

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

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

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## **EXPLANATORY NOTES**

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#### ***Introduction***

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

#### ***The Act***

3. The Act will largely implement the recommendations of the Scottish Law Commission Report on Abolition of the Feudal System (Scot Law Com No 168). It will abolish the feudal system of land tenure. Land previously held feudally will be converted into simple ownership. Vassals will become owners and superiors will disappear. All remaining feuduties will be extinguished as will any obligation to pay redemption money under the Land Tenure Reform (Scotland) Act 1974.
4. Real burdens (i.e. conditions on land) in feudal deeds (such as restrictions on the use to be made of property) will cease to be enforceable by superiors. Rights of enforcement of third parties - e.g. owners of other flats in a tenement whose properties are protected by the burden - will not be affected. What will be extinguished by the Act is the superior's right to enforce the burden. Some feudal real burdens, however, will be preserved as ordinary real burdens and so will then be subject to the existing law on real burdens generally. They will be in the same position as real burdens created in an ordinary disposition. The preserved burdens will be classified in three categories: neighbourhood burdens (where the right to enforce the burden is reallocated to other land), conservation burdens and maritime burdens. The superior's right to enforce in another category – common facilities burdens – will be converted into a right for whoever owns the land intended to be protected by those burdens. In many cases, those owners have such rights under the present law, but for the case where they might not, this will protect them.
5. Compensation will be payable to superiors for the loss of the right to feuduties on the same basis as compensation is payable under the Land Tenure Reform (Scotland) Act 1974: it will be paid by the former vassals. Compensation will also be available for the loss of the right to certain real burdens which reserve development value to the superior – where the price was reduced or waived altogether in return for the burden. Compensation will not be payable for the loss of the bare superiority interest itself – and so for the loss of the right to charge vassals for waivers of conditions which the superior will no longer have a right to enforce.

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6. Certain other archaic forms of land tenure and payments will be abolished. Entails, already defunct in practice, will also be abolished. Baronial titles will be separated from the land. The Act provides for the repeal of 46 entire Acts, as well as over 300 sections and Schedules and many obsolete and unnecessary words in other Acts. The Act provides for a prohibition on the granting of leases of non-residential land for a period exceeding 175 years (residential leases are already restricted to a period of 20 years). It makes new provision for conveyancing and the ownership of land in Scotland. Some of the reforms and repeals are not strictly consequential on the abolition of the feudal system.

**Background**

7. The system of land tenure in Scotland is overwhelmingly feudal in nature. In theory, this means that the land is held under the Crown as ultimate feudal superior. Historically, the Crown would make a grant of land in return for military or other services and the grantees would in turn make sub-grants for other services and so on. Those making grants - the "superiors" - retained a legal interest in the land ("dominium directum"), and so a hierarchical structure was created with each property having a number of owners, co-existing simultaneously. Only one of these, the "vassal", has what in normal language would be regarded as ownership of the property ("dominium utile").
8. The service which the vassal had to perform for the superior was gradually replaced by a financial payment – feuduty. The Land Tenure Reform (Scotland) Act 1974 prohibited the imposition of new feuduties and provided for the redemption of existing ones.
9. Feudal deeds have and still do generally also impose conditions on the property feued – e.g. use, maintenance, building restrictions. These are feudal real burdens and are enforceable by the superior in that capacity. As explained in paragraph 4, the Act will extinguish many of these conditions (real burdens). The superiors and their concurrent rights will disappear, as will the superior's obligations, though contractual rights and obligations are not affected by the Act. Only the owner will continue to have a right to the land.
10. After the abolition of the feudal system there will still be restrictions on how an owner can use land. The planning and building control systems will for example, remain. The Scottish Law Commission estimate that only around half of all real burdens affecting property in Scotland are imposed in feudal deeds. Equivalent real burdens can be and are created outwith the feudal system in ordinary dispositions. These non-feudal real burdens will be unaffected by the Act which is concerned only with the consequences for feudal real burdens of the abolition of the feudal system of land tenure. The Scottish Law Commission issued a Discussion Paper on this very closely related subject in October 1998 proposing reform of the general law of real burdens as regards matters which have nothing to do with the feudal system (Scot Law Com Dp No 106) and will submit its final Report this autumn. The Scottish Executive intends to introduce a further Bill to take forward such reform.
11. Abolition of feudal tenure will apply equally in urban and rural areas, perhaps having greater practical impact in the former. For example, the vast majority of council houses which have been bought under the right to buy legislation were feued by local authorities when they were sold in order that the authorities could impose conditions on future use. Local authorities therefore have extensive superiority interests. Abolition of the feudal system will not address the land use difficulties which arise from the landlord/tenant relationship in rural areas. There is an essential distinction to be drawn between the "feudal" system which is a technical legal framework for ownership of land throughout Scotland and the rural land ownership structure characterised by large estates, which is often condemned as being "feudal" in nature. Such problems will be addressed by other elements in the overall land reform action plan, including the land reform Act which is also to be introduced in the first session of the Parliament.

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12. The Act's main purpose is to abolish the feudal system of land tenure in Scotland and to replace it with a system of simple ownership.
13. The Act is in 7 Parts.

### **Part 1: Abolition of Feudal Tenure**

14. This Part covers actual abolition and confers outright ownership of land on those who were formerly vassals under the feudal system.

### **Part 2: Land Transfers etc. on and after appointed day**

15. This Part restates, in non-feudal language, the established rules for the transfer of ownership of land in Scotland.

### **Part 3: Feuduties**

16. This Part covers the extinction of all remaining feuduties, the claim by the superior for a compensatory payment, the payment of arrears and the disclosure of certain information.

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

17. This Part of the Act extinguishes superiors' rights to enforce feudal burdens and covers the arrangements for the reallocation of enforcement rights, common facilities burdens, conservation burdens, compensation for development value real burdens and the registration of notices, agreements and applications to the Lands Tribunal to give effect to these arrangements.

### **Part 5: Entails**

18. This Part provides for the disentailment of entailed land and the closure of the Register of Entails.

### **Part 6: Miscellaneous**

19. This Part deals with the discharge of certain rights and the extinction of certain obligations and payments, and also deals with the Crown, the Lord Lyon, Barony titles, the abolition of Kindly Tenancies, liferents, the availability of title deeds, and the prohibition on leases for periods of more than 175 years.

### **Part 7: General**

20. This Part of the Act makes provision for the actual date of abolition of the feudal system, makes provision for the meaning of 'land', stipulates how feudal terms in enactments and documents should be interpreted following abolition, contains a saving for the enforceability of contractual rights and provides for consequential amendments and repeals.

### ***Commentary on Sections***

#### **Part 1: Abolition of Feudal Tenure**

##### ***Section 1: Abolition on appointed day***

21. *Section 1* abolishes the feudal system of land tenure as from the "appointed day". In terms of section 71 the appointed day will be such day as the Scottish Ministers may specify by a statutory instrument.

## **Section 2: Consequences of abolition**

22. *Section 2* converts land held under feudal tenure into simple ownership of the land.
23. *Subsection (1)* makes it clear that those who hold land as vassals under the feudal system, and are technically said to own the 'dominium utile', will automatically become owners of that land at the date of abolition. Abolition of the feudal system will not affect non-feudal real burdens and property will remain subject to planning, environmental and any other applicable law.
24. *Subsection (2)* abolishes all feudal superiorities and mid-superiorities, including the paramount superiority of the Crown. The prerogative rights and powers of the Crown as Sovereign or Head of State are not affected (see section 58).
25. *Subsection (3)* prohibits the creation of any new feus after the date of abolition.

## **Section 3: Amendment of Land Registration (Scotland) Act 1979**

26. Abolition of the feudal system will mean that the Land Register will contain obsolete material, particularly obsolete feudal burdens. This section contains technical amendments designed to ensure that such material may be safely eliminated over time.
27. *Paragraph (a)* ensures that the Keeper of the Registers will be entitled to refuse to accept applications for registration in the Land Register of Scotland which relate in whole or in part to superiorities. This will eventually cleanse the register of superiority interests. In the absence of this provision people might attempt to register 'mixed estates' (consisting partly of abolished rights in land) without making any attempt to distinguish between what has been abolished and what remains.
28. The amendments to the 1979 Act in *paragraphs (b) and (c)* are designed to enable the Keeper to rectify the register to take account of abolition of the feudal system, and anything done in consequence of abolition, and to do so without fear of claims for indemnity. The amendments will ensure that obsolete material, particularly obsolete feudal burdens, may be safely removed from the Register over time. The appearance on the Register of interests in land or burdens which are extinguished by the Act will constitute an inaccuracy in the Register. The process of correction of inaccuracies is known as rectification. The general policy is that the Keeper should be able to rectify the Register to take account of the effect of feudal abolition. The Keeper currently has power to rectify an inaccuracy in the Register but cannot do so to the prejudice of a proprietor in possession. Section 3 of the Act makes it clear that the Keeper may rectify the Register to take account of the abolition of the feudal system without having to concern himself as to whether or not to do so would prejudice the proprietor in possession or give rise to a claim on his indemnity. It is intended to facilitate rectification of the Register by the removal of obsolete entries. If the Keeper fails to enter on or remove from the Register an enforceable burden, for example a burden that has been saved under the Act, the omission of that burden from the Register will be an inaccuracy. It is not however intended to enable the Keeper to correct such an inaccuracy by the inclusion on the Register of the burden where to do so would prejudice a proprietor in possession. The underlying principle is that people should be able to rely with certainty on the information contained in the Register. The Keeper will be able to rectify the Register under section 9 of the Land Registration (Scotland) Act 1979 to remove inaccuracies arising due to the operation of the Act or due to anything done apparently under or by virtue of the Act. In general terms, the Keeper is obliged to indemnify persons for loss which arise as a result of a rectification of the Register. Section 12(3) of the Land Registration (Scotland) Act 1979 sets out various circumstances in which no entitlement to indemnity arises. Section 3 of the Act adds to those circumstances the case where the loss arises in consequence of a rectification of or an omission to rectify an inaccuracy which has arisen due to the abolition of the feudal system.

29. Paragraphs (b) and (c) will allow the Keeper to delete superiority titles, feuduty and real burdens enforceable only by superiors. Paragraph (b) makes it clear that the provisions which facilitate rectification of the Register to take account of feudal abolition apply not only where a rectification is required, for example, due to a court order, but where the Keeper exercises his discretion to rectify the Register. Paragraph (b) also makes it clear that the provision is intended to cover not only acts done by virtue of the Act, but also inaccuracies arising as a result of acts purportedly undertaken under it. An example might be an inaccuracy resulting in the Register from the Keeper giving effect to an invalid notice. The exclusion of sections 4 (ownership of land) and 65 (creation of proper liferent) of the Act from the ambit of the provision is to prevent rectification taking place following a normal transfer of ownership or creation of a liferent. Paragraph (b) also provides that the Keeper will not be able to enter or reinstate a real burden in the Land Register which he has omitted to include or has removed because he erroneously considered it to have been extinguished on feudal abolition. Section 12(3) of the 1979 Act sets out various circumstances in which no entitlement to indemnity arises and paragraph (c) adds to those circumstances the case where the loss arises in consequence of a rectification of or an omission to rectify an inaccuracy which has arisen due to the abolition of the feudal system. Indemnity is excluded not only where there is a proprietor in possession, but also where there is no proprietor in possession.

