

# TITLE CONDITIONS (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1: Real Burdens: General

##### *Section 1: The expression "real burden"*

22. *Section 1* defines 'real burden', and introduces the terms 'benefited property', 'burdened property' and 'personal real burden'.
23. *Subsection (1)* re-states, but does not change, the current law concerning real burdens. A **real burden** is an obligation affecting land or buildings. It is a condition of ownership which runs with the land. The word 'real' is used to distinguish this sort of obligation from a 'personal' obligation, such as a contract. A personal real burden is, despite the name, not a 'personal' obligation: it is a real burden and as such must be an obligation affecting land or buildings. A personal real burden is an encumbrance on land but, unlike other real burdens, is constituted in favour of a person rather than in favour of the owner of other land in that person's capacity as owner of that land.
24. The land that benefits from the condition, and whose owner is able to enforce the *burden*, is called the **benefited property**. Except for personal real burdens which are limited to the special types of burden listed in subsection (3), there must always be a benefited property; and the holder of a burden is the person who for the time being is the owner of that property. Viewed from the position of the holder, a real burden is a real right. The benefited property must be 'land' (defined in section 122(1)). The benefited property will commonly be neighbouring land. The definition of 'land' does not generally include a superiority interest, the estate of *dominium directum*, however for the purposes of the definition of real burden does include the estate of *dominium utile*. This is to include feudal burdens created before the appointed day within the provisions of the Act. Following the abolition of the feudal system it will no longer be possible for real burdens to be created for the benefit of feudal superiorities. In terms of section 2 of the 2000 Act not only do all existing superiority interests in land cease to exist but it becomes impossible to create a new feudal estate.
25. *Subsection (2)* gives names to the properties affected, or benefited, by real burdens. The land subject to the burden will be known as the '**burdened property**'.
26. *Subsection (3)* provides 8 exceptions to the rule expressed in subsection (1) that burdens must be in favour of other land. It will be possible in future to create burdens that directly favour a person without reference to a benefited property. These are personal real burdens. Personal real burdens represent a new category of right but the category is limited to the types of burdens set out in subsection (3), namely: conservation burdens, rural housing burdens, maritime burdens, economic development burdens, health care burdens, manager burdens, personal pre-emption burdens and personal redemption burdens.
27. Personal pre-emption burdens and personal redemption burdens cannot be created in the future. They exist as a limited category of former feudal burdens converted by notice

registered under section 18A of the 2000 Act. Some personal pre-emption burdens may become rural housing burdens if held by a rural housing body (see the note on section 43). Personal real burdens are the subject of Part 3 of the Act, although manager burdens are primarily regulated by section 63.

### ***Section 2: Affirmative, negative and ancillary burdens***

28. *Section 2* is concerned with the *type* of obligation which can be created as a real burden. In future all real burdens will be either **affirmative** burdens, **negative** burdens or **ancillary** burdens.
29. *Subsections (1) and (2)* provide that in future new real burdens must be either obligations **to do** something (an affirmative burden), such as to use the property for a particular purpose, or to maintain a building, or obligations **to refrain** from doing something (a negative burden), such as to build on the property, or to use it for commercial purposes. It is rare under the current law for a real burden to take the form of any other type of obligation than affirmative or negative. It is possible under the current law, to create a real burden as a *self-standing* right to enter or make use of property. This could be to walk or drive over property, or to run a pipe through it. It is more usual for such rights to be constituted as positive servitudes. In future it will only be possible to create this sort of obligation as a positive servitude, and any existing real burdens in this form will be converted into positive servitudes by section 81.
30. *Subsection (3)* provides a *degree* of flexibility to the rule in subsection (1). It is sometimes necessary for a burden to reserve a right of access or use. This is not a right of access of itself: that would be a servitude. It is instead a right to enter or use a burdened property for a purpose ancillary to other obligations imposed by real burdens. For instance, a burden might oblige an owner to maintain property. An ancillary part to this burden could be to allow the benefited proprietor to access the property to inspect the maintenance work.
31. *Subsection (5)* prevents the rules set out in section 2 being avoided by labelling a burden as something that it is not. Whether an obligation falls within the permitted categories will be judged by the effect of the words rather than the words themselves.

### ***Section 3: Other characteristics***

32. *Section 3* sets out the rules that a burden must comply with concerning the *content* of an obligation. Real burdens affect land. Subsections (1) to (4) re-state what is known as the praedial rule. This rule provides that real burdens must affect, and relate to, a burdened property for the benefit of the benefited property.
33. *Subsections (1) and (2)* re-state the rule that a real burden must affect the burdened property. This is the first aspect of what is known as the praedial rule. The praedial rule requires that the burden must in some way relate to the burdened property. Subsection (2) makes it clear that if the *only* link between the burden and the property is that the burden is imposed on the person who owns that property, the praedial rule is not complied with. The other aspect of the praedial rule is that the burden must benefit the benefited property. This second requirement of praedial benefit does not apply to personal real burdens as there is no benefited property in these cases (see subsection (3)). All real burdens, including personal real burdens, must in terms of subsection (1) comply with the first aspect of the praedial rule.
34. *Subsection (4)* makes a special provision for community burdens so that the praedial test for a community burden will be satisfied if it confers a benefit on the community or any part of the community. Community *burdens* are defined in section 25. Certain burdens, such as for management structures and service charges, will clearly be in the community's interest, and subsection (4) will accordingly make them praedial, regardless of their relationship with an individual property. The subsection also allows for an exception for communities in special circumstances. In a normal housing estate a

prohibition on occupation by residents over the age of 60 would probably not normally be praedial because it would not benefit the property. It would consequently be invalid. However, the special needs of certain types of community, such as a sheltered or retirement housing complex where the housing is specifically adapted for occupation by the elderly, would allow for an exception. This sort of condition would be for the benefit of the community as a whole.

