INTRODUCTION
The Law Society of Scotland (the Society) welcomes the opportunity to provide provisional written evidence on the Land Registration (Scotland) Bill, (the bill) ahead of oral evidence which the Society has been invited to give before the Economy, Energy and Tourism Committee on 11 January 2012. The Society will be submitting final written evidence ahead of the call for written evidence deadline of the 20th January 2012.

The bill has been considered by a Working Group which included members from the Society’s Property Law Committee, Banking Law Sub-Committee and the Criminal Law Committee.

COMMENT
The Society is fully supportive of, and committed to, all measures aimed at preventing and minimising any kind of fraudulent behaviour. In this respect the Society have often worked, and continue to work, very closely with stakeholders, including the Registers of Scotland.

Section 108
The Society notes that the Land Registration (Scotland) Bill, as currently drafted, creates a new offence at Section 108:

(1) A person mentioned in subsection (2) commits an offence if the person—
(a) makes a materially false or misleading statement in relation to an application for registration knowing that, or being reckless as to whether, the statement is false or misleading, or
(b) intentionally fails to disclose material information in relation to such an application or is reckless as to whether all material information is disclosed.

The Society wish to make the following comments on the proposed Section 108 offence:

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.

(1)
There already exist statutory and common law criminal offences which cover the mischief complained of. The common law provides for the offence of fraud, and attempted fraud which extends to false representation by writings, words or conduct. Further offences are also provided for in the Proceeds of Crime Act 2002. Part 7 sets out a number of offences (appendix 1) which relate to money laundering.

In addition, the Society is of the opinion that when a solicitor is completing and submitting registration forms they are effectively making a statutory declaration. If the solicitor provides false or misleading information in that declaration, then the making of false or misleading statements, whether intentionally or recklessly, may be
pursued as contempt with the penalties that establishment of that offence carries (see Appendix 2).

As well as criminal sanctions, the Society, as the regulator of the solicitors profession in Scotland, has strict rules in place to prevent and address any kind of wrongdoing by a practicing solicitor. In particular, the Law Society of Scotland Practice Rules 2011, Rule 6 provides:

6.23.1 Every independent legal professional who is regulated by the Society shall comply with the provisions of the Money Laundering Regulations.
6.23.2 A regulated person shall demonstrate to the Society on request that the information held by him or by his practice unit is sufficient to evidence compliance with the provisions of Part 7 of the Proceeds of Crime Act 2002 and Part 3 of the Terrorism Act 2000.

Where a solicitor is found to be in breach of the Society’s Rules, then the Society may take disciplinary action against that individual or firm of solicitors.

The Society, therefore, is of the opinion that there exits sufficient deterrent in the form of existing law and practice rules to deter the mischief complained of.

(2)

The Society believes that the introduction of this offence is disproportionate to the level of threat presented. The Society has not been presented with, nor is it aware of, sufficient evidence to demonstrate that the level of mischief to be apprehended is as extensive as suggested. And therefore, the Society suggests that the number of cases where current ‘difficulties’ in prosecuting the mischief under existing criminal law arise, as forwarded to support the introduction of the offence, is very small in number. The Society also believes that the very small number identified could all be prosecuted under existing criminal law. Statutory intervention to address cases which are of rarity would appear to be incongruous to the statutory process where adequate tools exist for prosecutors to pursue criminally reckless conduct by solicitors resulting in loss to a public body.

The Land Registration Act 2002, which applies in England and Wales, provides for a similar offence and mirrors, to an extent, the proposed Section 108 offence. The Crown Prosecution Service has confirmed to the Society that no proceedings or prosecutions have been brought under these provisions.

The Society is of the opinion 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. The Society hold this to be a fundamental requirement of the criminal law in our society.

