

## SPICe Briefing

# Land Registration etc. (Scotland) Bill

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The Land Register was created under the Land Registration (Scotland) Act 1979 (c 33) and since 2003 has been operational across the whole of Scotland. This register does not enjoy a high public profile but, nevertheless, its effective operation is regarded as vital to Scotland's economy.

The Land Registration etc. (Scotland) Bill, introduced in the Scottish Parliament on 1 December 2011, is a lengthy, technical and complex piece of legislation designed to address difficulties which have arisen with the land registration system as it is operating at present. This briefing discusses the key policy proposals contained in the Bill and the reactions of stakeholders to these proposals.

The briefing also provides information relating to the structure, finances and operations of [Registers of Scotland](#), the non-ministerial government department which maintains the Land Register and which will be largely responsible in practice for the successful implementation of the Bill's proposals.



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## EXECUTIVE SUMMARY

Scotland has a long history of operating a system of public land registration, with the 'Register of Sasines', the original national register of property deeds, dating back to 1617. In 1979, the 'Land Register of Scotland' was set up under the Land Registration (Scotland) Act 1979 (c 33) as a replacement for, and improvement on, the original register. The Land Register was brought into operation gradually across Scotland and since 1 April 2003 has applied throughout the country.

Having an effective system of land registration is regarded as vital to a country's economy for a number of reasons. These include that the system of credit secured over property, vital to businesses and individuals, could not function without it. A sophisticated land registration system also makes investment in property more attractive to outside investors, with the recent Chinese investment in Grangemouth Oil Refinery being a good example of where this was important for Scotland.

Because the principal way that a property enters the Land Register for the first time is on its sale, a significant amount of property in Scotland remains on the old Register of Sasines. There are 2.6 million units of property in Scotland for the purposes of the land registration system, and so far, 55% of these units have been switched to the Land Register. However, in terms of area the figure is much lower; only 21% of Scotland's land mass is on the Land Register.

Whilst the Land Register is recognised as an improvement on the Register of Sasines and to have achieved many of its policy objectives, a range of issues have also been identified with the system of land registration as it operates at present (including that the Land Register is incomplete). Accordingly, the Land Registration etc. (Scotland) Bill, introduced to the Scottish Parliament on 1 December 2011, aims to make significant reforms to the current system.

The Registers of Scotland (RoS), a little-known non-Ministerial government department, will play a vital role in the successful implementation of the Bill's reforms in practice. RoS is headed by the Keeper of the Registers of Scotland (a statutory office holder in the Scottish Administration) and maintains a number of registers under the Keeper's control, including the Land Register. RoS is self-financing and has been operating as a trading fund since 1996. It is regulated by the Public Finance and Accountability (Scotland) Act 2000 (asp 1). Under this Act, RoS has been the subject of two 'Section 22 reports' by the Auditor General for Scotland in recent years, ie reports made to highlight issues which the Auditor General considers merit public disclosure or emphasis. The first was to highlight the negative impact of the economic downturn on RoS' income and reserves; the second related to constructive losses arising from the decision to halt and cancel two IT projects.

Part 2 of the Bill contains four measures designed to facilitate the gradual and phased completion of the Land Register (and associated closure of the Register of Sasines) which the Scottish Government estimates will take a further 30 to 40 years. The first measure that will be implemented is that *all* transfers of property, including those not for money, will result in the requirement to register the transfer in the Land Register (section 47(1) (a)). One effect of this proposal is that farms and estates passed down through families between generations will enter the Land Register.

The minority of respondents who expressed views on this aspect of the RoS consultation on the draft Bill in 2010 were supportive of what was proposed, although some concerns were expressed about the specific proposal to permit so-called 'Keeper-induced registrations', ie allowing the Keeper to register a title in the Land Register for the first time without an application by a property owner and without the consent of the property owner.

The law relating to the rectification of 'inaccuracies' in the Land Register and the operation of the state guarantee of title (given in respect of properties registered in the Land Register) is currently thought to be too complex. Also, as most inaccuracies cannot be rectified whilst there is a 'proprietor in possession', the current law is thought to give too great a weight to the interests of the person purchasing property in reliance on the Land Register, over the interests of the 'true' owner of the property.

The Bill aims to make it less likely that the 'true' owner will be deprived of his or her property as a result of an inaccuracy on the face of the Land Register (Parts 3, 5, 8 and 9). The requirement of one year's possession (by either the seller or the seller in combination with the buyer) before a buyer in good faith is protected from the possibility of rectification (section 82) is designed to give the 'true' owner an opportunity to discover the inaccuracy and apply for rectification. If the requirement of one year's possession is not satisfied the buyer in good faith will receive financial compensation (not the property) for losses incurred if the Land Register is rectified.

In the small number of cases where a property is resold within a year, this may have implications for conveyancing practice and may result in an increase in the legal fees charged for a transaction of this type compared to what is charged under the current system. However, the SLC has argued there will be no such impact. In addition, the Scottish Government believes that other aspects of the Bill (eg the proposals to complete the Land Register contained in Part 2) may reduce legal fees charged overall in the long term (Financial Memorandum, para 368).

The proposals in the Bill in this regard were well-received by the minority of respondents who commented on this aspect of the RoS consultation, although some concerns were expressed about whether one year was long enough for a 'true' owner of a property to discover an inaccuracy in the Register and apply for rectification.

Part 4 of the Bill introduces a new system of 'advance notices', designed to protect the buyer of property from the risks he or she is exposed to in the short gap between handing over the purchase price (at 'settlement') and receiving legal title to the property via registration. The current system of 'letters of obligation' (backed up by the master insurance policy which all solicitors pay premiums towards) is recognised as being under strain, and these proposals were well received by the minority of respondents to the Registers' consultation who expressed a view on this topic.

At present, due to the terms of the Requirements of Writing (Scotland) Act 1995 (c 7), most legal deeds associated with the transfer of land have to be paper documents, although a limited degree of 'electronic conveyancing' is permitted under the optional, 'members only' system of 'ARTL', ie Automated Registration of Title to Land. However, take-up of ARTL amongst the legal profession has not been high as hoped and the system has certain limitations in practice.

Part 10 of the Bill contains a range of proposals designed to facilitate (but not require) the use of electronic documents for the transfer of land and, in a departure to the Bill as consulted on, the use of electronic wills and trust deeds (where desired). Part 10 also provides for the Keeper to run a computerised system for electronic registration, whether ARTL or, as is more likely in the long term, a successor system. Much of the detail of Part 10 (including the standard and safeguards associated with electronic documents) is left to secondary legislation, which the Scottish Government believes will allow the law to respond more flexibly to technological developments.

The proposals received majority support on consultation, although stakeholders stressed the importance of developing strong safeguards against forgery and fraud.

The Financial Memorandum estimates the total cost of the Bill to the Registers of Scotland to be £3.9m, with relatively minor costs likely to be incurred elsewhere. These costs are composed of one-off costs (£49,500), plus estimates of annual costs of £3.85m. This is in the context of annual income to Registers of Scotland in 2011-12 of £48.6m. As a trading fund with significant income and reserves, RoS makes no call on the Scottish budget. It earns income from customers by fees charged for registrations and by charging for information from the registers it keeps. Overall, the Financial Memorandum states that, as a result of efficiencies anticipated by RoS (including those partly derived from the development, and implementation, of a new IT system), the additional costs arising from the Bill should not translate into higher fees.

# INTRODUCTION AND BACKGROUND

## The importance of land registration to Scotland

A wide variety of 'real rights' in land (ie rights in things, as opposed to 'personal rights' held against people) can only be created by the registration or recording of a deed in one of the property registers kept by the [Registers of Scotland](#) (RoS). Perhaps most significantly, changes in the ownership of property can only be given effect to via registration or recording and likewise securities granted in respect of mortgage and re-mortgage transactions take effect as real rights on registration or recording.