## **Part 2: Land Transfers Etc. on and after Appointed Day**

### ***Section 4: Ownership of land***

30. *Section 4* restates, in non-feudal language, the established rules for the transfer of ownership of land.
31. *Subsection (1)* provides that ownership passes either on registration of an interest in land in the Land Register of Scotland following a registrable transfer of a property in a county which is operational under the Land Registration (Scotland) Act 1979, or in any other case, on the recording of the conveyance of the land in the Register of Sasines.
32. *Subsection (2)* follows section 3(2) of the Land Registration (Scotland) Act 1979 in saving any special rule of the common law or statute. The most important such rule in practice is that which states that when land is conveyed to A and B and the survivor, ownership of A's pro indiviso share passes automatically to B, in the event that A predeceases B without evacuating the destination i.e. making some other arrangement for what happens to the pro indiviso share after the person's death.

### ***Section 5: Form of application for recording deed in Register of Sasines***

33. At present a deed which is to be recorded in the Register of Sasines must contain at its end a warrant for registration. In the Land Register, however, warrants of registration have been replaced by a statutory application form signed by or on behalf of the applicant. The application form is mandatory in terms of the Land Registration (Scotland) Rules 1980. Since April 1992, an application form has also been in use for the Register of Sasines in connection with computerisation of the presentment book, although it has no statutory basis and strictly cannot be insisted upon.
34. *Section 5* brings the Register of Sasines into line with the Land Register by removing the need for a warrant of registration. The warrant will be replaced with a new statutory application form to be prescribed by the Scottish Ministers in subordinate legislation. The subordinate legislation may also set out the procedure relating to applications for recording in the Register of Sasines.

### ***Section 6: Deduction of title for unregistered land etc.***

35. *Section 6* deals with a gap in the existing law. Legislation on deduction of title takes for granted that there will always be a last recorded title. On rare occasions there will

not be such a title. Examples of ownership without a recorded or registered title include corporations such as the University of St Andrews which acquired land before the Register of Sasines was set up in 1617. The purpose of section 6 is not to require deduction of title in every case where a deed is taken from a person who owns without a recorded title; rather it allows deduction of title from such a person in a case where deduction of title would otherwise be necessary. Once land is registered in the Land Register, deduction of title ceases to be required.

### **Part 3: Feuduties**

#### ***Section 7: Extinction on appointed day***

36. *Section 7* extinguishes all remaining feuduties on the day on which the feudal system of land tenure is abolished. This does not affect recovery of arrears of feuduty. The Land Tenure Reform (Scotland) Act 1974 prohibited the imposition of new feuduties and provided for the redemption of existing payments. It is estimated by the Scottish Law Commission that probably less than 10% of properties remain subject to feuduty.

#### ***Section 8: Requiring compensatory payment***

37. *Section 8* permits a former superior to claim compensation from a former vassal for feuduty extinguished under section 7 by serving a notice on the vassal in the appropriate form. The amount of compensation will be calculated in accordance with section 9. It is an ordinary unsecured debt. If no request for compensation is made, no liability arises.
38. *Subsection (1)* requires the notice demanding compensation to stipulate the sum due by the former vassal. The notice will have to be served within 2 years of the appointed date of abolition. Service would constitute the debt and trigger liability. Failure to serve within the 2 year period would extinguish any right to compensation.
39. *Subsection (2)* makes provision for a cumulo feuduty (which is defined in section 16(2)). Many older feus have come to be divided into smaller parts. The feuduty might be formally allocated among the fragmented parts so that each vassal is liable for a share. There is a possibility, however, that the feuduty will be an unallocated cumulo affecting the whole feu. In theory, the superior is entitled to recover the full amount of feuduty from any one vassal leaving that vassal to pursue neighbours to contribute a share. This provision, however, requires a separate notice to be served in respect of a cumulo feuduty on each former vassal in respect of the sum due by that vassal (see section 9(3) and (4) in relation to the share due by each vassal for a cumulo feuduty). A statutory form of notice is prescribed for such a feuduty in schedule 1.
40. *Subsection (3)* prescribes a statutory form of notice contained in schedule 2 for other feuduties.
41. *Subsection (4)* requires the prescribed explanatory note to be served with each notice of compensation. The note set out in schedule 1 applies for cumulo feuduties and that in schedule 2 for other feuduties.
42. *Subsection (5)* gives a vassal 8 weeks from service of the notice to pay the sum due. This is subject to the provisions for payment by instalments specified in section 10.

#### ***Section 9: Calculation of amount of compensatory payment***

43. *Section 9* makes it clear that the basis of the calculation of compensation for the extinction of feuduty is the same as that used for the redemption of feuduty under the Land Tenure Reform (Scotland) Act 1974. The principle is that full compensation should be paid by the vassal to the superior.
44. *Subsection (1)* sets out the same basic formula as is used in the 1974 Act.

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45. *Subsection (2)* provides that, except in the case of a cumulo feuduty, the sum produced using the statutory formula is the sum due by the former vassal.
46. In the case of the extinction of a cumulo feuduty, subsection (3) requires the former superior to allocate the compensation due among the former vassals in order to find the share due by each. The allocation requires to be done on a basis which is reasonable in all the circumstances.
47. *Subsection (4)* creates a presumption that an allocation is reasonable if it accords with an existing informal apportionment of a cumulo feuduty.

**Section 10: Making compensatory payment by instalments**

48. This section provides a scheme for payment by instalments where the sum due is £50 or more.
49. Where a superior is entitled to a compensatory payment of not less than £50, *subsection (1)* requires the superior to serve a completed instalment document and explanatory note in the prescribed form contained in schedule 3 on the former vassal at the same time as the notice calling for payment of the sum due. If the superior does not do so, then the notice has no effect.
50. If the former vassal wishes to take advantage of the option of making the compensatory payment by instalments, *subsection (2)* requires the vassal to sign, date and return the instalment document along with payment of a 10% surcharge within 8 weeks of the date of service of the notice. The surcharge of 10% of the total compensation recognises the administrative and other costs for the former superior where the compensation is to be paid by instalments.
51. *Subsection (3)* has the effect that if a former vassal sells the property after having received a notice to pay compensation to his former superior for the extinction of feuduty, he should no longer have the opportunity to pay by instalments and would be obliged to pay off the remaining compensation in a lump sum if the instalment option has been taken up. The effect is to provide a "clean break" when the property is sold.
52. *Subsection (4)* sets out the details of the instalment scheme. It provides for immediate payment of the balance due if an instalment is unpaid for 42 days and makes it clear that in other cases the balance can be repaid at any time. If the vassal, having previously taken up the instalment option subsequently loses the option of paying compensation by instalments by virtue of having sold the property, then the outstanding balance will be due on the seventh day after the day on which the former vassal ceased to have right to the land. In cases where the vassal loses the right to obtain the option of paying compensation by instalments because the property is sold after service of the notice but before the instalment option has been taken up, *subsection (5)* makes clear that the compensation will wholly be paid within 56 days after due service under section 8(5).

**Section 11: Service under section 8(1)**

53. This section sets out the rules for service of a notice (and instalment document). Service of a notice constitutes the debt and triggers liability for payment. It is also the starting point for negative prescription (see section 12 - extinction by prescription of requirement to make compensatory payment).
54. *Subsection (1)* along with subsection (5) sets out the normal rule for service. Service on each former vassal is required either personally or by registered post or recorded delivery to that person's place of residence, place of business, or a postal address which that person ordinarily uses or that person's most recently known such address. Where the land is owned in common, there should be separate service on each *pro indiviso* owner.

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55. *Subsection (2)* provides that a signed acknowledgement by the former vassal will be evidence that he has received the documents. Alternatively a certificate accompanied by the postal receipt where they are sent by registered post or the recorded delivery service will suffice. If the documents are sent by post but are returned to the former superior because they could not be delivered, they may be sent on to the Extractor of the Court of Session, and that will be equivalent to serving the vassal with the documents.
56. *Subsection (4)* defines the date of service as the date of delivery or of posting in compliance with subsection (1) or (2).

***Section 12: Extinction by prescription of requirement to make compensatory payment***

57. This section provides that the obligation to pay compensation prescribes, or ceases to be legally enforceable, after 5 years. Prescription starts to run from the date when the obligation becomes enforceable, i.e. the date of service of the notice.

***Section 13: Arrears of feuduty etc.***

58. This section deals with transitional arrangements for feuduty. Unpaid arrears will be unaffected by this legislation.
59. *Subsection (1)* makes it clear that arrears of feuduty for any period before the appointed date of abolition are still recoverable. It further provides that feuduties which relate to that period but which have not yet fallen due will fall due on the appointed day for abolition. The persons who were liable for payment of the arrears before the appointed day will continue to be liable after that date.
60. *Subsection (2)* abolishes the security (debitum fundi) which a superior previously had over the feudal property for unpaid feuduty and redemption money.
61. *Subsection (3)* abolishes the corresponding security (hypothec) which the superior had over moveable property. The former superior will still be able to recover arrears as a personal debt in the usual way.
62. *Subsection (4)* preserves the right of any superior to pursue actions based on debitum fundi or hypothec which commenced before the appointed day for abolition and also any rights or preferences founded on that basis which are claimed in a sequestration or other ranking process which have commenced before that date.

***Section 14: Duty of collecting third party to disclose information***

63. This section places a statutory duty on the collector of a feuduty or part of a feuduty to disclose information about the vassals from whom feuduty has been collected and the amount so collected. The collector could be a vassal or a property factor. The duty is not, however, absolute, since the collector could be subject to an obligation of confidentiality or might genuinely have lost the records in a fire or flood. He is therefore required to comply only in so far as it is practical for him so to do. The duty will come into force on Royal Assent (see section 77(1) - short title and commencement) in order to allow a superior time to investigate cumulo feuduties. Most cumulo feuduties which are not formally allocated may be informally apportioned, ie divided up for payment among the various vassals. If a superior collects feuduty directly, the apportionment will be familiar. If collection is carried out by a third party (such as one of the vassals or a factor), the duty to disclose the apportionment to the superior should ensure that the share of the compensation payment is fairly arrived at.

***Section 15: Duty to disclose identity etc. of former vassal***

64. This section relates to the situation where a property subject to a feuduty has been sold or transferred prior to the appointed day for abolition of the feudal system but the sale or transfer did not give rise to the compulsory redemption of feuduty under the

Land Tenure Reform (Scotland) Act 1974. Feuduty will therefore be extinguished on the appointed day and the former superior will be able to claim compensation. If the former superior wishes to claim a compensatory payment he will have to do so from the vassal who had right to the property immediately before the appointed day. The former superior may try to trace that person by searching in the property registers. If, however the property had changed hands, the property registers may not disclose the new owner, if either the new owner had not yet presented their title, or the Register of Sasines has not been updated to show the new owner's title. It would still show the original owner as the owner of the house, but having sold or transferred the property, the original owner is not the person who is to pay the compensation. If liability rested with the person shown as owner in the property registers, the new owner could avoid liability by delaying in registering his title. This section provides a mechanism to assist a superior relying on the information in the property registers to identify the person who was the vassal or owner at the relevant time. An obligation is placed on the person who owned the property before the vassal or owner who is obliged to pay the compensation (ie the vassal who had right to the property immediately before the appointed day) to help the superior to find that vassal or owner by telling him the name and address of the vassal or owner if he knows it or any other relevant information.

