I am a member of the public. I wish to make the following observations on the Land Register Bill.

(A) The proposals for the completion of the land register and registration issues;

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

Paragraph 20 of the Policy Memorandum states “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.” If all ‘transfers’ includes transfers resulting from the operation of a survivorship destination this could imposes on grieving parties additional worries, expense and difficulties in meeting the necessary expenditure of registration?

(2) Completion of the Land Register: closure of GRS to new deeds

It is proposed that the recording of a standard security in the General Register of Sasines will no longer be of effective. I would make the following observations for consideration on whether to accept this proposal

(a) The introduction of this trigger is to be delayed to some time in the future. Any substantive delay in introducing this proposal will seriously negate the effectiveness of this proposal, as the number of such securities will decline.

(b) It may affect the remortgaging market in that any savings to the proprietor in repayments could be negated by the additional costs of registering the land.

(c) Second or subsequent loans are usually for substantially smaller amounts. The additional costs of registering the land may mean that the proprietor is discouraged from taking out such loans.

(d) It is not clear how the proposal affects a security over part of the land owned by proprietor. Will it result in only that part of the land included in the security being registered? If it is the whole of the land owned by the Sasine proprietor then that might impose a substantial additional cost to that proprietor in registration dues and solicitor costs.

(3) Completion of the Land Register: voluntary registration

The acceptance/rejection of an application for voluntary registration should not be based on a date set or otherwise. The conclusive decision whether to accept/refuse an application should be based on the grounds of reasonableness. This will depend on and resources available to the Keeper at the time. The Keeper should not be forced to accept too many applications at the one time, as this could be detrimental and prejudice the proprietor’s compulsory registrable transactions.
(4) Completion of the Land Register: Keeper induced registration

What is being proposed is that the Keeper adopts the solicitor's role acting for the proprietor of the subjects with or without the proprietor knowing that the Keeper is acting in that way and without the proprietor of the property being able to consent to such registration. This seems contrary to ECHR legislation. The following issues have serious concerns for accuracy of the Register are not addressed:

(i) Where title is held subject to a survivorship destination. Without an enquiry by the Keeper to ascertain whether any of the parties have died. Not to make such an enquiry could result in an inaccurate register by creating an interest in the title in favour of a person who is deceased.

(ii) A variation on (i) above would include titles held equally where one of the equal owners title is held subject to a survivorship destination.

(iii) The methodology in preparing a title sheet being proposed contains flaws and raises many important issues. It is imperative that strict criteria are in place to ensure that the Keeper carries out a thorough examination of title. There should be an undertaking that the Keeper meets all the costs incurred by the titleholder. Legislation that is deliberately targeting an individual's freedom of choice requires a cautious and thoroughly considerative approach especially as Ministers will require to justify the approval of such legislation to their voting constituents. The rules under which such legislation is applied should not solely be for the benefit of unelected civil servants. The Keeper is not legally acting for the proprietors and appears to be proposing an inadequate of examination of such titles. The Keeper's staff are not in the main solicitors their interest is acting on behalf of the Keeper. This creates the possibility of a conflict of interest e.g. where boundary overlaps/disputes are not addressed because of the desire to complete the registration. A duty of care must be owed to the proprietor of the property. The search sheet is not a statutory document nor does it always represent the current state of ownership of the title [e.g. (i) and (ii) above]. Further difficulties will arise, as the Keeper will be examining copy deeds rather than the original documentation in order to process the title. The Keeper will only have copy deed plans that are black and white photocopies. How will the Keeper deal with copy deeds that refer to colouring on the deed plan to identify the parts of the title? In addition measurements based on a photocopy of a plan are not accurate. In light of the foregoing the Keeper before she/he undertakes Keeper induced registrations should seek the permission and approval of the titleholder whose land he is forcibly registering. If the Keeper is empowered to forcibly register plots then the Keeper must also assume all the costs relating thereto including all the costs incurred by the proprietor in instructing a solicitor to check that the Keeper has not erred in the registration of their title, this latter cost is not included in the current proposals. This would place the examination of a forcibly registered title on the same footing as any other registration the proprietor should expect no less, for the Keeper not do so she/he would be failing in her/his duty of care.