35. *Subsection (5)* provides that a right of pre-emption is the only type of option to acquire land that may be created as a real burden in the future. The present law also allows redemption and reversion options to be constituted as real burdens. Pre-emption entitles the holder to first refusal in the event of the property coming up for sale. The decision by the owner to sell is the only thing that can trigger the pre-emption. Redemption does not depend upon the decision of the owner. It is a right to repurchase triggered by a specified event such as death of an owner or the granting of planning permission. Reversion is similar, but does not necessarily require the payment of money or value. Further provision for rights of pre-emption is made by sections 82 to 84. Although the Act (section 1(3)) recognises personal pre-emption burdens and personal redemption burdens it is not possible to create such burdens under the Act. These burdens are by definition (see section 122) only capable of arising by the conversion of a former feudal burden under section 18A of the 2000 Act, introduced by section 114 of the Act.
36. *Subsection (6)* re-states the rule of the common law that a real burden must not be illegal nor contrary to public policy. The illegality requirement would include a purported burden that attempted to breach race or sex discrimination laws. There are 3 main categories of public policy prohibitions. A burden cannot be repugnant with ownership, i.e. it could not be so restrictive that the value of ownership would be lost. In addition, a burden cannot form an unreasonable restraint of trade. There is no bar, however, on a general prohibition, for example from carrying on a business in a housing estate. The third category is that a burden must not create a monopoly. This is dealt with by subsection (7).
37. *Subsection (7)* makes clear that a real burden cannot create a monopoly, except where the contrary is expressly permitted by the Act. Despite the reference in *paragraph (a)* to manager appointment, a temporary monopoly is permitted elsewhere in the Act: see sections 26(1)(d) and 63.
38. *Subsection (8)* provides that a provision which purports to allow a person who is not the holder of a real burden to waive compliance with or vary the terms of a burden is not competent after the appointed day. The holder of a burden will most commonly be a benefited proprietor but could include the holder of a personal real burden. Subsection (8) prevents a person who cannot enforce the burden from being able to waive or vary the burden. The new subsection (2A) inserted into section 73 of the 2000 Act by paragraph 13(c) of Schedule 13 makes an equivalent provision for feudal burdens.
39. *Subsection (9)* ensures that there is no conflict between the terms of subsection (8) and section 33(1)(a). Section 33(1)(a) permits the terms of a community burden to be varied or discharged without the need for all holders to sign the deed of variation or discharge. In terms of subsection (8) “the holder” would, where there is more than one holder, mean all the holders. Subsection (9) therefore clarifies that subsection (8) does not prejudice the operation of section 33(1)(a).

#### **Section 4: Creation**

40. *Section 4* explains how a real burden is created after the appointed day. In summary, a burden is created by a deed (known as a ‘**constitutive deed**’) granted by the owner of the burdened property and registered in the Land Register or Register of Sasines against both the benefited and the burdened properties.
41. *Subsection (1)* restates the current law that a real burden is created by registration of a constitutive deed. By section 122(1) “registration” means registration of the real burden

in the Land Register or recording of the constitutive deed in the Register of Sasines. These property registers record ownership of land in Scotland. The time of creation is usually the time of registration, but where the constitutive deed is a deed of conditions, it is permissible under the present law to prevent the creation of burdens on registration of the deed of conditions by disapplying section 17 of the Land Registration (Scotland) Act 1979 (section 17 is repealed by schedule 15 to the Act). In this case the burdens are created on the date of registration of a subsequent conveyance into which the deed of conditions is incorporated. For instance, a builder might create a deed of conditions over an entire development, but choose to postpone the activation of the real burdens on each unit until it is sold. The sale of the unit is the subsequent conveyance: that is the point at which the burdens will affect that part of the development. Subsection (1) allows the continuation of this practice (by *paragraph (b)*) but by different means and also allows (by *paragraph (a)*) a more straightforward postponement to a specifically specified date. After the appointed day the constitutive deed must itself provide for a delay in the effectiveness of a real burden. The postponement must be in accordance with subsection (1). If the deed is silent, the burden will take effect immediately upon registration.

42. Under the current law the terms of a real burden must be set out either in a conveyance or a deed of conditions. *Subsection (2)* abandons this limitation. In future it will be possible to create a real burden using any deed, provided that the deed complies with the three conditions set out in paragraphs (a) to (c).
43. Paragraph (a) of subsection (2) should be read together with section 5 (which qualifies the rule that the terms of the burden must be set out in full). The requirement that the term “real burden” (or “community burden” etc.) be used is new.
44. Paragraph (b) of subsection (2) restates the rule that only an owner can burden land. “Owner” includes a person who has right to the property but has not completed title by registration (section 123(1)(a)). Where title has not been completed and the land is not already on the Land Register, there must be a deduction of title. This is further explained in the note on section 60. Where property is owned in common, both (or all) *pro indiviso* owners must grant. This is indicated by the use of the definite article (“the” owner). If the constitutive deed is a conveyance of the burdened property, the grantor satisfies paragraph (b) on the basis that he continues to own until the time of registration, and in such a case transfer of ownership and creation of the real burden occur simultaneously. An owner “grants” a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act.
45. Paragraph (c) of subsection (2) requires nomination and identification of both the benefited and the burdened property. With personal real burdens, there is no benefited property, and the requirement is merely to identify the person in whose favour the burden is created. Subsection (4) contains an exception in respect of community burdens where it is only necessary to identify the community. Where this is done section 27 provides that each unit in the community is both a burdened and benefited property.
46. Many burdens are given special names by the Act. *Subsection (3)* makes clear that such special names can be used in the constitutive deed instead of “real burden”. Examples of these include community burdens, facility burdens, conservation burdens, maritime burdens and manager burdens. The word “purports” ensures that where a constitutive deed states that it creates a nameable type of real burden but does not in fact do so that the real burden is not invalid. This situation may typically arise where community burdens are created on the sequential sale of units. The burdens will not in fact be community burdens in terms of section 25 until at least four units are both burdened and benefited properties.
47. In community burdens, each benefited property is also a burdened property. Taken together, each of these units forms the “community” which is being regulated by the burdens (section 26(2) defines ‘community’ as any units subject to community

