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## ABOLITION OF FEUDAL TENURE

In June 1999, the Scottish Executive announced its intention to introduce a Bill to abolish feudal tenure in the first session of the Scottish Parliament. This Bill will be based on the Draft Abolition of Feudal Tenure (Scotland) Bill, published by the Scottish Law Commission<sup>1</sup> (SLC) in February 1999. One of the main provisions of the Bill will be the abolition of feudal superiorities and their replacement with a system of outright ownership of land.

This research note considers the various aspects of the current system of feudal land tenure. It traces the developments leading up to the publication of the SLC's *Report on Abolition of the Feudal System* and examines the Draft Bill and its intended effects. The Draft Bill is 100 pages in length, with 71 clauses and 9 schedules, and repeals 45 whole Acts, plus 246 sections and 57 schedules of other Acts. This research note focuses on the main provisions of the Draft Bill. Once the Scottish Executive's Abolition of Feudal Tenure Bill is published, a research paper will be available considering the proposed legislation in more detail, including the more technical aspects of the Bill.

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<sup>1</sup> The SLC is a non-political advisory body, with statutory powers to keep under review the law of Scotland, "with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law" (Section 3(1) of the Law Commissions Act 1965).

# ABOLITION OF FEUDAL TENURE

## BACKGROUND TO THE PROPOSED REFORMS

Feudal tenure is a system of land ownership, which is generally regarded as archaic, unfair and in need of reform. Other legal jurisdictions replaced feudal tenure in preceding centuries. Feudal tenure is difficult for non-lawyers to understand, with the obscure concepts and terminology involved making it particularly inaccessible. It also entails a number of principles which, if applied, could be arbitrary and out of step with principles of modern justice. The system itself is examined in more detail later in this research note.

In the 20<sup>th</sup> century in Scotland, a variety of legislation has been enacted to reform the operation of the feudal tenure, but the system itself remains in place. In 1964, a committee was set up under the chairmanship of John Halliday to examine conveyancing legislation and practice within the context of feudal tenure, and make recommendations. The committee reported in December 1966.<sup>2</sup> In addition to its main recommendations relating to conveyancing, the Halliday Committee recommended reform of feudal tenure and a gradual conversion to a more suitable system of land tenure. Following the Halliday Committee's report, a Government white paper was produced in 1969, *Land Tenure in Scotland: A Plan for Reform*,<sup>3</sup> followed by a Government green paper in 1972, *Land Tenure Reform in Scotland*,<sup>4</sup> both of which were committed to abolition of feudal tenure in Scotland, rather than just gradual reform.

Legislation introduced in the 1970s removed some of the more oppressive aspects of feudal tenure. The Conveyancing and Feudal Reform Act 1970 made a number of changes, including extending the jurisdiction of the Lands Tribunal for Scotland to hear applications for variation or discharge of feudal land conditions. The Land Tenure Reform (Scotland) Act 1974 was particularly effective in deconstructing the system of feu duties, by preventing the imposition of new feu duties and providing for compulsory redemption of feu duties at the time of sale of a property, and voluntary redemption elsewhere.

However, since the 1972 green paper and the 1974 Act, no further substantive changes have been made to feudal tenure, and its problems still remain.

In 1991, the Scottish Law Commission published a discussion paper<sup>5</sup> to “seek comments on the formulation of a new system of land tenure in Scotland to replace the existing feudal system and on ways of effecting transition to the new system”,<sup>6</sup> followed by a *Report on the Abolition of the Feudal System* in February

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<sup>2</sup> The Halliday Committee, *Report on Conveyancing Legislation and Practice*, Cm 3118, December 1966

<sup>3</sup> *Land Tenure in Scotland: A Plan for Reform*, Government white paper, Cm 4099, 1969

<sup>4</sup> *Land Tenure Reform in Scotland*, Government Green Paper, 1972

<sup>5</sup> Scottish Law Commission, *Property Law: Abolition of the Feudal System*, July 1991, DP No. 93

<sup>6</sup> page 1

1999, including a and *Draft Abolition of Feudal Tenure etc. (Scotland) Bill*.<sup>7</sup> The report recommended the abolition of feudal tenure and its replacement with a system of outright ownership.

