1. I am generally in favour of this Bill and think its aims worthy. In my comments I will concentrate only on technical aspects of the wayleave rights in Part 6 of the Draft Bill. This comprises Clauses 57 et Seq. My aim is to make this a better Bill.

2. Section 58. A Right to Convey Liquid, gas, fluid, water for Transfer Thermal of Energy. This is somewhat oddly drafted and lacks clarity. I know there are other statutes for service media mainly of the Westminster Parliament (e.g. Land Drainage (Scotland) Act 1930, ss.1 and 2 and Land Drainage (Scotland) Act 1958, s.1) that use a similar type of formula but surely the Scottish Parliament can do better than this. The flaw in such drafting has already been noticed by the Courts as long ago as 1944. See Madden v Coy [1944] VLR 88. Good drafting would specify the primary right and then set out the ancillary rights. What is the primary right that a licence holder would wish to obtain in a network wayleave right? I do not think it is sufficient to state – as is done in Clause 58(1)(a) – the closest to a statement of the primary right – that the licence holder may “operate” the heat network apparatus. That is too vague and it is also a statement of an ancillary right. What really is being done (if you please excuse my limited knowledge of the physics involved) is the passage of heated water, gas, liquid of some sort across a servient tenement. It is done within pipes and other apparatus (these are laid as ancillary rights to facilitate the passage of the material). They would have no utility at all if no material was being passed through them. The primary right is a right to supply thermal energy by means of the transport across the servient tenement of this heated water, liquid or gas. That is the primary right. It should be stated expressly. The use of the heat network apparatus facilitates that primary right and is no more than an ancillary right and, in turn, the right to “operate” that apparatus is an ancillary right just like turning on a tap is a right ancillary to the conveyance of water. The result is Clause 58 as presently drafted does not confer this primary right in any form expressly. I have little doubt it confers it impliedly because the ancillary rights are to be used for a stated purpose but why be so coy about what the section is actually about? The primary right is the most important right of all. Section 59 expressly confers a lot of ancillary rights by a list of verbs such as the right to “install and keep installed a heat network apparatus (Section 58(1)(a)) and “to enter on the land to install, inspect, maintain, adjust, alter, repair, replace, upgrade, operate or remove” the heat network apparatus. Such rights are all subordinate to the primary right to transfer water, gas liquid etc. across a servient tenement for the purpose of heat transfer.
3. A Closed List of Ancillary Rights. The drafting employed in Clause 58 suggests a closed list of ancillary rights. A list is set out and this suggests, consistent with the maxim *expressio unius est exclusio alterius* that that is all the licence holder obtains. If that were to be the case the statutory provision would simply not work. Not only will there be circumstances unforeseen by the draftsman (probably not a person well practiced in digging trenches or drains) that require rights that are not specified – e.g. the removal of spoil dug out of the ground – who owns it? Who can dump it? (There is an express provision for disposal of soil taken from underneath roads in the *Edinburgh Tram (Line One) Act 2006*, asp. 7, s.5(1)(b) but you might need a wider right) Where can it be stored? How can it be decontaminated if soaked with oil? (that is just a few questions for a start) but every word used in the existing list in the draft Bill needs to be construed to produce a workable result. For example, does “installation” include machinery (of course it does); Can such machinery be parked on site (no idea from the draft Bill itself); If such machinery can be used, can it be locked in a site hut (no idea from the draft Bill); Can fencing be put up around the works to comply with Health and Safety and other requirements (no idea from the draft Bill); to that extent can the owner be excluded from his own land (no idea from the draft Bill). That is just for starters. What you will find is that someone – perhaps an aggrieved landowner - wishing to frustrate the operation of this Bill will not pick in exactly this way. In addition, all of the expressly stated ancillary rights really require the implication of further ancillary rights to make the express ones work. For example, exactly where in the draft Bill is the right of lateral and vertical support of network apparatus duly laid in the ground? Where is the right to stop someone building on top of the apparatus? Or beside the apparatus? I don’t see any of these. The Parliamentary draftsman is presumably aware of the case law tending to show there is a difficulty of implying ancillary rights where there has been a compulsory acquisition (See *Sovmots Investments Ltd v The Secretary of State for the Environment* [1979] AC 144) and, also, the tendency to construe statutes limiting private property in a restrictive way.

