

LAND REGISTRATION ETC. (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Land Registration etc. (Scotland) Bill introduced in the Scottish Parliament on 1 December 2011. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 6–EN.

2. Secure, reliable and accessible information about who owns land is fundamental to the operation of modern market economies. The registration of legal rights in land in a property register ensures accurate and reliable information is available to parties transacting with interests in land. An entry for a property registered in a land register of the type provided for in this Bill includes a description of a property with reference to a plan that allows anyone looking at the register to establish the extent of a property. It discloses who owns that property, what rights and burdens the land is subject to and any securities, such as mortgages, which affect the land. When someone wants to sell their land any potential buyer can establish from the register that the person selling the land is the legal owner and what the extent of the land is. It also enables the owner of a property to secure finance using the property as security by allowing a lender to establish through the register that the person is the legal owner. This ensures the smooth running of a vibrant property market.

OVERVIEW OF LAND REGISTRATION IN SCOTLAND

3. Scotland has a long history of public registration of rights in land. The General Register of Sasines, Scotland's original national register of property deeds, dates back to 1617. Over the centuries, the General Register of Sasines developed into an effective public record which, combined with high standards in professional conveyancing and principled property law, has given Scotland an effective balance between certainty as to ownership and ease of transacting with land.

4. However, from the mid 19th century, a different approach to land registration began evolving in some other jurisdictions, including England and Wales. This approach comprised two innovations: first, the idea of a map-based register, which reflects legal boundaries in a clear and accessible manner; and second, the idea that registered titles should be guaranteed by the state, which gives protection to property owners and potential purchasers.

5. The Land Registration (Scotland) Act 1979 (“the 1979 Act”) introduced this new form of registration to Scotland. Beginning with the County of Renfrew in April 1981, property that was sold for value began to be transferred from the General Register of Sasines to the new Land Register of Scotland. The Land Register became operational across the whole of Scotland in 2003 and now contains some 55% of titles and 21% of the land mass of Scotland.

6. The Land Register is managed by the Keeper of the Registers of Scotland (“the Keeper”). The Keeper is the statutory officeholder who heads the Registers of Scotland (“RoS”). The Keeper is responsible for compiling and maintaining 16 public registers. The Keeper handles around half a million registration transactions each year and also makes information from the registers publicly available. This Bill is primarily associated with the Land Register, however it also makes some provision in respect of the General Register of Sasines and the Keeper’s other registers.

7. In Scotland, the Land Register was introduced to make conveyancing simpler and cheaper. It has achieved this for titles on the Land Register. The Land Register is open and transparent. When looking at a title in the Land Register, it is easy to determine the boundaries of the property; the ownership of the property; whether there are any securities over the property; and what rights and burdens affect the property. This process is slower when examining a title in the General Register of Sasines, and consequently conveyancing fees are higher.

8. An effective system of land registration is vital to a country’s economic development. According to the United Nations Economic Commission for Europe “a system of compulsory registration of private land rights facilitates ... a crucial feature of a successful economy. Land registration makes possible quick and sure procedures for creating and securing mortgages. The evolution of a flourishing financial sector, providing loans for development and investment, comes about where land rights are guaranteed”.

WORK OF THE SCOTTISH LAW COMMISSION

9. In 2002, the Keeper, with the agreement of Scottish Ministers, invited the Scottish Law Commission (“the SLC”) to review the law of land registration in Scotland. The SLC issued three discussion papers. The first was a Discussion Paper entitled *Land Registration: Void and Voidable Titles* (Scots Law Com DP No 125, 2004), the second was a Discussion Paper on *Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP No 128, 2005) and the third was a Discussion Paper on *Land Registration: Miscellaneous Issues* (Scot Law Com DP No 130, 2005). The SLC project culminated in the publication of its Final Report on Land Registration (Scot Law Com No 222) (referred to in this document as the SLC report), including a draft Land Registration (Scotland) Bill, in February 2010.

10. 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. Where the policy in the Bill is fully explained in the SLC report, this Memorandum, instead of repeating the report at length, provides a summary and also cross-refers to the relevant parts of the report in order to provide a detailed, but readable, explanation of the Government’s policy intentions.

ALTERNATIVE APPROACHES

11. Consideration has been given to a number of alternative approaches to the various policies in the Bill. Where appropriate, this document makes reference to these alternative approaches and explains why they have been discounted.

BILL OVERVIEW

12. The Land Registration etc. (Scotland) Bill is intended to achieve five broad policy objectives. It:

- provides for the eventual completion of the Land Register by increasing the number of triggers for a first registration and providing for voluntary registrations and Keeper-induced registrations;
- introduces 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 (which risk is currently underwritten by insurance);
- introduces amendments to the Requirements of Writing (Scotland) Act 1995 (the 1995 Act) to allow for electronic conveyancing and electronic registration;
- seeks to re-align registration law with property law by, for example, adjusting the circumstances in which a person can recover their property rather than only receive compensation from the Keeper; and
- continues and makes improvements to the system for land registration in Scotland. It replaces much of the Land Registration (Scotland) Act 1979. The Bill places on a sound statutory footing the administrative practices of the Keeper of the Registers of Scotland that have evolved in practice since the passing of the 1979 Act.

POLICY OBJECTIVES OF THE BILL

Overview of the bill provisions

13. The Bill provides a statutory framework for the continuation and improvement of the land registration system in Scotland. The Bill is in 11 parts and 5 schedules. The provisions can broadly be divided across the five principal policy objectives described above. This document deals with each in turn instead of describing the Bill Part by Part. In addition to these policies there are some other miscellaneous provisions that contain further policy objectives. These are explained below.

