

RESPONSE FORM

DISCUSSION PAPER ON SECTION 53 OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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Summary of Proposals

1. What information or data do consultees have on:
 - (a) the economic impact of section 53 of the Title Conditions (Scotland) Act 2003, or
 - (b) the potential economic impact of any reform proposed in this Discussion Paper?

(Paragraph 1.10)

Comments on Proposal 1

Section 53 is not particularly well worded and creates a degree of uncertainty. More than that, we cannot comment on economic impact.

2. Owners of properties within an identifiable “community” should have the implied right to enforce any common scheme of real burdens affecting that community against all the other owners (subject to “community” being appropriately defined).

(Paragraph 7.9)

Comments on Proposal 2

We agree. The concepts of title and interest and work well together; the latter being an important restriction in practice to how the former would operate.

3. Sections 52 and 53 of the 2003 Act should be replaced with a new provision regulating implied enforcement rights in relation to common schemes.

(Paragraph 7.10)

Comments on Proposal 3

We agree. As stated, they are not particularly well worded and create confusion.

4.
 - (a) What general comments do consultees have in relation to defining “common scheme”?
 - (b) Do consultees agree that whether there is a common scheme should be determined by considering as a whole the deeds which impose the burdens?

(Paragraph 7.14)

Comments on Proposal 4

We agree with the comments in Section 7.14 of the Discussion Paper, although in practice this may lead to further uncertainty (and expense in identifying the community). Common law principles should be adhered to so far as possible.

5. The replacement statutory provision should set out clear rules as to the circumstances in which there is title to enforce, rather than indicative examples.

(Paragraph 7.15)

Comments on Proposal 5

The indicative examples have caused difficulties in practice; clear rules would be preferable.

6. Owners of flats in the same tenement should have title to enforce a common scheme of real burdens against each other.

(Paragraph 7.16)

Comments on Proposal 6

We agree; the community is clearly easy to identify.

7. Owners of properties subject to real burdens providing for common management in respect of their community should have title to enforce a common scheme of real burdens against each other.

(Paragraph 7.18)

Comments on Proposal 7

We agree; this would accord with mutuality. Title and interest to enforce are of course separate issues as stated above.

8. Should owners of properties

- (a) subject to real burdens providing for common maintenance, or

- (b) which share common property,

have title to enforce a common scheme of real burdens against each other, in the absence of common management provisions?

(Paragraph 7.20)

Comments on Proposal 8

Or members differed on this.

Some agreed with the proposed rule 3 that in this situation there should be no title to enforce a common scheme of real burdens in the absence of common management provisions.

Others considered that, as a matter of fact, common property requires regulation of the relationship of co-owners, title to enforce a common scheme (in the absence of management provisions) would be desirable.

9. (a) Owners of properties which are close together should have title to enforce a common scheme of real burdens against each other.
- (b) If consultees agree with this proposal, how close should the properties require to be for this rule to apply?
- (c) If consultees agree with this proposal, should it be subject to a requirement that there must be notice of that scheme on the title of the property in respect of which the burden is to be enforced?

(Paragraph 7.25)

Comments on Proposal 9

We agree with the suggestions in paragraphs 7.21 – 7.24 of the Discussion Paper. However, 4 metres' distance is too short. Other factors such as whether there will be e.g. a material impact should be considered over and above the question of distance.

We agree that Rule 3 should have the additional requirement set out in paragraph 7.24 that there should only be title to enforce when notice of the common scheme appears on the burdened owner's title.

10. Do consultees consider that there should be other situations where there are implied rights to enforce real burdens in common scheme cases?

(Paragraph 7.26)

Comments on Proposal 10

No.

11. Should there be implied rights to enforce real burdens imposed before 28 November 2004 although the relevant common scheme only arises following a sub-division after that date?

(Paragraph 7.28)

Comments on Proposal 11

Yes- as set out in paragraph 7.27 and 7.28 of the Discussion Paper. To distinguish schemes by reference to that date would create a two-tier system which would be unfair.

12. (a) Do consultees agree that if sections 52 and 53 are replaced with a new provision along the lines set out earlier, there should be a preservation scheme under which those losing enforcement rights could preserve these by registering a notice?
- (b) If so, should notices be registrable by individual owners or should a group of owners have to agree to preservation?
- (c) What should be the duration of the period in which notices could be registered?

(Paragraph 7.32)

Comments on Proposal 12

The interests of fairness would require a preservation scheme as set out in paragraphs 7.29 – 7.31 of the Discussion Paper. We would suggest a 2 year period.

General Comments

None.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.