

LAND REGISTRATION ETC. (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Land Registration etc. (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Bill contains five broad policy objectives:
 - provides for the eventual completion of the Land Register by increasing the number of triggers for a first registration and providing for voluntary registrations and Keeper-induced registrations;
 - introduces a system of "advance notices" for conveyancing transactions which will remove the risk of losing title to a property between the settlement date and the registration date (which risk is currently underwritten by insurance);
 - introduces amendments to the Requirements of Writing (Scotland) Act 1995 (the 1995 Act) to allow for electronic conveyancing and electronic registration;
 - seeks to re-align registration law with property law by, for example, adjusting the circumstances in which a person can recover their property rather than only receive compensation from the Keeper; and
 - continues and makes improvements to the system for land registration in Scotland. It replaces much of the Land Registration (Scotland) Act 1979 (the "1979 Act"). The Bill places on a sound statutory footing the administrative practices of the Keeper of the Registers of Scotland that have evolved in practice since the passing of the 1979 Act.

4. Further information about the Bill's provisions are contained in the Explanatory Notes and Financial Memorandum, published separately as SP Bill 6 EN and the Policy Memorandum, published separately as SP Bill 6 PM.

RATIONALE FOR SUBORDINATE LEGISLATION

5. The Bill contains a number of delegated powers that are explained in more detail below. The Scottish Government has carefully considered whether provisions should be set out in subordinate legislation or on the face of the Bill. In so doing, the Scottish Government had regard to:

- the need to make proper use of valuable Parliamentary time;
- the need to ensure sufficient flexibility to respond to changing circumstances and technological advances;
- the likely frequency of amendment;
- allowing detailed administrative arrangements to be made or kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipating the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation.

6. When deciding whether negative or affirmative procedure is appropriate, the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is required, balancing the need for an appropriate level of scrutiny with the need to avoid using Parliamentary time unnecessarily.

DELEGATED POWERS

7. The delegated powers provisions are listed below, together with a short explanation of:

- what each power allows;
- who the power is conferred on;
- the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power; and
- the Parliamentary procedure (if any) to which the exercise of the power is to be subject and why this procedure (if any) is considered appropriate.

8. The approach in the Bill to powers to make subordinate legislation is, generally, for powers to be conferred within the section in relation to which the power relates. Section 111 is the general exception to this, as it provides substantive powers to make rules of more general

application in relation to the Land Register. It is expected that many of the powers will be invoked simultaneously and the resulting subordinate legislation will be the “land register rules”.

9. The Bill contains the power to make land register rules by regulations. In addition to the main power, there are various specific references to the land register rules in other sections of the Bill. Section 109 defines “land register rules” as the rules made under section 111(1). The general rule-making power is considered first below. The provisions making specific reference to the rules are considered next, with an explanation of why they are appropriate to be included in the land register rules. Other powers are then considered in the order in which they appear in the Bill.

Section 111(1) - land register rules

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

10. This provision allows the Scottish Ministers to make land register rules that cover:

- the making up and keeping of the Land Register;
- the procedures in relation to applications for registration;
- forms to be used in relation to the register;
- when the application record is open for entries;
- information, not covered in the Bill, that the Keeper is required or authorised to enter in the title sheet record; and
- other matters which seem to them necessary or expedient to give effect to the purposes of the Bill.

Reason for taking power

11. The land register rules will provide detail to support the provisions in the Bill on the Land Register. It is expected that the rules will look something like the current Land Registration (Scotland) Rules 2006 but will make more detailed provision. While it is not expected that the rules will be subject to frequent change, it is foreseeable that they will require amendment as time goes on. In particular, the rules will allow the Scottish Ministers to regulate how the Land Register is kept in light of changing circumstances and technologies. Amendments to the rules will also allow any application forms to be altered as required, where, for example, a development in the law requires the Keeper to ask different questions or be supplied with different information by applicants.

Choice of procedure

12. The current Land Registration (Scotland) Rules 2006 are subject to negative procedure and this is considered appropriate for the new land register rules. The rules are concerned with the normal running of the register and will not affect the underlying principles of the Bill.

Other matters to be provided for in land register rules

Section 14(1)(b) - documents which the Keeper must add to the archive record.

Provision

13. This section provides that the archive record is to consist of, among other things, copies of documents which the Keeper must include under the land register rules.

