



ros.gov.uk

Registers of Scotland
Land Registration (Scotland) Bill
Consultation Paper

Contact Ellen Okoe
Telephone 0131 659 6111 Ext. 5184
e Mail Ellen.Okoe@ros.gov.uk
e Mail LRConsultation@ros.gov.uk

Dear Consultee

REGISTERS OF SCOTLAND: LAND REGISTRATION (SCOTLAND) BILL CONSULTATION

Responding to this consultation paper

We are inviting written responses to this consultation paper by **30 November 2010**. Please send your response with the completed **Respondent Information Form** (see 'Handling your Response' below) to:

LRConsultation@ros.gov.uk

or

Ellen Okoe
Registers of Scotland
Room 1.05
Erskine House
68 Queen Street
Edinburgh
EH2 4NF

If you have any queries contact Ellen Okoe on 0131 659 6111 Ext. 5184 or Ellen.Okoe@ros.gov.uk.

We would be grateful if you clearly indicate in your response which parts of the consultation paper you are responding to as this will aid our analysis of the responses received. This consultation can be viewed online at <http://www.ros.gov.uk/lrbillconsultation>.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form**, which forms part of the consultation paper attached to this letter, as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential and we will treat it accordingly.

All respondents should be aware that Registers of Scotland and the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to them under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library within 20 working days of the consultation closing date and on the Registers of Scotland website within 25 working days of the consultation closing date. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

We will issue a report on this consultation process to the Scottish Ministers to assist them in deciding whether to introduce the draft Land Registration (Scotland) Bill into the Scottish Parliament.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact details above.

Yours sincerely



Sandy McNeil
Legal Director

Contents

Chapter 1 – Background	5
Chapter 2 – Completion of the Land Register	7
Chapter 3 – Advance Notices	11
Chapter 4 – Electronic Land Contracts and Deeds	13
Chapter 5 – Mapping	16
Chapter 6 – Acceptance and Rejection of Applications	20
Chapter 7 – Duties of Care	23
Chapter 8 – The effect of registration and the rectification of inaccuracies....	25
Chapter 9 – Guarantee of Title	27
Chapter 10 – Archive Record.....	31
Chapter 11 – Designation of Parties: date of birth	33
Chapter 12 – Issues going beyond the SLC Recommendations.....	34
Chapter 13 – Miscellaneous and General.....	36
Appendix A – List of Consultation Questions	39
Appendix B – The Scottish Government Consultation Process	43
Appendix C – Respondent Information Form.....	44
Appendix D – List of Consultees.....	45
Appendix E – Partial Business Regulatory Impact Assessment	47
Appendix F – Equalities Impact Assessment	61
Appendix G – Strategic Environmental Assessment.....	64

Chapter 1 — Background

1.1 This is a consultation on a proposed new Land Registration (Scotland) Bill. It is being carried out on behalf of the Scottish Ministers by Registers of Scotland (RoS), which is the non-Ministerial Government Department responsible for registering a variety of legal documents mainly relating to interests in land. We are part of the Scottish Administration and are associated with the Finance and Sustainable Growth Portfolio of the Scottish Government.

1.2 RoS is headed by a statutory officeholder, the Keeper of the Registers of Scotland, who is responsible for compiling and maintaining 16 public registers. Our work is primarily associated with the Land Register and the General Register of Sasines. We handle around half a million registration transactions each year and we also make information from the registers publicly available.

1.3 Scotland has a long history of public registration of rights in land and property. The Register of Sasines, our original national register of property deeds, dates back to 1617. Over the centuries, the Sasine Register developed into a highly effective public record which, combined with high standards in professional conveyancing and principled property law, have given Scotland an effective balance between certainty as to ownership and ease of transacting with land and buildings.

1.4 However, from the late 1850s, a different approach to land registration had been evolving in some other jurisdictions (including England and Wales). This approach, which is fundamentally about registration of titles to land rather than mere registration of property deeds, involves two great innovations: first, the idea of a map-based register, which is readily understandable to the lay person and removes uncertainty as to the location of the legal boundaries between adjoining properties; and second, the idea that registered titles should be guaranteed by the state, obviating any need for an intending acquirer to look beyond that which is disclosed by the Land Register itself.

1.5 The Land Registration (Scotland) Act 1979¹ (the 1979 Act) was passed to introduce this new form of registration of title to Scotland, and beginning in the County of Renfrew in April 1981, titles that were transferred on a sale began to be transferred to the new Land Register of Scotland, which now covers all areas of Scotland. There are currently some 1.2 million titles on the new Land Register, representing 19% of the landmass of Scotland and around 55% of titles. The remainder, being about 0.9 million titles amounting to 81% of landmass, is predominantly the subject of Sasine recorded titles, although land that has not been transacted with since 1617 is in neither register.

¹ c.33

1.6 The Land Register, as intended, provides much clearer land information and the backdrop for simple, low risk conveyancing. However, experience has shown that there are some problems with the 1979 Act (for example it deals inadequately with completing the transition from Sasine Register to Land Register).

1.7 In 2001, RoS, with the agreement of the Scottish Ministers, asked the Scottish Law Commission (SLC) to review the 1979 Act. This led to three consultative Discussion Papers: "[Land Registration: Void and Voidable Titles](#)"², "[Land Registration: Registration, Rectification and Indemnity](#)"³, and "[Land Registration: Miscellaneous Issues](#)"⁴ which were issued in 2004 and 2005. These, combined with a massive amount of further research, consideration, innovation and consultation, culminated in completion, at the end of 2010, of the Commission's final "[Report on Land Registration](#)"⁵ (the SLC report), which incorporates the draft Bill that is the subject of this consultation.

1.8 The Commission's Report includes 150 specific proposals, many of which divide into sub-proposals. In addition, the draft Bill includes hundreds of more minor innovations and improvements to the current legislative governance of the Land Registration system in Scotland. To attempt to consult upon every proposal is impractical, especially since much of what the SLC propose retains the status quo, referred to as "pumping concrete into the foundations", where mature registration practice is unsupported by the current legislative provisions.

1.9 However, RoS wants to gauge public reaction to the more significant changes to the system that the SLC advocate and to gauge opinion on a number of additional areas going beyond the SLC's recommendations. The consultation therefore poses a number of questions in these areas.

1.10 We recognise that some consultees may have particular interests in areas that we may have viewed as uncontroversial from our perspective and have excluded on the basis that we are satisfied with the work already carried out by the SLC. We therefore welcome responses to the following general questions:

Question 1: Do you agree with the recommendations in the Scottish Law Commission's Report?

Question 2: Do you want to comment on or do you disagree with any particular recommendations in the Scottish Law Commission's Report, not specifically covered by the other questions in this consultation paper? If so please identify the recommendation in question and provide comments.

² Scot Law Com DP No. 125

³ Scot Law Com DP No. 128

⁴ Scot Law Com DP No. 130

⁵ Scot Law Com No. 222

Chapter 2 — Completion of the Land Register

(SLC Report Part 33, draft Bill Part 8)

Introduction: the current legal position

2.1 Under the current legislation, the circumstances in which a title held in the Register of Sasines will be transferred to and registered in the Land Register (known as 'first registration') are either registration triggered by a transfer of land for valuable consideration or voluntary registration at the Keeper's discretion.

