Subordinate Legislation Committee

4th Report, 2012 (Session 4)

Land Registration etc. (Scotland) Bill

Published by the Scottish Parliament on 25 January 2012
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Mike MacKenzie
Michael McMahon
John Pentland
John Scott

**Committee Clerking Team:**

Clerk to the Committee
Irene Fleming

Assistant Clerk
Euan Donald
Subordinate Legislation Committee

4th Report, 2012 (Session 4)

Land Registration etc. (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 10 and 24 January 2012, the Subordinate Legislation Committee considered the delegated powers provisions in the Land Registration etc. (Scotland) Bill at Stage 1. The Committee submits this report to the Economy, Energy and Tourism Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Land Registration etc. (Scotland) Bill was introduced in the Scottish Parliament on 1 December 2011. It is a Government Bill which restates and amends the law on land registration. This has the objectives of making use of the Land Register easier for all concerned, and to facilitate the transfer of all land (eventually) from the Register of Sasines into the Land Register.

3. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

4. In the consideration of the memorandum at its meeting on 10 January, the Committee agreed to write to the Scottish Government to raise questions on a number of the delegated powers.

5. This correspondence is reproduced in the Annexe.

6. The report considers each of the delegated powers on which questions were raised in turn, and provides the Committee’s conclusions thereon.

1 Land Registration etc. (Scotland) Bill. Delegated Powers Memorandum. Available at: http://www.scottish.parliament.uk/S4_Bills/Land%20Registration%20etc.%20(Scotland)%20Bill/Land_Registration_etc._Bill_DPM.pdf
7. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers contained in the following sections (as they are listed in the DPM) -

sections 111(1), 14(1)(b), 22(1)(d), 33(2), 34(1), 39(5), 40(5), 42(7), 44(6), 59(2), 78(5), 11(6)(b), 27(6), 36(3) and 37, 42(8), 44(7), 52(4), 57(6), 66(3), 93(2) (inserting sections 9B(1)(b), 9B(2)(c), 9C(2) and 9G(3) of the Requirements of Writing (Scotland) Act 1995); 95(3), 96(1) and (2), 106(1), 109(4), 113(1), 118 and 119(3).

Delegated powers provisions

8. The report addresses those delegated powers which relate to the land registration rules first, and then other powers to make subordinate legislation. This follows the ordering of the Bill sections in the DPM.

Section 77(4) - Powers to prescribe in land register rules the rate of interest payable on claims under warranty

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: negative procedure

**Background**

9. Section 77 sets out rules in connection with the quantification of compensation for losses incurred, through a breach of Keeper's warranty of title to a registered interest in land. Section 77(2) sets out 3 possible dates (depending on the circumstances) from which interest runs on the compensation amount payable by the Keeper, until it is paid.

10. The power in section 77(4) allows Scottish Ministers to provide, in the land register rules, for the rate of interest payable by the Keeper.

Section 80(7) - Powers to prescribe in land register rules the rate of interest payable on claims for compensation as a result of rectification of the register

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: negative procedure

**Background**

11. Section 80 concerns compensation payments by the Keeper for losses in consequence of rectification of the Register. Section 80(5) provides that interest is payable on the compensation. Section 80(7) gives the Scottish Ministers power to provide in the land register rules for the rate of interest payable by virtue of section 80(5).
Section 91(4) - Power to prescribe in land register rules the rate of interest on compensation for realignment of rights

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: negative procedure

Background

12. Section 91 concerns the quantification of compensation payable by the Keeper for losses incurred, as a result of the operation of realignment of property rights under the Bill. Part 9 contains provisions allowing for that realignment, in certain circumstances.

13. Section 91(2) provides that interest is payable on the compensation. Section 91(4) allows the Scottish Ministers to provide, in the land register rules, for the rate of interest.

Comment on the powers in sections 77(4), 80(7) and 91(4)

14. The Committee asked the Scottish Government to explain why it is considered that the negative procedure is a suitable level of Parliamentary scrutiny of the exercise of these powers, rather than the affirmative procedure, given that specification of the level of the interest rate in each case could have significant financial effects for persons entitled to be paid the interest and for the Keeper of the Registers.