(iv) The rights of security holders seem to be being ignored or will they be given the chance to formally register their recorded security in the land register and gain the benefits that flow therefrom?
The understanding of the extent of the unregistered residue of land seems restrictive e.g. no account appears to be being taken of the tens if not hundreds of thousand of slithers, small areas of ground which were retained (not conveyed) by developers, estate owners. The developers, estate owners may no longer exist or may have abandoned the land. The Lands Tribunal case [PMP Plus Ltd v The Keeper & others] infers rights in common in developments to residue of land in the development not identified until the development is completed are in fact not validly conveyed and as a result are not registered. The inference from the said Lands Tribunal case is that there will be inaccuracies in the register in that land thought to be included in the registered titles is not in fact include in those registered title i.e. they will be added to the pool of unregistered titles.

QLTR are unlikely to be interested in taking title to the unregistered slithers of ground [nor will have the resource to do so]. Where there is no readily discernible owner to unregistered land it has been proposed that title sheets should be created for titles with non-discernable owners I would suggest that this is palpably absurd. It goes in the face of the fundamental concept that the register can be relied upon. This very basis of the register has been given judicial approval at all levels. The creation of a title with no owner appears to be a complete contradiction. The devil is in the detail in the work involved in transferring the residue of the unregistered interests in land to the Land Register completion of that process is likely to take substantially longer than anticipated.

The explanatory notes to the Bill at paragraph 419 states that it is not immediately clear whether the Keeper will implement this proposal for Keeper induce registrations at the time the bill comes into force and paragraph 420 takes a restrictive view of the costs to that may fall to be met by the Keeper. Why this delay in taking forward the prime aim of completion of the Land Register? With the likelihood that the property market will continue to be at a low ebb with insufficient intakes of registration applications to keep all the Keeper’s staff employed. In such a situation would it not be sensible to accelerate this proposal Keeper induced registrations provided the concerns addressed above are dealt with rather than have staff unemployed. The Keeper is after all paying the staff for doing nothing, surely supplying the staff with work is more beneficial to all concerned.

(B) The proposals for electronic documents, conveyancing and registrations;

I have no difficulty with the proposals for electronic documents. I am concerned about the viability of the Register of Scotland’s Automated Registration of Title to Land (ARTL) system. The Report by the Auditor General for Scotland under Section 22(3) of the Public Finance and Accountability (Scotland) Act 2000 the 2010-2011 Audit of Registers of Scotland at paragraph 8 states:

In line with the Auditor General’s concerns the indications are that the ARTL system is not a viable project. For example, there have in the last 4 years or so only just over 50,000 applications. The Keeper’s projected estimates envisage around 700,000 such applications, a shortfall of some 650,000 applications. If the average fee for these applications was in the range of £100 to £200 there is an income shortfall of between £65 and £130 Million. The proposals in the Bill will impose further restrictions or have an effect on the number of transactions that will be ARTL compatible e.g. Advance Notices. The current state of the property market is likely to continue for some time and will have a

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major effect on the financial viability of ARTL. The registration processes impose restrictions on the number of transactions that are ARTL compatible. The current ARTL system requires a buoyant re-mortgaging market to recompense the cost of its introduction and continued usage. Despite the Keeper setting the fees for ARTL applications at a lesser amount than paper transactions the costs taking account of the cost of development greatly exceed those for paper transactions. In light of these facts it seems possible that electronic registration could be abandoned as such level of losses is unsustainable.