The Scottish property market (including mortgages and re-mortgages) was worth over £24billion in 2009-10 (Registers of Scotland 2011a). The Final Business Impact and Regulatory Statement on the Land Registration etc Scotland Bill ('the Bill') highlights the importance of the system of land registration in this context:

"The Land Register is of fundamental economic importance to the people of Scotland and its business community. It provides clarity of ownership through secure and reliable property rights" (Scottish Government 2011, para 9)

The Statement continues:

"The work of RoS is essential to the Scottish economy: security of land ownership is a pre-requisite for anyone wishing to invest in property. This includes commercial investors and the Scottish house-buying public, as well as major landowners such as local authorities and the Forestry Commission. All these bodies rightly demand security of land and property rights" (Scottish Government 2011, para 10)

Yet land registration law is largely inconspicuous; in fact few people outside the legal profession realise that it exists. In this regard, the [Scottish Law Commission](#) has observed:

"Much law is like plumbing: useful but unexciting and seldom thought about except when it goes wrong. Visible or invisible, it is important. It is important for ordinary people, for commercial enterprises, for the agricultural sector and for the financial services industry...If banks could not rely on an efficient title system before they give secured credit then the system of secured credit could not function. Development economists constantly stress the important for developing countries of what they tend to call 'land titling'. The absence of a functioning land titling system is regarded as a brake on economic development. We are lucky that in this country we can take such things more or less for granted, like plumbing." (Scottish Law Commission 2010a, para 1.1)

A [report](#) (BiGGAR Economics Limited 2009) written in 2009 by an economics consultancy firm (and commissioned by RoS) identified the characteristics which strong registration systems tend to embody, stating that the "the stronger these traits are upheld within a system, the stronger that system tends to be". These characteristics are:

- the accuracy and reliability of the information
- transparency
- credibility and trustworthiness
- accessibility
- efficiency, and
- innovation

## Land registration and the economy – two case studies

**Grangemouth Oil Refinery** – RoS were asked to agree to voluntarily register the plant in the Land Register in order to provide certainty as to the title extent of the plant. This was considered necessary in order to support and facilitate significant inward investment to the plant. In January 2011, the Scottish Government announced that Operators INEOS had confirmed details of a Joint Venture with PetroChina that would “see investment in its refineries in Scotland and France and the sharing of petrochemicals technology and expertise.” The deal was aimed at “securing the long term profitability of the Grangemouth oil refinery and securing more than 2,000 Scottish jobs”. According to RoS, the investor(s) required assurances as to the title position that only a registered title could provide.

**Strathclyde Partnership for Transport (SPT)** – RoS have been working with SPT to register their titles to the subway system in Glasgow. The driver behind this has been the desire to have clear and marketable Land Register titles to enable SPT to acquire funding/loans to upgrade subway stations in advance of the Commonwealth Games in 2014. Land Register titles provide a definitive record of the extent of SPT ownership and are backed by a state indemnity of title (see further below), thereby providing lenders with the re-assurance necessary to support a decision to lend.

(Source: Registers of Scotland 2011c)

## The Land Registration (Scotland) Act 1979

Scotland has a long history of operating a system of public land registration, with the ‘Register of Sasines’, the original national register of property deeds, dating back to 1617.

In 1979, the ‘Land Register of Scotland’ was set up under the Land Registration (Scotland) Act 1979 (c 33) (‘the 1979 Act’) to replace and improve upon the original Sasine Register. The Land Register was brought into operation in phases across Scotland, and since 1 April 2003 has applied throughout the country.

The ‘new’ Land Register has achieved many of its policy objectives, including providing clearer information about land and simplifying the legal process associated with property sales and purchases. However, problems have also been identified with the 1979 Act (see further below).

### Further reform

In 2001, RoS, with the agreement of Scottish Ministers, asked the [Scottish Law Commission](#) (SLC), the body tasked with making proposals for law reform in Scotland, to review the 1979 Act. This led to three Discussion Papers issued in 2004 and 2005 (SLC 2004; SLC 2005a and SLC 2005b) and a final two-volume Report on Land Registration in 2010, including a draft Bill on the topic (SLC 2010a and SLC 2010b).

After a further [online public consultation](#) (Registers of Scotland 2010a) on the main proposals contained in the draft Bill by the RoS in Autumn 2010, the Scottish Government introduced the [Land Registration \(Scotland\) Bill](#) (‘the Bill’) (and associated documents) in the Scottish Parliament on 1 December 2011. The [Economy Energy and Tourism Committee](#) was designated the lead committee on the Bill at Stage 1 of the legislative process.

The remainder of this briefing provides an introduction to the current system of land registration (including its advantages and suggested shortcomings), summarises the key policy initiatives contained in the Bill, as well as the reaction of stakeholders to these proposals (where these are available). The briefing also considers the financial implications of the Bill.

Reference is made in this briefing to the Consultation Analysis (Registers of Scotland 2010b) prepared in respect of the public consultation in 2010. This was not published online but has been made available to SPICe. Individual consultation responses can also be accessed [here](#).

The Bill is a lengthy and technically complex piece of proposed legislation and the treatment of the Bill's provisions in this briefing are not intended to be exhaustive. For a more detailed guide to individual provisions the [Explanatory Notes](#) to the Bill should be consulted.

## AN OVERVIEW OF LAND REGISTRATION

### THE SALE AND PURCHASE OF PROPERTY IN SCOTLAND

The sale and purchase of property is one of the most important transactions reliant on registration in the Land Register. It may be helpful, therefore, to summarise the main features of this process.

In Scotland, whatever the type of property being sold (ie residential or commercial or rural) there are three main legal steps associated with the transfer of ownership. In the first place the parties to the transaction conclude a contract for the sale of the property (often known as **the missives**). In this contract, the sellers bind themselves to transfer the property at a future date and the buyers oblige themselves to pay the purchase price.

The next stage is **settlement** (also called **completion** in transactions affecting commercial property) where the legal deed used to transfer ownership of the property (**the disposition**), along with the keys to the property, is passed to the buyer (via the respective solicitors) and the buyer pays the purchase price.

Although most people typically think of settlement as the point when ownership has transferred, ownership of the property does not actually transfer in law until the third stage, when the transfer of ownership is registered in the Land Register.

Assuming that an application for registration is found to satisfy the requirements of the 1979 Act (and associated secondary legislation) then, as a matter of law, the date of registration is the date the application for registration is received by the RoS. In good conveyancing practice this is usually the date of settlement or the day after.

However, it is worth noting that there is typically a delay between receipt of an application and it being processed by the RoS staff in such a way that the legal effect of the transaction in question can actually be reflected on the Land Register. In particularly complex cases, this delay can be a matter of many months.

## THE MECHANICS OF THE LAND REGISTRATION SYSTEM

The **Keeper of the Registers of Scotland** (a statutory office holder in the Scottish Administration) heads the RoS. The Keeper is in charge of sixteen registers, two of which are the Register of Sasines and the Land Register. It is in the Keeper's name that all acts and decisions are made under the 1979 Act.

For the purposes of the Land Register, there are 33 **registration counties** in Scotland. RoS (2003) published a useful [guide](#) to these counties in 2003 and the dates they became operational for the purposes of the Land Register. The first county (Renfrew) became operational in 1981 and, as alluded to earlier, the last five counties not until 2003.

When a property is sold for the first time after a registration county has become **operational** for the purposes of the Land Register the sale triggers a switch to the new register, known as a **first registration**.

Each property registered has a **title sheet**, a four part document setting out the boundaries to the property (with reference to a title plan based on the Ordnance Survey map), who owns the property in question and any other property rights which affect the property (for example, the property might have a mortgage over it). The official copy of the title sheet is called a **Land Certificate**. It is accompanied by a title plan that shows the registered extent of the property on the OS map base.

Properties of a type which attract their own title sheet under the 1979 Act are sometimes referred to as **title units**. Title units can vary in size from large rural estates to single flats.

The Keeper sets **registration targets** and **customer service targets** for RoS. These cover the time taken to complete different types of registration, the accuracy level which needs to be achieved and the standards of customer service that must be met. The performance of RoS in respect of these targets is one of the areas documented in its annual reports. See chapter 3 of the latest [Annual Report](#) (2010/2011) (Registers of Scotland 2011b).

## THE REGISTERS OF SCOTLAND

### How the Registers of Scotland is funded

RoS is a non-ministerial government department. It is self-financing, has been operating as a trading fund since 1996, and is regulated by the Public Finance and Accountability (Scotland) Act 2000 (asp 1). It earns income from customers by charging for registrations and by providing information from the registers it keeps. Customers include the general public and professional users, mainly solicitors, working in land and property.

As a trading fund with significant income and reserves, RoS makes no call on the Scottish budget. It meets any trading deficit from its reserves, or in years of surplus, it builds up those reserves. After the current voluntary exit scheme RoS will employ just over 1,000 staff.

As Figure 1 (below) indicates, the largest single source of income is 'Dealings with Whole', the relatively straight forward transactions affecting the whole of a title unit already on the Land Register. This category of transaction earned RoS just under £23million of its £48million operating income in 2010-11.