Reason for inclusion in land register rules

14. The provision is designed to ensure that, if in future it is considered desirable that documents not covered by section 14 (which may be new documents that do not exist in law at present) are included in the archive record, the Scottish Ministers may provide for this in the land register rules. It is related to administration of the Land Register and as such is suitable to be made in the land register rules.

Section 22(1)(d) - the form of any application in the land register rules

Provision

15. This provision refers to the Scottish Ministers' power to prescribe, in the land register rules under section 111(1), the form (if any) required for applications for registration.

Reason for inclusion in land register rules

16. The form of applications must be flexible to allow for changes in approach and also for changes in property law, which may result in a different form of application being required. As more property comes onto the Land Register, it may be possible and desirable to streamline the form of particular types of application. This is largely an administrative matter regarding application forms for registration and is therefore considered suitable for land register rules.

Section 33(2) - circumstances in which the Keeper must consent to an application being substituted or amended

Provision

17. Section 33(2) provides that the land register rules may specify the circumstances in which the Keeper must give consent to an application being substituted or amended.

Reason for inclusion in land register rules

18. Section 33 is intended to ensure that applications to the Keeper are correct first time, thus increasing the efficiency of the land registration system. However, section 33(2) recognises that experience may show that there are some circumstances where a deviation from this principle is appropriate. Specifying some such circumstances in the rules will add certainty for applicants. It will not otherwise affect stakeholders; therefore, it is thought to be suitable for inclusion in land register rules.

Section 34(1) - the period in which the Keeper must make a decision

Provision

19. This provision allows the time period within which the Keeper must accept or reject an application to be prescribed in the land register rules. Section 34(2) confirms that different periods may be prescribed for different types of application.

Reason for inclusion in land register rules

20. The time period within which it is appropriate for the Keeper to make a decision on an application may be subject to change as a result of such factors as the condition of the property market and the overall volume and complexity of applications submitted to the Keeper. The period might therefore require to be amended to reflect those changing circumstances. Accordingly, it is considered appropriate for the period to be specified in the land register rules rather than primary legislation.

21. Different periods for different cases are required as a simple re-mortgage over a registered property will be capable of completion more quickly than a complex first registration.

Section 39(5) - further provision regarding notification of acceptance, rejection or withdrawal of application

Provision

22. Section 39(1) and (2) provides that various parties must be notified when the Keeper has accepted or rejected an application for registration or it has been withdrawn. Section 39(5) allows the land register rules to make further provision about such notification.

Reason for inclusion in land register rules

23. The detail of notification under section 39(1) and (2), how it is done and who is notified is an area where views are likely to alter in light of changing circumstances. It is thought desirable to have the flexibility provided by subordinate legislation to change the rules accordingly. Notification to applicants and other related parties is not required for the creation of rights and it is largely an administrative practice. As such, it is considered suitable for land register rules.

Section 40(5) - further provision regarding notification to proprietors

Provision

24. Where the Keeper has accepted an application for registration of a kind that triggers registration of the underlying plot or the Keeper has registered a plot of land by Keeper-induced registration, section 40(2) provides that the Keeper must notify the proprietor of the plot and any other person the Keeper considers appropriate. Section 40(5) allows the land register rules to make further provision regulating such notification.

Reason for inclusion in land register rules

25. The detail of notification under section 40(2), how it is done and who is notified is an area where practice is likely to alter in light of changing circumstances. As such, it is thought desirable to have the flexibility provided by the Scottish Ministers being able to make provision in subordinate legislation to change the rules accordingly. This is largely an administrative practice and is considered appropriate for inclusion in the land register rules

Section 42(7) - further provision regarding notification to various parties of applications relating to prescriptive claimants

Provision

26. Section 42 makes provision for prescriptive claimants and the statutory rules relating to prescriptive claimant applications. Section 42(4) provides that the applicant must satisfy the Keeper that he or she has notified the proprietor, whom failing any person who appears capable of completing title. If neither exist or cannot be traced, the applicant must satisfy the Keeper that he or she has notified the Crown. Section 42(7) allows the Scottish Ministers to make further provision in the land register rules about such notification.

Reason for inclusion in land register rules

27. The detail of notification, how it is done and the information to be provided is an area where practice is likely to alter in light of changing circumstances. As such, it is thought desirable to have the flexibility provided by subordinate legislation to make provision in the land register rules. As an administrative practice it is considered appropriate for inclusion in the land register rules.