15. The response to the Committee explains that the Government’s policy in this area is that interest should be available to a person due payment of a compensation sum under the Bill, to acknowledge the fact that during the period between a loss being sustained and the payment being made the person has been unable to benefit from the sum in question. The intention is not that the payment of interest should act as a penalty on the Keeper. Therefore the rate of interest is unlikely to make a significant financial impact on the overall compensation payment. In addition it is not appropriate to tie the rate of interest to a rate (such as the judicial rate of interest) which does not change frequently according to market conditions. The rate must be flexible enough to change to reflect the interest a person may have been able achieve by, for example, depositing the sum in a savings account. As a result the rate of interest will reflect that available in the market, and could be subject to regular amendment.

16. The Committee accepts from this explanation that a delegated power is required to enable the Scottish Ministers to vary the interest rate. However the power is framed as a general power to specify any interest rate, which is wider in scope than the intended policy as explained in the Government’s response. It is intended that the specified interest rate shall reflect market conditions, to properly compensate persons over time, and not be a penalty rate. The Committee considers that in principle these delegated powers should not be drawn more widely in scope than is practicable to give effect to the intended policy.

17. In relation to the application of negative procedure for the exercise of these powers, the response indicates that this procedure is justified as being (in the
Government’s view) the best use of Parliamentary time. On the other hand, the Committee has regard to the substance of these powers to specify any interest rate. The specification of the particular rate could have significant financial effects for persons entitled to be paid the interest, and for the Keeper of the Registers. This is particularly the case where the power is drawn to allow any rate to be specified.

18. The Committee therefore draws to the attention of the lead committee the response from the Scottish Government in relation to the powers to specify an interest rate in sections 77(4), 80(7) and 91(4). The Committee considers that these powers should not be drawn more widely than is appropriate to give effect to the intended policy.

19. The Committee considers that these powers have significant enough effects that the affirmative procedure would be a suitable level of scrutiny.

Section 47(5) and 47(6) - power to prescribe days, on or after which recording of certain deeds in the Register of Sasines will have no effect

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Background

20. Section 47(5) allows the Scottish Ministers to prescribe the day on or after which the recording of a standard security (mortgage) over land in the Register of Sasines will have no effect. Section 47(6) allows the Scottish Ministers to prescribe the day on or after which the recording of any deed in the Register of Sasines will have no effect.

21. Section 47(10) provides any day prescribed under section 47(5) or 47(6) is to be a day no earlier than the day when the Keeper’s discretion relating to voluntary registrations under section 27(3)(b) is removed. Ministers must consult the Keeper before making an order.

22. Section 47(12) allows for different provision to be made under section 47(5) and 47(6) for different areas.

Comments

23. In relation to the powers in section 47(5) and (6), the Committee indicated to the Scottish Government that the DPM explains that affirmative procedure is considered appropriate, because the closure of the Register of Sasines to new deeds is likely to affect various stakeholders.

24. The Committee asked if this objective would be better achieved in the interests of stakeholders by providing in section 47 for a requirement to consult the relevant persons before making an order, as well as the Keeper of the Register. The Committee also sought clarification of which stakeholders are being referred to.
25. The Committee sought clarification as to why affirmative rather than negative procedure is considered to be an appropriate level of scrutiny, given that the scope of these powers is limited to prescribing the relevant dates.

26. In response, the Government has confirmed that it will consider, in advance of Stage 2, whether it is appropriate to add a requirement to consult relevant persons with an interest in the Register. It is confirmed that the stakeholders affected by the closure of the Register of Sasines will be anyone who submits or may submit an application for recording to that Register, or otherwise interacts with that Register. This will include (but not be limited to) banks and other lenders, local authorities, conveyancing solicitors and private searching firms. Given the number of potential stakeholders, the Scottish Government does not consider it appropriate to list the stakeholders to be consulted on the face of the Bill. The Committee would agree it does not appear necessary to list each and every consultee, but does consider that consultation prior to setting the date for closure of the Sasine Register may better protect the interests of stakeholders.

27. In relation to the use of affirmative procedure, the response emphasises that the closure of the Register of Sasines has been considered of sufficient importance to warrant the level of scrutiny given by the affirmative procedure, when the power is exercised. This has adopted the suggestion of the Scottish Law Commission.

28. The Scottish Government has undertaken in response that, in light of the consideration noted above on consultation, it will consider whether the addition of a requirement to consult would mean that negative procedure is more appropriate.