The use of the term ‘Recklessness’

The Society notes, and is concerned, that the provision as drafted states that the mens rea required to satisfy the offence is intention or ‘recklessness’. The Society believes that the term ‘recklessness’ is very problematic and is too vague to meet the
requirement of due notice which is a tenet of the rule of law. The term is not settled in Scots law, and may differ dependent on the offence pursued. Case law suggests that this should be an objective approach, with behaviour falling far below that of the competent person in the defendant’s position. Applying this principle to conveyancing transactions, this is likely to demand a very high level of proof of malpractice, and will require expert evidence being lead to show that the solicitor’s actions fell far short of that of a competent practitioner. The Society is of the view that it may be no easier to prosecute recklessness conduct under the proposed new offence as it is with intention, under the existing criminal law offence of fraud.

In addition, the use of the term ‘recklessness’ has the effect of criminalising professional service which, although unsatisfactory, falls short of fraudulent. As drafted, this would cover those solicitors who make a genuine administration error in submitting an application for registration or any other dealings with the Registers of Scotland. Unsatisfactory professional service, on the part of solicitors, in relation to land registration is already dealt with in a number of ways, and sanctions may be imposed on solicitors by both the Law Society of Scotland and the Scottish Legal Complaints Commission – both striving to eradicate unsatisfactory professional service. Any loss suffered by clients may ultimately be recovered from the Scottish solicitors’ indemnity and guarantee funds and civil action may also be raised in the event of any loss.

By incorporating the term ‘recklessness’ in this way, a solicitor may find him or herself facing criminal prosecution for a genuine error.

**Defences**

The Society believes that the defences require further consideration in order to avoid (1) unfair consequences arising from a lack of clarity in the terminology used and (2) a breakdown in the accepted conveyancing practice which has operated for a considerable number of years.

(1) The Society notes that subsection (3) provides for a defence to the offence created by Section 108, and states:

> 3) It is a defense for a person charged with an offence under subsection (1) (the “accused”) that the accused took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

The Society has concerns about the proposed wording ‘all reasonable precautions’. What are all reasonable precautions? This is a subjective test and the bill fails to provide any definition or guidance to clarify. Again this falls short of what one might expect from an executive’s criminalisation of conduct. The Society has the same concern with the stated wording ‘all due diligence’.

(2) The Society does not believe that the defence, set out in S108(4), adequately addresses the issue of the input of any other party to an application. The steps
required to make out the defence are cumulative and the last limb of the defence introduces the undefined concept of solicitors taking "all such steps as could reasonably be taken" – this step suggests that there may be accepted procedures and enquiries which should be taken which are not themselves set out in the statute and nor may they necessarily be within the ken of the applicants in any given situation and any that agents may develop will necessarily result in delay and time costs to members of the public.
APPENDIX 1

Part 7 Proceeds of Crime Act 2002

327 Concealing etc
(1) A person commits an offence if he—
(a) conceals criminal property;
(b) disguises criminal property;
(c) converts criminal property;
(d) transfers criminal property;
(e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.

(2) But a person does not commit such an offence if—
(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
(c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(3) Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.

328 Arrangements
(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

(2) But a person does not commit such an offence if—
(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
(c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

329 Acquisition, use and possession
(1) A person commits an offence if he—
(a) acquires criminal property;
(b) uses criminal property;
(c) has possession of criminal property.
(2) But a person does not commit such an offence if—
(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
(b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
(c) he acquired or used or had possession of the property for adequate consideration;
(d) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(3) For the purposes of this section—
(a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;
(b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession;
(c) the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.

330 Failure to disclose: regulated sector
(1) A person commits an offence if each of the following three conditions is satisfied.

(2) The first condition is that he—
(a) knows or suspects, or
(b) has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.

(3) The second condition is that the information or other matter—
(a) on which his knowledge or suspicion is based, or
(b) which gives reasonable grounds for such knowledge or suspicion, came to him in the course of a business in the regulated sector.

(4) The third condition is that he does not make the required disclosure as soon as is practicable after the information or other matter comes to him.

