



The Scottish Parliament
Pàrlamaid na h-Alba

Economy, Energy and Tourism Committee

3rd Report, 2012 (Session 4)

**Stage 1 Report on the Land
Registration etc (Scotland) Bill**

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The Scottish Parliament
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Economy, Energy and Tourism Committee

Remit and membership

Remit:

The remit of the Committee is to consider and report on the Scottish economy, enterprise, energy, tourism and renewables and all other matters within the responsibility of the Cabinet Secretary for Finance, Employment and Sustainable Growth apart from those covered by the remit of the Local Government and Regeneration Committee and matters relating to the Cities Strategy falling within the responsibility of the Cabinet Secretary for Health, Wellbeing and Cities Strategy.

Membership:

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Mike MacKenzie
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Clerk to the Committee

Stephen Imrie

Senior Assistant Clerk

Joanna Hardy

Assistant Clerk

Diane Barr



The Scottish Parliament
Pàrlamaid na h-Alba

Economy, Energy and Tourism Committee

3rd Report, 2012 (Session 4)

Stage 1 Report on the Land Registration etc (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. The Land Registration etc. (Scotland) Bill¹ (SP Bill 6), (“the Bill”) was introduced to the Scottish Parliament by the Cabinet Secretary for Finance, Employment and Sustainable Growth on 1 December 2011. The Bill was accompanied by Explanatory Notes² (SP Bill 6-EN), including a Financial Memorandum, and a Policy Memorandum³ (SP Bill 6-PM). The Explanatory Notes and the Policy Memorandum have been prepared by the Scottish Government.

2. On 7 December 2011, under Rule 9.6, the Parliament agreed that the Economy, Energy and Tourism Committee (“the Committee”) be appointed as the lead committee to consider and report on the general principles of the Bill at Stage 1.⁴

Purpose of the Bill

3. The Bill proposes to reform and restate the law on the registration of rights to land in the Land Register; to enable electronic conveyancing and registration of electronic documents in the Land Register; to provide for the closure of the Register of Sasines in due course; to make provision about the functions of the Keeper of the Registers of Scotland; to allow electronic documents to be used for certain contracts, unilateral obligations and trusts that must be constituted by writing; to provide for the formal validity of electronic documents and for their registration; and for connected purposes.

¹ Land Registration etc. (Scotland) Bill. Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/44469.aspx>

² Land Registration etc. (Scotland) Bill, Explanatory Notes. Available at:

[http://www.scottish.parliament.uk/S4_Bills/Land%20Registration%20etc.%20\(Scotland\)%20Bill/Ex_Notes_and_FM.pdf](http://www.scottish.parliament.uk/S4_Bills/Land%20Registration%20etc.%20(Scotland)%20Bill/Ex_Notes_and_FM.pdf)

³ Land Registration etc. (Scotland) Bill, Policy Memorandum. Available at:

[http://www.scottish.parliament.uk/S4_Bills/Land%20Registration%20etc.%20\(Scotland\)%20Bill/Policy_Memo.pdf](http://www.scottish.parliament.uk/S4_Bills/Land%20Registration%20etc.%20(Scotland)%20Bill/Policy_Memo.pdf)

⁴ S4M-1519 Bruce Crawford on behalf of the Parliamentary Bureau: Designation of Lead Committee

Committee consideration

4. The Committee agreed its approach to evidence-taking on 14 December 2011 and took evidence at 5 meetings. Extracts from the minutes of the oral evidence sessions are attached in Annexe C and the written evidence and extracts of the *Official Reports* of the oral evidence sessions are attached in Annexe D. The Committee would like to express its thanks, both to those who submitted written evidence, and to those who took part in the oral evidence sessions.

5. The Committee issued a call for evidence on 15 December 2011 and received a total of 34 written submissions.

BACKGROUND TO THE BILL

6. The Land Register of Scotland was established under the Land Registration (Scotland) Act 1979 (c 33)⁵ to replace and improve upon the Register of Sasines, which has been in use since 1617 for the registration of deeds relating to land. The Land Register was brought into operation in phases across Scotland and, since 1 April 2003, has applied throughout the country. The Register of Sasines is, however, still in use for certain classes of deed.

7. In 2002, the Keeper of the Registers of Scotland, with the agreement of Scottish Ministers, invited the Scottish Law Commission (SLC) to review the law of land registration in Scotland. The SLC issued three discussion papers on land registration. The first on *Void and Voidable Titles*, the second on *Registration, Rectification and Indemnity* and the third on *Miscellaneous Issues*.⁶ The SLC project culminated in the publication of its *Final Report on Land Registration* including a draft Land Registration (Scotland) Bill, in February 2010.⁷ The policy in the Bill as introduced to the Scottish Parliament follows closely the policy in the Bill explained in the SLC report, though there are some differences of detail.

The consultation process

8. A formal public consultation process was carried out by the Registers of Scotland (RoS) in 2010. Prior to this the Scottish Law Commission (SLC) carried out a consultation process, which is contained in Appendix B of its report. The RoS consultation was based on the draft Bill in the SLC report and contained a number of questions. It was circulated to representative bodies of the legal profession, key lenders and representative bodies within the lending industry, a number of government bodies, all Scottish local authorities and all Scottish university law schools. The primary distribution list of consultees is available on the RoS website.⁸ The consultation was also advertised in the *Journal of the Law Society of Scotland*.

9. A total of 71 responses were received. Of those, 29 answered only the questions that pertained to electronic registration and conveyancing, whilst the remaining 42 responses varied in the questions that they answered. A minority of respondents addressed the questions relating to the completion of the Land Register, such as the requirement for first registrations, the introduction of voluntary registrations and the closure of the Register of Sasines. Responses to those questions indicated there was strong support for the completion of the Land Register.

10. A minority of respondents answered the questions on the effect of registration, rectification of inaccuracies and the state guarantee of title. Of those that responded there was strong support for aligning the consequences of registration in the Land Register with the normal rules of property law and for a duty on the Keeper to rectify all inaccuracies in the Land Register which come to

⁵ <http://www.legislation.gov.uk/ukpga/1979/33/contents>

⁶ <http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/2000-2009/>

⁷ <http://www.scotlawcom.gov.uk/publications/reports/2010-present/>

⁸ Registers of Scotland: www.ros.gov.uk

light. The proposals to adjust the state guarantee of title to make it less likely that a “true” owner would be deprived of title to his or her property were particularly popular, with 21 out of the 23 respondents (91%) expressing their support.

11. The least popular proposal was that of permitting Keeper-induced registrations. Eleven out of 23 stakeholders responding to the main question on this topic (48%) were supportive; four were opposed (17%); and eight (35%) left the question open.

12. A stakeholder event was held in Edinburgh in June 2011 and further events were held in Edinburgh, Glasgow and Aberdeen in November 2011. In 2011, RoS conducted a Scottish Firms Impact Test with 10 Scottish firms to discuss the impact of the proposed Bill on their businesses.

13. The Economy, Energy and Tourism Committee considers that the Scottish Government’s consultation on the proposals contained within the Bill has been acceptable, with the exception of a new offence created by section 108 on which we comment later in the report.

14. We note the extensive consultation by the Scottish Law Commission which preceded the Bill.

THE GENERAL PRINCIPLES OF THE BILL: KEY ISSUES

Policy intention

15. A key policy aim of the Bill is the completion of the Land Register. The Policy Memorandum states that “Currently, approximately 55% of title holdings in Scotland are registered in the Land Register. However, this only equates to around 21% of the land mass”, and that “Although Land Register coverage continues to grow, total coverage is unlikely to be completed without legislative change.”⁹ The Bill provides a statutory framework for the continuation and improvement of the land registration system in Scotland.

16. The Bill contains several provisions aimed at achieving the completion of the Land Register. These include the eventual closure of the Register of Sasines and 3 ways to increase first registrations of titles in the Land Register: increased triggers for first registration; a power to remove the Keeper’s discretion to refuse voluntary first registrations; and a power that will allow the Keeper to initiate registration of any unregistered property without an application being made.

17. It also makes amendments to the Requirements of Writing (Scotland) Act 1995¹⁰ to permit all types of land deed and contracts for the sale of land (known as missives) to be in electronic form, subject to safeguards. It provides a new legislative basis for electronically valid documents and allows for registration of those documents in any register the Keeper controls.

18. The other main areas of the Bill are: the introduction of a system of advance notices to replace the letters of obligation currently granted by solicitors who act for the seller of land; registration of a title that is definitive in nature and extent and backed by a state guarantee; provisions for the rectification of errors; the introduction of a new statutory offence; a withdrawal and amendment procedure; shared plot title sheets; a new procedure in relation to prescriptive claims; registration of deeds affecting registered leases; provisions for fees; consultancy and other powers.

Completion of the Land Register

19. There was overwhelming support from witnesses for a Land Register that is reliable, secure and accessible and for the eventual closure of the Register of Sasines. However, although the Committee heard that the policy aim of a complete register was desirable, there were questions raised about whether or not this was possible to achieve within a reasonable time frame or indeed at all. It is clear to the Committee that transaction-based applications alone are not enough to complete the Register.

20. The Committee considered how, and to what extent, the proposed new powers for increasing registrations would work. The Bill contains four strategies to accelerate the registration process and to complete the Register. Firstly, all

⁹ Land Registration etc. (Scotland) Bill, Policy Memorandum. Available at: [http://www.scottish.parliament.uk/S4_Bills/Land%20Registration%20etc.%20\(Scotland\)%20Bill/Policy_Memo.pdf](http://www.scottish.parliament.uk/S4_Bills/Land%20Registration%20etc.%20(Scotland)%20Bill/Policy_Memo.pdf)

¹⁰ <http://www.legislation.gov.uk/ukpga/1995/7/contents>

transfers and not just those arising from a sale will induce first registration. Secondly, deeds which create encumbrances on land, and in particular securities (mortgages), will, in due course, trigger first registration of the land to which they relate. Thirdly, the Keeper will continue to accept 'voluntary' first registrations and may, if Ministers so decide, lose discretion to refuse such registrations. Fourthly, the Keeper can register land without the consent or co-operation of the owner.

21. Graeme McCormick of Conveyancing Direct detailed the impact that extra fees and costs triggered by a first registration could have on those who wish to remortgage. He asked for clarification of whether there would be one charge and if it would be on the value of the property—

“If we are to have mandatory land registration of a title on a remortgage, we must consider whether there will be a charge according to the value of the property or just a single payment regardless of the value of the property. That obviously affects the economics and the all-in charges that are likely to be made”.¹¹

22. In oral evidence to the Committee, the Minister for Energy, Enterprise, and Tourism indicated that at present fees for all registrations are set on a scale which does not reflect the time and work that the Registers of Scotland undertake for land registrations. He indicated that the Bill seeks to rectify this. He said—

“...fees are based on a scale; they are not based on the actual cost of the work required for an application. The first registration of title of a large landholding of several thousand hectares in Scotland would require the keeper to do a considerable amount of work, and the cost to the keeper might far exceed the fee that the keeper is entitled to receive for that work.”¹²

23. The Committee heard that, as the Registers of Scotland is self-funding, if fees are to be reduced in one area then they would have to be raised in another. Gavin Henderson of the Registers of Scotland confirmed that “time and line” fees would be considered as an option in the proposed consultation. He said—

“As you know, the fee power in the bill is subject to affirmative procedure, and ministers will want to consult stakeholders on what an appropriate level would be before moving to time-and-line charging for only some-if any-properties.”¹³

Voluntary registrations

24. Section 27 of the Bill provides for application for voluntary registration. By continuing to allow the Keeper to accept voluntary registration the aim of the Bill is to assist in the acceleration of land registration coverage. There was widespread support in both written and oral evidence for this provision in principle. However, the Committee heard from a number of witnesses that for it to have the necessary

¹¹ Official Report, 11 January 2012, Col 749.

¹² Official Report, 8 February 2012, Col 952,

¹³ Official Report, 8 February 2012, Col 957.

impact there should be a reduced fee for voluntary registration. Ross Mackay of the Law Society of Scotland held this view—

“If we ask the public to register voluntarily and then hit them with a big fee in the process, their response will be, “Thanks, but no thanks.””¹⁴

25. A number of witnesses shared this view, including Richard Blake of Scottish Land & Estates Ltd who told the Committee that a reduced fee procedure was in operation in England and Wales—

“I suspect that that is an area in which there might be discussion about an application fee and whether encouragement should be given. I think that that is the case in England and Wales, where the fee for application for voluntary first registration is pretty low, to encourage people to get land on to the register.”¹⁵

26. The Committee heard that for those who own a lot of land the level of voluntary registration costs act as a disincentive. Tom Axford told the Committee that this was an issue for Scottish Water—

“We are moving to voluntary first registration for selected key sites. At the moment, the issue with that is the fees and costs that are involved, which we need to balance up.”¹⁶

27. In supplementary evidence the Keeper, Sheenagh Adams, confirmed to the Committee that currently the fee for voluntary registrations is the same as the fee for trigger-induced registrations. However, she indicated that the level of fees was a matter for Scottish Ministers, who would be consulting on this issue. She said—

“Fees are set by Scottish Ministers and are prescribed by the Fees in the Registers of Scotland Order 1995 (as amended) ... Ministers will be considering and consulting on whether this remains the appropriate feeing mechanism when they next consider making a Fee Order.”¹⁷

28. The Committee appreciates that voluntary land registration is a key part of the policy aim of increasing the amount of registered land and towards the eventual completion of the Land Register. Given that the Registers of Scotland currently has reserves of approximately £75 million, we ask the Scottish Government to consider possible ways of incentivising voluntary land registration, such as the introduction of reduced fees in more complex cases.

Keeper-induced registrations

29. Section 29 of the Bill provides for Keeper-induced registration. This provision gives the Keeper the power to register land without an application from, or the consent of, the landowner. The Committee was told that the main purpose

¹⁴ Official Report, 11 January 2012, Col 748.

¹⁵ Official Report, 18 January 2012, Col 830.

¹⁶ Official Report, 18 January 2012, Col 830.

¹⁷ Registers of Scotland, supplementary written submission, Annex E, page 5.

of the inclusion of this section is to register land that would perhaps not ordinarily be registered and thereby achieve a complete Land Register.

30. There were a number of concerns raised in evidence about the cost implications for landowners and the proposal for land to be registered without the landowner either being notified beforehand or giving their consent. There was also concern that a landowner could be asked to pay for a re-registration which they had not requested and may not want.

31. Some witnesses requested clarification on whether a fee would be charged for this type of registration. Andy Wightman told the Committee that the issue of who paid should depend on the circumstances. He said—

“If the public interest is in registering the land, the keeper should substantially pay. However, the owner should not be exempt. As a consequence of registration, the owner will get a much better title that is guaranteed by the state. That is incredibly valuable to have, in comparison with the quality of titles that some people have. It is therefore only fair that owners should pay something. However, sending somebody a bill for something that they did not ask to be done is in a sense a political problem.”¹⁸

32. In oral evidence to the Committee, Richard Blake of Scottish Land & Estates Ltd indicated that even if there were no fees associated with a Keeper-induced registration the landowner would still incur legal costs checking that the title received from the Keeper was correct. He requested clarification on the fees issue and on how the process would work, stating—

“As far as I can see, the bill neither says anything about when the keeper has to inform a landowner that a keeper-induced registration has taken effect, nor sets out the period for raising what we might call an objection or appeal against the certificate as issued. Will the keeper be under an obligation to deal with any queries that the landowner makes after a keeper-induced first registration certificate has been issued? All those practical issues need to be seriously addressed.”¹⁹

33. In oral evidence to the Committee the Keeper confirmed that there were no plans for reimbursement of the legal costs incurred by landowners checking their land certificate was accurate, whilst acknowledging that this was not an unreasonable thing for landowners to do. She said—

“... the effort and investment that a landowner wanted to put into checking the outcome of a keeper-induced registration would be their choice.”²⁰

34. The Minister for Energy, Enterprise and Tourism reiterated this view in his evidence to the Committee. He said—

“There can therefore be considerable benefits to a landowner in a keeper-induced registration, a voluntary registration or a first registration, because

¹⁸ Official Report, 18 January 2012, Col 809 - 810.

¹⁹ Official Report, 18 January 2012, Col 829.