2.2 The SLC note that although around 55% of titles are now registered in the Land Register, this equates to just under 20% of land mass coverage. In fact, there are still properties that do not even appear in the Register of Sasines because there has been no related deed since this Register was established in 1617. Although the Land Register continues to grow, in another 400 years it is still unlikely to be complete unless something is done to change this.

The new scheme

2.3 The purpose of the provisions in Part 8 of the draft Bill is to achieve the objectives of having all land in Scotland registered in the Land Register and thereafter to close the Register of Sasines.

2.4 The strategy put forward by the SLC to achieve completion of the Land Register has three elements:

- removal of the Keeper's power to decline to accept applications for voluntary registration;
- more triggers for first registration; and
- a power that allows the Keeper to initiate registration of any unregistered properties without an application being made.

2.5 The SLC anticipate the closure of the Register of Sasines happening in three stages:

- Closure Step I - as from the commencement of the new legislation, the Register of Sasines will be closed to all transfers of property;
- Closure Step II - as from a later date to be fixed by statutory instrument, the Register of Sasines will be closed to all new standard securities; and
- Closure Step III - as from a later date to be fixed by statutory instrument, the Register of Sasines will be closed to all deeds.

Voluntary Registrations

2.6 Currently, the Keeper has absolute discretion as to whether or not to accept an application for voluntary registration.

2.7 With a view to accelerating the completion of the Land Register, the SLC recommend that as from a future date set by Scottish Ministers by statutory instrument and after consultation, the Keeper will cease to have discretion to refuse applications for voluntary registrations.

2.8 It should be noted that the provisions relating to voluntary registration are also linked to closure of the Sasine Register. Given that at some point the Sasine Register will be closed to the intake of all deeds, it follows that an owner of an unregistered property must have the ability to register their title. For example, if the owner wishes to grant a new standard security and their title is unregistered, the security cannot be registered without the title being registered.

Question 3: Do you agree that it should remain possible for the proprietor of unregistered land to seek voluntary registration and that after a date to be prescribed the Keeper should cease to be able to decline such applications?

Closure Step I — transfers of property

2.9 The current law provides that only those transfers of property that are deemed to be for 'valuable consideration' induce first registration of the interest being conveyed into the Land Register. As a result of this, there are a significant number of properties, for example those which stay in the same family for generations, which are likely to remain unregistered for the foreseeable future. This position would change given that it would no longer be possible to record **any** disposition in the Register of Sasines. This will undoubtedly accelerate the extension of the Land Register.

Question 4: Do you agree that all transfers of unregistered land should induce first registration in the Land Register?

Closure Step II — standard securities

2.10 Presently, a standard security that is granted over land still held in the Register of Sasines falls to be recorded in that Register. It is only once either the ownership interest or the leasehold interest is brought into the Land Register that the subsequent grant of a security can be registered against the relevant Title Sheet. The SLC recommend that, as from a date fixed by statutory instrument, it will no longer be possible to record a new standard security in the Register of Sasines. However, it would still be possible to present deeds such as discharges and assignations that relate to existing securities.

2.11 Given that by the time the Register of Sasines is closed to new standard securities it will already have been closed to all transfers of property, the consequence of this provision for proprietors of unregistered land wishing to grant new standard securities is that they must make an application to register their land in the Land Register. This application will form a voluntary registration. By the time this provision is in force, the Keeper will no longer be able to refuse voluntary registration applications.

2.12 The SLC anticipate that this provision will not cause substantial inconvenience and we agree. They argue that by the time the provision is in force the number of unregistered properties will be fairly small and that voluntary registration would not require to take place prior to any application for registration of a security, so both applications could be submitted contemporaneously. There are obvious benefits to both the proprietor and the heritable creditor: the proprietor gains a registered title, whilst the creditor obtains a registered real interest in the land that is also protected by the Keeper's warranty.

Question 5: Do you agree that, after a date to be prescribed, it should cease to be possible to create a security (mortgage) by recording in the Register of Sasines?

Registration without application

2.13 Although, eventually, the Register of Sasines will be closed to the intake of all deeds, this in itself does not mean that there will be no remaining unregistered Sasine titles. The draft Bill therefore provides for the final completion of the Land Register by giving the Keeper power to register any unregistered plot of land at any time, irrespective of whether the consent of the proprietor or any other person has been obtained. Registration that is instigated by the Keeper will not affect the rights of the parties with an interest in the land.

2.14 In the new scheme, there will be two types of registrations that can be instigated by the Keeper. The one described above is outwith the context of any transaction and will allow the Keeper to, essentially, 'fill in the gaps' in the Land Register. The other does involve a transaction but there is no owner or disponee to make the application for registration of the property. An example would be an application to register an assignation of a long lease where the lease is registered in the Register of Sasines. In order to register the assignation, a Title Sheet must be created for the plot of land. In such cases the Keeper will register the plot.

2.15 The SLC discuss the source of the details required to make up the Title Sheet in such cases. Primarily, the details will be taken by the Keeper from the Sasine Register; however, the SLC note that there will be cases, albeit rare, where a proprietor cannot be identified. This potential issue is resolved by a provision in the new system that allows the Keeper to note on the Title Sheet the uncertainty or absence of the details of a proprietor.

2.16 It might be a concern that a result of registering property without the requirement of the consent of the titleholder is that proprietors and their agents may be unaware when their plots are first registered. Accordingly, the new legislation permits the Keeper to notify such registrations to the proprietors and any other person as she sees fit.

Question 6: Do you agree that the Keeper should be empowered to register plots without any application having been made?

Question 7: If you do not agree, what difficulties do you foresee with such an approach?

Completion of the Land Register

2.17 From a practical and public understanding viewpoint having one property registration system for Scotland is more efficient than running two quite different systems. The Land Register is more transparent and easier to interpret, making it far less confusing to members of the public and conveyancing practitioners alike. Completion of the Land Register will mean that the whole landmass of Scotland is mapped in terms of title boundaries, with all the title data available online. Registration of title in the Land Register also offers titleholders a title that is definitive in nature and extent plus is backed by a statutory warranty.

Question 8: Do you agree that the long term aim should be to complete the Land Register and relegate the Register of Sasines to a purely historical record?

Chapter 3 — Advance Notices

(SLC Report Part 14, draft Bill Part 4)

Introduction - The gap risk

3.1 The object of a normal conveyancing transaction is that the grantee receives a real right from the granter, and the granter receives money, or other consideration, from the grantee. In most cases there is a single moment, known as settlement, when the consideration is given to the granter and the deed is delivered to the grantee. The delivery of the deed itself does not confer on the grantee the real right in the property: this is only achieved through the registration of the deed. In practice, registration cannot occur simultaneously with the delivery of the deed to the grantee. This results in a period where a risk can enter the conveyancing process. That risk divides into (a) insolvency risk, i.e. the risk that the granter is sequestrated, put into liquidation etc, and (b) competing deed risk, i.e. the risk that the granter grants a deed to another party and that deed reaches the Land Register first.