### **Section 16: Interpretation of Part 3**

65. This section defines certain terms used in Part 3 of the Act.
66. *Subsection (1)* makes it clear that blench duty is extinguished along with feuduty. This arises where land is held under blench tenure. It has been described as a small illusory rent which is rarely collected. *Subsection (1)* also defines "vassal" for the purposes of liability for compensation. The feudal meaning of the term is extended to include a person who has right to the feu even if that person's title has not been completed. This is to take account of the situation where property is in the process of changing hands before the appointed date of abolition. A purchaser could otherwise avoid liability for compensation simply by delaying registration until after the appointed day. The seller would then be left with the bill.
67. The definitions of "cumulo feuduty" and "feu" cover the case where part of the cumulo has been allocated. The definition of "cumulo feuduty" in *subsection (2)* embraces (a) the whole cumulo feuduty where no part has been allocated and (b) the unallocated balance of a cumulo remaining exigible from more than one part of a feu where part has already been allocated. The definition of "feu" in *subsection (3)* embraces (a) the original feu where there has been no allocation of the cumulo, (b) those parts of a feu which are subject to the unallocated balance of a cumulo and (c) each part of a feu on which part of a cumulo has been allocated.
68. *Subsection (4)* makes it clear that where a feu or any part of a feu is held as common property, the former superior may recover all of the compensation from one of the co-owners, subject to a right of relief based on the size of their pro indiviso share. Any co-owner could therefore be called upon to pay the former superior, but would then have a right of relief against fellow owners.

## **Part 4: Real Burdens**

### **Section 17: Extinction of superior's rights**

69. *Section 17* sets out the general rule that a superior's rights in relation to the enforcement of feudal real burdens are extinguished on the appointed day for the abolition of the feudal system.
70. *Undersubsection (1)* any real burden enforceable only by a superior is extinguished on the appointed date of abolition. A burden which a third party (such as a neighbour) can also enforce survives, but the (former) superior loses his rights. Sections 18 (reallotment of real burden by nomination of new dominant tenement), 19 (reallotment of real

burden by agreement), 20 (reallotment by real burden by order of Lands Tribunal), 23 (reallotment of real burden affecting facility of benefit to other land etc.), 27 (notice preserving right to enforce conservation burden), 28 (enforcement of conservation burden) and 60 (preserved right of Crown to maritime burdens) set out exceptions to this rule where a former feudal real burden may survive extinction but as an ordinary real burden without any of the feudal trappings. It should be noted that under section 75 (saving for contractual rights), a former superior will retain any purely contractual rights. Like other conveyances, feudal deeds contain contractual terms which, on registration, become real burdens. In a dispute between the original parties to a feudal relationship, a condition in a feu which is valid as a real burden will also be valid as a contractual term. Even after abolition, a feudal superior will be able to enforce the terms of a feudal deed against the original vassal in so far as such terms are contractual. Section 17 (extinction of superior's rights) extinguishes only the real burden. Successive vassals are subject only to the real burden, not the contractual terms between the original parties.

71. Under the general law, an obligation, once extinguished, is extinguished for all purposes. When feudal burdens are extinguished, it should therefore cease to be possible to sue in respect of past breaches. *Subsection (2)* prevents superiors from attempting to enforce burdens extinguished under subsection (1). It makes no difference that the breach occurred before the appointed day for abolition. Subsection (2) makes it clear that an interdict, or order for specific implement, will be deemed to have been abandoned on the date of abolition. *Subsection (3)* makes it clear that proceedings in relation to irritancy (for which see section 53 - discharge of rights of irritancy), damages and payment of money are not however affected by this section (see also section 54(3) - extinction of superior's rights and obligations qua superior). If a burden is saved under the Act then section 17 will not affect any proceedings or court order in relation to that burden. If the superior is unable to save that burden under the Act he will not continue to have enforcement rights by other means.

### ***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,

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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 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.

***Section 19: Reallocation of real burden by agreement***

81. **Section 19** makes provision for the superior and vassal to enter into an agreement to maintain a burden in force in favour of land nominated in that agreement in such terms

as may be agreed between the parties. This provides an opportunity for both parties to maintain a burden in place while also providing an opportunity to modify the terms of the real burden or any counter-obligation enforceable against the superior.

82. It is competent under the present law for superiors and vassals (as well as people not operating under feudal law) to "save" what are in effect feudal burdens by creating new, ordinary burdens in identical terms in a non-feudal document, such as a deed of conditions. This section does not affect that facility, but it provides a means whereby parties may act to save (in modified form if the parties so agree) former feudal conditions as ordinary real burdens which are of lasting mutual benefit as regards particular land of the parties.
83. *Subsection (1)* stipulates that a superior should serve a notice in the form specified in schedule 5 on the vassal intimating that he is seeking to enter an agreement to save a burden. This is to give the vassal some information to help him consider his position. The notice would not have to be sworn or affirmed and it would not be registered in the Land Register (or recorded in the Register of Sasines), so there will be no need for a conveyancing description to identify the title to the land nominated as the dominant tenement. The superior has until the appointed day for abolition to register the agreement in the Land Register (or record it in the Register of Sasines). *Subsection (1)* makes it clear that the superior and vassal may, by the agreement, modify the real burden or any counter-obligation relating to the real burden. It also makes clear that it is possible for parties to enter into an agreement without first having to complete title.
84. *Subsection (2)* sets out the content of the notice which must follow the statutory form given in schedule 6. Further provision in relation to counter-obligations referred to in *paragraph (d)* is made in section 25 (counter-obligations on reallocation).
85. *Subsection (3)* specifies the content of an agreement between the superior and the vassal to save a burden. If an agreement is entered into it will have to be a written document which expressly states that it is made under section 19.
86. *Subsection (4)* provides for registration (or recording) of the agreement against both the benefited and burdened property in either the Land Register or the Register of Sasines. 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) the agreement in both registers.
87. On the appointed day for abolition, *subsection (5)* converts the feudal burden into an ordinary non-feudal 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)(b) and (c), (3) and (4). The burden must still have been enforceable immediately before the date of abolition. This subsection makes clear that, where a superior has not completed title, the savings provisions operate in circumstances where the superior would be able to enforce the burden if he were to complete title.
88. *Subsection (6)* relates to circumstances where a person has not completed title. A person who has not completed title should be able to enter into an agreement to save a burden under section 19. In line with conveyancing requirements for deeds which are to be recorded in the Register of Sasines where a person has not completed title to land, that person should deduce title in the agreement. This subsection enables parties to enter into an agreement without first having to complete title. The clause of deduction of title would specify the last recorded title and the various links in title by which the person entering into the agreement has acquired right to the land.

### ***Section 20: Reallocation of real burden by order of Lands Tribunal***

89. Clearly there will be occasions when a superior is unable to come to an agreement with a vassal to preserve a burden. There may also be valid feudal burdens imposed to protect valued amenity interests which are not saveable as ordinary non-feudal burdens

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under section 18. For example, the building on the superior's land may be more than 100 metres from the land subject to the burden. Alternatively, a superior may own an area of ground on which he intends to build a retirement home, but he has not yet built anything on his piece of land and so the property does not qualify under any of the heads in section 18.

90. **Section 20** provides a further opportunity for a superior to save a particular burden as an ordinary non-feudal real burden which would otherwise be extinguished by introducing an element of judicial discretion. If agreement cannot be reached with the vassal, the superior will have a right to apply to the Lands Tribunal for Scotland for an order to save a real burden in favour of land owned by the superior as an ordinary non-feudal real burden. The Lands Tribunal would have power to make an order in favour of the superior if it was satisfied that there would be substantial loss or disadvantage to the applicant if the burden was not saved. The section makes it clear that the superior will not be allowed to maintain any such burden unless various specified requirements have been gone through. This would then protect a range of cases, including general amenity or diminution in value. The Lands Tribunal is already used to applying the substantial loss or disadvantage test in relation to the amount of compensation which it is entitled to award for the variation or discharge of all real burdens under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. In addition, section 24 of the Act (interest to enforce real burden) provides that even if a feudal burden is saved under sections 18, 19, 20 or 23, to enforce the burden in the future the former superior will have to show interest to enforce in the same way as someone who benefits from a burden imposed in an ordinary disposition. The substantial loss or disadvantage test would involve the need to show a genuine and practical interest, and is intended to catch cases where there is a real interest to enforce and not the type of case where a superior does not have land in the vicinity at all and has no real interest in enforcing the burdens. The Lands Tribunal's decision will be final.
91. This section may only be resorted to after the filtering process of seeking to first save the burden by agreement in terms of section 19 has been gone through and it provides for a timescale to be imposed for bringing these applications forward. In the event that any such feudal burden is saved under this provision it will be as an ordinary real burden, thus placing the former superior in the same position as if he had imposed the burden in a disposition.
92. So that the appointed day for the abolition of the feudal system does not need to be delayed until all applications to the Lands Tribunal have been disposed of and any orders to allow a burden to be saved as an ordinary non-feudal burden have been registered, provision has been made to allow determination of any applications still to be dealt with on the appointed day for the abolition of the feudal system to be dealt with thereafter. The application must, however, have been made within a period (which must end before the appointed day) to be prescribed by the Scottish Ministers in subordinate legislation. In respect of any applications still outstanding on the appointed day for abolition of the feudal system the burden in question will therefore survive on a transitional basis, but as an ordinary non-feudal burden, pending the determination of the Lands Tribunal. An extract order from the Tribunal will be registered in the Land Register or recorded in the Register of Sasines, as appropriate, at the applicant's expense.
93. *Subsection (1)* makes it clear that a superior will only be able to apply to the Lands Tribunal if he is unable to reallocate the burden under section 18. So, for example, the Lands Tribunal route is not to be available in respect of a real burden which comprises a right to enter, or otherwise make use of the servient tenement, or comprises a right of pre-emption or redemption. The section 20 procedure will also only be available to the superior if he has first attempted to reach an agreement with the vassal in relation to the burden in question under section 19. If so, he may apply to the Lands Tribunal for an order under subsection (7) to preserve the burden, but the application will have to be made within a period to be prescribed by Scottish Ministers by order. The period

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is not expected to be very long in order to “kick start” the process of superiors applying to preserve burdens. The period must in any event end before the appointed day of abolition.