burdens). Since it would be pointless to describe the same land twice, *subsection (4)* modifies subsection (2)(c) by requiring merely that there is nomination and identification of the community to which the burdens are to apply.

48. *Subsection (5)* provides for dual registration of the constitutive deed. At present registration is required against only the burdened property. It will now be required that registration occurs against both the burdened and the benefited property (or properties). Registration against the benefited property is excused where there is no such property (as with personal real burdens) or where the property is not in Scotland (for which see section 116). This subsection should be read in conjunction with section 120, which makes it clear that in future a deed creating a new burden cannot be registered against one property only: it will have to be registered against both properties.
49. It is unclear at present whether a real burden can be created over, or in favour of, a mere *pro indiviso* right to land that is where land is undivided but held in common by more than one owner. *Subsection (6)* puts the position beyond doubt by disallowing such burdens.
50. In certain circumstances real burdens can be created by the Lands Tribunal (section 90(8)). Section 4 does not then apply. Section 73(2) permits the creation of real burdens in a deed of disapplication of a Development Management Scheme. In this case section 4 would generally apply other than the requirement for the deed to be signed by all the owners of the burdened properties. Section 73(2) permits the deed to be signed by the owners association. These exceptions are acknowledged by *subsection (7)*.

### **Section 5: Further provision as respects constitutive deed**

51. *Section 4(2)(a)* restates the common law rule that the terms of a real burden must be set out in full in the constitutive deed. *Section 5* introduces an exception to that rule.
52. *Section 5* means that it should not be necessary to specify the amount payable towards an obligation to pay some cost provided that some method is provided for calculating liability. This is applied to existing burdens. Although this may not in fact change the existing law, it will remove a current uncertainty. The provision is retrospective in order to ensure the validity of existing burdens which make this sort of provision.
53. *Subsection (1)* makes a distinction between an obligation to defray the whole of some cost and an obligation to contribute towards some cost. In the case of an obligation to defray paragraph (a) removes any question that it is necessary for a real burden to specify the actual amount payable. It is sufficient (the other terms of the burden being adequately specified) if, for example, the burden is simply stated to be an obligation to pay for the cost of maintaining some item of property. Paragraph (b) removes any doubt as to the validity of a real burden which provides for the burdened property to pay a proportion or share of some cost. If no proportion or share is set out in the deed itself then it may be ascertained by a means specified in the deed. In terms of *subsection (2)* the deed may, as a way of arriving at the proportion or share due, make reference to another document. This document however must be readily available to the public. If, for example, the method of calculating liability makes reference to extrinsic material, for example the valuation roll, this will not invalidate the burden. This is a change to the current law.

### **Section 6: Further provision as respects creation**

54. *Section 6* makes a necessary, if limited, provision for the creation of burdens by reference to a deed of conditions registered before the appointed day. Schedule 15 of the Act repeals section 32 and schedule H of the Conveyancing (Scotland) Act 1874 which are the statutory provisions under the current law which allow burdens to be set out in a deed of conditions and then to be imported by reference into a subsequent conveyance. Section 4(1) makes a different but equivalent provision for the future. Section 6 allows deeds imposing real burdens after the appointed day to do so by reference to a deed

of conditions registered before the appointed day. “Deed of conditions” is defined in section 122(1).

55. *Subsections (1) and (2)* allow an owner of the land which is to become the burdened property to create a real burden by importing the terms of the burden into the deed to be registered after the appointed day from a deed of conditions. “Owner” is defined in section 123. The definition of deed of conditions in section 122(1) makes it clear that this term is used only to refer to deeds executed under section 32 of the 1874 Act which are registered before the appointed day. It is sufficient when importing burdens to use the form of words in schedule 1. It should be noted that schedule 1 is cast in the language of the Act and differs somewhat from the form of words in schedule H of the 1874 Act (to be repealed by schedule 15 to the Act). The same considerations however arise in completing the reference and the amendment to section 8(5) of the Conveyancing (Scotland) Act 1924 by paragraph 3 of schedule 14 to the Act applies the same notes for completion to the new form set out in schedule 1 as were applied to the form it replaces.
56. *Subsection (3)* provides that, as for section 4, it is not competent to create a burden over a right of ownership held pro indiviso.

### **Section 7: Duration**

57. *Section 7* re-states the existing rule that real burdens are perpetual, unless they have been extinguished by one of the methods recognised by law. Extinction of burdens is provided for by sections 16 to 24. The section also makes clear that the constitutive deed can provide for a shorter duration, if desired.