Section 44(6) - further provision regarding notification by the Keeper to various parties in relation to prescriptive claimants

Provision

28. Section 44 concerns the Keeper's duty to notify applications for registration by prescriptive claimants. It provides that the Keeper, as an administrative double check, must notify the same parties as the prescriptive claimant making the application is required to do under section 42.

Section 44(6) allows the Scottish Ministers to make further provision in the land register rules about such notification.

Reason for inclusion in land register rules

29. As with section 42 and the other sections on notification more generally, this is an area where views are likely to alter in light of changing circumstances. As such, it is thought desirable to have the flexibility provided by subordinate legislation to make changes in the light of changing circumstances. As a largely administrative practice it is considered appropriate to be included in the land register rules.

Section 59(2) - the period after which mapping of advance notice must be removed from cadastral map

Provision

30. Section 56(4)(a)(ii) provides that where an advance notice relates to part only of the subjects of a lease or of a plot of land, the Keeper must delineate such part on the cadastral map. Section 59(2) provides that the Keeper, after the period prescribed in the land register rules, must remove the delineation from the cadastral map if the deed to which the advance notice relates has not been registered.

Reason for inclusion in land register rules

31. This matter relates to the issue of where a deed has not followed the advance notice. It may be that a further advance notice will be registered (perhaps by another purchaser if the original sale has fallen through). If the intention is still to split the plot of land, it would be unwise for the Keeper to delete the work done to delineate the plot immediately. However, if the plot of land is not to be split then the delineation should, at some point, be removed from the cadastral map. The power allows the Scottish Ministers to determine, from experience, what is an appropriate length of time to delete the relevant mapping work. The matter fits within the land register rules, as it is related to how the Keeper administers the register.

Section 77(4) - the rate of interest payable on claims under warranty

Provision

32. Section 77 is about quantification of compensation for loss incurred as a result of a breach of Keeper's warranty. Section 77(2) makes provides about when interest is payable on the compensation. Section 77(4) allows the land register rules to provide for the rate of interest payable by virtue of section 77(2)

Reason for inclusion in land register rules

33. The power does not extend to altering the principle of warranty or calculating the compensation itself. Interest rates can fluctuate and it is desirable for the Scottish Ministers to have power to amend the interest rates from time to time to fit with the market. As the power is

limited only to interest rates rather than the compensation itself, it is considered appropriate for this to be dealt with in the land register rules

Section 78(5) - provision relating to notification on rectification of the Register

Provision

34. Section 78(4)(b) provides that the Keeper must give notice of rectification of the register to any person who appears to the Keeper to be materially affected by it. Section 78(5) provides that the land register rules may make provision regarding the persons to be notified and the method of notification.

Reason for inclusion in land register rules

35. The detail of notification, how it is done and who is notified is an area where views are likely to alter in light of changing circumstances. As such, it is thought desirable to have the flexibility provided by subordinate legislation to change the rules accordingly. Notification to applicants and other related parties is not required for the creation of rights, its function is largely administrative. As such, it is thought suitable to be dealt with in land register rules.

Section 80(7) - the rate of interest payable on claims for compensation as a result of rectification of the register

Provision

36. Section 80 is about compensation for loss in consequence of rectification. Section 80(5) provides that interest is payable on the compensation. Section 80(7) allows the land register rules to provide the rate of interest payable by virtue of section 80(5)

Reason for inclusion in land register rules

37. The power does not alter the principle of rectification or affect the calculation of the compensation itself. Interest rates can fluctuate and it is desirable for the Scottish Ministers to have power to amend the interest rates from time to time to fit with the market. As the power is limited only to interest rates rather than the compensation itself, it is considered appropriate for this to be dealt with in the land register rules.

Section 91(4) - the rate of interest on compensation for realignment of rights

Provision

38. Section 91 is about quantification of compensation for loss incurred as a result of the operation of realignment of rights. Section 91(2) provides that interest is payable on the compensation. Section 91(4) allows the land register rules to provide for the rate of interest payable by virtue of section 91(2)

Reason for inclusion in land register rules

39. The power does not extend to altering the principle of compensation for realignment losses. Clearly, interest rates can fluctuate and it is desirable for the Scottish Ministers to have power to amend the interest rates from time to time to fit with the market. As the power is limited only to interest rates rather than the compensation itself, it is considered appropriate for this to be dealt with in the land register rules.