94. *Subsection (2)* requires an applicant to the Lands Tribunal to include in his application a description of the attempt to reach agreement with the vassal pursuant to section 19. The form of application should set out the steps which have been taken by the superior to try to reach agreement with the vassal to save the burden. This requirement will act to filter out cases before they reach the Lands Tribunal.
95. On sending or delivering an application to the Lands Tribunal, the superior is required under *subsection (3)* to execute and register (or record) a notice, within 42 days, in the form contained in schedule 7. This is to put anyone checking the Sasine or Land Registers on notice that the superior has applied to the Lands Tribunal to seek to permanently save the burden. The imposition of a time limit of 42 days from the date of the application to the Lands Tribunal is to prevent the superior from delaying in registering the notice stating that he has applied. The Tribunal is given discretion to extend the time limit if there is good cause.
96. *Subsection (4)* sets out the content of the notice which must follow the statutory form given in schedule 7. The notice will set out the same information as for an agreement under section 19. A conveyancing description is, however, required because the notice is to be registered (or recorded).
97. *Subsection (5)* provides for registration of the notice against both the benefited and burdened properties in the Land Register or the Register of Sasines as appropriate. This subsection also provides that where, by the appointed day for abolition, an order by the Lands Tribunal giving its determination in respect of such application has not yet been registered, then for a transitional period (defined in subsection (6)) the feudal burden will be converted into an ordinary non-feudal real burden in which the benefited property is the land nominated by the superior. The burden must still, however, have been enforceable immediately before the date of abolition of the feudal system. The saving provisions will operate in circumstances where the superior could enforce a burden or would be able to enforce a burden if he were to complete title.
98. *Subsection (6)* defines the transitional period for the purposes of subsection (5) as the period beginning on the appointed day of abolition and ending on either the day on which an order preserving or extinguishing the burden is registered in the Register of Sasines or Land Register or on a "specified day" to be stipulated by order made by the Scottish Ministers to finally close off the position for burdens which have been saved on a transitional basis under subsection (5) but where, for example, the applicant has not pursued his application to a conclusion. The length of the transitional period will largely depend upon the number of applications to the Lands Tribunal by superiors attempting to have burdens preserved. At the end of the transitional period for each burden which has been saved on a transitional basis under subsection (5), the burden will either be saved permanently (on registration of the Lands Tribunal's order where the application has been successful) or extinguished (which will happen on registration of the order where the application has been unsuccessful, or failing any order at all in respect of the application, on the specified day).
99. *Subsection (7)* provides that the Lands Tribunal may order that a burden, in respect of which a notice has been duly registered, may continue to be enforceable after the appointed day of abolition and shall continue to be enforceable after the end of the transitional period. It will do so if it is satisfied that there would be substantial loss or disadvantage to the former superior. It already uses this test in relation to the amount of compensation which it is entitled to award for the variation or discharge of real burdens under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. Alternatively, under *paragraph (b)* the Tribunal may order that the burden should be extinguished or should cease to be enforceable by the superior if it is not so satisfied. The use of the words "(taking him to be such)" after "owner" in paragraph (a) is intended

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to ensure that a person who does not have a completed title is treated in the same way as one who does. Normally, an owner of land is considered to be the person who has a registered title to the land, but it is not necessary for a person to have completed title in order to save a burden. These words also make it clear that, for the purposes of saving the burden, the original applicant to the Lands Tribunal does not still have to own the land which is to become the new dominant tenement. The proceedings under section 20 will not be prejudiced and will be able to proceed even if the original applicant has transferred the nominated land on to a third party.

100. *Subsection (8)(a)* makes it clear that if an order to save the burdens is obtained under subsection (7)(a) and is registered, then the burden or burdens which were the subject of the application to the Lands Tribunal will be preserved. Under *sub-paragraph (i)*, if the order was obtained and registered before the appointed day of abolition, then the burden will still be enforceable by the superior (or by a successor) on that day provided it was enforceable immediately before that day. Under *sub-paragraph (ii)*, if the order was obtained and registered on or after the appointed day of abolition, then the burden will remain enforceable from the day of registration of the order, provided it was enforceable immediately before that day. *Paragraph (b)* makes similar provision where an order is registered under subsection (7)(b) with regard to the date of extinction of a burden where an application to the Lands Tribunal has been unsuccessful. *Paragraph (c)* makes it clear that if no order has been made and registered under subsection (7) by the time of the specified day at the end of the transitional period, then the burden will be extinguished and will no longer be enforceable. This section makes it clear throughout that, where a superior has not completed title, the saving provisions will operate in circumstances where the superior would be able to enforce the burden if he were to complete title.
101. *Subsection (9)* makes it clear that the order issued by the Lands Tribunal may modify the burden or any counter-obligation attaching to the burden. This provides an element of flexibility and may indeed mean that a burden is preserved in a form which is more acceptable to the former vassal if the Lands Tribunal so orders.
102. *Subsection (10)* provides that there is no appeal beyond the final decision of the Lands Tribunal on an application under section 20.
103. *Subsection (11)* imposes a duty on the Lands Tribunal to extract and register (or record) an order issued under subsection (7) against both the burdened and benefited properties in the Land Register or the Register of Sasines. The provision makes clear that the applicant (i.e. the former superior) will bear the cost of registration (or recording) and this will be reflected in an amendment to the rules prescribing the fees payable in respect of applications to the Lands Tribunal.
104. *Subsection (12)* makes it clear that the provisions of subsections (2) and (3) of section 17 will apply to burdens which are extinguished or rendered unenforceable on the determination of the Lands Tribunal in the same way as would have been the case if they had fallen under subsection (1) of section 17. Burdens extinguished or rendered unenforceable under section 20 will therefore either fall on the appointed day for abolition (if the Lands Tribunal determines before that date) or on the date of registration of the relevant order from the Tribunal (in the case of an application dealt with after the appointed day of abolition) and failing any such order, on the specified day.
105. Under *subsection (13)*, a person opposing an application to preserve a burden at the Lands Tribunal (the former vassal) will incur no liability in respect of the expenses incurred by the applicant (the former superior) or his successor unless in the opinion of the Lands Tribunal they have acted vexatiously or frivolously. This is to limit the financial implications for former vassals being drawn unwillingly into litigation at the Lands Tribunal.

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106. *Subsection (15)* requires the notice for registration to 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 (16)* sets out exceptions to the normal rule that the notice must be sworn or affirmed by the superior personally.

***Section 21: Manner of dealing with application under section 20***

107. This section relates to the procedure in the Lands Tribunal for Scotland for applications under section 20. The approach is that the Tribunal should deal with these cases in broadly the same way as it deals with cases under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. On receiving an application under section 20, the Tribunal will inform the vassal and any other party which the Tribunal considers should be informed. It also sets out who may be heard by the Tribunal, namely the owner of the servient tenement or someone who is affected by the real burden in question. It gives the vassal and any other interested party the right to be heard by the Tribunal. It also provides that Scottish Ministers may make special rules in relation to section 20 cases, in the same way as they can for other business of the Tribunal. This allows a degree of flexibility and could provide a means for introducing an expedited procedure for the particular type of case under section 20.

***Section 22: Amendment of Tribunals and Inquiries Act 1992***

108. *Section 22* is ancillary to section 20(10) which provides that there is no appeal from the decision of the Lands Tribunal on an application under section 20.

***Section 23: Reallotment of real burden affecting facility of benefit to other land etc.***

109. Common facilities burdens regulate the management, maintenance or use of a common facility. They are of the same nature as the equivalent non-feudal real burdens and similarly, in certain circumstances, are enforceable by the owners of land which they are designed to protect. The extra-feudal feature is that they are also enforceable by the superior because they are imposed in a feu deed. In some cases, they can be drafted in such a way that only the superior has a right to enforce them. Without express provision, these burdens and rights would be extinguished on abolition. Common facilities in housing estates and tenements would be particularly at risk. This section transfers the superior's enforcement rights to the owners of those properties which benefit from the common facility in the event that they do not already have this right. The effect will be to convert a feudal burden which could be enforced only by the superior into an ordinary real burden, mutually enforceable within the tenement or housing estate.
110. *Subsection (1)* transfers a superior's enforcement rights to the owners of the properties which benefit from the common facility. *Subsection (1)* creates enforcement rights only where none exist already. If, as often happens in practice, the properties benefiting from the facility are already subject to the burden but have mutual enforcement rights, section 23 will not be necessary and will not add anything.
111. *Subsection (2)* extends the effect of the section to burdens regulating the provision of services to other property (for example factoring or heating).
112. *Subsection (3)* excludes burdens which constitute maintenance obligations (for example in relation to roads and sewers) from the operation of subsection (1) which have been taken over by a local or other public authority since the maintenance of the common facility is covered already without the need to transfer the right to enforce the burden.
113. *Subsection (4)* gives some examples of common facilities. The list is not intended to be comprehensive.

### **Section 24: Interest to enforce real burden**

114. At present, the interest of a superior to enforce real burdens is presumed in law. This section reaffirms the need for those succeeding to superiors' rights of enforcement to have an interest to enforce a real burden. Such interest however will not be presumed for burdens which are to be enforceable by the former superior under sections 18 (reallotment of real burden by nomination of new dominant tenement), 19 (reallotment of real burden by agreement), 20 (reallotment of real burden by order of Lands Tribunal), including burdens enforceable on the transitional basis under section 20(5), and 23 (reallotment of real burden affecting facility of benefit to other land etc.). The interest required is often characterised as being "praedial", by which is meant benefit, not as an individual, but to the dominant tenement. The position can be contrasted with conservation burdens (sections 26 to 32) and maritime burdens (section 60) for which, as they do not benefit other land, interest is presumed.

### **Section 25: Counter-obligations on reallotment**

115. This section makes it clear that the acquisition of superiors' enforcement rights under sections 18 (reallotment of real burden by nomination of new dominant tenement), 19 (reallotment of real burden by agreement), 20 (reallotment of real burden by order of Lands Tribunal) or 23 (reallotment of real burden affecting facility of benefit to other land etc.) is subject to compliance with any counter-obligations which were binding on the superior. In the case of section 18, the counter-obligations require to be listed in the initial notice (see section 18(2)(e)). For example, if a superior could exact the cost of maintaining a facility only subject to an obligation to carry out the necessary work, any post-abolition successor will be similarly obliged. Similar provision also applies in respect of burdens saved by agreement under section 19 or the subject of an application to the Lands Tribunal under section 20. Under section 47 (extinction of counter-obligation), a counter-obligation is extinguished with the extinction of the burden to which it relates.

### **Section 26: Conservation Bodies**

116. This is the first of a number of sections dealing with conservation burdens. In some cases superiors may be viewed as exercising their rights at least partly in the public interest. Superiors falling into this category might include the National Trust for Scotland and conservation trusts. For example, in selling a building which it has recently restored, a conservation trust might wish to impose real burdens in order to prevent inappropriate alteration and to ensure future standards of maintenance. Since the trust will rarely own neighbouring land, it is likely to sell by feu disposition, and its right to enforce the burdens will then be tied to the reserved superiority. Arrangements of this kind will not survive feudal abolition, unless a special saving is put in place. [Section 26](#) provides for the Scottish Ministers to prescribe by subordinate legislation a list of conservation bodies who will be entitled to preserve conservation burdens.
117. *Subsection (2)* sets out the criteria for a body to be included on the list. The definition of the type of body which may be prescribed as a conservation body is intended to be broad enough to catch all the bodies who have a function or object of preserving or protecting for the benefit of the public the architectural, historical or other special characteristics of land.
118. Since trusts are not separate legal persons, *subsection (3)* makes it clear that the conservation body would be the trustees.
119. *Subsection (4)* allows bodies to be removed from the list.

### **Section 27: Notice preserving right to enforce conservation burden**

120. This section permits a superior which is also a conservation body, and the Scottish Ministers, to preserve burdens concerned with conservation.

121. *Subsection (1)* explains how the burdens are to be preserved. The words "for the benefit of the public" are intended to ensure that the preservation of conservation burdens in the future must be in the public interest. The conservation body must register a notice before the appointed day for abolition of the feudal system in the Land Register or Register of Sasines. If no notice is registered, the burdens will be extinguished under section 17 (extinction of superior's rights). This subsection makes it clear that, where a conservation body has not completed title, the saving provisions will operate in circumstances where the body would be able to enforce the burden if it were to complete title. This also applies to Scottish Ministers.
122. *Subsection (2)* sets out the type of burden which may be preserved. The purpose of the burdens must be to preserve or protect the architectural or historical characteristics of the land or any other special characteristics of the land (including, without prejudice to the general rule, a special characteristic derived from the flora, fauna or general appearance of the land).
123. *Subsection (3)* sets out the content of the notice. The notice must follow the form given in schedule 8.