Letters of Obligation

3.2 The traditional way of covering the gap risk is for there to be a letter of obligation by the granter's solicitor in favour of the grantee. This is a guarantee, binding the solicitor's firm, which covers the period of risk. Law firms insure against the risk they incur by providing this guarantee. Full insurance cover is only available for what is termed 'classic' letters of obligation. The premiums paid for these insurance policies are part of the cost for a firm doing conveyancing and, as such, are indirectly passed onto clients through their conveyancing fees. If these premiums increase, so does the cost of conveyancing to the general public.

The alternative - advance notices

3.3 A solution that has been developed in some other legal systems is a registered advance notice. The basic idea is that a notice is placed on the Land Register saying that the owner, X, is intending to grant a deed to Y. This notice does not confer on Y a real right. The real right is only obtained on the registration of a deed in favour of Y. What it means is that if a deed is in due course granted to Y and registered, then anything in the Land Register in favour of another party, Z, that is registered between (i) the date of the advance notice and (ii) the date of registration of the deed to Y is postponed to the latter. This is not unfair to Z, because third parties can search the Land Register and thus see the advance notice for the deed in favour of Y. Such schemes are not costly to operate,

3.4 The SLC propose that a system of advanced notices be introduced to Scotland. The Bill itself provides for an optional system, which would only apply to properties registered in the Land Register, although there is a power for the Scottish Ministers to extend it to applications for first registration. The advance notice would be in a standardised form narrating the granter and grantee, identifying the property and the type of deed which will be granted. It would be entered on the Application Record for the affected title so that an

ordinary search of the Land Register would disclose the existence of the advance notice.

Question 9: Do you agree that a system of advance notices should be introduced?

3.5 The purpose of the advance notice is to provide the grantee of the deed a protected period against the risks outlined above before the application to register the deed is submitted. The advance notice would be effective for 35 days commencing from the day the notice is entered onto the application record. The protected period is not backdated to the date that the notice is granted or to the date that the application is submitted to the Keeper.

Question 10: Do you agree that 35 days is an appropriate length of protected period and if not what alternative period would you view as appropriate?

Effect of advance notice

3.6 Section 36 of the draft Bill outlines the effects of an advance notice. The principal effect is that a protected deed (Deed Y), if registered within the protected period, takes effect as if a prior competing deed received within the protected period (Deed Z) had not been registered. The secondary effect is that the grantee of Deed Y is protected from adverse entries in the Register of Inhibitions taking effect during the protected period.

As an example:

Circumstances: X who is the owner of Blackmains, grants an advance notice in favour of Y in respect of a prospective disposition of that property.

The advance notice is entered in the application record of the Land Register on 1st May.

X delivers a disposition of the property to Y but also delivers a disposition of the same property to Z.

On 8th May, Z's disposition is registered in the Land Register.

On 15th May, Y applies for registration in the Land Register.

Consequence: the Keeper first accepts and registers Z's application. On receipt of Y's application she registers Y's disposition and replaces Z's name by Y's in the Land Register. Y becomes the registered owner of the property with effect from 15th May.

Further examples are given in Schedule 3 of the draft Bill.

Question 11: Do you agree that an advance notice should have the effect that a protected deed takes effect as if any prior competing deed received within that protected period had not been registered and that the grantee of the protected deed should be protected from adverse entries in the Register of Inhibitions taking effect during that period?

Chapter 4 — Electronic Land Contracts and Deeds

(SLC Report Part 34; draft Bill section 83(2) and schedule 5.

Introduction — the current legal position

4.1 For many centuries, Scots Law has had rules about the form and authentication of contracts (often known as ‘missives’) relating to rights in land and deeds that create, transfer and vary rights in land such as dispositions (property transfer deeds) and standard securities (mortgage deeds.) Such rules are necessary to minimise the scope for uncertainty and disputes about parties’ intentions in land contracts and conveyances.

4.2 The current law covering the authentication of such contracts and deeds is contained in the Requirements of Writing (Scotland) Act 1995⁶ (the 1995 Act), which did not contemplate land contracts and deeds being in electronic form, or being authenticated electronically. Rather, the 1995 Act restricts itself to what the SLC have termed ‘traditional documents’ in which text must be applied to a physical surface such as paper or parchment and also authenticated in a physical format (usually in the form of a handwritten signature).

4.3 Until recently, the effect of the 1995 Act was that all land contracts and deeds could be formed only on paper. In 2006, amendments were made to the 1995 Act to permit valid electronic land deeds to be created, and authenticated by secure ‘digital signatures’ within RoS’s Automated Registration of Title to Land (ARTL) system⁷. However, ARTL is limited in scope (see SLC Report paragraphs 34.6 to 34.12) and can only be used to create land deeds in certain situations. All other land deeds, and every land contract, continue to require to be formed and authenticated as traditional documents.

4.4 Electronic communication has revolutionised the way in which many types of business are conducted but all land contracts and most land deeds are excluded from the benefits of new technology by the terms of the 1995 Act. Opinion amongst stakeholders is generally that the time has come to fully ‘e-enable’ the 1995 Act insofar as it governs land contracts and deeds. Safeguards will of course be needed, and we discuss these later in this chapter. The SLC propose that it will remain necessary for all land deeds and contracts to be in writing but that writing may take an electronic form, such as a Microsoft Word document or an Adobe Acrobat PDF file⁸.

Policy considerations – electronic land deeds

4.5 The policy arguments in favour of permitting land deeds to be created and authenticated in electronic form have already been substantially validated by the limited e-enablement put in place for ARTL. They include:

⁶ c.7

⁷ See The Automated Registration of Title to Land (Electronic Communications) (Scotland) Order 2006 SSI 2006/491

⁸ We acknowledge those providers’ intellectual property rights in their own and their product names.

- meeting stakeholder expectations;
- increased speed of processing and communication, making the conveyancing process more satisfactory for consumers;
- increased scope for automation in conveyancing firms, lending institutions and RoS, increasing efficiency and leading ultimately to reduced costs for consumers; and
- consistency with European and UK policy on developing electronic commerce, and with Scottish Government policy on making Scotland a better place to do business.

4.6 The only obvious arguments against fully e-enabling land deeds are that, without adequate safeguards, it might become too easy unwittingly to create or transfer rights in land, or to do so by a transient form of electronic communication, the existence (or non-existence) of which might be difficult to prove at a later date. We think that these arguments are properly answered not by denying the possibility of electronic land deeds, but by permitting appropriate safeguards to be imposed by secondary legislation.

Question 12: Do you agree that deeds conveying rights in land should be permitted to be in electronic form?

Policy considerations — electronic land contracts

4.7 The policy considerations for permitting electronic land contracts are similar to those relating to deeds, but in several ways more compelling. In the first place, whilst some deeds can already be electronic if created within ARTL, no land contract can yet be electronic. It could be viewed as an irrational anomaly that the contract precedent to an electronic deed currently needs to be on paper. Secondly, with missives, the need for speed and ease of communication is arguably greater than with deeds. Arguably, professional conveyancers should not be barred from using technologies such as email to carry through their clients' instructions quickly and efficiently.

Question 13: Do you agree that land contracts should be permitted to be formed electronically?