### **Section 8: Right to enforce**

58. *Section 8* identifies the person who has right to enforce a real burden.
59. *Subsection (1)* sets out the rule, familiar from the common law, that a benefited proprietor cannot enforce a real burden unless he has both title and interest to enforce. Establishing title is a matter of proving that the property is the benefited property. This usually will be by virtue of the deed that constituted the burden. A property can also become a benefited property under the provisions of Part 4 of the Act or Part 4 of the 2000 Act. The concept of interest to enforce is a question of whether a breach of the burden would have a detrimental effect upon the benefited property. *Subsection (2)* details who has title to enforce, and *subsection (3)* specifies the interest requirement.
60. *Subsection (2)* provides a change to the current law. The main person with title to enforce is the owner of the benefited property, for it is the owner who is holder of the real burden (see section 1(1)). The meaning of “owner” is given in section 123. The owner has the primary role in the enforcement of burdens, but *subsection (2)* extends title to enforce to tenants, liferenters, heritable creditors in possession, and non-entitled spouses under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. These categories, set out in paragraphs (a) and (b), comprise the holders of such real (or quasi-real) rights as give a right to possession of the benefited property. The idea is that a possessor should be able to protect their interest by founding on the real burden. Paragraph (c) allows former owners (or right holders) to recover certain costs. Section 15, on discharging burdens, continues the rule that it is the owner’s prerogative alone to agree to the discharge of a condition.
61. If a right is held by two or more people as co-owners, each has an independent entitlement to enforce the real burden. In *subsection (2)* this is indicated by the use of the indefinite article (“an owner”, “a person”, and so on). So if the benefited property is owned in common by a husband and wife, each could enforce without reference to the other but in terms of section 15 both would have to grant a discharge.

62. *Subsection (3)* provides a statutory restatement of interest to enforce. The question of interest is specific to each particular burden and the circumstances in which enforcement is sought. Paragraph (a) clarifies the meaning of interest to enforce. The opening words (“in the circumstances of any case”) emphasise that whether interest arises depends on the nature of the particular breach. Though interest to enforce is in many ways related to the praedial rule outlined in section 3, there is a distinction. The praedial rule is merely a test of whether a burden is capable of benefiting certain land in general.
63. The interest of an owner is likely to be stronger than that of a person holding a lesser right, such as a lease. For example, if a breach affects the value of the benefited property but not its enjoyment, a tenant might not have interest to enforce. For in such a case the value of the *lease* might be unaffected.
64. Paragraph (b) sets out a special rule for payment of maintenance and other costs. In such a case a person has interest only if he has some ground for seeking payment – for example, he has paid for a repair or other shared expense and is trying to recover the cost from the other owners. In such a case, the detriment arising from a refusal to pay would be to that person rather than to their property.
65. It would be inappropriate for anyone other than the owner to exercise an option to acquire. These options are discussed further in the note on section 3. *Subsection (4)* restricts title to enforce in respect of pre-emptions, and other options to acquire, to the owner of the benefited property. The use of the definite article (“the” owner) indicates that, contrary to the rule set out in subsection (2), *pro indiviso* owners do not have independent rights. In future it will not be possible to create as real burdens options other than pre-emptions: see section 3(5).
66. Some special types of real burden do not have benefited properties. These are personal real burdens, namely: conservation burdens, rural housing burdens, maritime burdens, economic development burdens and health care burdens (see sections 38 to 46), manager burdens (see section 63), personal pre-emption burdens and personal redemption burdens (see section 114). *Subsection (6)* indicates that personal real burdens have special rules.

### ***Section 9: Persons against whom burdens are enforceable***

67. In the past it was unclear whether liability extended to parties connected with the burdened property other than the owner. *Section 9* resolves this doubt by identifying who has liability in respect of a real burden. The terminology (“affirmative”, “negative” and “ancillary” burdens) is explained in the note on section 2.
68. *Subsection (1)* provides that burdens which provide for an obligation to do something (an **affirmative burden**) should only be enforceable against the **owner** of the benefited property.
69. *Subsection (2)* provides that burdens other than affirmative burdens (**negative** or **ancillary** burdens) should be enforceable against **anyone having use of the burdened property**.

### ***Section 10: Affirmative burdens: continuing liability of former owner***

70. In most cases only the owner of the burdened property can be liable in respect of an affirmative burden (section 9(1)), which means that liability is lost when ownership transfers, but a former owner will retain liability for the performance of a ‘relevant obligation’ in the circumstances detailed in *section 10*. The section clarifies and develops a rule of the existing law. ‘Relevant obligation’ is defined in subsection (4). A person ceases to be “owner” (in the sense meant here) on delivery of a conveyance by virtue of section 123(1).

71. The effect of *subsection (1)* is that the former owner retains liability in respect of any obligation which was already due for performance at the time when the property was sold on. As well as obligations becoming due during the period of ownership, this includes obligations attributable to an earlier period (for which see *subsection (2)*).
72. Under *section 9(1)*, affirmative burdens are enforceable against the owner of the property. As a result, an incoming owner (B) is also liable for any 'relevant obligation' incurred by the former owner (A). *Subsection (2)* provides that a benefited proprietor trying to enforce an affirmative burden could seek to do so against either A or B or both.
73. *Subsection (3)* makes clear that while the liability of former and new owners is joint and several, the underlying liability rests with the former owner. A benefited proprietor could enforce an obligation liable during the ownership of A against a subsequent owner B. B would then have the right to recover the cost from A.
74. *Subsection (4)* explains which type of obligation is 'relevant' for the purposes of *section 10*, i.e. obligations for which a subsequent owner could become liable in conjunction with a previous owner. It also explains when an obligation becomes due for performance. Paragraph (a) deals with expenditure (typically for maintenance) incurred by virtue of a community burden. Usually such expenditure will be sanctioned by some collective decision-making process, whether under the titles or in terms of *section 29*. If so, the obligation to contribute to the expenditure is treated as becoming due when the decision is made and not when the expenditure occurs. Paragraph (b) sets out a (necessarily) general rule for other cases.