(5) The required disclosure is a disclosure of the information or other matter—
(a) to a nominated officer or a person authorised for the purposes of this Part by the Director General of the National Criminal Intelligence Service;
(b) in the form and manner (if any) prescribed for the purposes of this subsection by order under section 339.

(6) But a person does not commit an offence under this section if—
(a) he has a reasonable excuse for not disclosing the information or other matter;
(b) he is a professional legal adviser and the information or other matter came to him in privileged circumstances;
(c) subsection (7) applies to him.

(7) This subsection applies to a person if—
(a) he does not know or suspect that another person is engaged in money laundering, and
(b) he has not been provided by his employer with such training as is specified by the Secretary of State by order for the purposes of this section.

(8) In deciding whether a person committed an offence under this section the court must consider whether he followed any relevant guidance which was at the time concerned—
(a) issued by a supervisory authority or any other appropriate body,
(b) approved by the Treasury, and
(c) published in a manner it approved as appropriate in its opinion to bring the guidance to the attention of persons likely to be affected by it.

(9) A disclosure to a nominated officer is a disclosure which—
(a) is made to a person nominated by the alleged offender’s employer to receive disclosures under this section, and
(b) is made in the course of the alleged offender’s employment and in accordance with the procedure established by the employer for the purpose.

(10) Information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to him—
(a) by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client,
(b) by (or by a representative of) a person seeking legal advice from the adviser, or
(c) by a person in connection with legal proceedings or contemplated legal proceedings.

(11) But subsection (10) does not apply to information or other matter which is communicated or given with the intention of furthering a criminal purpose.

(12) Schedule 9 has effect for the purpose of determining what is—
(a) a business in the regulated sector;
(b) a supervisory authority.

(13) An appropriate body is any body which regulates or is representative of any trade, profession, business or employment carried on by the alleged offender.

331 Failure to disclose: nominated officers in the regulated sector
(1) A person nominated to receive disclosures under section 330 commits an offence if the conditions in subsections (2) to (4) are satisfied.

(2) The first condition is that he—
(a) knows or suspects, or
(b) has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.

(3) The second condition is that the information or other matter—
(a) on which his knowledge or suspicion is based, or
(b) which gives reasonable grounds for such knowledge or suspicion,
came to him in consequence of a disclosure made under section 330.

(4) The third condition is that he does not make the required disclosure as soon as is practicable after the information or other matter comes to him.

(5) The required disclosure is a disclosure of the information or other matter—
(a) to a person authorised for the purposes of this Part by the Director General of the National Criminal Intelligence Service;
(b) in the form and manner (if any) prescribed for the purposes of this subsection by order under section 339.

(6) But a person does not commit an offence under this section if he has a reasonable excuse for not disclosing the information or other matter.

(7) In deciding whether a person committed an offence under this section the court must consider whether he followed any relevant guidance which was at the time concerned—
(a) issued by a supervisory authority or any other appropriate body,
(b) approved by the Treasury, and
(c) published in a manner it approved as appropriate in its opinion to bring the guidance to the attention of persons likely to be affected by it.

(8) Schedule 9 has effect for the purpose of determining what is a supervisory authority.

(9) An appropriate body is a body which regulates or is representative of a trade, profession, business or employment.

332 Failure to disclose: other nominated officers
(1) A person nominated to receive disclosures under section 337 or 338 commits an offence if the conditions in subsections (2) to (4) are satisfied.

(2) The first condition is that he knows or suspects that another person is engaged in money laundering.

(3) The second condition is that the information or other matter on which his knowledge or suspicion is based came to him in consequence of a disclosure made under section 337 or 338.

(4) The third condition is that he does not make the required disclosure as soon as is practicable after the information or other matter comes to him.

(5) The required disclosure is a disclosure of the information or other matter—
(a) to a person authorised for the purposes of this Part by the Director General of the National Criminal Intelligence Service;
(b) in the form and manner (if any) prescribed for the purposes of this subsection by order under section 339.
(6) But a person does not commit an offence under this section if he has a reasonable excuse for not disclosing the information or other matter.