The requirement for safeguards and standards

4.8 As already noted, the underlying policy objectives of legal rules as to the format and authentication of land deeds and contracts include avoidance of disputes and uncertainty. In practice most people do have an awareness that signing a paper document about land is likely to have legal consequences. It should be difficult for a person, particularly an unrepresented member of the public, to unwittingly contract to buy or sell land, or to transfer or encumber their land. It is also desirable that such deeds and contracts should be in a durable format that may be retained for use as evidence in the event of any dispute arising at a later date. The current law for paper contracts and deeds actually says less about this than one might expect (see SLC Report paragraph 34.36) but in practice care is taken and difficulties are rare. A third point is that, so far as reasonably practical, the scope for fraud and forgery should be limited.

4.9 With new forms of electronic communication, these points cannot be taken for granted. For example (developed from paragraph 34.37 of the SLC Report), suppose that site agent Alice texts potential buyer Bob “Plot 16 now reduced to £220K do you want it? Alice.” If Bob texts back “OK, Bob” does that constitute a binding contract? Bob may not expect legally to bind himself, and if his mobile is not set to retain sent items, he may not even have a record of his reply to Alice. If the 1995 Act were simply modified to allow any electronic document authenticated by any electronic signature to form a contract, Bob might be bound. Further, the exchange provides very little assurance that the parties involved actually were Alice and Bob and not impostors.

4.10 Whilst it appears appropriate to remove barriers to e-commerce that stand in the way of property professionals conducting their business more efficiently, it is necessary to retain the ability to prescribe minimum standards and safeguards. Given that the forms of electronic document and of electronic signature are evolving all the time, the SLC recommend that power be delegated to the Scottish Ministers to set standards by statutory instrument.

4.11 At present there are two thresholds for paper land deeds and contracts. The first is formal validity, which is achieved simply by a document being signed by its granter; the second is ‘probativity’ or ‘self-proving status,’ whereby a document is presumed, unless the contrary is shown, to have been granted by the person by whom it bears to have been granted, which is usually achieved by the granter’s signature being witnessed. The SLC recommend that, for electronic documents, Scottish Ministers should be able to prescribe by Regulations the conditions to be met for achieving formal validity and probativity. The SLC also recommend introduction, for electronic documents only, of a third threshold condition, registrability, with the standard again to be set in Regulations. In practice, paper deeds submitted to the Keeper’s registers and to the Sheriff Court Books are invariably in formats that the Keeper’s staff or, as the case may be, Sheriff Clerks can understand and process. However, this does not follow for electronic documents, and the Keeper of these public registers cannot be expected to have and maintain the capability to process every conceivable format of electronic document and electronic signature; hence the need for a standard-setting power.

Question 14: Do you agree that there should be controls on the format and authentication of acceptable electronic land deeds and land contracts and that power should be delegated to the Scottish Ministers to prescribe standards for legal validity, probativity, and registrability?

Question 15: Do you think that some safeguards should be included in the primary legislation rather than secondary legislation? If so, what should those overarching safeguards be?

Chapter 5 — Mapping

(SLC Report Parts 5 and 6, draft Bill sections 3, 4, 15, 16, 29, 30 and 31)

5.1 It is one of the basic principles of property law that a real right can be created or transferred only in relation to that which can be specifically identified. A conveyancing deed must therefore describe the land it deals with in such a way that the land can be identified but there is no requirement for such a deed to contain or refer to a plan. When the Register of Sasines was introduced in 1617, there was no compulsion for deeds to contain plans and this remains the case to the present day. In contrast, the 1979 Act instructed the Keeper to make up and maintain a Title Sheet that includes a description of the land based on the Ordnance Survey (OS) Map. It also gave the Keeper the power to reject applications where the description of the land was not sufficient to identify it on the OS map. This introduced a statutory foundation for the identification of legal title on plans.

Cadastral Map

5.2 Since the inception of the Land Register in 1981, the Keeper has included in every Title Sheet a Title Plan based on the OS Map. The Title Plan shows by coloured edging and tints the extent of the property and also the land to which particular rights and burdens relate. The Keeper maintains an Index Map that is based on the OS Map and shows all the registered titles.

5.3 The SLC recommend there should be maintained, as part of the Land Register, a map of Scotland to be known as the Cadastral Map, in effect replacing the current Index Map. A Cadastral Map is a map showing the boundaries and ownership of land parcels. This term is in common usage around the world for land register maps. It is not a topographic map although it may use an underlying topographical map, such as the OS map, as a base map. The SLC recommend that the Keeper should have the discretion to replace the OS base map with some other system of mapping that accords with requirements of Scottish Ministers.

5.4 The extent of the Cadastral Map will be constituted by the combined extents of all of the registered titles. The map will be divided into cadastral units, which will represent a single registered plot of land that is owned by one person (e.g. an individual or company) or one group of persons. A cadastral unit will be distinguished by a cadastral unit number, which will be assigned by the Keeper and the Title Number of the registered title will correspond with the cadastral unit number. For example, the Title Sheet for REN12345 will refer to cadastral unit number REN12345.

No registration without mapping

5.5 The provisions in the 1979 Act regarding the identification of registered properties on the OS map established the principle of map-based registration. Although most titles are specifically delineated on the OS Map, there are currently two main exceptions. The first is tenement properties (discussed in paragraph 5.6 below); the other is where property is disposed together with a pro indiviso share in a common area, the common area not being identified by

a plan in a deed. The proposal for the Cadastral Map and cadastral units gives a statutory footing for the principle that there will be no registration without mapping. Therefore, the current practice of registering common areas without specific delineation, which has the disadvantage that these areas cannot be identified when searching the Index Map, will end. The only instance where registration without specific mapping will be permitted is tenement properties.

Tenements

5.6 Flats within tenements are often described in the conveyances without reference to a plan. The deed simply contains a written description of the flat and the exclusive and common property rights that pertain thereto. In these cases, the Keeper maps the tenement standing (i.e. the whole area occupied by the tenement building and its associated garden ground) on the Title Plan and includes a written description for the exclusive and common property in the Property Section of the Title Sheet. The SLC propose that this practice is given a statutory basis.

5.7 The SLC propose that the standing extent of the tenement will be depicted as a single extent on the Cadastral Map. Each of the flats within the tenement will be given a separate cadastral unit number.

Question 16: Do you agree that there should be no registration without mapping?

Question 17: Do you agree that within tenement steadings individual plots do not need to be mapped?

Common areas

5.8 The Keeper's current practice is to include in the Title Sheet for an individual property any pro indiviso shares in common property that relate thereto. For example, a plot of ground that encompasses a driveway that is common between two neighbouring properties will be included in both Title Sheets. Each Title Sheet will include a 1/2 pro indiviso share to the driveway. With the introduction of the Cadastral Map, the driveway would be given a separate cadastral unit number and a separate Title Sheet. The Title Sheet will reflect that this area of ground is common property. This proposal will affect the registration of all common property, including common property within developments.

Shared Plot Title Sheets

5.9 Having a separate cadastral unit and separate Title Sheet for a common area would have the potential to give rise to double handling, for example every time one of the sharing plots changes hands, or a security is granted over one of the sharing plots, a change would have to be made to the Title Sheet of the common area as well as to the Title Sheet of the sharing plot. To avoid this, the SLC recommend that the Keeper have the ability to designate a common area Title Sheet as a 'shared plot Title Sheet'.