### ***Section 11: Affirmative burdens: shared liability***

75. The first four subsections of *section 11* specify who is liable for an affirmative burden when the burdened property is divided into two or more parts. *Subsection (5)* apportions liability where the burdened property is owned in common. An affirmative burden is an obligation to do a specific thing: see *section 2(2)(a)*. Internal liability is the liability between each owner for the burden: the owner of a smaller property might have a lesser share of liability. External liability is where the benefited proprietor is attempting to enforce the burden against one or more of the burdened proprietors.
76. *Subsection (1)* clarifies and develops the existing law. If a burdened property is divided, the owner of each part is jointly and severally liable for any affirmative burdens. An enforcer would have a choice of debtors. If one owner performed the burden at the instigation of an enforcer, a share of the cost would be recoverable from the other owner(s). The liability of owners would be determined by the respective sizes of their part of the property. This would be calculated by area. Since the effect of division is to create two separate burdened properties (see *section 13*), *subsection (1)* would be applied again if either burdened property were further divided. *Subsection (1)* applies even where the division took place before the appointed day (i.e. the day on which most of the Act comes into force: see *sections 122(1) and 129(2)*).
77. *Subsection (2)* introduces a necessary exception. Some affirmative burdens are, by their nature, restricted to a particular part of the burdened property. It might only be possible for an affirmative burden to be performed in one part of the burdened property. In such a case, the other part, if separated, would not be subject to the burden. For example, a burdened property comprising a house and a garden might be divided so that the garden was sold separately. In such a case, the owner of the garden should not be liable for maintenance of the house.
78. *Subsection (3)* introduces a special rule for tenement flats in relation to calculation of internal liability. Measurement of liability shares will be by the floor area of each flat.
79. *Subsection (4)* allows contracting out from the rules set out in *subsection (1)*. The rules of external liability can be varied only in the constitutive deed.



80. *Subsection (5)* does not deal with division. Instead it regulates both external and internal liability in a case where the burdened property is owned in common. If the property is owned in common, each owner should be liable jointly and severally, but subject to a right of relief proportionate to the size of the shares.

### ***Section 12: Division of a benefited property***

81. **Sections 12** and **13** are concerned with division of the properties.
82. If a benefited property is divided, the current law confers on each part the status of an independent benefited property. The result is an, often unwelcome, multiplication of benefited properties. *Subsection (1)* changes the rule in respect of divisions of property made by a deed registered on or after the appointed day. If A divides his land and conveys part to B, then only the part retained by A will be the benefited property – unless the conveyance provides otherwise. It will be possible for the break-off deed to provide either that both properties or just the part being sold will be benefited properties. *Subsection (1)* will apply again if the new, reduced, benefited property comes to be divided at a later date.
83. Sometimes it may be desirable to provide that certain burdens are enforceable by the owner of the retained land and certain others by the owner of the conveyed land. *Subsection (2)* makes clear that this is permissible.
84. Paragraphs (a) and (b) of *subsection (3)* explain the method by which contrary provision is made. Paragraph (c) restricts choice in the case of pre-emptions and other options. In such a case there is only to be one benefited property. If the default rule (that the retained land is to be the benefited property) is disapplied, the only alternative provision which may be made is that the conveyed property is to be the benefited property.
85. *Subsection (4)* disapplies these rules in certain cases where they would be inappropriate. Sections 52 to 54 and 56 and 57 provide special rules for the identification of benefited properties in relation to common scheme burdens created before the appointed day. Paragraph (a) ensures that the rules operate regardless of division. Community burdens are designed for the benefit of the entire community, regardless of the number of units that it may be divided into. In a community each property is both a burdened and a benefited property. Paragraph (b) follows the principle that it is undesirable that any unit in the community should be deprived of enforcement rights. If the burdens are set out in a deed of conditions, each sale will amount to a division of benefited property and so, under the above rules, the part conveyed would cease to be a benefited property. Paragraph (c) disapplies these rules so that in each sale there is no requirement to make the special provision referred to in *subsection (1)*. Paragraph (c) refers to a “common deed of conditions”. This is not a “deed of conditions” as defined by section 122(1) and could be a constitutive deed registered after the appointed day which sets out the terms of burdens to be imposed on a number of properties.

### ***Section 13: Division of a burdened property***

86. This section makes clear that, on division of a burdened property, each part is treated as a separate burdened property. This means, for example, that the owner of a part may make an application to the Lands Tribunal under section 90(1)(a) in respect of that part only. Liability for affirmative burdens (obligations to do a particular thing), following division, is regulated by section 11.

### ***Section 14: Construction***

87. **Section 14** overturns the rule that real burdens are to be interpreted more strictly than other comparable obligations, such as servitudes.