Completion of the Land Register: general

14. Completion of the Land Register is considered to be the most important policy aim of the Bill. A completed Land Register is viewed as highly desirable in the longer term. For both professional solicitors and members of the public, having one property registration system is more efficient than having two. The Land Register is more modern, transparent and easier to understand than the General Register of Sasines. The Land Register also better serves those involved in conveyancing transactions in relation to residential, commercial and agricultural property. Finally, the Land Register aims to deliver cheaper conveyancing. The financial saving

of land registration as opposed to recording in the General Register of Sasines was the primary policy objective behind the 1979 Act and is still the one of the primary long term policy objectives behind the provisions in the Bill. Registration of title in the Land Register also offers titleholders a title that is definitive in nature and extent and backed by a state guarantee.

15. The current law as to when a property enters the Land Register is contained in section 2 of the 1979 Act. It provides that unregistered property enters the Land Register as and when it is sold for a monetary consideration. The sale of unregistered property is what is commonly referred to as a “trigger” for “first registration”. First registration describes the process by which land becomes registered in the Land Register for the first time. There are properties in Scotland that have not been, and are unlikely to be, sold. Examples include farms and estates that are passed down through families from one generation to the next through the law of succession, and some land that is publicly owned.

16. 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. This is because the registered title holdings are concentrated in urban areas where the turnover of properties is higher than in rural areas. Although Land Register coverage continues to grow, total coverage is unlikely to be completed without legislative change.

17. The Bill contains several provisions that ensure the eventual completion of the Land Register. The three main elements of the strategy to increase land register coverage and the eventual closure of the General Register of Sasines are to provide: more triggers for first registration; a power to remove the Keeper’s discretion to refuse a voluntary registration; and a power that will allow the Keeper to initiate registration of any unregistered property without an application being made. The following paragraphs describe these key policy ideas.

18. There are two alternative approaches to this policy that have been discounted. The first would have been to maintain the scheme for first registration that was included in the 1979 Act. This was discounted on the basis that it would result in the operation of two registers indefinitely. Equally, scrapping the Land Register and resorting to the General Register of Sasines for registration of title to land. This was not considered a serious option on the basis of the advantages to property-owners in having their title registered on the Land Register (particularly where 55% of titles are already on the register).

19. Part 33 of the SLC report contains a detailed explanation of the background to the objectives of completing the Land Register. Paragraphs 33.13 to 33.18 of the report contain detail as to why completion of the Land Register is desirable.

Completion of the Land Register: increased “triggers” for registration

20. New “triggers” for first registration will be created. Under the Bill all transfers of land (including those not for money) will result in the requirement to register the land in the Land Register. This will coincide with the closure of the General Register of Sasines to all new transfer deeds. It is anticipated that this will result in an additional 7000 first registration applications being received by RoS per annum. This compares with the 26,000 application for first registration received in financial year 2010-11. Paragraphs 33.29 to 33.33 of the SLC report explain the thinking behind this policy in greater detail.

Completion of the Land Register: closure of the General Register of Sasines to new deeds

21. The Bill includes two additional provisions that will result in the full closure of the General Register of Sasines. These provisions are the closure of the register to standard securities and the eventual closure to all deeds. Once the Land Register is nearing completion, there will be a gradual and phased closing of the General Register of Sasines to various deed types. When Scottish Ministers consider that, at a point in the future, it would be beneficial to increase the triggers for first registration by subordinate legislation, the recording of a standard security in the General Register of Sasines will no longer be of effect. The final stage will be the eventual closure to all deeds; again this will be achieved through subordinate legislation. Paragraphs 33.36 to 33.46 of the SLC report explain this policy in greater detail.

Completion of the Land Register: voluntary registration

22. The Keeper has a power under the 1979 Act to accept or reject an application for registration by a land-owner on a voluntary basis. The Bill re-enacts this power but allows subordinate legislation to remove the Keeper's discretion to reject such applications. The Keeper already accepts applications that RoS has the resources to deal with, so it is unlikely the subordinate legislation power will be used in the short term. In the financial year 2010-11 approximately 1300 voluntary registrations were accepted by the Keeper. The ability to accept applications for voluntary registrations will facilitate the completion objective in the Bill in two ways. First, it will help to accelerate land registration coverage. Second, it will help to fill the gap left when recording a deed in the General Register of Sasines is no longer of effect. When that register is eventually closed to all deeds, an owner of an unregistered property must have the ability to register their title. Paragraphs 33.24 to 33.28 of the SLC report explain this policy in greater detail.

Completion of the Land Register: Keeper-induced registration

23. The final policy that will facilitate the ultimate completion of the Land Register is that of "Keeper-induced registration." This policy is a power for the Keeper to register a title without an application by the proprietor and without the consent of the proprietor. It is Keeper-induced registration that will allow for the final completion of the Land Register to be realised. The power allows the Keeper to 'fill in the gaps' in the Land Register where surrounding properties are registered. Under the Bill, the Keeper could notify owners of land and other persons with an interest when completing a Keeper-induced registration. Paragraphs 33.47 to 33.58 of the SLC explain this policy in greater detail. In a slight departure from the SLC Bill, it is considered that the Keeper should be able to grant warranty where appropriate to avoid possible adverse practical implications for the title of those affected.

Electronic documents and electronic conveyancing

24. The Bill makes amendments to the Requirements of Writing (Scotland) Act 1995 (the 1995 Act). The amendments will permit all types of land deed and contracts relating to land (known as missives) to take an electronic form, subject to safeguards. Part 34 of the SLC report contains a detailed explanation of the background to the objectives surrounding the reform of the 1995 Act contained in the Bill. The Bill goes a step further, however, in allowing for electronic wills and some other categories of electronic documents.

25. Historically Scots law has had rules about the form and authentication of contracts relating to rights in land and deeds that create, transfer or vary rights in land such as dispositions (property transfer deeds) and standard securities (mortgage deeds). Currently, the 1995 Act provides the rules for the form and authentication of contracts relating to rights in land. These rules apply to deeds creating, transferring or varying rights in land such as dispositions and standard securities. Rules about form and authentication are vital to minimise the scope for uncertainty and disputes about the intentions of parties entering into such land contracts and deeds. The 1995 Act did not originally contemplate land contracts and deeds being in electronic form, or being authenticated electronically. Rather, the 1995 Act restricts itself to what the SLC have termed 'traditional documents' in which text must be applied to a physical surface such as paper or parchment and also authenticated in a physical format (usually in the form of a handwritten signature).