²⁰ Official Report, 25 January 2012, Col 868.

they will then have a clear title that is based on the Ordnance Survey map and which, in most cases, is registered with the keeper without exclusion of indemnity, and so can be used for securitisation purposes”.²¹

35. In oral evidence to the Committee the Keeper outlined a proposal to be put to Scottish Ministers to use Keeper-induced registrations over a 5-10 year period to register “research areas”, which were expected to be a quite cheap and easy method of getting a lot of titles on to the Land Register. She said—

“Over the years, we have done a lot of pre-mapping in research areas ... We think that something like 720,000 titles in those research areas are not yet on the land register ... We will be looking into the cost of that, and talking about it to the minister.”²²

36. In supplementary evidence to the Committee the Keeper stated that concerns regarding costs to landowners was something that had been considered and a commitment had been made that Keeper-induced registrations would not be carried out in the lifetime of this Parliament—

“This concern has been recognised by the Minister and the Keeper and a commitment has been given that RoS will not carry out any Keeper-induced registrations during the lifetime of this Parliament. Given this, we do not consider this option should be progressed further at this time.”²³

37. This was in contrast to the oral evidence that the Minister for Energy, Enterprise and Tourism gave, where he restricted this commitment to large and complex land titles only—

“In particular, there will be no keeper-induced registration of large and complex land titles in this parliamentary session.”²⁴

38. It is unclear to the Committee, partly as the detail will follow in subordinate legislation, whether there will be a fee for Keeper-induced registration. We therefore ask the Minister to make the Scottish Government’s intentions clear during the Stage 1 debate.

39. The Committee is unclear how the Keeper can achieve the inclusion of research area titles within the Land Register when it would appear that Keeper-induced registrations have been ruled out in this Parliamentary session and how this approach would be consistent with a priority of completing the Land Register. The Committee would appreciate clarity on this and on how prescriptive Ministers intend to be in making decisions on Keeper-induced registrations. We therefore recommend that the Scottish Government clarify when it intends to begin Keeper-induced registrations and also how they will work in practice.

²¹ Official Report, 8 February 2012, Col 954.

²² Official Report, 25 January 2012, Col 867.

²³ Registers of Scotland, supplementary written submission, Annex E, page 6.

²⁴ Official Report, 8 February, Col 949.

First registrations

40. The Committee is aware of the crucial importance of the first registration of land as it determines the quality of the Land Register. The Committee has heard evidence from witnesses expressing their unhappiness with what is seen as the low quality of first registrations.

41. The Council of Mortgage Lenders highlighted in their written submission that they are concerned about the time that it takes at present for first registrations and the possible increased risk to solicitors of any such delays. It said—

“From the perspective of our members the main interest which they will have in this matter will be to ensure that Standard Securities granted in their favour as security for lending which they have provided are registered as quickly as possible in the Land Register and there are no delays which could expose our members to additional risk ... The speed of registration in Scotland compares unfavourably with that in England and Wales, particularly on a first registration and this is an area which in our view needs to be addressed.”²⁵

42. The Committee heard from the Keeper that the time for first registrations may increase as some of the first registrations prompted by the new triggers were expected to be complex and time consuming, which would have resource implications for the Registers of Scotland. She said—

“The bill provides for additional triggers that will bring in more registrations—we estimate that it will be about 7,000 a year from the new triggers ... Many of the titles that still have to come on to the land register will be fairly complex, because the easy stuff has been sold and transacted on.”²⁶

43. The Committee considers that the powers contained within the Bill for increasing land registration will assist in securing the desired objective of a complete Land Register. The Committee appreciates that these powers will have significant resource implications for the Registers of Scotland and therefore asks the Scottish Government to consider how they can be implemented to ensure the correct balance is struck between incentives, fees and costs to the Keeper.

Fees

44. Section 106 provides Scottish Ministers with the power to set fees for registration. Subsection 106(2) allows different fees to be set for different types of application, for example reduced fees for electronic applications or voluntary registrations.

45. In the Financial Memorandum it states that the cost of first registrations for dispositions for no value and notices of title is expected to be around £2.34 million, but that the Registers of Scotland do not intend to recover these costs through increases to fees—

²⁵ Council of Mortgage lenders, written submission, page 1.

²⁶ Official Report, 25 January 2012, Col 865.

“The net increase in the annual cost of registering these applications has been assessed to be around £2.345 million ... RoS will seek to cover the cost of this through efficiency gains from new systems and processes and not from fee increases.”²⁷

46. The Committee heard that some practitioners had serious concerns about current and future fees, in particular the proposal for “time and line” fees for complex registrations.

47. Fiona Letham of Dundas & Wilson told the Committee of her concerns. She said—

“We do not support any move to increase fees. A number of our clients who deal with property in England are surprised to find that the fees for registering high-value properties in Scotland are significantly—indeed, 10 times—higher than they are there ... I have to say that, with regard to complex transactions, I am concerned about proposals to allow the keeper to charge on a time-and-line basis rather than according to a scale.”²⁸

48. In its written submission, the Scottish Property Federation highlighted the higher fees at present in Scotland compared to England and Wales and say this could be a disincentive to investment. It stated—

“An additional point we would make here is the significant difference between Registration fees north and south of the border where Scottish Land Registration fees are sometimes considerably higher than their English counterparts. The maximum Scottish fee is some £7,000 whereas in England HM Land Registry charge at a maximum £920 for properties in excess of £1mn.”²⁹

49. The Committee was told that the increase in fees could also have a disproportionate impact on the time and cost of a re-mortgage application. Kenneth Swinton of the Scottish Law Agents Society indicated that any fees need to be proportionate and not slow down the process—

“Our concern about fees relates to a situation in which a title is at present in sasines and the owner wishes to remortgage. Under the bill, that might be a trigger event, depending on whether those particular provisions are activated, and we doubt whether it is proportionate to increase the costs of a remortgage transaction for those who remortgage and slow the transaction down by requiring a first registration”.³⁰

50. The Committee notes the level of fees is to be dealt with in future subordinate legislation. It believes that the level of fees set is central to the success of completion of the Land Register. The Committee considered 2

²⁷ Financial Memorandum, paragraph 405:

[http://www.scottish.parliament.uk/S4/Bills/Land%20Registration%20etc.%20\(Scotland\)%20Bill/Ex_Notes_and_FM.pdf](http://www.scottish.parliament.uk/S4/Bills/Land%20Registration%20etc.%20(Scotland)%20Bill/Ex_Notes_and_FM.pdf)

²⁸ Official Report, 11 January 2012, Col 748.

²⁹ Scottish Property Federation, written submission, page 2.

³⁰ Official Report, 11 January 2012, Col 749.

issues: the level of fees in general and the fees incurred due to new triggers and powers in the Bill.

51. The Committee believes that the setting of fees will have an impact on land registration and that, if these are set too high, this could act as a disincentive. There is a balance to be struck between the benefit of registration and the cost to the Keeper. The Committee notes the particular proposal to move to “time and line fees” that are not necessarily limited to the value of property and asks the Minister to clarify the Scottish Government’s position during the Stage 1 debate.

Ability to cope with the expected increase in registrations

52. Concerns were expressed about the ability of the Registers of Scotland to cope with the increase in first registrations, estimated as “an additional 7,000 applications per annum”,³¹ resulting from the drive to complete the Register.

53. In oral evidence to the Committee the Minister for Energy, Enterprise and Tourism provided assurances that he was confident that the measures that the Registers of Scotland had put in place were sufficient to cope with the increased workload. He said—

“ ... we are confident that the keeper has the capacity to deal with the workload in the times ahead. She is also building up capacity to cope with that, in particular the complex work that is required in relation to examination of title.”³²

Timeframe and target

54. Whilst there was a clear view that there would be economic benefits to consumers as well as to public and private bodies in having an accurate and complete Land Register, there were conflicting views on whether or not an accelerated programme to complete the Register should be undertaken. Andy Wightman told the Committee that any proposed acceleration must take account of the cost. He stated—

“If you want Registers of Scotland to continue to be a self-funding organisation that does not receive any public money, a balance must be struck between the demands on its time, the costs to those who are paying fees for the registration of titles and public demand for that information ...”³³

55. The Committee also heard conflicting views on whether or not a target date for completion of the Land Register should be set. Andy Wightman told the Committee that it would be “highly beneficial”,³⁴ whilst Iain Langlands of the Royal Institute of Chartered Surveyors (RICS), thought that “... a target must be in there, or the aspiration simply will not be achieved.”³⁵

³¹ Financial Memorandum, paragraph 405.

³² Official Report, 8 February 2012, Col 960.

³³ Official Report, 18 January 2012, Col 808.

³⁴ Official Report, 18 January 2012, Col 812.

³⁵ Official Report, 18 January 2012, Col 812.

56. In contrast, Ann Stewart, of the Scottish Property Federation told the Committee that, whilst completion was welcome, it should not be at the expense of businesses continuing to be able to transact swiftly and efficiently. She said—

“It would be quite dangerous to set a target date for this work: instead, it should be phased in sensibly with some easy wins that can be made without too much disruption and within Registers of Scotland’s resourcing capabilities.”³⁶

57. In oral evidence to the Committee the Keeper, whilst not in favour of the proposal to include a target date within the Bill, did agree that placing duties on either Ministers or public bodies to meet a target date was “perfectly feasible and reasonable”. She said—

“There can be advantages and disadvantages in having targets. If they are in the bill, disadvantages could arise if things go wrong and the targets are not met. Furthermore, not enough research has been done into what a reasonable target might be, and into the balance between cost and advantage.”³⁷

58. The Committee agrees that maintaining one land register is a more efficient system. Given the very slow progress of land registration since the 1979 Act was introduced, the Committee recommends the setting of a target and interim targets, even if aspirational, on the face of the Bill.

Accuracy of the Land Register

Use of Ordnance Survey (OS) maps – scale

59. Section 2(b) of the Bill provides that the Land Register is to include “the cadastral map”. Section 11(5) indicates that the cadastral map “must be based upon the base map” and section 11(6) proposes that “the base map” is “(a) the Ordnance Map or (b) another system of mapping, being a system which accords with such requirements as the Scottish Ministers may, by order, prescribe”.³⁸

60. Currently, the plans used in the Land Register are based on the Ordnance Map, and while section 11 of the Bill allows the Keeper to change providers, the Committee heard from a number of witnesses that this is not something which is likely to happen in the near future due to costs and the lack of an alternative provider.

61. In evidence to the Committee a number of concerns were expressed about the scale and accuracy of the Ordnance Survey maps used and the Keeper’s reliance on them for land registration.

62. In oral evidence, Gary Donaldson of Millar & Bryce indicated that there were ongoing issues with the scale of the Ordnance Survey maps. He said—

³⁶ Official Report, 25 January 2012, Col 844.

³⁷ Official Report, 25 January 2012, Col 869.

³⁸ Land Registration etc. (Scotland) Bill, page 5:
<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/44469.aspx>

“Ordnance Survey has invested heavily and is improving the accuracy of the maps, but there is an inherent problem with the scale of data capture. That is not necessarily the keeper’s problem.”³⁹

63. A number of witnesses outlined problems encountered due to the larger scale used for mapping rural areas. Ross MacKay of the Law Society of Scotland told the Committee that in rural areas the tolerance level was greater than in urban areas 1:5,000 and that this “will inevitably lead to disputes”.⁴⁰

64. This was a view echoed by Ken Swinton of the Scottish Law Agents Society who told the Committee that the scale of mapping for the Highlands area was even worse: “The mapping in Highland areas is done on a scale of 1:10,000”.⁴¹

65. Alan Cook of the Scottish Property Federation told the Committee that the increase in the development of wind farms requires rural areas to be mapped to a greater degree of accuracy. He said—

“The problem has arisen particularly because of the increasing appearance of wind farm developments in rural areas. Suddenly, we need a more precise level of detail in the mapping in order to understand the boundaries of ownerships, but Ordnance Survey is not performing the necessary function to enable us to achieve that.”⁴²

66. The difference between physical and property boundaries was explained by Graham Little of the Ordnance Survey—

“ ... Ordnance Survey maps show not property boundaries-that work clearly falls within Registers of Scotland’s expertise, not ours-but physical features on the ground that might or might not be property boundaries ... the Ordnance Survey map is a map of topography, not a map of title”.⁴³

67. In oral evidence to the Committee, John King from the Registers of Scotland accepted that there were issues in relation to the scale of Ordnance Survey maps, especially maps of rural areas. He stated—

“We have more of a challenge in mountain and moorland areas, which are covered on the 1:10,000 map. Figures from Ordnance Survey suggest that only about 1 per cent of titles in Scotland are affected by the 1:10,000 scale map, so although it covers a significant landmass, the impact on property titles is more contained. That is helpful to us because it means that we can take a more involved approach to mapping in those areas.”⁴⁴

Supplementary plans

68. As a direct result of the scale of the maps being used by the Keeper, disputes are arising between landowners. Ross MacKay of the Law Society of

³⁹ Official Report, 25 January 2012, Col 853.

⁴⁰ Official Report, 11 January 2012, Col 752.

⁴¹ Official Report, 11 January 2012, Col 755.

⁴² Official Report, 25 January 2012, Col 853.

⁴³ Official Report, 18 January 2012, Col 799 and 807.

⁴⁴ Official Report, 25 January 2012, Col 862.

Scotland told the Committee that this is especially the case in urban areas. He said—

“Regrettably, there is an issue with the scale of the plans that are used by the registration system. The smallest scale is 1:2,500. As is made clear, there is a tolerance level of plus or minus 0.3m or 0.4m ... That tolerance level-which is used by Ordnance Survey maps-can be enough to trigger disputes”⁴⁵

69. Other witnesses reiterated this view with Ken Swinton of the Scottish Law Agents Society suggesting that more use be made of supplementary plans—

“The underlying mapping is the issue. In some cases, the answer would be for the keeper to use supplementary plans drawn from the title deeds”⁴⁶

70. One possible option is for rural land to be mapped in more detail in individual cases. In oral evidence to the Committee the Keeper explained that this is done when required. She stated—

“Where we are not happy with the scale of mapping in rural areas, we have the facility to get Ordnance Survey to go out and map the area to a more detailed scale. We can also send out our own surveyor to look at issues on the ground if we cannot get the information that we need to make an accurate registration.”⁴⁷

71. Graham Little of the Ordnance Survey confirmed that they can provide supplementary information if there is a request to do so—

“Where there is a requirement for land registration, Registers of Scotland will often commission us to supply that information. I am speaking about small items of change that may not be relevant to many map users, but may be relevant to land registration.”⁴⁸

Technological advancements in surveying methods

72. Due to advances in technology it is possible to survey land to a greater level of accuracy than the OS maps provide. This point was accepted by Graham Little of the Ordnance Survey who explained that ideally the OS maps would be aligned with modern accuracy standards, but that costs and resources were an issue. He said—

“Ordnance Survey has been collecting data for many decades—indeed, one could say centuries-and our customers have been using that information for a similar period. We do not have the luxury of being able to wave a magic wand and suddenly bring everything up to modern specifications for positional accuracy.”⁴⁹

⁴⁵ Official Report, 11 January 2012, Col 752.

⁴⁶ Official Report, 11 January 2012, Col 755.

⁴⁷ Official Report, 25 January 2012, Col 864.

⁴⁸ Official Report, 18 January 2012, Col 799.

⁴⁹ Official Report, 18 January 2012, Col 800.

73. A specific issue with the OS maps is that, being mapped on a horizontal plane, they do not always correspond to the measurements on the ground. One way of overcoming this difficulty would be to include the actual measurements on the title plan in the Land Register. Graham Little, Ordnance Survey, agreed that this was a possibility—

“It is quite possible, of course, to put the true measured dimension in the title, if there is a desire to do so, should there be a radical difference between the horizontal and the true slope distance.”⁵⁰

74. John King of the Registers of Scotland acknowledged the need to include new technologies “and think about how we apply them to the Ordnance Survey map to supplement what is already there.”⁵¹

75. The Keeper indicated that any improvements to mapping would lead to increased costs for the consumer. She said—

“Ministers set the level of fees that we can charge and we must balance our books year on year, although there are no annuality issues. The cost of any improvements would be passed on to the users of the service.”⁵²

76. The Minister indicated that he was aware of mapping issues raised, in particular mapping of rural areas and indicated that a working group⁵³ had been established to consider how to improve maps used by the Keeper. He said—

“The keeper has therefore recently set up a mapping group with Ordnance Survey, the RICS and the Law Society to deal with mapping issues ...I have given you our broad response, but we are happy to work further with the committee on this important and complex issue to ensure that we serve rural Scotland as we do urban Scotland.”⁵⁴

77. The Committee heard that a lot of disputes happen because there are not always maps associated with titles in the Register of Sasines and that this will not be the case in the future when only the Land Register is used. Ross MacKay of the Law Society of Scotland told the Committee that—

“... the difficulty at the moment is that many titles are based on old sasines, which have no maps at all”.⁵⁵

78. Despite the shortcomings of the Ordnance Map, the Committee accepts that, due to cost implications and the lack of a suitable alternative, it will continue to be used by the Keeper. It is clear that maps are a key part of the information kept and are not being used simply as “reference material”. The Committee feel that if there is to be confidence in the content of the Land Register, it is essential that it contain the most accurate and reliable

⁵⁰ Official Report, 18 January 2012, Col 803.

⁵¹ Official Report, 25 January 2012, Col 862.