Other subordinate legislation powers

Section 11(6)(b) - Power to prescribe the requirements of a system of mapping, other than the Ordnance Map, to be used for the base map

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

40. This provision allows the Scottish Ministers to prescribe requirements for a mapping system other than the Ordnance Map. A mapping system meeting these requirements may then be used, instead of or in conjunction with the Ordnance Map, as the base map.

Reason for taking power

41. The provision is intended to future-proof mapping in the Land Register. If a mapping system more suitable than the Ordnance Map comes along then, providing it meets the requirements set out, it should be capable of being used as the base map. As mapping techniques and providers move forward, the Land Register should be able to do so too. Also, the Ordnance Map does not extend to the sea-bed. This power will allow the Scottish Ministers to prescribe requirements for a sea-bed mapping system for those areas.

Choice of procedure

42. This is considered part of the normal running of the register. There should be flexibility to choose the mapping provider in the same way as other providers. It is therefore thought that negative procedure is suitable.

Section 27(6) - Power to remove the Keeper's discretion to decline to accept an application for voluntary registration

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

43. Section 27(6) enables the Scottish Ministers to repeal section 27(3)(b), thus removing the Keeper's discretion to decline to accept applications for voluntary registrations. Section 27(8) allows an order under section 27(6) to make different provision for different areas.

Reason for taking power

44. The Bill retains the Keeper's discretion regarding voluntary registrations contained in the 1979 Act. This is required to give the Keeper time to consider the staff resource and other practical implications of being obliged to accept voluntary registration applications. It is considered preferable that, when considered appropriate, the discretion to decline an application for voluntary registration should be removed without the need for primary legislation.

45. The power to make different provision for different areas is required as it may be desirable to remove the discretion, for example, for the county of Renfrew (which has been on the Land Register since 1981) at a different time to Midlothian (which has only been on the Land Register since 2001).

Choice of procedure

46. The power only removes the Keeper's discretion and the Keeper is to be consulted; it does not affect the rights of any other party. The use of this power removes, rather than adds to, the Keeper's powers. It is therefore considered that negative procedure is suitable.

Section 36(3) and section 37 - power to make different provision as regards time of registration

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

47. Section 36(3)(a) allows the Scottish Ministers to amend section 36(2) to make different provision as regards time of registration. Section 36(3)(b) allows the Scottish Ministers to amend other parts of the Bill consequential upon the amendment under section 36(3)(a). Section 37 provides that if the Scottish Ministers make such an order amending the Bill, they may correspondingly amend section 6 of the Land Registers (Scotland) Act 1868 and other parts of that Act. This allows for the extension of the provision to the General Register of Sasines.

Reason for taking power

48. The Bill reflects current registration systems and practice in that the time of registration is deemed to be the moment at which and following receipt of the application by the Keeper, the

application record next closes. So two applications, one received at 10am and one received at 3pm are deemed to be received at the same time. It may be that advances in registration systems would allow for this to be improved. It is also possible that the advances would allow for such improvement to be done in stages. As this is, to a large extent, technology-dependent, it is desirable that the capacity is available without the need for primary legislation.

49. The power in section 36(3)(a) is necessary as other parts of the Bill would require amendment in order to continue to work as intended. It is thought appropriate that such consequential changes should also be made by subordinate legislation.

Choice of procedure

50. Affirmative procedure is thought appropriate here as the power includes power to amend primary legislation. This will require Parliament to consider the impact of the amendment and whether it is appropriate.

Section 42(8) - Power to amend relevant time periods for prescriptive claimant applications

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

51. Section 42 is about prescriptive claimants and it sets out the criteria to be satisfied for the Keeper to accept an application from a prescriptive claimant. Section 42(3)(a) sets out that the true owner must not have been in possession of the land for a period of seven years preceding the applications and section 42(3)(b) sets out that the applicant must have been in possession for one year. Section 42(8) allows the Scottish Ministers to substitute different time periods for those in subsection (3)(a) and (b).

Reason for taking power

52. Prescriptive claimants are a new statutory creation and there is a balance to be struck between allowing prescriptive claims to be registered in order to bring into use abandoned land and protecting the rights of any underlying owner. This power will allow the Scottish Ministers to amend the time periods if experience shows they are not achieving the correct balance.