5.10 In a shared plot Title Sheet the Proprietorship Section, instead of naming and designing the co-owners, would simply list the Title Numbers of the sharing plots. The Property Sections of the Title Sheets for the sharing plots would include a reference to the Title Number of the shared plot. Thus, when the sharing plot changed hands, no change would be needed to the shared plot Title Sheet. Reference in contracts of sale and deeds to the sharing plot Title Number will include the interest in the shared plot unless the contrary is stated.

5.11 To illustrate, the houses 1 and 2 High Street, Anytown, each have a 1/2 pro indiviso share to a driveway lying between the properties. The houses are registered and given the Title Numbers WLN12345 and WLN54321; they are the sharing plot Title Sheets. The driveway is given a separate cadastral unit number and a separate Title Sheet WLN98765-S. The Property Sections for WLN12345 and WLN54321 will both include a reference to WLN98765-S and the pro indiviso share therein, which is an accessory to the subjects. The Proprietorship Section for WLN98765-S will list that the subjects in that title are an accessory of the Title Sheets WLN12345 and WLN54321, each to the extent of a 1/2 pro indiviso share.

Question 18: Do you agree that co-owned areas should become the subjects of separate Title Sheets?

Question 19: Do you agree that the Keeper should have the discretion to make up such title as shared plot Title Sheets?

Common areas within developments

5.12 A practice has developed in conveyancing deeds whereby the common areas within developments conveyed in split-off dispositions for individual properties are not identified with reference to a plan. A reason for this is that when a developer has sold a plot and purported to include common rights to amenity areas within the development (footpaths, play areas etc.) the extent of the common amenity areas has not been fully established at the time of the sale. In the past, the Keeper reflected the conveyancing submitted, resulting in Title Sheets that included reference to areas which were intended to be common.

5.13 A recent Lands Tribunal decision has led the Keeper to review this practice. The Keeper's current practice is to include rights in common in a Title Sheet only where they can be specifically identified either with reference to a plan or by a written reference. In future, common areas within developments will have to be identified on the Cadastral Map and given a separate cadastral unit number (such areas would in practice be a shared plot).

Provisional Shared Plot Title Sheets

5.14 The SLC propose the introduction of provisional shared plot Title Sheets to provide developers with a facility to manage the conveyance of titles to common areas within developments. This proposal would give a

developer the option to apply to the Keeper to open up a new Title Sheet for the intended common areas within a development.

5.15 As developers convey the individual properties within the development the Title Sheets for those properties would contain a reference to the provisional shared plot Title Sheet. At this stage the extent of the common areas would not have been established and thus no real right in the provisional shared plot would have been transferred

5.16 On completion of the development, the developer would lodge with the Keeper a plan of the common areas. This plan would be part of what is termed an ascertainment deed, which acts as a conveyance of the now-identified common areas. On receiving an application to register this deed, the Keeper would map the common areas in the provisional shared plot Title Sheet and remove them from the developer's Title Sheet. The provisional status of the shared plot Title Sheet would be updated, which would have the effect of giving the proprietors of the individual properties a right in common to the common parts. In the proposed scheme the developer would have nine years to lodge the ascertainment deed with the Keeper. If after nine years the developer has not ascertained the common areas, the Keeper will cancel the provisional shared plot Title Sheet and remove any reference to it from the sharing plot Title Sheets.

Question 20: Do you agree with the proposals for provisional shared plot Title Sheets and ascertainment?

Chapter 6 — Acceptance and Rejection of Applications

(SLC Report Parts 12 and 16; draft Bill sections 17, 20 and 21)

Introduction — the current legal position

6.1 The 1979 Act detailed what could be registered in the Land Register but did not define what constitutes an acceptable application for registration, nor did it provide a mechanism for the Keeper to reject unacceptable applications. It is clear that the Keeper must be entitled to reject an application where the deed is invalid. While the Keeper currently operates a policy of rejecting applications where persons seek to obtain property that clearly belongs to someone else, there is no statutory basis for the rejection of these applications. The draft Bill seeks to clarify the position by creating clear rules governing the acceptance and rejection of applications for registration.

Criteria for acceptance

6.2 Both the 1979 Act and the draft Bill contain ‘translation provisions’, so that, with a few exceptions, provisions authorising recording in the Register of Sasines in prior legislation are to be read as including registration in the Land Register.

6.3 In addition, section 2 of the 1979 Act set out to detail all the circumstances that would give rise to registration. However, this approach created practical difficulties, as a residual, or ‘catch-all’, category (subsection 2(4)(c)) acted to blur the crucial and fundamental distinction between registration and rectification. This created uncertainty and has resulted in litigation.

6.4 Accordingly, section 17(1(a)) of the draft Bill is a simple, all-encompassing statement about eligibility of deeds for registration. The proposed rule is that registration must be authorised by an enactment; for example, standard securities are authorised by section 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970⁹. The proposed rule creates certainty about what may and may not be registered and thereby preserves the integrity of the Land Register as a record of real rights.

Question 21: Do you agree that registration of rights of land should only be permissible where specifically authorised by legislation?

Acceptance or rejection of application

6.5 Section 4(1) of the 1979 Act provides that “an application for registration is to be accompanied by such documents and evidence as he (the Keeper) may require.” This provides the Keeper with the necessary discretionary power to reject invalid deeds. It has become increasingly clear that the basis for acceptance or rejection should be more clearly expressed

⁹ c.35

where the safeguarding of important interests in land is concerned. Section 20 of the draft Bill sets out clear and unambiguous conditions that must be satisfied for an application to be accepted for registration. Furthermore, the proposals in the draft Bill direct the Keeper to reject applications to register void (invalid) deeds.

6.6 Where a deed is partially invalid, subsection 20(1) allows the Keeper to register it to the extent of its validity. For example, this would mean that if an application contains a deed where there is a small area of ground where the grantor of a deed does not have title, then the Keeper can proceed to complete the application by registering only those parts to which the grantor does have good title.

6.7 A valid deed must be correctly executed (i.e. signed) by the grantor thereof, in terms of in the 1995 Act. While the Keeper, as a matter of policy, has a general rule requiring all deeds accepted for registration to be probative (self-proving), again relying on section 4(1) of the 1979 Act, the draft Bill introduces a statutory requirement for self-proving status for all deeds submitted for registration, thus bringing the Land Register into line with the long-standing rule in the Sasine Register.

6.8 In authorising the Keeper to accept only valid and probative deeds, the draft Bill clarifies and gives a legislative basis for the safeguards already employed to ensure that land is not registered without right or on the basis of unsatisfactory evidence.

Question 22: Do you agree that, in order to be registered, a deed must be (a) valid and (b) probative?

Prescriptive claimants

6.9 Special provision is required for *a non domino* dispositions (those deeds granted by a person without title to the ground in question). These deeds have long been a part of Scots Law and, as the SLC observe, may have legitimate and valuable purposes. Registering an *a non domino* disposition, followed by possession of the land for the prescriptive period of ten years, will lead to a good title.

6.10 The Keeper's current policy is to accept *a non domino* dispositions that serve a legitimate purpose, so that applicants may obtain the benefits of positive prescription, and to reject those that are speculative. The draft Bill does not seek to change the substantive law of prescription but rather seeks to provide a statutory basis for the Keeper to accept or reject applications to register *a non domino* dispositions. The draft Bill also introduces the term 'prescriptive claimant' for a person taking title.