### **Section 15: Discharge**

88. The remaining provisions of Part 1 are concerned with the manner in which real burdens are extinguished.
89. The standard method of discharging or varying real burdens is by obtaining a minute of waiver from the benefited proprietor(s) and registering it in the Land Register or Register of Sasines. *Section 15* re-states the current rules for this voluntary discharge mechanism.
90. *Section 15* provides that a real burden is discharged by registration of an appropriate deed granted by or on behalf of the owner of the benefited property. As *subsection (1)* makes clear, the discharge is effective only in respect of the benefited property whose owner has granted it. As a result, any *other* benefited properties are unaffected. An owner can only discharge a burden in relation to their own property: the effect of a benefited proprietor discharging their enforcement rights means that the burden no longer benefits their property. It does not mean that the rights of the owner of any other benefited property are affected. A burden is not completely ‘extinguished’ until the owner of every benefited property has discharged their enforcement rights. Even though section 8 will extend enforcement rights beyond owners (to tenants etc.), a discharge by the owner will remove the right of these parties to enforce. The Act makes separate provision in section 48 for personal real burdens.
91. This discharge procedure has to be carried out by or on behalf of the owner. Unlike under the present law, ‘owner’ includes a person who has right to the property but has not completed title by registration (section 123(1)(a)). Where property is owned in common, all *pro indiviso* owners must grant a deed (*subsection (1)* refers to ‘the’ owner). The owner ‘grants’ a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act. There is no requirement for a grantee (the owner of the burdened property) to be specified (section 69(1)). By section 122(1) ‘registration’ means registration of the discharge in the Land Register or recording of the deed of discharge in the Register of Sasines; and while registration is required only against the burdened property, the Keeper has power, and in some cases a duty, to make a corresponding entry against the title sheet of the benefited property (section 105). No particular deed or form of deed is specified.
92. *Subsection (2)* makes clear that partial discharge is included. If a burden is discharged wholly or in part then the discharge only needs to be registered against the burdened property. If, however, a burden is discharged and a replacement burden created the deed would then be both a discharge and a constitutive deed. It would then become necessary to register the deed against the burdened property and the benefited property in terms of section 4(5).

### **Section 16: Acquiescence**

93. The three paragraphs of *subsection (1)* restate the pre-conditions for acquiescence. Paragraph (c) provides for either active or passive consent. There is no specific form of words that active consent must take: a casual word exchanged over the garden fence would be sufficient, if awkward to prove. Passive consent requires knowledge (actual or constructive) of the activity coupled with an absence of opposition. In both cases (and by contrast with section 15) the consent is to the activity itself rather than to the breach of the burden. Neither party need know that the burden is being breached.
94. By contrast with the rules for voluntary discharge (set out in section 15), consent is required from all enforcers (including in the case of passive consent tenants and others with subsidiary rights under section 8(2)(a) and (b)), and in respect of all benefited properties. This means that a burden cannot be extinguished in respect of some enforcers, or benefited properties, but not in respect of others. If all those able to enforce a burden do not acquiesce, then the burden cannot be discharged by section 16, even in

respect of those who have given their consent. The two types of consent may be mixed, so that some enforcers give active and others merely passive consent. If active consent is obtained from the owners of all the benefited properties which have title and interest to enforce the particular breach of the burden then the burden would, to the extent of the breach, be extinguished without the need for either active or passive consent, or indeed even in the face of actual objection from an person with a right to enforce other than an owner. Passive consent, likewise, is only needed from those benefited proprietors who have both title and interest to enforce the particular breach. An objection by a benefited proprietor with title but no interest to enforce will not prevent extinguishment of the burden. The test for interest to enforce is set out in section 8(3)(a). The requirement for interest to enforce reinforces the presumption introduced by subsection (2) that an enforcer was aware or ought to have been aware of the activity constituting the breach. If the nature of the breach is such that an enforcer will suffer material detriment to the value or enjoyment of their interest in the benefited property then it will be difficult to rebut the presumption that the enforcer ought to have been aware of the activity constituting the breach.

95. Because of the difficulty in establishing acquiescence under the existing law, *subsection (2)* introduces a presumption that after the expiry of 12 weeks from the substantial completion of the activity breaching the burden those entitled to enforce the burden knew of the breach, but did not make any objection. This presumption could be rebutted by a benefited proprietor.

#### ***Section 17: Further provision as regards extinction where no interest to enforce***

96. *Section 17* makes it clear that to the extent that a burden is unenforceable it is extinguished. For a burden to be enforceable there must in terms of section 8(1) be someone with both title and interest to enforce it. Whether a person has interest is determined by the test set out in section 8(3) and is particular to each set of circumstances that arise. *Section 17* also supplements section 16 which assumes that there will be someone who has interest to enforce. That section would not operate to extinguish a burden (to the extent of the breach) if there is no-one with interest to enforce to give active or passive consent. As the provision has a wider application than just the circumstances envisaged by section 16 it merits a separate section of its own.

#### ***Section 18: Negative prescription***

97. *Section 18* makes an alteration to the law on prescription. The existing law of negative prescription provides that if a burdened proprietor breaches a burden, and the benefited proprietor takes no action, the burden will fall (to the extent of the breach) in 20 years. The prescription is interrupted if the breach is challenged by the benefited proprietor or acknowledged by a burdened proprietor. The change is made by a self-standing provision rather than (as in section 88) by amendment to the Prescription and Limitation (Scotland) Act 1973. But prescription is to operate in substantially the same way as under that Act, and subsection (3) applies some of the 1973 Act provisions.
98. *Subsection (1)* provides for extinction if a breach is unchallenged for a period of five years. As with acquiescence (section 16), the extinction is only to the extent of the breach. Paragraph (b) repeats the rule of the existing law that a claim or acknowledgement will interrupt the prescriptive period.
99. *Subsection (2)* provides a modification to the rule for pre-emptions and other options to acquire. For these obligations a single failure to convey (or, with pre-emptions, to offer to convey) results in the complete extinction of the burden. Any sale in breach of a right of pre-emption will extinguish the pre-emption within 5 years by virtue of negative prescription. This differs from the standard position in subsection (1) in that the obligation will be completely removed, and not merely to the extent of the breach. Subsection (6) modifies the application of subsection (2) as regards rural housing burdens. Where there is a failure to offer to convey to a rural housing body, the passage

of 5 years with no relevant claim or acknowledgement will not extinguish the burden but will prevent any enforcement action being taken in respect of the particular failure.

