship of the Title Conditions Bill with the 2000 Act.

PART 11

141. Part 11 of the Bill deals with savings, transitional and general provisions, 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.

The Executive agrees with the provisions in Part 11.

Chapter 11 – Title Conditions and the Abolition of Feudal Tenure Act

142. As the foreword to this Consultation Paper explains, the Title Conditions Bill is part of a programme of property law reform. The first part was the Abolition of Feudal Tenure etc. (Scotland) Act which was passed by the Scottish Parliament in 2000. That Act is referred to in this Paper as the 2000 Act. It is published by The Stationery Office and may be found on their website at:

http://www.scotland-legislation. hmso. gov.uk/legislation/scotland/acts2000/20000005.htm

143. There is a close relationship between the 2000 Act and this Bill, and the intention is that this Bill will be commenced at the same time as the remaining parts of the 2000 Act. When the 2000 Act is completely commenced the feudal system will be abolished. Although the purpose of the 2000 Act was to abolish the feudal system, it recognised that some feudal burdens were valuable. It therefore allowed certain feudal burdens to be preserved, so that they would then be treated like ordinary real burdens, under the law as reformed by the Title Conditions Bill. The provisions on feudal burdens can be found in Part 4 of the 2000 Act.

144. During the passage of the 2000 Act, the Executive made it clear that Part 4 of the Act would not be commenced until after the Title Conditions Bill had been enacted. It had become clear that the Title Conditions Bill might affect the 2000 Act. The Executive wished to look at the relationship between the two pieces of legislation. The Executive also undertook to look again at certain aspects of Part 4 which were criticised during the passage of the 2000 Act.

145. This Chapter deals with the impact of the Title Conditions Bill on the 2000 Act.

146. The introduction to this Paper contains a brief explanation of some technical terms. It may be helpful here to give some definitions of feudal terms. Under the feudal system, the benefited proprietor is known as the **feudal superior.** He owns an interest in land called a **superiority**. The superiority is the benefited property. The burdened proprietor is the **vassal**. In feudal tenure, a superior's interest to enforce a burden was **presumed**. But the 2000 Act changed that. It removed the presumption in favour of the superior. In future a former superior will be on the same footing as any other owner of benefited land.

The 100 metre rule

147. The 2000 Act allows superiors to save enforcement rights for some burdens which are beneficial to their land. One category that can be saved is the neighbour burden. If the superior owns neighbouring land he may be able to save the burden provided that certain conditions are fulfilled. In particular, the superior would have to have, on his own land, a building used for human habitation or resort (normally a house), and that house would have to be within 100 metres of the burdened property. This is the 100 metre rule. If the 100 metre rule is satisfied, the superior has an automatic right to save his burden. All he has to do is to serve a notice on the vassal and register it in the property registers.

148. The rule is not absolute. Even if the superior's land does not meet the conditions set out above, he can still preserve his right to enforce a burden if the vassal agrees (section 19 of the Act). If the vassal does not agree, the superior has a last chance to save his enforcement right by applying to the Lands Tribunal under section 20, where he has to prove

that he would suffer substantial loss or disadvantage from the loss of the right.

149. The main argument in favour of the 100 metre rule is that it provides an easily understood criterion for saving burdens which protect the amenity of a neighbouring property. Many superiors are absentees, or live at a distance from the burdened land, but they are still able to enforce burdens. They are sometimes able, particularly in rural areas, to stifle development. This is one of the reasons why the feudal system has been greatly criticised. But some superiors live locally. A superior may well have sold off land near to his own home – possibly even a part of his garden. He might quite reasonably have wanted to place a condition on the sale – possibly to prevent his view being blocked. It was generally accepted by the Law Commission, by the Executive and by Parliament that superiors in this position should not lose the right to protect their interests.

150. But the question was how to achieve this while at the same time not allowing all feudal burdens to be saved, even those where the superior's land is a considerable distance away. The advantage of the 100 metre rule is that it restricts superiors' rights to save burdens, while at the same time allowing essential amenity of buildings in use to be protected. 100 metres may be enough to protect the amenity of most houses, but any figure is bound to be arbitrary. The additional provisions of sections 19 and 20 mean, however, that if a superior genuinely feels that 100 metres is not enough to protect his amenity, he can still go to court to try to save his right to enforce the burden. The sections as a whole therefore provide a balanced approach.

151. Considerable concerns were, however, raised about the 100 metre rule during the Parliamentary stages of the 2000 Act. One main concern was that the 100 metre distance was too short in rural areas; and that it was unfair to have the same distance requirement for rural and urban areas. The Executive readily understood these arguments, and could accept that in an urban context 100 metres would probably be more than enough to protect the amenity of a house, whereas in the country, where buildings are more scattered, it might not.

