

# **ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000**

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## **EXPLANATORY NOTES**

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#### *Commentary on Sections*

#### **Part 4: Real Burdens**

#### ***Section 18: Reallotment of real burden by nomination of new dominant tenement***

72. Burdens on neighbouring property are feudal if they were created in a feu writ, but non-feudal if they were imposed in a simple disposition. While non-feudal burdens will survive feudal abolition, the former superior's title to enforce formerly feudal burdens will not, unless special provision is made. For example, a person may have sold part of the garden ground of a house for the erection of a separate house, subject to conditions. The superior/proprietor of the original house would be unable to enforce these conditions if the burdens were created in a feu writ rather than a disposition following feudal abolition. Section 18 allows superiors, in certain circumstances, to reallocate the title to enforce a feudal real burden to neighbouring land which they own. That land will become the benefited property and the burden will be enforceable by successive owners of that land.
73. *Subsection (1)* provides for the registration of a notice nominating land as a benefited property. The superior must have right to the sole dominium utile or sole allodial ownership of the benefited property. Unless the land is in the vicinity of the burdened property (i.e. the former feu subject to the feudal burden), there will be no interest to enforce and registration will be pointless. The present legal requirement of interest to enforce is preserved by section 24 (interest to enforce real burden). Section 18 will come into force on such day as the Scottish Ministers may appoint (see section 77(4)) and the superior has until the appointed day for abolition to complete registration of the notice.
74. *Subsection (2)* sets out the content of the notice which must follow the statutory form given in schedule 5. Further provision in relation to counter-obligations referred to in paragraph (e) is made in section 25 (counter-obligations on reallotment).
75. *Subsection (3)* provides for registration (or recording) of the notice against both the benefited and burdened property in either the Land Register or the Register of Sasines, as appropriate. If the title to one property is in the Land Register and to the other in the Register of Sasines, it will be necessary to register (or record) in both registers.
76. *Subsections (4) and (5)* make it clear that the notice must be sworn or affirmed before a notary public. The notices will contain information provided by the superior, the accuracy of which will not always be easy to check. Sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true. *Subsection (5)* sets out exceptions to the normal rule that the notice must be sworn or affirmed by the superior personally and Schedule 2 to

*These notes relate to the Abolition of Feudal Tenure etc. (Scotland)  
Act 2000 (asp 5) which received Royal Assent on 14 July 2000*

the Requirements of Writing (Scotland) Act 1995 identifies who may sign on behalf of companies and other legal persons.

77. On the appointed day for abolition, *subsection (6)* converts the feudal burden into an ordinary non-feudal real burden in which the benefited property is the land nominated by the superior. It makes no difference if the superior no longer owns the land, but there must have been full compliance with subsections (1) to (5). The burden must still have been enforceable immediately before the date of abolition. If the superior registering the notice subsequently conveyed the superiority (unlikely given its impending abolition). This subsection makes clear that the savings provisions operate in circumstances where the superior would be able to enforce a burden if he were to complete title.
78. A notice will not be effective unless one (at least) of the three conditions of *subsection (7)* is satisfied. These are—
- (a) that the land has on it a permanent building used wholly or mainly as a place of human habitation or resort and that building is at some point within 100 metres of the burdened land;
  - (b) that the burden comprises—
    - (i) a right to enter or otherwise make use of the burdened land; or
    - (ii) a right of pre-emption or of redemption;
  - (c) that the dominant tenement comprises minerals or salmon fishings or some other incorporeal property and the terms of the burden make clear that it was created for the benefit of such land.
79. With regard to *paragraph (a)*, by stipulating a distance beyond which a burden cannot be preserved, it is possible to include those cases where protection of amenity is most essential while excluding those cases where the superior may have no real interest in enforcing the burdens. In built-up areas, distant neighbours are less affected than in open countryside where there are no intervening buildings to provide a shield. A rural superior with a large estate may own land adjacent to most, if not all, of the feus. The rule in Section 18 whereby a superior is permitted to convert a feudal burden into a neighbour burden is therefore restricted to circumstances where the benefited property has on it a building which is routinely used by people for work, recreation or habitation. If a building is merely used for animals or for storage it will not qualify.
80. *Paragraph (b)* should be read together with the definition of “real burden” in section 49 (interpretation of Part 4). Burdens conferring a right of use are different in character from amenity burdens and there is no reason to apply the 100 metres limit in such cases. Burdens may also be imposed for the benefit of a mineral estate or salmon fishings or some other incorporeal property. *Paragraph (c)* allows minerals and salmon fishings to become the benefited property under section 17 and it would not be appropriate to include a restriction based on distance or the presence of a building in these cases.