INTRODUCTION:

Turcan Connell are a firm of Solicitors and Asset Managers based in Edinburgh and with offices in London and Guernsey. We act for private individuals, charities and owners and managers of land. The Land & Property Department in Turcan Connell act in all aspects of rural property transactions including purchases, sales and leasing arrangements for all types of property. The practitioners at Turcan Connell have significant experience in conveyancing and property law including dealing with recording deeds in the General Register of Sasines and registering land in the Land Register of Scotland.

Turcan Connell welcome the opportunity presented by the introduction of the Land Registration etc (Scotland) Bill (“the Bill”) to modernise and update the law with regard to land registration and address issues which practitioners have encountered since the introduction of the Land Register in terms of the Land Registration (Scotland) Act 1979 (“the 1979 Act”). We firmly believe that legal practitioners have an important part to play in reviewing and commenting on the Bill to assist the Scottish Government in achieving the best result for the land registration process. Conveyancers are and will be the users of the land registration process and, accordingly, their views (formed on their experience of using and working with the system) are, surely, essential in making an effective and workable land registration process. We are disappointed, therefore, at the timescale given for making written submissions. The Bill was introduced to the Scottish Parliament on 1st December 2011 and, given the Christmas and New Year break, the deadline for written submissions is very short.

Given the timescale, our submissions relate to what we see as some of the main issues arising in terms of the Bill. Our submissions are made in relation to the relevant sections noted in the heading of each paragraph.

SECTION 1 – THE LAND REGISTER OF SCOTLAND

Notwithstanding that the Keeper’s discretion is stated to be subject to the provisions of the Bill, (which includes, in particular, Section 5 upon which we comment below) the Keeper still has a wide discretion with regard to the form of Land Certificates.

It is anticipated that the Register will be in electronic form. With the advent and acceptance by the legal profession of Registers Direct and Land Certificates produced therefrom, it is, possibly, too late to give consideration to the possible disadvantages of an electronic register. When Land Registration was first introduced, having a paper Land Certificate was important. One had to explain why one did not have the same in order to obtain a copy from Registers. This must have been an aid to combating fraud and this additional check will now disappear with the Electronic Register of Land being the ultimate Register of Ownership. We appreciate there is an obligation on the Keeper to take such steps “as appear reasonable” to protect the Register. The Keeper should be required to take all necessary steps to protect the Register.
Section 3 – Title Sheets and the Title Sheet Record

Under sub-section 1 the Keeper has an obligation to make up and maintain a Title Sheet for each registered plot of land. In sub-section 2, the Keeper has discretion as to whether a Title Sheet for a registered Lease should be made up. We submit that a tenant should be entitled to a separate Title Sheet for a Lease in excess of 21 years. A lender to a tenant under a registered Lease may well wish the registered tenant to have a separate Land Certificate on which their security appears.

Section 5 – Structure of Title Sheets

We strongly recommend that the structure of Title Sheets is addressed. A Land Certificate should give the entire picture regarding the title of and rights pertaining to and affecting a plot of land. The current structure of Land Certificates makes this difficult to achieve in a clear and concise way and, frequently, it is impossible to fully understand a title and report on it to a client without reference to prior deeds. This completely defeats the purpose of the Land Register. We suggest that Land Certificates should comprise:-

(a) a Property Section;

(b) a Pertinents Section: this would be a new section and would include (i) reference to the servitude rights pertaining to a property and would identify the properties over which these rights are exercisable; and (ii) details of the burdens which the proprietor of a registered property has a right to enforce and would identify the relevant burdened properties.

(c) Proprietorship Section;

(d) Security Section;

(e) Burdens Section: the Burdens Section could be improved to make it clearer and more easily understood. Rather than referring to the relevant burdens writs and setting out their terms verbatim, we recommend that the Burdens Section of a Land Certificate sets out the burdens affecting the registered property and identifies the properties the proprietors of which are entitled to enforce them.

On a first registration, consideration should be given to making provision for the legal transfer of land to be completed by the purchaser’s and seller’s agents completing a Land Certificate template for use and checking by the Keeper. This would avoid duplication of work for the solicitors and ease the workload on the Keeper. The applicant’s solicitor would, essentially, prepare the Land Certificate during the conveyancing process. This would reduce the time spent in checking Land Certificates on issue, often many years later when the detail of the transaction has been forgotten; and as much of the work would have been carried out in preparing a Land Certificate for the Keeper, Registers would merely have to check the various sections of the Land Certificate are correct in terms of the titles produced and
prepare the relevant records to be kept by the Keeper in terms of Section 2 of the Bill.

Section 6 – The Property Section of the Title Sheet

With regard to Section (1)(b) we refer to our comments above on Section 5. We recommend these rights are specified in a separate Pertinents Section.

Section 11 – The Cadastral Map

Sub-section (3) states that the cadastral map may show the boundaries of plots of land “on the vertical plane”. Is this in relation to showing the profile of a boundary or measuring the plots of land taking into account the topography of the ground? (E.g. if the land is measured as though it was flat, the area measurement will be less than the actual area which may incorporate hills, etc.) This would also link into maps lodged with the Scottish Government Rural Payment and Inspections Directorate in connection with IACS Forms and Single Farm Payment Entitlement claims as actual area measurements may be shown. It is assumed that, currently, area measurements are given on the basis of the horizontal plane (i.e. not taking into account hills, etc.).

Section 17 – Shared Plots

It appears the word “and” has been omitted after the word “plots”, before paragraph (b).

Salmon Fishings. We would like to see provision in the Bill which would resolve the issue of registering time-shared salmon fishings and property. As you will be aware, the Keeper refuses to register pro indiviso shares in property (whether land based or salmon fishings) where there are burdens restricting the times during which the proprietor of a pro indiviso share may exercise their property rights. We have always taken the view that such burdens are unenforceable and are a matter of contract. As the Keeper does not give any indemnity in relation to burdens, there would be no problem with the Keeper registering such pro indiviso shares. However, the Keeper does not share this view. We are aware that there are (in particular of salmon fishings) “timeshare” interests changing hands. Dispositions are unrecorded so that the ownership per the Sasine Register no longer reflects the true picture. This is not sensible and muddle can only result the longer such a situation continues. It does not assist the ambition of speeding up the transfer of properties to the Land Register. We recommend, therefore, that provisions are entered in the Bill to make it clear that any title which includes a burden or restriction to the effect of restricting the period during which occupancy of the property can be exercised is not guaranteed by the Keeper and that the title sheet is evidence, only, of the fact that the party entered into the proprietorship section owns the pro indiviso share entered in the title sheet. Restrictions on entitlement to occupy could be omitted from the burdens section. It should also be made clear that subject to the above such pro indiviso shares should be registered in the Land Register.

We do not consider that Sections 17 – 20 of the Bill (regarding shared plots) address the issue. These sections refer to plots of land owned in common by proprietors of
other plots of land by virtue of the ownership of such other plot. In our view specific provision would need to be made in the Bill in respect of the issue of “time shared” property. We would be happy to work with the Keeper's staff/Scottish Government on suitable wording if this would be of assistance.

Section 21 – Application for Registration of Deed

Sub-section 3 states the Keeper must reject an application which does not satisfy the Keeper that the general application conditions are met and the conditions set out in sub-section 2 of Section 21 are met. In complex cases we recommend that the guidance to the Keeper and the Keeper’s staff is that the first step in relation to problems with an application should be to phone the solicitor acting for the applicant. Sometimes there are simple errors which could be corrected with co-operation between the solicitor and the Keeper and sometimes applications are rejected incorrectly. Such an initial dialogue would prevent this and the waste of time from rejecting and having to accept a returned application (both for the profession and the Keeper/Registers). We understand, entirely, that this requires co-operation from solicitors as well, but the Keeper would still be able to reject an application if the solicitor did not timeously co-operate in addressing the issues raised. It is often useful to be able to discuss with an experienced member of the Keeper’s staff issues which arise in complex cases to find the best resolution.

Sections 24 and 25 – Circumstances in which certain deeds are registrable and conditions for their registration

These sections mean that on the granting of a registrable lease or a standard security the land over which it is granted will be registrable in the Land Register. This is likely to lead to a piecemeal registration of larger properties which will incur additional expense for landlord and tenant in a lease transaction and the landowners and lender in a security transaction. Conveyancing on such properties will become more complex as titles made up of various parts are always more time consuming to check and more complicated to explain to an owner or purchaser. In particular with regard to renewable projects the areas leased are often small discrete parts of a farm or estate. Having several small registered areas within an overall larger land area does not make sense. If the answer is a registration of the whole estate we refer to our comments on Section 29 below which would apply also in this situation.

Section 27 – Application for Voluntary Registration

The Keeper is given a wide discretion in Sub-section 3(b) (which, it is noted, the Scottish Ministers may by order repeal). Prior to any repeal, however, the Keeper’s discretion is wide. We would like to see a duty on the Keeper to take into account the owner’s reasons for applying for voluntary registration and to act reasonably including taking into account those reasons, in making his decision.

Section 29 – Keeper Induced Registration

1. We remain concerned with regard to the cost which such registrations will inevitably incur for the landowner. The Bill should make it clear that in such
situations no fee will be charged to the landowner. This does not wholly address the issue of costs however. Any Land Certificate issued to a landowner following on a Keeper induced registration will need to be checked. This will incur legal fees. In complex cases, our advice would always be for the landowner to have the Land Certificate checked once it is returned to his solicitor. Errors do occur in Land Certificates and, if not picked up timeously, may lead to complications in the future with dealings in registered land.

2. Although the Keeper has to notify a landowner that their title has been registered (Section 40) there is no provision for when notice should be given. We recommend that prior notice is given to a landowner.

3. Where a registration is Keeper induced, at least until the point where the landowner does something which would have induced registration, we consider provision should be made for the Keeper to be obliged to accept queries or comments or, alternatively, a special right of appeal should be written in for the benefit of such a landowner following on registration. Such a landowner should not be disadvantaged by any error in the Land Certificate following on a Keeper induced registration.

Section 33 – Withdrawal and Amendments etc of Application

Sub-section 2 states that Land Register rules may specify circumstances in which consent to substitution or amendment of an application must be given by the Keeper. It would be helpful if the guidance/rules/policy was to engage and allow amendment/substitution as discussed and agreed with the relevant solicitors. We refer to our comments in relation to Section 21 above.

Section 38 – Order in which Applications are to be dealt with

We recommend this section also provides that where a solicitor specifies an order for entries being made in the Land Register, this order should be followed unless there is a legal reason not to do so.

Section 42 – Prescriptive Claimants

We have concerns about the whole process. How is an applicant to satisfy the Keeper that the proprietor of land has not occupied it? If the proprietor can be identified, why should a procedure be put in place whereby their land can be transferred to another person? What evidence will the Keeper accept with regard to possession by the applicant? One year does not seem long in this context. On large estates how is a “nibbling away” of areas at the margins to be prevented? Where the estate owner is known to be the proprietor and receives notice, it could be a timely and costly exercise to combat third parties trying to obtain ownership of parts of such an estate in terms of this Section. In situations where no proprietor can be identified (as not infrequently happens) is it the intention that the Crown is to be given a commercial opportunity?
With regard to sub-section 8, we recommend landowners and not just the Keeper be consulted with regard to any amendment of the period of time referred to. Consultation of landowners could be through bodies such as Scottish Land & Estates.

Section 44(7) & (8)

We refer to our comments above regarding the Scottish Ministers making an order for changing the period of time as set out in Section 42. The same applies to changing the number of days within which notice of an objection can be received.

Section 54: Registration of order for rectification of document, etc.

We do not consider the provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act") as amended by the Bill (in so far as relating to land registered property/documents) are at all clear. We suggest that the 1985 Act is disapplied to land registered documents and new clear provisions are made in the Bill. More thought requires to be given to the issue of rectification of errors in Land Certificates (of both inclusion and omission) to ensure that the original intentions of the contracting parties is reflected in the Certificate issued/Title Sheet made up by the Keeper.

Section 73 Extension, Limitation or Exclusion of Warranty

We question why the Keeper has discretion in terms of sub-section 4. After ten years’ possession and the removal of the provisional element of an entry, should the Keeper not be required to grant indemnity unless there is a specific reason for his not doing so?