What I would recommend is a general clause in the Bill that the ancillary rights listed are without prejudice to a more general collection of ancillary rights that defined by a clause such as “and such other ancillary rights as are reasonably necessary for the comfortable and effective operation of the primary right”. But that actually requires the Parliamentary draftsman to specify what the primary right is in the first place. So, Clause 58 needs a complete restructure to make it both readable and effective. In addition to this, it really needs integrated with Clause 65. The heading of that clause is far too narrow and should be expanded to deal with all ancillary rights. Clause 65(2)(c) imposes a test of necessity and incidental nature. I would suggest that this is reconciled with the test established by the House of Lords in *Moncrieff v Jamieson 2008 SC (HL) 1* for servitudes. The test of necessity should be expressly lowered to “reasonable” necessity to show it is not a test of “absolute” necessity but there should be a limitation that such works can be carried out without material prejudice to the servient proprietor or without occasioning a material increase in the burden on the servient
tenement. If the word “material” is not used you will potentially afford a veto on the landowner to stifle future works. In particular you should not adopt the wording relating to “prejudice” seen in the crofting legislation as this affords too much control to the landowner: That formulation of control varies from section to section. For woodland see Crofters (Scotland) Act 1993, s.50. For other activities see Crofters (Scotland) Act 1993, s.50B(2); Crofters having Rights in the Common Grazings of Sandwickhill North Street; Melbost and Branahuie; Sandwick and Sandwick East Street and Aignish v The Crofters Commission (Coimisean Na Croitearachd) and the Stornoway Trust, [2020] SCIH 49 (community owned wind farms).

4. Conveyancing Matters. Clause 58(2)(a) states there are only two ways of a network wayleave right in respect of “land” being conferred on a licence holder: (a) by agreement or (b) by a necessary wayleave. This rules out immediately acquisition by positive prescription in terms of Prescription and Limitation (Scotland) Act 1973, s.3(1) or (2) As a result, it perils the entire constitution of a network wayleave right upon tracing the true owner and acquisition consistent with the maxim nemo dat quod non habet. In such a case there should be a provision for the wayleave to be created ex nihilo without reference to a lost or untraceable owner.

5. Note there is no creation by positive prescription. I suspect that is deliberate. However, it has its down sides that are potentially serious. On balance, I think it is a bad idea to exclude prescription because of its good effects. First of all the failure to allow positive prescription removes the possibility of cure if the wayleave is obtained from the wrong person or the right person in the wrong capacity. It is a complex task working out who really owns land and in what capacity. A very good example of the latter is working out whether land is held in the common good by a local authority. Secondly, what happens if the pipe is put in the wrong place? If it is not possible to create a wayleave for heat transfer by positive prescription, prescription will not operate as a cure even if the pipe has been there for twenty years. In my own experience, pipes are rarely exactly where you expect them to be. I think it will be overly sanguine to expect the builder’s shovel to conform in every or even most situations with the lawyer’s pen. Pipes tend to be bent round obstacles on the ground in informal manner to cut costs of digging. The clerk of works is not even told far less the instructing client or landowner. I think it would be prudent to have some admission that a wayleave right can be created in terms of Prescription and Limitation (Scotland) Act 1973, s.3(2). If this is not done there will be an incentive for landowners to seek out minor deviations and demand removal of the items installed. This would leave the heat transfer licence holder at the mercy of the exercise of the equitable jurisdiction of the court. A second best is to make it clear a wayleave can be obtained ex post facto after a pipe has been laid (as is the case in the electricity legislation) but in such a case a second payment of compensation may be due. No second payment of compensation is due when prescription applies. Note also prescription cures the problem of voidable deeds as well as void deeds. That is not addressed in the present Bill. All in all, you should reconsider this issue in my view.
6. **Bilateral Deeds?** The reference to “agreement” in s.58(2)(a) might be taken to suggest the deed of acquisition is to be bilateral and should be executed not only by the landowner but also by the licence holder. That really would be an economic waste of time. Someone would have to sign all these agreements for the licence holder. Whilst this is not impossible it seems a job for a job’s sake and it will simply create costs. Surely it could be clear the network wayleave agreement could be granted by a unilateral deed by the landowner just like a normal servitude? Why not use the word “grant” as is used in connection with the grant of a necessary wayleave by the Scottish Ministers. Undoubtedly that can be a unilateral deed.