In the *Partnership for Scotland* agreement,<sup>8</sup> the Scottish Executive announced its intention to “reform Scotland’s outdated system of land tenure” and to “abolish feudalism”. Prior to this, in the run up to the Scottish Parliament elections, support was given to the abolition of feudal tenure by the Labour Party, the Scottish National Party, the Liberal Democrats and the Green Party. The Conservative Party expressed support for updating the current system.

On 16 June, the First Minister, Donald Dewar, announced the Scottish Executive’s intention to introduce a bill to abolish feudal land tenure, with appropriate steps taken to ensure the survival of conditions necessary to maintain common amenities and to protect property.<sup>9</sup> Subsequently, the Deputy-First Minister, Jim Wallace, announced that the SLC’s *Draft Abolition of Feudal Tenure etc. (Scotland) Bill* would form the basis of the legislation to be put to the Scottish Parliament, with only minor modification.<sup>10</sup>

## CURRENT SYSTEMS OF LAND TENURE IN SCOTLAND

There are two main types of land tenure in Scotland:

- Feudal tenure
- Non-feudal tenure

### FEUDAL TENURE

#### *Basic principles*

Feudal tenure is the most common type of land tenure in Scotland. It is a system of land ownership whereby there is no unitary concept of ownership in the legal sense of land being owned outright by one party. Instead, multiple concepts of ownership co-exist in relation to land. Each type of ownership has a particular name and entails a different relationship to the land in question.

The person regarded by modern society as the owner of feudal land is actually the person who has the type of ownership which gives them the use of the land, known as the dominium utile (useful ownership). This person is called the ultimate vassal<sup>11</sup> of feuar, and holds the land at the end of a chain of former holders of the

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<sup>7</sup> Scottish Law Commission, *Report on Abolition of the Feudal System*, ScotLawCom 168, February 1999

<sup>8</sup> *Partnership for Scotland: An Agreement for the First Scottish Parliament*, 14 May 1999

<sup>9</sup> SPOR, 16 June 1999, Vol 1, Col 406

<sup>10</sup> SPWA, 30 June 1999, S1W-00286

<sup>11</sup> The origins of the word ‘vassal’ lie in the old Celtic language of Gaul. ‘Vassal’ is derived from the word ‘gwas’, meaning ‘manservant’. The word ‘gwas’ is still in usage in modern Welsh, carrying the same meaning.

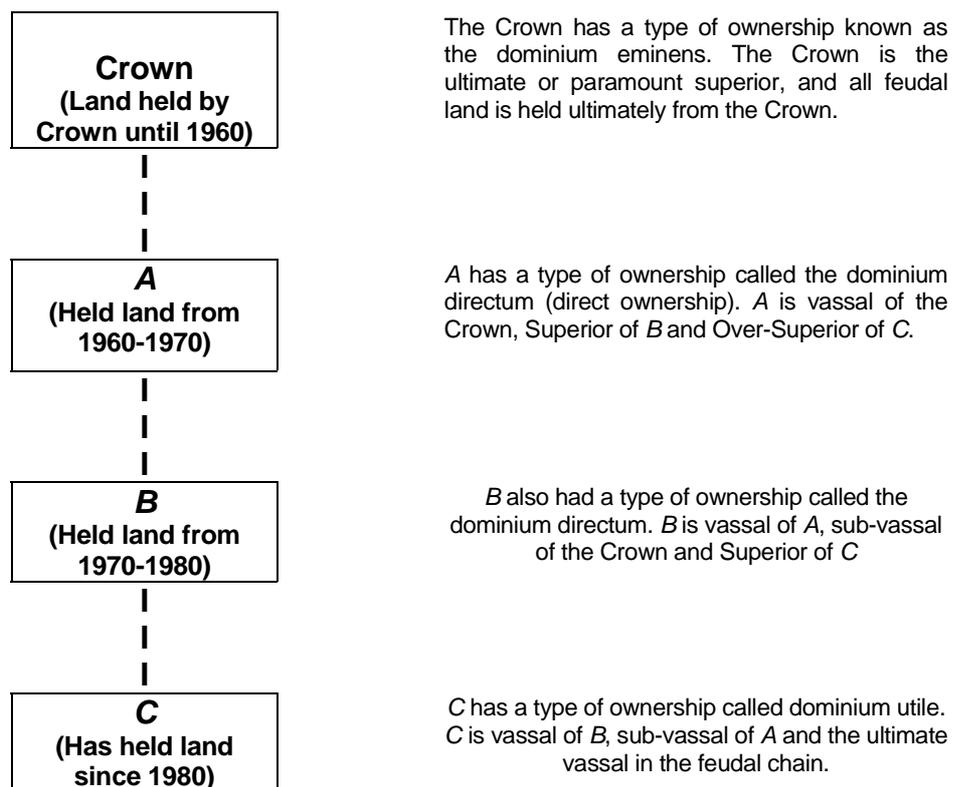
dominium utile. Only the ultimate vassal has the right to occupy and use the property.