Choice of procedure

53. This power includes the power to amend primary legislation. The time periods will also be of significance to stakeholders and are important for the operation of the system of prescriptive claimants. Affirmative procedure is therefore considered appropriate.

Section 44(7) - power to amend the period of time in section 44(5)

This document relates to the Land Registration etc. (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 1 December 2011

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

54. Section 44(7) allows the Scottish Ministers to substitute a different number of days for the number of days provided for in section 44(5). Section 44(5) relates to the number of days (set in the Bill at 60 days) within which a person notified by the Keeper of a prescriptive application may object to that application.

Reason for taking power

55. Flexibility is required here if, in practice, the period of notice is found to be too short or too long. As the principle of notice is not amended, it is considered appropriate for the number of days to be substituted without the need for primary legislation.

Choice of procedure

56. As this is a procedural matter about the period of notice, it is considered appropriate for negative procedure to be applied.

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

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

57. Section 47(5) allows the Scottish Ministers to prescribe the day on or after which the recording of a standard security 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. Section 47(10) provides any day prescribed under 47(5) or 47(6) is to be a day no earlier than the day the Keeper's discretion relating to voluntary registrations under section 27(3)(b) is removed.

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

Reason for taking power

59. The provision is related to the policy objective of completion of the Land Register. It allows the Scottish Ministers to exercise some control over the rate of first registrations coming into the

Land Register when the Register of Sasines is to be closed. It allows for the Scottish Ministers to increase the rate of first registrations at a suitable time when the Keeper has made requisite preparations. It is considered suitable for this to be done under subordinate legislation.

60. Section 47(12) allows for the possibility that it may be desirable to increase the rate of first registrations in certain areas at different times. This would allow, for example, for the Register of Sasines in the County of Renfrew (which has a lot of property in the Land Register) to be closed before the County of Midlothian (which does not).

Choice of procedure

61. Closure of the Register of Sasines to new deeds is a significant step. It is likely to affect various stakeholders and it is therefore thought that affirmative procedure will provide the appropriate level of scrutiny.

Section 52(4) inserted section 49A(1) of the Conveyancing (Scotland) Act 1924 - Power to modify any schedule to the Conveyancing (Scotland) Act 1924

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

62. Section 52(4) inserts a new section 49A(1) into the Conveyancing (Scotland) Act 1924. The new section inserts the form of a notice of title to be used in the Land Register; it also includes a power for the Scottish Ministers to amend any schedules to the 1924 Act.

Reason for taking power

63. The form of a notice of title inserted by the Bill is a much simplified version of the form required for use in the Register of Sasines. In future, it may be possible to simplify the form further. The Act includes various other statutory forms for deeds for registration or recording that may benefit from simplification in future.

Choice of procedure

64. This is a power to amend primary legislation and therefore affirmative procedure is considered appropriate.

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

Power conferred on: the Scottish Ministers

This document relates to the Land Registration etc. (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 1 December 2011

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

65. This section allows the Scottish Ministers to make provision concerning the description of subjects in advance notices in relation to unregistered leases or plots.

Reason for taking power

66. Advance notices for registered subjects will be described by reference to the title number or a plan. This power allows the Scottish Ministers to make provision about the standard of description required for notices going into the Register of Sasines (which is not a map-based register). A balance is required between making the notice quick and easy to prepare but sufficiently detailed to identify the subjects. The power will allow for the provision to be decided based on experience of the new system.

Choice of procedure

67. This power will be of interest to stakeholders and it is important for the running of the system; affirmative procedure is considered appropriate.

Section 57(6) - Power to change protected period of advance notice

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

68. Section 57(1) sets the length of time an advance notice has effect at 35 days. Subsection (6) of that section gives the Scottish Ministers a power to vary that period.

Reason for taking power

69. The advance notice scheme is new to Scotland. It is thought that 35 days is the appropriate period but that may change. Flexibility is required if experience shows the period to be too short or too long.

Choice of procedure

70. Affirmative procedure is considered suitable for this power since it would have a significant effect on the workings of the policy.

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

Power conferred on: **the Scottish Ministers**

Power exercisable by: **order made by Scottish statutory instrument**

Parliamentary procedure: **negative procedure**

Provision

71. Section 58(6)(a) provides that the effect of an advance notice does not apply to specific documents registered under certain specified enactments. Section 58(6)(b) allows the Scottish Ministers to specify other types of deeds to be similarly unaffected.