### ***Section 28: Enforcement of conservation burden***

124. The effect of *section 28* is that on the date of abolition of the feudal system, a feudal burden in respect of which a notice has been registered under section 27 (notice preserving right to enforce conservation burden) is converted into a conservation burden. The burden will be enforceable by the person who was the superior immediately before the date of abolition, provided that such a person is a conservation body or the Scottish Ministers. Where a conservation body or the Scottish Ministers have not completed title, the saving provisions will operate in circumstances where the conservation body or the Scottish Ministers would be able to enforce the burden if the body in question or they were to complete title. If the superior is not such a conservation body, or the Scottish Ministers, conversion will not take place and the burden will fall under section 17 (extinction of superior's rights). Unlike the case of neighbour burdens or common facilities burdens, a conservation body and the Scottish Ministers will be presumed to have an interest to enforce a conservation burden.
125. *Subsection (2)* makes it clear that if a conservation body has registered a notice preserving the right to enforce a conservation burden after the appointed day of abolition, but has conveyed the superiority to another conservation body or to the Scottish Ministers prior to the appointed day, then the successor conservation body or the Scottish Ministers as the case may be will be able to enforce the conservation burden after the appointed day. Similarly, if the Scottish Ministers have registered a notice but conveyed the superiority to a conservation body prior to the appointed day, then the conservation body will be able to enforce the burden after the appointed day.

### ***Section 29: Assignment of right to conservation burden***

126. Since a conservation burden is a burden in favour of a legal person and not land, there is no reason why a conservation burden cannot be assigned by its holder, provided that the assignee is another conservation body or the Scottish Ministers. *Section 29* provides that the benefit of a conservation burden can be assigned to another conservation body or the Scottish Ministers and assignment will be completed by registration in the Land Register or recording in the Register of Sasines. It is not necessary to intimate to the owner of the burdened property that assignment has taken place.

### ***Section 30: Deduction of title for conservation burden***

127. This section provides for deduction of title in cases where, under the general law, deduction of title would be required. No deduction of title would be required once the burden was registered in the Land Register.

***Section 31: Extinction of burden on body ceasing to be conservation body***

128. This section makes it clear that a conservation burden is extinguished if its holder ceases to be a conservation body. The privilege of conservation burdens will not be made available more widely.

***Section 32: No standard security over conservation burden***

129. This section prevents a standard security being granted over a conservation burden. Such a security would be of little value since a conservation burden is not usually income-producing and restrictions on assignation restrict the market for sale. This disposes of the possibility that a conservation burden could be extinguished if a security over it was called up by a creditor which was not itself a conservation body.

***Section 33: Notice reserving right to claim compensation where land subject to development value burden***

130. This section is the first in a group of sections on compensation for the loss of certain real burdens reserving development value to the superior. Property may have been feued for a heavily discounted consideration, or even for no consideration, for charitable, religious, public or amenity purposes on the understanding that a further financial return is to be available to the superior later if the land is freed to be sold on the open market or used for purposes prohibited by the burden. For example, land feued for use as a sports field might be suitable for a commercial development. The superior may have been happy to grant a feu for a token sum so long as the ground was used as a sports field but may have been unwilling to allow the vassal to make a large profit by selling the land for development. Where a superior has not completed title, the saving provisions will operate in circumstances where the superior would be able to enforce the burden if he were to complete title.
131. *Subsection (1)* enables the superior, before the date of abolition, to reserve the right to claim compensation by executing and registering a notice in prescribed form. This subsection deals with circumstances where a superior has gifted land or sold land at a price significantly lower than that for which the superior could have sold it had the burden not been imposed.
132. *Subsection (2)* explains what information should be set out in the notice.
133. *Subsections (3) and (4)* provide that the notice must be sworn or affirmed before a notary public. *Subsection (4)* sets out exceptions to the normal rule that this must be done by the superior personally. *Subsection (4)(b)* should be read in conjunction with Schedule 2 to the Requirements of Writing (Scotland) Act 1995 which identifies who may sign on behalf of companies and other legal persons.

***Section 34: Limited transmissibility of right to claim compensation***

134. This section allows the free assignation of a right to claim compensation for the loss of a development value burden. It will also be possible to transmit a right to claim by testamentary disposition, court decree or by operation of law.

***Section 35: Claiming compensation***

135. This section deals with the circumstances in which a right to compensation arises if a notice has been duly registered under section 33 (notice reserving right to claim compensation where land subject to development value burden). The general rule is that the right does not arise immediately after the date of abolition. It emerges only if something happens within 20 years after the appointed date of abolition which would have been a breach of the burden if it had still subsisted.
136. To deal with cases where there may have been a breach shortly before the appointed date for abolition so that the superior has not had time to enforce the burden, section 35

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also allows the superior to claim compensation for breaches occurring within 5 years before the date of abolition.

137. *Subsection (1)* confers the right to compensation if the conditions set out in *subsection (2)* are satisfied. This subsection also makes it clear that it will not only be the person who registered the notice who can claim compensation, but anyone who subsequently obtains a right to all or part of the claim. Every party who has a right to claim must serve a notice to actually make the claim.
138. In setting out these conditions, *subsection (2)* makes it clear, in particular, that the real burden must have been enforceable by the superior before it was extinguished or rendered unenforceable by abolition. This is because many apparently valid real burdens are unenforceable. This subsection makes it clear that, where a superior has not completed title, the saving provisions will operate in circumstances where the superior would be able to enforce the burden if he were to complete title.
139. *Subsection (3)* regulates the way in which a claim is to be made. A notice in writing will be duly served on the owner and this will specify the amount of compensation claimed.
140. *Subsection (4)* lays down time limits within which a claim for compensation must be made. In the normal case the time limit is 3 years from the date of the occurrence which would have been a breach had the burden still subsisted. In the special transitional case of breaches in the 5 years before the appointed date of abolition, the time limit is 3 years from the date of abolition.
141. *Subsection (5)* makes it clear that in the case of a continuing breach or occurrence, the time runs from the date when the breach or occurrence first happens.

***Section 36: Service under Section 35(3)***

142. This section makes provision for service of a claim for compensation. This will be made against the person who is the owner of the land at the time of the act or event triggering the claim. The obligation to pay compensation would be a personal obligation on that person and would not run with the land. Section 36 follows the model of section 11 (service under section 8(1)).

***Section 37: Amount of compensation***

143. *Subsection (1)* provides that the amount payable on any one claim is the amount of development value which would have accrued to the owner of the land if the burden had been modified so as to free the land for the development which has actually occurred. For example, if the burden prohibited all building and the owner, 7 years after the appointed date of abolition, has built a small shed, the compensation would only be the difference between the value of the land on the assumption that a shed could not be built and the value of the land on the assumption that a shed could be built. Building the shed would not trigger a claim for compensation based on the fact that a supermarket could be built.
144. *Subsection (2)* limits the total amount of compensation payable, on one or several claims, to such an amount as will make up for any effect which the burden produced at the time when it was imposed in reducing or eliminating the consideration paid by the vassal for the original feudal grant. This formula is derived from section 1(4)(ii) of the Conveyancing and Feudal Reform (Scotland) Act 1970. In relation to that provision, the practice of the Lands Tribunal for Scotland has been to make no allowance for inflation in the calculation of compensation. To leave inflation out automatically takes account of the age of burdens. Since the Lands Tribunal was given the power in 1970 to vary or discharge land obligations, it is now rare for feuing conditions alone to be used to protect the superior's interests in development value.
145. *Subsection (3)* is designed to prevent double compensation. The former superior may, for example, have a valid contractual claim against the former vassal if they are both

the original parties to the contract. There would be no need for statutory compensation in such a case. *Paragraph (b)* stipulates that the assignee of a reserved right to claim compensation will not be able to recover more than the assignor would have been entitled to had there not been an assignation. The former superior may have contractual rights to recover the development value that are not passed on to the assignee. These contractual rights will still, however, be taken into account for the purposes of determining the amount of compensation due to the assignee.

146. *Subsection (4)* is designed to deal with the point that, in the case of an occurrence after the appointed date of abolition, the burden will already have been extinguished by section 17 (Extinction of superior's rights). The comparison is between what the land would have been worth if a burden had subsisted unmodified and what it would have been worth if the burden had been modified to permit the development which has taken place.

### ***Section 38: Duty to disclose identity of owner***

147. This section deals with the situation where there has been a sale or transfer of the property before the event giving rise to a claim for compensation in relation to a development value burden. If the former superior wishes to claim a compensatory payment he will have to do so from the owner of the property at the time of the breach or occurrence giving rise to the claim. The former superior may try to trace that person by searching in the property registers. If, however, the property had changed hands, the property registers may not disclose the new owner, if either the new owner had not yet presented their title, or the Register of Sasines has not been updated to show the new owner's title. It would still show the original owner as the owner of the house, but having sold or transferred the property, the original owner is not the person who is to pay the compensation. If liability rested with the person shown as owner in the property registers, the new owner could avoid liability by delaying in registering his title. This section provides a mechanism to assist the superior relying on the information in the property registers to identify the person who was the owner at the relevant time. An obligation is placed on the person who owned the property before the owner who is obliged to pay the compensation to help the superior to find that owner by telling him the name and address if he knows it or any other relevant information.

### ***Section 39: The expression "owner" for the purposes of Sections 35 to 37***

148. *Subsection (1)* defines "owner" for the purposes of liability for compensation. Before the appointed date of abolition, such a person will own the dominium utile and thereafter, by section 2(1) (consequences of abolition), will have simple ownership.
149. *Subsection (2)* makes it clear that where the land is held as common property, the former superior may recover all of the compensation from one of the co-owners. That co-owner would then have a right to recover the appropriate share from the other co-owners based on the size of their interest in the property.

### ***Section 40: Assignment, discharge, or restriction, of reserved right to claim compensation***

150. *Paragraph (a)* provides that a reserved right to claim compensation can be assigned and schedule 11 provides the appropriate form. It also makes clear that it will be possible to assign only part of the right to claim. Any assignation of part of a claim will be expressed as a proportion or percentage of each individual claim that may subsequently be made under section 35. *Paragraph (b)* makes it clear that a reserved right to claim compensation can be discharged or restricted by the person entitled to it. Provision is made for registration of such discharge or restriction and schedule 11 provides the appropriate form. This section is concerned with voluntary discharge or restriction. Section 44 (referral to Lands Tribunal of notice dispute) enables the owner of land affected by a notice reserving the right to compensation to apply to the Lands Tribunal

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for an order to have the notice discharged or restricted without the consent of the person entitled to it.

***Section 41: Notices: pre-registration requirements etc.***

151. This is the first in a group of sections making common provision for notices drawn up under sections 18 (reallotment of real burdens by nomination of new dominant tenement), 20 (reallotment of real burden by order of Lands Tribunal), 27 (notice preserving right to enforce conservation burden) and 33 (notice reserving right to claims for compensation where land subject to development value burden) which require to be registered.
152. **Section 5** (which abolishes warrants of registration) does not come into force until the appointed day for abolition and so would not affect these notices which require to be registered before that day. **Subsection (2)** therefore exempts notices from having to contain warrants of registration.
153. **Subsections (3) and (4)** provide for the sending of a copy of the notice to the vassal. Normal service will be by post and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

***Section 42: Further provision as respects sections 18 to 20, 27 and 33***

154. In some cases, a superior may have a choice of registering a notice to reallocate a burden, or to save it as a conservation burden (if the superior is a designated conservation body or the Scottish Ministers) or to reserve a right to claim compensation, or alternatively may save it by agreement or on an application to the Lands Tribunal. **Subsection (1)** makes it clear that the various courses open to the superior are mutually exclusive. A choice must be made though this would not necessarily be final. A different option could be pursued later, before feudal abolition, provided the appropriate steps are taken to deal with the notice or agreement first sent.
155. **Subsection (2)** deals with division of a feu. The rule is that if land originally subject to a single grant in feu comes to be divided into separate parts, each part is treated as a separate feu for the purposes of Part 4 of the Act (real burdens).
156. **Subsections (3) and (4)** regulate the number of notices which need to be sent. Each feu requires its own notice, but there is no objection to using the same notice or agreement for different burdens which affect the same property.