29. The Committee welcomes this re-consideration. It appreciates that in reviewing the delegated powers in the Bill, it is not in a position to assess in detail the significance and effects of specifying the particular dates for the closure of the Register of Sasines, in relation to standard securities and subsequently for any deeds. The Committee notes that the Register of Sasines was established in 1617. It would not therefore disagree with any finalised proposal of the Government and the Scottish Law Commission that affirmative procedure may be an appropriate level of scrutiny for the exercise of these powers. On the other hand, the principle of closure of the Register is set out in the Bill, and the scope of these powers is limited to prescribing the relevant dates.

30. The Committee will return to consider these powers after Stage 2.

31. The Committee therefore reports to the lead Committee that the Scottish Government has confirmed it will consider, in advance of Stage 2—

(a) whether it is appropriate to add a requirement to consult relevant persons with an interest in the Register of Sasines, in relation to the powers in section 47(5) and (6), and

(b) in light of that consideration, whether affirmative or negative procedure is the more appropriate level of scrutiny for the exercise of these powers.
Section 55(4) - Power to make provision about the description of unregistered subjects in an advance notice

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: affirmative procedure

Background
32. This section allows the Scottish Ministers to make provision concerning the detailed description of land plots or leases, in “advance notices”, where a plot or lease is not yet registered in the Land Register. The Bill introduces the new system of “advance notices” in sections 55 to 61.

33. This new system protects the grantee of a deed during the time between taking delivery of it (in exchange for the money) and the registration of the deed. This period is the “gap risk”, as the grantee is vulnerable in this period to the registration of competing deeds or the bankruptcy of the grantor of the deed. The entry of an advance notice referring to a registrable deed ensures that during the next 35 days no disposition or competing advance notice can beat that deed in any “race to the register” to obtain the title to the property.

Comments
34. The Committee drew to the attention of the Scottish Government that the DPM explains that affirmative procedure is considered an appropriate level of scrutiny for the exercise of this power because “the power will be of interest to stakeholders and it is important for the running of the system.” This power shall be used to make technical provision on matters of conveyancing description.

35. The Committee therefore asked if the objective could be better achieved in the interests of stakeholders by providing in section 55 for a requirement to consult the relevant persons before making the regulations, as well as the Keeper of the Register? The Committee also asked for clarification why affirmative rather than negative procedure is considered the appropriate level of scrutiny, and why the standard of conveyancing description for advance notices could not initially be set out in the Bill?

36. The Government response explains that the advance notice scheme in the Bill was widely consulted on prior to introduction of the Bill, and it is not considered appropriate to provide for further consultation on the same area. In particular it is possible that the type of description for Sasine advance notices or minor parts of it will change over time, and in light of changing technology. It is not considered appropriate to require consultation every time the power is exercised.

37. The Committee accepts that approach in relation to consultation, taking into account that this is a power to make technical provision on matters of conveyancing description. The Committee also accepts the explanation why it is not considered appropriate to include the initial conveyancing descriptions for unregistered subjects in the Bill.

38. The Scottish Government response confirms, however, that they have reconsidered the appropriate level of scrutiny and the best use of parliamentary
time, in light of the potential for frequent amendment. The Government now considers that negative procedure would be a more appropriate procedure than affirmative procedure in the circumstances. The Committee accepts this approach, taking into account that the power will be used to specify technical matters.

39. The Committee reports in relation to the power in section 55(4) that it considers that the negative procedure would be an appropriate level of scrutiny for the exercise of this power. The Scottish Government has confirmed this view in its response. The Committee assumes this will be taken forward by suitable amendment at Stage 2.

Section 58(6)(b) - Power to provide certain documents are unaffected by advance notices

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<tr>
<td>Parliamentary procedure:</td>
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Background

40. Section 58(6)(a) provides that the effect of an advance notice does not apply to specific documents registered under specific Acts. This concerns notices of potential liability for maintenance costs of former and new owners of property. Section 58(6)(b) allows the Scottish Ministers to specify other types of deeds to be similarly unaffected.

Comments

41. The Committee asked the Scottish Government in relation to this power-

   (a) Could it be explained why this power requires to apply to any types of deed and cannot be more narrowly drawn, for instance by specifying significant types (such as dispositions) which cannot be excluded from the advance notice system?