26. When the 1995 Act came into force, land contracts and deeds relating to land could only be formed on paper. An exception to that rule was created in 2006 by the Automated Registration of Title to Land (Electronic Communications) (Scotland) Order 2006 which permitted valid electronic deeds to be created and authenticated by secure digital signature (but only within RoS's Automated Registration to Title Land (ARTL) system).

27. Electronic communication has revolutionised the way in which many types of business are conducted but all land contracts and most land deeds are excluded from the benefits of new technology by the terms of the 1995 Act. The legal profession and lenders are firmly of the view that the ability to exchange missives electronically should be made a reality.

28. The Bill rewrites the part of the 1995 Act that deals with these matters. It provides for two types of valid document: traditional paper documents and electronic documents. The Bill provides a new legislative basis for electronically valid documents and allows for registration of those documents in any register the Keeper controls. These new powers will allow subordinate legislation to make provision allowing documents (including missives) to be electronically valid (meaning solicitors will be able to email each other documents without relying on paper back-ups for some legal purposes).

29. There are numerous advantages to electronic conveyancing including faster, and hence less risky, conveyancing for the consumer. It is thought that an increase in the use of electronic systems in conveyancing firms, lending institutions and in the Keeper's offices could eventually lead to reduced costs for consumers. There is also an overarching policy desire at European, UK and Scottish Government level to develop e-commerce generally.

30. Despite the technological possibilities, safeguards are needed to protect individual rights. To account for this the Bill includes provision to allow for minimum standards of authentication of electronic documents to be set and to be varied in reaction to future technological developments.

31. If the 1995 Act was not amended to allow Scottish Ministers to make provision about electronic documents and electronic registration, then the status quo would be maintained allowing only partial electronic conveyancing as through ARTL (the current system of electronic registration of titles in the Land Register). This approach was discounted, as without the

proposed powers, the benefits of the greater efficiencies that derive from electronic documents and electronic registration for homeowners, lenders and for business would not be realised.

Advance notices

32. The Bill introduces a system of "advance notices". The system was developed by the SLC at the request of the Law Society of Scotland. Advance notices are designed to cover the "gap risk" period in a conveyancing transaction between the delivery of the deed and its registration in the Land Register. Where there is a potential sale of a property the owner will, after the commencement of the Bill, be able to apply to the Keeper for an advance notice to be placed on the Land Register or the General Register of Sasines, depending on which register the property is held. This advance notice will protect the potential purchaser from the "gap risk". This "gap risk" period is currently covered by a system known as "letters of obligation" which guarantees that nothing prejudicial to the purchaser will occur in the gap risk period that will result in their title being reduced or an exclusion of indemnity appearing on the eventual land certificate (the official document which currently shows a snapshot of each property title on the Land Register). The letters of obligation system is underpinned by the Law Society of Scotland's master insurance policy, the premiums of which are paid by all solicitors in Scotland.

33. In an ordinary conveyancing transaction the buyer usually purchases a house using mortgage funds from a lender. The buyer will receive a deed known as a disposition transferring ownership of the house, and will grant a standard security to the lender in security of the mortgage. The seller will receive money for the property; this is known as "the consideration". Finalising the process is known as "settlement".

34. In reality, registration cannot occur simultaneously with the delivery of the deed to the buyer. The period between delivery and registration is the period to which the phrase "gap risk" applies. The two main risks that a buyer in a conveyancing transaction is exposed to are (1) the insolvency of the seller, and (2) that a competing deed will be registered before that deed. It is worthwhile noting that the use of the Keeper's ARTL system greatly reduces the "gap risk" period because the deed is delivered electronically to the Keeper for registration on the day of settlement.

35. Part 14 of the SLC report contains a detailed explanation on the policy behind advance notices. The SLC report provided for advance notices for titles on the Land Register and a power to make subordinate legislation in relation to titles on the General Register of Sasines. The Bill as introduced makes provision for both types of advance notice. For titles on the General Register of Sasines which are being registered in the Land Register for the first time, the advance notice will be recorded on the General Register of Sasines.

36. There are three possible other approaches to this policy. First, not to introduce the policy. This is not a suitable long term solution as the insurance that underpins this system is coming under increasing pressure and there is the potential risk that it will be withdrawn. The second option would be to allow registration of advance notices on the Register of Inhibitions. (Inhibitions are enforcement orders which 'freeze' property) This was discounted on the basis that advance notices are not inhibitions. The third option would be to create a stand-alone register of advance notices. This was discounted on the basis that solicitors would have the

burden of searching an additional register when conducting a conveyancing transaction, resulting in additional cost.

The state guarantee of registered titles in land

37. The most technical and complex parts of the Bill concern the reform of the state guarantee of titles to land. The 1979 Act established a state guarantee on the registration of the title in the Land Register (subject to the power of the Keeper to exclude that right, by excluding indemnity). This principle is sound and has been retained in the Bill. Part 19 of the SLC report provides a detailed explanation as to why there should continue to be a state guarantee of title. Part 22 of the report provides a detailed explanation of what the limits to that guarantee should be.

38. Sometimes in land registration, two or more parties can have a claim over the same land. This can happen due to an error in registration, as a consequence of the underlying conveyancing or by fraud on the part of one of the parties. The 1979 Act solution to this problem was to provide that, where one of the parties is in possession of the property, the Land Register cannot be rectified against their interests. Under the 1979 Act, the party who does not get the land, but has a legally sound competing claim to it, normally gets compensation from the Keeper. The current position means that ownership of a property is dependent on what the register provides and on the possession of the property at any given time (even if this is in conflict with the true legal position). It leads to the situation where a court determines who the owner of a property is but RoS cannot correct the Land Register to reflect the judgement of the court. Often the true owner of the property receives monetary compensation from the Keeper rather than getting their property back. Parts 20 and 21 of the SLC report provide a detailed explanation of this issue and characterises it in terms of receiving the mud (the property) or the money (compensation).