6.11 It is proposed that, but for the fact that the grantor does not have title, an *a non domino* disposition contained in an application for registration must be a valid deed in all other aspects. Next, the draft Bill sets up conditions that give the Keeper a statutory basis to decide if the application should be accepted for registration.

6.12 To achieve this, two filter conditions are proposed. The first is that the owner must have been out of possession of the subjects for at least seven years. The second is that the prescriptive claimant must have possessed the subjects for at least one year and that possession must be in terms of existing legislation, i.e. openly, peaceably and without judicial interruption and must be to the exclusion of any proprietor of the subjects. Taken together, the two conditions provide a safeguard.

6.13 Positive prescription still has to run after registration, so a true owner will have to be out of possession for at least 17 years before they lose title. The draft Bill also provides a further safeguard: where there is an identifiable true owner, the Keeper will be entitled to notify that person. In such cases, the true owner will have a further ten years in which to assert their title, either by using judicial remedies or by regaining possession.

Question 23: For an *a non domino* disposition to be registered, do you agree that the applicant or granters should have been in possession for the preceding year?

Question 24: For an *a non domino* disposition to be registered, do you agree that the owner should have been out of possession for at least 7 years?

One-shot principle

6.14 Not all applications for registration contain the necessary documentation and the Keeper currently uses the discretionary powers of subsection 4(1) of the 1979 Act to requisition any missing information from the submitting solicitor.

6.15 Using the Keeper's staff to requisition essential evidence is a waste of resources and also delays the registration process. The draft Bill proposes a 'one-shot' principle, placing the onus on those applying for registration to ensure their applications are complete before they are submitted for registration. This proposal would give the Keeper a statutory power to reject an incomplete application. Where an application was rejected under the 'one-shot' principle, the applicant would need to gather the necessary documentation and then reapply for registration.

Question 25: Do you agree that a 'one-shot' rule should be introduced?

Question 26: Should specific exceptions to the proposed rule apply for any specific types or classes of application?

Chapter 7 — Duties of Care

(SLC Report Paragraphs 12.101 to 12.109, draft Bill section 27)

The current legal position

7.1 The 1979 Act provides that, if the Land Register is inaccurate, then the Keeper must compensate anyone who suffers loss as a result of that inaccuracy. The accuracy of the Land Register depends not only on the care with which the Keeper's staff carry out their duties but also on the care taken by those involved with the transaction (that is, the individual parties and their legal advisers) to supply the Keeper with accurate information. Where a claim to indemnity is paid under section 12 of the 1979 Act, the Keeper is by section 13(2) subrogated to all rights which the claimant had against third parties. RoS routinely make use of this statutory right to seek recovery from the parties responsible for losses. Beyond this statutory right, it is probable that parties and their agents also owe the Keeper a common law delictual duty of care.

Position under the SLC's proposals

7.2 Under the SLC's proposals, the Keeper will continue to compile the Land Register placing reliance upon the accuracy of what is represented by applicants for registration, the granters of the deeds in favour of those applicants, and the solicitors acting for those parties. Although some changes are proposed to the guarantee of title, it will remain the case that where loss flows from an inaccuracy in the Land Register, compensation will be payable by the Keeper and that the claimant's rights will then become exercisable by the Keeper against the person responsible for the inaccuracy.

Proposed introduction of statutory duties to the Keeper

7.3 Whilst considering it likely that such duties already exist under general law, the SLC recommend that the question be confirmed by the introduction of specific statutory duties of care to the Keeper. They consider that as a matter of general policy, such duties should exist.

7.4 It is clearly in the public interest to ensure the accuracy of the Land Register and the introduction of a statutory duty of care will have a positive benefit. The SLC's proposals state that applicants, granters and their respective solicitors have a duty to take reasonable care that the Land Register does not become inaccurate. However, the Commission stress that in their view the proposed duties would not raise the standard of what is required of conveyancers; a law firm would not be liable unless it had fallen below the standard of reasonable care. The Commission also note that, cases of actual dishonesty aside, it would be unusual for parties themselves to breach the proposed duty.

Question 27: Do you agree that the granters of deeds presented for registration and their advisers should owe a statutory duty of care to the Keeper?

Question 28: Do you agree that applicants for registration and their advisers should owe a statutory duty of care to the Keeper?

Duration of the duties of cCare

7.5 The Law Commissioners were divided as to when the two statutory duties described above should end. So far the duties owed by applicants and their advisers were concerned, a majority took the view that the duty should end at the point of the lodging of the application. However there was also an equally principled minority view that this duty should subsist until the Keeper actually takes the relevant registration decision, which may be some time after the application date. Similarly, for the duties owed by granters and their advisers, the question is whether the duty should end upon delivery of the deed in question or again continue until the actual making of the registration decision.

7.6 The question is thus whether a party or agent should be under duty to disclose some adverse matter that comes to light after they have taken their last step in the transaction, be that delivering the deed at settlement, or getting the registration application to the Keeper, but before the Keeper has made a decision on the application. In practice, this will very rarely make any difference and RoS is inclined to support the majority view, which we think will cause less concern to practitioners. However, given that the SLC were divided on the point, we think it appropriate to seek consultees' views on the issue, which is more fully discussed in paragraphs 12.105 and 12.106 of the SLC Report and the associated footnotes.

Question 29: Do you agree that the statutory duty of care owed by the granters of deeds and their advisers to the Keeper should subsist until the delivery of the deed?

Question 30: Do you agree that such a duty of care by applicants for registration and their advisers should subsist until delivery of the application to the Keeper?

Chapter 8 — The effect of registration and the rectification of inaccuracies

(SLC Report Parts 13, 17 and 18, draft Bill sections 17, 53 and 54)

8.1 The SLC recommended two particular changes to the underlying principles of the land registration system created by the 1979 Act. First, the draft Bill will change the legal effect of registration provided for in the 1979 Act and second, it will change the arrangements for the rectification of errors (or inaccuracies) in the Land Register. If implemented, these proposals would constitute substantive change although, in practice, the effect would mostly be unnoticed by those involved in transactions with land.

Effect of registration — the current position

8.2 Under the provisions of the 1979 Act, registration of a deed by which it is proposed to create, transfer, vary or extinguish a right in land, will create, transfer, vary or extinguish that right, irrespective of the validity of the deed. This is sometimes described as the Keeper's '*Midas touch*'.

8.3 In the overwhelming majority of cases, the fact that registration in the Land Register has this effect does not create a problem; deeds relating to land are usually valid. However, occasionally a deed is invalid: for example, the granter may believe that they are the owner of land that they purport to transfer but they are not, or the signature of the owner of the property may, in rare cases, be forged.

8.4 Under the general law applying to transactions with all types of property, such an invalid transaction has no effect. In accordance with this rule, where an invalid deed relating to land is recorded in the Register of Sasines, recording has no effect. Consequently, the legal effect of registration of an invalid deed relating to land in the Land Register is entirely contrary to general property law: not only is it contrary to accepted legal principles, but it also seems to be contrary to reasonable expectation.

Effect of registration - the draft Bill

8.5 The SLC discussed the shortcomings of the effect accorded to registration in the Land Register in Part 13 of the Report. Section 17 of the draft Bill would re-align the effect of registration with the general rules of property law. This means that registration of an invalid deed would not of itself confer the relevant right affected by the deed.