⁵² Official Report, 25 January 2012, Col 864.

⁵³ http://www.ros.gov.uk/professional/registration/plans_working_group/index.html

⁵⁴ Official Report, 8 February 2012, Col 972.

⁵⁵ Official Report, 11 January 2012, Col 753.

information possible and therefore it asks that the Keeper take all necessary steps to ensure that the information is both accurate and reliable. Although there are continuing issues with the scale of the maps, the Committee is of the view that there are steps that the Keeper should take, such as taking a more involved approach to mapping mountain and moorland areas, making more use of supplementary plans as well as the facility to map rural areas in more detail, to increase confidence in the mapping information in the Register.

79. The Committee recommends that supplementary plans, where they provide more accurate mapping information, should be used as a matter of course. This should include maps from the Register of Sasines when property switches from it to the Land Register. Plans on Sasine deeds which are to a larger scale than the OS map should be routinely preserved and appear as supplementary plans on the title sheet.

80. The Committee is concerned that the mapping of rural areas to a larger scale is continuing to cause difficulties and disputes and therefore recommends that the Keeper use supplementary plans and map rural areas to a greater degree of detail as much as possible.

81. The Committee also recommends that the Keeper, as a matter of course, include the dimensions of the map on the title deed where there is a marked difference between the horizontal and the true slope distance.

82. The Keeper should also take all necessary steps to include the use of the latest technology to ensure accuracy of the Land Register.

83. Property on the Land Register is to continue to be identified by means of a plan. As there is no longer a requirement for that plan to be based on the Ordnance Map, the Committee recommends that the Keeper should be proactive in continuing to seek better mapping methods and alternatives.

84. The working group on mapping issues is asked to take the Committee's mapping recommendations into consideration in its deliberations on how to improve the mapping information within the Land Register. The Committee also asks the Scottish Government to provide feedback on the progress of the working group as soon as possible.

Electronic conveyancing and documents

85. The Registers of Scotland *Annual Report and Accounts 2010/11* state that: "Effective IT remains key to RoS operating effectively and providing improved services to customers."⁵⁶ Section 95 of the Bill provides Ministers with the power to "make provision to enable the recording or registration of electronic documents in any register under the management and control of the Keeper".⁵⁷

⁵⁶ http://www.ros.gov.uk/pdfs/ar_1011.pdf

⁵⁷ Land Registration etc. (Scotland) Bill, Section 95.

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/44469.aspx>

ARTL – Automated Registration of Title to Land

86. In December 2004, the Registers of Scotland entered into a 10 year partnership with BT to provide IT services. In 2007 they introduced Automated Registration of Title to Land (ARTL), a system of electronic registration designed to make registration “quicker, more efficient, and cheaper”.⁵⁸ Whilst support for the move to the use of electronic documents and conveyancing is clear, witnesses raised a number of issues about the ARTL system.

87. A number of witnesses questioned whether ARTL was “fit for purpose”. Ian Ferguson of the Scottish Law Agents Society thought that a new system was needed. He said—

“Things such as remortgage transactions are being covered. It is almost not being used for any other purpose: buying and selling is a dead duck at present because the system is not, in my view, fit for purpose. It needs to be changed because it is a mess and it is not working properly. It is too clunky and difficult to work with”.⁵⁹

88. This view was shared by Ross Mackay of the Law Society of Scotland who said—

“Such a system will require robust IT systems. Individual solicitors will have their own systems, and that is fine, but Registers of Scotland’s IT system is not adequate at the moment ... a new system has to be created. When it is ready and it is as simple to use as paper, practitioners will use it.”⁶⁰

89. Others told the Committee that they did not use ARTL at all as it did not cover enough transactions and was not robust enough. Fiona Letham of Dundas & Wilson told the Committee—

“Because it can be used only on rare occasions, it does not speed up the process, due to unfamiliarity and issues that I have heard about that result from information technology capability not being robust enough”.⁶¹

90. In oral evidence the Keeper told the Committee that ARTL was fit for “some purposes”, whilst acknowledging that uptake had been lower than anticipated. She stated—

“ARTL was designed to be used primarily for relaying and discharging of standard securities when the remortgage market was at its height ... so the business that it was designed to cover is no longer there, which explains why the number is reduced.”⁶²

91. In supplementary written evidence,⁶³ Registers of Scotland provided information on the number of applications processed through ARTL, by type of

⁵⁸ http://www.ros.gov.uk/artl/what_is_artl.html

⁵⁹ Official Report, 11 January 2012, Col 759.

⁶⁰ Official Report, 11 January 2012, Col 764.

⁶¹ Official Report, 11 January 2012, Col 760.

⁶² Official Report, 25 January 2012, Col 880.

⁶³ Registers of Scotland, supplementary written submission, Annex A.

application. This showed that, from 2007 to 2011, from a total of 52,412 applications, only 1,804, or 2% of the total, were for dispositions (i.e. for transfers of land). The table below provides more information.

Deed type	deed	2007	2008	2009	2010	2011
Charge	Charging Order	0	0	0	6	0
	HASSASSA Charging order	0	2	18	61	12
	Notice of Payment of Improvement Grant	0	12	189	920	518
	Notice of Payment of Repairs Grant	0	5	183	4,010	2,094
	Standard Security	531	6,903	4,381	3,413	8,382
Discharge	Discharge of Charging order	0	0	0	0	1
	Discharge of HASSASSA Charging order	0	0	0	4	2
	Discharge of Standard Security	482	4,990	4,899	5,278	4,028
	Notice of cessor of Improvement Grant	0	0	0	1	0
Title Transfers	Assignment of Lease	0	0	1	0	2
	Disposition	0	12	48	203	821
Total		1,013	11,924	9,719	13,896	15,860

92. The Financial Memorandum states that moving to electronic registrations should reduce costs to solicitors. The Committee heard that this should then in turn reduce costs to consumers. However, this assertion was questioned in oral evidence by John Scott of the Law Society of Scotland. He said—

“... for most transactions, by far the biggest outlay that the buyer will make is payment of the stamp duty land tax.”⁶⁴

93. In written evidence to the Committee, Registers of Scotland indicated that it was their intention to continue using the digital signature aspect of ARTL and provided costs of the full system to date—

“The costs are set out for the ARTL system and the Public Key Infrastructure (PKI) electronic signature system that underpins it. RoS considers that the PKI system for ARTL will be capable of being substantially re-used for any successor system ... **Total costs** are £6,663,816.”⁶⁵

⁶⁴ Official Report, 11 January 2012, Col 766.

⁶⁵ Registers of Scotland written evidence.

Consumer confidence

94. Both oral and written evidence raised questions as to the ability of Registers of Scotland to provide a robust IT system. In a written submission First Scottish Group warned that—

“The changes required to allow all the proposals in the Bill to be implemented are very significant and on the evidence to date it seems highly unlikely that the Keeper will be in a position to provide a robust system.”⁶⁶

95. In a recent report, the Auditor General cautions about the “continuing uncertainty” of IT projects between Registers of Scotland and their IT provider through the Strategic Partnership Agreement (SPA) and recommends a regular review process. He said—

“The auditor has accepted the results of the impairment review but has identified that the future of some projects being developed under the SPA remains uncertain and has recommended that another specific project designed to provide automated registration of title to land is regularly reviewed to ensure RoS continue to value it at an appropriate level.”⁶⁷

96. In answer to the question “how the conveyancing community can have confidence in the systems that the Registers of Scotland develops?”, the Keeper told the Committee that—

“The current IT director took up his place last summer and he is creating a team that will have the skills to develop or commission the systems that we need. We are also in discussion with our current supplier about changes to the contract, where it goes, and whether it lasts for the full 10 years ... As keeper, my concern is to ensure that the organisation has a proper intelligent client function so that, in future, we get systems that people are desperate to use, love using, and offer real value for money”.⁶⁸

Future IT system

97. There were a number of criticisms from practitioners that the consultation was not wide enough and that there was not enough testing of the ARTL system prior to its introduction. The Committee heard that for any future system lessons needed to be learned from ARTL if “buy-in” from practitioners was to be achieved. Gary Donaldson of Millar & Bryce stressed that an inclusive process would improve any new product. He stated—

“Good stakeholder engagement is essential to ensure that performance issues are addressed as they arise ... Feeding back issues and those issues being addressed are key to ensuring that successful delivery can be scaleable.”⁶⁹

98. This view was shared by others, including Graeme McCormick of Conveyancing Direct, who indicated that consideration should be given to the

⁶⁶ First Scottish Group, written submission, page 2.

⁶⁷ http://www.audit-scotland.gov.uk/docs/central/2011/s22_1011_registers_scotland.pdf

⁶⁸ Official Report, 25 January 2012, Col 880 - 881.

⁶⁹ Official Report, 25 January 2012, Col 855.

impact on costs to small businesses, and widespread testing undertaken. He said—

“You cannot introduce systems that will cost small businesses an absolute fortune. Any system will have to be compatible and properly stress tested. The problem with ARTL is that-despite what Registers of Scotland will say-it was not properly stress tested. The 10 most active domestic conveyancing firms in the country should be asked to test systems properly in order to ensure that they work in different kinds of transactions”.⁷⁰

99. There was support for both these proposals and whilst safeguards would be paramount witnesses felt that the current ARTL system was safe and seemed confident that any new system would be also. In written evidence, the Scottish Property Federation supported the proposals. However, they cautioned that “it will be important to ensure safeguards and examine lessons to be learned from the ARTL process”.⁷¹

100. The Committee heard evidence that making the use of ARTL compulsory would exclude lay people from undertaking their own conveyancing, and on this ground rejected this idea.

101. In oral evidence to the Committee, the Minister gave a commitment to explore with the Keeper the issues raised in relation to the ARTL system. He stated—

“I understand that evidence has been given to the committee by solicitors to the effect that the ARTL system has limited application, and that some have said that it is not fit for purpose. In the light of the questions from committee members and the evidence that you have heard, I will ask the keeper to explore further the issues with me, and we will come back to the committee when we have had an opportunity to do that.”⁷²

102. The Committee acknowledges the widespread support for the proposal for e-registration and welcomes the opportunity for Registers of Scotland to make registration easier and more accessible. The Committee agrees, however, that the ARTL system in its current form is inadequate for the task and welcomes the Minister’s commitment to discuss the ARTL upgrade with the Keeper.

103. The Committee is aware that the uptake of the ARTL system has been disappointingly low and believes that to ensure value for money, and the success of any future system, user “buy-in” will be essential. To harness the current enthusiasm for e-registration, the Committee recommends that before the introduction of an upgraded or new system, the Keeper should from the very start of the design process both consult and test widely.

104. The Committee is concerned about the associated risks and costs of the proposed upgraded IT system to support e-registration and would seek

⁷⁰ Official Report, 11 January 2012, Col 761.

⁷¹ Scottish Property Federation, written submission, page 1.

⁷² Official Report, 8 February 2012, Col 989.

reassurances from the Keeper that any new IT contract would contain the necessary obligations to protect the public purse from future losses. The Committee agrees with the Auditor General's view that ARTL be kept under review for value purposes and awaits the outcome of the Public Audit Committee's inquiry with interest.

Electronic Documents

105. The Bill also allows documents which currently require to be in paper form to be generated and signed electronically. Sections 92-94 amend the Requirements of Writing (Scotland) Act 1995 by providing that, in addition to a 'traditional' paper document, it will be permissible to use an electronic document which is signed by means of an electronic signature. Section 96 further allows for the introduction of e-registration in any register under the management and control of the Keeper.

106. The Committee supports the move towards electronic documents as long as the necessary safeguards are in place.

Prescriptive Claimants

107. Section 42 of the Bill aims to put on a statutory footing the Keeper's current practices and procedures in relation to consideration of a *non domino* dispositions. The Bill provides that certain conditions must be satisfied. These are—

(a) that for a continuous period of 7 years immediately preceding the date of application the land to which the application relates has not been possessed by the proprietor or by any person in right of the proprietor, and

(b) that the land has been possessed openly, peaceably and without judicial interruption by the disponent or by the applicant for a continuous period of 1 year immediately preceding the date of application (or first by the disponent and then by the applicant for periods which together constitute a continuous period of 1 year immediately preceding that date).

108. There is a further time period of 10 years possession after registration before ownership is conferred and the title guaranteed.⁷³

109. In addition, the Keeper must also be satisfied that the proprietor has been notified of the application or, if no owner can be identified, that the application has been intimated to the Crown.

110. The Committee heard arguments both for and against the inclusion of prescription in the Bill. Current legislation is silent on how a *non domino* dispositions should be dealt with, and section 42 provides clear rules for the first time which tighten up current practice.

111. The Committee heard arguments both for and against the use of a *non domino* dispositions. Those from the legal profession were unanimously in favour of provision for such dispositions being included in the Bill. In oral evidence, Ross Mackay of the Law Society of Scotland told the Committee that prescriptive acquisition can be a useful tool for developers. He said—

⁷³ Prescription and Limitation (Scotland) Act 1973, section 1(1).

“It is a useful pragmatic tool for people to be able to go to the keeper and say, “Can we get title to that bit?” so that they can round off the development site-or round off something that has been de facto for many years without causing concern.”⁷⁴

112. The Keeper reiterated this view in her evidence to the Committee. She stated—

“Our view is that a non domino titles are a useful tool in property law and conveyancing in Scotland for a variety of reasons, including both the jigsaw that the previous panel talked about and bringing land back into productive use.”⁷⁵

113. Others expressed an opposing view telling the Committee that, historically, prescriptive claims had been used to gain land unfairly. In written evidence, Andy Wightman stated that land should not necessarily be given to the first person to make a claim. He said—

“... despite such tightening of the rules, the question remains as to whether such first-come, first-served land seizure is desirable in the first place and whether alternative arrangements should be made to deal with land that has no apparent owner.”⁷⁶

Land not possessed for the previous 7 years

114. Many witnesses raised questions about how to prove that land had not been possessed for the required 7 years prior to an application. This would be particularly difficult for those who may not have prior knowledge of an area. Fiona Letham of Dundas & Wilson told the Committee this would impact on developments. She asked—

“ ... how would a developer be able to prove that an owner had not been there for seven years ... The seven-year requirement could lead to long delays for developments that would otherwise happen and be of great economic benefit.”⁷⁷

115. In written evidence, Brodies asked that the 7 year requirement be removed from the Bill. It stated—

“How could one prove that, for example, the verge of a road has not been possessed for 7 years and has been abandoned? ... We would suggest that the requirement to prove 7 years’ abandonment should be removed from the Bill.”⁷⁸

116. In oral evidence to the Committee, John King of the Registers of Scotland acknowledged that in some cases providing proof would be challenging. He said—

⁷⁴ Official Report, 11 January 2012, Col 780.

⁷⁵ Official Report, 25 January 2012, Col 884.

⁷⁶ Andy Wightman, written evidence, page 2.

⁷⁷ Official Report, 11 January 2012, Col 781.

⁷⁸ Brodies, written submission, page 2.

“It becomes more difficult when somebody who is interested in acquiring an area of land has little knowledge of its history or there is no known history. In such cases, we will be asked what evidence we expect. We recognise that it will be a challenge for us to provide guidelines in those circumstances.”⁷⁹

117. These criticisms, it appears, have been accepted by the Scottish Government. In oral evidence to the Committee, the Minister for Energy, Enterprise and Tourism said that he had listened to the arguments and was minded to remove the requirement from the Bill. He said—

“In the light of the concerns that have been raised, I have decided to remove that particular duty from the bill.”⁸⁰

118. Given the strength of the arguments heard against its inclusion, the Committee welcomes the Minister’s commitment to removing section 42(3)(a) from the Bill.

Land possession for 1 year

119. The Committee heard very little dissent on the proposal for 1 year’s possession immediately prior to an application. Witnesses felt that, on balance, it provided the right length of time to be in possession of land prior to registration.

120. The Committee is of the view that, if a *non domino* dispositions are to continue to be allowed, then there is a clear need for them to be put on a statutory basis. It is satisfied that 1 year is a sufficient length of time to be in possession of land prior to registration. However, it would recommend that the Registers of Scotland keep this timescale under review and if in practice it was not long enough, we would ask the Scottish Government to consider extending the period by exercising its powers under section 42(8) of the Bill.

Notification

121. Section 44 requires that when there is a prescriptive application the Keeper must notify the proprietor or, if none can be identified, the Crown. This is in addition to the identical obligation imposed on the applicant by section 42(4). There were questions raised about how notification might work. The Committee heard that, if the owner was known, then there should be no need for an *a non domino* disposition, as the applicant would deal directly with the owner.

Advertising

122. In his written submission, Andy Wightman suggested advertising unowned land to give those who may have a legitimate claim the opportunity to do so. He said—

“Any claims to “unowned” land should be lodged with the Keeper and then advertised publicly on the Registers of Scotland website for a minimum period of one year.”⁸¹

⁷⁹ Official Report, 25 January 2012, Col 890.