152. There was also some criticism of the need for there to be a house on the benefited land. Many existing burdens are placed to protect open land rather than a house. They can be important, particularly if the land is agricultural or used for the leisure industry. One example which was cited was a burden which prohibited the keeping of more than one dog. The purpose of this burden was to protect the farmer's livestock. It was not his house which was in need of protection, but his fields.

153. The Executive agreed to consider possible alternatives and to cover this matter in the consultation exercise on Title Conditions.

154. Amongst the alternatives which the Executive considered were developing definitions for urban and rural which would work in the context of property law, altering the 100 metre figure so that the distance would be greater, and abolishing the need for there to be a house on the benefited land. It also considered the possibility of creating a new category of feudal burdens – 'agricultural burdens' – which could be preserved. In the event, however, the Executive did not consider that any of these alternatives would provide a complete answer to the criticisms which had been made.

155. A change to provide a different distance limit for urban and rural land would address the difficulties posed by the greater distances between buildings in rural areas but would not address the issue of open land in either context. Open land in an urban setting – for instance a golf course – might also be in need of protection. Similarly, merely increasing the 100 metre figure would not help in a rural case where it was the land, rather than a house, which needed to be protected. But to increase it to a greater distance might mean that the effectiveness of the rule (in saving only burdens which give genuine benefit) would be reduced. Abolishing the need for there to be a house would address concerns about the need to protect open land but might allow many more rural burdens to be saved, as often in rural areas the superior's land will at some point be near or adjacent to the burdened property. The creation of agricultural burdens would help livestock and agricultural businesses, but would pose serious difficulties of definition. It would be likely to provoke disputes over whether or not a burden was designed for agricultural purposes.

Discussion Point 32

The Executive would welcome further views on the arguments which were put forward in the Parliamentary stages of the 2000 Act. Do you think that it is only houses which need to be protected? Should there be protection for open land? If open land needs to be protected, is it only livestock which needs protection? Are there any other examples of useful burdens which protect open land?

156. One possible solution which the Executive has considered is to drop the 100 metre rule completely. This would mean removing the 100 metre rule from section 18 and the consequential repeal of sections 19 and 20 of the 2000 Act. Former superiors would still have to register notices by the appointed day to preserve burdens. Removing the 100 metre rule would solve all of the criticisms raised in the passage of the 2000 Act. Rural and urban situations would be treated in the same way, and former superiors would be able to preserve valuable burdens such as those which protect agricultural land.

157. The disadvantage of this potential change, however, is that it might make it possible for remote superiors to save more burdens in rural areas. The 100 metre rule is designed to act as a filter to avoid superiors indiscriminately registering notices. It is not clear how they would react without such a filtering mechanism. Superiors might be tempted to register notices to perpetuate existing burdens without giving careful consideration as to whether the burdens are of genuine benefit to nearby land.

158. There would be no reasonable point in attempting to save a burden where there was no interest to enforce. While at present, a superior's interest to enforce a burden is presumed, section 24 of the 2000 Act makes it clear that in future a former superior will have to demonstrate interest to enforce a burden. It is to be expected that superiors will only take the trouble and expense of saving burdens which are of real benefit to their land. But it is possible that without the 100 metre rule some superiors might issue notices indiscriminately in the hope that their interest to enforce the burden would not be challenged by their vassals. That is the risk of removing the 100 metre rule.

Discussion Point 33

Do you think that the 100 metre rule should be retained?

159. The Scottish Law Commission has now brought forward proposals for the treatment of non-feudal neighbour burdens. These are discussed in Chapter 4 of this Consultation Paper. In brief, the owner of property which benefits from a non-feudal neighbour burden will have to register a notice in the property registers to save his right to enforce the burden, and he will have 10 years to do so. But he will not have to meet any special criteria. In particular there is no distance limit proposal like the 100 metre rule. Nor is there any requirement that there should be a house or similar on the benefited land.

160. On the issue of this different treatment, the Commission observe that feudal and ordinary neighbour burdens are legally distinct. In the case of ordinary burdens, the purpose of the notice is to identify the neighbouring land which is already the benefited property. In the case of a feudal burden the benefited property is a superiority rather than the neighbouring land and the purpose of the notice is to transfer the entitlement to enforce the burdens from the superiority to the neighbouring land. Only in the feudal case is the actual benefited property changing.

The Executive considers that in the overall context of the abolition of the feudal system the different treatment of feudal and non-feudal burdens is reasonable and justifiable.