100. *Subsection (3)* applies the definition of ‘relevant claim’ and ‘relevant acknowledgement’ (terms used in subsection (1)) used in the Prescription and Limitation (Scotland) Act 1973. Paragraphs (a) to (c) specify that for the purposes of section 18, the specified definitions in the 1973 Act will be modified so as to relate to real burdens and those with right to enforce them. The definition of ‘relevant acknowledgement’ in section 10 of the 1973 Act states that the burdened proprietor will be regarded as having acknowledged that the burden is still in force if he has acted to implement the obligation or has given a written acknowledgement that it subsists.
101. *Subsection (4)* applies to subsections (1) and (2) section 14 of the Prescription and Limitation (Scotland) Act 1973. Section 14 contains rules for the computation of prescriptive periods, for example, that such periods commence on the day following the event which triggers the prescriptive period, if that event falls at a time other than the beginning of the day. Subsection (1)(a) of section 14 is however excluded because it makes provision for time occurring before the commencement of the 1973 Act to be included in the computation of prescriptive periods. There is special provision in subsections (5) and (7) for computing the prescriptive period in respect of any breach of a real burden which occurred before the appointed day when this section comes into force.
102. *Subsection (5)* relates to breaches of real burdens that occur before the appointed day when this section comes into force. Instead of 5 years, the prescriptive period for such breaches is to be the period described in subsection (7).
103. *Subsection (6)* modifies the application of subsection (2) in respect of rural housing burdens. See further the note to subsection (2).
104. *Subsection (7)* provides that the prescriptive period for breaches of real burdens that occur before the appointed day is to be 20 years, computing the period from the date of the breach, or 5 years, computing the period from the appointed day, whichever period expires earlier. This means that where a breach occurred more than 15 years before the appointed day, the prescriptive period will still be 20 years but no longer. If the breach occurred less than 15 years before the appointed day, the prescriptive period will expire 5 years after the appointed day.

### ***Section 19: Confusio not to extinguish real burden***

105. A real burden (usually) requires both a burdened and a benefited property (section 1(1)), but there is no requirement that the properties be in separate ownership. The term ‘confusio’ is used to describe the situation where the benefited and burdened proprietors are the same person. Section 19(a) resolves a doubt by making clear that a burden is not extinguished by confusion. This means that the owner of both properties will be able to enforce an obligation against a tenant under section 9(2). Paragraph (b) gives an equivalent rule for personal real burdens.

### ***Section 20: Notice of termination***

106. **Sections 20 to 24** introduce a completely new termination procedure for real burdens which are at least 100 years old. *Subsection (1)* of section 20 sets out the essential criteria. The burden must be at least 100 years old. The 100 years run from the date of registration of the constitutive deed. Normally this would be the date of registration of the disposition or feu disposition creating the burden but if the constitutive deed is a deed of conditions the 100 year period begins on the registration of the deed of conditions even if the burdens are not in fact imposed until a later date. For this purpose variations or renewals (whether by charter of novodamus or judicially, under section 90(1)(b)) are disregarded. If, for example, a burden was created in 1900 and renewed or waived to a certain extent in 1950, the relevant date would still be 1900.

The procedure may be used by any owner of the burdened property (including a *pro indiviso* owner) or any other person (such as a tenant) against whom the burden is enforceable. It comprises two stages: intimation is given under section 21 of an intention to register a notice of termination, and the notice is then executed and registered under section 24. If there are no applications to renew the burden the notice of termination may be submitted for registration. A notice of termination cannot be registered unless a certificate is endorsed on it by the Lands Tribunal under section 23. The form of notice of termination is provided in schedule 2.

107. *Subsection (2)* makes clear that an owner (or other person) can continue with a termination process initiated by a predecessor in title. An owner might begin the process of termination, but sell the burdened property before it is complete. The new owner would be able to step into the process. ‘Terminator’ is used throughout this group of sections to refer to the person who is currently using the procedure.
108. The termination procedure is not available for all burdens. *Subsection (3)* sets out the exclusions. They include facility burdens (defined in section 122(1)). These burdens regulate the maintenance, use or management of a common facility. Conservation, maritime, and service burdens are also protected. Paragraph (e) excludes the title conditions that are excluded from the jurisdiction of the Lands Tribunal under section 90(3). These are specified in schedule 11.
109. *Subsection (4)* specifies the content of a notice of termination. A statutory form is given in schedule 2. Paragraph (c) makes clear that partial termination is permitted (and see also section 24(1)). Paragraphs (e) and (f) require information about intimation, both in general terms and also in the form of a list of those to whom intimation was sent. This will allow recipients to contact each other and consider the possibility of a joint challenge. There is no requirement to identify the benefited property or properties, and in practice these may often be unknown to the terminator.
110. *Subsection (5)* provides that the renewal date stipulated in the notice must be not less than eight weeks after the date of last intimation. The renewal date is, ordinarily, the last day on which the notice may be opposed, by application to the Lands Tribunal for renewal of the burden. An application can only be made after the renewal date with the consent of the terminator (section 90(4)(a)) and then must still be made before the Lands Tribunal have endorsed a certificate on the notice (section 90(4)(b)). The renewal date must have previously appeared in the notice which is sent for the purposes of intimation.
111. *Subsection (6)* makes clear that a single notice can be used in respect of more than one burden even if the burdens are not contained in the same deed.