Reason for taking power

72. Advance notices are a new concept in Scotland. There may be changes required to the procedure relating to advanced notices in light of experience. It is also possible there will be new types of deed created by statute that should not be affected by advance notices. It is therefore considered necessary that the Scottish Ministers are able to provide for such deeds

Choice of procedure

73. Negative procedure is thought appropriate given that this power is simply adding further detail and will not make significant changes to the policy.

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

Power conferred on: **the Scottish Ministers**

Power exercisable by: **order made by Scottish statutory instrument**

Parliamentary procedure: **negative procedure**

Provision

74. Section 61(1) provides that the Scottish Ministers may modify the application of Part 4 of the Bill in relation to certain deeds (e.g. to 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).

Reason for taking power

75. Section 58 envisages that certain deeds may be exempted from the effect of an advance notice. Similarly, certain registrable deeds (such as unilateral deeds granted by local authorities under statute) may have to be capable of being protected by an advance notice. It is therefore considered necessary for the Scottish Ministers to be able to tailor the provision made to provide specifically for such deeds. Advance notices are also a new concept in Scotland and inevitably

there may be changes required to the procedure relating to advanced notices in light of experience.

Choice of procedure

76. Negative procedure is thought appropriate given that this provision allows for further detail to be added to the advance notice system for specific cases and as a result of experience. It will not make significant changes to the operation of advance notices generally.

Section 66(3) - Power to set period after caveat expires

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

77. Section 66(1) makes provision about the period of time (12 months) after which a caveat under section 65 expires. Subsection (3) allows the Scottish Ministers to vary that time period.

Reason for taking power

78. Caveats are a new concept to land registration in Scotland. The period of 12 months is thought to be an appropriate period for a caveat placed or a caveat renewed (as this is the length of time court caveats last). If practice shows this period to be too short or too long, it is desirable to have the flexibility to change the period by subordinate legislation.

Choice of procedure

79. This time period will be of interest to various stakeholders, including the Lands Tribunal for Scotland. Affirmative procedure is considered appropriate.

Section 93(2) - inserted section 9B(1)(b) and 9B(2)(c) of the Requirements of Writing (Scotland) Act 1995 - Power to make regulations regarding validity of electronic documents.

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

80. Section 93(2) inserts a new section 9B into the Requirements of Writing (Scotland) Act 1995. Inserted section 9B(1)(b) provides that the Scottish Ministers may prescribe other requirements for an electronic document to be valid in respect of the formalities of execution. Section 9B(2)(c) provides for the Scottish Ministers to prescribe the type of electronic signature and any requirements for an electronic signature needed to authenticate such electronic document.

Reason for taking power

81. Electronic documents are required for electronic conveyancing and registration and may in future be desirable for other areas. They are intrinsically linked to technology and technological advances. It is therefore appropriate for the Scottish Ministers to have the power to set standards in this fast moving area.

Choice of procedure

82. This power is concerned with the practicalities of electronic validation and execution. The principles of the 1995 Act will not be altered. Negative procedure is considered appropriate.

Section 93(2) - inserted section 9C(2) of the Requirements of Writing (Scotland) Act 1995 - Power to make regulations regarding the presumption as to authentication of electronic documents

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

83. Section 93(2) inserts a new section 9C into the Requirements of Writing (Scotland) Act 1995. Inserted section 9C(2) provides that the Scottish Ministers may prescribe the type of and any requirements for an electronic signature to an electronic document needed in order to engage the presumption as to authentication.

Reason for taking power

84. There is a requirement for the Bill to be technology-neutral in this area so that the Scottish Ministers can ensure the law does not fall behind the technology. Given the fast pace of change in this area, it is considered appropriate to make changes in secondary legislation rather than require primary legislation.

Choice of procedure

85. This is mainly about process and how electronic documents will operate. It is considered negative procedure is appropriate.

Section 93(2) - inserted 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 made by Scottish statutory instrument

Parliamentary procedure: negative procedure, but affirmative procedure where regulations amend or repeal any enactment.

Provision

86. 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.

87. 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).

Reason for taking power

88. The presumptions and rules on alterations etc. of traditional documents already exist. The provision allows the Scottish Ministers, in light of experience and technology, to make suitable corresponding regulations for electronic documents.