Lands Tribunal criterion

161. Paragraph 148 explains that a feudal superior who goes to the Lands Tribunal to attempt to save his enforcement rights to a burden will have to prove that he would suffer substantial loss or disadvantage from the loss of the right. The Executive believes that it would be simpler for the Tribunal and for all parties if this were altered so that the criterion matched the definition of interest to enforce which is set out in section 7(3) of the Title Conditions Bill, and discussed in Paragraph 42 of this Paper.

Discussion Point 34

Do you agree that the criterion for the Lands Tribunal set out in section 20 of the 2000 Act should be amended from 'substantial loss or disadvantage' to 'material detriment'?

Sporting rights

162. Sporting rights were a feature of feudal tenure. When a feudal superior sold land, he would sometimes reserve the right to shoot or fish on that land. Section 18(7)(b)(i) of the 2000 Act allows superiors to preserve sporting rights as real burdens. Section 77 of the draft Title Conditions Bill converts them into positive servitudes on the appointed day.

Discussion Point 35

Do you agree that sporting rights which are preserved as burdens under the 2000 Act should be converted into servitudes?

Development value burdens

163. Another aspect of the 2000 Act on which the Executive has received representations is development value burdens.

164. **A development value burden** is a special category of real burden that has been imposed in exchange for a reduced purchase price. The understanding is that if the land is used for a different purpose from that specified in the deed, a further financial payment will be due for any increase in value caused by it no longer being subject to the use restriction. Examples of development value burdens are:

- A plot of land sold for very little on condition that it was used for a community hall, or a sports field.
- A local authority may have sold land cheaply to be used as gardens or for recreational purposes, but would not want that land to be used for any other purpose which might reduce the amenity of surrounding land (even though the authority did not itself own the surrounding land).

165. The Commission considered whether former superiors should be allowed to save burdens of this type, in perpetuity or for 20 years. They dismissed this idea, however, on the grounds that these burdens are not really intended to protect the amenity of land: they exist because of financial arrangements made at the time of their creation, for which it would be possible to allow compensation. Accordingly, section 33 of the 2000 Act provided that the beneficiary of the burden would be able to register a right to be compensated if it was breached in the five years preceding or the 20 years following the appointed day. The compensation was capped at the difference in value of the land with the burden and without the burden at the time of sale.

166. As for the future, if someone wished to make a charitable bequest of land, he would be able to do so by setting up a trust. For situations involving local authorities, the Commission pointed to the use of planning legislation, but did not express a view as to whether further powers were needed. The Commission stressed that burdens should provide a benefit to land and that a mere personal interest unconnected to a benefited property was not a sufficient ground to keep development value burdens. The public interest that justified the preservation of conservation and maritime burdens (despite their lack of a benefited property) was absent.

Discussion Point 36

Do you think that development value burdens should fall with compensation paid along the lines of the 2000 Act? Or do you think that they should be capable of being saved?

Clawback

167. An additional type of condition is frequently used by both public and commercial bodies where land is sold either at less than its market value or at market value but with an expectation that its value will be enhanced by the purchaser. This is where 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. A condition might be placed at the time of sale so that the seller could share a part of the increase in value.

This is termed a **clawback** condition. Such agreements are often limited in duration to around ten years. The selling price is not necessarily lower than the current market value. In contrast to development value burdens, the seller does not desire to restrict use, but wishes the event to occur that will trigger the additional payment.

168. 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 will get a further financial payment. The second is a feudal real burden, which restricts the use of the site. If the use changed, the burden would come into play, and because a feudal burden was often backed up by a right of irritancy (re-possession of the site if the burden was breached) it was a very powerful weapon. The mere threat of irritancy would be enough to ensure that the original seller got his money. Even without the threat of irritancy, the seller would be able to take legal action if the burden was breached.

169. Section 53 of the 2000 Act abolished irritancy rights. That section has already been commenced. The Act also provided that it would no longer be possible to create feudal real burdens. All future burdens will therefore be non-feudal. They will generally require a benefited property. The question is whether there is a continuing place for the real burden in clawback transactions, and if so, whether that would justify the creation of a new category of burden which does not require benefited land. Should it be possible in future to draw up commercial land transactions, which would involve a real burden restricting use?

170. The Commission take the view that clawback arrangements are commercial transactions protecting a financial investment. The purpose of real burdens, however, is to protect land. Real burdens may have been used as a device to assist the completion of a deal, but they are not appropriate for that purpose. The Commission also believe that they are not an efficient means of protecting the investment as the burden can always be varied or discharged by the Lands Tribunal. They give as an example a case where the seller was awarded as compensation less than a third of the sum provided for in the clawback agreement.