⁸⁰ Official Report, 8 February 2012, Col 964.

⁸¹ Andy Wightman, written submission, page 3.

123. Gavin Henderson of the Registers of Scotland told the Committee that this was possible as the Keeper has the power to include advertising as a form of evidence that the true owner has been sought. He said—

“In theory, there is no problem with an advertising provision. It would work. The question for the keeper, for registration purposes, would be whether there was evidence that sufficient advertising had been done.”⁸²

124. Graeme McCormick of Conveyancing Direct supported advertising land as a more transparent approach to acquisition. He stated—

“I see no reason why this could not be advertised. We should be as transparent as possible with these things. We must also remember that the keeper has a general duty of care. I see no reason why, when the keeper gets such an application, she cannot then refer it to the QLTR [Queen’s and Lord Treasurer’s Remembrancer] for his or her comments.”⁸³

125. However, other witnesses felt that there were already enough checks in place and that advertising was not necessary. Tom Axford of Scottish Water told the Committee that he questioned—

“whether advertisement would be necessary, given the increased checks and balances that are going into the system.”⁸⁴

126. John King of the Registers of Scotland cautioned that in certain circumstances advertising could result in competing claims for land. He stated—

“Where there is a contentious development, there will occasionally be somebody who, on the face of it, has a legitimate reason for applying for an a non domino disposition. When the application becomes known locally, it is not unusual for us to receive competing applications for a non domino dispositions. Operationally, that places us in a difficult position, as we cannot adjudicate between them.”⁸⁵

127. The Committee heard evidence for and against different forms of advertising. In oral evidence Alan Cook of the Scottish Property Federation thought that a neighbour notification scheme could be used—

“We would not have any problem in principle with a wider process—such as advertising, neighbour notification or putting notices on lamp posts—that would give people the maximum opportunity to put their hands up and say that they had an interest in the area. However, we would have to ensure that it did not stand in the way of what we would regard as reasonable use of the process.”⁸⁶

⁸² Official Report, 25 January 2012, Col 886.

⁸³ Official Report, 11 January 2012, Col 784.

⁸⁴ Official Report, 18 January 2012, Col 834.

⁸⁵ Official Report, 25 January 2012, Col 889.

⁸⁶ Official Report, 25 January 2012, Col 859-860.

128. Ann Stewart of the Scottish Property Federation cautioned that there would need to be clarity about the purpose of any advertisement. She said—

“We would need to be clear whether the object of the exercise was not to disenfranchise the true owner or whether it was to give anybody who might be interested in having a nice little patch of land, thank you very much, the opportunity to do so. Those are two different matters.”⁸⁷

Buying land from the Crown

129. Another option that the Committee considered was for the Crown to sell the land. The Committee has been advised that there is no such thing as “unowned land” as any land without an owner becomes the property of the Crown. In oral evidence, Ross Mackay of the Law Society of Scotland told the Committee that if a notice went to the Crown it could use it as an “opportunity to treat the land as a “ransom strip and seek compensation for it”.⁸⁸

130. Andy Wightman suggested in oral evidence that the statutory obligations and duties of the Crown could be revised to make its role in relation to land more proactive and transparent. He said—

“We should provide guidance and guidelines, some of which would be to do with the fact that, if there is a public interest in the land, the Crown Office should act as a public body—as the state—and do something proactive with it.”⁸⁹

131. In oral evidence to the Committee, the Minister for Energy, Enterprise and Tourism indicated that he was not in favour of either advertising or auctioning land. He said—

“It [advertising] might also encourage speculative claims that would not otherwise be made ... I find the proposal that there should be auctions quite extraordinary. Are we really suggesting that the person with the deepest pockets should be able to claim and secure ownership of land in Scotland?”⁹⁰

132. The Committee agrees that it is not in the public interest for areas of land to lie unused. Land should not be given to the first claimant through prescriptive acquisition as there may be others who have a legitimate interest. Therefore we recommend that the Scottish Government consider the inclusion of a more public process of advertising land when there is an application for prescriptive acquisition. We consider that where multiple claims to land are regarded as having equal merit the general principle should always be that land should be put to the use which creates the greatest benefit to the community. We recommend that the Scottish Government consult on the options for putting this principle into practice.⁹¹

⁸⁷ Official Report, 25 January 2012, Col 860.

⁸⁸ Official Report, 11 January 2012, Col 780.

⁸⁹ Official Report, 18 January 2012, Col 821.

⁹⁰ Official Report, 8 February 2012, Col 966.

⁹¹ Murdo Fraser and Mike Mackenzie recorded their dissent to this paragraph.

Common land

133. The Committee heard that there is an issue in relation to the public being unaware that they can register common land in Scotland. In his written submission, Andy Wightman says that “as a result it stands vulnerable to prescriptive claims”.⁹² In oral evidence he suggested a statutory power for the management of common land resting with local authorities, similar to the procedure in England and Wales. He said—

“I propose a more straightforward means of registering common land as a protective order that says, “We assert that this piece of land is common land. It belongs to the parish and should not therefore be subject to any claim of title until due process has been followed”.”⁹³

134. Gavin Henderson of Registers of Scotland told the Committee that the notification provisions within the Bill should avoid any future “hostile takeover” of land. He stated—

“The keeper would have to satisfy herself that the true owner had been notified, which may mean finding out who the common owners are and notifying them. Failing that, if it was reasonable to presume that there was no other owner, the Queen’s and Lord Treasurer’s Remembrancer would be notified. There is a relatively robust process for ensuring that the people who own the land are notified and have the ability to veto the sale, rather than there being—in Mr Wightman’s language—hostile takeover of the edges of common land.”⁹⁴

135. In his written submission Andy Wightman proposes advertising land publicly for a minimum period of 6 months—

“The Land Register recognises commons as a class of property and admits applications for registration from any member of the public residing in the civil parish in which the land is situated. For so long as the application is pending, no other private claims will be entertained by the Keeper. The application will be advertised publicly on the Registers of Scotland website for a minimum period of six months and circulated to the local authority, community councils and published in local newspapers. The publicity should include the name of the claimant and their grounds for the claim, the extent of the land being claimed, a report on investigations into its legal history, and an invitation to lodge rival claims.”⁹⁵

136. The Committee agrees with the objective sought by Mr Wightman, namely the protection of common land. However, the Committee also notes the alternative view that commonities are a form of private land, and that an alternative means of securing Mr Wightman’s objective may be more appropriate. The Committee calls on the Scottish Government to respond to

⁹² Andy Wightman, written evidence, page 4.

⁹³ Official Report, 18 January 2012, Col 822.

⁹⁴ Official Report, 25 January 2012, Col 887.

⁹⁵ Andy Wightman, written submission, page 4.

the basic principle that there is a need to achieve legal protection for common land, and examine possible options for achieving this.

137. In particular, the Committee asks the Scottish Government to express a view on:

- a) whether there is merit in the Bill being taken as an opportunity to repeal the Division of Commonties Act 1695;**
- b) whether a duty should be placed on local authorities to identify and register a title to all commonties in the area for which they are responsible; and**
- c) how each commonty could be held for a public use which is consistent with its nature.**

Offence relating to applications for registration

138. Section 108 of the Bill introduces a new offence relating to the content of applications for land registration. The offence is committed where a false or misleading statement is made or material information is not disclosed, and where the accused either knows of the false statement or omission or is reckless as to it. The Committee heard that section 108 had not been part of the Bill as produced by the Scottish Law Commission and had not been consulted upon. In both written and oral evidence, strong arguments were made against the inclusion of this section in the Bill mainly on the grounds of the breadth of the provision, the criminalisation of recklessness, and the offence already being covered by existing legislation.

139. A number of witnesses from the legal profession made clear that in their view the offence was not necessary. In oral evidence Ian Ferguson, Scottish Law Agents Society, told the Committee—

“The policy memorandum acknowledges that a common law crime of fraud is already being used for the matter.”⁹⁶

140. The Law Society of Scotland agreed, adding that the offence was disproportionate. It stated that—

“The Society is of the opinion that the proposed provision is not necessary for two reasons, (1) the current criminal law, both at common law and under statute, is sufficient to prosecute the mischief complained of, and (2) the introduction of this offence is disproportionate to the level of threat presented.”⁹⁷

141. In contrast Integrity4Scotland told the Committee in written evidence that additional measures are required to tackle fraudulent behaviour. It said—

⁹⁶ Official Report, 11 January 2012, Col 773.

⁹⁷ Law Society of Scotland, written submission, page 1.

“It would appear that in the past it has been all too easy for an applicant for title registration or their agent to fill in the application form certifying that *to the best of their knowledge and belief* there is nothing which would prejudice the applicant’s right to have their title registered when evidence exists on the ground which shows that that is not the case.”⁹⁸

142. In oral evidence to the Committee, the Solicitor General for Scotland, Lesley Thomson QC, indicated that the offence was a necessary addition to help tackle serious and organised crime. She said—

“I see the offence in section 108 as another opportunity to add to the existing legislation and offences as part of the effort to disrupt and detect organised criminality ... the offence goes further than that, because it includes the element of recklessness.”⁹⁹

143. The Law Society of Scotland also had concerns that the provision was too wide in scope. It stated—

“The concern is that it will possibly affect the innocent solicitor. There is no reference in the section to fraud-it is not mentioned at all-and it boils down to making an arguably misleading statement on a “reckless” basis.”¹⁰⁰

144. In oral evidence to the Committee, the Minister for Energy, Enterprise and Tourism gave a commitment to look at the scope of the offence prior to stage 2. He said—

“ ... if there is to be an offence, it must be correctly stated and should not go further than is necessary and appropriate ... There are safeguards in section 108 and, if they need to be tightened up, we are happy to look at that.”¹⁰¹

145. The Committee heard conflicting views on whether the term “reckless” had a clear meaning in Scots law. In written evidence, the Law Society of Scotland stated that—

“The term is not settled in Scots law, and may differ dependent on the offence pursued.”¹⁰²

146. However, in oral evidence the Minister for Energy, Enterprise and Tourism told the Committee the provision was necessary to combat mortgage fraud in particular and stated that “reckless” is a known and used term. He said—

“... despite the Law Society’s objection to the term or concept of recklessness, it is a well-established part of law..”¹⁰³

147. The Keeper told the Committee that—

⁹⁸ Integrity4Scotland, written submission, page 3.

⁹⁹ Official Report, 22 February 2012, Col 1004 - 1005.

¹⁰⁰ Official Report, 11 January 2012, Col 774.

¹⁰¹ Official Report, 8 February 2012, Col 987.

¹⁰² Law Society of Scotland, written evidence, page 5.

¹⁰³ Official Report, 8 February 2012, Col 975.

“ ... section 108 has been included in the bill on the advice of the police force, those who are responsible for dealing with serious crime and the Lord Advocate.”¹⁰⁴

148. ACPOS provided written evidence that the offence would help it deal with serious organised crime as well as acting as a deterrent. It stated—

“The existence of the new provisions in the Land Registration Bill should also act as a deterrent to solicitors and other professional enablers involved in fraud, where criminality by a client is either known or suspected. By reducing the amount of false or misleading information submitted to the Land Registry, the system would become a more accurate and valuable resource for investigators.”¹⁰⁵

149. In its written evidence, the Law Society of Scotland highlights that—

“...the proposed wording of Section 108 (1) is not sufficient to give solicitors or other applicants sufficient notice of the types of behaviour, action or inaction which may result in criminal penalties being levied or indeed deprivations of liberty ensuing.”¹⁰⁶

150. In oral evidence, Fiona Letham of Dundas & Wilson agreed and told the Committee that if the provision were to remain it would need to be tightened up. She said—

“ ...we have to exercise all due diligence, and we have to take all such steps as could reasonably be taken to ensure that no offence will be committed, but we do not have any guidance on what those steps should be.”¹⁰⁷

151. The Keeper told the Committee this was not necessary as solicitors would already know what to do to avoid being caught by the provision. She stated—

“I think that solicitors understand what they would have to do, and those who are honest-the vast majority of solicitors in Scotland-will have no problem with the provision ...”¹⁰⁸

152. In oral evidence to the Committee, the Solicitor General for Scotland, Lesley Thomson QC, indicated that whilst the use of the affirmative procedure to outline guidance to solicitors was a decision for the Minister, she would discuss with the Law Society of Scotland what additional guidance and advice could be provided to solicitors, should the Bill be passed. On the proposal to consult on section 108, the Solicitor General for Scotland stressed how important it is “that every single opportunity is taken to prevent serious and organised criminality”¹⁰⁹ and was therefore not in favour of a consultation on the provisions.

¹⁰⁴ Official Report, 25 January 2012, Col 873.

¹⁰⁵ ACPOS, written submission, page 1.

¹⁰⁶ Law Society of Scotland, written submission, pages 5.

¹⁰⁷ Official Report, 11 January 2012, Col 776.

¹⁰⁸ Official Report, 25 January 2012, Col 875.

¹⁰⁹ Official Report, 22 February 2012, Col 1014.

153. **The Committee notes the firm view given by both the Minister and the Solicitor General for Scotland that this new offence is required to combat fraud. However, the Committee also notes the strong objections from the legal fraternity to the inclusion of this offence on the grounds that it is disproportionate, it is unclear what steps solicitors would need to take to avoid committing this offence and that it is unnecessary as the offence is already covered by existing legislation.**

154. **Whilst the Committee is content that section 108 remains in the Bill, the Committee welcomes the Minister's commitment to look again at how it is worded and the Committee recommends that the Scottish Government amends the section to make it clear that it relates to fraud and does not cover genuine mistakes.**

155. **Furthermore, the Committee recommends that the Scottish Government makes the commencement of the powers in section 108 subject to the affirmative procedure in order to allow Parliament the means for further scrutiny and that, in any case, he provides guidance to solicitors on what is expected of them, consults on the section 108 provisions and reports back to the Committee after the consultation has been completed.**

156. **Should the Parliament decide that the new offence is to remain in the Bill, the Committee recommends that the Scottish Legal Complaints Commission be asked to provide statistics on land registration offences in its annual report.**

Duty to take reasonable care

157. Section 107 of the Bill provides the Keeper with the power to claim compensation if the Register was to contain inaccurate information as a result of the content of an application being wrong. Legal practitioners agreed with this in principle, but raised concerns about the 'duty of care' lasting until completion of the registration process, which can sometimes be years. Fiona Letham, Dundas & Wilson suggested that the time period be reduced. She said—

"I understand that the proposal now is that the duty of care should last until completion of the registration process. Given the length of time that some applications can take to be processed, that could be many years after the solicitor has dealt with the transaction, which would put quite an onerous duty on a solicitor."¹¹⁰

158. Ms Letham recommends that the time period be reduced to that outlined in the Commission's original proposal—

"... the duty of care to end either at the time of settlement of the transaction on the part of the grantor of the deed and their solicitor, or when the registration application is submitted, if it is the purchaser and their solicitor who are making the application."¹¹¹

¹¹⁰ Official Report, 11 January 2012, Col 776.

¹¹¹ Official Report, 11 January 2012, Col 776-777.

159. The Committee notes the issues raised and asks the Scottish Government to consider these during Stage 2 of the Bill.

Errors in the Land Register

160. The success of the Land Register depends crucially on the accuracy of first registrations. The Committee heard from a number of witnesses about the high number of errors that they have experienced in land certificates and the impact of these increasing as a result of an increase in first, and potentially complex, registrations. This view was disputed by the Keeper.

161. The Committee heard conflicting evidence about both the accuracy of land certificates and the error rate by the Registers of Scotland. On the one hand, users of the current system told the Committee of their experience of a lot of errors, both minor and material. Whilst on the other, the Keeper provided data which showed error rates were relatively low.

162. Graeme McCormick, Conveyancing Direct, told the Committee that—

“every week I see at least two land certificates that contain a material error. A system that is robust should not be like that at all.”¹¹²

163. Fiona Letham, Dundas & Wilson, agreed but indicated that solicitors also have a role to play in ensuring accuracy. She said—

“We definitely see land certificates with errors, and my view is that, at the end of the day, the solicitor has a responsibility as part of a conveyancing transaction to check the land certificate and sort out errors then.”¹¹³

164. The Committee heard from Ross MacKay of the Law Society of Scotland that there had been an increase in the number of errors by the Keeper over the last 10 years and that she should be more proactive in resolving them at an early stage. He stated—

“The keeper should be more proactive in dealing with errors. She should be more responsive to agents, pointing things out and dealing with them as quickly as possible on an informal basis, short of full rectification of the certificate”.¹¹⁴

165. In oral evidence, John Scott of the Law Society of Scotland indicated that the Keeper had introduced quality control measures to improve error rates. He said—

“I understand that she has introduced a system of improving quality control for land certificates, which involves sampling certificates and double-checking their accuracy”.¹¹⁵

¹¹² Official Report, 11 January 2012, Col 745.

