



Law Society  
of Scotland

# Written evidence

## Pow of Inchaffray Drainage Commission (Scotland) Bill

May 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Property and Land Law Reform Sub-committee and Rural Affairs Sub-committee welcome the opportunity to consider the Pow of Inchaffray Drainage Commission (Scotland) Bill and provide our views to the Pow of Inchaffray Drainage Commission (Scotland) Bill Committee. The Sub-committees have the following comments to put forward for consideration.

## Comments

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### Opening remarks

We consider that the constitution of the Pow of Inchaffray Drainage Commission is a matter for the parties directly affected. The Commissioners should be commended for seeking to modernise the existing arrangements.

However, we would like to offer the following general legal observations which we hope will be helpful in consideration of the bill from a practical perspective.

### Apportionment of charges

One further issue to consider is the apportionment of charges and whether responsibility for payment of charges dated on or prior to conclusion of missives should remain with the seller (in the same way as responsibility for payment of local authority or public body notices or orders under SSC version 2 condition 6.1). A further question arises in the context of an executry as to whether the executors would be regarded as "owners" (and therefore heritors) in terms of the act. The same principle would apply to heritable creditors in possession/trustees in sequestration.

## Purchaser awareness

While we note that the Commission has been in existence for a substantial period of time and as a principle of law, what appears in statute is deemed to be known, in practice this may not be sufficient to ensure awareness on the part of potential purchasers.

We note that the obligation to pay the Commissioners would not appear on the Land Register. From the perspective of a purchaser or prospective purchaser of land affected, there is therefore a question as to whether or how they might know of the obligation to pay unless the seller chooses to inform them of it.

The obligation is not to be noted in the Land Register. This seems to be the correct approach as we do not consider that the obligation to pay would fall within the scope of a servitude/burden-type situation as no real rights are being created under the bill. It might, however, be possible for the Act to specifically stipulate that it be registered, bringing it within the scope of an “encumbrance” under section 9(1)(f) of the Land Registration (Scotland) Act 2012 and in turn ensuring disclosure to purchasers or prospective purchasers.

In legal terms the fees would be analogous to e.g. water rates or council tax but they are more unusual. Although local knowledge on the part of the purchaser’s solicitor might, in practice, mean that the purchaser is alerted to the existence of the Commission, this would not necessarily be the case.

Indeed as it is a highly unusual arrangement and particular to a very localised area, unless a solicitor or other conveyancing professional had specific local knowledge or experience of the matter they would not normally check for this kind of obligation when providing a competent service on behalf of the purchaser. Nor would the obligation necessarily be covered under generic apportionment terms in standard missives without a specific clause being introduced, thereby potentially leaving a purchaser exposed to an unexpected cost.

This is also the kind of information which many practitioners might expect to be noted in sales particulars. Similarly, the clauses in the property questionnaire section of the Home Report may be of some limited assistance. The most equitable solution may be to impose a specific obligation to include details of the Commission and attached charges in the Home Report.

## Collection of charges

While details are given as to how costs are to be calculated, no mechanism for collection of the charges is specified. This could create practical problems as the Commission would be unable to carry out certain projects without funds and at the same time individuals may have neither the inclination nor the power to ensure that payments are made. This could be resolved by an additional provision in the bill granting powers/imposing an obligation to enforce payment of the charges.



## **Property Factors (Scotland) Act 2011**

Consider whether the Commission would or should indeed be required to register in line with the attached Guide. This is a public register and registration would have the advantage of alerting people to the Commission's existence and the properties and lands affected.



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