***Section 43: Notices and agreements under certain sections: Extent of Keeper's duty***

157. The Keeper has to decide whether to accept for recording or registration the deeds which are submitted to him. In relation to the Sasine Register, the Keeper's concern is limited to whether the deed presented for recording is of a type appropriate to the Register and whether it is formally valid. By contrast, all deeds are carefully examined before registration in the Land Register and if necessary the Keeper calls for further information or evidence. A notice would be rejected if the Keeper was not satisfied as to its validity. There are, however, certain matters which the Keeper could not be reasonably expected to check. These are:
  - **whether a burden was enforceable by a superior in circumstances where a former superior is permitted to register notices or an agreement which will have the effect of either preserving a feudal burden as a non-feudal burden or reserving the right to claim compensation for the loss of a development value burden - in order for these notices or agreement to be competent, the real burden in question must be enforceable by the superior;**
  - **whether a copy of the notice has been duly sent to the vassal;**

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- **whether, in the case of a notice converting a feudal burden to a neighbour burden, the requirement of a building within 100 metres of the burdened property has been met;**
- **whether, in the case of a burden saved by an agreement, the notice requirement has been complied with;**
- **whether, in the case of a notice of an application to the Lands Tribunal to save a burden on substantial loss or disadvantage, an attempt was made to save it by agreement or that substantial loss or disadvantage does arise - the Keeper also has no duty to check whether the relevant notice has been executed and registered within the specified period;**
- **whether, in the case of a notice reserving a right to claim compensation, the statements made about development value, and the reduction in consideration are true.**

158. Accordingly this section provides that the Keeper has no duty in relation to these matters. The superior will have sworn or affirmed before a notary public that the information contained in the notice is true. The vassal may be expected to scrutinise any notice received and will be in a much better position than the Keeper to check the information in it. (Section 42(1) allows an invalid notice to be challenged.) Section 43 therefore relieves the Keeper of the need to verify the above facts which would in practice be difficult for him to check. Although the section applies to both registers, it is of importance mainly in relation to the Land Register.

159. *Subsection (3)* provides that it will not be a matter for the Keeper to determine whether or not a burden is actually enforceable, and by whom, immediately before the appointed day or the day of registration of an order of the Lands Tribunal. This is a further provision resulting from the policy that the Keeper should not be expected to verify information which he could not check from documentation submitted to him in connection with an application for registration.

#### ***Section 44: Referral to Lands Tribunal of notice dispute***

160. This section gives the Lands Tribunal for Scotland a broad jurisdiction to resolve disputes in relation to notices. The proposition that notices should be judicially challengeable is particularly important in the case of compensation notices, which depend on subjective assertions which are difficult to prove or disprove in the absence of extrinsic evidence. A compensation notice will be accepted for registration by the Keeper without consideration of its merits.

161. *Subsection (2)* gives jurisdiction in relation to claims for compensation following the extinction of development value burdens.

162. *Subsection (3)* makes it clear that the burden of proof will be on the person relying on the notice or making the claim for compensation.

163. *Subsection (4)* allows the registration of an extract of a Lands Tribunal order in the property registers and makes it clear that, on registration, they will affect third parties.

#### ***Section 45: Circumstances where certain notices may be registered after appointed day***

164. *Section 45* allows a notice or agreement which is submitted for registration prior to the appointed day, but rejected by the Keeper, to be registered late in the event that a court or the Lands Tribunal determines that the notice or agreement is in fact registrable. Section 46(3) makes provision to prevent the Keeper from removing such burdens while a decision is awaited from the court or the Lands Tribunal. Section 45 provides that the application requires to be made within a period prescribed by an order made by

Scottish Ministers. Notices or agreements which are the subject of determinations made on or after the appointed day will have to be registered within a 2 month period and before a date to be prescribed in an order by the Scottish Ministers. Provision is also made for the possibility that an appeal may be determined prior to the appointed day and, in particular, that the date of determination may be more than 2 months prior to the appointed day.

***Section 46: Duties of Keeper: Amendments relating to the extinction of certain real burdens***

165. This section has 3 purposes. First, it makes clear that it is not competent to request or for a court or the Lands Tribunal to order the Keeper to delete real burdens extinguished under section 17 (extinction of superior's rights) from the Land Register for such period of years following the appointed day as may be specified in an order made by the Scottish Ministers. Even if the Keeper has been ordered by the court or the Lands Tribunal to remove a burden from the Land Register which is the subject of a notice or agreement which has been rejected for registration but which the former superior is seeking to have registered late under section 45, then the Keeper is prevented from removing the burden while it remains possible that the notice or agreement saving the burden may yet be registered (see subsection (3)).
166. Second, this section gives the Keeper temporary relief for a period to be determined by Scottish Ministers after the appointed day for abolition. A degree of discretion is allowed to the Keeper. He will be enabled, but not required, to enter extinguished feudal burdens into the Land Register when processing an application for first registration and will be at liberty to remove extinguished feudal burdens. This is to enable the Keeper to deal with applications for first registration of an interest in land without having to make a judgement as to whether or not a feudal burden had been extinguished or had been validly saved. This temporary relief is in operation for a period to be prescribed by order made by the Scottish Ministers subject to negative procedure.
167. Finally, although the Keeper will be entitled to remove extinguished burdens from the register at his discretion, *subsection (3)* makes it clear that he will not be entitled to do so when the burden in question is the subject of a notice or agreement which is before a court or the Lands Tribunal for a decision on its eligibility for registration. This will ensure no-one might purchase the subjects in ignorance of the burden.
168. *Subsection (4)* simply ensures consistency in the time periods under the provisions of sections 45 and 46.

***Section 47: Extinction of counter-obligation***

169. Counter-obligations are tied to real burdens. This section makes it clear that, on the extinction of a real burden, any counter-obligation which is a counterpart of the burden is extinguished also. Such extinction will be on the appointed day for abolition of the feudal system, other than where the superior had applied to the Lands Tribunal to save a feudal real burden under section 20 and no order from the Lands Tribunal had been registered before the appointed day and the application was not ultimately successful, when extinction will be on the expiry of the transitional period (see section 20(5) and (6)).

***Section 48: No implication as to dominant tenement where real burden created in grant in feu***

170. This section makes it clear, for the avoidance of doubt, that a real burden created in a feudal grant is implied to be for the benefit of the superiority only, and not for the benefit of land in the vicinity which the superior also happens to own. Such land could be made into a benefited property only by the operation of section 18 (reallotment of real burden by nomination of new dominant tenement), section 19 (reallotment of real burden by agreement) and section 20 (reallotment of real burden by order of Lands Tribunal).

#### ***Section 49: Interpretation of Part 4***

171. This section gives the meaning of certain terms used in Part 4 of the Act. "Superior" is defined to include over-superior. Over-superiors are able under the existing law to enforce real burdens directly against the vassal owning the dominium utile. For the purposes of Part 4, over-superiors are treated in the same way as immediate superiors.

#### **Part 5: Entails**

#### ***Section 50: Disentailment on appointed day***

172. This section abolishes entails which were at one time commonly used to keep lands in the same family for generations. A feudal grant of land would be made in such a way that the succession to it was strictly regulated and protected. For example, a deed might provide that on the death of the owner the land was to pass to his eldest son or other male heir and so on for subsequent owners. At any one time there would be an heir in possession and an heir apparent who could expect to succeed to the lands on surviving the heir in possession. The stipulated line of succession would be secured by provisions whereby any attempt by the heir in possession to interfere with the succession or to reduce the extent or value of the estate (for example, by selling or feuing or burdening the property) resulted in the lands passing immediately to the next heir. The disadvantages of tying up land by strict entails quickly became apparent and a succession of statutes was passed to increase the powers of the heir in possession to deal with the land. Finally, the Entail (Scotland) Act 1914 prohibited the creation of new entails after 10 August 1914. The Scottish Law Commission think that there are few, if any, entails still in existence but there are 20 statutes still in force to deal with an area of law which has become obsolete.
173. *Subsection (1)* provides for the automatic disentailing of land on the appointed date of abolition.
174. *Subsection (2)* provides that the effect of automatic disentailing is to be the same as the effect of a duly recorded instrument of disentail. This means that the destination and the titles will remain in force as a special destination, until altered, but the restrictions on the freedom of the owner of the property to deal with it as his own property will fall away. Accordingly the owner can sell the property or alter the succession to it.

#### ***Section 51: Compensation for expectancy or interest of apparent or other nearest heir in an entailed estate***

175. Under sections 1 and 2 of the Entail Amendment Act 1848, any heir of entail in possession born after the date of the entail can now disentail without any consent or payment of compensation. Only if the heir in possession was born before the date of the entail (which must have been before 10 August 1914 - the date of the prohibition of the creation of new entails under the Entail (Scotland) Act 1914) could there be any question of compensation. It is therefore unlikely that there will be any heirs in a position to claim compensation for the effects of automatic disentailing on their prospects of succeeding to the entailed estates. This section provides a mechanism for assessing compensation and having it secured on the land.

#### ***Section 52: Closure of Register of Entails***

176. This section provides for the Register of Entails to be closed by the Keeper of the Registers of Scotland and transmitted to the Keeper of the Records of Scotland for preservation.

## **Part 6: Miscellaneous**

### ***Section 53: Discharge of rights of irritancy***

177. "Irritancy" means confiscation of the feu property. A superior can irritate for non-payment of feuduty or (in cases where the right has been stipulated for) for non-compliance with real burdens. An owner who makes a minor deviation from the title conditions is potentially vulnerable to the total loss of the property, without compensation. This section extinguishes the remedy of irritancy and will come into force on Royal Assent.

### ***Section 54: Extinction of superior's rights and obligations qua superior***

178. A superior has certain rights and, sometimes, obligations simply by virtue of being the superior. Such rights and obligations run with the superiority and transmit to successors. Parts 3 and 4 of the Act provide for the extinction (with exceptions) of the two principal rights of a superior namely the right to collect feuduty and the right to enforce real burdens. *Section 54* is concerned solely with any other rights and obligations a superior might have by virtue of being the superior. Accordingly it extinguishes any other residual rights which a superior might be thought to have. It also extinguishes obligations on the superior, other than the counter-obligations which are expressly saved by sections 25, 28(1)(a) and 60(1)(a). Section 75 (saving for contractual rights) makes it clear that contractual rights and obligations are unaffected.
179. *Subsections (2) and (3)* are modelled on the equivalent provisions in section 17 and prevent the enforcement (subject to exceptions) of superior's rights and obligations after the appointed date of abolition.

### ***Section 55: Abolition of thirlage***

180. Thirlage was the obligation on a landowner to take corn to a particular mill to be ground. It is highly unlikely that any obligations of thirlage still exist but this section effects formal abolition.