171. The Commission therefore argue that if there are problems with clawback agreements the solution should lie, not in the use of real burdens, but in addressing directly any inadequacies in the other parts of clawback arrangements, particularly the use of standard securities. They identify section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 as the main problem. Commercial developments are regularly funded by staged borrowing: the developer will borrow money as he requires it to fund the ongoing development. As he borrows the various sums that he needs over time, he will grant his creditors standard securities on the property. The various standard securities are ranked chronologically unless otherwise agreed. The original seller (holding the first registered security in respect of the clawback arrangement) will be at the start of this chain. It is possible that when a later creditor gives notice under section 13, the result is that his debt gains precedence over the possible claim to be made by the seller. This is because the Act stipulates that security holders will only be ranked in respect of 'advances' made before subsequent

securities. As in the case of a clawback there are no 'advances' involved, the right to the clawback would only become due after subsequent securities, by which point the equity may be exhausted.

172. The Commission have therefore proposed a simple amendment to section 13 (substitution of 'debt' for 'advances'). The effect of this would be to clarify section 13 and to ensure that the original seller would receive protection for his investment.

Discussion Point 37

Do you think that real burdens should still be used in clawback arrangements? Would clawback justify the existence of a new category of burden without benefited property (the 'clawback burden')? Do you share the Commission's view that burdens are not an appropriate device to control financial arrangements and that section 13 should be amended as proposed? Do you believe the amendment will operate effectively in practice?

Chapter 12 – Sheltered Housing

173. The Executive has received many re-presentations from residents of sheltered housing schemes and this Chapter explains how the Bill will affect them. The term sheltered housing includes retirement complexes. Many of the proposals in this Consultation Paper affect sheltered housing, but this Chapter attempts to draw them all together. As a result, there is some repetition between this Chapter and other Chapters, particularly those on Parts 2, 3 and 5 of the Bill.

174. As the foreword to this Paper explains, the Title Conditions Bill is part of a large programme of property law reform. The first part of the package was the Abolition of Feudal Tenure Act (referred to in this Paper as the 2000 Act), which was passed by the Scottish Parliament in 2000, and which abolished feudal tenure. That Act also affected sheltered housing.

175. In many sheltered housing complexes the developer who builds the complex creates burdens (or conditions) to control the use of the property. Often these are feudal burdens. Some feudal burdens give the developer the power to appoint a manager. The general effect of the abolition of the feudal system and of the Title Conditions Bill will be to remove control from the developer, and to give it to the owners.

The problem

176. The Executive has received many complaints about the management of owner occupied sheltered housing developments, mainly related to owners not being consulted on proposals for the maintenance of their properties, service charges and the appointment of wardens. The Executive published a voluntary code of good management practice for owner occupied sheltered housing in February 2000.

Managers

177. Developers of sheltered housing complexes often appoint a manager. Appointing the manager allows developers to retain control of the complexes after they have started to sell off units to private owners. The manager enforces the burdens which have been imposed by the developer to deal with various matters affecting the scheme such as maintenance and restrictions on use. Developers may give up their right of appointment when the last unit is disposed of, at which point power of appointment passes to the owners.

178. But sometimes the developer reserves the power to appoint a manager without time limit. The Commission has concluded that this sort of real burden, which perpetually deprives owners of the right to appoint the manager, is probably unenforceable, on the grounds of repugnancy with ownership. In other words, it is possible that, if tested in court, a superior might be prevented from appointing a manager in perpetuity. The Bill saves existing burdens which may be unenforceable for this reason. But it also restricts the period within which the developer retains a power of appointment. For the future, the Bill will not allow a developer to appoint a manager forever.

Manager burdens

179. The legitimate commercial interests of developers and the ability of owners to regulate their own property have to be carefully balanced. The Commission believe that while the developer is still marketing the properties, he

has a strong interest in the condition and maintenance of the property as a whole. At that stage, the manager protects the interests of the developer. The manager can perform valuable services for the sheltered housing complex, ensuring individual owners keep their property in good repair or preventing any anti-social behaviour. Although this spares owners from involvement in day to day management issues, the owners may increasingly regard the imposition of a manager as oppressive. Individual owners may wish different policies to be adopted for the running of the scheme or want to manage the property themselves. Over time the balance changes, and the role of a manager is not then to protect the interests of the developer, but to help the community to organise itself.

180. Sections 53 to 55 of the draft Bill allow developers to appoint managers but provide that owners can eventually override the developer's choice of manager. The developer will no longer be able to control the appointment of a manager after the last unit has been sold, or, even if a unit is retained, after 10 years from the creation of the power of appointment.