7. **Agreement in Writing.** Surely agreement in writing would be a good idea to create a wayleave. It would be somewhat ridiculous to have a potentially perpetual right created verbally especially as I suspect it is intended to bind successors in title of the landowner at least in some cases. However, I do not see this anywhere. It will be essential if a real right longer than one year is created or even if a personal right relating to land allows occupancy for more than a year. See [Requirements of Writing (Scotland) Act 1995, s.1](https://www.legislation.gov.uk/ukpga/1995/29). However, it appears to be deliberate in the draft Bill as presently drafted as other matters require writing e.g. [Clause 59(4)(a)](https://www.legislation.gov.uk/si/si2006/20060079/pdfs/si20060079_en.pdf).

8. **A Personal Right Only?** Is a right created by Agreement intended to be only a personal right? That seems to me to be a possibility but it must be made clearer in the draft Bill that a personal right is a possibility if the landowner only intends to bind himself but that also a real right can be created by such agreement if it is registered in the Land Register of Scotland. Only in the latter case will a successor in title be bound. In the latter case this is a personal servitude and would be very useful because it avoids the technical difficulty of what is known as the [Irvine Knitters rule](https://www.judiciary.gov.uk/decisions/1978/sc/109) (after [Irvine Knitters Ltd v North Ayrshire Cooperative Society Ltd 1978 SC 109](https://www.judiciary.gov.uk/decisions/1978/sc/109)) for an expanding network. However, the possibility of a personal servitude not linked to a geographically limited dominant tenement must be very clear in the draft Bill. At the moment it is not clear at all. The problem with a mere “agreement” is that it will probably not bind the singular successor of the landowner and a trustee in bankruptcy may disclaim it. Given the possible length of such agreements as potentially perpetual rights this would be unwise. If a real right is indeed registration should be required.

9. **Licence Holders and Temporary Rights.** You might wish to make it clear licence holders can acquire temporary personal or real rights such as rights to build a site storage compound on land during construction, or even something as basic as a right to install a portacabin or toilet for workers.

10. **Traffic Signs.** You might wish to consider affording to a licence holder, during works being carried out, a right to place and maintain traffic signs similar to that seen in the [Edinburgh Tram (Line One) Act 2006, asp. 7, s.58](https://www.legislation.gov.uk/asp/2006/7/contents).
58 Traffic signs and priority

(1) The authorised undertaker may, for the purposes of, or in connection with the operation of, the authorised tramway, place or maintain traffic signs of a type prescribed by regulations made under section 64(1)(a) (General provisions as to traffic signs) of the 1984 Act or of a character authorised by the Secretary of State on any road in which the authorised tramway is laid or which gives access to such a road.

(2) The authorised undertaker—
(a) shall consult with the traffic authority as to the placing of signs; and
(b) unless the traffic authority is unwilling to do so and subject to any directions given under section 65 (Powers and duties of highway authorities as to the placing of traffic signs) of the 1984 Act, shall enter into arrangements with the traffic authority for the signs to be placed and maintained by the traffic authority.

(3) Any power conferred by section 65 of the 1984 Act to give directions to a traffic authority or local traffic authority as to traffic signs shall include a power to give directions to the authorised undertaker as to traffic signs under this section; and, accordingly, the powers conferred by subsection (1) shall be exercisable subject to and in conformity with any directions given under the said section 65.

(4) The traffic authority may make provision for trams to take priority over other means of transport at any junction of a road and a tramroad or road tramway.

(5) Trams shall be taken to be public service vehicles for the purposes of section 122(2)(c) (Exercise of functions by local authorities) of the 1984 Act.

(6) Expressions used in this section and in the 1984 Act shall have the same meaning in this section as in that Act.