**Figure 1: RoS Operating Income (£'000), 2011<sup>1</sup>**  
 (Registers of Scotland 2011b)

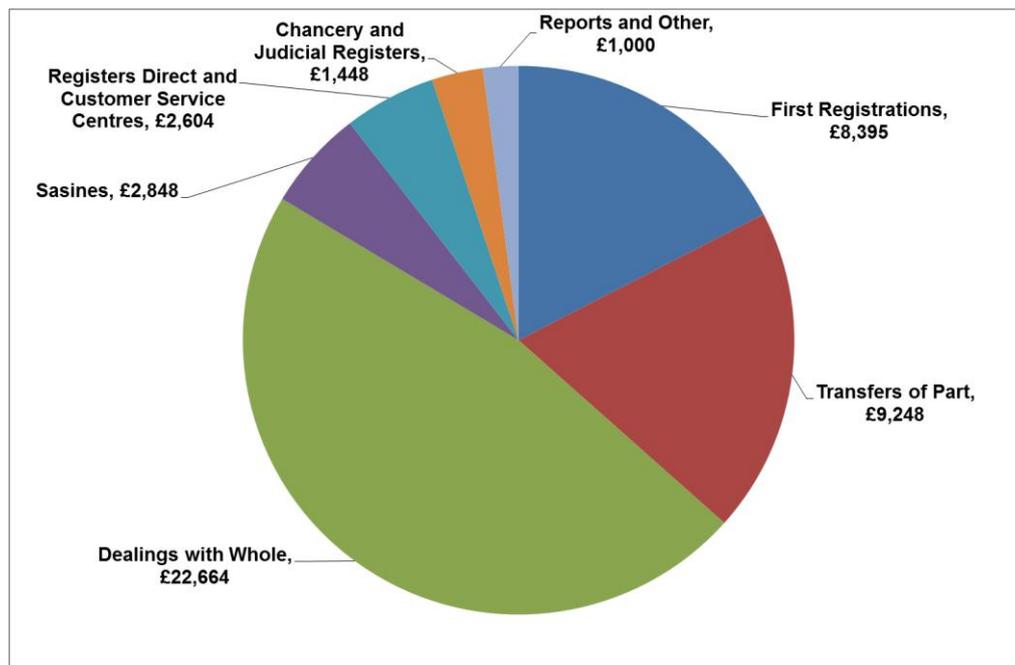
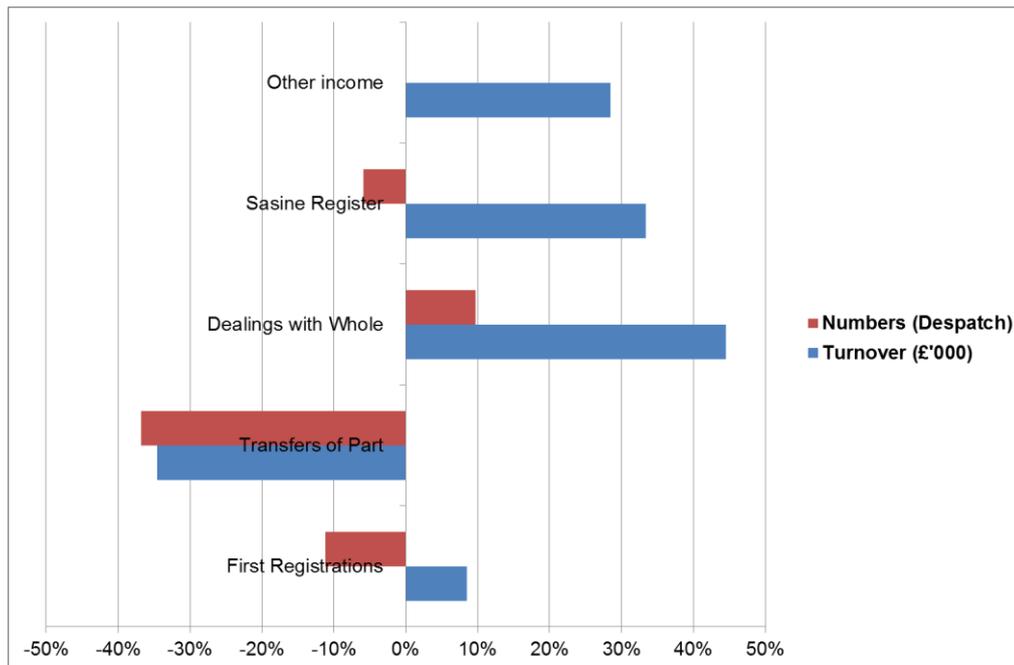


Figure 2 illustrates the projected volume of, and anticipated income from, the different categories of transaction. 'Dealings with Whole' shows the greatest growth in both volume and income terms. Overall, the volume of all transactions is expected to rise by 1%, with income expected to rise by 20%. It should be noted that, despite these projected increases, income from, and the volume of, transactions are expected to remain below their 2007-08 (pre-recession) level.

**[the briefing continues on the next page]**

<sup>1</sup> In Figure 1 the heading 'Sasines' refers to transactions involving the recording of new deeds on the Register of Sasines which is still competent in some cases. The heading 'Transfer of Part' refers to the situation where a title unit already on the Land Register is divided up and sold off in parts, eg when a Victorian house is sub-divided into flats by a developer. The term 'first registration' has been referred to earlier but, as a reminder, relates to the situation where a property is being registered on the Land Register for the first time. Other categories of income referred to do not relate directly to the Land Register.

**Figure 2: Forecast (%) change in income from registrations by RoS 2010-11 to 2013-14<sup>2</sup>**  
(Registers of Scotland 2011a)



## Reports about RoS by the Auditor General

Section 22 of the Public Finance and Accountability (Scotland) Act 2000 (asp 1) outlines the circumstances under which the [Auditor General for Scotland](#) produces a 'Section 22 report'. These include cases where he considers that the issues arising merit public disclosure or emphasis.<sup>3</sup> RoS has been subject to two Section 22 reports in recent years.

In 2009 the Auditor General's (2009) [Section 22 report](#), which was also considered by the [Public Audit Committee](#) of the Scottish Parliament, indicated that:

“RoS incurred a large operating deficit in 2008-09 and it plans further deficits in future. The deficits are larger than previously forecast as a result of the economic downturn. However, RoS intends to use its accumulated reserves to meet the planned deficits and to continue to develop and improve its services in line with its corporate plan.

RoS will need to continue to manage its income and expenditure plans in the light of future market movements to ensure that its plans remain realistic and supportable.”

More recently a [Section 22 report](#) in 2011 (Auditor General for Scotland 2011) alerted the Parliament to constructive losses of £6.0 million and £0.8 million in relation to decisions to halt and cancel two IT projects - the eSettle project and a Content Management System (CMS) IT. The report also highlighted “continuing uncertainty over other projects being delivered through a Strategic Partnership Agreement (SPA) with their IT provider”.

The Auditor General also highlighted a number of actions that RoS have taken following their experiences. These include:

<sup>2</sup> See footnote 1 for a description of the different categories of transaction.

<sup>3</sup> In evidence to the Scottish Parliament's Public Audit Committee on 14 December 2011, the Auditor General described section 22 reports as “what we call exception reports that are made when things have gone wrong.” (Scottish Parliament Public Audit Committee 2011, col 317).

- "post project reviews to learn lessons from abandonment.
- staff training to ensure all relevant costs are included in business plans.
- an annual review of ongoing capital projects to identify any asset impairments.
- the preparation of exit and transition strategies for the end of the BT contract in 2014."

The Scottish Parliament's [Public Audit Committee](#) took evidence on the latest Section 22 report on 14 December 2011 (Scottish Parliament Public Audit Committee 2011). The Committee is to consider at a later stage what further action it should take in respect of the report (Scottish Parliament Public Audit Committee 2011, col 319).

## Fees Charged by RoS

As indicated above, RoS operates as a trading fund and is able to build up, or draw down from reserves. Having built up substantial reserves by 2007 a decision was made to reduce fees and so reduce the reserves. However, as a result of the economic downturn RoS incurred a larger than anticipated deficit in 2008-09, and indeed the RoS corporate plan anticipates further annual deficits up to 2014. A [fee review](#) in 2010 resulted in a new set of higher fees being introduced in January 2011. RoS indicate that, despite this increase, historically fees have increased very little. For example, for average residential house price (in 2010) the fees have increased only slightly (and only in cash terms) since the mid-nineties.

**Table 1: Registration Fees for Transfer of Properties Valued at £150,001 to £155,000**  
(Source: Registers of Scotland 2011c)

Year	Paper Application	Automated Registration of Title in Land (ARTL) Application
	£	£
1995	341	N/A <sup>4</sup>
2010	300	225
Current	360	270

RoS calculated unit costs for its four main registration products. Table 3 below shows that in 2010 three of these were making a substantial loss. First Registrations (FR) were showing a loss of around £253 for each registration, Transfers of Part (TP) a loss of around £62 and Sasine transactions a loss of £6.51 per transaction. The only profit making area was Dealings with Whole which showed a profit of £25.75 per application.<sup>5</sup> The bottom line of Table 3 shows the predictions for current fees and shows FRs continuing to make a substantial loss and the other products in profit. Overall RoS fees are still making a 'loss'.

<sup>4</sup> ARTL was not operational in 1995. For more information on ARTL see further below under 'Electronic Documents and Electronic Registration'.

<sup>5</sup> See footnote 1 for further explanation of these terms.

**Table 2: Unit Cost Calculations Produced for 2010 Review**

	<b>FR</b>	<b>TP</b>	<b>DW</b>	<b>Sasines</b>
<b>Unit Costs at 2010</b>	£480.00	£330.00	£78.00	£60.00
<b>2010 profit/loss</b>	(£253.64)	(£62.31)	£25.75	(£6.51)
<b>Prediction for current fees</b>	(£188.74)	£13.70	£71.05	£24.89

## **ADVANTAGES OF THE LAND REGISTER**

The Land Register is an improvement on the old Register of Sasines in a number of ways.