¹¹³ Official Report, 11 January 2012, Col 746.

¹¹⁴ Official Report, 11 January 2012, Col 750.

¹¹⁵ Official Report, 11 January 2012, Col 750-751.

166. Graeme McCormick of Conveyancing Direct told the Committee that a lot of the errors are basic in nature and could be avoided by checking adjoining properties during the processing of new registrations. He said—

“We find problems with the extent of the plans and the description of properties, in relation to shared properties, the existence of servitude rights and so on. Such problems arise because the keeper is not checking the titles of adjoining properties”.¹¹⁶

167. By contrast, the Keeper told the Committee that the number of errors made by the Registers of Scotland was “very low”. John King, Registers of Scotland, told the Committee that the aim is a 98.5% accuracy rate with regards to clerical errors and that this tends to be met and indicated that sometimes it is more a difference of opinion rather than an error. He stated—

“There are more than 1.4 million registered titles, and we receive more than 250,000 applications a year. We also receive between 250 and 350 applications a year to rectify inaccuracies in the register ... Outwith the figure of between 250 and 350, land certificates or charge certificates are returned to us in which we have made administrative error—for example, there may be a spelling mistake, or we may have missed out a middle name. Our 98.5 per cent target rate relates to clerical administrative errors.”¹¹⁷

168. In written evidence, First Scottish Group highlighted that the 250-350 figure provided did not include either informal corrections or errors brought to the attention of the Keeper by search companies, known as DA1s, which were significant. It said—

“Most errors tend to be discovered on a re-sale which would be beyond one year from the registration date. These figures are not kept but have a major impact. First Scottish alone submit an average of 20 DA1s per day to the Keeper for correction. This would equate to 4260 per year.”¹¹⁸

169. In oral evidence to the Committee, the Keeper confirmed that there is a provision for rectification of the registers but not for all errors, for example typographical errors and that if a fee in relation to these type of errors by Registers of Scotland was introduced it would have an impact on fees. She stated—

“There is a provision for us to pay legal costs if the register needs to be rectified ... if we had to pay a fee for the type of errors about which John King talked, it would have to be passed on to fee payers in general.”¹¹⁹

170. The Committee appreciates that there will be errors in any system of land registration. However, given the importance of accuracy in the Land Register and the potential impact on consumers, it feels that every measure should be taken to ensure that errors are kept to a minimum. It agrees that both practitioners and the Registers of Scotland have a responsibility to

¹¹⁶ Official Report, 11 January 2012, Col 751.

¹¹⁷ Official Report, 25 January 2012, Col 871-872.

¹¹⁸ First Scottish Group, written submission, page 3.

¹¹⁹ Official Report, 25 January 2012, Col 875-876.

ensure registration and land certificate information is accurate and therefore recommends that the Keeper put in place appropriate measures to improve quality control.

171. **The Committee recommends that to reduce basic errors at first registration related to the description of properties, shared properties and the existence of servitude rights, the Keeper should review current procedures and consider whether introducing a policy of checking adjoining properties for all registrations would be appropriate.**

172. **The Committee believes that it is essential that the public has confidence in the accuracy of land certificates and would therefore caution not to increase the pace of completion of the Land Register at the expense of its quality.**

Rectification and dispute resolution

173. Sections 78 to 81 of the Bill provide for rectification measures where the Keeper becomes aware of a *manifest* inaccuracy in a title sheet or in the cadastral map. These provisions have been welcomed in principle. However, the Committee heard evidence that “manifest” sets the bar too high with the result that fewer disputes would be resolved by the Keeper and more people would have to undertake expensive and potentially prolonged litigation.

174. The Committee appreciates that any resolution of disputes needs to be by a proper judicial process which is ECHR compliant. However, it heard compelling evidence about the potentially significant costs to consumers of having to go to either the Sheriff Court or the Court of Session to resolve land ownership issues, sometimes through no fault of their own. Ross MacKay of the Law Society of Scotland suggested that the Lands Tribunal for Scotland could be used to consider boundary and land ownership cases, due to its expertise in this area and as it may be able to resolve disputes more quickly. He said—

“The Lands Tribunal for Scotland already deals with title issues although, at the moment, it does not have a locus in dealing with a boundary dispute over who owns what. At the very least, there is scope for giving the tribunal a remit to look into that sort of thing. That would still be judicial, but the tribunal is quasi-judicial and the process is simpler and much speedier. There would still be a cost to it, but it would be a lot less than the cost of going to the Court of Session”.¹²⁰

175. Ian Langlands of the RICS agreed that a speedy process for dealing with these issues would be welcome, especially as surveying being carried out in the future to a more accurate level could lead to more challenges and appeals against mismatches in the Land Register. He stated—

“If it is permissible to have surveys of the level of precision that my practitioners can provide and match them with historical data, there will be mismatches of the kind that we are talking about. I agree, and the RICS

¹²⁰ Official Report, 11 January 2012, Col 756.

Scotland, that there is a potential risk of lots of challenges and appeals against those mismatches, and it would be helpful if there were some form of mechanism to speed up the process.”¹²¹

176. In response to a request from the Committee on whether these types of disputes could be added to the remit of the Lands Tribunal for Scotland, the Hon. Lord McGhie, President of the Tribunal, responded that it would be possible. However, he cautioned that there could be resource implications. He said—

“However, I can say in general terms that disputes involving legal issues relating to registration are currently within our jurisdiction in terms of the existing 1979 Act. We have had to deal with a number over the years. They have raised a wide variety of issues. The present proposals may cover material of the same nature. There is, accordingly, no reason from our point of view why the Tribunal should not deal with them ... However, in formal terms I should say that nothing is within our remit unless some statutory provision expressly says so.”¹²²

177. As Lord McGhie points out, the Lands Tribunal already has jurisdiction to hear appeals against a decision of the Keeper. What is now suggested is that the Tribunal should be able to hear disputes between ordinary citizens as to registered land.

178. The Minister for Energy, Enterprise and Tourism confirmed in oral evidence that he will consider the role of the Lands Tribunal for Scotland prior to Stage 2. In a letter to the Committee, he stated—

“I have asked the keeper to explore with the Lands Tribunal in advance of stage 2 whether anything more can be done to ensure that the Lands Tribunal resolves disputes, especially boundary disputes.”¹²³

179. The Committee agrees that there is a need for a resolution process short of the courts so that disputes affecting title to registered land can be dealt with more quickly and possibly more cheaply. The Committee believes that the Lands Tribunal for Scotland is uniquely positioned to undertake this role and welcomes the Minister’s commitment to consider how it can be used to adjudicate over such disputes.

Withdrawal and amendments etc. of application

180. Section 33(1)(b) provides that, except with the consent of the Keeper, a person who makes an application “may not substitute it or amend it”. There were concerns expressed that this provision would impact negatively on the ability to resolve minor issues and errors quickly.

181. In its written submission, Dundas & Wilson indicated that this provision should only be used when there is a serious error or omission. It stated—

¹²¹ Official Report, 18 January 2012, Col 805.

¹²² Lands Tribunal for Scotland written response.

¹²³ Official Report, 8 February, Col 971.

“We consider that it is reasonable for the one-shot principle to be used where an error or omission is so serious as to result in rejection of an application within one or two days after receipt by the Keeper, but we have significant concerns about it potentially being used to cancel an application many months after the application was accepted by the Keeper.”¹²⁴

182. In supplementary evidence, the Law Society of Scotland requested that a “reasonableness test” be applied before a withdrawal or rejection is decided. It wrote—

“The Society is concerned that this section as drafted would give the Keeper unfettered discretion to reject an application in the event of any error or omission, no matter how minor. The Society considers that a reasonableness test should be included and that the Keeper should be obliged to pay compensation in the event of a wrongful rejection.”¹²⁵

183. The Committee believes that it is essential that the information contained within the Land Register is accurate. In light of this, it feels that it is reasonable for the Keeper to reject applications only where there is a serious error or omission and to continue to apply an informal approach to resolve minor issues.

Advance notices

184. Sections 55 to 61 of the Bill introduce a system of “advance notices” for conveyancing transactions, which will remove the risk of losing title to a property between the settlement date and the registration date. This risk is currently underwritten by a letter of obligation granted by the seller’s solicitor and underwritten by professional indemnity insurance. There was a lot of support, especially from the legal profession, for the introduction of advance notices as quickly as possible and for these to replace the existing practice of solicitors providing letters of obligation.

185. In oral evidence, Ann Stewart of the Scottish Property Federation told the Committee that industry practitioners were very supportive of advance notices. She said—

“There has always been a gap between completion and registration, and that gap can be fraught with risk ... It would certainly improve confidence among purchasers and lenders if they had a clear indication of some kind of protection for the risk period, even if that period is sometimes very short.”¹²⁶

186. Whilst there was clear support for advance notices there were a number of questions raised about how these would work in practice.

187. Ross Mackay of the Law Society of Scotland sought clarification that advance notices would be included in the application record. He stated that—

¹²⁴ Dundas & Wilson, written submission, page 2.

¹²⁵ Law Society of Scotland, supplementary evidence, page 2.

¹²⁶ Official Report, 25 January 2012, Col 850.

“ ... if advance notices are to be worth anything, they will have to appear on the record in an easily searchable format so that when someone is about to buy a property, the advance notice will be flagged up.”¹²⁷

188. In oral evidence to the Committee, the Keeper confirmed that advance notices would be searchable as part of the Registers Direct system. She said—

“We will develop systems that will enable advance notices to be shown. Things get loaded on overnight, and they will be on our registers direct system ...”¹²⁸

189. Others sought clarification on whether one or two advance notices would be required for certain transactions. In oral evidence, Fiona Letham of Dundas & Wilson said—

“ ... we would prefer the legislation to be clear about whether one advance notice or two would be required in a situation in which someone is purchasing property and granting a mortgage over it.”¹²⁹

190. To assist practitioners in adopting advance notices, Ann Stewart of the Scottish Property Federation requested that guidelines be provided to clarify the effect of an advance notice. She said—

“If a disposition—in other words, the document that transfers title—were protected by an advance notice and another disposition had gone in previously, when the proper disposition hit Registers of Scotland the earlier one would be regarded as not having been registered, whereas the effect with standard securities is that both would stay on the register but the priority of their ranking might change.”¹³⁰

191. In answer to questions about the effect of advance notices, Gavin Henderson of the Registers of Scotland told the Committee that—

“If there is an advance notice that protects a deed and a later deed comes in that is not protected by an advance notice, the deed with the protecting advance notice will prevail—that is the whole point.”¹³¹

192. With regards to what advance notices will look like, Ross Mackay of the Law Society of Scotland requested that guidance be provided. He stated that—

“On a technical point, no style of advance notice is given in the bill. It just says there should be an advance notice but it does not say who will prepare it.”¹³²

¹²⁷ Official Report, 11 January 2012, Col 787.

¹²⁸ Official Report, 25 January 2012, Col 892.

¹²⁹ Official Report, 11 January 2012, Col 788.

¹³⁰ Official Report, 25 January 2012, Col 851.

¹³¹ Official Report, 25 January 2012, Col 892.

¹³² Official Report, 11 January 2012, Col 788.

193. Section 57(1) states that an advance notice has effect for a period of 35 days. In its written submission, the Scottish Property Federation requested that this be changed to 30 business days in order to—

“... align the period of Advance Notice to England’s 30 **business** days. Our reasons for this is that as the majority of Scottish commercial property is owned and invested in by UK institutions or trusts it would be helpful to avoid differences where they may not appear to be absolutely necessary.”¹³³

Costs and fees

194. The Registers of Scotland estimate that advance notices will result in a substantial increase (74%) in the number of deeds registered and that the fee for an advance notice would be no more than £10. It stated that—

“The cost of advanced notices will be met through the fees that will be charged specifically for this new service ... it is expected that the fee for advance notices will not be less than cost recovery or more than £10.”¹³⁴

195. The Committee welcomes the introduction of the advance notice provisions. However, the Committee notes that whilst the explanatory notes provide examples of how these will work in practice, there still seems to be some confusion and therefore we recommend that the Scottish Government provides further guidance to assist understanding. It would also be helpful if the Minister was able to provide the clarity required by some of those who gave evidence on whether one or two advance notices would be required.

196. The Committee is aware that the Scottish Law Commission considered using the term “working days” and decided that “days” was a simpler concept. The Committee agrees that it would be helpful to avoid inconsistencies with systems used elsewhere in the UK and asks the Scottish Government to review the period of 35 days.

Tenements and other flatted buildings

197. The Policy Memorandum states that “Flats within tenements are often described in conveyancing deeds without reference to a plan.”¹³⁵ The Committee heard that this can cause issues for the conveyancing profession. To resolve these issues Graeme McCormick of Conveyancing Direct recommended the use of floor plans. He said—

“We need, for tenement properties, a system of floor plans that shows the footprint of properties. Many builders now use such a system for flatted developments, and that gives certainty”.¹³⁶

198. In oral evidence to the Committee, Alan Cook of the Scottish Property Federation agreed and requested that a clear protocol be provided. He said—

¹³³ Scottish Property Federation, written submission, page 1.

¹³⁴ Financial Memorandum, paragraph 364 and 440.

¹³⁵ Policy Memorandum, paragraph 52.

¹³⁶ Official Report, 11 January 2012, Col 761.

“I agree that there is quite a lot of scope for uncertainty because of the use of terms such as “left” and “right” to describe which flat is which. I am not aware of any protocol that is supposed to be followed in expressing that. If there was a clear protocol that had to be followed, that would perhaps overcome that particular problem.”¹³⁷

199. In response to this suggestion, John King of the Registers of Scotland told the Committee that, although this was not a big issue, standardised description for flatted properties would be welcomed. He said—

“We would certainly welcome a standardised property description for flats, particularly for the older tenements in Scotland’s cities.”¹³⁸

200. The Policy Memorandum states that the inclusion of a plan “could add considerable additional costs onto transactions”.¹³⁹ However, the Committee heard that as costs would be in line with the amount paid by those who were purchasing non-tenement properties at first registration this should not be an issue.

201. The Committee agrees that a standard description of tenement properties would be a simple way to help avoid future conveyancing disputes. It recommends that the Scottish Government provides description guidance for flats and tenements and also considers the inclusion of plans when registering these types of properties.

Shared plots

202. Sections 17 to 20 of the Bill are intended to change the Keeper’s current practice of including in the title sheet for an individual property any shares in common property that relate to it and to have a separate title sheet for the shared plot. This would avoid the problem of overlapping cadastral units (and title sheets).

203. The Committee heard evidence both for and against the introduction of this new system, with some witnesses feeling it was unnecessary and that it added complexity, with others indicating it could help identify common ownership.

204. In oral evidence, Ann Stewart of the Scottish Property Federation told the Committee that she did not see any need for the introduction of shared plot title sheets. She said—

“ ... as a practitioner, I am not sure that the absence of a separate title sheet that shows shared areas is a problem.”¹⁴⁰

205. Gary Donaldson of Millar & Bryce, told the Committee he welcomed the provision. He stated—

¹³⁷ Official Report, 25 January 2012, Col 855.

¹³⁸ Official Report, 25 January 2012, Col 863.

¹³⁹ Policy Memorandum, paragraph 53.

¹⁴⁰ Official Report, 25 January 2012, Col 851.

“ ... we often receive queries about establishing common ownership. From our point of view, a separate title sheet would assist in identifying that ownership.”¹⁴¹

206. In written evidence, Brodies requested clarification of the circumstances where a shared plot can be revoked and converted to an ordinary plot. It wrote—

“We are concerned that the provision in its current form does not limit or explain the circumstances in which this can be done. We would assume that safeguards will be put in place to protect any potential proprietors of the shared plot.”¹⁴²

207. In its written submission, First Scottish Group raised concerns about adding complexity to the system and thus increasing the potential for errors—

“These will comprise areas of ground that are shared between proprietors, a simple example would be a driveway that is owned by two different properties. Instead of appearing on the house title of each property the driveway will have its own title sheet and will be referred to in the title sheet for the house ... This will mean that additional searches will be required to cover both the house and driveway. Naturally there will also be additional work for the Keeper’s staff and huge scope for errors in the referencing and cross-referencing of title sheets.”¹⁴³

208. The Policy Memorandum states that “The title sheet will reflect that this area of ground is common property.”¹⁴⁴ In oral evidence to the Committee, Gavin Henderson of Registers of Scotland explained that the system should make the Land Register clearer. He said—

“... when you look at the map, you can tell which areas are shared areas and which are not. In addition, the title sheet will have a mutually enforcing cross-reference to the shared plot title sheet. We should therefore not miss out shared areas or mislead people when they look at the title sheet. They should be able to see what the shared plot title sheet is.”¹⁴⁵

209. The Committee notes the views both for and against the inclusion of this provision and recommends that the Minister respond at the Stage 1 debate to the concerns raised.