11. The Owner of the Land. In Clauses 58 and 59 there is an assumption that it is obvious who this is. It is not. In this respect the draft Bill is materially defective. What happens when a heritable creditor has entered into possession? What happens where a local authority has not made up title or an executor has not made up title or a trustee in bankruptcy has not made up title. These are very regularly encountered examples. Not to deal with them will seriously limit the efficacy of the wayleave powers. This is all the more so as many of the heating channels could be placed in the solum of roads where the owner is hard to trace because no title has been made up. However, it really should not be necessary to make up title by notice of title to grant such a right. If you do not wish to deal with this you should expand the compensation provisions in Clause 63 to include the costs of making up title. This is a big problem in the electricity industry as they award compensation without regard to the costs of making up title. That costs completely eats up any compensation (and the electricity companies refuse to pay for this) with the result landowners simply do not wish to engage. I would suggest that for this section a wider definition of owner that allows a person to grant the right without making up title. That saves cost and time.
and renders heat transfer rights cheaper to obtain. Might I suggest lifting and adjusting the excellent provisions that are already used in the Title Conditions (Scotland) Act 2003, asp. 9, s.123. There is no need to reinvent the wheel. As regards technical property law that 2003 statute is probably the finest hour of the Scottish Parliament and there is a lot in it that could be used in this present draft Bill.

12. Section 59: Necessary Wayleaves. Many of these types of heat transfer channels will be placed in areas where it is difficult or impossible to trace the owner e.g. the solum of a road. As presently drafted the Bill cannot deal with this and there will be a degree of paralysis. I would suggest an additional ground for the grant of a necessary wayleave is that the solicitor acting for the licence holder certifies that, after suitable conveyancing enquiries and publicity, it has been impossible to identify with sufficient certainty the owner of the land.

13. Title Raiders. In addition to this, I would suggest a procedure, building on what I have said in para 12 to allow the solicitor to certify a title as being unknown in its ownership even if a title raider comes forward with a spurious claim. In such a case, of course, the compensation can be placed I trust for later decision as to entitlement but at least the work can proceed. Title raiders also appear where the agreement has been entered into by the wrong person. That is another reason why prescription should be considered as a basis for creation.

14. The Law of Fixtures: Inaedificatio Solo Solo Cedit. Who do you think actually owns the apparatus placed in the ground? Under the present law it is not the licence holder but the owner of the ground as the apparatus will be a fixture. This, I think is something that needs changed by confirmation that the owner retains ownership of the land (so when the apparatus is removed no conveyancing is needed) and the space in which the apparatus is located but the apparatus belongs to the licence holder. In this regard there is precedent in the Electricity legislation (Electricity Act 1989, c.29, Schedule 6, Electricity Code, para 11) as to the identity of the owner of a domestic electricity meter (albeit that provision is badly worded by referring to “landlord”). In this respect, however, this is a further complexity as it is entirely possible the licence holder in a heat transfer scheme may simply lease the apparatus in some form of finance lease from a bank or security arrangement (just like the photocopier in the office).

15. Variations and Discharge. The draft Bill provisions in ss.58 and 59 relative to Agreements and necessary wayleaves all deal with initial grant. It is inevitable that these agreements will have to be discharged or varied in particular situations. Some provision will have to be made for that. It is also important to extend the list of “Title Conditions” in Title Conditions (Scotland) Act 20023, asp. 9, s.122. If that is not done a wayleave agreement may confer an unexpected ransom potential on the licence holder. The power of the Lands Tribunal to vary such wayleaves will then be engaged. I see the draft Bill Clause 67(2) already allows reference to the
Land Tribunal as regards compensation and this is a logical concomitant of that. One does not wish a situation where a heat transfer licence in years to come itself hinders development that could be resolved by a simple variation. Provision should be made for variation and discharge and registration of deeds effecting such in the Land Register of Scotland.

16. Extinction. Nothing is stated in the draft Bill about extinction of the wayleaves. I suggest this should be remedied. Not only should express variation and discharge be permitted but also negative prescription and abandonment. These doctrines tidy up oddities on the ground and make the law work. The provisions in Land Registration (Scotland) Act 2012, asp. 5, s.91 about extinction upon compulsory purchase should be extended to wayleaves just as they are in relation to servitudes.

17. Land Registration and grant of persons without proper title. The provisions of Land Registration (Scotland) Act 2012, asp. 5, s.90 should be extended to wayleaves just as they apply to servitudes. This will assist in some way with the problems cast up by the nemo dat rule.