### ***Section 56: Extinction etc. of certain payments analogous to feuduty***

181. This section applies the provisions of Part 3 of the Act on extinction of feuduties to other payments which, although non-feudal in nature, have similar characteristics. The section follows the approach in the Land Tenure Reform (Scotland) Act 1974, but adds teinds and stipend to the list of burdens being dealt with.
182. Ground annual is a perpetual payment secured on land and due to a person not otherwise connected with that land. The owner of property burdened with a ground annual does not, however, hold title from the creditor on a ground annual in the same way as a vassal holds title from a superior. Most land subject to a ground annual is itself held on feudal tenure. Extinction of a ground annual will extinguish the security for payment and leave the land unencumbered.
183. Skat is a tribute under udal tenure which equates to feuduty under feudal tenure. In the case of skat, however, this would normally be payable directly to the Crown. Payment of skat has survived only on Orkney and Shetland.
184. Teinds were originally one-tenth of the annual produce of land and were used towards the support of the clergy and after the Reformation towards the minister's stipend. With the standardisation of stipend, teinds are of little or no value. The stipend of a standard value - "standard charge" - is constituted as a real burden on those lands in favour of the General Trustees of the Church of Scotland and is payable at Whitsunday and Martinmas.
185. The section also specifically applies to dry multures which are an annual payment derived from thirlage.

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186. *Subsection (4)* makes it clear that the extinction of the payments referred to in this section does not affect the underlying right to hold, occupy or use the land.

***Section 57: Extinction by prescription of obligation to pay redemption money for feuduty, ground annual etc.***

187. Substantial sums of redemption money under the Land Tenure Reform (Scotland) Act 1974 are still held on deposit receipt for the benefit of untraceable superiors. Such sums must continue to be held until the debt is extinguished by negative prescription, being 20 years (section 7 of the Prescription and Limitation (Scotland) Act 1973), and only then can they be returned to the original seller of the property. After so long a time the original seller may be difficult to trace. *Section 57* reduces to 5 years the period of negative prescription for redemption money for feuduty, ground annual etc under the 1974 Act. It is to apply to any obligation to pay redemption money that is still extant at the appointed date of abolition. The section will mean that there is a uniform 5 year prescription period for all matters relating to feuduty and payments analogous to feuduty. It will enable money which may have been on deposit receipt for many years to be returned if the 5 year period has already elapsed.

***Section 58: Crown application***

188. This Act will apply to the Crown. The Crown's position as paramount feudal superior will disappear on the appointed date of abolition and the Crown will not be able to grant new feus. Abolition of the feudal system will not affect property held allodially by the Crown which has never entered a feudal chain. Allodial tenure is complete, or absolute, ownership of property where there is no superior/vassal relationship.
189. The prerogative powers of the Crown will be completely unaffected by the Act. A distinction should be drawn here between the Crown's rights and powers as paramount feudal superior and the Crown's rights and powers as Sovereign. The prerogative powers are preserved generally, but three of them are mentioned specifically for the avoidance of any doubt. Firstly, the prerogative of honour is mentioned to make it clear that matters such as peerages are not affected, even although many of these matters may have their roots in the feudal system. Secondly, the Crown's prerogative rights in relation to ownerless or unclaimed property are also specifically excluded. These cover the Crown's rights as the so called last heir (ultimus haeres) to property which is unclaimed by any heir on the death of the deceased and the Crown's right of property, whether moveable or heritable, which ceases to have an owner (bona vacantia).
190. Thirdly, this section makes it clear that the *regalia majora* are to be treated as part of the prerogative and so will be unaffected by the Act. The *regalia majora* are royal rights which cannot be alienated by the Crown. Examples are:

the Crown's right in the sea and seabed in respect of public rights of navigation and fishing;

the Crown's right in the foreshore in respect of public rights of navigation, mooring boats and fishing; and

the Crown's right in the water and bed of navigable rivers, again in respect of public rights such as navigation.

***Section 59: Crown may sell or otherwise dispose of land by disposition***

191. There is at present some doubt as to whether the Crown can dispone, as opposed to feu, land which has never entered the feudal system. For the avoidance of doubt, this section therefore provides that the Crown can grant a disposition of land.

***Section 60: Preserved right of Crown to maritime burdens***

192. The Crown has in the past feued parts of the seabed or (more frequently) the foreshore for various purposes, including the construction of piers, harbours and bridges. Real burdens restricting the use of the parts of the seabed or foreshore feued out may have been imposed in the feudal grant. This section therefore preserves the right of the Crown to enforce such "maritime burdens".

***Section 61: Mines of gold and silver***

193. This section makes it clear that the Crown's right to a proportion of the minerals extracted is not a feuduty or a perpetual periodical payment relating to land (in which case it would be extinguished). The right is of the nature of a royalty and is not intended to be extinguished on feudal abolition.

***Section 62: Jurisdiction and prerogative of Lord Lyon***

194. For the avoidance of any doubt, this section preserves the jurisdiction and prerogatives of the Lord Lyon King of Arms who retains full jurisdiction and control over coats of arms.

***Section 63: Baronies and other dignities and offices***

195. This section deals with the effect of the abolition of the feudal system of land tenure on feudal baronies. A barony title is a feudal grant of land directly from the Crown as superior conferring baronial privileges and responsibilities. The estate and land, which can be bought and sold in the normal way, might be no more than a tiny plot of wasteground, of little or no value in itself, which represents the head place of the barony. But ownership of such an estate and land enables the owner to adopt the title of "Baron of ...". A market in Scottish Baronies has developed in recent years and the expected price for a barony, with no special features and a minimal amount of land of no value, is (the Scottish Law Commission advise in their Report) about £60,000.
196. There are 3 special features of barony titles. First, certain conveyancing peculiarities are attached to them. Secondly, the holder of land on a barony title still has, in theory but not in practice, the right to hold a baron's court. Thirdly, the holder of land on a barony title has the right to use the title of baron and, if granted armorial bearings by the Lord Lyon, to add certain special baronial features to the coat of arms. Such baronies are not an aspect of the constitution and have nothing to do with the Crown, except in so far as the Crown is the feudal superior of the land in question.
197. *Subsection (1)* abolishes any surviving criminal or civil jurisdiction of barony courts. Such jurisdiction is obsolete for all practical purposes. *Subsection (1)* also abolishes any conveyancing privileges incidental to a barony, such as the ability to convey the barony lands by a general description or the ability to acquire a right to salmon fishings by prescription even though they are not expressly mentioned in the titles to the land. *Subsection (1)* expressly preserves the dignity of baron, which is derived from the direct connection with the Crown as feudal superior of the land held in barony, and any other dignity or office whether or not of feudal origin. The reference to offices is intended to make clear that the abolition of the feudal system will not affect ancient offices in, for example, the Royal Household which might be regarded as relics from the feudal era.
198. *Subsection (2)* provides that the retained dignity of baron will no longer attach to the land. It will be a floating dignity which can be bought and sold as incorporeal heritable property and may be bequeathed by will in the normal way. If a baron dies intestate, the barony would transmit to the eldest son or other heir in accordance with the pre-1964 rules on intestate succession which were preserved by the Succession (Scotland) Act 1964 for "any title, coat of arms, honour or dignity transmissible on the death of the holder". For the avoidance of doubt, it is provided that baronies will not be registrable in the Land Register and that deeds relating to them will not be recordable in the Register

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of Sasines. In this way, the social, ceremonial and armorial aspects of baronies will be severed from land ownership and baronies will become non-territorial dignities.

199. *Subsection (3)* is a savings provision for existing heritable securities over barony titles. It makes it clear that from the appointed date of abolition, a security over the former dominium utile will continue (until discharge) to attach to the land and the dignity of baron and the security over the former dominium directum will continue to attach to the dignity alone.
200. *Subsection (4)* makes it clear that "conveyancing privilege" covers, for example, the special rule relating to prescription to salmon fishings and that the reference to "dignity" includes matters of heraldry and precedence incidental to a dignity, such as the addition of certain special baronial features to a coat of arms.

***Section 64: Abolition of Kindly Tenancies***

201. A kindly tenancy is a form of land tenure found in a small part of Dumfriesshire. "Kindly" simply means hereditary. *Section 64* provides for the abolition of kindly tenancies and the conversion of the interest of the kindly tenant to simple ownership. Kindly tenants will therefore enjoy the same kind of ownership as former feudal vassals. Any rent still payable would be extinguished, subject to a claim for compensation, by the operation of section 56 (extinction etc. of certain payments analogous to feuduty).
202. *Subsection (1)* abolishes the tenure of kindly tenancies in equivalent terms to section 1 which abolishes the feudal system of land tenure.
203. *Subsection (2)* converts the interest of the kindly tenant into ownership, which it already is, for all practical purposes. This ownership will remain subject to the same real rights and encumbrances as the kindly tenancy (for example servitudes or standard securities).
204. *Subsection (3)* specifically provides for the right of salmon fishings of kindly tenants. The right to fish for salmon, in so far as it is an unseverable pertinent of the kindly tenancy, will remain as such in the future.

***Section 65: Creation of proper liferent***

205. A liferent may be created either by reservation or by grant. An owner of land may either grant a right of liferent to a second party (i.e. the right to occupy and use the property during the second party's lifetime), or convey the land to a second party while reserving in the conveyance a right of liferent to the original owner. *Section 65* restates, in non-feudal language, the established rules for the creation of the real right of proper liferent. It does not affect trust liferents ("improper liferents").
206. *Subsection (1)* provides that a proper liferent is created on registration in the appropriate property register (or on such later date as the deed may provide).
207. *Subsection (2)* follows section 3(2) of the Land Registration (Scotland) Act 1979 in saving any special rule of the common law or statute. As with section 4, this would accommodate cases involving survivorship destinations. The most important in practice is the rule that where land is conveyed to A and B and the survivor, ownership of A's pro indiviso share passes automatically to B in the event that A predeceases B without evacuating the destination.

***Section 66: Obligation to make title deeds and searches available***

208. The abolition of superiors' obligations would remove the duty of former superiors to make available title deeds, except where the duty exists as a matter of contract. Demand for deeds will usually stop when the title to land has become registered in the Land Register (because then title flows from the Register and not from the deeds). It may, however, be necessary to inspect prior deeds from time to time, whether to check the accuracy of the Register or to determine the existence of rights at a particular time in

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

the past. *Section 66* provides a replacement obligation to make title deeds and searches available which is not confined to former superiors. The obligation will only be owed to a person who has, or is entitled to acquire, a real right.

***Section 67: Prohibition on leases for periods of more than 175 years***

209. The prohibition on leases for periods of more than 175 years is designed to prevent the feudal system from being replaced by a system of leasehold tenure with many of the same defects. Leases of residential property are already restricted to 20 years by section 8 of the Land Tenure Reform (Scotland) Act 1974. There is, however, no restriction on the length of other leases. Leases of 999 years or longer have at times been common in certain areas of Scotland.
210. *Subsection (1)* provides that no lease of land executed after the section comes into force on Royal Assent may continue for longer than 175 years. Leases, whatever their term, will come to an end automatically when the end of the 175 year period is reached.
211. *Subsection (2)* prohibits the use of leases containing obligations to renew in order to avoid the effect of subsection (1).
212. "Tacit relocation" is the legal doctrine whereby a lease may be tacitly continued for up to a year at a time if the tenant continues in occupation and nothing is done to bring the lease to an end. *Subsection (3)* makes it clear that tacit relocation is not affected by section 67. *Subsection (3)* also preserves the effect of any enactment under which the duration of a lease may be extended (for example the Tenancy of Shops (Scotland) Acts 1949 and 1964).
213. *Subsection (4)* stipulates 3 exceptions to the rule that non-residential leases should be subject to a limit of 175 years. First, the rule will not apply where a contractual obligation (such as missives) was entered into prior to Royal Assent to grant a lease in excess of the prohibited duration. Second, the 175 years rule will not apply to a lease executed before Royal Assent which has been renewed after Royal Assent in implement of a provision of that lease. This is to cover the position of, for example, Blairgowrie leases which are for 99 years but contain an obligation for automatic renewal at the end of the 99 years for a further 99 years and would thus exceed the proposed limit of 175 years. Last, the 175 years rule will not apply to circumstances where a lease has been entered into before Royal Assent which still has more than 175 years to run and it is desired to grant a sublease for the full residue of the head lease.

