

# Consultation Response

## Scottish Law Commission's Report on Section 53 of the Title Conditions (Scotland) Act 2003

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## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Property and Land Law Reform sub-committee and Property Law Committee welcome the opportunity to consider and respond to the Scottish Government consultation: *Scottish Law Commission's Report on Section 53 of the Title Conditions (Scotland) Act 2003*.<sup>1</sup> The committees have the following comments to put forward for consideration.

## Questions

### Question 1 - Are you content that sections 52 and 53 of the Title Conditions (Scotland) Act 2003 be replaced with a single provision regulating implied enforcement rights in relation to common schemes?

We support consolidating sections 52 and 53 of the Title Conditions (Scotland) Act 2003 ("the 2003 Act") with one section but we highlight that codification of common law is difficult.

We consider that the draft Bill lacks sufficient detail and requires clarification and we further highlight our answers to Questions 2 and 7.

### Question 2 - Are you content with the Scottish Law Commission's definition of "common scheme"?

We agree that a definition of "common scheme" is useful but consider that the definition of "common scheme" used in the draft Bill requires further work. In general, we consider that the meaning of the section 57A (within section 4 of in the draft Bill) is unclear and suggest that this be revised as follows:

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<sup>1</sup> [Scottish Law Commission's Report on Section 53 of the Title Conditions \(Scotland\) Act 2003 - Scottish Government consultations - Citizen Space](#)



#### **4 Interpretation of Title Conditions (Scotland) Act 2003: the expression “common scheme”**

After section 57 of the Title Conditions (Scotland) Act 2003 insert—

##### **“57A The expression “common scheme”**

(1) In this Act any reference, however expressed, to a common scheme is to the imposition of the same, or similar, real burdens on two or more properties, whether or not by one person.

(2) In determining whether **such** real burdens are ~~se~~ imposed—

(a) regard must be had to the deeds by which the burdens have been imposed; and

(b) the burdens imposed must—

(i) all be considered; and

(ii) be considered as a whole.

(3) In determining whether one real burden is similar to another for the purposes of subsection (1) above, regard must be had to the degree of equivalence between the burdens **in relation to their purpose and / or effect.”.**

We further query whether section 57A could be combined with and rolled into section 53A.

### **Question 3 - Do you agree with the Scottish Law Commission’s five rules conferring implied enforcement rights in common schemes which pre-date feudal abolition?**

We consider that the five rules cover what is already recognised, with the exception of (a) common maintenance and (b) mutual boundary features (which featured in the cases of *Thomson's Executor, Applicant 2016 GWD 27-494* and *Gordon Murray Cornish v Fiona Philippi and Jared Philippi [2025] LTS 26*. However, we agree with the Commission that these should be excluded from the five rules for the reasons set out in paras 3.66 (“the section 53(2) (a) (ii) common maintenance example is predicated on the convenience of managing the properties together” and common management burdens are “a more appropriate way of implementing a policy based on management”)<sup>2</sup> and 3.67 of the SLC Report (omitting these will avoid “overlapping communities”).<sup>3</sup> We note that by implementing a clear framework, most issues will now have some form of

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<sup>2</sup> [Report on Section 53 of the Title Conditions \(Scotland\) Act 2003 \(Report 254\)](#)

<sup>3</sup> [Report on Section 53 of the Title Conditions \(Scotland\) Act 2003 \(Report 254\)](#)



enforcement rights. We consider that these rules provide continuity with sections 53(2)(a)-(d).<sup>4</sup>

We note that the 20-meter rule aligns with existing provisions in planning law. It would be helpful if section 53A made it clear whether the 20m includes roads.

#### Question 4 - Do you have any comments on any other of the Scottish Law Commission's recommendations for reform?

Subject to our comments in this response, we welcome the recommendations for reform and look forward to scrutinising the proposals in further detail in due course.

#### Question 5 - Are you aware of any subsequent case law or legislation which impacts on any of the recommendations contained in the Scottish Law Commission's Report?

We highlight the draft Tenements (Amendment) (Scotland) Bill and consider it important to ensure this aligns with the draft Bill.<sup>5</sup>

We also highlight the case of *Gordon Murray Cornish v Fiona Philippi and Jared Philippi [2025] LTS 26* and that *Conveyancing 2025*<sup>6</sup> says that the *Cornish v Philippi* decision

*"shows the continuing instability of the law in this area. First there was Thomson's Executor, [Applicant 2016 GWD 27-494,] holding that a burden providing for the shared maintenance of a boundary fence was sufficient to make the properties 'related', at least in cases where the fence was also owned in common. Then there were the doubts expressed as to that approach in O'Gorman v Love [2019 SLT (Lands Tr) 1]. And now Cornish v Philippi has returned to the position adopted in Thomson's Executor and in one respect has gone beyond it, holding that a fence which is to be mutually maintained is enough of itself, and without common property, to induce a finding of 'relatedness'."*

We consider a boundary feature creating a common scheme as an undesirable outcome.