   (b) As it appears this power is capable of excluding such significant types with a significant effect on Part 4 of the Bill, could the Government reconsider whether the affirmative procedure could be more suitable for the exercise of this power?

42. The Government response explains that it is difficult or impossible to specify all the types of deeds which should not in future be excluded from the advance notice system. The Committee accepts this explanation, taking into account that it involves technical matters of conveyancing.

43. The response to the Committee acknowledges that the use of this power is potentially significant (in relation to its effect on the advance notice system in the Bill). The Scottish Government has re-considered that the power in section 58(6)(b) should be subject to the affirmative procedure. The Committee accepts this approach.
44. The Committee therefore reports in relation to the power in section 58(6)(b) that it considers that the affirmative procedure would be an appropriate level of scrutiny for the exercise of this power. The Scottish Government has confirmed this view in its response. The Committee assumes that this will be taken forward by suitable amendment at Stage 2.

Section 61(1) - Power to amend application of advance notices scheme in relation to certain deeds

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Background

45. Section 61(1) provides that the Scottish Ministers may modify the application of Part 4 of the Bill in relation to any deed of a kind specified in the Order. For example this might enable a particular type of deed to be capable of being protected by an advance notice, where that otherwise wouldn't be possible by virtue of the provisions in Part 4.

Comments

46. The Committee asked in relation to this power (a) for an explanation why it requires to apply to any kinds of deed and cannot be more narrowly drawn, for instance by specifying significant kinds (such as dispositions) for which any order could not modify the application of provisions in Part 4.

47. The Committee also asked, as it appears that this power is capable of extending to such significant types of deed with a significant effect on Part 4 of the Bill, (b) whether the Government might re-consider whether the affirmative procedure could be more suitable for the exercise of this power.

48. In relation to (a) and the scope of this power, the Scottish Government has responded that there are numerous types of deed in relation to which the Government has no intention of altering the principal application of Part 4 of the Bill. It is considered by the Government to be appropriate that the power is available to make technical changes to the application of Part 4, in relation to those deeds where experience shows those changes to be necessary. In addition new deeds may be created by legislation which would then have to be added in turn to any list.

49. The Committee notes therefore from the response that it appears this power is drawn wider in scope than is required to deliver the intended policy. The intention is to permit technical changes in relation to specific types of deed, if experience shows this is required over time, or to add new deeds to the advance notice system in Part 4. However section 61 enables the Scottish Ministers by order to modify the application of Part 4 (in any way) in relation to any type of deed specified in the order, after consultation with the Keeper. This is capable of allowing Part 4 to be very significantly modified, in relation to significant types of deeds, such as dispositions or other types transferring land and buildings.
50. The Committee considers that this power should be drawn no more widely than is appropriate to deliver the intended policy, and the Scottish Government should therefore re-consider the scope of this power in advance of Stage 2 of the Bill.

51. In relation to the application of negative procedure, the Government response indicates that it has carefully considered part (b) of the Committee's question. However it remains of the view that negative procedure is the appropriate level of Parliamentary scrutiny. The explanation for this relates to the intended scope of the power, as above. The power is intended primarily to be used to extend the advance notice system to deeds that currently could not be covered by an advance notice (such as unilateral deeds created by statute). In relation to deeds already covered, it is envisaged that any modification will be of a technical nature, and only where experience has shown it to be required. The response indicates that no-one would be detrimentally affected by the use of the power.

52. The Committee considers that this power is widely framed, and it appears from the Government's response to be drawn wider than the intended policy requires. The Committee cannot follow why any modification of Part 4 by order in relation to dispositions, for example, could not possibly detrimentally affect certain persons. For example section 58 sets out new rules for the priority of deeds registered under the advance notice system, to determine which registered deed has legal effect in priority. It appears that modification of these rules in relation to particular types of deeds might adjust the rights of the persons involved. While the present Government may have no intention of causing a detrimental effect, in the Committee's view the potential for causing such an effect remains.

53. The Committee therefore considers that the power in section 61 is significant in allowing the modification of Part 4 of the Bill in relation to any kinds of deeds. The Committee has not accepted the explanations in the DPM and the response to the Committee in justification of the choice of negative procedure as the appropriate level of Parliamentary scrutiny for the exercise of this power.

