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

SPF Consultation Response

Submitted on 15 May 2026

SCOTTISH PROPERTY FEDERATION

The Scottish Property Federation is the voice of the real estate industry in Scotland. We work closely with our members to support the **growth of the real estate industry and to improve Scotland's built environment** - key pillars that underpin a productive, thriving society.

Our industry-wide membership enables us to provide government and regulators with **expert insight and informed guidance**, helping shape effective policy and regulation. Our members reflect the **diversity of the real estate sector** - ranging from property owners and developers to funders, agents, and professional advisers.

From 23 June, we will transition to Real Estate: Scotland following the merger with BPF, IPF and AREF on 1 May 2026.

CONSULTATION SUMMARY

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

In 2019, the Scottish Law Commission published a report and Draft Bill, recommending reform on Section 53 of the Title Conditions (Scotland) Act 2003. Section 53 specially confers a right to enforce real burdens (objections) where there is a common scheme such as a housing estate, tenement or mixed developments, and affects everyone who owns a house. Section 53 primarily deals with common schemes prior to the abolition of the feudal system in 2004. The current wording means it is often unclear who has enforcement rights with extensive investigations often required just to determine if the rights exist.

The Scottish Law Commission proposes replacing the current Section 53 framework with a clearer and more predictable system.

GENERAL COMMENTS

SPF Response

We welcome the Scottish Law Commission's proposals to reform Section 53 of the Title Conditions (Scotland) Act 2003. The current system can create significant uncertainty around who has enforcement rights within common schemes, often requiring extensive and costly title investigations. We support moves to introduce a clearer, more modern and proportionate framework, particularly proposals to limit enforcement rights to those most directly affected, such as immediate neighbours.

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

Yes, we agree that Section 52 and 53 should be repealed and replaced with a single provision to reduce complexity and uncertainty during property transactions and improve confidence as to who can enforce real burdens. It may also help to improve marketability and title confidence which is particularly important for lenders and purchasers.

QUESTION 2**Are you content with the Scottish Law Commission's definition of "common scheme"?**

Yes, the main legal issue is uncertainty. Solicitors will often undergo extensive investigation just to determine if enforcement rights exist which can be timely and costly for clients. In many cases, even following detailed investigation, there remains no clear consensus on enforceability. The definition of 'common scheme' will improve clarity and fairness, ensuring that enforcement rights are confined to those properly intended to benefit from.

A key issue to consider is the potential for the proposals to unintentionally create a common scheme in circumstances where large sites are brought forward in multiple phases over many years. Clarity is required on whether the imposition of similar real burdens across separately phased developments would, in itself, be sufficient to establish a single common scheme.

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?**

Yes, the proposed five rules are welcome in principle as it gives better clarity when determining if parties have legal grounds to object. However, care is required to ensure the rules do not operate too broadly in the context of large or phased developments, where the new provisions could unintentionally expand enforcement rights beyond what was intended. For context, it is rare for large, phased sites to have the same legal structures given that phased development are typically brought forward at different times, under different ownership structures, funding arrangements, and evolving design requirements. As a result, reliance on similarity of burdens alone may not be a reliable indicator of a single intended common scheme.

QUESTION 4**Do you have any comments on any other of the Scottish Law Commission's recommendations for reform?**

No comments

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?**

The proposed Tenement (Amendment) (Scotland) Bill if passed will impact on the recommendations in the report on implied enforcement rights for owners of flats in a tenement as the proposed legislation envisages that a compulsory owners association will be formed and it will have title to enforce the association rules (initially the title conditions affecting the flats) in addition to the owners.

Over the 7 years since the SLC's report, there have been a lot of cases (some of which are listed below) concerning common schemes showing the challenges that the current law creates. Streamlining the law of implied rights of enforcement will provide clarity and certainty to property owners and reduce the burden on the Lands Tribunal.

LT cases concerning common schemes: Smith v Burden [2025] LTS 14; Cornish v Philippi [2025] LTS 26; Moffat v Bromley Capital Ltd [2025] LTS 29; O'Gorman v Love 2019 SLT (Lands Tr) 1; Leehand Properties Ltd 2019 GWD 29-468, Lands Tribunal; Rollo v Jamieson 2022 GWD 31-454, Lands Tribunal; Shanks v McClintock [2024] LTS 3, 2024 GWD 18-168.

QUESTION 6 **Are you aware of change in conveyancing law practice which impacts on any of the recommendations contained in the Report?**

No comments

QUESTION 7 **Do you have any comments on the draft Bill included the Scottish Law Commission's Report?**

No comments

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?**

Yes, requirement for a notice of the common scheme in the title would in principle improve transparency, ensuring that enforcement rights are clearly identifiable from the Land Register. However, notice in the title should not be a mandatory pre-condition as titles will not necessarily be updated so it risks undermining the existence of otherwise valid common schemes.

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

It is reasonable to impose a deadline to bring certainty to title conditions. However, in practice, there is unlikely to be general awareness of this relatively technical requirement, particularly among non-professional owners. Issues often only come up during sale, refinancing or a dispute

so therefore it is important there are appropriate mechanisms in place to ensure effective understanding and awareness of the practise.

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?**

A special fee arrangement where an owner is required to register multiple preservation notices seems reasonable in principle, as it reflects the administrative work involved. However, it will be important to keep it proportionate, particularly in the context of large or phased developments where multiple notices may arise from what is effectively a single wider scheme. Care should be taken to ensure the fee structure does not discourage owners from preserving otherwise valid enforcement rights or create disproportionate costs in more complex cases.

QUESTION 11 **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 the reform proposed by
the Scottish Law Commission in its draft Bill.**

No comments

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?**

No comments

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**

No comments

End of questions