First of all, unlike the old system, the title sheet of each property describes the property by reference to the relevant part of an Ordnance Survey (OS) map, contrasting with the deeds registered in the Register of Sasines which often only contained a written description of the legal boundaries to a property, or a poor quality plan. The latter approach left the legal boundaries of many properties uncertain.

Secondly, the Land Register is a 'register of title', not a 'register of deeds' like the Register of Sasines. With a register of title system RoS staff review the deeds that form the basis of the application for registration in respect of a particular property. RoS then makes an official statement as to the legal effect of those deeds (eg who owns the property). With a register of deeds, the deeds are registered without any such official statement by RoS.

This difference is particularly important when it comes to subsequent transactions. A person buying land registered on a register of deeds can verify the seller's legal title to that land only by examining the sequence of prior deeds (a complex and skilled task virtually impossible for the layperson to undertake); however if the land is on a register of title, it is only necessary to check that the seller is the person listed on the register as the owner, a much simpler task.

Another important innovation of the Land Register is that it provides a state guarantee of legal title, and therefore a system of state compensation when things go wrong, whereas the Register of Sasines does not. This state guarantee aims to remove much of the risk and uncertainty inherent in transacting with property.

## **SOME ISSUES WITH THE LAND REGISTER**

A range of issues have been identified with the current land registration system. Some key highlights are summarised below.

In the first place, the 1979 Act is not regarded as a well-drafted piece of legislation. In particular, it is silent on a number of topics where staff at RoS might have benefited from statutory direction and RoS have had to develop detailed practices to attempt to overcome these legislative gaps (SLC 2004, paras 2.24 and 2.25).<sup>6</sup>

Secondly, despite the creation of the Land Register in the late 1970s, a significant amount of property remains on the old Register of Sasines. There are rather more than two million title units in Scotland, and so far, 55% of these units have been switched to the new register. However, in terms of area the figure is much lower: only 21% of Scotland is in the new register.

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<sup>6</sup> In this regard, see the Registration of Title Practice Book (Registers of Scotland 2000) available online here: <http://www.ros.gov.uk/rotbook/>

This is because some significant land holdings are rarely sold, for example, land belonging to the Crown, local authorities, the churches and the great estates (Policy Memorandum, paras 5 and 15).

Thirdly, the law relating to the rectification of inaccuracies in the Land Register and the operation of the state guarantee of title has been criticised for being legally complex and for giving a result which, in policy terms, favours too greatly the interests of the person acquiring property in reliance on the Land Register, as opposed to the 'true' owner of the affected property (SLC 2004, paras 4.30 and 4.31).

Finally, although recognised as a very great improvement on the previous system, the mapping system operated by RoS, which is based on OS maps, has also been criticised for being a source of difficulty or dispute. Criticisms have included on occasion that the OS maps themselves are out of date or lacking in accuracy (SLC 2004, para 2.27).

The Bill attempts to address the first of these difficulties by replacing the 1979 Act with a much more detailed piece of legislation. Issues including the currently incomplete Land Register and the approach to rectification of inaccuracies are addressed via specific policy initiatives in the Bill (see further below).

The accuracy of the OS mapping system is not addressed in the Bill. However, on 15 December 2011 RoS (2011e) published a short report explaining the recent work done by RoS on mapping in the Land Register. This report addresses the situation where inaccuracies in the OS map have an effect on how the extent of a title is reflected in the Land Register. In particular it sets out the RoS policy when it is established that the OS map may be incorrect. RoS has also recently set up a 'mapping forum' with the [Law Society of Scotland](#), [RICS Scotland](#) and [Ordnance Survey](#) to consider best practice in relation to land registration mapping (see further Registers of Scotland 2011d).

Some of the key policy initiatives of the Bill, along with the financial implications of the Bill, are considered in more detail below.

## **COMPLETION OF THE LAND REGISTER (PART 2 OF THE BILL)**

Because of the many advantages of the Land Register over the Register of Sasines, the key policy objective of the Bill is to ensure that the Land Register eventually contains all property in Scotland, enabling the Register of Sasines ultimately to be closed.

### **THE CURRENT LAW**

At present, the main way property enters the Land Register for the first time (ie a 'first registration') is when it is sold for a value, when it is required under the 1979 Act to be so entered (1979 Act, section 2(1)(a)).

However, as mentioned above, the difficulty with this approach is that there are properties in Scotland that have not been sold, and are unlikely ever to be sold. Examples include farms and estates that are passed down through families from one generation to the next through the law of succession (ie the law determining how a deceased person's property should be distributed on death) (Policy Memorandum, para 14).

At present, an owner can also apply for property to be registered in the Land Register even when no relevant transaction has taken place ('a voluntary registration') but the Keeper has a

discretion to refuse such an application (1979 Act, section 2(1)(b)) and historically has been keen to do so for reasons including to avoid a diversion of staff resources from compulsory first registrations (SLC 2010a, paras 33.8 and 33.24). However, it is understood that, more recently, the Keeper has accepted the vast majority of voluntary applications made to her. In October 2011, the Keeper and the Minister for Energy, Enterprise and Tourism authored an article explaining the new policy (Adams and Ewing 2011).

## **THE PROPOSALS IN THE BILL**

### **Four steps to completion of the Land Register**

The Bill makes provision for the following four measures, designed to ensure the eventual transfer of all property in Scotland to the Land Register (and the associated closure of the Register of Sasines):

- *all* transfers of ownership of property, including those not for money, result in the requirement to register the transfer in the Land Register to obtain a real right (section 47(1)(a))
- Scottish Ministers can compel, via secondary legislation, the closure of the Register of Sasines to standard securities (the type of legal deed which gives effect to taking security over property for mortgage transactions) and the eventual closure of the Register of Sasines to all other types of deed (section 47(2)–(4)). One of the consequences of closing the Register of Sasines to standard securities is that the re-mortgaging of a property alone will induce a first registration in the Land Register
- the Keeper’s discretion to refuse to accept voluntary registrations can also be removed by Scottish Ministers via secondary legislation (section 27(6) and (7))
- the Keeper can register a title in the Land Register for the first time without an application by a property owner and without the consent of the property owner (so called ‘Keeper-induced registration’) (section 29)

### **Timescales and workload**

It appears from the Policy Memorandum (paras 20–23) and the Financial Memorandum (paras 410–414) to the Bill that the measures describe above are designed to facilitate a gradual and phased completion of the Land Register.

Notably, RoS envisage that the final step resulting in completion of the Land Register (closure of the Sasine Register to all deeds) “will not be taken for some considerable time, perhaps 30 to 40 years” (Financial Memorandum, para 414).

It is also anticipated that closure of the Register of Sasines to standard securities will likely not occur for at least five years after the commencement of the main provisions of the Bill (Financial Memorandum, para 412) and that removing the Keeper’s discretion to refuse voluntary registrations is unlikely in “the short term” (a phrase not further elaborated on) due to resource constraints at RoS (Policy Memorandum, para 22).

The likely timing of the introduction of the individual measures is otherwise not specified. Capacity at RoS at specific points in time seems to play an important role (Financial Memorandum, paras 413–414 and 418). Furthermore, in relation to Keeper-induced

registrations, where the costs incurred will be borne by RoS, timing is also likely to depend on available resources (Financial Memorandum, paras 418–419).

When Scottish Ministers set fee levels for all types of registration (see further below) they will take account factors including the expense to the Keeper of completing the Register (section 106). Therefore the Financial Memorandum states that a portion of the general fees charged by RoS will cover the costs to RoS of Keeper-induced registrations (Financial Memorandum, para 418).

The Scottish Government anticipates that the first of the measures described above (the requirement to register all transfers of ownership) will result in an additional 7,000 first registration applications being received by RoS per annum. This compares with the 26,000 applications for first registrations received in the financial year 2010-11 (Policy Memorandum, para 19).

## IEWS OF STAKEHOLDERS

A minority of respondents to the RoS consultation addressed the various questions posed in the consultation relating to this policy area.<sup>7</sup>

Of those responding to the relevant questions, there was strong support for the overall objective of completing the Land Register, as well as for the first three steps to achieve this aim described above.

The least popular proposal on consultation was that of permitting Keeper-induced registrations. Eleven out of 23 stakeholders responding to the main question on this topic (48%) were supportive; four were opposed (17%) and eight (35%) left the question open.

Concerns in this regard included that freedom of choice would be restricted; uncertainty over who would bear the costs of such registrations and fears of a detrimental impact on turnaround times for registrations overall. A couple of stakeholders, including the [Scottish Property Federation](#), raised the issue of what would happen if the Keeper could not identify an owner of the land in question, in particular that Keeper-induced registrations would encourage 'title raiding' ie unscrupulous individuals or organisations seeking to claim legal title to previously unregistered land (Registers of Scotland 2010b, pp 5–6).