181. If an existing burden provides for the nomination of a manager in perpetuity, or any period longer than 10 years, it will be extinguished if the last unit of the scheme has been sold, or if the manager was appointed more than 10 years ago. The warden's flat does not count as a unit for this purpose. If the manager burden was created 5 years ago, and the developer continues to own at least one unit, the developer's power to appoint the manager would have at most 5 years to run. In summary, <u>any manager burden affecting sheltered housing would be extinguished after 10 years at the very latest, even if the developer continues to own some of the units within a development.</u> In practice, a developer is likely to have sold all the units in a sheltered housing development (excluding the warden's flat) before 10 years have elapsed.

Discussion Point 38

(similar to Discussion Point 23)

The Executive agrees that residents should eventually be able to override the developer on the appointment of a manager. What are your views? Do you foresee any difficulties? Is 10 years the right set period? Would a shorter period of 5 or even 3 years be better? Is the condition of continuing to hold a unit available for sale acceptable? Do you feel that the proposals for manager burdens will operate coherently and efficiently for sheltered housing?

Dismissal of the manager

182. Once the developer's right to keep a manager in place has lapsed, the residents may dismiss the manager. The majority required for dismissal will vary depending upon the circumstances. In many sheltered housing complexes, the title deeds will not provide for the dismissal of a manager. In that case, the Title Conditions Bill provides (in Section 26(1)(d)) that the owners of a simple majority of units may dismiss the manager. In other cases, however, the title deeds might have a special provision specifying the size of the majority required. Some title deeds may specify that the consent of more than 50% – possibly even 100% – of the owners is required before a manager can be dismissed. In that case, section 54 provides that

irrespective of the provisions contained in the title deeds a manager may be dismissed by a two-thirds majority of owners. The two-thirds calculation would not, as section 54(2) is currently drafted, include units still owned by the developer.

Discussion Point 39

(similar to Discussion Point 25)

Do you agree with the two-thirds majority default rule? Do you think that units still owned by the developer should be excluded from the calculation?

Enforcing burdens in sheltered housing

183. The bulk of this Consultation Paper is about real burdens. These are types of conditions which have been placed on properties when they were sold. Flats in sheltered housing are often subject to burdens. Typical burdens in sheltered housing complexes might stipulate that the owners would have to maintain their properties regularly, that they could not keep pets, or that they could not use their properties to conduct business.

184. These burdens will usually apply to all the individual properties, and they will have been stipulated by the developer when the complex was sold. Section 46 of the Bill provides that in future the individual properties will be 'benefited properties', and that the sheltered housing complex will be treated as a 'community', with all the burdens becoming 'community burdens'. They will therefore be treated in the same way as other community burdens under the provisions in Part 2 of the Bill.

185. In practice what this means is that in future the owners of the complex will be able to control what happens to it, and they will be able to do so by majority rule. This is a change from the arrangements in many complexes at present, where the developer has been able to exercise control.

186. The proposals for community burdens also provide a number of default rules where the title deeds do not provide for decision making with regard to issues such as common maintenance, management issues and the resolution of disputes. Most sheltered housing schemes are likely to have some sort of provision in the title deeds to supersede these rules.

Annex A – Summary of Discussion Points

CHAPTER 1 – GENERAL

1. The Executive believes that the requirement to register burdens against both properties is a far-reaching reform which will lead to a significant improvement in the transparency of the registers, and the efficiency of the conveyancing system. Do you agree?

2. The Executive is concerned that the proposal to allow extrinsic material to be included in future burdens would cause difficulties of interpretation. Do you think that extrinsic material should be included in future burdens?

3. The Executive agrees that the law should be clarified so that existing burdens imposing an obligation to contribute to the cost of maintenance and apportioning that cost can be enforced, but the Executive has reservations about the proposal to allow extrinsic material to be included in other burdens. What are your views?

4. The Executive believes that it would be helpful to make clear that an existing burden would not be invalid because it contains a provision on unspecified costs. Do you agree? As for the future, it will be clear to conveyancers that if a burden of this sort is to be valid, its terms must be clear as to how liability is to be calculated.

5. The Executive agrees that title to enforce burdens should be extended to non-registered proprietors, tenants, proper life renters and non-entitled spouses. Do you agree?

6. Do you agree with the definition of interest to enforce given in Paragraph 41, and in particular the use of the phrase 'material detriment'? Do you think that 'material' would be too high a threshold?

7. The Executive agrees that the period for negative prescription should be reduced to 5 years. Do you agree?

8. The Executive has concerns about the detail of the notification procedure for termination of a burden. What are your views?

9. Do you agree that 100 years is the best cut-off for the sunset rule?

10. Do you think the sunset rule is necessary or attractive as an alternative to simply applying to the Tribunal in all cases?

