1. Introduction
The Scottish Law Agents Society is the largest national voluntary association of solicitors in Scotland representing the interests of the whole of the profession. In general terms the Society welcomes the introduction of the Land Registration (Scotland) Bill. The current legislation is now over 30 years old and the Reports which formed the basis of that legislation date back to the 1960s. Reviewing the current regime applicable to land registration is therefore appropriate and the Scottish Law Commission has carried out a detailed examination of the Land Registration (Scotland) Act 1979 and its operation culminating in its Report No 222 which forms the basis of the Bill as introduced.

2. Closure of the existing Register of Sasines
2.1 The current scheme of Land Registration has not yet resulted in the capture of all titles within the Land Registration system. The Sasines system of registration remains an important register at present.

2.2 We understand the logic of wishing to close the Register of Sasines which is provided for in S47 of the Bill. We note the provision has been revised compared with the draft bill attached to the SLC Report and consider this is an improvement.

2.3 The closure of Sasines is potentially a legitimate purpose. The Land Register records ownership or at least it records who has title to the property. It does not prevent nominees holding title, ownership by trusts or corporate vehicles all of which may serve to obscure beneficial ownership. However a register of title does, in our view, constitute a legitimate purpose. The extension of the current system which requires a transfer of ownership for onerous consideration, typically sale, is extended to gratuitous transactions. Insofar as they involve a change of ownership then that falls within the realms of proportionality and we include within this, by extension, those types of lease transaction which are already treated by law as akin to ownership – leases of more than 20 years. However where an existing title is recorded in Sasines and the current owner wishes to remortgage the property then, should s47(3) become operative, the owner will first have to register the property which will increase the transaction costs perhaps with the preparation of a new plan which will also create delay. The number of titles still remaining in Sasines will decrease year on year but where there is no transfer of ownership the ability to carry out a standard juridical act – the granting of a security over the property - without incurring further expense does not seem proportionate. We therefore have some doubt as to whether this is compliant with A1P1 ECHR. A reasonable use of the property as security for a loan is impeded by the proposed legislation which, absent a change of ownership, does not appear to us to comply with the Convention requirement for proportionality. There seems to be insufficient public benefit. We have raised this previously with Registers of Scotland who have assured us that it is unlikely that s47(3) will be activated for many years to come. As the number of titles in Sasines diminishes then the proportionality argument becomes weaker. Nonetheless it would be helpful to have the Minister/Registers of Scotland place their views on the record with an assurance that the provision will not be activated until the number of potential Sasine titles which might fall into this category is much smaller than at present.
2.4 The arguments we have made in relation to securities are also applicable to dispositions and other deeds but in our view ensuring a single Register of titles and the capturing of data coupled with the change in ownership outweighs the detriment which owners suffer even where that transaction is gratuitous. We therefore support s47(1)

3. Advance Notices
3.1 We note that the Bill proposes the introduction of a system of advance notices. There is no such system at present. We note the SLC Report 222 para 14.5 where they conclude after extensive research Scotland is only legal system in world with method of addressing these common problems with letters of obligation granted personally by agents. These are granted by solicitors to cover the gaps in the present system. There will always be a small time frame in which it is not possible to carry out searches which are right in real time. Information is at best real time -24 hours and in practice it may be real time – 48 hours. The second gap covered by the obligation is the period from delivery of the disposition to the registration of the deed. When using paper documents the best that can be hoped for a one day gap unless using ARTL when the gap can be reduced in theory to nil.

3.2 Letters of obligation covering these gaps fall within the terms of the Master Policy so solicitors will be insured should claims arise. We understand that this matter was referred to the SLC by LSS. The Bill does not require the use of such notices and while insurance cover is available then the need for advance notices is marginal. We expect that the availability of such notice will lead the Master Policy insurers to withdraw cover making the use of such notices effectively mandatory.

3.3 Initially we considered Advance Notices to be unnecessary. However in light of recent cases [Frank Houlgate Investment Company Limited v Biggart Baillie [No 1] (2009) CSOH 165; Mair SSDT 1463 (27/05/09); Frank Houlgate Investment Company Limited v Biggart Baillie [No 2] 2011 CSOH 160 and Cheshire Mortgage Corporation v Grandison and Blemain Finance v Balfour & Manson [2011] CSOH 157] where it has been argued solicitors could be liable to third parties on the basis of identity fraud on the part of their clients on the basis of letters of obligation issued by the solicitors. Notwithstanding that such arguments in these cases have to date been unsuccessful it has convinced us that a move to advance notices has merit. The introduction of advance notices must therefore be simple to operate and fit with existing practices. That appears generally to be the case in relation to the proposed system. We do have some observations noted below.

3.4 The application record
S15 The application record is to consist of all—
(a) applications for registration as are for the time being pending, and
(b) advance notices as are for the time being extant.

