SUBMISSION FROM PROFESSOR WILLIAM M GORDON

1. Proposals for the Completion of the Land Register and Registration Issues

(a) The policy of completing the Land Register seems obviously sound. In view of the size and cost of the project a gradualist policy for compulsory registration seems inevitable. Voluntary registration, which is being more encouraged, will assist but Keeper-induced registration as provided for in s.29 of the Bill will be required to give 100% coverage as some land may never otherwise be included. However, it would seem preferable to include in the primary legislation a requirement to inform the owner or presumed owner or other interested parties of the Keeper’s intention to act with land register rules on the procedure to be followed to deal with any disputes e.g. over boundaries, pertinents or mineral rights.

(b) So far as the process of registration is concerned it seems right to include in the legislation matters which were left to the practice of the Keeper because the 1979 Act was so skeletal. The “one-shot” principle seems reasonable particularly in light of the duties of care spelt out in the Bill.

(c) As a register of rights should be essentially a record of rights that exist rather than a means of creating rights the new policy of removing the Keeper’s “Midas touch” and allowing greater scope for challenge of right mistakenly entered in the Land Register is preferable to the present position. Money is not necessarily adequate compensation for the loss of rights lost through a mistaken entry in the Register although in theory compensation might allow by negotiation recovery of the right lost. Litigation shows that people can be extraordinarily difficult over what seem minor issues e.g. of boundaries and the person who has lost the right is in a poor negotiation position.

(d) Advance notices are a good idea to help protect acquirers and the inclusion of cases of first registration fits in with the policy of encouraging registration. One might, however, ask why the helpful examples of the working of advance notices in the Scottish Law Commission bill have been relegated to the Explanatory Notes to the bill. It is something of an innovation in a modern statute to have such a useful device to assist understanding by giving examples to make the provisions more intelligible. Users are more important than the admittedly expert parliamentary draftsmen.

(e) It is right to put provision for a non domino dispositions on a regular basis although the abolition of the Keeper’s Midas touch makes their registration less of a problem.

2. Proposals for Electronic Documents, Conveyancing and Registration

(a) The extension of the use of electronic documents in conveyancing is likely to be popular with legal practitioners who increasingly use electronic documentation. However, it seems unfortunate that the necessary amendments to the Requirements of Writing (Scotland) Act 1995 have been made partly by inclusion of provisions in the body of the bill and partly by provisions in a Schedule. There seems much to be said for the re-enactment of the amended Act as the new and reconstructed provisions will now have to be put together by commercial publications and the
Statute Law database (itself never up to date in an easily accessible form) to give a clear picture of the law. Should Parliament itself not be making the law it makes easily accessible?

(b) It seems clear that to make the best use of electronic documentation the ARTL system needs to be improved – something on which work is already being done. Articles and correspondence in the Journal of the Law Society of Scotland e.g. make it clear that there is a good deal of dissatisfaction with the current system which cannot be used as easily or as widely as would be desirable.

(c) I cannot help wondering about the security of an all-electronic register when it is so easy to destroy large quantities of electronic data. No doubt technological experts will say that this is nonsense but experts said that the Titanic was unsinkable.

3. Other Aspects of the Bill

(a) It would have been helpful if the Explanatory Notes on the bill had referred back to the corresponding provisions of the bill annexed to the Scottish Law Commission Report and so correlated the provisions of the two bills. There are considerable changes of arrangement and less considerable changes of substance in the two bills and the SLC bill has notes explaining its provisions and relating them to the Report which would have helped to explain the present bill and the deviations from it. Many of the changes are clear and helpful but others are more obscure, such as the separation of the provisions on inaccuracy from the provisions on rectification of the Register and the notes to the SLC bill make it clear why there is no provision for electronic registration in sheriff court books (not all sheriff courts will have the necessary facilities).

(b) It would have been more helpful to re-enact the amended Registered Leases (Scotland) Act 1857 than to split the amended provisions between the body of the bill and a Schedule.

(c) One wonders why the sensible suggestion of the Scottish Law Commission in s. 86 of its bill to amend the Prescription and Limitation (Scotland) Act 1973, s. 1 in such a way as to make separate provision for registered and recorded deeds was not followed. Clarity is sacrificed to save a few words.

(d) There may be a question whether s. 104 is too wide in providing for services going beyond the obvious expertise of the Keeper’s staff.

(e) It seems a pity to drop the suggestion of the Scottish Law Commission to re-enact the provisions on acquisition of ownership by a tenant-at-will introduced rather anomalously into the 1979 Act. They could perhaps be fitted into the Long Leases Bill which is due to be re-introduced. They would fit more naturally there than into a Land Registration Bill.

Professor William M Gordon
11 January 2012