Rights of person acquiring etc. in good faith

210. Section 82 gives ownership to a person who has acquired a property from a non-owner in good faith, as long as certain conditions have been met. These include a requirement that the seller, or the seller and buyer in sequence, should have been in possession of the land “for a continuous period of at least a year”.¹⁴⁶

¹⁴¹ Official Report, 25 January 2012, Col 848.

¹⁴² Brodies, written submission, page 1.

¹⁴³ First Scottish Group written evidence, page 1

¹⁴⁴ Policy Memorandum, paragraph 55.

¹⁴⁵ Official Report, 8 February 2012, Col 972.

¹⁴⁶ Land Registration etc. (Scotland) Bill: Section 82 (3) (a)

The Committee considered whether or not 1 year's possession struck the right balance between the interests of the acquirer and the person who actually owns the property.

211. Ross Mackay of the Law Society of Scotland told the Committee that 1 year seemed fair. However, he cautioned that it may cause solicitors difficulties in practice. He said—

“As a matter of principle, I think that the commission has come up with a fair balance in trying to protect an owner who has lost out because of fraud or something similar and to ensure that they can get their house back, provided that they do it within a year.”¹⁴⁷

212. In his oral evidence to the Committee, Tom Axford of Scottish Water disagreed, stating—

“Our concern is that that period is quite short for landowners of major areas of land across Scotland, including us, particularly if we are talking about transfers of access roads, which are difficult to ascertain—we have had to deal with that. The registration process can also take six to nine months to be completed.”¹⁴⁸

213. The Committee feels that in the majority of circumstances, 1 year's possession is sufficient. However, we feel that it may not be long enough in all circumstances, especially where large amounts of land or pieces of land spread out across the country are owned, for example by utility companies, and would therefore ask the Scottish Government to consider increasing the timescale.

Beneficial interests and ownership

214. The Committee heard that by only registering the name of the owner, the Land Register does not provide enough transparency about ownership and that this lack of information can assist criminal activity such as money laundering and tax evasion.

215. In written evidence, Andy Wightman proposes that additional information would be available if the company registering as owner was registered in a member state of the EU. He wrote—

“My proposal is simply to make it incompetent to register title to land in Scotland's Land Register in any legal entity not registered in a member state of the EU. This provides compliance with Treaty of Rome obligations and means that any US or Japanese company that wishes to buy land and build a factory can happily do so—they simply need to set up an EU entity to do it.”¹⁴⁹

¹⁴⁷ Official Report, 11 January 2012, Col 768.

¹⁴⁸ Official Report, 18 January 2012, Col 832.

¹⁴⁹ Andy Wightman, written evidence, page 6.

216. In oral evidence to the Committee, the Minister for Energy, Enterprise and Tourism indicated that the inclusion of this restriction on land registration could negatively affect investment. He stated—

“I am not in favour of such a proposal, even if it is within the scope of the bill—I have not looked into that question, but I suspect that it would be answered in the negative—because there would be a significant risk that introducing such a system would have a negative effect on investment by companies that are registered outwith the EU.”¹⁵⁰

217. The Committee notes the comments made by some of those who gave evidence that there needs to be greater transparency of ownership and the proposal for companies to be registered in the EU before they can register land in Scotland. We have some sympathy with the principle that it should be possible in most circumstances to find out who has ownership of a particular piece of land.

218. However, we are not convinced that companies should need to be registered in the EU to register land in Scotland.

219. We consider that the Scottish Government should reflect further on options for ensuring that the land registration system reduces the scope for tax evasion, tax avoidance and the use of tax havens, and that the Government should explain prior to Stage 2 what additional provisions can be included, whether in the Bill or otherwise, to achieve this objective.

Accessibility of the Land Register

220. The Committee heard evidence that the public do not find it easy to access information in the Land Register. It therefore considered whether the provisions in the Bill will make the Land Register more accessible to the public.

221. There was support for information online to be more accessible as the current system, Registers Direct, is directed at practitioners. In written evidence, Andy Wightman suggested the introduction of an on-line search facility for the public. He stated—

“Moreover, there is no online facility for the public to use to conduct their own search. Registers Direct is an online service but demands an account be set up and a high level of familiarity with the structure of the Registers (particularly Sasines) to use effectively. By contrast, the Land Register in England and Wales has a box where one can enter a postcode and a checkout where you pay for the result.”¹⁵¹

222. The Committee heard from the Keeper that although previously there had been too much emphasis on the legal fraternity, more public access was an aspiration. She said—

¹⁵⁰ Official Report, 8 February 2012, Col 984.

¹⁵¹ Andy Wightman, written evidence, page 6.

“My view is that we are a public body-a public service organisation-so citizens need to know about the service that they get from us ... We would like to see an online system that the public can access and from which they can find out information easily. At the moment, they would have to come through our customer service centres, as the registers direct system is designed for use by businesses ...”¹⁵²

223. The Committee believes that a policy intention of the Bill should be to make access to information on land ownership easier for members of the public. It recommends that the Scottish Government considers how the information held by the Registers of Scotland can be made more publicly accessible, including the use of an on-line facility. The Committee suggests that if there is to be a fee for public access that it be kept as low as possible.

¹⁵² Official Report, 25 January 2012, Col 883 - 884.

MISCELLANEOUS ISSUES

224. There were a number of requests made to the Committee, in both written and oral evidence, to amend the Bill. **These are outlined below and we would ask the Minister to consider them and make clear his intentions about them during the Stage 1 debate.**

225. Section 1(5) outlines the steps the Keeper should take to protect the Register. The Committee was asked if the list could be extended to include “(d) inaccuracy, and (e) fraud”.

226. Section 39 provides the Keeper with the discretion to decide who to notify when an application is accepted, rejected or withdrawn. In its written submission the Law Society of Scotland recommends that—

“ ... notice of rejection or withdrawal of an application should be given to any other applicants affected by such a rejection or withdrawal and that this should not be at the Keeper’s discretion.”¹⁵³

227. In written evidence¹⁵⁴ to the Committee, the Crown Estate requested a number of additions to the Bill which the Committee asks the Scottish Government to consider.

228. The Law Society of Scotland requests in its written submission the inclusion of the following 2 provisions within the Miscellaneous and General Section of the Bill to address particular problems which have arisen—

“Firstly, there should be clarification that s.160 of the *Bankruptcy & Diligence etc (Scotland) Act 2007* does not alter the common law position and accordingly that Inhibitions registered against a seller after missives are concluded remain ineffective as the seller is already contractually bound to dispose of the property. This would remove the uncertainty caused by the Keeper’s current policy of excluding indemnity in these circumstances.

Secondly there should be clarification that s.26 of the *Conveyancing and Feudal Reform (Scotland) Act 1970* will operate to remove from the Title Sheet any remaining prior ranking or *pari passu* securities following a sale on repossession, even if the calling up procedure did not comply with the interpretation of the statutory requirements in the Supreme Court decision of *RBS v Wilson* in November 2010.”¹⁵⁵

229. In its written submission, Scottish Land & Estates requests the following change—

“Sections 42(8), 42(9), 44(7) and 44(8). If the Scottish Ministers are to make an Order changing the number of days within which a Notice of Objection can

¹⁵³ Law Society of Scotland, supplementary evidence, page 1.

¹⁵⁴ Crown Estate, written submission, page 2.

¹⁵⁵ Law Society of Scotland, supplementary evidence, page 5.

be received, it is recommended that landowners (perhaps through stakeholder bodies) should be consulted as well as the Keeper.”¹⁵⁶

230. In its written submission, Brodies recommends the following change to section 36 of the Bill. It asked whether the Scottish Government would—

“... welcome a similar facility to that used in England whereby the time of registration is noted in a title as well as the date of registration? This would assist with any issues relating to order of presentment.”¹⁵⁷

¹⁵⁶ Scottish Land & Estates, written submission, page 4.

¹⁵⁷ Brodies, written submission, page 2.

SUBORDINATE LEGISLATION COMMITTEE REPORT

231. In accordance with Rule 9.6.2, the Subordinate Legislation Committee considered the delegated powers and provisions in the Land Registration etc. (Scotland) Bill as introduced and reported to the Economy, Energy and Tourism Committee as lead committee. A copy of the report by the Subordinate Legislation Committee is attached in Annexe A of this report.

232. The Subordinate Legislation Committee sought further clarification from the Scottish Government on a number of proposals and drew the responses to the attention of the lead committee.

233. In relation to the power in section 61(1) to modify the application of Part 4 of the Bill, the Subordinate Legislation Committee considers that this power should not be drawn more widely than is appropriate to give effect to the intended policy.

234. In relation to the power in section 93(2), so far as it inserts new section 9E(1)(b) of the Requirements of Writing (Scotland) Act 1995, the Subordinate Legislation Committee considers this to be a potentially significant power, going beyond minor technical matters in relation to the authentication and alteration of electronic documents.

235. In relation to the powers in section 103(1), the Subordinate Legislation Committee has concerns as to the general scope of this power in relation to information to be made available by the Keeper and access to the Keeper's Registers, and whether in light of that response it could be drawn more narrowly to give effect to the intended policies.

236. The Committee notes the Subordinate Legislation Committee's report and is content to agree with its recommendations. We welcome the Minister's commitment to amend the procedure for regulations made under inserted section 9E(1)(b) to the affirmative procedure.

FINANCE COMMITTEE

237. The Finance Committee adopted a 'level 1' approach to scrutiny of the Financial Memorandum for the Land Registration etc. (Scotland) Bill and did not, therefore, take oral evidence on the Bill or produce a report. A copy of the evidence received by the Finance Committee is attached in Annexe B of this report.

CONCLUSION ON THE GENERAL PRINCIPLES OF THE BILL

238. The Committee considers that land registration is important to Scotland and welcomes this comprehensive Bill, which provides a much needed update and extension of the existing legislation. There are, however, a number of areas within the Bill where some improvements could be made and the Committee invites the Minister to consider these. There are also a number of issues where greater clarity is required and the Committee invites the Minister to provide this in the Stage 1 debate. Following our discussions with the Minister, the Committee welcomes the changes that the Minister has already agreed to make.

239. In conclusion, the Committee recommends to the Parliament that the general principles of the Bill be agreed to.

ANNEXE A: REPORT FROM THE SUBORDINATE LEGISLATION COMMITTEE

Subordinate Legislation Committee

4th Report, 2012 (Session 4)

Land Registration etc. (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 10 and 24 January 2012, the Subordinate Legislation Committee considered the delegated powers provisions in the Land Registration etc. (Scotland) Bill at Stage 1. The Committee submits this report to the Economy, Energy and Tourism Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Land Registration etc. (Scotland) Bill was introduced in the Scottish Parliament on 1 December 2011. It is a Government Bill which restates and amends the law on land registration. This has the objectives of making use of the Land Register easier for all concerned, and to facilitate the transfer of all land (eventually) from the Register of Sasines into the Land Register.

3. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)¹⁵⁸.

4. In the consideration of the memorandum at its meeting on 10 January, the Committee agreed to write to the Scottish Government to raise questions on a number of the delegated powers.

5. This correspondence is reproduced in the Annexe.

6. The report considers each of the delegated powers on which questions were raised in turn, and provides the Committee’s conclusions thereon.

7. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers contained in the following sections (as they are listed in the DPM) -

sections 111(1), 14(1)(b), 22(1)(d), 33(2), 34(1), 39(5), 40(5), 42(7), 44(6), 59(2), 78(5), 11(6)(b), 27(6), 36(3) and 37, 42(8), 44(7), 52(4), 57(6), 66(3), 93(2) (inserting sections 9B(1)(b), 9B(2)(c), 9C(2) and 9G(3) of the Requirements of Writing (Scotland) Act 1995); 95(3), 96(1) and (2), 106(1), 109(4), 113(1), 118 and 119(3).

¹⁵⁸ Land Registration etc. (Scotland) Bill. Delegated Powers Memorandum. Available at: [http://www.scottish.parliament.uk/S4_Bills/Land%20Registration%20etc.%20\(Scotland\)%20Bill/Land_Registration_etc._Bill_DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Land%20Registration%20etc.%20(Scotland)%20Bill/Land_Registration_etc._Bill_DPM.pdf)

Delegated powers provisions

8. The report addresses those delegated powers which relate to the land registration rules first, and then other powers to make subordinate legislation. This follows the ordering of the Bill sections in the DPM.

Section 77(4) - Powers to prescribe in land register rules the rate of interest payable on claims under warranty

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: negative procedure

Background

9. Section 77 sets out rules in connection with the quantification of compensation for losses incurred, through a breach of Keeper's warranty of title to a registered interest in land. Section 77(2) sets out 3 possible dates (depending on the circumstances) from which interest runs on the compensation amount payable by the Keeper, until it is paid.

10. The power in section 77(4) allows Scottish Ministers to provide, in the land register rules, for the rate of interest payable by the Keeper.

Section 80(7) - Powers to prescribe in land register rules the rate of interest payable on claims for compensation as a result of rectification of the register

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: negative procedure

Background

11. Section 80 concerns compensation payments by the Keeper for losses in consequence of rectification of the Register. Section 80(5) provides that interest is payable on the compensation. Section 80(7) gives the Scottish Ministers power to provide in the land register rules for the rate of interest payable by virtue of section 80(5).

Section 91(4) - Power to prescribe in land register rules the rate of interest on compensation for realignment of rights

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: negative procedure

Background

12. Section 91 concerns the quantification of compensation payable by the Keeper for losses incurred, as a result of the operation of realignment of property

rights under the Bill. Part 9 contains provisions allowing for that realignment, in certain circumstances.

13. Section 91(2) provides that interest is payable on the compensation. Section 91(4) allows the Scottish Ministers to provide, in the land register rules, for the rate of interest.

Comment on the powers in sections 77(4), 80(7) and 91(4)

14. The Committee asked the Scottish Government to explain why it is considered that the negative procedure is a suitable level of Parliamentary scrutiny of the exercise of these powers, rather than the affirmative procedure, given that specification of the level of the interest rate in each case could have significant financial effects for persons entitled to be paid the interest and for the Keeper of the Registers.

15. The response to the Committee explains that the Government's policy in this area is that interest should be available to a person due payment of a compensation sum under the Bill, to acknowledge the fact that during the period between a loss being sustained and the payment being made the person has been unable to benefit from the sum in question. The intention is not that the payment of interest should act as a penalty on the Keeper. Therefore the rate of interest is unlikely to make a significant financial impact on the overall compensation payment. In addition it is not appropriate to tie the rate of interest to a rate (such as the judicial rate of interest) which does not change frequently according to market conditions. The rate must be flexible enough to change to reflect the interest a person may have been able to achieve by, for example, depositing the sum in a savings account. As a result the rate of interest will reflect that available in the market, and could be subject to regular amendment.

16. The Committee accepts from this explanation that a delegated power is required to enable the Scottish Ministers to vary the interest rate. However the power is framed as a general power to specify any interest rate, which is wider in scope than the intended policy as explained in the Government's response. It is intended that the specified interest rate shall reflect market conditions, to properly compensate persons over time, and not be a penalty rate. The Committee considers that in principle these delegated powers should not be drawn more widely in scope than is practicable to give effect to the intended policy.

17. In relation to the application of negative procedure for the exercise of these powers, the response indicates that this procedure is justified as being (in the Government's view) the best use of Parliamentary time. On the other hand, the Committee has regard to the substance of these powers to specify any interest rate. The specification of the particular rate could have significant financial effects for persons entitled to be paid the interest, and for the Keeper of the Registers. This is particularly the case where the power is drawn to allow any rate to be specified.

18. The Committee therefore draws to the attention of the lead committee the response from the Scottish Government in relation to the powers to specify an interest rate in sections 77(4), 80(7) and 91(4). The Committee

considers that these powers should not be drawn more widely than is appropriate to give effect to the intended policy.

19. The Committee considers that these powers have significant enough effects that the affirmative procedure would be a suitable level of scrutiny.

Section 47(5) and 47(6) - power to prescribe days, on or after which recording of certain deeds in the Register of Sasines will have no effect

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	affirmative procedure

Background

20. Section 47(5) allows the Scottish Ministers to prescribe the day on or after which the recording of a standard security (mortgage) over land in the Register of Sasines will have no effect. Section 47(6) allows the Scottish Ministers to prescribe the day on or after which the recording of any deed in the Register of Sasines will have no effect.

21. Section 47(10) provides any day prescribed under section 47(5) or 47(6) is to be a day no earlier than the day when the Keeper's discretion relating to voluntary registrations under section 27(3)(b) is removed. Ministers must consult the Keeper before making an order.

22. Section 47(12) allows for different provision to be made under section 47(5) and 47(6) for different areas.

Comments

23. In relation to the powers in section 47(5) and (6), the Committee indicated to the Scottish Government that the DPM explains that affirmative procedure is considered appropriate, because the closure of the Register of Sasines to new deeds is likely to affect various stakeholders.