8.6 Although it might be thought that the existing arrangements have the benefit of certainty, in reality the effect of registration under the 1979 Act, combined with the existing provisions for the rectification of inaccuracies, operates to deprive instantly the true owner of their property. Typically, the deprived owner is then unable to recover the property, even where the error in the Land Register is identified by the deprived owner very soon after it occurs. Whilst the 1979 Act scheme has the extremely important benefit of monetary compensation for the party suffering loss in such a scenario, in circumstances

where a former owner has been deprived of their property as a result of a fraudulent transaction, such compensation is unlikely to be a comfort, and the results under the existing arrangements may be perceived as both absurd and unfair.

Question 31: Do you agree that the consequences of registration in the Land Register should be better aligned with the normal rules of property law?

Rectification of inaccuracies in the Land Register

8.7 The SLC reached the view that the existing arrangements for the rectification of inaccuracies in the 1979 Act are unacceptable and should be revised. In particular, sections 53 and 54 of the draft Bill:

- provide that an inaccuracy in the Land Register would be constituted where the Land Register failed to reflect the true legal position, for example where it includes more land in the name of X than the transfer deed in their favour purported to transmit, a statutory definition that is lacking from the 1979 Act; and
- place a duty on the Keeper to rectify all demonstrable inaccuracies in the Land Register.

8.8 The proposal that all inaccuracies in the Land Register should be rectified constitutes a significant departure from the existing arrangements under which the Keeper has a severely limited power to remove inaccuracies in the Land Register. In many cases, the Keeper is under a duty not to rectify the Land Register, and may not be ordered by a court to rectify the Land Register, where such rectification would prejudice a proprietor in possession. As a result, it is often the case that the 1979 Act requires the Keeper to retain inaccuracies in the Land Register. The SLC highlighted that this has encouraged a perception that the arrangements for rectification of inaccuracies in the Land Register operate irrationally.

Question 32: Do you agree that the Keeper should be required to rectify all inaccuracies in the Land Register as and when they come to light?

Chapter 9 — Guarantee of Title

(SLC Report Parts 19 to 25; draft Bill Parts 5 and 6.)

9.1 The 1979 Act introduced to Scotland for the first time State guarantee of registered titles. This protects those transacting with property from latent invalidities in deeds and from errors. It also supports the ‘curtain principle’, which permits the solicitor acting for a proposed purchaser or secured lender to rely on the terms of the Title Sheet in question thus saving the expense of re-examining a progress of prior title deeds in every transaction.

9.2 In broad terms, there can be no doubt that the scheme has been a success; the level of claims paid out under the indemnity provisions of the 1979 Act, generally less than £0.5 million a year, is remarkably low considering the number and value of titles guaranteed. Economic analysis has shown that the State-guaranteed system is substantially more economically efficient than routine resort to private title insurance. (This is not to say that there is no place for private title insurance in certain specific situations; see Part 26 of the SLC Report.) The simplification of conveyancing practice intended by the 1979 Act has been very successful and is now largely taken for granted.

9.3 Experience has shown, however, that there are some problems in the detail of the current system that have led to disputes, litigation and, in some cases, the feeling that the present rules result in unreasonable outcomes. The SLC reached important conclusions on fundamental issues as to when, independently of the normal rules of property law, the land registration system should itself confer title on an otherwise unentitled party and when a registered right should be privileged with an indefeasible status.

9.4 The legal mechanics of the changes to the scheme of title guarantee recommended by the SLC are complex. They were discussed and consulted upon in detail in the SLC’s first two Discussion Papers, and comprise seven Parts of their final Report. Whilst we welcome any comments that respondents to the current consultation may have on these mechanics, our aim here is to consult upon the policy effect of implementing the SLC’s recommendations.

9.5 Any title guarantee system will encounter ‘judgement of Solomon’ situations. Sometimes, through no fault of their own, two innocent parties will both have the expectation of owning the same property. The system cannot award the same property to both of them; one will receive the property whilst the other must settle for monetary compensation. As the SLC put it, one gets ‘the mud,’ the other ‘the money’.

9.6 The practical effect of the changes proposed is most easily illustrated by reference to an example of such a case. Suppose that Donald is the owner of a house. Unbeknown to him, fraudster Fraser impersonates him and agrees to sell the house to innocent purchaser, Gregor. Gregor’s solicitor goes through all normal and appropriate checks and conveyancing procedures but these do not reveal the fraud. The conveyancing transaction concludes and Gregor’s solicitor pays over the price in exchange for a title

deed apparently (but actually not) signed by Donald. Gregor moves into the house and the deed is presented to the Keeper, who registers Gregor as owner. Now Donald returns from his holiday-of-a-lifetime round-the-world trip to find Gregor occupying his house and claiming to be owner. Who is to get the mud and who will have to settle for money?

9.7 Under the provisions of the 1979 Act, in such a scenario, the act of registration transfers ownership from Donald to Gregor. So, by the time that Donald becomes aware of the problem, he has already lost the property. The remaining question then is whether he can get it back. This depends upon the application of the provisions of the 1979 Act about rectification of inaccuracies. Usually in such cases, the Keeper is not permitted to rectify the Land Register and even the courts cannot undo the effect of the forged deed having been registered: Donald will have to settle for money.

9.8 This is in various ways a surprising result. It runs contrary to the normal rule of property law that a forged deed cannot convey a good title. That rule is not technical 'lawyers' law' but one well-known to the population in general and which influences people's actions and expectations. As an example, the maxim *caveat emptor* is well-known and it is widely appreciated that if one buys a second-hand car from a fraudster, ownership will remain with the true owner. Thus, where real-life parties have the misfortune to find themselves in Donald and Gregor's situation, they are often surprised by the result dealt to them by the title guarantee system. True, the purchaser in good faith, Gregor, has been fully protected, but at the expense of depriving Donald of ownership. Whilst Gregor has taken part in the transaction and has had the opportunity to minimise risk and to exercise due diligence, Donald will have had no awareness of the transaction and will only discover after the event that his property has been expropriated. Of course, if Donald owned the property solely as an investment, he might well be satisfied with monetary compensation but, particularly where a family home is lost in this manner, 'true' (i.e. former) owners rarely see this as a good result.

9.9 Under the SLC's proposals registration of a defective deed would not of itself transfer ownership. Thus in the scenario described Donald would remain owner of the property whilst Gregor would be entitled to monetary compensation (under the proposed 'Keeper's warranty'; see Part 22 of the SLC Report).

9.10 If the rule were simply changed to be that registration of an invalid deed never gives rise to a good title, which is the rule in the Register of Sasines, this would undermine one of the major benefits of the registration of title system. As noted above, the 'curtain principle' is such that a proposed purchaser or lender can rely on the terms of a Title Sheet, avoiding time-consuming and wasteful re-examination of prior deeds. In the example given above, the curtain principle was not engaged; at the time of Gregor's transaction, his solicitor would have looked to the Land Register and found that it correctly showed Donald to be owner; the problem was not that the Land Register was wrong, but that Gregor went on to transact with the wrong person. The SLC calls this type of error a 'transactional error'.