CHAPTER 2: COMMUNITY BURDENS

11. Do you agree with the exclusion of communities with less than four units? Would any variation of the deed of conditions after sale of the first units cause problems? Do you foresee any potential difficulties posed for developers during the course of completion and sale of a development which will become subject to community burdens? Are there any particular difficulties here for local authorities when they have sold some but not all of the units?

12. The Executive endorses the concept of majority rule for common maintenance. It believes that this would be an important reform which would assist householders. A single owner would find it more difficult to prevent essential repairs to common facilities from being carried out. Do you agree?

13. The Executive is concerned about the requirement to deposit money in advance with no guarantee of when or if the work will be done, but on balance it supports the proposal. Do you agree? What safeguards would you like to see?

14. The Executive agrees that a mechanism for mass discharge or variation would be a useful reform. Do you agree? The Executive, however, has concerns over the detail of the proposals. Do you think that benefited proprietors should be notified and have an opportunity of objecting prior to the discharge or variation of the burdens in question?

15. The Executive is concerned about the loss of enforcement rights for the minority in a community, particularly when they are close neighbours. What are your views? Do you think that benefited proprietors should be notified and have an opportunity of objecting prior to the discharge or variation of the burdens in question?

CHAPTER 3 – CONSERVATION AND MARITIME BURDENS

16. The Executive believes that it should be possible for conservation and maritime burdens to be created in the future. Do you agree?

17. Do you think it would be helpful to allow former superiors to nominate a conservation body as the benefited proprietor for burdens which are similar to conservation burdens?

CHAPTER 4 – IMPLIED RIGHTS

18. The Executive believes that the requirement for a notice to be registered in order to preserve implied enforcement rights for neighbour burdens is a valuable reform. It believes that the benefits to be gained from ready identification of benefited proprietors justify the amount of work which will be required to register the notices. Do you agree? Do you think that the period of 10 years required to register a notice is appropriate? Should a deadline for registration be nominated instead by Scottish Ministers after the Bill has been passed?

19. While the Executive believes that close neighbours have the greatest interest in a burden, it recognises that other, more distant, neighbours also have an interest. The Executive is concerned that the current proposals for implied rights of enforcement in common schemes do not sufficiently take into account the interests of the more distant neighbours. What are your views?

20. How many neighbours would you approach in seeking the discharge of a burden? At what point would you find it easier to go to the Lands Tribunal?

21. The Executive is inclined to accept that there should not be a general transfer of superior's rights to neighbours. Do you agree? Alternatively, should it be possible in future for amenity burdens in a common scheme to be enforceable by neighbours where they could not previously do so? The draft Bill already provides for this in the case of tenements and sheltered housing schemes, and it would be possible to extend it to common schemes generally.

22. Do you agree with the proposed different treatment of amenity burdens where there are express rights of enforcement, implied rights or perhaps only a superior's right of enforcement (and none following commencement of 2000 Act)?

CHAPTER 5 – MISCELLANEOUS

23. Do you think the set period of 10 years for manager burdens is right? Would 5 or even 3 years be better? Is the condition of continuing to hold a unit available for sale acceptable? Do you agree that local authority developments should be subject to a different time limit, and if so is 30 years a suitable period?

24. Manager burdens are likely to be utilised for business parks, sheltered housing developments, residential housing estates and local authority housing. Do you foresee their use in other circumstances? Will they operate satisfactorily in your situation?

25. The Executive would welcome views on the two-thirds majority default rule. Do you think that it is appropriate for former local authority stock? Do you think that units still owned by the developer or local authority should be excluded from the calculation?

CHAPTER 7 – SERVITUDES

26. The Executive agrees that a right to lead a pipe etc. over land can be a servitude. Do you agree? Will the retrospective nature of this section create any difficulties?

CHAPTER 8 – PRE-EMPTION & REVERSION

27. The Executive believes that the provision for a pre-sale undertaking for pre-emption rights would be a useful reform, which would make it easier for parties in a property transaction. Do you agree?

28. Do you agree that an offer to a pre-emption holder should be made on reasonable terms?

29. The Executive supports the conversion of reversion rights held under the School Sites Act into claims for compensation. Do you agree? Does the provision on prescription present any problems?

CHAPTER 9 – POWERS OF THE LANDS TRIBUNAL FOR SCOTLAND

30. The Executive favours the proposed fast-track approach for unopposed applications to the Lands Tribunal. Do you think the 21 day period for objections is adequate?

CHAPTER 10 – MISCELLANEOUS

31. The Executive agrees that the effect of compulsory purchase on real burdens and servitudes should be clarified, and favours the approach set out in sections 98 and 99. Do you agree with the exclusion of pipeline servitudes and facility burdens from the operation of sections 98(1) and 99(1)?