39. The Bill adjusts the circumstances in which an inaccuracy in the Land Register can be rectified in favour of a person who has been the victim of fraud or error. It provides that in certain cases, instead of rectification, the underlying right to ownership of a property is changed to reflect what the Land Register says. The circumstances where the Bill provides for this transfer of rights are limited and are most likely to operate in the cases of error or fraudulent sale and subsequent registration. Where a property is fraudulently registered or registered in error, the true owner can seek a reversal of that registration in their favour, as long as the property has not been possessed since the registration for ten years, or has not been registered in favour of an innocent third party and possessed by that party (or the original purchaser followed by the third party) for more than one year after the original registration. However, where the property has been so possessed by a person, or registered in favour of such an innocent third party, the registration cannot be reversed. In such cases the original true owner would be compensated by the Keeper. Part 23 of the SLC Report provides a detailed analysis of these changes to the state guarantee of title, which have been carried into the Bill as introduced.

40. The SLC's proposed reform of this area is to replace the proprietor in possession test which exists under the 1979 Act (where the true owner of a property cannot get their property back when there is a proprietor in possession, unless they consent, it can be proven that they were fraudulent or careless or the Keeper excluded indemnity). This new scheme strikes a fairer balance between the interests of the registered proprietor and the true owner in more situations. The Bill takes this approach. One alternative to this policy would be to retain the existing

proprietor in possession test for resolving disputes. However, the proprietor in possession test was one of the principal reasons that the Keeper first invited the SLC to review the 1979 Act back in 2002. Furthermore, this test produces inconsistent results and has resulted in litigation (and would probably continue to do so). Another alternative would be to change the underlying ethos of the land registration system. The "curtain principle" (where a person need not look behind what the register says) could be removed. However, this would mean that the register itself could not be relied upon and the underlying deeds would have to be examined by solicitors in each transaction. This would make conveyancing expensive for those transacting with heritable property. The proposed changes to the state guarantee of title seek to find the correct balance between fairness and certainty.

Keeper's right to seek recovery for loss

41. The Bill makes it a condition of a payment for compensation that the claimant assigns the right to pursue a claim for damages against another person to the Keeper. Part 24 of the SLC report explains in detail. This differs to the policy of section 13(3) of the 1979 Act which allowed, but did not compel, a formal assignation of such rights.

Inaccuracy and Rectification

42. The Bill makes provision for defining inaccuracy in the Land Register and, more importantly, when and how the Land Register can be rectified. The test provided for in the Bill is whether the inaccuracy is manifest (i.e. where it is indisputable or more than merely possible or probable). This gives the Keeper the ability to retain control of the Land Register and ensure its integrity is maintained. Where a court rules on a matter, the decision of the court would make the position in relation to an inaccuracy on a title sheet manifest. Parts 17 and 18 of the SLC report contain detail on policy background to inaccuracy and rectification.

Caveats

43. Caveats are a new method by which information about pending court action affecting titles in the Land Register is entered on to the Land Register. They serve as notice to third parties searching the Register that court action may be pending or ongoing. The current law has several methods by which such notice is given. Caveats provide a single method, which will be simpler and clearer.

44. A caveat is intended to protect the party who has placed it on the Register. It does this principally by appearing on the Land Register. This ensures where the other party in the dispute sells the property the purchaser will not be able to claim they were unaware of a defect in the title (i.e. when they bought the property they knew it had an issue with the title). The policies behind the topic of caveats are explained in Part 32 of the SLC report.

General reforms of the Land Register

General reforms of the Land Register: Provisions placing the Land Register and the Keeper's practices on a statutory footing

45. The 1979 Act does not include much detail on the form of the Land Register and the practices the Keeper should employ in running the register. The Bill provides much greater detail as to the processes of land registration than was provided for under the 1979 Act. The policy

thinking behind this is that it is important that the rules surrounding land registration are transparent and clear. Many of the reforms simply formalise the existing processes that are executed on an administrative non-statutory basis. Part 4 of the SLC report provides more policy detail.

General reforms: The “one-shot principle”

46. Provision is made in the Bill for what the SLC call the “one shot principle”. This allows the Keeper to refuse to allow an application to be supplemented after the application is submitted. Currently, the Land Registration (Scotland) Rules 2006 allow the Keeper to requisition documents from the applicant if they are missing from what they originally submitted. The process of requisition places an administrative burden upon the Keeper to obtain from the solicitor submitting the application information that should have been included in the application. Requisitions are also costly for solicitors to deal with as usually by the time the conveyancing solicitor receives a requisition, they will already have billed their client. Therefore, there are efficiency savings for both the Keeper and the solicitor in the enforcement of the “one shot principle”. It is likely that the power would not be used where significant work already done by the Keeper would be lost if the power was used. The power is meant to improve administrative conveyancing practice and lead to efficiency savings (which can in due course be passed on to home-buyers in lower fees). Paragraphs 12.71 to 12.77 of the SLC report provide greater policy detail.

General Reforms: Mapping

47. It is one of the basic principles of property law in Scotland that a real right can be created or transferred only in relation to that which can be specifically identified. This is known as the specificity principle. A conveyancing deed must therefore describe the land it deals with in such a way that the land can be identified. Currently, there is no legal requirement for such a deed to contain or refer to a plan.

48. Since the inception of the Land Register in 1981, the Keeper has included in every title sheet a title plan based on the Ordnance Survey map. The Keeper currently maintains a map (known as the “index map”) that is based on the Ordnance Survey map, which shows all the registered titles.