In relation to the ultimate vassal, the previous holder of the dominium utile in the land is known as the superior and has a type of ownership in the land which is known as the dominium directum (direct ownership). The superior has a residual right in the land, which does not interfere with the ultimate vassal's right of ownership, provided the ultimate vassal meets the feudal conditions which apply to the land.

Each time feudal land is transferred a new ultimate vassal is created, forming another link at the end of a feudal chain. The transfer of land in this way is known as 'subinfeudation'. A piece of land can be sub-feued any number of times.

A 'chain' of ownership will consist of a number of vassals and superiors. An example of such a chain can be seen in figure 1 below:

**Figure 1: Example of a feudal 'chain' where property is transferred by subinfeudation**



The Crown has a form of ownership known as the *dominium eminens* (ultimate ownership). All feudal chains of ownership are deemed to emanate from the Crown as ultimate or paramount superior. This is because feudal tenure is based on the simple, albeit erroneous, theory that, at one time, all land in Scotland

belonged to the Crown. The theory is that the Crown then dispersed the land to other people, in a process known as feuing.

Originally, feudal tenure was based on the requirement that each vassal must perform a service for their superior in return for the grant of the land. Historically, many different types of feudal tenure created different requirements. For example, in 'ward holding', vassals were required to perform military service for their superior, although this was abolished by the Westminster Parliament in 1746 after Culloden. Vassals holding land under 'feu farm' tenure, a common arrangement, were required to pay a perpetual annual monetary amount to the superior, called a feu duty.

Feu farm tenure still exists, along with feu duties. However, the Land Tenure Reform (Scotland) Act 1974 provided that no new feu duties could be imposed by superiors on vassals from 1 September 1974.<sup>12</sup>

Feudal tenure gives a superior certain rights in relation to requiring the payment of feu duties by vassals. Some of them appear out of proportion to the value of feu duties that are now payable:

A superior has the following rights in relation to the payment of feu duty:

- A personal right to receive a money payment from the vassal, enforceable through the courts
- A real right over the land itself, as feu duty is a *debitum fundi* (a debt secured on the land)
- A real right in security over any moveable property brought onto the land (the superior's hypothec)

A superior has powerful remedies to enforce these rights. The Feu-Duty Act 1597, as amended,<sup>13</sup> provides the statutory remedy of 'irritancy',<sup>14</sup> also known as 'tinselling the feu'. Where a vassal is in arrears on feu duty payments for a period of 5 years, the superior can bring an action of irritancy, and thereby unilaterally bring the feu to an end. The legal effect is to undo the feu, with the vassal losing all rights in the property, with no right to compensation. However, in practice, the courts give the vassal a further chance to pay and statutory powers now allow the vassal to 'purge the irritancy' by paying the amount of money due, even after the court has awarded the superior a decree. However, the vassal must purge the irritancy before the superior registers the decree. Because a vassal can purge an irritancy, an action for irritancy is rarely successful, although it does still happen.

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<sup>12</sup> Section 1(1)

<sup>13</sup> Amended by Conveyancing (Scotland) Act 1874 and 1879; Amendment Act 1887 (section 4); Conveyancing Amendment (Scotland) Act 1938 (section 6) and Land Tenure Reform (Scotland) Act 1974 (section 15)

<sup>14</sup> Irritancy is a legal term which, in this context, means the forfeiture of a right and nullification of an agreement, due to failure to observe, or contravention of, that agreement (conventional irritancy).