54. The Committee therefore draws to the attention of the lead committee the response from the Scottish Government in relation to the power in section 61(1) to modify the application of Part 4 of the Bill. The Committee considers that this power should not be drawn more widely than is appropriate to give effect to the intended policy.

55. The Committee also considers that this power has significant enough effects in permitting modifications of Part 4 of the Bill, that the affirmative procedure would be a suitable level of scrutiny.
Section 93(2), inserting section 9E(1) of the Requirements of Writing (Scotland) Act 1995 - Further powers related to electronic documents

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Regulations  
**Parliamentary procedure:** Negative procedure, but affirmative where regulations amend or repeal any enactment

**Background**

56. Section 93(2) inserts a new section 9E into the Requirements of Writing (Scotland) Act 1995. Inserted section 9E(1) provides that the Scottish Ministers may make provision in regulations as to the effectiveness or formal validity of, or presumptions to be applied to:

- alterations made before or after execution to an electronic document;
- authentication, by or on behalf of the granter, of such a document;
- authentication, by or on behalf of a person with a disability, of such a document; and
- any annexation to such a document.

57. It appears that those provisions in relation to alterations, authentication by persons with disabilities and annexations, propose to extend to electronic documents provisions which are already contained in the 1995 Act for traditional documents. The new section 9E(1)(b) will enable the Scottish Ministers in regulations to make provision as to the effectiveness or formal validity of, or presumptions to be made with regard to, the authentication (by or on behalf of the granter) of an electronic document.

58. Inserted section 9E(2) provides that regulations under section 9E(1) may make incidental, supplemental, consequential, transitional, transitory or saving provisions considered necessary in light of regulations made under 9E(1).

**Comments**

59. The Committee indicated to the Scottish Government that it appears that the power contained in new section 9E(1)(b) of the Requirements of Writing (Scotland) Act 1995 could be used to prescribe significant matters - for example requirements for the validity of electronic wills or electronic contracts for land transactions. The Committee therefore asked why the Government has considered that negative procedure is the appropriate level of Parliamentary scrutiny of such regulations, rather than prescribing initial requirements in the Bill, or applying the affirmative procedure.

60. The Scottish Government has responded to the Committee that that power is intended to relate to “minor technical matters in relation to the authentication and alteration of electronic documents, for example amending an electronic document to fix a spelling error in a company name, which the Government considers are appropriately subject to negative procedure.” The response also indicates that there are other amendments to the 1995 Act proposed in the Bill which are subject to the negative procedure, and so the fact that this power is also negative will allow the Scottish Ministers the scope to make one set of regulations in the area of
electronic documents. The response also indicates that “the minor nature of the matters at hand mean it is not appropriate to set out initial requirements in the Bill.”

61. The Committee has not found that explanation to be convincing, in relation to the power in the new section 9E(1)(b), to enable the prescription of the requirements for the validity, effectiveness and presumptions to be made with regard to, the authentication of electronic documents. It considers that the substance of this power should be considered. For example, it appears capable of being used to prescribe any validity requirements for electronic wills or electronic contracts for land transactions. Changes of that nature would be significant legal changes, not minor and technical matters.

62. The Committee accepts that it appears such matters would likely be to a level of detail and technicality that subordinate legislation will be a suitable means of prescribing them, in principle.

63. The Committee therefore draws to the attention of the lead committee the response from the Scottish Government in relation to the power in section 93(2), so far as it inserts new section 9E(1)(b) of the Requirements of Writing (Scotland) Act 1995. That paragraph enables the prescription by regulations of validity or authentication requirements for electronic documents. The Committee considers this to be a potentially significant power, going beyond minor technical matters in relation to the authentication and alteration of electronic documents.

64. The Committee considers that this power is significant enough that the affirmative procedure would be a suitable level of scrutiny.

**Section 103(1) - Power to make provision regulating availability of information and access to the Keeper’s registers**

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<td>Parliamentary procedure:</td>
<td>affirmative procedure</td>
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**Background**

65. Section 103(1) enables the Scottish Ministers to make provisions regarding what information has to be made available by the Keeper, the manner of doing so, and access to any of the Keeper’s Registers. This is capable of covering information in or as to the Registers, and other information held by the Keeper (such as for instance statistics and reports).