### ***Section 21: Intimation***

112. Intimation is the first stage of the termination procedure.
113. *Subsection (1)* imposes a requirement to intimate the proposal to terminate the burden. Intimation must be given to the owners of all the benefited properties, to the holder of any personal real burden, (as defined in section 122(1) and, if the terminator is not the owner (or is only one of the owners), to the owner of the burdened property. As the termination procedure operates to extinguish a burden, it cannot be used to target individual benefited proprietors. All benefited proprietors must be given intimation and the renewal date cannot occur until intimation has been given to all, as the renewal date must always be at least 8 weeks after the last date of intimation.
114. *Subsection (2)* explains the permissible methods of intimation. It may be difficult to identify all of the benefited properties. Method (a) involves sending a copy of the proposed notice (with an explanatory note). A form for this explanatory note is contained in schedule 2. Section 124 details the various methods of ‘sending’ the notice. The notice must be substantially complete, but should not be signed. Method (b) requires the posting of the intimation on the burdened property and on lamp posts

in the neighbourhood. The form of this notice is set out in schedule 3. Method (c) is by newspaper advertisement. Evidence of intimation should be retained, for example, recorded delivery slips, a copy of the affixed notice or the advertisement as these may be required by the Lands Tribunal or the Keeper.

115. *Subsection (3)* provides that the first method of intimation (directly sending a copy of the intimation) will have to be used to give intimation to the owner of the burdened property, the holder of any personal real burden and the owner of any benefited property which is within four metres of the burdened property. For other benefited proprietors, the terminator has a choice of intimating by sending, or by affixing notices to the burdened property and to lamp posts. Where this is not possible (or where the burdened property is minerals or salmon fishings) intimation may be given by advertisement. In the measurement of the four metres there is to be disregarded (i) pertinents and (ii) any road if of less than twenty metres in width (section 125).
116. *Subsection (4)* sets out the content of the advertisement used in method (c).
117. *Subsection (5)* obliges the terminator to provide a copy of the proposed notice on request. This will mainly be necessary where intimation has been by lamp post or advertisement (see subsection (4)(c)).
118. *Subsection (6)* makes provision for the removal of lamp post notices no later than one week after the renewal date specified in the notice. The person affixing the notice must take care that it remains conspicuous and legible.
119. *Subsection (7)* confirms that planning permission is not required for the display of termination notices.

### ***Section 22: Oath or affirmation before notary public***

120. This and the following two sections are concerned with the second (and final) stage of the termination procedure, namely the execution and registration of the notice of termination.
121. *Section 22* deals with execution. *Subsection (1)* provides that the terminator must swear or affirm before a notary public that the information in the notice is true, and that the notice has been duly intimated. In the normal case this must be done by the terminator personally, but *subsection (2)* sets out some exceptions. *Subsection (2)(b)* should be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. 'Notary public' is given an extended meaning, in relation to overseas execution, by section 122(1).

### ***Section 23: Prerequisite certificate for registration of notice of termination***

122. A notice of termination cannot be registered if it is opposed (other than opposed in part). A notice is opposed by making an application to the Lands Tribunal under section 90(1)(b) (and see also section 90(2) for renewal or variation of the real burden (or burdens). Variation is defined in section 122(1) but in this instance does not include the imposition of a new obligation or the creation of a new benefited property (see section 90(5)(b)). For the Keeper to register the notice, there must be a certificate from the Lands Tribunal endorsed on or annexed to the notice. *Section 23* requires the Lands Tribunal to certify on the notice that no application has been made. Where an application has been received, but it relates to only some of the benefited properties or to only some of the burdens, the Tribunal will be able to give a certificate stating in respect of which benefited properties and/or which burdens an application has been made.
123. *Subsection (1)* provides for the Lands Tribunal certificate. A certificate may be given if there has been no application for renewal or variation by the renewal date, or if an application has been made but then withdrawn. Even if an application has been made in respect of some of the burdens or only some of the benefited properties, the Lands

Tribunal may still execute the certificate. Where there are several benefited properties, not all of their owners will necessarily apply to renew the burden. Alternatively, where there are several burdens in the notice of termination, a benefited proprietor applying for renewal might be content for some of the burdens to fall and so only apply in respect of certain of the listed burdens. In either case, the application for renewal does not encompass the entire notice of termination: it only applies to some of the burdens or some of the benefited properties. As a result, the notice of termination has not been fully opposed, and may be registered to the extent that it has not been contested. The certificate given by the Lands Tribunal under section 23(1)(b) will list the burdens and the relevant properties that are subject to applications for renewal or variation. When the notice of termination is registered the burdens set out in the certificate will not be extinguished nor will the rights of a benefited property named in the certificate be discharged. If an owner does not make an application for renewal or variation, then his property will cease to be a benefited property in relation to the burden, regardless of what other owners do. The meaning of 'renewal date' is given in section 20(4)(d) and (5) as the date by which an application to renew or vary must be made. The reference in paragraph (b)(ii) of subsection (1) to 'probably or possibly' reflects the difficulty, under the current law, of making an accurate identification of the benefited properties.

124. *Subsection (2)* allows a notice of termination to be withdrawn at any time before the certificate is endorsed.

***Section 24: Effect of registration of notice of termination.***

125. **Section 24** explains the effect of registration. Registration extinguishes the burdens, subject to any qualifications (i) in the notice itself or (ii) in the Lands Tribunal certificate endorsed on the notice.
126. If, at a later time, opposition was withdrawn by a benefited proprietor, *subsection (2)* allows a further certificate (under section 23(1)(a)) and a second registration. This second registration will rely upon the second certificate. If, however, the opposition (partial or full) was not withdrawn but the application for renewal or variation was instead refused by the Lands Tribunal and the burden discharged, the proper procedure is to register the Tribunal's order in terms of section 104(2). The notice itself cannot be registered because no certificate can be given under section 23(1).