Another problem with feudal tenure is the ability of an over-superior to irritate the feu. Where A sub-feus land to B, and then B sub-feus to C, A is the superior of B and the over-superior of C. Under the present system, if B fails to pay the feu duty he owes to A, A can go directly to C for payment. If C has already paid the feu duty he owes to B, he cannot be required to pay A as well. However, if B fails to pay A for a period of 5 years then, under the Feu-Duty Act 1597, A can irritate the feu and bring to an end B's right in the land by removing him from the feudal chain. The problem here is that A's successful action for irritancy also breaks the link in the feudal chain with B, and with all those who come after him in the chain, so that C would also lose his right in the land, and would no longer be the effective owner, even though he had paid his feu duty to B. This is more of a problem in theory than in practice, as the remedy of the over-superior is regarded as being so unjust that it is not sought by over-superiors, although in theory it could be.

The 1974 Act introduced measures to allow vassals to redeem existing feu duties, i.e. to buy out the superior, by paying a lump sum, so that feu duty was no longer due. The Act provides a formula for the redemption of feu duties, requiring that the vassal must pay the superior the sum that, if invested in 2½% Consolidated Stock, would produce an annual sum of the same value as the feu duty that the vassal is seeking to redeem. The Journal of the Law Society of Scotland publishes a *Table of Feu Duty Factors* every month, providing a multiplier for calculating redemption costs, tied to consolidated stock.

The 1974 Act provides that redemption of the feu can take place on a number of specified occasions:

- Section 4 of the Act enables the vassal to redeem the feu duty on one of two "term days", either: Whitsunday (28 May) or Martinmas (20 November). The significance of these dates is that this is when feu duty is payable.
- Section 5 of the Act requires the compulsory redemption of feu duty on the sale of land, with the liability for paying the redemption charge falling on the seller. The effect of this requirement is that any piece of land sold since 1974 no longer has a feu duty. Section 5 has been very effective in achieving the redemption of a large number of feu duties since 1974.
- Section 6 of the Act provides the mechanism for redeeming the feu in the purchase of land by an authority using purchase powers.

Prior to the 1974 Act, the Conveyancing and Feudal Reform (Scotland) Act 1970 gave ultimate vassals the right to apply to the Lands Tribunal for Scotland for variation or discharge of feuing conditions deemed unreasonable, inappropriate or unduly burdensome.

However, feuing conditions known as feudal real burdens can still be imposed by a superior on a vassal through a conveyance of land by subinfeudation. The conditions imposed usually relate to land use matters. Once created, these real

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burdens can last forever, as they are linked to the land itself rather than to the current vassal or superior. If feudal tenure is abolished, feudal real burdens will largely disappear, along with the superiorities which allow them to be created.

## **NON-FEUDAL TENURE**

Various kinds of non-feudal land tenure exist in Scotland:

**Allodial land** is land held by an outright owner, and can be found across Scotland, for example, land held by the Church.

**Udal land** is land held outright by the owner, but without a written title. This type of land is found in Orkney and Shetland, although it is in decline.<sup>15</sup>

**Statutory title** is where land is acquired by statutory conveyance, for example, compulsory purchase by a local authority. This type of tenure is sometimes called allodial, although there is some debate about whether this is the case, or whether there is a feudal element in the title.

**Kindly tenants** (sometimes called rentallers) occur where a title in land is held directly from the Crown in perpetuity, under a hereditary lease. This type of tenure is now only found in a few areas of Scotland (Lochmaben and Kirkyetholm near Dumfries).

**Commonly** is where ground is held in common ownership, for example, for peat-cutting and grazing, although this type of tenure has largely disappeared.

**Leasehold** (over 20 years, ie. a long lease) is where the right to occupy land is given, but only for a fixed period. This type of tenure is particularly prevalent in Lanarkshire, but can also be found across Scotland, eg. Strathaven, Blairgowrie, Ullapool and Montrose.

**Tenants at will** are tenants who occupy land through custom or usage, or in exchange for a ground rent. This type of tenure is found in Leadhills, Pennand, Hopeman, Avoch and Golspie.