49. The Bill provides that there should be maintained, as a constituent part of the Land Register, a map of Scotland to be known as the “cadastral map”. The cadastral map is conceptually similar to the current index map. A cadastral map is a map showing the boundaries and ownership of land parcels. This term is in common usage around the world for land register maps. A cadastral map is not a topographic map, although it may use an underlying topographical map, such as the Ordnance Survey map, as the starting point (the Bill refers to this as the “base map”). The power in the Bill to use a base map other than the Ordnance Survey base map is likely to be used to make provision for mapping of titles on the seabed out to the 12 mile limit. Examples of such titles are long leases for renewable energy projects or fish farming. Paragraphs 5.5 to 5.12 of the SLC report provide policy detail on the relationship between the cadastral map and the base map.

50. The extent of the cadastral map will be constituted by the combined extents of all of the registered titles. The map will be divided into cadastral units, which will represent a single registered plot of land that is owned by one person (e.g. an individual or company) or one group of persons. There are limited exceptions to the rule that one plot of land equals one cadastral unit such as for a tenement and where land is subordinate and ancillary to other land. Paragraphs 5.25 to 5.30 provide detail on this issue. One point of divergence from the Bill included within the SLC report is that the Bill as introduced permits large pertinents cut off from a property (such as a garage or a garden across a road) to be included in the same cadastral unit as the main property. This policy will prevent homeowners having to have two title sheets for their property (and potentially incurring two registration fees). The SLC report envisaged this would only be possible for features that are too small to be shown on the cadastral map.

51. The provisions in the Bill regarding the identification of registered properties on the Ordnance Survey map establish the legal principle of map-based registration in Scotland. The proposals give a statutory footing to the principle (subject to limited exceptions) that there should be no land registration without mapping (see paragraphs 5.14 to 5.18 of the SLC report for more detail).

52. Flats within tenements are often described in conveyancing deeds without reference to a plan. In such a case, the deed simply contains a written description of the flat and the exclusive and common property rights that pertain to it. In these cases, the Keeper maps the tenement as a site of single extent on the title plan (i.e. a red edge goes around the whole area occupied by the tenement building and its associated garden ground) and includes a written description for the exclusive and common property in the property section of the title sheet of the individual flat. The 1979 Act was silent as to how flats in tenements should be mapped and registered. Therefore, it may be presumed that they were to be treated in the same way as other property. However, tenements are unique. The SLC's view was that the Keeper's practice is sound and the Bill gives this approach a statutory basis. Greater detail of the policy is contained in paragraphs 5.19 to 5.23 of the SLC report.

53. The alternative approach to tenement mapping would be to require tenements to be mapped precisely. This is impossible to do without three-dimensional mapping (which the cadastral map does not currently provide for – see paragraph 5.43 of the SLC report). Furthermore, historically title deeds for flats within traditional tenements have relied on describing the properties verbally and have not included plans. If legislation prescribed that the deeds transferring tenement flats had to include a description with reference to a plan this could add considerable additional costs onto transactions involving these types of property, which would be borne by purchasers of tenement properties.

54. Part 5 of the SLC Report contains more policy detail on the mapping aspects of the Bill.

Common areas & shared plot title sheets

55. Common areas are those that are in the ownership of more than one proprietor or set of proprietors. They are distinct from joint ownership (such as a husband and wife, who jointly own all of their property). Typical types of common property are shared driveways and areas of amenity ground in housing developments. The Keeper's current practice is to include in the title sheet for an individual property any shares in common property that relate to it. For example, a

plot of ground that encompasses a driveway that is in common ownership between two neighbouring properties might be included in the title sheets of both properties accompanied by a statement in each saying that its inclusion is limited to a half share of ownership. With the introduction of the concept of the correlation between one title sheet and one cadastral unit, the driveway would be given a separate cadastral unit number and a separate title sheet. The title sheet will reflect that this area of ground is common property. The Bill will affect the registration of all common property, including common property within developments.

56. The Keeper will be able to make up “shared plot title sheets” for property in common ownership. This change is purely a different way of presenting the same information but is necessary to realise a true map based system of land registration.

57. One alternative approach to this policy would be to continue to allow shared titles to land to continue to be shown in multiple title sheets. This was discounted on the basis that in order to establish the ownership of an area of ground, anybody searching the register would have to look at several title sheets. Another alternative could be not to make provision for shared plot title sheets. The Keeper could continue to use the current arrangement for title sheets and to narrate all the common proprietors in the title sheet. However, this would result in “double handling” in any conveyancing transaction affecting any of the properties surrounding the common area. Such “double handling” would result in increased costs for proprietors.

Prescriptive Claimants

58. It is important that apparently abandoned land can be brought into use by individuals who wish to use it. However, that interest must be balanced with the property rights of a person who owns the property (even if the person does not know they own it). The Bill places on a statutory footing the requirements that an applicant must meet to allow the Keeper to register a modern equivalent to what in Scots law has been known as an *a non domino* disposition. The term “*a non domino*” literally means “from one who is not the owner”. The law on prescription allows someone to grant a deed which, if unchallenged for 10 years, allows them to become owner if they have been in peaceful, open and uninterrupted possession of the land. The 1979 Act is silent as to how the Keeper should process such applications. The registration of an *a non domino* disposition can prejudice the true owner of the property in question, therefore there can be ramifications not just for the true owner (because they will lose their land), but also for the publicly-funded Keeper’s indemnity fund. It is imperative that registration law strikes a fair balance in relation to the circumstances in which an *a non domino* disposition can enter the Land Register.