**Comments**

66. The Committee asked the Scottish Government to explain, given the apparent significance of this power in relation to information to be made available by the Keeper and access to any of the Keeper’s Registers, why the provision is framed as a general, discretionary power. It would have been possible to provide that an order could make provision on matters described by specified headings, in connection with such information and access. It also asked for an explanation why initial provision on these matters could not be made in the Bill.
67. The Scottish Government has responded that the provision is in general terms, as the power extends to all of the Keepers Registers, for which different levels and types of access will be appropriate, due to the different structure, nature and underlying legislative foundations of the various Registers. The principle that the Land Register is a public register is set out in section 1 of the Bill, and section 100 provides for the issue of extracts and certified copies from parts of the Land Register.

68. In relation to the intended scope of the power, the response indicates – “section 103 allows Scottish Ministers to make provision about the manner of wider access, which is a matter of detail. At present the electronic land registration system of Registers of Scotland restricts the way the Land Register may be indexed and therefore the way it may be searched. This power will allow Scottish Ministers to give consideration to the flexibility of the future IT system. It is not possible or appropriate to set out more detail on the face of the Bill until the capabilities of any future IT system are known.”

69. The Committee appreciates that a delegated power may be necessary, to make further provision on detailed matters which may not be appropriate for further primary legislation, as regards information to be made available to the Keeper and access to any of the Keeper’s Registers. The Committee also accepts that the power appears to cover significant matters, and this indicates that the affirmative procedure may be appropriate for the exercise of the power.

70. However in light of the Government’s response, the Committee has concerns as to the wide and general nature of this power, and whether it could be drawn more narrowly to give effect to the intended policy/policies. The power extends to any of the Keeper’s Registers, and so relates to the statutory framework for each Register. The response to the Committee has indicated that it is intended that the power covers residual matters of detail.

71. The Committee also notes that, when read with the ancillary provisions in section 113, it is possible that an order under the general powers in section 103 could make provision as regards access to any of the Keeper’s Registers (for example) and section 113 might be used to make supplemental provision to that. Such provision is capable of modifying any enactments, including this Bill itself (once passed).

72. The Committee therefore draws to the attention of the lead Committee the response from the Scottish Government in relation to the powers in section 103(1). The Committee has concerns as to the general scope of this power in relation to information to be made available by the Keeper and access to the Keeper's Registers, and whether in light of that response it could be drawn more narrowly to give effect to the intended policies.

73. The Committee recommends that the Scottish Government should consider this further in advance of Stage 2.
ANNEX

Scottish Government Response to Subordinate Legislation Committee

Land Registration etc. (Scotland) Bill at Stage 1

1. I refer to your letter of 10 January 2012 regarding the Land Registration etc. (Scotland) Bill, in which you sought explanations for a number of matters related to the Delegated Powers Memorandum. As requested I set out the Scottish Government response.

Section 77(4) - Powers to prescribe in land register rules the rate of interest payable on claims under warranty

Section 80(7) - Powers to prescribe in land register rules the rate of interest payable on claims for compensation as a result of rectification of the register

Section 91(4) - Power to prescribe in land register rules the rate of interest on compensation for realignment of rights

SLC Question

2. The SLC asked the Government to explain why it is considered that the negative procedure is a suitable level of Parliamentary scrutiny of the exercise of these powers rather than the affirmative procedure, given that specification of the level of the interest rate in each case could have significant financial effects for persons entitled to be paid the interest and for the Keeper of the Registers.

Scottish Government Response

3. The Scottish Government policy in this area is that interest is available to a person due payment of a sum under the Bill to acknowledge the fact that during the period between a loss being sustained and the payment being made the person has been unable to benefit from the sum in question. The intention is not that the payment of interest should act as a penalty on the Keeper. Therefore the rate of interest is unlikely to make a significant financial impact on the overall compensation payment. In addition it is not appropriate to tie the rate of interest to a rate (such as the judicial rate of interest) which does not change frequently according to market conditions. The rate must be flexible enough to change to reflect the interest a person may have been able achieve by, for example, depositing the sum in a savings account. As a result the rate of interest will reflect that available in the market and could be subject to regular amendment. The Scottish Government's view is that, in order to provide for best use of Parliamentary time, negative procedure is appropriate. This fits with the level of scrutiny suggested by the Scottish Law Commission in their draft Land Registration (Scotland) Bill accompanying their Report on Land Registration.
Section 47(2) and 47(3) - power to prescribe days, on or after which recording of certain deeds in the Register of Sasines will have no effect

SLC Question

4. The Delegated Powers Memorandum explains that affirmative procedure is considered appropriate because the closure of the Register of Sasines to new deeds is likely to affect various stakeholders.