In relation to the proposal to close the Register of Sasines to standard securities, the main concern expressed was cost-related, with stakeholders envisaging an extra charge to be borne for re-mortgaging property (Registers of Scotland 2010b, p 5). In relation to the first and third measures described above (all transfers of ownership to induce first registration and the removal of the Keeper's discretion to refuse to accept voluntary registrations) concerns also focused on the potential for increased costs to the public, and, in the case of voluntary registrations, a negative impact on turnaround times overall because of the complex nature of some anticipated voluntary registrations (Registers of Scotland 2010b, p 4).

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<sup>7</sup> Questions 3–8 of the Registers' consultation addressed the proposals designed to promote completion of the Land Register. Between 12 and 28 respondents (out of a total of 71 respondents to the Registers' consultation) responded to questions 3–8.

# **INACCURACIES, RECTIFICATION OF THE REGISTER AND THE STATE GUARANTEE OF TITLE (PARTS 3, 5, 8 AND 9 OF THE BILL)**

Few aspects of the 1979 Act have caused so much controversy as its approach to 'inaccuracies' in the Land Register and their 'rectification' (ie correction). This is one of the key areas which the Bill seeks to address, by creating a flexible regime for responding to the problems which inaccuracies create (SLC 2004, para 2.32).

## **THE CURRENT LAW**

### **Effect of registration**

Under the provisions of the 1979 Act, at first instance, if the Land Register says the buyer of a house is the owner then that is the legal position, *regardless of the validity of the legal deed on which the registration was founded*. This is sometimes referred to as the Keeper's 'Midas touch'.

However, if the registration is subsequently cross-checked against the general rules of property law and there is found to be a conflict between the special rules of land registration found in the 1979 Act and the general rules of property law, there is an 'inaccuracy' and the Land Register may be liable to 'rectification'. For example, if the special rules of land registration say X owns a property (due to being registered as owner) but the general rules of property law say Y owns that property (as the deed which founded the registration is invalid) then this scenario arises.

### **Rectification of inaccuracies**

Under section 9 of the 1979 Act inaccuracies are rectifiable except if rectification would prejudice a 'proprietor in possession'. The protection for a proprietor in possession is removed if the inaccuracy is caused wholly or substantially by the proprietor's fraud or carelessness.

In practice, buyers of property almost invariably take possession, so they are almost invariably protected against rectification, unless the fraud or carelessness exception applies (which is rare). Hence, where an inaccuracy exists, it is common for the Land Register to remain inaccurate, to the detriment of the 'true' owner of the property. However, this approach is advantageous to the buyers of properties who can place a strong degree of reliance on the position as stated in the Land Register.

### **The operation of the state guarantee**

Under the current system (as under the proposals in the Bill), the state guarantee of title to property takes one of two forms – a right to keep the property in question or a right to receive monetary compensation for loss suffered.

As mentioned above, at present, unless the fraud or carelessness exception applies, a 'proprietor in possession' currently receives the property (even if the deed on which the registration was founded was invalid) and the 'true' owner of the property (according to the ordinary rules of property law) receives monetary compensation for the loss of his or her rights.

The 'proprietor in possession' test has received criticism on a number of grounds including that its emphasis on the *current* state of possession encourages self-help as in the case of *Kaur v Singh* (1999 SC 180) where the 'true' owner recovered possession via the services of a

locksmith, with the buyer of the property later following suit by the same method (SLC 2010, para 21.23).

## **THE PROPOSALS IN THE BILL**

### **Effect of registration**

For reasons including a dislike of the “impenetrable complexities” of the current system (SLC 2010, para 21.36), the SLC recommended (2010, recommendation 62) that the consequences of registration in the Land Register should be better aligned with the normal rules of property law and Part 3 of the Bill gives effect to this recommendation.

### **Rectification of inaccuracies**

In a further proposed change to the existing law, section 78 of the Bill provides that the Keeper is obliged to rectify the Register if it contains a “manifest inaccuracy”, ie an inaccuracy which is indisputable or more than merely possible or probable.

### **The operation of the state guarantee**

#### *What is proposed*

The Bill also adjusts the state guarantee with the aim of making it less likely that the ‘true’ owner will be deprived of his or her property as a result of an inaccuracy on the face of the Land Register.

Section 82 of the Bill provides that a buyer of property in good faith shall acquire the property free from the possibility of rectification of the Land Register if, subsequent to the creation of the inaccuracy on the Register, there has been a period of possession of the property of one year. The one year’s possession can be that of the seller or it can be the seller’s, in combination with the possession of the aforementioned buyer.<sup>8</sup>

If the requirement of one year’s possession has been satisfied the ‘true’ owner of the property will receive financial compensation for any loss caused by the fact that the Register will not be rectified to correct the inaccuracy (section 90).

On the other hand, if the requirement of one year’s possession is *not* satisfied when an inaccuracy is rectified, the buyer in good faith will only receive compensation for the loss caused by the fact the Register will be rectified in favour of the ‘true’ owner, rather than the property itself (section 90).

The requirement of one year’s possession before a buyer is protected from the possibility of rectification is designed to give the ‘true’ owner an opportunity to discover the inaccuracy and apply for rectification.

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<sup>8</sup> So, for example, the seller could have possessed it for nine months and then, if the buyer possesses it for three months, the requirement of one year’s possession will then be satisfied.

## *The impact on conveyancing practice*

As mentioned earlier, one great advantage of the 1979 Act was that it simplified the conveyancing process and, in particular, removed the need to undertake the complicated and skilled task of inspecting the chain of prior legal deeds affecting the property to establish a seller's legal title to the property. Instead, if the Land Certificate said X was owner, X was the owner. This simplification of the process allowed an increase in paralegals (as opposed to qualified solicitors) undertaking conveyancing work. This in turn caused a reduction in costs for law firms which could be passed on to purchasers of property in the legal fees charged.

The effect of the proposals in the Bill is that these advantages will be preserved, except in the small number of cases where the property in question has changed hands a short time prior to being put up for sale again.

In the latter situation the likely effect of the Bill's proposals on conveyancing practice is uncertain. The SLC took the view that the approach to examination of title by the law firm acting for the buyer would remain the same (SLC 2010a, para 37.54). However, in the event of a successful application for rectification of the Register by the 'true' owner, the buyer will get financial compensation, not the property (as the one year's possession requirement under section 82 is not satisfied). Consequently, it is arguable that law firms acting for the buyer will elect to use qualified solicitors rather than paralegals to act in this type of transaction. Furthermore, these solicitors may endeavour to protect their clients' interests by doing some additional investigation associated with the seller's title to the property (over and above what happens at present in relation to properties already on the Land Register).

If a change of practice does occur, this may result in an increase in the legal fees charged for such transactions compared to what is charged under the current system. On the other hand, the Scottish Government believes that other aspects of the Bill (eg the proposals to complete the Land Register contained in Part 2) may reduce the legal fees charged overall in the long term (Financial Memorandum, para 368).

## **VIEWS OF STAKEHOLDERS**

### **General principles**

A minority of respondents to the RoS consultation addressed the various questions posed in the consultation relating to this policy area.<sup>9</sup>

Of those that responded to the relevant question, there was strong support for aligning the consequences of registration in the Land Register with the normal rules of property law and for a duty on the Keeper to rectify all inaccuracies in Land Register which come to light. The proposals to adjust the state guarantee of title to make it less likely that a 'true' owner would be deprived of title to his or her property were particularly popular, with 21 out of the 23 respondents (91%) answering the relevant question expressing their support.

Examples of the supportive comments by stakeholders included Professor Robert Rennie's observations as follows:

"I am very much in favour of the new principle of realignment/rectification whereby the 'true' owner gets the property back, the Land Register is rectified, and, where

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<sup>9</sup> Questions 31–34 of the Registers' consultation addressed the effect of registration, rectification of inaccuracies and the state guarantee of title. Between 17 and 24 respondents (out of a total of 71 respondents to the Registers' consultation) responded to questions 31–34.

appropriate, the registered proprietor against whom realignment/rectification is effected is compensated. It has always been very difficult to justify a land registration system which results in a true owner in good faith losing title to his property through the actions of another or indeed through the actions of the Keeper. As a practitioner I have been involved in a number of cases where I have tried to explain to the disappointed owner just why he has lost an access to his property to an adjoining developer because a red line has been pushed too far to the west. Similarly I know the Keeper has had great difficulty in explaining such situations to MPs and MSPs. Frankly people do not accept the notion that true owners can be deprived of ownership and simply given a cheque”

Although in a small minority, a handful of respondents objected to the effect of the proposals on the buyer of property in good faith. For example, Cliff Macdonald commented:

“Monetary recompense of the true owner whilst often unsatisfactory is fairer than removal from the property of the innocent owner who may have rearranged his life, the schooling of his children, adapting the house to the needs of his family...