(C) Any other aspects of the Bill

(1) Re-alignment of registration law with property law (bullet point 4 of paragraph 12 of the Policy Memorandum)

The Bill seeks to re-align registration law with property law by e.g. by adjusting the circumstances in which a person can recover their property rather than only receive compensation under the state guarantee of title from the Keeper of the Registers. It is suggested that the new scheme strikes a fairer balance between the interests of the registered proprietor and the true owner. All that is being achieved is an alteration in the aggrieved party from the true owner to the party who is losing the property in dispute. What is being proposed is that after completing registration of 55% of properties the law is being turned on its head for the completion of the residue of 45% of properties this can only lead to confusion and conflict. Emphasis may have been better served by re-aligning property law with registration law rather than reverting to a Sasine system albeit with a plan. In formulating the revised registration process the effect on the underlying policy of reliance on the register may not have been fully thought through or may not accurately foretold all its effect.

It seems generally accepted that there is no perfect system. Whilst true owners deserve protection the rectification, where permitted, of all inaccuracies many injustices will arise. The reversal of the policy to protect “true owners” will create situations worse than those which the proposals in the Bill seek to remedy e.g. protecting the innocent in possession of their home rather than putting them out on the street and possibly creating financial and social hardship is surely a preferable aim. Monetary recompense of the true owner whilst often unsatisfactory is fairer than removal from the property of the vulnerable innocent owner e.g. a pensioner or a family who may have rearranged their lives, the schooling of children, adapting the house to the need of the family (disabled needs, aged parental needs etc). This vulnerability could last for up to 10 years and certainly detracts from the current certainty of reliance on the register. In these circumstances is this proposal contrary to human rights legislation.

There may however be merit in allowing rectification of inaccuracies in the Register to return to the true owners small/insignificant slithers of ground. Some sort of “equity” as to whether it should be “mud or money” should be the target.

(2) Shared Plots (Sections 17 and 18 of the Bill)

The practical application of this proposal does not appear to have been thought out. The difficulties that arise following the Lands Tribunal decision (PMP Plus Ltd v The Keeper
and others) in relation to unspecified rights in common to property are not dealt with. What forms a shared plot in existing title sheets is in a state of flux. Based on the Lands Tribunals view there are several thousand inaccurate title sheets.

Another problem is that 55% of all properties are already registered. The 45% of properties remaining to be registered will have title sheets formulated on a different basis to existing registrations. Where some of the proprietors who own part of a shared plot do not have a registered title does that mean that part of the property which they own a pro indiviso share is registered despite no application to do so has been submitted? As registration of the unregistered 45% progresses is it the intention to rectify those parts of the 55% registered properties to provide a consistent register? The Bill appears vague on this point.

Section 17 (2) of the Bill gives discretion to the Keeper whether a shared plot title sheet is to be made up or not. I do not see how this sits with the correlation between one title sheet and one cadastral unit and the necessity to realise a true map based system of land registration (paragraphs 65 and 66 of the Policy Memorandum).

If title sheets identify all proprietors, including those with unregistered titles, who own the shared plot what would be the increased costs for proprietors? I see limited benefit in the Keeper discontinuing the current arrangement of narrating all the common proprietors in the title sheet.

The costs to the Keeper of processing shared plot titles, as set out in 373 to 375 of the Explanatory Notes is a narrow view that needs expanding. No account is taken of ongoing developments pre the new proposals taking effect nor of the many titles from old developments that have yet to go through the process of First Registration. Further should rectification of the present inaccuracies in the register be undertaken the level of work could reach gargantuan levels.

(3) Advanced Notices

Advanced notices clearly have benefits. These Advanced notices are effective for a protected period (35 days). Applications that affect a registered plot of land will appear in the application record and for unregistered land the notice will be recorded in the Register of Sasines. At this point there is no real difficulty in complying with the Bills proposals. The Bills proposals however appear incomplete or incapable of be complied with in relation to the removal or discharge of the advanced notices.

Section 59 and 60 of the Bill deals with the removal/discharge of the Notices: For the Register of Sasines, it is stated that if a discharge is recorded the advanced notice ceases to have effect. Is it envisaged that in the absence of a discharge the Notice will continue to have some meaning?