CHAPTER 11 – TITLE CONDITIONS AND THE ABOLITION OF FEUDAL TENURE ACT.

32. The Executive would welcome further views on the arguments (on the 100 metre rule) which were put forward in the Parliamentary stages of the 2000 Act. Do you think that it is only houses which need to be protected? Should there be protection for open land? If open land needs to be protected, is it only livestock which need protection? Are there any other examples of useful burdens which protect open land?

33. Do you think that the 100 metre rule should be retained?

34. Do you agree that the criterion for the Lands Tribunal set out in section 20 of the 2000 Act should be amended from ‘substantial loss or disadvantage’ to ‘material detriment’?

35. Do you agree that sporting rights which are preserved as burdens under the 2000 Act should be converted into servitudes?

36. Do you think that development value burdens should fall with compensation paid along the lines of the 2000 Act? Or do you think that they should be capable of being saved?

37. Do you think that real burdens should still be used in clawback arrangements? Would clawback justify the existence of a new category of burden without benefited property (the 'clawback burden')? Do you share the Commission's view that burdens are not an appropriate device to control financial arrangements and that section 13 should be amended as proposed? Do you believe the amendment will operate effectively in practice?

CHAPTER 12 – SHELTERED HOUSING

38. The Executive agrees that residents should eventually be able to override the developer on the appointment of a manager. What are your views? Do you foresee any difficulties? Is 10 years the right set period? Would a shorter period of 5 or even 3 years be better? Is the condition of continuing to hold a unit available for sale acceptable? Do you feel that the proposals for manager burdens will operate coherently and efficiently for sheltered housing?

39. Do you agree with the two-thirds majority default rule? Do you think that units still owned by the developer should be excluded from the calculation?

Annex B – Glossary

Acquiescence – A way in which *enforcement rights* can be lost. Something must happen to *breach* a *real burden*, and the *benefited proprietor* must be aware of it. The *benefited proprietor* must make no effort to enforce the burden. In addition, the activity which causes the breach must involve significant expenditure, the benefit of which would be lost if the burden were enforced afterwards.

Amenity Burden – The Bill defines *facility* and *service* burdens. It does not use the term *amenity burden*. This term is used in the Consultation Paper as a convenient label for *real burdens* that are not *facility* or *service burdens*. Amenity burdens include burdens which may restrict the uses of the property, for instance by prescribing that no more than one animal may be kept, or that property can only be used as a dwelling-house.

Appointed Day – The day on which the provisions of the Title Conditions (Scotland) Bill and the remaining provisions of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 will come into force.

Benefited Property – A *real burden* must normally benefit other *land* rather than a particular person. One plot of land must benefit from the burden placed on the other. This first plot is the *benefited property*. There may be more than one *benefited property*.

Benefited Proprietor – The owner of the *benefited property* and the person who can take action to enforce *title conditions*. He has *enforcement rights*.

Breach – This happens when a burden is not complied with. Typically, the property owner ignores the burden, or acts in contravention of it without permission.

Burdened Property – The property that is affected by the burden.

Burdened Proprietor – The owner of the *burdened property*.

Common Scheme – Such a scheme exists where two or more properties are subject to the same, or equivalent, burdens.

Community – For the purposes of the draft Bill, 'community' is defined as the properties subject to *community burdens*.

Community Burdens – Burdens imposed under a *common scheme* of four or more properties where the burdens apply to all the properties and are mutually enforceable by the *owners* of each property.

Conservation Burdens – Burdens created in favour of a conservation body or Scottish Ministers, for the benefit of the public and the purpose of protecting Scotland's built or natural heritage.

Constitutive Deed – The deed which sets out the obligation.

Discharge – This is where the owner of the *burdened property* wishes to extinguish the burden entirely. This can be achieved by application to the *Lands Tribunal* or by asking the *benefited proprietor* for a document called a *minute of waiver*.

Dominant Tenement – Another term for *benefited property*.

Enforcement Rights – In order to enforce the burden, the *benefited proprietor* must have right to enforce. This requires both *title* and *interest to enforce*. Rights may be *express* or *implied*.

Express Rights of Enforcement – Where the identity of the person who can enforce the *real burden* is expressly set out in the title deeds.

Facility Burden – An important type of *real burden*, which obliges the owner to maintain or contribute to the maintenance of a common facility, for example the common parts of a tenement.