(a) Would this objective be better achieved in the interests of stakeholders by providing in section 47 for a requirement to consult the relevant persons before making an order, as well as the Keeper of the Register? Which stakeholders are being referred to?

(b) Could it be further clarified why affirmative rather than negative procedure is considered to be an appropriate level of scrutiny, given that the scope of these powers is limited to prescribing the relevant dates?

Scottish Government Response

5. The Scottish Government will consider, in advance of Stage 2, whether it is appropriate to add a requirement to consult relevant persons with an interest in the Register. The stakeholders affected by the closure of the Register of Sasines will be anyone who submits or may submit an application for recording to that Register or otherwise interacts with that Register. This will include but not be limited to, banks and other lenders, local authorities, conveyancing solicitors and private searching firms. Given the number of potential stakeholders, the Scottish Government does not consider it appropriate to list the stakeholders to be consulted on the face of the Bill.

6. The Scottish Law Commission suggested that affirmative procedure was appropriate for this power. The Scottish Government felt that what could be done under the power is of sufficient importance to warrant the level of scrutiny given by affirmative procedure. However, in light of the consideration noted above regarding consultation the Scottish Government will consider whether the addition of a requirement to consult would mean that negative procedure is more appropriate.

Section 55(4) - Power to make provision about the description of unregistered subjects in an advance notice

SLC Question

7. The Delegated Powers Memorandum explains that affirmative procedure is considered appropriate because “the power will be of interest to stakeholders and it is important for the running of the system.” On the other hand, it appears that this power shall be used to make technical provision on matters of conveyancing description.
(a) Would this objective be better achieved in the interests of stakeholders by providing in section 55 for a requirement to consult the relevant persons before making the regulations, as well as the Keeper of the Register? Which stakeholders are being referred to?

(b) Could it be further clarified why affirmative rather than negative procedure is considered the appropriate level of scrutiny, and why the standard of conveyancing description for advance notices could not initially be set out in the Bill?

Scottish Government Response

8. The stakeholders affected will be those using advance notices. This will include, but not be limited to, people buying houses (or their solicitors) and lenders registering standard securities. The Scottish Government view is that the advance notice scheme in the Bill was widely consulted on prior to introduction of the Bill and it is not appropriate to provide for further consultation on the same area. In particular it is possible that the type of description for Sasine advance notices or minor parts of it will change over time and it is not considered appropriate to require consultation every time the power is exercised.

9. The description required for Sasines advance notices is likely to change in light of changing circumstances and technology. For example, if it becomes practical to identify a tenement flat by exact co-ordinates rather than general description it may be appropriate to include this information in a Sasine advance notice. For this reason it is not possible to set out the standard of description for a Sasine advance notice on the face of the Bill. By way of contrast Land Register advance notices will always describe the property by reference to the title number. The Scottish Government considers the description of subjects in a Sasines advance notice to be an important part of the advance notice system. However, the Scottish Government have reconsidered the appropriate level of scrutiny and the best use of Parliamentary time in light of the potential for frequent amendment. The Government now consider negative procedure would be a more appropriate procedure than affirmative procedure in the circumstances.

Section 58(6)(b) - Power to provide certain documents are unaffected by advance notices

SLC Question

10. The committee asks

(a) Could it be explained why this power requires to apply to any types of deed and cannot be more narrowly drawn, for instance by specifying significant types (such as dispositions) which cannot be excluded from the advance notice system?
(b) As it appears this power is capable of excluding such significant types with a significant effect on Part 4 of the Bill, could the Government re-consider whether the affirmative procedure could be more suitable for the exercise of this power?