***Section 68: Certain applications to Sheriff of Chancery***

214. Sections 27 to 50 of the Titles to Land Consolidation (Scotland) Act 1868 deal with the service of heirs - an essentially feudal procedure whereby an heir could obtain infefment. They were repealed by the Succession (Scotland) Act 1964, but the repeal did not affect the "making up of title to any part of the estate of any person who died before" 10 September 1964 "or the right to take legal proceedings with respect to any such matters". This partial repeal meant that (a) archaic rules were preserved for cases involving deaths before 10 September 1964 and (b) there was no provision whereby, when property was conveyed to named trustees and the heir of the last surviving named or assumed trustee, the heir of that trustee could establish his title to act as trustee. Such an heir had to apply to the Court of Session for a declarator that he was entitled to act as trustee.
215. *Section 68* completes the repeal of sections 27 to 50 of the 1868 Act and replaces the provisions on the service of heirs with 3 sections which enable the same results to be achieved in a simpler way.

***Section 69: Application of 1970 Act to earlier forms of heritable security***

216. The conveyancing statutes contain many provisions, often extremely detailed, relating to old forms of heritable security which are now rarely encountered in practice. *Section 69* enables many of these obsolete provisions to be swept away. It does this by providing that the forms and procedures used in relation to standard securities - the modern form of security over land - can be used, with any appropriate modifications, in relation to older forms of heritable security such as the bond and disposition in security.

***Section 70: Ownership of land by a firm***

217. It is generally believed that a Scottish firm (i.e. a partnership) cannot own feudal property, even though the firm has a separate legal personality in Scots law. It is, however, generally accepted that a firm can own moveable property and can hold the right of a tenant under a lease.
218. *Section 70* resolves any doubt as to the position of partnerships by making it clear that partnerships having a separate legal personality (as all Scottish partnerships have) can themselves own land.

**Part 7: General**

***Section 71: The appointed day***

219. This section provides that the appointed day, which is the day when the feudal system is abolished and the main provisions of the Act come into effect, is to be fixed by the Scottish Ministers by order. They must choose a day at least 6 months after the order is made. The appointed day is to be either a Whitsunday (28 May) or a Martinmas (28 November) because those are the dates on which feuduty is normally payable. It is envisaged that the appointed day will be sufficiently long after the date when the Act is passed to give people time to make any necessary arrangements to adapt to the new law. For example, a former superior might wish to register a notice to convert a feudal burden into a neighbour burden or a notice reserving the right to claim compensation in respect of a development value burden. Time will obviously need to be allowed for this to be done. It should, however, be noted that it is envisaged that the Title Conditions (Scotland) Bill which is intended to be introduced by the Scottish Executive and which will complement the terms of this Act will be commenced on the same appointed day.

***Section 72: Interpretation***

220. This section defines "land" and is intended to include not only surface land (including land covered by water) and the buildings and other structures which are present on it, but also the separate legal rights which are capable of being held on feudal tenure under the present law. These include flats in tenement buildings, minerals under the ground, and the right to salmon fishings, as well as other more esoteric subjects. This definition avoids the risk that the feudal system will survive in relation to some anomalous type of property. The definition expressly includes land which was not actually held on feudal tenure but which because of its nature might have been (for example, ground owned under udal law).

***Section 73: Feudal terms in enactments and documents: construction after abolition of feudal system***

221. This section provides for the automatic translation of certain feudal terms which might be found in deeds or enactments dating from before the appointed date of abolition but having to be applied after that date. The translations will apply in so far as the context admits. The definition of "subordinate legislation" includes all subordinate legislation made by the Scottish Parliament whether under a Westminster Act or an Act of the Scottish Parliament.

#### **Section 74: Orders, regulations and rules**

222. This section regulates the procedure for orders, regulations or rules under the Act.
223. *Subsection (2)* provides that any consequential repeals or amendments pursuant to section 76(3) to primary legislation by subordinate legislation as a result of the Act must be made by affirmative procedure before the Scottish Parliament.

#### **Section 75: Saving for contractual rights**

224. Like other conveyances, feudal deeds contain contractual terms, such as warrandice or the conditions which, on registration, become real burdens. Such terms become enforceable immediately on acceptance of delivery of the deed, and thus before the superior/vassal relationship is constituted by registration. Section 54 makes clear that feudal abolition will extinguish (subject to exceptions) all rights and obligations of a superior which are held simply by virtue of being the superior. It is not, however, intended to extinguish contractual rights and obligations, whether created in feudal deeds or otherwise. *Section 75* makes it clear that, even after abolition, a former superior will be able to enforce the terms of a feudal deed against the original vassal insofar as such terms are contractual. As with other contracts, the rights can be assigned. The right to feuduty is expressly excluded, on the grounds that Part 3 of the Act already provides full compensation for its loss.

#### **Section 76: Minor and consequential amendments, repeals and power to amend or repeal enactments**

225. This section will give effect to the schedules of amendments and repeals. Because enactments made against the background of the feudal system extend over hundreds of years and cover disparate subjects, it is impossible to guarantee that all provisions containing feudal terminology or concepts have been discovered. The translation provision in section 73 should cover this possibility, but, as an added safeguard, power is given by *subsection (3)* to make further consequential amendments by order.

#### **Section 77: Short title and commencement**

226. *Subsection (2)* identifies the provisions which will come into force on the appointed day for abolition. Except as provided in this subsection and in *subsection (4)*, the Act comes into force on Royal Assent (see *subsection (1)*).
227. *Subsection (3)* provides that an amendment made to the Conveyancing and Feudal Reform (Scotland) Act 1970 is to have retrospective effect. The amendment is in response to the decision of the First Division of the Court of Session in *Beneficial Bank plc v McConnachie* and is to the effect that the security subjects in a standard security need to be described only in such a manner that they can be identified.
228. *Subsection (4)* provides that the relevant provisions in Part 4 of the Act relating to real burdens will come into force on a day prescribed by Scottish Ministers.

#### **Schedule 1**

229. This is the form of notice (with appendix) referred to in section 8(2) for claiming compensation for the extinction of a cumulo feuduty. It contains instructions for completing the form, an explanatory note a copy of which must be served with the notice (see section 8(4)) and notes for the completion of the appendix.

#### **Schedule 2**

230. This is the form of notice referred to in section 8(3) for claiming compensation for the extinction of the feuduty which is not a cumulo feuduty. It contains instructions for completing the form and an explanatory note a copy of which must be served with the notice (see section 8(4)).

### **Schedule 3**

231. This is the form of instalment document referred to in section 10(1) for use where compensation due for the extinction of the feuduty is £50 or more and thus qualifies for payment by instalments. It contains notes for completing the form and an explanatory note a copy of which must be served with the document.

### **Schedule 4**

232. This schedule provides forms for use in connection with the service of notices requiring compensatory payments for the extinction of feuduty under section 8(1). Form A is an acknowledgement of receipt to be signed by the former vassal, while Form B is a certificate which, if accompanied by a postal receipt shall be sufficient evidence of due service where service is by recorded delivery or registered post.

### **Schedule 5**

233. This is the form of notice referred to in section 18(1) for use by superiors who wish to convert feudal burdens to neighbour burdens. It contains an explanatory note and notes for completion of the notice.

### **Schedule 6**

234. This is the form of notice referred to in section 19(1) for use by superiors who wish to enter into an agreement to convert feudal burdens into neighbour burdens. It contains an explanatory note and notes for completion of the notice.

### **Schedule 7**

235. This is the form of notice referred to in section 20(3) for use by superiors who wish to apply to the Lands Tribunal to convert feudal burdens into neighbour burdens, having failed to reach agreement under section 19. It contains an explanatory note and notes for completion of the notice.

### **Schedule 8**

236. This is the form of notice referred to in section 27(1) for use by superiors which are conservation bodies, or the Scottish Ministers, to convert feudal burdens to conservation burdens. It contains an explanatory note and notes for completion of the notice.

### **Schedule 9**

237. This is the form of notice referred to in section 33(1) for use by superiors who wish to reserve the right to claim compensation for the loss of development value burdens. It contains an explanatory note and notes for completion of the notice.

### **Schedule 10**

238. This schedule provides forms for use in connection with the service of notices claiming compensation in relation to a development value burden.

### **Schedule 11**

239. This is the form of assignation, discharge or restriction of a reserved right to claim compensation for the loss of development value burdens.

### **Schedule 12Part 1**

240. This schedule contains numerous consequential and conveyancing amendments. Many remove feudal terminology or replace it with non-feudal language. Part 1 of the schedule deals with amendments to public general statutes.

### **Schedule 12 Part 2**

241. This part of the schedule contains consequential amendments to private Acts relating to the National Trust for Scotland.

### **Schedule 13**

242. This schedule deals with the large number of repeals made necessary or possible as a result of the abolition of the feudal system and related reforms in the Act. It eliminates a great deal of obsolete legislation. Part 1 deals with repeals in general and Part 2 deals with private Acts relating to the National Trust for Scotland.

### **Financial Effects of the Act**

243. The main financial effect of the Act will be the liability of former vassals to pay compensation to former superiors in respect of the extinction of feuduties. The sums involved are likely to be relatively small and provision is being made for payment by instalments where the total exceeds £50. In many cases the compensation will be very low. Former vassals may also be liable to pay compensation in cases where a former superior has registered a notice reserving the right to claim compensation in respect of development value real burdens. Compensation is also limited to an amount as would make up for any effect which the development value burden produced at the time when it was imposed in reducing or eliminating the consideration for the feudal grant.

### **Effects of the Act on public sector finances**

244. Since most local authorities have feued large numbers of council houses, they have substantial superiority interests, and like all other superiors, they will lose the right to demand payment for consenting to variations in feudal conditions. They will, however, be compensated for the extinction of any remaining feuduties and for the loss of any development value burdens where an appropriate notice to claim such compensation has been registered.

### **Effects of the Act on public service manpower**

245. Some extra resources may be required for the Lands Tribunal for Scotland, but these are not likely to be substantial.

### **Summary of the regulatory appraisal**

246. It is not thought that a Regulatory Impact Assessment is required. No superior is obliged to register a notice to preserve a feudal burden as a neighbour burden or to reserve the right to claim compensation in respect of a development value burden. Each superior has to reach a judgement on whether to do so, in which case the cost, among other things, will be a factor.

### **Commencement**

247. A number of provisions in the Act will take effect on Royal Assent, but the majority will not be commenced until the appointed day for abolition of the feudal system. This is expected to be at least 2 years after Royal Assent in order to allow transitional arrangements such as the registering (or recording) of notices to be made. It is also envisaged that the Bill on title conditions will be commenced at the same time as the Abolition of Feudal Tenure etc. (Scotland) Act.