24. The Committee asked if this objective would be better achieved in the interests of stakeholders by providing in section 47 for a requirement to consult the relevant persons before making an order, as well as the Keeper of the Register. The Committee also sought clarification of which stakeholders are being referred to.

25. The Committee sought clarification as to why affirmative rather than negative procedure is considered to be an appropriate level of scrutiny, given that the scope of these powers is limited to prescribing the relevant dates.

26. In response, the Government has confirmed that it will consider, in advance of Stage 2, whether it is appropriate to add a requirement to consult relevant persons with an interest in the Register. It is confirmed that the stakeholders affected by the closure of the Register of Sasines will be anyone who submits or may submit an application for recording to that Register, or otherwise interacts with that Register. This will include (but not be limited to) banks and other lenders, local authorities, conveyancing solicitors and private searching firms. Given the

number of potential stakeholders, the Scottish Government does not consider it appropriate to list the stakeholders to be consulted on the face of the Bill. The Committee would agree it does not appear necessary to list each and every consultee, but does consider that consultation prior to setting the date for closure of the Sasine Register may better protect the interests of stakeholders.

27. In relation to the use of affirmative procedure, the response emphasises that the closure of the Register of Sasines has been considered of sufficient importance to warrant the level of scrutiny given by the affirmative procedure, when the power is exercised. This has adopted the suggestion of the Scottish Law Commission.

28. The Scottish Government has undertaken in response that, in light of the consideration noted above on consultation, it will consider whether the addition of a requirement to consult would mean that negative procedure is more appropriate.

29. The Committee welcomes this re-consideration. It appreciates that in reviewing the delegated powers in the Bill, it is not in a position to assess in detail the significance and effects of specifying the particular dates for the closure of the Register of Sasines, in relation to standard securities and subsequently for any deeds. The Committee notes that the Register of Sasines was established in 1617. It would not therefore disagree with any finalised proposal of the Government and the Scottish Law Commission that affirmative procedure may be an appropriate level of scrutiny for the exercise of these powers. On the other hand, the principle of closure of the Register is set out in the Bill, and the scope of these powers is limited to prescribing the relevant dates.

30. The Committee will return to consider these powers after Stage 2.

31. The Committee therefore reports to the lead Committee that the Scottish Government has confirmed it will consider, in advance of Stage 2—

(a) whether it is appropriate to add a requirement to consult relevant persons with an interest in the Register of Sasines, in relation to the powers in section 47(5) and (6), and

(b) in light of that consideration, whether affirmative or negative procedure is the more appropriate level of scrutiny for the exercise of these powers.

Section 55(4) - Power to make provision about the description of unregistered subjects in an advance notice

Power conferred on:	the Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	affirmative procedure

Background

32. This section allows the Scottish Ministers to make provision concerning the detailed description of land plots or leases, in “advance notices”, where a plot or

lease is not yet registered in the Land Register. The Bill introduces the new system of “advance notices” in sections 55 to 61.

33. This new system protects the grantee of a deed during the time between taking delivery of it (in exchange for the money) and the registration of the deed. This period is the “gap risk”, as the grantee is vulnerable in this period to the registration of competing deeds or the bankruptcy of the granter of the deed. The entry of an advance notice referring to a registrable deed ensures that during the next 35 days no disposition or competing advance notice can beat that deed in any “race to the register” to obtain the title to the property.

Comments

34. The Committee drew to the attention of the Scottish Government that the DPM explains that affirmative procedure is considered an appropriate level of scrutiny for the exercise of this power because “the power will be of interest to stakeholders and it is important for the running of the system.” This power shall be used to make technical provision on matters of conveyancing description.

35. The Committee therefore asked if the objective could be better achieved in the interests of stakeholders by providing in section 55 for a requirement to consult the relevant persons before making the regulations, as well as the Keeper of the Register? The Committee also asked for clarification why affirmative rather than negative procedure is considered the appropriate level of scrutiny, and why the standard of conveyancing description for advance notices could not initially be set out in the Bill?

36. The Government response explains that the advance notice scheme in the Bill was widely consulted on prior to introduction of the Bill, and it is not considered appropriate to provide for further consultation on the same area. In particular it is possible that the type of description for Sasine advance notices or minor parts of it will change over time, and in light of changing technology. It is not considered appropriate to require consultation every time the power is exercised

37. The Committee accepts that approach in relation to consultation, taking into account that this is a power to make technical provision on matters of conveyancing description. The Committee also accepts the explanation why it is not considered appropriate to include the initial conveyancing descriptions for unregistered subjects in the Bill.

38. The Scottish Government response confirms, however, that they have reconsidered the appropriate level of scrutiny and the best use of parliamentary time, in light of the potential for frequent amendment. The Government now considers that negative procedure would be a more appropriate procedure than affirmative procedure in the circumstances. The Committee accepts this approach, taking into account that the power will be used to specify technical matters.

39. The Committee reports in relation to the power in section 55(4) that it considers that the negative procedure would be an appropriate level of scrutiny for the exercise of this power. The Scottish Government has

confirmed this view in its response. The Committee assumes this will be taken forward by suitable amendment at Stage 2.

Section 58(6)(b) - Power to provide certain documents are unaffected by advance notices

Power conferred on: the Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

Background

40. Section 58(6)(a) provides that the effect of an advance notice does not apply to specific documents registered under specific Acts. This concerns notices of potential liability for maintenance costs of former and new owners of property. Section 58(6)(b) allows the Scottish Ministers to specify other types of deeds to be similarly unaffected.

Comments

41. The Committee asked the Scottish Government in relation to this power-

- (a) Could it be explained why this power requires to apply to any types of deed and cannot be more narrowly drawn, for instance by specifying significant types (such as dispositions) which cannot be excluded from the advance notice system?
- (b) As it appears this power is capable of excluding such significant types with a significant effect on Part 4 of the Bill, could the Government re consider whether the affirmative procedure could be more suitable for the exercise of this power?

42. The Government response explains that it is difficult or impossible to specify all the types of deeds which should not in future be excluded from the advance notice system. The Committee accepts this explanation, taking into account that it involves technical matters of conveyancing.

43. The response to the Committee acknowledges that the use of this power is potentially significant (in relation to its effect on the advance notice system in the Bill). The Scottish Government has re-considered that the power in section 58(6)(b) should be subject to the affirmative procedure. The Committee accepts this approach.

44. The Committee therefore reports in relation to the power in section 58(6)(b) that it considers that the affirmative procedure would be an appropriate level of scrutiny for the exercise of this power. The Scottish Government has confirmed this view in its response. The Committee assumes that this will be taken forward by suitable amendment at Stage 2.

Section 61(1) - Power to amend application of advance notices scheme in relation to certain deeds

Power conferred on: **the Scottish Ministers**
Power exercisable by: **Order**
Parliamentary procedure: **Negative procedure**

Background

45. Section 61(1) provides that the Scottish Ministers may modify the application of Part 4 of the Bill in relation to any deed of a kind specified in the Order. For example this might enable a particular type of deed to be capable of being protected by an advance notice, where that otherwise wouldn't be possible by virtue of the provisions in Part 4.

Comments

46. The Committee asked in relation to this power (a) for an explanation why it requires to apply to any kinds of deed and cannot be more narrowly drawn, for instance by specifying significant kinds (such as dispositions) for which any order could not modify the application of provisions in Part 4.

47. The Committee also asked, as it appears that this power is capable of extending to such significant types of deed with a significant effect on Part 4 of the Bill, (b) whether the Government might re-consider whether the affirmative procedure could be more suitable for the exercise of this power.

48. In relation to (a) and the scope of this power, the Scottish Government has responded that there are numerous types of deed in relation to which the Government has no intention of altering the principal application of Part 4 of the Bill. It is considered by the Government to be appropriate that the power is available to make technical changes to the application of Part 4, in relation to those deeds where experience shows those changes to be necessary. In addition new deeds may be created by legislation which would then have to be added in turn to any list.

49. The Committee notes therefore from the response that it appears this power is drawn wider in scope than is required to deliver the intended policy. The intention is to permit technical changes in relation to specific types of deed, if experience shows this is required over time, or to add new deeds to the advance notice system in Part 4. However section 61 enables the Scottish Ministers by order to modify the application of Part 4 (in any way) in relation to any type of deed specified in the order, after consultation with the Keeper. This is capable of allowing Part 4 to be very significantly modified, in relation to significant types of deeds, such as dispositions or other types transferring land and buildings.

50. The Committee considers that this power should be drawn no more widely than is appropriate to deliver the intended policy, and the Scottish Government should therefore re-consider the scope of this power in advance of Stage 2 of the Bill.

51. In relation to the application of negative procedure, the Government response indicates that it has carefully considered part (b) of the Committee's question. However it remains of the view that negative procedure is the appropriate level of Parliamentary scrutiny. The explanation for this relates to the intended scope of the power, as above. The power is intended primarily to be used

to extend the advance notice system to deeds that currently could not be covered by an advance notice (such as unilateral deeds created by statute). In relation to deeds already covered, it is envisaged that any modification will be of a technical nature, and only where experience has shown it to be required. The response indicates that no-one would be detrimentally affected by the use of the power.

52. The Committee considers that this power is widely framed, and it appears from the Government's response to be drawn wider than the intended policy requires. The Committee cannot follow why any modification of Part 4 by order in relation to dispositions, for example, could not possibly detrimentally affect certain persons. For example section 58 sets out new rules for the priority of deeds registered under the advance notice system, to determine which registered deed has legal effect in priority. It appears that modification of these rules in relation to particular types of deeds might adjust the rights of the persons involved. While the present Government may have no intention of causing a detrimental effect, in the Committee's view the potential for causing such an effect remains.

53. The Committee therefore considers that the power in section 61 is significant in allowing the modification of Part 4 of the Bill in relation to any kinds of deeds. The Committee has not accepted the explanations in the DPM and the response to the Committee in justification of the choice of negative procedure as the appropriate level of Parliamentary scrutiny for the exercise of this power.

54. The Committee therefore draws to the attention of the lead committee the response from the Scottish Government in relation to the power in section 61(1) to modify the application of Part 4 of the Bill. The Committee considers that this power should not be drawn more widely than is appropriate to give effect to the intended policy.

55. The Committee also considers that this power has significant enough effects in permitting modifications of Part 4 of the Bill, that the affirmative procedure would be a suitable level of scrutiny.

Section 93(2), inserting section 9E(1) of the Requirements of Writing (Scotland) Act 1995 - Further powers related to electronic documents

Power conferred on:	the Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure, but affirmative where regulations amend or repeal any enactment

Background

56. Section 93(2) inserts a new section 9E into the Requirements of Writing (Scotland) Act 1995. Inserted section 9E(1) provides that the Scottish Ministers may make provision in regulations as to the effectiveness or formal validity of, or presumptions to be applied to:

- alterations made before or after execution to an electronic document;
- authentication, by or on behalf of the granter, of such a document;
- authentication, by or on behalf of a person with a disability, of such a document; and

- any annexation to such a document.

57. It appears that those provisions in relation to alterations, authentication by persons with disabilities and annexations, propose to extend to electronic documents provisions which are already contained in the 1995 Act for traditional documents. The new section 9E(1)(b) will enable the Scottish Ministers in regulations to make provision as to the effectiveness or formal validity of, or presumptions to be made with regard to, the authentication (by or on behalf of the granter) of an electronic document.

58. Inserted section 9E(2) provides that regulations under section 9E(1) may make incidental, supplemental, consequential, transitional, transitory or saving provisions considered necessary in light of regulations made under 9E(1).

Comments

59. The Committee indicated to the Scottish Government that it appears that the power contained in new section 9E(1)(b) of the Requirements of Writing (Scotland) Act 1995 could be used to prescribe significant matters – for example requirements for the validity of electronic wills or electronic contracts for land transactions. The Committee therefore asked why the Government has considered that negative procedure is the appropriate level of Parliamentary scrutiny of such regulations, rather than prescribing initial requirements in the Bill, or applying the affirmative procedure.

60. The Scottish Government has responded to the Committee that that power is intended to relate to “minor technical matters in relation to the authentication and alteration of electronic documents, for example amending an electronic document to fix a spelling error in a company name, which the Government considers are appropriately subject to negative procedure.” The response also indicates that there are other amendments to the 1995 Act proposed in the Bill which are subject to the negative procedure, and so the fact that this power is also negative will allow the Scottish Ministers the scope to make one set of regulations in the area of electronic documents. The response also indicates that “the minor nature of the matters at hand mean it is not appropriate to set out initial requirements in the Bill.”

61. The Committee has not found that explanation to be convincing, in relation to the power in the new section 9E(1)(b), to enable the prescription of the requirements for the validity, effectiveness and presumptions to be made with regard to, the authentication of electronic documents. It considers that the substance of this power should be considered. For example, it appears capable of being used to prescribe any validity requirements for electronic wills or electronic contracts for land transactions. Changes of that nature would be significant legal changes, not minor and technical matters.

62. The Committee accepts that it appears such matters would likely be to a level of detail and technicality that subordinate legislation will be a suitable means of prescribing them, in principle.

63. The Committee therefore draws to the attention of the lead committee the response from the Scottish Government in relation to the power in section 93(2), so far as it inserts new section 9E(1)(b) of the Requirements of

Writing (Scotland) Act 1995. That paragraph enables the prescription by regulations of validity or authentication requirements for electronic documents. The Committee considers this to be a potentially significant power, going beyond minor technical matters in relation to the authentication and alteration of electronic documents.

64. The Committee considers that this power is significant enough that the affirmative procedure would be a suitable level of scrutiny.

Section 103(1) - Power to make provision regulating availability of information and access to the Keeper's registers

Power conferred on:	the Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	affirmative procedure

Background

65. Section 103(1) enables the Scottish Ministers to make provisions regarding what information has to be made available by the Keeper, the manner of doing so, and access to any of the Keeper's Registers. This is capable of covering information in or as to the Registers, and other information held by the Keeper (such as for instance statistics and reports).

Comments

66. The Committee asked the Scottish Government to explain, given the apparent significance of this power in relation to information to be made available by the Keeper and access to any of the Keeper's Registers, why the provision is framed as a general, discretionary power. It would have been possible to provide that an order could make provision on matters described by specified headings, in connection with such information and access. It also asked for an explanation why initial provision on these matters could not be made in the Bill.

67. The Scottish Government has responded that the provision is in general terms, as the power extends to all of the Keepers Registers, for which different levels and types of access will be appropriate, due to the different structure, nature and underlying legislative foundations of the various Registers. The principle that the Land Register is a public register is set out in section 1 of the Bill, and section 100 provides for the issue of extracts and certified copies from parts of the Land Register.

68. In relation to the intended scope of the power, the response indicates – “section 103 allows Scottish Ministers to make provision about the manner of wider access, which is a matter of detail. At present the electronic land registration system of Registers of Scotland restricts the way the Land Register may be indexed and therefore the way it may be searched. This power will allow Scottish Ministers to give consideration to the flexibility of the future IT system. It is not possible or appropriate to set out more detail on the face of the Bill until the capabilities of any future IT system are known.”

69. The Committee appreciates that a delegated power may be necessary, to make further provision on detailed matters which may not be appropriate for

further primary legislation, as regards information to be made available to the Keeper and access to any of the Keeper's Registers. The Committee also accepts that the power appears to cover significant matters, and this indicates that the affirmative procedure may be appropriate for the exercise of the power.

70. However in light of the Government's response, the Committee has concerns as to the wide and general nature of this power, and whether it could be drawn more narrowly to give effect to the intended policy/policies. The power extends to any of the Keeper's Registers, and so relates to the statutory framework for each Register. The response to the Committee has indicated that it is intended that the power covers residual matters of detail.

71. The Committee also notes that, when read with the ancillary provisions in section 113, it is possible that an order under the general powers in section 103 could make provision as regards access to any of the Keeper's Registers (for example) and section 113 might be used to make supplemental provision to that. Such provision is capable of modifying any enactments, including this Bill itself (once passed).

72. The Committee therefore draws to the attention of the lead Committee the response from the Scottish Government in relation to the powers in section 103(1). The Committee has concerns as to the general scope of this power in relation to information to be made available by the Keeper and access to the Keeper's Registers, and whether in light of that response it could be drawn more narrowly to give effect to the intended policies.

73. The Committee recommends that the Scottish Government should consider this further in advance of Stage 2.

ANNEX

Scottish Government Response to Subordinate Legislation Committee

Land Registration etc. (Scotland) Bill at Stage 1

1. I refer to your letter of 10 January 2012 regarding the Land Registration etc. (Scotland) Bill, in which you sought explanations for a number of matters related to the Delegated Powers Memorandum. As requested I set out the Scottish Government response.