Other tenancies have been reported in some rural areas, where certain rights in land are claimed, but with no title. The land appears to be feudal property where no superior can be traced. These tenancies are found in the North East, in places such as Harris and Johnshaven, and Gordon near Montrose.<sup>16</sup>

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<sup>15</sup> Scottish Office Central Research Unit, *Non-Feudal Landholdings in Scotland*, 1997

<sup>16</sup> Source: Scottish Office Central Research Unit, Scottish Office Central Research Unit, *Non-Feudal Landholdings in Scotland*, 1997

## THE SCOTTISH LAW COMMISSION'S DRAFT ABOLITION OF FEUDAL TENURE, ETC. (SCOTLAND) BILL

In February 1999, the Scottish Law Commission (SLC) published its *Report on Abolition of the Feudal System and Draft Abolition of Feudal Tenure, etc. (Scotland) Bill*, following a discussion paper issued in July 1991,<sup>17</sup> a consultation exercise on that paper, and extensive research and background work undertaken by the SLC.

It is anticipated that the measures in the Draft Abolition of Feudal Tenure Bill produced by the SLC will be largely implemented by the Abolition of Feudal Tenure Bill to be introduced by the Scottish Executive in the first session of the Scottish Parliament. Therefore, in examining the main provisions in the SLC's Draft Bill, this section refers to the effects of the draft legislative provisions as if they were to be enacted.

### ABOLITION OF FEUDAL TENURE

Part I of the Draft Bill provides for the abolition of feudal tenure,<sup>18</sup> to occur on an "appointed day" set down by statutory instrument. It is expected that the "appointed day" will be a term day, i.e. either Whitsunday (28 May) or Martinmas (20 November), the significance of these dates being that this is when feu duty is payable under the current system, where it is paid in two instalments. The "appointed day" is likely to be about two years after Royal Assent is given to the Scottish Executive's Bill. This time period was recommended by the SLC in its report, to allow the enactment of the legislation to be publicised and for those affected to seek advice and become informed.

The effect of abolition of feudal tenure will be to bring to an end the concept of multiple ownership in the land and replace it with a unitary concept of outright ownership. In terms of the existing forms of ownership, the superiorities held by the Crown (dominium eminens) and other superiors (dominium directum) will disappear and the useful ownership (dominium utile) held by the ultimate vassal will become outright ownership, so that the former vassal will own the land absolutely. All feudal land will cease to be held from the Crown.<sup>19</sup>

However, other crown rights are preserved by clause 52 of the Draft Bill, as only the Crown's paramount superiority disappears under the legislation. Thus, land held allodially (outright) by the Crown will continue to be held by the Crown and the Crown's general prerogative powers will not be affected by the legislation. Although this is a general provision to preserve the Crown's non-feudal rights, certain Crown rights are also specifically mentioned as being preserved. Clause

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<sup>17</sup> SLC, *Property Law: Abolition of the Feudal System*, July 1991, DP No.93

<sup>18</sup> Clause 1(1)

<sup>19</sup> Clause 2

52 makes specific reference to the preservation of the Crown's prerogative of honour, to ensure that peerages are unaffected. Clause 52 also specifically preserves the Crown's prerogative rights in respect of property which is ownerless (*bona vacantia*) or which is unclaimed, under the Crown's right as the ultimate heir (*ultimus haeres*).

## **EXTINCTION OF FEU DUTIES**

Part III of the Draft Bill sets out a comprehensive framework for the extinction of feu duties and the payment of compensation to the former superiors. Clause 7 provides that feu duties will cease to exist on the appointed day, at the time when the abolition of feudal tenure will be effective.

Clause 8 of the Draft Bill provides that the former superior is entitled to a compensatory payment from the former vassal. Clause 8(1) places the onus on the former superior to make the claim against the former vassal, within 2 years of the appointed day. A failure to make a claim within 2 years will result in former superiors losing their rights to compensation. The person who was the ultimate vassal immediately before the appointed day is the party liable to make the compensatory payment.

The Draft Bill sets out the scheme to be used for calculating the level of the compensatory payment due to the superior.<sup>20</sup> It adopts the compensation scheme in section 4 of the Land Tenure Reform (Scotland) Act 1974 used to calculate the payment required for the redemption of feu duties, referred to earlier in this research note. In summary, the scheme calculates the sum payable on the basis of the amount of money that would need to be invested in 2½% Consolidated Stock to produce a return in 1 year equivalent in amount to the feu duty. However, clause 10 provides that, if the amount claimed is £100 or more, the former vassal can opt to pay in instalments.

