



FACULTY OF ADVOCATES

Response to Scottish Government's Consultation on Scottish Law Commission's Report on Section 53 of the Title Conditions (Scotland) Act 2003

Question 1: Are you content that sections 52 and 53 of the Title Conditions (Scotland) Act 2003 could be replaced with a single provision regulating implied enforcement rights in relation to common schemes?

Yes.

We expressed reservations about this in our response to the Scottish Law Commission consultation. However, we note the near unanimous support for a single provision amongst other consultees (see paragraph 3.18 of the Scottish Law Commission report) and therefore defer to that view.

Question 2: Are you content with the Scottish Law Commission's definition of "common scheme"?

The first of these suggestions may help achieve what s.57A(3) is intended to achieve but does not in our view achieve that successfully we would suggest,

- revising the section to read, the same burdens, or burdens which are **substantially** similar in their content or purpose'.
- replacing 'whether or not by one person.' with 'irrespective of when or by whom those burdens were imposed'.

The first of these suggestions may help achieve what s.57A(3) is intended to achieve but does not in our view achieve successfully.

We do not consider s.57A(3) to be helpful. It is not clear why it focuses on the similarity of one burden to another when the rest of s.57A is concerned with the similarity of the body of burdens as a whole. We find it confusing to have a refined test for comparing the similarity of individual burdens (s.57A(3)) when it is the similarity of the body of burdens as a whole that matters. Further, we do not consider that the test of ‘the degree of equivalence between the burdens’ is sufficiently clear in its meaning to add anything to the test of “similarity”.

We consider that the ongoing difficulty in finding a satisfactory definition of common scheme is linked to the fact that there was (at common law) more to the concept than mere similarity of burdens. We agree with the comments noted in the Scottish Law Commission report at paragraph 3.28 that the concept included the burdens conforming in some way to a general or overall plan. It was this conformity to a greater plan (combined with similarity) that yielded the inference of a relationship between the burdens such that mutual enforcement was appropriate.

We accept the Law Commission’s point (Report, para 3.32) that, under the proposed law, the “five rules” establish the circumstances in which mutual enforcement is deemed by the law to be appropriate. This is helpful. We do, however, consider that similarity of content or purpose of the burdens is a further factor of importance. Our suggested revision is intended to clarify the content of that requirement.

Question 3: Do you agree with the Scottish Law Commission’s five rules conferring implied enforcement rights in common schemes which pre-date feudal abolition?

Whilst we are in agreement with the five rules proposed, one drafting suggestion is to change, in s.53A(1), ‘on a group of units’ to, ‘on more than one unit’. This avoids any confusion which might otherwise arise as to what is meant by “a group” of units.

Question 4: Do you have any comments on any other of the Scottish Law Commission’s recommendations for reform?

No.

Question 5: Are you aware of any subsequent case law or legislation which impacts on any of the recommendations contained in the Scottish Law Commission's Report?

Yes.

In *Cornish v Philippi* [2025] LTS 26, the Lands Tribunal followed the reasoning in *Thomson's Executor* as regards 'related' properties and found that a low-level boundary fence (not common property) was sufficient to render the properties related for the purposes of s.53 of the 2003 Act.

This highlights the need for reform of the legislation.

Question 6: Are you aware of change in conveyancing law practice which impacts on any of the recommendations contained in the Report?

No.

Question 7: Do you have any comments on the draft Bill included in the Scottish Law Commission's Report?

Yes.

Please see responses above.

Question 8: Do you agree that it should be a requirement for there to be notice of the common scheme in the title of the burdened property?

Agree.

Question 9: Do you agree that 2 years is an appropriate period during which a notice preserving enforcement rights should be registered?

Agree.

We consider a period of two years sufficient to enable advice to be taken and a decision made as to whether any preservation notice is necessary or desirable in the circumstances of any case.

Question 10: Do you have any views on the proposal that there should be a special fee arrangement where an owner needs to raise multiple preservation notices?

No.

Question 11: What information or data do consultees have on:

(a) the economic impact of section 53 of the Title Conditions (Scotland) Act 2003, or

(b) the potential economic impact of the reform proposed by the Scottish Law Commission in its draft Bill.

We do not hold any such information or data.

Question 12: Are there any direct or indirect impacts on children and young people as a result of the legislative proposals set out in the Scottish Law Commission's draft Bill?

Yes.

It is conceivable that children and young people might be affected by the enforceability (or otherwise) of certain real burdens in relation to open space, and areas designated as play or recreation areas in title deeds. This is overwhelmingly likely to be an indirect impact, as the children are unlikely to be the owners of affected properties.

Question 13: Is there any impact on specific groups of children and young people as a result of the legislative proposals set out in the Scottish Law Commission's draft Bill?

No.