There may however be merit in allowing rectification of inaccuracies agreed to by the affected party or inaccuracies relating to small slithers of ground”

## **The requirement of possession**

The main policy issue for respondents seemed to be whether the requirement of possession for one year by the seller (or by the seller and the buyer) was sufficient to allow a buyer in good faith to acquire a right which could not subsequently be affected by rectification of the Register. Some stakeholders felt that one year was not long enough, citing three years as the preferred option, whilst others stated that if neighbours affected by a property transaction were notified of the transaction, then one year may be acceptable (Registers of Scotland 2010b).

Section 39(1) of the Bill provides for the possibility of the Keeper notifying neighbouring property owner. However, this is at her discretion and is not compulsory.

## **ADVANCE NOTICES (PART 4 OF THE BILL)**

### **THE CURRENT LAW**

The object of a normal conveyancing transaction is that the buyer receives a right of ownership and the seller receives money for the sale of the property. As mentioned earlier, on the date of settlement the legal deed transferring ownership (the disposition) is exchanged for the purchase price. Yet, as also noted earlier, ownership is not transferred to the buyer until the disposition is registered, leaving a brief gap where the buyer is exposed to several risks. These include the risk that the seller has granted a deed transferring ownership to another party (perhaps as part of a fraudulent scheme) and this deed is registered first.

The traditional way of addressing the risks during the ‘gap period’ is by a ‘letter of obligation’, granted by the seller’s solicitor in favour of the buyer’s solicitor, which makes various promises. Law firms insure against the risk they incur in respect of the obligations assumed via the [Law Society of Scotland](#)’s master insurance policy and, in practice, the premiums paid by solicitors are passed on to clients through conveyancing fees.

# THE PROPOSALS IN THE BILL

## The basic system

Part 4 of the Bill, recommended by the SLC in response to concerns outlined by the [Law Society of Scotland](#) about the strains the existing system was under, creates a new system of 'advance notices' in respect of the risks associated with the 'gap period' described above.

Under the proposals in the Bill, an advance notice will typically be granted by a seller in favour of a buyer in advance of settlement and submitted to RoS. Once this process occurs there is a 'protected period' lasting 35 days. If that buyer registers a deed with the Keeper during the protective period then his or her deed will take priority over any other deed registered by a third party, notwithstanding the order of the registration of the deeds in question.

Use of the system of advance notices is optional under the proposals in the Bill but, by reference to what has occurred in other jurisdictions, the SLC anticipated that its use would become standard practice (SLC 2010a, para 14.14).

## Scope of the system

The SLC proposed that advance notices would be possible for properties already in the Land Register, with the possibility of making secondary legislation at a later date to extend the system to properties undergoing first registration in the Land Register (SLC 2010a, recommendation 63). The SLC's concerns about extending the new system to first registrations included a concern that it would push up costs (SLC 2010a, para 14.19), a view challenged to some extent on consultation (see below).

The Bill provides for a system where advance notices are available for properties already registered in both the Land Register and properties about to undergo a first registration in the Land Register (sections 48, 56 and 109). Section 61 allows for the possibility of future alterations to the scope of the scheme by empowering Scottish Ministers to make secondary legislation on this topic.

## Financial aspects

RoS will recover the costs of running the advance notices system through fees charged. The fees will be set by Scottish Ministers and will be consulted on at a future date. Based on a series of assumptions, the Financial Memorandum states that the cost to RoS of an advance notice will be "less than £5" and that the fee per advance notice will be "not less than cost recovery or more than £10" (Financial Memorandum, para 440). The cost for the equivalent type of notice in England and Wales is £4 (Land Registration Fee Order 2009 (SI 2009/845)).

## VIEWS OF STAKEHOLDERS

A minority of respondents to the RoS consultation addressed the various questions posed in the consultation relating to this policy area.<sup>10</sup>

Of the 23 stakeholders that responded to the relevant question, 20 (87%) supported the introduction of a system of advance notices, with the remainder opposed or uncommitted. The legal profession were unanimous in their support for the proposal (Registers of Scotland 2010b, p 7). However, Professor of Scots Law, Kenneth Reid commented:

“it is important the system used should be as simple and cheap as possible. Otherwise, the result will have been to complicate conveyancing for what is only a modest gain in security of title” (Reid 2010, p 2)

There was general contentment amongst stakeholders with the 35 day protected period proposed, with 16 out of the 21 respondents (76%) who answered the relevant question expressing their support, although a couple of respondents argued for a 60 day period and the [Scottish Property Federation](#) argued for the English system of 30 business days, in the interests of consistency across the UK.

Two large commercial law firms expressed a desire for the system of advance notices to be extended to property undergoing first registration in the Land Register (as is now proposed) and the [Law Society of Scotland](#) went further, arguing the system should apply to all transactions which can still be given effect to in the Sasine Register (until such time as the latter is closed to new deeds by secondary legislation).

Despite the SLC’s view that advance notices will become standard practice, the [Council of Mortgage Lenders](#) argued the system should be compulsory not optional.

## ELECTRONIC DOCUMENTS AND ELECTRONIC REGISTRATION (PART 10 OF THE BILL)

### THE CURRENT LAW

The law requires that certain acts intended to have legal consequences must be in writing and signed according to certain requirements. The current law in this regard is contained in the Requirements of Writing (Scotland) Act 1995 (‘the 1995 Act’) (c 7).

A contract for the sale of land (missives), a deed transferring ownership of land (a disposition) and a deed which gives effect to a mortgage transaction by securing the debt over property (a standard security) are amongst the documents which must satisfy the requirements of the 1995 Act. However, the 1995 Act requires words to be written on a physical surface such as paper, thus preventing the general use of legal documents associated with property transactions in electronic form.

In 2006, some limited degree of ‘electronic conveyancing’ was made possible in Scotland via various pieces of secondary legislation passed partly under powers contained in the 1979 Act

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<sup>10</sup> Questions 9–11 of the Registers’ consultation addressed the issue of advance notices. 23 respondents (for Question 9), 21 respondents (for Question 10) and 20 respondents (for Question 11) out of a total of 71 respondents to the Registers’ consultation responded to the questions on this topic.

and partly under powers contained in the Electronic Communications Act 2000 (c 7) (the latter piece of legislation itself being a response to requirements imposed upon EU member states by the E-Commerce Directive (2000/31/EC) and the E-Signatures Directive (1999/93/EC)).

Among other things, the package of secondary legislation facilitated optional automated land registration in Scotland via a system called 'ARTL', ie Automated Registration of Title to Land. Within ARTL (a members only system) use of electronic conveyancing documents is possible. These documents are signed by the 'electronic signature' of solicitors on behalf of their clients, and submitted to RoS for registration via an electronic application. Although the intention is that most applications for registration are then processed automatically, RoS staff are still involved in handling 'problem cases' identified by ARTL.

The term 'electronic signature' deserves further explanation. Electronic signatures can take a wide range of forms but, at their most sophisticated, operate in a similar way to the 'card reader' system used by retail banks for online transactions and rely on a trusted third party to generate the electronic data which is exchanged and to certify that the electronic signatures have in fact been created by the individuals in whose name the document has been signed. Electronic signatures currently operate in the ARTL system using a card-reader and a password and RoS set up a separate 'Certification Authority' to be the third party that certifies the electronic signatures.

About half of law firms in Scotland have signed up to ARTL, however, it has not proved as popular as was hoped and the IT system supporting it is getting out of date. The 2006 reforms are regarded as having other limitations too, including that use of electronic documents is not possible outside the members only system of ARTL and is not possible for a deed which cannot be registered, such as missives. Even for ARTL members, ARTL (and therefore electronic documents) also cannot be used in numerous situations, including first registrations in the Land Register and registrations where an existing title unit is being divided into smaller parts (SLC 2010a, para 34.9 and 34.10). The main use of ARTL at present seems to be used by 'bulk conveyancers' (ie firms handling a large number of low value conveyancing transactions) in order to process standard securities and 'discharges' of standard securities.

## **THE PROPOSALS IN THE BILL**

The SLC in its report (SLC 2010a, paras 34.6–34.12, paras 34.16–34.17) outlined many policy benefits it considered were associated with the expansion of the scope of 'electronic conveyancing' in Scotland and the Scottish Government has endorsed the SLC's approach stating in the Policy Memorandum to the Bill:

"There are numerous advantages to electronic conveyancing including faster, and hence less risky, conveyancing for the consumer. It is thought that an increase in the use of electronic systems in conveyancing firms, lending institutions and in the Keeper's offices could eventually lead to reduced costs for consumers. There is also an overarching policy desire at European, UK and Scottish Government level to develop e-commerce generally" (Policy Memorandum, para 29)

## Electronic documents

### *Deeds relating to land*

Section 92 of the Bill amends the 1995 Act to permit (but not compel) all documents relating to land (including missives, dispositions and standard securities) to be in electronic form, as long as they are in a form specified in secondary legislation (see further below).