We note that the application record will include advance notices. Such notices however never make it on the title sheet. If an application coheres with an advance notice the application is given effect to. If it does not then the application is not given effect to. While the title sheet is searchable it does not appear that the application record will be. A creditor who is considering inhibiting a selling debtor may incur expense in obtaining an inhibition which would be defeated by the advance notice. In
our view such a system is not transparent. It ought to be the same for both Sasines and the Land Register which it does not appear to be. There are two ways in which this might be achieved – (i) making the application record searchable or (ii) registering the advance notices directly on the title sheet. The former complicates the searching procedure and the latter clutters the title sheets. Our preference would be (i).

3.5 Application for advance notice- s56
We note the new procedure which is being proposed for advance notices inspired by provisions of the German Civil Code - BGB s883. This has the potential to eliminate letters of obligation which have oiled the conveyancing system for over a century. Any such system is designed to cover gaps. Solicitors grant such obligations personally so that they become liable as well as their client. In essence the current system has two potential gaps- the first is from the date of the last search obtained prior to settlement. If instructed today the search will cover entries up to the close of business yesterday. So that gap is now short. The danger is that the seller is inhibited in the gap. The risk of the seller being sequestrated in the gap has gone as a result of the Bankruptcy & Diligence (S) Act 2007 s17 and in relation to companies it is still possible to rely on the decision in Sharp v Thomson. The second gap covers the period from settlement until the deed is registered. That gap can and should be short. The transaction might be ARTL enabled which would enable the transfer of property to be effected electronically which again would be effective tomorrow. Alternatively it could be transmitted by post or private mail service in which case it ought to be received the next day and given effect to. As SDLT is now paid online there are no delays in paying stamp duty.

Recent case law noted above has suggested that there may be examples of identity fraud which conceivably have an impact on liability under letters of obligation albeit not in those cases. Creating a system which will be optional that permits there to be no letter of obligation will be welcomed by many agents even if classic letters of obligation are covered by professional indemnity insurance.

3.6 We are however concerned regarding the implementation of this concept in s56. In a Sasine case Keeper records the advance notice S56(4)(b). This will include an application for first registration because there will be no application record at that point. In relation to a Land Registration case the Bill provides:

(1) A person falling within subsection (2) may apply to the Keeper for an advance notice in relation to a registrable deed which the person intends to grant.

(2) This does not appear to have been fully thought out – this suggests Keeper grants it in Land Register case. It is not clear why there is this difference in treatment. We would recommend that s56 be revised to reflect that the advance notice will be signed by or on behalf of the seller or with their consent and when submitted in a Land Register case entered by the Keeper on the application record when appropriate. On our reading the Explanatory Notes are in line with our suggestions while the Bill itself is not so aligned.

We recommend that the drafting be amended to show that an application is made to lodge an advance notice for inclusion by the Keeper in the application record.
3.7 The notice will be drafted by buyer’s agent and adjusted with seller’s agent. A style ought to be provided in the Bill. Does it need to be signed? It is not clear and if so by whom? The Bill is silent. We consider it should be signed either physically or electronically by the agent and this would be made clear by the incorporation of a style.

4. Changes to the system of rectification and indemnity
4.1 Under the current law a proprietor in possession who has not been fraudulent or careless will be permitted to retain the property even where their title was the product of a fraud on the owner unknown to them. This places a premium on attaining the status of proprietor in possession. In reported cases [Kaur v Singh; Tesco v Keeper] this has been interpreted as having physical possession and thus where there are competing claims this has resulted in a premium attaching to the self help remedy of obtaining and thus denying an opponent possession. This is not a satisfactory basis on which to operate a system of title to land. One of the consequences of the current system can be a mismatch between the operations of the Land Registration system and the conduct of a court case where say boundaries are disputed or where a servitude right is claimed. In a disputed boundary situation if the Keeper grants a land certificate then title flows from the Register and any boundary dispute is effectively resolved by the Keeper’s actions. The court must simply adopt the boundary as stated in the land certificate. In short the Keeper while acting administratively determines the outcome of litigation – a judicial function. In some instances the Keeper is aware of the dispute at the time of the application and delays dealing with the application until the judicial proceedings are complete. In either situation the different nature of the Land Register from the general law is not a comfortable situation. We accordingly welcome the realignment of the provisions for rectification and compensation. This will prevent an owner with a registered interest losing a right without notice [see e.g. Williamse v French [2011] CSOH 51].

4.2 We note that the term used for rectification is ‘manifest’ inaccuracy in s78. ‘Manifest’ is not further defined. In the notes to the to the draft bill in the SLC Report a definition of manifest is provided. – the evidence for the inaccuracy is indisputable. We recommend that a definition be included in s78 along these lines which would improve the intelligibility of the provision.