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<sup>4</sup> [Title Conditions \(Scotland\) Act 2003](#), section 53(2)(a-d)

<sup>5</sup> [Report on Tenement law: compulsory owners' associations](#)

<sup>6</sup> Reid, K, Gretton, G & Steven, A 2026, *Conveyancing 2025*. Edinburgh Legal Education Trust, Edinburgh

## Question 6 - Are you aware of change in conveyancing law practice which impacts on any of the recommendations contained in the Report?

We are unaware of any changes to conveyancing law practice since the SLC report was published in 2019 which impact on any of the recommendations contained in the Report.

## Question 7 - Do you have any comments on the draft Bill included in the Scottish Law Commission's Report. If yes, please provide details.

We highlight our answer to question 2 concerning common schemes.

We suggest that section 53A and 53B be simplified and redrafted to reflect the changes which we have suggested be made to section 57A (in our response to Question 2) and would be happy to discuss this further with those drafting the Bill. (For example, we do not see the need for the properties to be “related” when, if one or more of the conditions listed in section 53A(4) are met, they would be part of a common scheme and enforcement rights and benefits would then arise. This is particularly so given that “related properties” is defined in a slightly different way in section 66 of the Title Conditions (Scotland) Act 2003.<sup>7</sup>

We also suggest that the terminology used in the draft Bill is inconsistent in places (for example, section 57A refers to “properties” but section 53A refers to “units”). We note that section 122 of the 2003 Act defines “property” as including “unit”<sup>8</sup> but nevertheless query why section 57A and section 53A do not use the same terminology. We would welcome engagement with the Scottish Government on this point.

We further recommend that the wording in the proposed section 53D(2) should be changed from “If the owner does so execute and register such a notice then” to “If the owner does so execute and register such a notice which is valid and enforceable then”.

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<sup>7</sup> [Title Conditions \(Scotland\) Act 2003](#), section 66

<sup>8</sup> [Title Conditions \(Scotland\) Act 2003](#), section 122



### Question 8 - Do you agree that it should be a requirement for there to be notice of the common scheme in the title of the burdened property?

We consider it appropriate and helpful that the notice of the common scheme is in the title of the burdened property.

We think swearing/affirming before a Notary Public is unnecessary for any notice of preservation which will be registered in the Land Register of Scotland as the applicant will already have a duty of care to the Keeper via section 111 of the Land Registration etc. (Scotland) Act 2012<sup>9</sup> to take reasonable care to ensure that the Keeper does not inadvertently make the Land Register inaccurate. Requiring such swearing/affirmation for these applications would therefore unnecessarily increase cost and delay.

### Question 9 - Do you agree that 2 years is an appropriate period during which a notice preserving enforcement rights should be registered?

We consider this appropriate as we highlighted in our previous response to the Scottish Law Commission's Discussion Paper on Section 53 of the Title Conditions (Scotland) Act 2003.<sup>10</sup>

### Question 10 - Do you have any views on the proposal that there should be a special fee arrangement where an owner needs to raise multiple preservation notices?

We are unclear how often this would be utilised but have no objections if it were applied. We consider it essential that a reduced fee should not impact on the resources of Registers of Scotland.

Where an owner needs to register a notice for multiple properties, we consider that it would be better to be able to do that via a single form.

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<sup>9</sup> [Land Registration etc. \(Scotland\) Act 2012](#)

<sup>10</sup> [18-08-31-pllr-plc-consultation-slc-title-conditions.pdf](#), page 6



## Question 11 - What information or data do you have on:

### (a) the economic impact of section 53 of the Title Conditions (Scotland) Act 2003, or

As previously stated in our response to the 2018 Discussion Paper,<sup>11</sup> we are not in a position to provide any specific data on the economic impact of current section 53 provisions or on the potential economic impact of any reform which is proposed. We can however provide some general remarks in relation to the economic impact of the current section 53 provisions in practice. In the experience of our members, the majority of costs incurred addressing section 53 provisions are typically incurred 'internally' to a legal firms' business, for example, by way of time spent by solicitors and/or legal staff in researching and assessing whether a property is affected by a common scheme under section 53. The lack of clarity in the current legislation in relation to the application of section 53 is undesirable and increases these costs. On occasion, the costs which require to be incurred may be disproportionate to the fee being paid by a client for the transaction (as such transactions are often carried out on a 'fixed fee' basis). There are also circumstances where additional 'external' costs require to be incurred, for example obtaining title insurance to cover the possibility that section 53 might apply and obtaining expert opinion as to whether or not section 53 applies. We are not in a position to quantify the extent or costs of this.

### (b) the potential economic impact of the reform proposed by the Scottish Law Commission in its draft Bill

We consider that reforming section 53 could ease the burden on the Scottish Land Court (formerly the Lands Tribunal of Scotland) due to the number of cases that have previously stemmed from it.

## Question 12 - Are there any direct or indirect impacts on children and young people as a result of the legislative proposals set out in the Scottish Law Commission's draft Bill?

We are unaware of any such impacts.

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<sup>11</sup> [18-08-31-pllr-plc-consultation-slc-title-conditions.pdf](#)



Question 13 - Is there any impact on specific groups of children and young people as a result of the legislative proposals set out in the Scottish Law Commission's draft Bill?

We are unaware of any such impacts.



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