59. Currently, the law of prescription is used to allow property that is abandoned to come back into economic use. The law is found in statute and is provided for in section 1(1) of the Prescription and Limitation (Scotland) Act 1973. The Keeper considers that an *a non domino* disposition can be a legitimate way of acquiring title where the true proprietor acquiesces over the acquisition or cannot be traced. Prescription operates to bring land that has been abandoned or has otherwise fallen into disuse back into economic use. It can also be used where property has been passed down through several generations of a family without the formality of recording or registration of the documents of transfer. If the family wish the title to be regularised (so, for example, they can obtain a loan secured against it) then an *a non domino* facility allows for this. The Bill seeks to place on a statutory footing the Keeper’s policy of ensuring that reasonable

steps are taken to notify true owners of property before a 10 year prescriptive period can start running in favour of another person. This is an innovation not included in the SLC Bill attached to the report.

60. Furthermore, to prevent fraudulent claims, the Bill requires the Keeper to notify the true owner of the claim and to allow them a chance to object to the claim before it is registered. The notification will act as a double-check that the true owner has been notified. This policy reverses the position in rule 18(2) of the Land Registration (Scotland) Rules 2006, which prevented the Keeper approaching the true owner (except in the case of the foreshore, where the Keeper is duty bound by section 14 of the 1979 Act to notify the Crown Estate Commissioners of any registration of the foreshore). This policy in particular assists true owners of property who do not know what they own (such as the Queen's and Lord Treasurer's Remembrancer and owners of commities) or true owners who cannot effectively police their land (such as some statutory landowners).

61. The policy intention behind the notification requirements is both to build transparency into the system and to force contact between persons who wish to acquire land and owners who do not use the land. It is expected that in many cases an agreement might be struck for the land to be disposed to the person who would otherwise have become the prescriptive claimant.

62. In addition to these tests, the Bill retains the policy, developed by the SLC, of requiring the underlying land to have been abandoned for seven years, and occupied by the claimant for the year before the application to register the prescriptive claim is made to the Keeper. The seven-year abandonment test, in particular, places a high bar in front of prescriptive claimants. Part 16 of the SLC report provides more policy detail behind the proposals.

63. There are possible other approaches to this policy. Not allowing prescriptive claimants at all would not provide the advantages noted above. It might be possible to withdraw the requirements to notify the true owners of property, on the basis that occupation of land is notice enough. This was discounted as some landowners do not know what they own or cannot effectively police against such occupation, which could result in landowners being unfairly deprived of property. Another alternative, to withdraw the policy requiring seven-years abandonment of the property or one year occupation (or both), was discounted on the basis that a high bar should be set before ownership in land can be acquired by prescription.

Registration of, and of transaction and events affecting, leases

64. The Bill simplifies the law on the registration of deeds affecting registered leases. Previously the law in this area was unclear as to when such a deed required registration and exactly what the effect of such registration was. There are three broad types of deed affecting registered leases. These are, deeds extending the duration of the lease, deeds terminating the lease and deeds altering the terms of the lease. The Bill provides that these deeds are registerable and that in order for these deeds to have effect, they must be registered.

65. This policy reflects the view that registered leases (i.e. long written leases) are more than a contract between two parties. They are, in many respects, akin to ownership and are capable of affecting third parties. It is important that people searching the register can rely on the fact it is

accurate and up to date. This policy helps achieve that by vastly reducing the ways in which leases can be affected by off register events.

Fees

66. RoS is the only Non-Ministerial Department in the Scottish Administration that operates as a trading fund. This means that RoS must operate as a self-funded entity. This funding is derived from the fees charged in respect of the registration or recording of deeds and documents in any register under the management and control of the Keeper, and in the provision of other services such as searches, reports, certificates and the provision of other documents or copies of documents. The provisions contained in the Bill do not require increases in the fees charged by RoS.

67. The current fee power derives from section 25 of the Land Registers (Scotland) Act 1868 (although it was inserted into that Act by the 1979 Act). This power is old-fashioned and no longer allows the Keeper the flexibility required to continue to operate as a viable quasi-commercial entity. At present, whenever Scottish Ministers wish to adjust the level of fees that the Keeper may charge, a new fee order is required. This is inevitably a slow process that means the level of fees can lag behind market conditions. The replacement of section 25 of the 1868 Act was part of recommendation 37 of the SLC report (see paragraph 8.23).

68. The new fee power maintains the position that the level at which fees are set will be by order made by Scottish Ministers. However, rather than requiring that the order must fix fees at a particular level, the new provision will allow Scottish Ministers to set fees within defined parameters. This change will give RoS greater flexibility in which to operate by allowing the level of fees to be adjusted within the parameters set by Scottish Ministers without the need for a further fee order. The new flexibility will allow RoS to be more responsive to changes in the housing market by either reducing or increasing fees to take into account any increase or reduction in the intake of deeds for registration.

69. The new fee power will also allow Scottish Ministers to set the rate at which fees are payable for processing certain applications. At present, all fees are set on an *ad valorem* scale (where the fees are set in proportion to the value of the property). The ability to charge time-and-line for complex transactions will allow the Keeper to recover the true cost of processing applications in complex cases where currently losses are made processing such cases (effectively meaning that fees for other cases may have to be higher).

70. The new fee power changes the relationship between the expenses of the Keeper and the level of fees set. Under the 1868 Act, fees could not be set above the level that would defray the expenses of the Keeper. The new power breaks this link but ensures that Scottish Ministers must take the expenses of the Keeper into account when setting fees. This change might, for example, allow the Keeper to charge lower fees in the knowledge that fees could be increased above cost-recovery levels later should market conditions significantly deteriorate (or vice versa).

Provision of information

71. The Bill provides a power to make subordinate legislation about the information that must be made available by the Keeper. This implements part of recommendation 37 of the SLC report (paragraph 8.23).