Choice of procedure

89. These regulations are, in the main, about process and procedure and so negative procedure is thought appropriate. However, where regulations under 9E(1) amend or repeal any enactment, affirmative procedure is required. This is normal for amendment or repeal of enactments.

Section 93(2) - inserted section 9G(3) of the Requirements of Writing (Scotland) Act 1995 - Power related to registration and recording of electronic documents

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

90. Section 93(2) inserts a new section 9G into the Requirements of Writing (Scotland) Act 1995. Inserted Section 9G(3) provides that the Scottish Ministers may, after consultation with the Keeper of the Registers of Scotland, the Keeper of the Records of Scotland and the Lord President (under 9G(4)), make provision as to the form and type of an electronic document, the electronic signature authenticating it and, if it bears to be certified, the certification, of an electronic document that can be registered or recorded in one of the Keeper's registers. Inserted Section 9G(5) provides different provision may be made for different cases or classes of case.

Reason for taking the power

91. It is possible for electronic documents to exist in many different and often incompatible electronic forms. It is not realistic to expect the Keeper to be able to register every conceivable type of electronic document. The power is therefore required to control what forms of electronic document are and are not able to be registered. The provision allows the Scottish Ministers to consider, amongst other things, technology and cost of possible forms. It is considered this is best done in subordinate legislation.

Choice of procedure

92. This power is about ensuring smooth running and good administration of the Land Register. Negative procedure is considered appropriate.

Section 95(3) - Power to make provision regulating the Keeper's electronic land registration system

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

93. The provision allows the Scottish Ministers to make various provisions regarding automated registration. Currently this is known as the Automated Registration of Title to Land (ARTL) system. The power allows the Scottish Ministers to make provisions regarding:

- the kind of deeds that may be authorised for registration under such system;
- persons who may be authorised to use the system;
- the suspension or revocation of a person's authorisation;
- the method of appeal against such suspension or regulation;

This document relates to the Land Registration etc. (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 1 December 2011

- the imposition of obligations on persons using the system; and
- the creation of deemed warranties by persons using the system.

Reason for taking power

94. ARTL (and any successor system) requires security in order to operate effectively. Such systems operate on the presumption that applications made through them will be in order. As such, there is a need for rules on authorised users and rules on when such users should no longer be authorised. These rules are also, by their very nature, linked to advances in technology. They will require to be flexible and up to date. As such, they are better set out in secondary legislation than primary legislation.

Choice of procedure

95. ARTL is currently regulated by the Automated Registration of Title to Land (Electronic Communications) (Scotland) Order 2006, made under sections 8 and 9(5) and (6) of the Electronic Communications Act 2000. The current procedure is affirmative. Given the significance of the regulations being made and their importance to stakeholders, it is considered affirmative procedure is suitable here as well.

Section 96(1) - Powers to enable electronic registration

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure, but affirmative procedure where regulations amend or repeal any enactment.

Provision

96. Section 96(1) allows the Scottish Ministers to enable the recording or registration of electronic documents in any of the Keeper's registers.

Reason for taking power

97. The Bill envisages electronic registration in the Land Register. However, as technology and commerce move on, there may be a need for other registers to be e-enabled. The Bill provides the underlying framework for all electronic documents, so the flexibility of being able to open up other registers to such documents is desirable.

Choice of procedure

98. These regulations are, in the main, about the process and procedure of registering deeds in certain registers and so negative procedure will suffice. However, where they amend or repeal

any enactment, affirmative procedure is required. This is usual for amendment or repeal of enactments.

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

Power conferred on: **the Scottish Ministers**

Power exercisable by: **order made by Scottish statutory instrument**

Parliamentary procedure: **affirmative procedure**

Provision

99. The provision allows the Scottish Ministers to make provisions regarding what information has to be made available by the Keeper and the method of doing so and access to any of the Keeper's registers.

Reason for taking power

100. This provision is about what information the Keeper provides and how it is provided. It is also concerned with access to each of the Keeper's registers. As such, it is closely linked to technology and to IT. Giving power to the Scottish Ministers allows for the flexibility required to react to IT capabilities.

Choice of procedure

101. Information and access are an important element of public registers. As such, affirmative procedure is considered appropriate.