Under clause 13 of the Draft Bill, the compensatory payment is not secured on the ground in the way that feu duty currently is. Also, any arrears in feu duty cease to be secured on the ground from the appointed day onwards, as clause 13(2) provides that such debts cease to be debts secured on the land (*debitum fundi*) and clause 13(3) abolishes the superior's hypothec (discussed earlier in this research note). However, these arrears do not disappear altogether and are still liable to be paid by the person who owed them prior to the appointed day.

Clause 51 of the Draft Bill provides that any money owed to the former superior for the redemption of a feu, or other perpetual payment under the 1974 Act, which was owed prior to the appointed day, will still be owed from the appointed day onwards. However, the period in which a former superior can make a claim for such money (the negative prescription period) is reduced by the Draft Bill from 20 years to 5 years, by an amendment to the Prescription and Limitation (Scotland) Act 1973. It is intended that the effect of this reduction in the prescription period

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<sup>20</sup> Clause 9

will be to allow the release of funds currently held on deposit, to cover the payments that may be required if superiors who are absent subsequently appear and claim the money owed.

## FEUDAL REAL BURDENS

A real burden has been described as a “*condition imposed on one piece of land for the benefit of another piece of land*”.<sup>21</sup> For a real burden to exist, there must be a ‘dominant tenement’ (where a right is attached to land, to enable the current proprietor to enforce the real burden) and a ‘servient tenement’ (where an obligation is attached to land, requiring compliance from the current proprietor of the land).

Different types of real burdens exist, but all have certain factors in common. Once created, real burdens can last forever, unless positive steps are taken to end them. They are said to have praedial benefit, in that they run with the land, and are therefore enforceable by or against whoever is the owner of the relevant land at the time of enforcement. Feudal real burdens exist under the feudal tenure system, with the feudal superior deemed to be the ‘dominant tenement’ and the vassal deemed to be the ‘servient tenement’.

The reform of real burdens is currently under consideration by the SLC,<sup>22</sup> with a separate Draft Bill expected to be available by the end of 1999. However, the SLC’s Draft Abolition of Feudal Tenure etc. (Scotland) Bill deals with real burdens in so far as is necessary to reform the law in relation to feudal real burdens.

When feudal tenure is abolished, feudal real burdens will disappear. Part IV of the Draft Bill deals with the position of other real burdens after the abolition of feudal tenure. Clause 16 of the Draft Bill provides for the extinction of a real burden on the appointed day where the real burden is only enforceable by a superior. For other real burdens, which will continue in existence after the appointed day, the Draft Bill provides that these will no longer be enforceable by former superiors on or after the appointed day.<sup>23</sup> These real burdens may be subject to further reform as an outcome of the SLC’s current considerations.<sup>24</sup>

Any proceedings by former superiors to enforce real burdens, which commenced prior to the appointed day, shall be deemed to have been abandoned on the appointed day and will therefore be dismissed, unless a decree or interlocutor has been pronounced by a court prior to that day and relating to the payment of money, for example, for a common repair.<sup>25</sup> On the appointed day, the enforcement rights of former superiors will transfer to all owners benefiting from

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<sup>21</sup> The reform of real burdens is currently under consideration by the SLC, (*Discussion Paper on Real Burdens*, October 1998, DP 106), with a separate Draft Bill expected to be available by the end of 1999. However, the SLC’s Draft Abolition of Feudal Tenure etc. (Scotland) Bill deals with real burdens in so far as is necessary to reform the law in relation to feudal real burdens.

<sup>22</sup> SLC, *Discussion Paper on Real Burdens*, October 1998, DP 106

<sup>23</sup> Clause 16(1)(b)

<sup>24</sup> SLC, *Discussion Paper on Real Burdens*, October 1998, DP 106

<sup>25</sup> Clause 16(3)

the common facility, with the former feudal burdens becoming community burdens.

However, the Draft Bill does provide for some of the rights of superiors under feudal real burdens to be retained, but only in the very limited circumstances provided for in the Bill. In particular, where conservation measures are currently contained within feudal real burdens, these will be converted into new conservation burdens, created under clause 21 of the Draft Bill. The Draft Bill provides that conservation burdens will be enforceable by those conservation bodies included in a list drawn up by the Secretary for State, although presumably this responsibility will now transfer to the First Minister. If a former superior is nominated as a conservation body and placed on the list, the body can then enforce a 'conservation burden' by registering it in the Land Register or the Register of Sasines, as appropriate. This process must take place between the Bill receiving Royal Assent and the appointed day.