For the Land Register, (1) the Bill acknowledges that applications must be processed in the order they are submitted otherwise inaccuracies in the Register will occur. Therefore in many instances it will be impossible to comply with the compulsive “must” remove/discharge once the protected period has elapsed due to intervening applications that are unable to be processed in the Bill.
(4) The “one shot principle” (Section 33)

I have no difficulty with this proposal provided safeguards are in place. The Keeper has an extremely poor record in timeous processing some applications, particularly Transfers of Part Applications. Years may pass before it is identified that the application is not complete.

Subsequent events with a bearing on the title sometimes occur after the application has been received and this may result in the need to requisition additional documentation, a one shot rule in such cases would be extremely unfair. Common deeds and documentation that form part of an application may already been examined by the Keeper and in such cases the Keeper does not expect submission of the same. This can cause confusion as to what documentation the Keeper holds and what he does not. Rejection of an application resulting from this confusion would be harsh. Equally a link in title appropriate to several titles may be submitted in one of the titles and not the others. Where these titles are examined in a block it would seem ridiculous to reject the applications that do not have the link in title.

It is not unknown for the Keeper to requisition documentation that is not required e.g. the Keeper had to pay the expenses in a Court Action where the Keeper incorrectly rejected an application for registration. Perhaps a fairer rule would be that there should be a set period during which the Keeper would be able to reject an application on the grounds that the application is incomplete. After the set period the Keeper should not be able to reject the application without the Keeper requisitioning the required documentation. Only if that documentation is not submitted within a reasonable period of time can the application be rejected. The Keeper has a duty of care not to unnecessarily reject applications and if that happens the Keeper is subject to the liability of meeting all the costs relating to the incorrect rejection.

(5) Duty of care (Section 107 of the Bill)

The placing on a statutory footing the duty owed by a person who grants a deed, the grantee of and both their solicitors is a welcome clarification.

The duty of care owed by the Keeper should also be placed on a statutory footing. The Keeper also owes a statutory duty of care for his actions. The temporary judge in the action of Braes v The Keeper said “Where a loss occurred which would not have been covered by the scheme, and where the person suffering that loss is able to demonstrate that it was caused by negligence on the part of the Keeper, I can see no reason in principle why a common law duty of care should not exist.

(6) Consultancy and other powers (section 104)

This section of the Bill seems to be too wide in its terms. The Agency exists to serve the public in the area of their expertise i.e. registration. The Agency is not a commercial enterprise; it is a monopoly and as such is isolated from the real world in that it lacks the element of having the competition that businesses have. Business means risk and that is not the purpose of a Government Body. The Keeper should not be allowed to unfairly
compete in markets particularly when they lack the skills to do so. One of the main aims of the Bill is the completion of the Land Register. The Keeper should not lose focus by providing services not related to its primary function and should only be authorised to deal with matters that do not fall outwith the law and practice of registration. The Keeper should be restricted to the areas that form the core business and not be able to form separate Companies.

(7) Archive Record (section 14)

This provision of the Bill again raises the question of the wisdom of introducing rules that will be directly applicable to the 45% of the Land Register. This may create a conflict with the historical records relating to the 55% of the Land Register already registered. The archive relating to the said 55% have parts missing and may not held in a format easily searchable. A two-tier system (pre and post the provision) will be created.

(8) Souvenir Plots (Section 22(2)(a))

The definition of a souvenir plot in the Bill lacks any real definition e.g. (i) “size” of a plot is not definitive as to whether it is registrable e.g. several plots are or will need to be registered which are smaller than some of the souvenir plots, and (ii) “no practical utility” is lacking in any definitive meaning. It may be that the English definition whilst still not without difficulties provides a clearer view, namely:

“being of inconsiderable size and of little or no practical utility, is unlikely to be wanted in isolation except for the sake of pure ownership or for sentimental reasons or commemorative purposes.”

Clifford McDonald
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