Section 77(4) - Powers to prescribe in land register rules the rate of interest payable on claims under warranty

Section 80(7) - Powers to prescribe in land register rules the rate of interest payable on claims for compensation as a result of rectification of the register

Section 91(4) - Power to prescribe in land register rules the rate of interest on compensation for realignment of rights

SLC Question

2. The SLC asked the Government to explain why it is considered that the negative procedure is a suitable level of Parliamentary scrutiny of the exercise of these powers rather than the affirmative procedure, given that specification of the level of the interest rate in each case could have significant financial effects for persons entitled to be paid the interest and for the Keeper of the Registers.

Scottish Government Response

3. The Scottish Government policy in this area is that interest is available to a person due payment of a sum under the Bill to acknowledge the fact that during the period between a loss being sustained and the payment being made the person has been unable to benefit from the sum in question. The intention is not that the payment of interest should act as a penalty on the Keeper. Therefore the rate of interest is unlikely to make a significant financial impact on the overall compensation payment. In addition it is not appropriate to tie the rate of interest to a rate (such as the judicial rate of interest) which does not change frequently according to market conditions. The rate must be flexible enough to change to reflect the interest a person may have been able to achieve by, for example, depositing the sum in a savings account. As a result the rate of interest will reflect that available in the market and could be subject to regular amendment. The Scottish Government's view is that, in order to provide for best use of Parliamentary time, negative procedure is appropriate. This fits with the level of scrutiny suggested by the Scottish Law Commission in their draft Land Registration (Scotland) Bill accompanying their Report on Land Registration.

Section 47(2) and 47(3) - power to prescribe days, on or after which recording of certain deeds in the Register of Sasines will have no effect

SLC Question

4. The Delegated Powers Memorandum explains that affirmative procedure is considered appropriate because the closure of the Register of Sasines to new deeds is likely to affect various stakeholders.
 - (a) Would this objective be better achieved in the interests of stakeholders by providing in section 47 for a requirement to consult the relevant persons before making an order, as well as the Keeper of the Register? Which stakeholders are being referred to?
 - (b) Could it be further clarified why affirmative rather than negative procedure is considered to be an appropriate level of scrutiny, given that the scope of these powers is limited to prescribing the relevant dates?

Scottish Government Response

5. The Scottish Government will consider, in advance of Stage 2, whether it is appropriate to add a requirement to consult relevant persons with an interest in the Register. The stakeholders affected by the closure of the Register of Sasines will be anyone who submits or may submit an application for recording to that Register or otherwise interacts with that Register. This will include but not be limited to, banks and other lenders, local authorities, conveyancing solicitors and private searching firms. Given the number of potential stakeholders, the Scottish Government does not consider it appropriate to list the stakeholders to be consulted on the face of the Bill.
6. The Scottish Law Commission suggested that affirmative procedure was appropriate for this power. The Scottish Government felt that what could be done under the power is of sufficient importance to warrant the level of scrutiny given by affirmative procedure. However, in light of the consideration noted above regarding consultation the Scottish Government will consider whether the addition of a requirement to consult would mean that negative procedure is more appropriate.

Section 55(4) - Power to make provision about the description of unregistered subjects in an advance notice

SLC Question

7. The Delegated Powers Memorandum explains that affirmative procedure is considered appropriate because “the power will be of interest to stakeholders and it is important for the running of the system.” On the other hand, it appears that this power shall be used to make technical provision on matters of conveyancing description.

- (a) Would this objective be better achieved in the interests of stakeholders by providing in section 55 for a requirement to consult the relevant persons before making the regulations, as well as the Keeper of the Register? Which stakeholders are being referred to?
- (b) Could it be further clarified why affirmative rather than negative procedure is considered the appropriate level of scrutiny, and why the standard of conveyancing description for advance notices could not initially be set out in the Bill?

Scottish Government Response

- 8. The stakeholders affected will be those using advance notices. This will include, but not be limited to, people buying houses (or their solicitors) and lenders registering standard securities. The Scottish Government view is that the advance notice scheme in the Bill was widely consulted on prior to introduction of the Bill and it is not appropriate to provide for further consultation on the same area. In particular it is possible that the type of description for Sasine advance notices or minor parts of it will change over time and it is not considered appropriate to require consultation every time the power is exercised.
- 9. The description required for Sasines advance notices is likely to change in light of changing circumstances and technology. For example, if it becomes practical to identify a tenement flat by exact co-ordinates rather than general description it may be appropriate to include this information in a Sasine advance notice. For this reason it is not possible to set out the standard of description for a Sasine advance notice on the face of the Bill. By way of contrast Land Register advance notices will always describe the property by reference to the title number. The Scottish Government considers the description of subjects in a Sasines advance notice to be an important part of the advance notice system. However, the Scottish Government have reconsidered the appropriate level of scrutiny and the best use of Parliamentary time in light of the potential for frequent amendment. The Government now consider negative procedure would be a more appropriate procedure than affirmative procedure in the circumstances.

Section 58(6)(b) - Power to provide certain documents are unaffected by advance notices

SLC Question

10. The committee asks

- (a) Could it be explained why this power requires to apply to any types of deed and cannot be more narrowly drawn, for instance by specifying significant types (such as dispositions) which cannot be excluded from the advance notice system?

(b) As it appears this power is capable of excluding such significant types with a significant effect on Part 4 of the Bill, could the Government re-consider whether the affirmative procedure could be more suitable for the exercise of this power?

Scottish Government Response

11. The two types of deed referred to in section 58(6)(a) are unique types of registrable notice. They represent the exception to the norm and are excluded from the advance notice system because application of the provisions would defeat their purpose. Clearly if dispositions were excluded this would defeat the purpose of the whole advance notice system. However, the view of the Scottish Government is that it is not practical to list all the deed types which cannot be excluded from the operation of the advance notice system. This would involve listing dispositions, standard securities, deeds of real burdens or conditions, deeds of servitude, minutes of agreement and many others. There would also be a need to ensure that new types of deed were added to the list if appropriate. The view of the Scottish Government is that, given the number of deeds which cannot be excluded there is no benefit in picking out one particular type of deed.
12. Negative procedure was selected because the use of the power is unlikely to be controversial. While this remains the Government's view we accept that the power is potentially significant. In light of this the Scottish Government now considers the power in section 58(6)(b) should be subject to affirmative procedure.

Section 61(1) - Power to amend application of advance notices scheme in relation to certain deeds

SLC Question

13. The Committee asks
- (a) Could it be explained why this power requires to apply to any kinds of deed and cannot be more narrowly drawn, for instance by specifying significant kinds (such as dispositions) for which any order could not modify the application of provisions in Part 4?
 - (b) As it appears this power is capable of extending to such significant types of deed with a significant effect on Part 4 of the Bill, could the Government re-consider whether the affirmative procedure could be more suitable for the exercise of this power?

Scottish Government Response

14. There are numerous types of deed in relation to which the Government has no intention of altering the principal application of Part 4 of the Bill. Each of these

deeds is significant to the grantor and grantee of that deed. However, it is considered appropriate that the power is available to make technical changes to the application of Part 4 in relation to those deeds where experience shows those changes to be necessary. In addition new deeds may be created by legislation which would then have to be added in turn to any list.

15. The Scottish Government has carefully considered part (b) of the committee's question. However, the Government remains of the view that negative procedure is the appropriate level of Parliamentary scrutiny. The power is primarily to be used to extend the advance notice system to deeds that currently could not be covered by an advance notice (such as unilateral deeds created by statute). As explained, in relation to deeds already covered, it is envisaged that any modification will be of a technical nature and only where experience has shown it to be required. No-one would be detrimentally affected by the use of the power.

Section 93(2), inserting section 9E(1) of the Requirements of Writing (Scotland) Act 1995 - Further powers related to electronic documents

SLC Question

16. It appears that the power contained in new section 9E(1)(b) of the Requirements of Writing (Scotland) Act 1995 could be used to prescribe significant matters – for example, requirements for the validity of electronic wills or electronic contracts for land transactions. Why is it considered that negative procedure is the appropriate level of Parliamentary scrutiny of such regulations, rather than prescribing initial requirements in the Bill, or applying affirmative procedure?

Scottish Government Response

17. The power relates to minor technical matters in relation to the authentication and alteration of electronic documents, for example amending an electronic document to fix a spelling error in a company name, which the Government considers are appropriately subject to negative procedure. In addition section 9E(4) provides if regulations amend primary legislation they will be subject to affirmative procedure. There are also other amendments to the 1995 Act in the Bill subject to the negative procedure. The fact that this power is also negative will give Scottish Ministers scope to make one set of regulations in this area. Finally the minor nature of the matters at hand mean it is not appropriate to set out initial requirements in the Bill.

Section 103(1) - Power to make provision regulating availability of information and access to the Keeper's registers

SLC Question

18. The Committee asks:

- (a) Given the significance of this power in relation to information to be made available by the Keeper and access to any of the Keeper's Registers, why is the provision framed as a general, discretionary power, rather than providing that an order shall make provision on matters as described by specified headings, in connection with such information and access?

- (b) Why could initial provision on these matters not be made in the Bill?

Scottish Government Response

- 19. The provision is in general terms as the power extends to all of the Keepers registers for which different levels and types of access will be appropriate due to the different structure, nature and underlying legislative foundations of those other registers.

- 20. The principle that the Land Register is a public register is set out in section 1 of the Bill. The public are therefore guaranteed access to the Land Register. Section 100 of the Bill makes more detailed provision about extracts, which will be one of the ways people will access the Register. Section 103 allows Scottish Ministers to make provision about the manner of wider access, which is a matter of detail. At present the electronic land registration system of Registers of Scotland restricts the way the Land Register may be indexed and therefore the way it may be searched. This power will allow Scottish Ministers to give consideration to the flexibility of the future IT system. It is not possible or appropriate to set out more detail on the face of the Bill until the capabilities of any future IT system are known.

ANNEXE B: EVIDENCE RECEIVED BY THE FINANCE COMMITTEE

SUBMISSION FROM HOMES FOR SCOTLAND

Please find below answers to the questions raised by the Finance Committee from Homes for Scotland:

1) Did you take part in the SG consultation exercise for the Bill and if so did you comment on the financial assumptions made?

Homes for Scotland submitted a short response on specific proposals but did not comment on the financial assumptions made.

2) Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

N/A

3) Did you have sufficient time to contribute to the consultation exercise?

Yes

4) If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum?

The Bill does not have any direct financial implications for Homes for Scotland. The Bill is likely to have financial implications for our home building member companies through changes to conveyancing practices but these are yet to be measured. The Financial Memorandum states (para 373) that there will be an initial extra cost to the registration process and we assume that this is the cost that will be passed to the public. It would however seem likely that this cost would be met by home building companies. This would be a 'new' cost that is not yet payable at the moment.

Note - It may be helpful to point out that it was our understanding that the shared plot title sheets would not be included at the next stage, yet costs to the ROS for processing them has been included within the Financial Memorandum at £436k.

5) Are you content that your organisation can meet the financial costs associated with the Bill?

There are no direct financial consequences for Homes for Scotland. Our members are yet to estimate the financial impact so we are unable to provide comment at this time.

6) Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Homes for Scotland does not feel in a position to comment.

7) If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Homes for Scotland does not feel in a position to comment.

8) Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance?
Homes for Scotland does not feel in a position to comment.

Kindest regards

Karen Trouten
Head of Policy & Research
Homes for Scotland

ANNEXE C: MINUTE OF MEETINGS

1st Meeting, 2012 (Session 4), Wednesday 11 January 2012

Decision on taking business in private: The Committee agreed to take item 4 and all future reviews of evidence taken in private.

Land Registration etc. (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

John Scott, Solicitor, and Ross MacKay, Solicitor, Law Society of Scotland;
Fiona Letham, Professional Support Lawyer, Dundas & Wilson;

Graeme McCormick, Founder and Managing Director, Conveyancing Direct;

Ken Swinton, Senior Lecturer in Law, Abertay University, Council Member, and Ian Ferguson, Solicitor, Partner Mitchells Robertson Solicitors, Council Member, Scottish Law Agents Society.

Murdo Fraser declared he is a member of the Law Society of Scotland and Mike MacKenzie referred to an entry in his Register of Interest and declared himself as a personal friend of Mr McCormick.

Land Registration etc (Scotland) Bill The Committee reviewed the evidence heard earlier in the meeting.

2nd Meeting, 2012 (Session 4), Wednesday 18 January 2012

Land Registration etc. (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Andy Wightman;

Iain Langlands, Chartered Surveyor, Royal Institution of Chartered Surveyors;

Graham Little, Head of Service Delivery, Data Collection and Management, Ordnance Survey;

Richard Blake, Legal Adviser, Scottish Land and Estates;

Tom Axford, Corporate Secretary & Head of Legal, Scottish Water.

Land Registration etc. (Scotland) Bill (in private): The Committee reviewed the evidence heard at today's meeting.

3rd Meeting, 2012 (Session 4), Wednesday 25 January 2012

Land Registration etc. (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Alan Cook, Chairman, and Ann Stewart, Member, SPF Commercial Committee & Professional Support Lawyer, Scottish Property Federation;

Gary Donaldson, Business Development Manager, Millar & Bryce;

Sheenagh Adams, Keeper of the Register, Gavin Henderson, Land Registration Bill Team Leader, and John King, Director of Registration, Registers of Scotland.

Land Registration etc. (Scotland) Bill (in private): The Committee reviewed the evidence heard at today's meeting

5th Meeting, 2012 (Session 4), Wednesday 8 February 2012

Land Registration etc. (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Fergus Ewing, Minister for Energy, Enterprise and Tourism, Scottish Government;
Gavin Henderson, Land Registration Bill Team Leader, Registers of Scotland;
Matthew Smith, Land Registration Bill Team Officer, and Valerie Montgomery,
SGLD Principal Legal Officer, Scottish Government.

6th Meeting, 2012 (Session 4), Wednesday 22 February 2012

Land Registration etc. (Scotland) Bill The Committee took evidence from—

Lesley Thomson Q.C, Solicitor General for Scotland;
Ernie Shippin, Deputy Head of Serious and Organised Crime Division, and Danny
Kelly, Principal Depute, Policy Division, The Crown Office.

Land Registration etc. (Scotland) Bill (in private): The Committee considered its draft Stage 1 report.

7th Meeting, 2012 (Session 4), Wednesday 29 February 2012

Land Registration etc. (Scotland) Bill (in private): The Committee considered and agreed a draft Stage 1 report. The Committee thanked Professor Reid for his assistance advice.

ANNEXE D: ORAL AND OTHER ASSOCIATED EVIDENCE

1st Meeting, 2012 (Session 4), Wednesday 11 January 2012

[Official report](#)

John Scott, Solicitor, and Ross MacKay, Solicitor, Law Society of Scotland;

Fiona Letham, Professional Support Lawyer, Dundas & Wilson;

Graeme McCormick, Founder and Managing Director, Conveyancing Direct;

Ken Swinton, Senior Lecturer in Law, Abertay University, Council Member, and Ian Ferguson, Solicitor

[Law Society of Scotland](#)

[Conveyancing Direct](#)

[Scottish Law Agents Society](#)

2nd Meeting, 2012 (Session 4), Wednesday 18 January 2012

[Official report](#)

Andy Wightman;

Iain Langlands, Chartered Surveyor, Royal Institution of Chartered Surveyors;

Graham Little, Head of Service Delivery, Data Collection and Management, Ordnance Survey;

Richard Blake, Legal Adviser, Scottish Land and Estates;

Tom Axford, Corporate Secretary & Head of Legal, Scottish Water.

[Andy Wightman](#)

[Scottish Water](#)

3rd Meeting, 2012 (Session 4), Wednesday 25 January 2012

[Official report](#)

Alan Cook, Chairman, and Ann Stewart, Member, SPF Commercial Committee & Professional Support Lawyer, Scottish Property Federation;

Gary Donaldson, Business Development Manager, Millar & Bryce;

Sheenagh Adams, Keeper of the Register, Gavin Henderson, Land

Registration Bill Team Leader, and John King, Director of Registration,

Registers of Scotland.

[Scottish Property Federation](#)

[Registers of Scotland](#)

5th Meeting, 2012 (Session 4), Wednesday 8 February 2012

[Official report](#)

Fergus Ewing, Minister for Energy, Enterprise and Tourism, Scottish Government;

Gavin Henderson, Land Registration Bill Team Leader, Registers of Scotland;

Matthew Smith, Land Registration Bill Team Officer, and Valerie Montgomery, SGLD Principal Legal Officer, Scottish Government.

6th Meeting, 2012 (Session 4), Wednesday 22 February 2012

[Official report](#)

Lesley Thomson Q.C, Solicitor General for Scotland;
Ernie Shippin, Deputy Head of Serious and Organised Crime Division, and Danny
Kelly, Principal Depute, Policy Division, The Crown Office.

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