18. Unilateral Abandonment? Is it intended that the licence holder will have a power of unilateral abandonment of a licence right or is the consent of the landowner required? Something should be said on that particularly if the necessary wayleave makes no provision itself. Clause 62 does provide for removal but does not address this issue of abandonment head on. For example, one of the conditions of an agreement may be the supply to the landowner of free power or at a discounted tariff.

19. Section 60 is Poorly drafted. This is probably my key recommendation, This Clause needs wholesale redrafting. It refers to parties bound by the wayleave right as the “owner” and “occupier”. This is English inspired nonsense. At the moment that does not even bind a bank having a security over those subjects. It does not bind those with other non possessory rights in the land. It does not bind those who exercise public rights of way or the public right to roam under the Land Reform (Scotland) Act 2003. The reason is that it certainly does not bind third parties outwith that short list. The solution is simply to declare in the Bill the network wayleave right to be a “real right”. That is a path the Scottish Parliament has already taken in several Acts. For example, Stirling Alloa Kincardine Railway and Linked Improvements Act 2004, s.16 as amended: “The powers conferred by this section constitute a real right”. Quite simple really. There are other examples I need not list here all in Scottish Acts but I can supply further details if needed. The declaration as to constitution of a real right solves a whole host of other problems.

(a) The draft bill so far as I can see does not require the Agreement with the landowner to be in writing. That is a big mistake. Requirements of Writing (Scotland) Act 1995, s.1 should apply and, if the rights are real rights, it will apply unless the heat transfer wayleave right if the right
endures for more than a year. Notice the possible limit of time in the necessary wayleave in Clause 59(2)(a).

(b) As a real right the wayleave may be enforced against anyone who interferes with it and no recourse will be needed to the law of delict or nuisance. I rather doubt if the criminal law is needed (See draft Bill, clause 65(8) if the right is a real right but I note that clause seeks to create an offence if “a person” obstructs access. That obstruction can be restrained by civil process very easily if the right is a real right. At the minute the section reads like a half baked import from England or Ireland where the notion of real rights is weak and recourse to the criminal law of trespass is needed to bolster their ideas. In Scotland we can do better than this.

(c) The Bill should address whether derivative real rights can be granted in respect of a heat transfer wayleave. I do appreciate the only party who can hold the wayleave is a licenced holder but it does not preclude the “enjoyment” of those rights by other such as tenant or a heritable security holder in the form of a standard security. Such enjoyment does not need an assignation. The latter – the standard security - may be useful for raising private finance. If such is desired, you may wish to make provision that when a bank enters into possession it must also have a licence or run the operation through the company by means of a floating charge or by an SPV with a licence. This is quite sophisticated stuff and needs a bit of thought. A lease arrangement would also be useful as there may be occasions that licence holders are not the only operator in town and it may be worthwhile to have the sharing of facilities. If such is the case an addition to Clause 61(3) is needed to address the issue of the imposition of conditions.

(d) If the right of wayleave is to be a real right it, and all ancillary rights, will bind others anyway. I note, however, there us a major exception to this in Clause 66 limiting the powers of licence holders. In principle, I accept that is a good idea.

20. Publicity and Registration. Apart from the issue of prescription noted above, I would strongly recommend that wayleaves should be registered in the Land Register of Scotland to make them real. This gives notice to all using land. It is economically sound and allows maximum safe use of land. There will be no dominant tenement except if a praedial servitude is constituted by the right should be shown on the title sheet of the burdened land. I suspect you will have to alter the Land Registration etc. (Scotland) Act 2012, asp. 5 as the Keeper will wish to show the route of these heat transfer rights on the Land Register.

21. The Crown. Clauses 79 and 80 should be changed to deal with what appear to be ownerless land and the Q & LTR. Such land is often the scrag end of an estate, the alveus or a river or loch or the solum of a road – just where a pipe is to be laid. It might be vest to have a procedure that does
not inadvertently confer a veto on the Q & LTR but instead allows Scottish Ministers to deal with this directly. I suspect this could otherwise take ages, waste the time of the Q & LTR who are busy people engaged on other valuable work and hold up much of what is proposed in a single project.