Feudal System – The system of land tenure applying to almost all of Scotland. The '*owner*' of property in the normal sense of the word holds his property on perpetual tenure from a *superior*. There is often a chain of ownership, with a *superior* (A) granting land to a *vassal* (B), who then grants it on to a further *vassal* (C), in respect of whom B is the *superior*. B is both the *vassal* of A and the *superior* of C. Where a party is the final *vassal* in the chain (i.e. is not a *superior* to anyone), he is commonly regarded as the *owner* of the property. A and B both retain an interest in the land owned by C. This interest is known as a *superiority*.

Implied Rights of Enforcement – Where the identity of the person or persons who can enforce the *real burden* can be inferred from the title deeds. Often third parties (i.e. neighbours) may hold rights to enforce burdens.

Interest to Enforce – In order to enforce a burden, a *benefited proprietor* must have interest in addition to title. His property must genuinely benefit from the burden or he will not be able to enforce it.

Irritancy – Provision in the title deeds for the *burdened property* to be returned to the *benefited proprietor* in the event of a burden being breached.

Land – Includes the buildings which stand on it.

Land Register – See *Property Registers.*

Lands Tribunal – A judicial body with power to vary or discharge land obligations, including *real burdens*.

Law of the Tenement – Term used to classify the rules applying to tenemental (i.e. flatted) property.

Maritime Burdens – Burdens in favour of the Crown concerning the seabed or foreshore for the benefit of the public.

Minute of Waiver – When a *burdened proprietor* wishes to vary or discharge a burden, he can ask the *benefited proprietor*(s) to agree to his proposal. The *benefited proprietor*, if he agrees, will grant a *minute of waiver*, often in return for a fee.

Neighbour Burden – A term used to indicate a burden affecting one property in favour of another neighbouring, property. Unlike *community burdens*, the *burdened proprietor* does not have reciprocal rights to enforce similar burdens over the *benefited proprietor*. *Neighbour burdens* can be *facility, service* or *amenity burdens*.

Owner – For the purposes of the Bill, owner means a person with right to the property, whether or not his title has been registered or recorded in the *Land Register* or *Register of Sasines.* The definition is fully explained in section 114 of the draft Bill.

Pre-emption – An entitlement for the *benefited proprietor* to have the first option to buy back the property in the event of it coming up for sale.

Prescription – The effect of the passage of time on obligations. A *real burden* which has been breached can be extinguished after a set time period, provided certain conditions are met. A servitude can be created if a right is exercised over the prescribed period.

Property Registers – The burdens which bind the owners of property are stipulated in deeds which must be recorded in either the *Land Register* or the *Register of Sasines.* These property registers record ownership of land in Scotland.

Real Burden – An obligation affecting land or buildings. It binds *owners* of property and is stipulated in deeds recorded in the *Register of Sasines* or registered in the *Land Register*. It is a condition of ownership. The *owner* of the property owns his property – but he has accepted that he owns it subject to the condition. When he sells the property, the burden will still apply to it. In theory, a burden is perpetual. It runs with the *land*.

Redemption – A right on behalf of the *benefited proprietor* to repurchase the property when a certain event occurs, such as the death of the burdened proprietor.

Register of Sasines – See *Property Registers.* The *Register of Sasines* is in the process of being replaced by the *Land Register*.

Reversion – A right on behalf of the *benefited proprietor* to regain the property on the occurrence of a certain event, but not necessarily accompanied by the payment of compensation.

Service Burdens – Burdens concerned with the provision of services such as water to other land. They are treated in the Bill in a similar way to *facility burdens*.

Servient Tenement – another term for *burdened property*.

Servitudes – A title condition similar to *real burdens*, in that it requires both a *benefited* and a *burdened property*, and an obligation that runs with the land. Servitudes are 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*.

Superior – See *feudal system*. The person from whom land is held in feudal tenure.

Superiority – The interest in *land* owned by a feudal *superior*. See *feudal system*.

Title Conditions – A broad term for conditions applying to land ownership, including not only *real burdens* but also *servitudes* and some lease conditions. Conditions can include an obligation to contribute to the cost of a service or to maintain property or a prohibition from carrying out certain activities on the property. They can restrict the *owner's* use of his *land*, or oblige him to do something. The most common type of title condition is a *real burden*.

Title to Enforce – Title to enforce a burden lies with the owner of the *benefited property*. Title to enforce can be express or implied.

Unit – Defined in the Bill as any *land* designed to be held in separate ownership.

Variation – Sometimes the owner of the *burdened property* will wish to vary a burden rather than *discharge* it completely. This is called a variation. An example of this could be varying a burden that prohibits all building to allow construction of a garage, but not to allow any other type of construction.

Vassal – The feudal term for the person holding the land from a *superior*, commonly regarded as the *'owner'* of the property. See *feudal system*.

Waiver – See *minute of waiver*.

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