### *Wills and trusts*

Likewise, section 92 permits wills and trusts to be constituted electronically (if they are in the form required by secondary legislation). The SLC's proposals did not extend to wills and trust deeds. Whilst acknowledging the area was "ripe for review", the SLC noted:

"Full e-enablement of the 1995 Act in every respect would go beyond the scope of the present project. In particular, the e-enablement of testamentary documents would be beyond scope. It would involve different stakeholders and different policy considerations from those applicable to land contracts and land deeds." (SLC 2010, para 34.17)

### *Requirements relating to electronic documents*

An important policy issue in the sphere of electronic documents is how to guard against forgery and fraud. Of particular importance, is what constitutes an 'electronic signature': whereas a traditional handwritten signature is unique and therefore harder to forge, very basic electronic signatures (such as typing one's name at the end of an email) are more open to abuse (SLC 2010a, para 34.65). On the other hand sophisticated electronic signatures (such as those used under the current ARTL system) provide good safeguards against fraud and forgery.

Separately, there is also a need to prevent informal methods of electronic communication (such as an exchange by text message) from having unintended legal consequences by having rules as to the required form of electronic documents (Registers of Scotland 2010a, paras 4.8–4.9).

Section 93 of the Bill (which amends the 1995 Act) sets out some basic requirements for an electronic document to be both formally valid as a matter of law, as well as 'probative' or 'self-proving', ie presumed in law (unless the contrary is shown) to have been signed by the person granting the deed. Section 93 also sets out basic requirements which an electronic document must meet before it can be registered in the Land Register (or recorded in the Register of Sasines).

To be valid, probative and able to be registered or recorded, section 93 requires that an electronic document must be signed using an 'electronic signature'. However, the requirements relating to such a signature will be specified in secondary legislation. For an electronic document to be probative and able to be registered or recorded, it must, among other things, bear to have been 'certified', although the form and type of certification is again left to secondary legislation (section 93).

Overall, Scottish Ministers are given significant discretion under section 93 to enact regulations (some of which will be subject to the negative procedure) relating to the standards and safeguards associated with electronic documents. In the Policy Memorandum to the Bill (para 29), the Government state that tackling the issue in detail via secondary legislation allows flexibility for their approach to evolve in accordance with technological developments.

## Electronic registration in the Land Register

Section 95 of the Bill allows the Keeper to run a computer system for electronic registration in the Land Register, whether ARTL or, as is more likely in the longer term, a successor system.

It should be noted that automated registration is enabled but not required under section 95, meaning that the computer system could simply facilitate electronic lodging of applications and RoS staff could participate in the processing of applications that follow.

The Bill leaves much of the detail associated with the computer system (including who can use it, their obligations during use and the types of deed which may be used within the system) to secondary legislation.

## VIEWS OF STAKEHOLDERS

### Deeds relating to land

Fifty one out of 71 respondents to the RoS consultation (72%) were in favour of legal deeds relating to land and missives being able to be formed electronically, with the remainder opposed, leaving the question open or not responding on that particular issue (Registers of Scotland 2010b, p 9). In their comments, stakeholders focused on the need to have a secure system with appropriate safeguards against forgery and fraud (Registers of Scotland 2010, pp 9–10).

### Electronic wills and trust deeds

The issue of electronic wills and trust deeds was not consulted on in the RoS consultation, presumably as that policy developed at a later stage of the policy-making process.

### Requirements for electronic documents

The RoS consultation sought stakeholders' approval of a) the need for controls on the format and authentication of electronic documents; and b) the proposal that the relevant standards and safeguards should be set out in secondary legislation. Fifty one out of 71 respondents expressed their support for what was proposed (72%),<sup>11</sup> with all other respondents leaving the question open or not responding to that particular question.

Stakeholders who were supportive of the use of primary legislation included the [Scottish Law Agents Society](#) who commented:

“We would prefer that primary legislation is used. We regard this as a matter of sufficient importance to be subject to detailed scrutiny by the Scottish Parliament”

By contrast, [Companies House](#), preferred the use of the secondary legislation, mirroring the views later expressed by the Scottish Government in the Policy Memorandum:

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<sup>11</sup> It is assumed that the support expressed by the respondents in relation to question 14 related to both aspects of the question, however, the slight danger of a two part question is always that respondents fail to recognise the two part aspect to it.

“Having the requirements in secondary legislation would make it easier to make changes in the light of technical developments, changing customer needs etc.”

## **Making electronic registration compulsory**

Although it was not an issue which featured in the SLC’s original proposals, RoS consulted on whether ARTL should be compulsory in some cases (Registers of Scotland 2011a, p 34). Of the 49 respondents that responded to the relevant question, 36 were in favour of this move (73%), with the remainder opposed or leaving the question open. Concerns included that freedom of choice would be restricted and that ARTL couldn’t cope with the volume of transactions.

Making ARTL (or a successor computer system) compulsory in some instances is not a policy proposal which has been taken forward in the Bill.

## **OTHER MISCELLANEOUS POLICY PROPOSALS**

This section of the briefing summarises some noteworthy miscellaneous reforms contained in the Bill, including stakeholder commentary where it is considered appropriate.

### **CADASTRAL MAP (SECTIONS 2, 11–13 AND 109)**

The Bill provides for the maintenance of a map of Scotland as part of the Land Register, to be known as the ‘Cadastral Map’ (adopting the term for such maps used in land registration systems around the world). The Cadastral Map will show all the boundaries of, and the ownership of, all the title units registered in the Land Register. It will be similar to an existing map of Scotland currently maintained by the Keeper as a matter of administrative practice. (For further detail on this topic see paras 48–50 of the [Policy Memorandum](#) to the Bill).

### **THE ‘ONE SHOT PRINCIPLE’ (SECTION 33)**

Currently, secondary legislation allows the Keeper to requisition documents from an applicant to the Land Register if they are required but missing from what was originally submitted and this is part of current practices. On this approach, the SLC commented:

“This strikes us as a waste of public resources. It should not be for the Keeper to do the work that conveyancers are supposed to do themselves. Our view is that bad applications should simply be rejected – what we call the one-shot principle” (SLC 2010a, para 3.20)

Section 33 of the Bill provides that an application cannot be supplemented or substituted after the date of application unless the Keeper consents. The aim of this provision is to give effect to the so-called ‘one shot principle’, subject to certain safeguards.

Eight out of the 21 (38%) stakeholders responding to the relevant question in the RoS consultation expressed support for the one shot principle.<sup>12</sup> However, of all the proposals consulted on, this was one of the ones that attracted the most negative feedback. Specific concerns included that an error in the documents submitted may take months to surface in a complex case and, furthermore, subsequent transactions (particularly those submitted by different solicitors) could be adversely affected (Registers of Scotland 2010b, pp 3 and 16).

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<sup>12</sup> 7 respondents (33%) were opposed and 6 (29%) left the question open (Registers of Scotland 2010b, p 16).

## **PRESCRIPTIVE CLAIMANTS (SECTION 42–44)**

It is regarded as advantageous in policy terms if land which has been apparently abandoned can be brought back into productive use by a new owner. On the other hand, if the law recognises a new owner of apparently abandoned land, the actual owner of the land in question loses his or her right of ownership, a serious step, so it is also recognised that the law should not allow such changes to occur too easily.

### **The current law and practice**

The law of ‘prescription’ attempts to balance the competing policy considerations. It provides that if an individual has a deed purporting to transfer ownership of land in his or her favour but which is actually granted by a non-owner, he or she may still become owner if certain requirements are satisfied. In particular, he or she must possess the land in question openly, peacefully and without ‘judicial interruption’ (ie legal proceedings being raised) for a period of ten years (Prescription and Limitation (Scotland) Act 1973, section 1(1)).

The 1979 Act is silent on how the Keeper should treat applications for registration in the Land Register founded on deeds obviously granted by non-owners. The Keeper’s current practice appears to be to reject ‘speculative’ applications but accept those which serve a ‘legitimate purpose’ (albeit with an exclusion of the state guarantee of title) (SLC 2010, para 16.8). Her acceptance allows the period of possession required under the law of prescription to begin.<sup>13</sup> With one minor exception, the Keeper is expressly prohibited from notifying the actual owner of the land in question of the application for registration by a non-owner (Land Registration Rules 2006, rule 18(2)).

### **The proposals in the Bill**

Under section 43 of the Bill, for an application for registration based on a deed granted by a non-owner to be accepted by the Keeper, the applicant must satisfy the Keeper of three things:

- that the owner has been out of possession for seven years
- that the applicant has possessed the land in question for a year preceding the application; and
- that the owner (who may be the Crown as the ultimate owner of ‘ownerless’ property) has been notified of the application

The third requirement in the Bill departs from the proposals of the SLC which thought notification should be permitted but not required if the other two requirements were satisfied (SLC 2010, paras 16.22–16.25).

Section 42(8) of the Bill allows Scottish Ministers to change the aforementioned time period by order.

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<sup>13</sup> It appears the Keeper has, at least on some occasions, allowed two names (ie the name of the current owner and the prescriptive claimant) to appear in the ownership section of the relevant title sheet during the period of possession required for prescription to operate. This received some academic criticism for being arguably at odds with important concepts underpinning the 1979 Act (see, for example, Reid 1991). This ‘double registration’ approach is also proposed in the Bill but is unproblematic under the new land registration scheme for technical reasons which do not need to be explored further here.