Consultancy and other powers

72. As mentioned above, RoS operates as a trading fund (the only such trading fund in Scotland). The Keeper's expenses are recovered from fees paid for processing applications for registration and from the provision of information from the registers under the Keeper's control. However, the Keeper is keen to do what is possible to keep the level of fees low so that business in Scotland can thrive. One aspect of this is driving efficiency and added value gains from the registration systems. To be as efficient as possible, RoS has also developed a quasi-commercial consultancy and advisory practice which includes a "title-investigation" service and "pre-registration enquiries" service. Functioning on a quasi-commercial basis (including making a profit) makes the Keeper better able to maintain and improve the registers the Keeper maintains and controls, serve the people of Scotland and deliver real and commercial benefits for customers. To provide a statutory underpinning to these activities, the Bill allows the Keeper to provide consultancy, advisory or other services and to form, or participate in the formation of, a company that provides these services. These provisions are similar to those conferred on the Chief Land Registrar in England and Wales by the Land Registration Act 2002. These powers were proposed by recommendation 149 of the SLC report.

Duty of Care

73. The Bill places on a statutory footing the duty owed by a person who grants a deed, the grantee of that deed and both their solicitors. This places on a statutory footing the common law duty that the SLC consider has existed since 2008. The duty is to take reasonable care that the Keeper does not inadvertently make the Land Register inaccurate as a result of information supplied. Where the individual or the solicitor knows something detrimental to the application but does not tell the Keeper, they will breach the duty of care and potentially be liable to be sued by the Keeper.

74. The SLC recommended in their report that the duty of care for applicants and their agents should end when the application for registration has been submitted to the Keeper, although it was noted in the report that the Commissioners did not agree on this point. Further policy consideration has resulted in the duty of care provisions in the Bill for applicants and their agents being extended to when the registration decision on the application is made by the Keeper. Extending the duty of care ensures that if an applicant or their solicitor becomes aware of any information which may affect the accuracy of the register, this should be disclosed to the Keeper if the registration decision has not been made.

75. The reason for this provision is that there is a strong public interest in the accuracy of the Land Register. It is ultimately the responsibility of the Keeper to ensure the Land Register is accurate. The duty of care will help to ensure that the Keeper is in possession of all the relevant facts when making registration decisions which should minimise the potential for inaccuracy entering the Register. Paragraphs 12.101 to 12.107 of the SLC report provide more background policy detail.

Statutory Offence

76. The Bill introduces a new statutory offence. This was not proposed by the SLC but was included in the terms of reference for the project supplied to the SLC in 2002. The offence is designed to deter fraudsters and their solicitors from using the Land Register to legitimise transactions that are being undertaken to launder the proceeds of crime or otherwise meet criminal ends by mortgage fraud. Under the Bill, it will be an offence to make a materially false or misleading statement in relation to an application to the Keeper, or intentionally to fail to disclose material information in relation to an application, or be reckless as to whether all material information is disclosed.

77. The new statutory offence is consistent with the Scottish Government's strategy to tackle serious organised crime. In 2009, the Scottish Government published "Letting Our Communities Flourish: A Strategy for Tackling Serious Organised Crime in Scotland". The document sets out the Scottish Government's commitment to reduce the harm caused by serious organised crime, and to make Scotland a hostile environment for serious organised criminals. The offence in the Bill provides an addition to the wide-ranging use of disruption tactics available to law enforcement in addressing the threat from serious organised crime groups. It is expected that the offence, in itself, should act as a deterrent to fraudsters and solicitors acting on behalf of fraudsters.

78. Whilst agents submitting applications to the Keeper are already heavily regulated, the Keeper relies on the information supplied in an application for registration. Indeed, due to the high volumes of applications received by the Keeper she has no choice but to place a lot of trust in the solicitor profession to submit applications that are legitimate. It has been known for the Keeper to be in receipt of applications submitted by solicitors who are, in fact, party to the fraud. In addition to this, the Keeper receives a number of personal presentments directly from applicants.

79. The common law of fraud already applies in relation to applications to the Keeper and is currently relied upon to secure the conviction of any person making such a fraudulent application. A key element of that offence is that knowledge of the fraud has to be proven, which is extremely difficult. A solicitor may meet the legislative requirements in respect of identifying their client (in terms of the Money Laundering Regulations 2007). However, a solicitor may have a suspicion that the funds being used to purchase subjects are derived from criminal activity or that the funds acquired through securities against the subjects are being used to finance criminal activity. The proposed statutory offence introduces "recklessness" on the part of the client or the agent as being a constituent part of the statutory offence.

80. It is important that the offence applies to solicitors as well as clients as solicitors are effectively the gate-keepers to conveyancing transactions in Scotland and are trusted by the Keeper to supply accurate information. However, it is recognised that the Keeper might be misled in an application by a solicitor in good faith. In those cases where a person has simply made a mistake, strong defences are provided so that the offence provision will not apply. The alternative approach to creating the offence would have been to rely on the common law of fraud for prosecuting illegal behaviour. This was discounted on the basis that it is seen as an insufficient deterrent to fraudulent behaviour due to the difficulties in prosecution for that offence.

Savings and Transitional Provisions

81. The Bill deals with the process of replacing the 1979 Act by the new legislation. The changes included in the Bill prevent discontinuity in the Register. The scheme of the Bill is that existing registration will continue in the Register after commencement. The differences between the provisions in the Bill and the 1979 Act mean that some legislative provisions are required to cover the change. The most important provisions are about what happens to inaccuracies in the register that exist immediately before the commencement of the new legislation.

82. The Bill makes it clear that on commencement a title sheet which forms part of the Land Register will form part of the title sheets record on the Land Register. Where an existing title sheet does not conform to the requirements of the Bill, the Keeper will have the power to make it so conform. This might, for example relate to information about quantum of share of a common area or about pertinents (for example the benefit of a servitude acquired by prescription) or encumbrances (for example the burden of a servitude acquired by prescription). The Bill, whilst giving the Keeper the power to make existing title sheets conform, does not compel this because of the potential costs that might be involved.

83. If anyone has a vested right against the Keeper for payment of an indemnity claim under section 12(1) of the 1979 Act when the Bill is commenced, that right should be unaffected by the new legislation. Whilst this would no doubt be implied anyway, the Bill has a specific provision confirming that that will be the position.