5. Shared plots
5.1 We note the provisions of s17 et. seq. in relation to shared plots. We understand the reasoning that in order to complete the map base shared plots offer a solution. However over 30% of titles in Scotland relate to tenement flats. The Bill provides in relation to such properties that the cadastral map may depict only the building and that it is not necessary to depict the pertinents of tenement on the map [s16]. We therefore are not convinced as to the necessity of having shared plots at all. The use of shared plots which we accept is optional for the Keeper does in our view give rise for the potential difficulties. At present the shared areas will be shown with a different colour scheme on the title plan forming part of the Land Certificate. If the shared plot system then two plans are required. See the example given in the SLC Report and the two plans at pages 614 and 622 thereof. When advising a purchaser both plans will need to be copied rather than just one at present. This example is a very simple one with only one shared right. In a modern estate there...
may be a number of differing shared rights shared with different numbers of other owners and conceivably a house could come with four or five different shared plots each with different rights/shares. This will inevitably lead to confusion and mistakes as to ownership rights on the part of owners and solicitors. We accept that the propose system has advantages in allowing a search of the Register which will disclose all the properties which benefit from a share of the shared plot but the inconvenience added expenses in handling multiple title sheets and opportunity for error or lack of communication of information at the transaction stage outweigh those arguments. We are not in favour of this provision. Our view is that it should not be included. It is only to be used at the discretion of the Keeper. We hope that if it is enacted the power is never used.

5.2 We are pleased that provisional shared plot scheme contained in the SLC Report has not found its way into the Bill. This scheme is simply too complex and requires developers to act responsibly and remain solvent over the lifetime of a development. It was a recipe for disaster and its omission is welcomed.

6. E-conveyancing
6.1 The logic of the SLC set out at para 34.6 of its Report for the extension of the ARTL system to a general system is correct. We welcome these provisions.

7. offences under s108
7.1 We fully endorse and adopt the submission by LSS that s108 is wholly unnecessary and that common law fraud and the protections of the Proceeds of Crime Act and the Money Laundering Regulations are sufficient. We note that s108 has no counterpart in the draft Bill in the SLC Report. We recommend its removal from the Bill.

8. Comments on drafting issues
8.1 The Keeper must take such steps as appear reasonable to the Keeper to protect the register from—
(a) interference,
(b) unauthorised access, and
(c) damage.[s1(5)]

This seems directed at computer misuse type offences. These are already subject to the offences created by the Computer Misuse Act 1990. It is appropriate to place the Keeper under a duty to minimise this type of risk. This duty might usefully be extended to include protection from fraud. The Register is vulnerable to identity fraud and the Keeper ought to be placed under a duty to guard against this so far as is practicable. We recommend such an extension.

8.2 A separate tenement constitutes a plot of land for the purposes of this Act. S3(5)
In this section and elsewhere separate tenement is used in a technical sense – it is not intended to mean a tenement building but rather any interest in land which is capable of being owned as a separate unit. Although tenement is defined in the definitions section s109 by reference to the Tenements (Scotland) Act 2004 it does contain the qualification unless the context otherwise requires. The use of separate tenements is well known to conveyancers but may not be readily understood by the general public. Taking tenement back to its Latin root gives us the idea of holding of
land. That connotation of holdings of land no longer has any significance since the coming into force of the Abolition of Feudal Tenure (Scotland) Act 2000 when feudal tenure was finally abolished. We note in relation to servitudes the Title Conditions (S) Act 2003 redefined the usage in relation to servitudes from dominant and servient tenements to dominant and servient properties – so references to tenement in this sense can be eliminated. The whole technical idea of holdings of land looks backwards rather than forwards and as people become less familiar with the feudal system of holding. **We recommend a change on the usage in s3(5) and the other instances within the Bill.**

8.3 Extension to facilitate integration of geospatial datasets. [s2.]

We note the SLC in their report para 33.17 envisage that in the future the Land Register will operate in a similar way to Google Maps. While that comment was made in relation to the zoom function specifically there is a singular failure of the ability of Google maps to integrate geospatial datasets. (Maps and photographs). Registers of Scotland were one partner in what must be regarded as the failed ScotLIS project which attempted to demonstrate the potential for such integration in Scotland. Adding for example information which presently has to be obtained from the Coal Authority in relation to former mine workings could usefully be overlaid on to the cadastral map. **We recommend that s2 be amended by adding to this section enabling provisions to permit the Keeper to host other layers of information to the cadastral map which might be triggered in the future by regulations.** This would help future proof the legislation. Obtaining information from a single source could in the future help reduce transaction costs. In addition such integration can be used to level economic development. British Columbia is a leader in this field and much could be learned from that approach. [See http://archive.ilmb.gov.bc.ca/irb/Level_1/Spatial/ICF/ICF.html ]

8.4 A title number is an unique identifier consisting of numerals or of letters and numerals [S4(2)].
**We recommend adding to the end ‘however represented’. This would remove any doubt that the title number could be represented by a barcode/QR code etc which may make for easier handling of paper documentation.**

The Scottish Law Agents Society
10 January 2012