## **Views of stakeholders**

Whilst there was support for the possession requirements in the RoS consultation, they also attracted some criticism, including that the one year's possession requirement was too short and that the seven year possession requirement was too long (given that a further ten years must then follow to acquire legal title by prescription). Other respondents also focused on potential difficulties in practice associated with the obligation of satisfying the Keeper on such matters (Registers of Scotland 2010b), pp 15–16).

Stakeholders did not have an opportunity to comment specifically in their consultation responses on the notification requirement which later appeared in the Bill.

## **THE DUTY OF CARE, THE STATUTORY OFFENCE AND REGISTRATION TARGETS (SECTIONS 34, 107 AND 108)**

### **Duty of care**

To promote the public interest in the accuracy of the Land Register, section 107 of the Bill imposes a duty on the person who grants a deed and the person who makes the application for registration based on that deed, as well as their respective solicitors, to take reasonable care that the Keeper does not inadvertently make the Land Register inaccurate as a result of information supplied. The SLC see this as putting into statute the common law duty of care which they say probably already exists (SLC 2010a, para 3.23).

### **Statutory offence**

Under section 108 of the Bill, it will also be a statutory offence to make a materially false or misleading statement in relation to an application to the Keeper, or intentionally fail to disclose material information in relation to an application, or to be reckless as to whether all material information is disclosed. This offence was not contained in the SLC proposals, nor was it consulted on by RoS, but it is thought necessary by the Scottish Government in support of its strategy to tackle serious organised crime (Policy Memorandum, para 77).

### **Registration targets**

Section 34 of the Bill enables Scottish Ministers, by secondary legislation, to set registration targets, ie targets as to the maximum gap that should exist between an application for registration being submitted and a final decision being taken about registration. At present, the Keeper sets the registration targets for RoS and invites Scottish Ministers to endorse them.

### **Registration fees**

Section 106 of the Bill provides the power under which Scottish Ministers may authorise the Keeper to charge fees for services provided in connection with the functions conferred on the Keeper under the Bill.

The equivalent power under the current system (section 25 of the Land Registers (Scotland) Act 1868 (c 64), inserted by the 1979 Act) has a number of limitations, including that fees must be fixed (in practice this means they are fixed in proportion to the value of the property). The inability to charge a 'per hour' rate for work means that RoS currently incurs a loss when

processing applications in respect of legally complex cases. Section 106 will make it possible to charge a 'time-and-line' fee for a complex case, ie a fee more closely reflecting the number of hours spent on the task by RoS.

At the moment, when a change in the level of registration fees is thought necessary, a new 'fee order' must be made by Scottish Ministers (see further above). This is a slow process which means that fees can lag behind current market conditions. Section 106 allows Scottish Ministers to allow the Keeper to set fees within defined parameters. This change will give RoS greater flexibility in which to operate by allowing fees to be adjusted by the Keeper within the parameters set, without the need for a further fee order.

## **FINANCIAL IMPLICATIONS OF THE BILL**

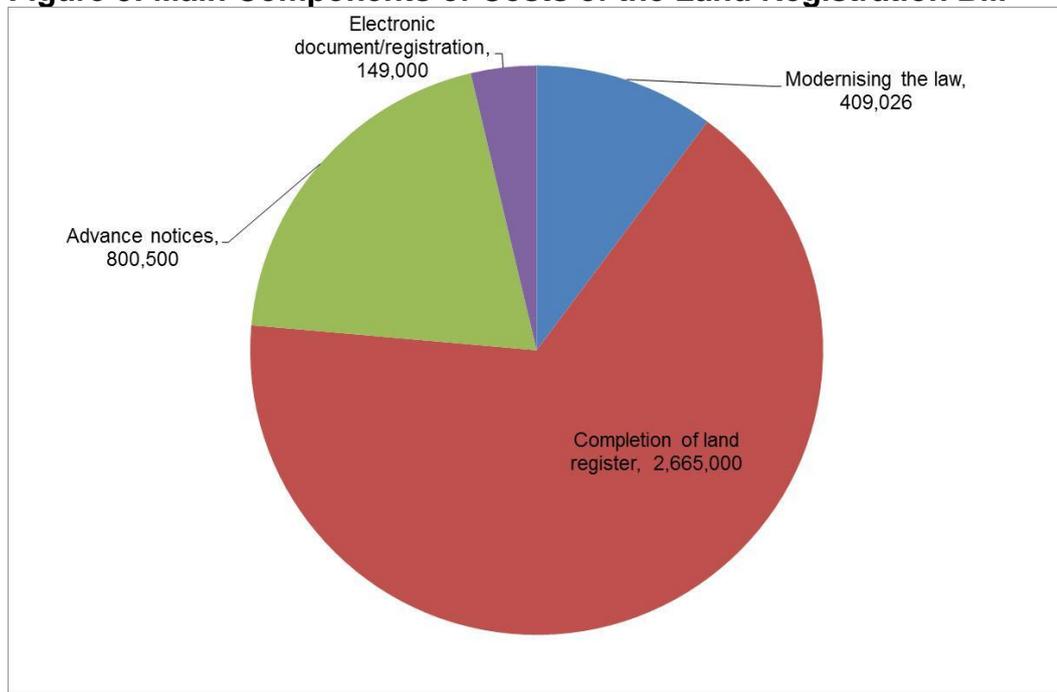
The Financial Memorandum (FM) estimates the total cost of the Bill to the RoS to be £3.9m, with relatively minor costs likely to be incurred elsewhere. These costs are composed of one-off costs (£49,500), plus estimates of annual costs of £3.85m. This is in the context of annual income to RoS in 2011 of £48.6m (Registers of Scotland 2011).

The annual costs of the Bill are based on a series of assumptions, for example on registration rates, and the consequent staffing and other resources required to deliver the service. Assuming constant annual costs, this would imply, for example, a total cost to RoS of just over £19m for the first five years (see Table 1 below).

Overall, the FM states that as a result of efficiencies anticipated by RoS the additional costs arising from the Bill should not translate into higher fees.

The FM splits the costs of the Bill into four areas of activity. These costs are illustrated in Figure 1 below.

**Figure 3: Main Components of Costs of the Land Registration Bill**



Completion of the Land Register is the largest single component of cost. Within this, the registration of all deeds transferring title (an estimated 7,000 additional applications each year for dispositions for no value and notices of title) is estimated to require 45 posts (FTEs) costing £2.3million per annum.

Table 1 below reproduces the key costs of the Bill, along with savings where identified. It should be noted that many of the savings, and some of the costs, have not been quantified in the FM. Table 1 also includes an estimate of the implied costs of the Bill after five years, assuming a continuation of annual costs at a constant rate.

**Table 3: Costs of the Bill to RoS (£)**

	<b>Initial costs</b>	<b>Annual costs</b>	<b>Implied total cost over first five years<sup>14</sup></b>	<b>annual savings (where identified)</b>
Shared plot titles <sup>15</sup>	-	436,277	2,181,385	27,251
Completion of land register	-	2,661,000	13,305,000	-
Advance notices	49,500	751,000	3,804,500	-
Electronic document/registration		-	-	97,000
<b>TOTAL</b>	<b>49,500</b>	<b>3,848,277</b>	<b>19,300,000</b>	<b>124,251</b>

The Bill is being introduced at a time when RoS will “completely replace its land registration IT systems in the next three to four years”. The FM states that this work should have happened

<sup>14</sup> SPICE calculation based on assumption of a continuation of annual costs at a constant rate.

<sup>15</sup> This is a new title sheet which will enable land and property owned in common shares to be more transparent. The FM estimates that a total of 14 staff (FTE) will be required to implement shared plot title sheets.

whether or not the Bill was introduced, and so the costs of this IT investment are thus not included in the £3.9m estimated costs of the Bill.

One of the key reasons why the Bill will result in additional costs for RoS is that it will result in a higher proportion of more expensive first registrations being carried out sooner than would otherwise have been the case. The FM estimates, for example, that the average unit cost for registering a first registration in 2014-15 will be around £395. The unit cost of recording a deed in the general Register of Sasines in the same year is, by contrast, predicted to be £60. There will thus be a significant increase in the average cost of processing applications.

The FM also states that, overall, there will be:

- some cost falling on the National Archives of Scotland (a one-off cost of £246,000 in relation to electronic conveyancing and registration);
- no significant financial implications for local authorities; and
- no great impact on businesses, except in the short term on solicitors familiarising themselves with the new system (though in the long term there will be reduced conveyancing costs)

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## RELATED BRIEFINGS

### [SB 11-01 Long Leases \(Scotland\) Bill](#)

This briefing provides an introduction to the relevant law, an overview of the Bill's proposals and a discussion of some of the key policy issues associated with the Bill.

(NB This briefing relates to the Bill which fell at the end of Session 3)

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