Section 106(1) - Power to set fees

Power conferred on: **the Scottish Ministers**

Power exercisable by: **order made by Scottish statutory instrument**

Parliamentary procedure: **affirmative procedure**

Provision

102. Section 106(1) allows the Scottish Ministers to provide for fees payable in relation to:

- registering, recording or entering in any register under the management and control of the Keeper;
- access to such a register; and

- information made available by the Keeper.

103. The power also allows for the Scottish Ministers to provide for the method of paying fees and for the Scottish Ministers to authorise the Keeper to determine, subject to limitations and conditions set out in the order, any such fees.

104. Section 106(1)(c) allows the Scottish Ministers to sub-delegate the power to set fees within specified parameters. If used, this power would allow the Keeper to react to market conditions without a new fee order being required.

105. Section 106(2) allows for the order to make different provision for different cases or classes of case. Section 106(3) provides the Scottish Ministers must first consult the Keeper before making an order under this section. Section 106(4) clarifies "information" in this section does not include information provided under section 104.

Reason for taking power

106. Fees will necessarily be influenced by costs and market conditions. They will also be influenced by technological advances. They may also have a role to play in encouraging registration in order to assist with completion of the Land Register. If they are to do this, they will require to be flexible. The Keeper therefore has flexibility to set fees within the limitations set by the Scottish Ministers.

Choice of procedure

107. The current fee order is subject to negative procedure. However, the level of fees is clearly of interest to stakeholders. The affirmative procedure will allow Parliament to scrutinise the fee order and decide what the range of fees should be.

Section 109(4) - Power to amend part of the definition of "designation" in the Bill

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

108. Section 109(1) defines "designation" for the purposes of the Bill. Section 109(4) allows Scottish Minister to amend paragraph (b) of the definition of designation.

Reason for taking power

109. In land registration, a person's "designation" is their unique identifier. It is also an anti-fraud measure. At present, an individual's designation is their name and address. If, in future, a better, more secure method of designating individuals emerges, it is desirable that the Scottish Ministers should be able to provide for its use without the need for primary legislation.

This document relates to the Land Registration etc. (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 1 December 2011

Choice of procedure

110. Affirmative procedure is considered appropriate given that this is a power to amend primary legislation.

Section 113(1) - Power to make ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: negative procedure, but affirmative procedure where the order amends or repeals any enactment.

Provision

111. The provision empowers the Scottish Ministers to make incidental, supplementary, consequential, transitory, transitional or saving provisions by order as they think appropriate. Subsection (2) allows such an order to make changes to primary legislation.

Reason for taking power

112. This is a general provision in standard terms that allows the Scottish Ministers to make provision by order to support the full implementation of the Bill. The power is considered appropriate for a Bill of this length and complexity.

Choice of procedure

113. Orders of the type under section 113(1) are in general made subject to negative resolution procedure but an exception is made where the order adds to, replaces or omits any part of the text of an Act. In that case, affirmative resolution procedure applies. This approach on procedure is in line with the approach taken in other Bills and there are not considered to be any reasons for a different approach in this case.

Section 118 - Power to provide for a designated day in relation to the Bill

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: To be laid before the Scottish Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Provision

114. This provision allows the Scottish Ministers to make provision by order as to a designated day for the purposes of the Bill.

Reason for taking power

115. Setting a designated day for the main operative land registration provisions of the Bill, which must be 6 months after the order under this section is made, allows for people affected by the Bill to prepare for any impact it may have. This is similar to the approach taken to the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5).

Choice of procedure

116. This provision is similar to a commencement order. It is appropriate that it is not subject to any Parliamentary procedure other than laying.

Section 119(3) - Power to commence the Bill by order

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: To be laid before the Scottish Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Provision

117. This section provides that the provisions of the Bill not specified in section 119(1) (which come into force on Royal Assent) or specified in section 119(2) (which come into force on the “designated day” under section 118) will come into force on a day set by the Scottish Ministers by order. Different days may be appointed for different provisions and different purposes.

Reason for taking power

118. This will enable the Scottish Ministers to bring the Bill into force. It is considered appropriate for the relevant provisions to be commenced at such times as the Scottish Ministers consider appropriate or expedient. It is standard procedure for such commencement provisions to be dealt with by subordinate legislation.

Choice of procedure

119. The commencement power has no procedure. This is usual for commencement powers.

This document relates to the Land Registration etc. (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 1 December 2011

LAND REGISTRATION ETC. (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM