Submission from the Faculty of Advocates

INTRODUCTION

The Faculty has previously been consulted (1) at the Consultation Draft stage in March 2010 and (2) on the previous Bill introduced in November 2010. The Faculty provided responses on both occasions and, following the later response, was invited, and accepted the invitation, to give evidence to the Justice Committee of the Scottish Parliament in January 2011. That Bill fell on the dissolution of the Scottish Parliament in March 2011.

The Faculty's second Response questioned the use, a difference from the Consultation Draft, of subordinate legislation particularly relating to the provision of the necessary forms, the provision of time limits and the power to alter primary legislation.

Thereafter the Justice Committee issued a Stage 1 Report on the Bill. The Report took up the question of one particular time limit where the power to introduce it was to remain with the Scottish Ministers to provide by subordinate legislation. A Bill in substantially similar terms has now been introduced in the present Parliamentary Session.

The Faculty considers that the points previously made in its January 2011 Response remain valid but accepts that the provisions of the Bill as now presented are similar to those previously commented on. The Faculty therefore adds very little to its previous Response, a copy of which is attached. The addition relates to the time limit on which the Justice Committee commented and to an associated point about giving notice in the Land Register that an application to the court or to the Lands Tribunal for Scotland has been made.

USE OF SUBORDINATE LEGISLATION TO PRESCRIBE TIME LIMITS

The Justice Committee’s Sixth Report, 2001 (Session 3) SP Paper 630 – the Stage 1 Report on the Long Leases (Scotland) Bill (the Bill that fell on dissolution) – recommended in paragraph 19 of Annex A to the report: the Subordinate Legislation Committee 5th Report, 2011 (Session 3), that further consideration be given to providing in the Bill fixed dates or periods rather than leaving them to be prescribed by the Scottish Ministers. These powers (in the then cl.75 and now repeated in cl.78 of the 2012 Bill) relate to applications to the court or to the Lands Tribunal for Scotland to determine the registrability of notices or agreements initially rejected by
the Keeper. Although a period is provided in cl.78(2) within which a court or Tribunal determination of registrability may be registered, there is no express limitation of the period after the Keeper’s rejection within which the application to the court or Tribunal has to be made. Power is given to the Scottish Ministers under cl.78(5)(a) to put a time limit on the registration of notices and agreements determined as registrable and under cl.78(5)(b) to limit the period within which an application to the court or Tribunal may be made.

2.2 The latter power puts it in the hands of the Scottish Ministers to introduce such a time limit, thereby potentially rendering worthless a person’s existing ability to proceed with a court or Lands Tribunal application. The Faculty recognises that a time limit is wholly appropriate in this area to support the certainty desirable in the Land Register. In the Annex to the Justice Committee Report (Correspondence with the Scottish Government) the point is made by the Government in relation to the (then) 75(5)(b) that Ministers should be given the power to stop applications being made long after the Keeper has made a decision. The Faculty agrees with the aim but proposes that the period should be a short one, provided provision is made for the Keeper’s rejection to inform the applicant of that limited period for appealing by application to the court or Tribunal.

2.3 The Faculty accordingly recommends that consideration is given to provision being made in the Bill for inclusion of a limited time period from the date of the Keeper’s rejection for any application to be made to the court or Tribunal.

NOTICE IN THE LAND REGISTER OF PENDING APPLICATIONS

3.1 Allied to the Faculty’s recommendation for a short time limit on applications against the Keeper’s rejection, and again associated with the aim of certainty in the Land Register, the Faculty also recommends consideration be given to an ability to register in the Land Register a caveat that application has been made to the court or Tribunal against rejection of any notice or agreement. This would follow the position presently being proposed in cl.65-70 of the Land Registration (Scotland) Bill for registration of caveats related to civil proceedings brought to reduce a voidable deed, to determine that the Land Register is inaccurate, or to rectify a deed. That could be provided within the current Long Leases (Scotland) Bill by authorising the court and the Tribunal to grant warrant to place such caveats on the title sheet or sheets of any land to which the application or appeal relates, and by requiring the Keeper to enter on the relevant title sheet or sheets such caveats as are presented to him by the person to whom the warrant has been granted.