333 Tipping off
(1) A person commits an offence if—
(a) he knows or suspects that a disclosure falling within section 337 or 338 has been made, and
(b) he makes a disclosure which is likely to prejudice any investigation which might be conducted following the disclosure referred to in paragraph (a).

(2) But a person does not commit an offence under subsection (1) if—
(a) he did not know or suspect that the disclosure was likely to be prejudicial as mentioned in subsection (1);
(b) the disclosure is made in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct;
(c) he is a professional legal adviser and the disclosure falls within subsection (3).

(3) A disclosure falls within this subsection if it is a disclosure—
(a) to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or
(b) to any person in connection with legal proceedings or contemplated legal proceedings.

(4) But a disclosure does not fall within subsection (3) if it is made with the intention of furthering a criminal purpose.

334 Penalties
(1) A person guilty of an offence under section 327, 328 or 329 is liable—
(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both, or
(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years or to a fine or to both.

(2) A person guilty of an offence under section 330, 331, 332 or 333 is liable—
(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both, or
(b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both.

Disclosures
337 Protected disclosures
(1) A disclosure which satisfies the following three conditions is not to be taken to breach any restriction on the disclosure of information (however imposed).

(2) The first condition is that the information or other matter disclosed came to the person making the disclosure (the discloser) in the course of his trade, profession, business or employment.
(3) The second condition is that the information or other matter—
(a) causes the discloser to know or suspect, or
(b) gives him reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.

(4) The third condition is that the disclosure is made to a constable, a customs officer or a nominated officer as soon as is practicable after the information or other matter comes to the discloser.

(5) A disclosure to a nominated officer is a disclosure which—
(a) is made to a person nominated by the discloser’s employer to receive disclosures under this section, and
(b) is made in the course of the discloser’s employment and in accordance with the procedure established by the employer for the purpose.

338 Authorised disclosures
(1) For the purposes of this Part a disclosure is authorised if—
(a) it is a disclosure to a constable, a customs officer or a nominated officer by the alleged offender that property is criminal property,
(b) it is made in the form and manner (if any) prescribed for the purposes of this subsection by order under section 339, and
(c) the first or second condition set out below is satisfied.

(2) The first condition is that the disclosure is made before the alleged offender does the prohibited act.

(3) The second condition is that—
(a) the disclosure is made after the alleged offender does the prohibited act,
(b) there is a good reason for his failure to make the disclosure before he did the act, and
(c) the disclosure is made on his own initiative and as soon as it is practicable for him to make it.

(4) An authorised disclosure is not to be taken to breach any restriction on the disclosure of information (however imposed).

(5) A disclosure to a nominated officer is a disclosure which—
(a) is made to a person nominated by the alleged offender’s employer to receive authorised disclosures, and
(b) is made in the course of the alleged offender’s employment and in accordance with the procedure established by the employer for the purpose.

(6) References to the prohibited act are to an act mentioned in section 327(1), 328(1) or 329(1) (as the case may be).

339 Form and manner of disclosures
(1) The Secretary of State may by order prescribe the form and manner in which a disclosure under section 330, 331, 332 or 338 must be made.
(2) An order under this section may also provide that the form may include a request to the discloser to provide additional information specified in the form.

(3) The additional information must be information which is necessary to enable the person to whom the disclosure is made to decide whether to start a money laundering investigation.

(4) A disclosure made in pursuance of a request under subsection (2) is not to be taken to breach any restriction on the disclosure of information (however imposed).

(5) The discloser is the person making a disclosure mentioned in subsection (1).

(6) Money laundering investigation must be construed in accordance with section 341(4).

(7) Subsection (2) does not apply to a disclosure made to a nominated officer.

**Interpretation**

**340 Interpretation**

(1) This section applies for the purposes of this Part.

(2) Criminal conduct is conduct which—

(a) constitutes an offence in any part of the United Kingdom, or

(b) would constitute an offence in any part of the United Kingdom if it occurred there.