84. All actual inaccuracies in the Register will continue to be actual inaccuracies unless and until rectified. That is simple. Less simple is the question of bijural inaccuracy (that is where there is conflict between registration law and property law). The Bill abandons the idea of bijuralism, and with it the unfairness and uncertainty in that area of law. In abandoning bijuralism the Bill must also abandon the concept of bijural inaccuracy; and where such an inaccuracy is to be found in existing titles, it must either be deemed to cease to be an inaccuracy, or be re-categorised as an actual inaccuracy (and thereafter rectified).

85. The criterion is whether, on the moment of commencement of the new legislation, a particular inaccuracy could have been rectified under the rules in section 9 of the 1979 Act. If the answer is that it could be so rectified, then the bijural inaccuracy should be converted automatically into an actual inaccuracy. In the new scheme all inaccuracies would be rectifiable, and so this class of inaccuracies, already rectifiable before the commencement of the new legislation, would continue to be rectifiable thereafter. In effect, therefore, there would be no change – except in a conceptual sense.

86. But if the answer is that the bijural inaccuracy could not be rectified under section 9 of the 1979 Act at the time the Bill is commenced then as of a result of the provisions in the Bill the inaccuracy ceases to be an inaccuracy. That is, the rights of the parties concerned are realigned so as to conform to what the Register says they are. This has the effect of making inaccuracies accurate. The Bill makes provision allowing for compensation of those adversely affected by these rules.

87. In order to minimise problems of evidence in the scenario explained above (especially after the passage of time) the Bill contains a presumption that the owner of the land is in

possession of their land immediately before the designated day (although this could readily be rebutted by evidence of contrary possession). For a further policy discussion see paragraphs 36.9 to 36.14 of the SLC Report.

CONSULTATION

88. A formal public consultation process was carried out in autumn 2010. The consultation was based on a draft Bill annexed to the SLC report. The Land Registration (Scotland) Bill consultation document was circulated to a number of consultees. These included 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 published on the RoS website, www.ros.gov.uk. The consultation was also advertised in the Journal of the Law Society of Scotland.

89. A total of 71 responses were received. The responses of those who consented to publication of their responses are available on the RoS website. Those who responded came from a wide variety of professional backgrounds and interest groups. Of the 71 responses, 29 answered only the questions that pertained to electronic registration and conveyancing: the other 42 responses varied in the questions that they answered.

90. Stakeholders responding to the consultation were generally supportive of the proposals although some had concerns about particular matters. The stakeholders who raised particular points were invited to discuss the Bill provisions with officials. These stakeholders included:

- Professors Stewart Brymer, George Gretton, Kenneth Reid and Robert Rennie;
- Mr John MacLeod;
- Law Society of Scotland;
- The Scottish Law Agents Society;
- Council of Mortgage Lenders;
- Lloyds Banking Group PLC;
- Solicitor for the Crown Estate Commissioners;
- Scottish Water;
- Queen's and Lord Treasurer's Remembrancer;
- COSLA;
- SOLAR (the local authority solicitors' group);
- Scottish Court Service;
- Scottish Law Commission;
- Mr Andy Wightman; and
- Scottish and Southern Energy.

91. In addition to the public consultation, in 2011 RoS conducted a Scottish Firms Impact Test whereby the following ten Scottish firms discussed the impact of the Bill on their business:

- AB & A Matthews;
- Miller & Bryce;
- Scottish Building Society;
- Marjory MacDonald;
- Royal Bank of Scotland;
- Pagan Osbourne;
- RA Direct;
- First Title;
- Aberdeen Considine; and
- Cullen Kilshaw.

92. A stakeholder event was held in Edinburgh in June 2011. Further events were held in Edinburgh, Glasgow and Aberdeen in November 2011.

93. In addition to the stakeholders who were formally consulted, discussions have taken place with a number of other interested bodies. These include the recently created Scottish Land and Estate Group.

94. There has also been an independent steering group established. This group is under the chairmanship of Professor George Gretton of the University of Edinburgh and Scottish Law Commission. The group includes a further two conveyancing professors as well as representatives from the legal profession, the lending industry and local authorities.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal Opportunities

95. The Bill's provisions do not discriminate on the basis of gender, race, age, religion, disability or sexual orientation. An Equalities Impact Assessment was carried out for the public consultation on the SLC Bill. No update of the assessment was required in light of the terms of the Bill as introduced.

Human Rights

96. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights.

97. In particular, we have been mindful throughout that the provisions need to be compatible with Article 1 of Protocol 1, which states that every natural and legal person is entitled to peaceful enjoyment of his possessions.

Island communities

98. The Bill has no direct impact upon island communities. We have considered that certain rural communities may be impacted by the provisions relating to completion of the Land Register. This is because land registration coverage is concentrated in urban areas. However, the fee power in the Bill will allow the Keeper to recover the costs of completing the Land Register. This cost will be recovered from registration fees for registrations across the whole of Scotland.

Local government

99. SOLAR and COSLA were both consulted on the draft Bill. SOLAR responded and bilateral meeting with both bodies were conducted since the consultation. An issue has arisen with regard to the advance notice policy and the effect this will have on the ability of local authorities to register charging orders. An amendment has been made to the SLC proposals for advance notices to allow local authorities to submit an advance notice to protect a charging order.

Sustainable development

100. The Bill will have a positive impact on sustainable development. The provisions regarding completion of the land register, electronic conveyancing and registration will eventually reduce the cost of transacting with heritable property in Scotland. Moreover, the decreased need for paper will have positive impact upon the environment.

101. A Business Regulatory Impact Assessment was carried out in preparation for the introduction of the Bill.

This document relates to the Land Registration etc. (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 1 December 2011

LAND REGISTRATION ETC. (SCOTLAND) BILL

POLICY MEMORANDUM

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