Scottish Government Response

11. The two types of deed referred to in section 58(6)(a) are unique types of registrable notice. They represent the exception to the norm and are excluded from the advance notice system because application of the provisions would defeat their purpose. Clearly if dispositions were excluded this would defeat the purpose of the whole advance notice system. However, the view of the Scottish Government is that it is not practical to list all the deed types which cannot be excluded from the operation of the advance notice system. This would involve listing dispositions, standard securities, deeds of real burdens or conditions, deeds of servitude, minutes of agreement and many others. There would also be a need to ensure that new types of deed were added to the list if appropriate. The view of the Scottish Government is that, given the number of deeds which cannot be excluded there is no benefit in picking out one particular type of deed.

12. Negative procedure was selected because the use of the power is unlikely to be controversial. While this remains the Government’s view we accept that the power is potentially significant. In light of this the Scottish Government now considers the power in section 58(6)(b) should be subject to affirmative procedure.

Section 61(1) - Power to amend application of advance notices scheme in relation to certain deeds

SLC Question

13. The Committee asks

(a) Could it be explained why this power requires to apply to any kinds of deed and cannot be more narrowly drawn, for instance by specifying significant kinds (such as dispositions) for which any order could not modify the application of provisions in Part 4?

(b) As it appears this power is capable of extending to such significant types of deed with a significant effect on Part 4 of the Bill, could the Government re-consider whether the affirmative procedure could be more suitable for the exercise of this power?

Scottish Government Response

14. There are numerous types of deed in relation to which the Government has no intention of altering the principal application of Part 4 of the Bill. Each of these
deeds is significant to the granter and grantee of that deed. However, it is considered appropriate that the power is available to make technical changes to the application of Part 4 in relation to those deeds where experience shows those changes to be necessary. In addition new deeds may be created by legislation which would then have to be added in turn to any list.

15. The Scottish Government has carefully considered part (b) of the committee's question. However, the Government remains of the view that negative procedure is the appropriate level of Parliamentary scrutiny. The power is primarily to be used to extend the advance notice system to deeds that currently could not be covered by an advance notice (such as unilateral deeds created by statute). As explained, in relation to deeds already covered, it is envisaged that any modification will be of a technical nature and only where experience has shown it to be required. No-one would be detrimentally affected by the use of the power.

Section 93(2), inserting section 9E(1) of the Requirements of Writing (Scotland) Act 1995 - Further powers related to electronic documents

SLC Question

16. It appears that the power contained in new section 9E(1)(b) of the Requirements of Writing (Scotland) Act 1995 could be used to prescribe significant matters – for example, requirements for the validity of electronic wills or electronic contracts for land transactions. Why is it considered that negative procedure is the appropriate level of Parliamentary scrutiny of such regulations, rather than prescribing initial requirements in the Bill, or applying affirmative procedure?

Scottish Government Response

17. The power relates to minor technical matters in relation to the authentication and alteration of electronic documents, for example amending an electronic document to fix a spelling error in a company name, which the Government considers are appropriately subject to negative procedure. In addition section 9E(4) provides if regulations amend primary legislation they will be subject to affirmative procedure. There are also other amendments to the 1995 Act in the Bill subject to the negative procedure. The fact that this power is also negative will give Scottish Ministers scope to make one set of regulations in this area. Finally the minor nature of the matters at hand mean it is not appropriate to set out initial requirements in the Bill.

Section 103(1) - Power to make provision regulating availability of information and access to the Keeper's registers

SLC Question

18. The Committee asks:
(a) Given the significance of this power in relation to information to be made available by the Keeper and access to any of the Keeper's Registers, why is the provision framed as a general, discretionary power, rather than providing that an order shall make provision on matters as described by specified headings, in connection with such information and access?

(b) Why could initial provision on these matters not be made in the Bill?

**Scottish Government Response**

19. The provision is in general terms as the power extends to all of the Keepers registers for which different levels and types of access will be appropriate due to the different structure, nature and underlying legislative foundations of those other registers.

20. The principle that the Land Register is a public register is set out in section 1 of the Bill. The public are therefore guaranteed access to the Land Register. Section 100 of the Bill makes more detailed provision about extracts, which will be one of the ways people will access the Register. Section 103 allows Scottish Ministers to make provision about the manner of wider access, which is a matter of detail. At present the electronic land registration system of Registers of Scotland restricts the way the Land Register may be indexed and therefore the way it may be searched. This power will allow Scottish Ministers to give consideration to the flexibility of the future IT system. It is not possible or appropriate to set out more detail on the face of the Bill until the capabilities of any future IT system are known.
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