(3) Property is criminal property if—

(a) it constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

(b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

(4) It is immaterial—

(a) who carried out the conduct;

(b) who benefited from it;

(c) whether the conduct occurred before or after the passing of this Act.

(5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

(6) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

(7) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained in both that connection and some other.
(8) If a person benefits from conduct his benefit is the property obtained as a result of or in connection with the conduct.

(9) Property is all property wherever situated and includes—
(a) money;
(b) all forms of property, real or personal, heritable or moveable;
(c) things in action and other intangible or incorporeal property.

(10) The following rules apply in relation to property—
(a) property is obtained by a person if he obtains an interest in it;
(b) references to an interest, in relation to land in England and Wales or Northern Ireland, are to any legal estate or equitable interest or power;
(c) references to an interest, in relation to land in Scotland, are to any estate, interest, servitude or other heritable right in or over land, including a heritable security;
(d) references to an interest, in relation to property other than land, include references to a right (including a right to possession).

(11) Money laundering is an act which—
(a) constitutes an offence under section 327, 328 or 329,
(b) constitutes an attempt, conspiracy or incitement to commit an offence specified in paragraph (a),
(c) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a), or
(d) would constitute an offence specified in paragraph (a), (b) or (c) if done in the United Kingdom.

(12) For the purposes of a disclosure to a nominated officer—
(a) references to a person’s employer include any body, association or organisation (including a voluntary organisation) in connection with whose activities the person exercises a function (whether or not for gain or reward), and
(b) references to employment must be construed accordingly.

(13) References to a constable include references to a person authorised for the purposes of this Part by the Director General of the National Criminal Intelligence Service.
Appendix 2

Statutory Declaration
Solicitors are licensed under an Act of Parliament to make statements and carry out legal acts as part of a public office on behalf of clients. When a solicitor completes a return to the Registers, as with a tax return or a confirmation to an estate on behalf of a client, he effects changes in publicly held registers which deal with the identity of persons and their ownership of property. That is why many in the profession have always believed that when they are completing and submitting forms on behalf of clients they are making declarations under statute - the statute that regulates their public office. In this respect the terms of Criminal Law (Consolidation) (Scotland) Act 1995 c. 39 S 44 should apply:-

"False statements and declarations.
44 (1) Any person who—
(a) is required or authorised by law to make a statement on oath for any purpose; and

(b) being lawfully sworn, willfully makes a statement which is material for that purpose and which he knows to be false or does not believe to be true, shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding five years or to a fine or to both such fine and imprisonment.

(2) Any person who knowingly and wilfully makes, otherwise than on oath, a statement false in a material particular, and the statement is made—
(a) in a statutory declaration; or

(b) in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return or other document which he is authorised or required to make, attest or verify by, under or in pursuance of any public general Act of Parliament for the time being in force; or

(c) in any oral declaration or oral answer which he is authorised or required to make by, under or in pursuance of any public general Act of Parliament for the time being in force; or

(d) in any declaration not falling within paragraph (a), (b), or (c) above which he is required to make by an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding two years or to a fine or to both such fine and imprisonment.

(3) Any person who—
(a) procures or attempts to procure himself to be registered on any register or roll kept under or in pursuance of any Act of Parliament for the time being in force of persons qualified by law to practice any vocation or calling; or

(b) procures or attempts to procure a certificate of the registration of any person on any such register or roll,
by wilfully making or producing or causing to be made or produced either verbally or in writing, any declaration, certificate or representation which he knows to be false or fraudulent, shall be guilty of an offence and be liable on conviction to imprisonment for a term not exceeding 12 months or to a fine or to both such fine and imprisonment.

(4) Subsection (2) above applies to any oral statement made for the purpose of any entry in a register kept in pursuance of any Act of Parliament as it applies to the statements mentioned in that subsection.

Law Society of Scotland
December 2011