## **COMPENSATION**

In most cases, compensation will not be payable to a former superior for the loss of the right to enforce real burdens which were available prior to abolition of feudal tenure. However, the Bill provides for some exceptions to this general rule. If, prior to abolition, a superior feued land to a vassal, but used a real burden to reserve a development value in that land, for example, reducing the price of the land because of certain conditions being attached to its use, then to merely allow the real burden on the former vassal to disappear after abolition of feudal tenure, might enable the former vassal to make a substantial gain, with an expanded development potential on his land at no extra cost, but a loss to the former superior.

The SLC wanted to avoid these circumstances arising, so the bill provides for a compensation scheme to apply where a superior wishes to recoup any losses resulting from real burdens disappearing due to abolition of feudal tenure. The compensation scheme is set out in clauses 28-34 of the Draft Bill. It is only applicable where in relation to development value burdens.

To claim compensation, the superior must register a notice in the Land Register or the Register of Sasines, whichever is applicable, before the appointed day. Once this notice has been duly registered, a former superior can claim compensation for any action which would have constituted a breach of the obligation under the former feudal burden where the breach occurred in the five years ending immediately prior to the appointed day, or if an event, which would have been a breach under the feudal burden, occurs during the 20 year period commencing after the appointed day.<sup>26</sup> The amount of compensation which can be claimed is the value of the vassal's gain, or the superior's loss, whichever is the lesser.

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<sup>26</sup> Clause 30(1)(c)

## **MISCELLANEOUS REFORMS**

The Draft Abolition of Feudal Tenure etc. (Scotland) Bill will make amendments to a wide range of legislation. Some of the more significant amendments are examined below.

### **BARONY TITLES**

Barony titles are specifically retained by clause 57 of the Draft Bill. However, they are retained in a form in which they have been severed from land ownership. The intended effect of this provision is to enable the transfer of a barony title merely by assignation, without the need for registration. It is hoped that this provision will provide a simplification of land law.

### **PARTNERSHIP LAW**

Under current partnership law provisions, partnerships are deemed incapable of being a party to a feudal relationship and are consequently excluded from holding a title to feudal land in their own name and, in the view of many lawyers, of holding any kind of land in their own name. However, clause 64 of the Draft Bill makes specific provision for partnerships to be able to hold all land in their own name following abolition of feudal tenure.

## **LEGISLATIVE COMPETENCE**

### **RESERVED MATTERS**

Section 29(2)(b) of the Scotland Act 1998 provides that an Act of the Scottish Parliament is outwith the Parliament's legislative competence if it relates to reserved matters set out in Schedule 5 of the 1998 Act.

In relation to the provisions to reform partnership law, consideration needs to be given to whether the proposed reforms are within the legislative competence of the Scottish Parliament. Section C1 of Schedule 5 to the Scotland Act states that the "*creation, operation, regulation and dissolution of types of business association*" are matters reserved to the Westminster Parliament. Partnerships appear to be a form of business association in the definition given in Section C1 that:

*"Business association' means any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit; and 'business' includes the provision of benefits to the members of an association."*

and introducing a right for partnerships to hold heritable property could constitute a change in their operation.

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

Under section 29(2)(d) of the Scotland Act, an Act of the Scottish Parliament must not be incompatible with any of the rights of individuals provided for in the European Convention on Human Rights. In addition, section 57(2) of the Scotland Act requires that, in the exercise of its powers, the Scottish Executive must not *providing research and information services to the Scottish Parliament*

make any subordinate legislation or do any other act, that is incompatible with the Convention.

The Scottish Law Commission has indicated that, when its proposals are taken as a whole, the Draft Bill is fully compatible with the ECHR.<sup>27</sup>

However, before a bill is introduced into the Scottish Parliament, or upon its introduction, the Scotland Act requires that a member of the Scottish Executive must state that the bill is within the Parliament's legislative competence, including confirmation of its compatibility with the Convention.<sup>28</sup> The Presiding Officer must also consider whether the bill is within the Parliament's legislative competence and provide a statement setting out his decision.<sup>29</sup>

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<sup>27</sup> Professor Ken Reid, 'Abolition of the feudal system', *Journal of the Law Society of Scotland*, February 1999, Vol 44, No.2

<sup>28</sup> Section 31(1)

<sup>29</sup> Section 31(2)