Section 82: Acquisition from Disponer without valid title

We are concerned that the provisions of this section change the way in which conveyancing is currently carried out. Where a party is on the title sheet as the registered proprietor of land, there is no way (without looking behind the Land Certificate, which defeats the whole purpose of land registration) that a purchaser could know that that party was not, in fact, the owner. Section 82 provides (among other things) that a purchaser or disponee acquires ownership of the land provided that the land has been in the possession, openly, peaceably and without judicial interruption, of the disponer for a continuous period of at least one year (or of the disponer and disponee, together, for one year). It is not currently normal practice to check ownership for a period of one year. However, it seems that on the enactment of this section, conveyancers will have to do so. Is that what Parliament intended? Has thought been given as to how possession is to be proved?

Section 87 (and subsequent): Extinction of Encumbrance when land disposed.

These provisions appear to state that if an encumbrance is missed off a title sheet for any reason, then on the transfer of that land, the encumbrance will be extinguished irrespective of the reason for the omission. We have concerns in this regard.
Although there is provision for compensation being payable, this seems to be inequitable to the party entitled to the encumbrance. In our view it is difficult to compensate for some rights: for example a security holder could lose out. Securities are not used solely in mortgage situations. Compensation could be much more difficult to quantify where a security is for a clawback or an obligation *ad factum praestandum*. Furthermore, a party entitled to enforce a burden, particularly a right of pre-emption, would find it difficult to quantify compensation. Compensation may not fully reflect the “loss”. For instance, if an estate owner does not have the opportunity to purchase back a cottage near to the heart of the estate, how is the compensation to be valued?

“Encumbrance” is stated not to include a servitude created other than in terms of section 75(1) of the Title Conditions (Scotland) Act 2003. Accordingly, a servitude created in terms of that section is an encumbrance and would, therefore, be extinguished if left off the title sheet. Is this the intention? What happens if this right is a right of access?

Properties are often sold before Land Certificates are issued and there would be no way to check that the Land Certificate is correct. Furthermore, it may not be in the owner’s interest to check that certain encumbrances are shown on the title sheet. Indeed, it would be in their interest not to draw the omission of such an encumbrance to the attention of the Keeper. Will the party entitled to enforce burdens or to the benefit of servitudes be sent copies of the Land Certificate to check? If their rights are omitted from the Land Certificate, presumably the error will be compounded by failure to send the Land Certificate to them for checking – there will be no reason on the face of the land certificate to do so.

**Section 100**

We would press for guidance/rules requiring the Keeper to issue complete maps when asked for copies: rather than large maps being printed off as A4 size pages with borders. Such maps are very difficult to use.

**Section 7(1)(a) and Section 109.**

Section 7(1)(a) of the Bill provides that the Keeper must enter in the proprietorship section of the title sheet the name and designation of the proprietor. Section 109 – interpretation – stipulates with regard to “designation” that it includes (where the person designated is not a natural person) the legal system under which the person is incorporated and if a number is allocated, that number. It would appear, therefore, that the Keeper will now reject applications where the disponee’s company number is not included. While many solicitors include the company number in their conveyances, it is not necessary to do so to properly design a company and many conveyances do not include it. While we understand the reasons for wanting to include company numbers on the title sheet and that it may be good practice to do so, we are not in favour of including provisions in the Bill which make it easier for applicants and solicitors to make an error (we consider a change to procedure such as this would fall into this category) resulting in their application being rejected.
Company numbers of UK companies are easily ascertained and could, therefore, be the subject of a requisition or added to the relevant form.

**Miscellaneous Points**

1. **Prescriptive Servitude Rights.** Would it not be useful for the Keeper to be able to enter on a title sheet that there is an unchallenged prescriptive right of access, even if this is in note form only?

2. It is noted that the Bill is predicated upon registration of plots of land rather than interests in land. We question whether this is, indeed, the best method for land registration. For instance, with regard to salmon fishings, where there can be a great number of *pro indiviso* proprietors, one title sheet for the plot of land would quickly become unwieldy and difficult to follow. In such an instance, a *pro indiviso* proprietor should be entitled to an individual Land Certificate for his *pro indiviso* share.

Turcan Connell
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