9.11 In contrast, the curtain principle relates to what the SLC calls 'register error'. Suppose that in year one, Heather conveys to Iain ten hectares of land held on a Sasine title. The disposition induces first registration and is duly registered in the Land Register. In fact Heather's Sasine title only comprehended nine hectares (the other one hectare actually belonging to Thomas). From Iain's perspective, this is a transactional error arising from his own transaction; he has not been misled by the Land Register. However the problem goes unnoticed and in year five Iain sells all ten hectares on to Jenny. In examining title, Jenny's solicitor relies on the Title Sheet, which states, wrongly, that Iain is the owner of all ten hectares. From Jenny's perspective the error is a register error: the Land Register is wrong before her transaction takes place.

9.12 Under the SLC's proposals, once an error appears on the face of the Land Register, if the registered proprietor possesses for a prescribed period of time and then conveys on to a third party in good faith, registration of the deed in favour of that purchaser has the effect of realigning the parties' rights to what they would have been if the Land Register had not been inaccurate. Thus taking the example above, in year one Thomas remains the owner of his one hectare. Registration of the deed in favour of Iain does not change this. If the problem comes to light before Iain sells on, Thomas keeps the mud and Iain is entitled to monetary compensation. But if Iain possesses for the following five years (assuming that the prescribed period is less than five years; see below) and then sells on to Jenny, registration of the deed in Jenny's favour will trigger a realignment of rights. Thomas will cease to be owner of the one hectare at that time (as opposed to in year one, which is the current position), and Jenny will become owner. If this happens, Thomas will become entitled to monetary compensation instead (which is all that he would ever usually be entitled to under the current system).

9.13 The SLCs proposals appear to strike a better balance. They do not go so far as to revert to the Sasine situation under which (until positive prescription operates), latent defects in prior conveyances can have the effect that a party who has paid full value, thinks they have good title, and appears to all the world to have good title actually does not.

9.14 The curtain principle is maintained; so long as Iain has been in possession for the prescribed period, Jenny's solicitor can rely on the face of the Land Register and need not inquire into prior conveyances. It is worth stressing the economic importance of this: serious title defects are fortunately rare whereas hundreds of thousands of conveyancing transactions take place a year. The simplification in conveyancing and resulting cost savings that flow from the curtain principle should be retained in the vast majority of cases. However, unlike the present system, 'true' owners such as Donald and Thomas would not normally be irremediably deprived of ownership as soon as an inaccurate deed is registered. Rather, before deprivation of ownership occurs – in favour of a party who is also deserving – there would need to have been the combination of a second transaction taking place involving reliance on the Land Register and possession by other parties for the prescribed period. Assuming that the prescribed period is set at a reasonable length, that possession should normally be enough to alert a true owner to the problem and allow them to take action to protect their position, whether by

regaining possession on the ground, requesting rectification of the inaccuracy in the Land Register if the facts are clear-cut, or court action. Where third parties have already possessed adversely to the true owner for a considerable period, arguments that money is an inadequate alternative to mud become less compelling. Under the 1979 Act scheme even the briefest possession by a good faith purchaser usually means that the 'true' owner cannot get the mud; again the proposals appear better balanced.

Question 33: Do you agree that the guarantee of title should be adjusted to make it less likely that a true owner will be deprived of their property?

9.15 The SLC have proposed that the prescribed period of possession required before realignment can operate to transfer title from a true owner to an acquirer should be one year (proposals 80 and 105(a)). The SLC note (Report para 21.32) that no clear view emerged from their own consultation on this point but offer their considered view that one year should suffice.

9.16 As noted above, this is a question of balance. The longer the period, the greater the opportunity for true owners to become aware of adverse possession and act to prevent any loss of property that may occur if the realignment principle operates. Conversely, the shorter the period, the greater the certainty the system provides to acquirers and the less damage done to the curtain principle, minimising the impact on conveyancing practice and potential cost implications.

9.17 Again as noted, the question is of greatest importance when the property concerned is owner-occupied, residential property. For commercial and investment property, money should be an ample substitute for mud. In the question of who gets the mud, it appears reasonable that a party in good faith who has relied on the Land Register, and who in practice will usually have taken entry to the property before the error comes to light, should be preferred to a true owner who has been out of possession for a complete year. Residential property does not usually change hands between owner-occupiers more frequently than this, and back-to-back sales and other transactions in rapid succession are already a known risk area for frauds and irregularities where increased diligence is warranted. We are inclined to agree with the Commission on this.

Question 34: Do you agree that one year is an appropriate length of possession required as condition for operation of the realignment principle?

Chapter 10 — Archive Record

(SLC Report Parts 4 and 8, draft Bill Sections 12 and 70(1)(c))

Introduction - the current position

10.1 The Archive Record currently maintained by the Keeper consists of copies of all historic and current deeds on which the terms of the Title Sheets in the Land Register are based, along with copies of any other relevant documentation submitted with an application for registration. Currently, there is no legal basis for the existence of the Archive Record.

10.2 The current law requires the Keeper to issue authenticated copies of any deeds specifically referred to in a Title Sheet. However, there is no statutory requirement for copies to be kept of deeds not referred in a Title Sheet. Such deeds include prior dispositions submitted for registration because when updating the Title Sheet in respect of a transfer of title there is no mention of the disposition itself in the proprietorship section of a Title Sheet. The Keeper does issue copies of deeds that are not cited on the Title Sheet but in the absence of any legislation such copies do not have the official evidential status of extracts that is so often required.

10.3 Usually, there is no requirement to look behind the current registered title. Nevertheless, there are occasions when it is necessary to consult prior registered deeds, for example if a question arises as to the content or accuracy of the Land Register. In such cases the Archive Record proves crucial.

The proposed changes

10.4 The SLC recommend that the Archive Record be given a statutory basis and recognised as part of the Land Register. The new legislation regulates the content of the Archive Record and also the issue of data from it. The documents that make up the Archive Record will be those 'relevant to the accuracy of the Land Register'. The SLC propose that the specific content of the Archive Record is left to the Keeper, being the person in the best position to determine the documents relevant in making up the Title Sheets. As to the issue of data, the new legislation obliges the Keeper to supply, on request, official extracts of deeds and other documents in the Archive Record.

Question 35: Do you agree that there should be a statutory basis for the Land Register archive record?

Searching the Archive Record

10.5 At present, the Keeper has a statutory duty to keep an index of names of persons currently entered in Title Sheets. However, since the evolution of the electronic Title Sheet and consequential ability to search the Land Register, there is no requirement for a separate index.

10.6 The Bill directs the Keeper to ensure that the Archive Record is searchable and specifies search criteria. At present, the Archive Record can

be searched using either Title Number or registration application number. The SLC recommend that, for the benefit of persons using the search, the Archive Record should be searchable by the names of proprietors, registered lessees, proper liferenters, and heritable creditors. The new legislation would provide that the Archive Record is also searchable by Title Number and date of application and in any other way that the Keeper may decide.

Question 36: Do you agree that the Archive Record should be searchable by (a) Title Number; (b) application date; and (c) names of proprietors, registered tenants, heritable creditors and proper liferenters?

Chapter 11 — Designation of Parties: date of birth

(SLC Report paragraphs 4.18 – 4.24 and 8.24 – 8.26; draft Bill section 92(1))

11.1 At present where registered subjects are owned by a natural person, the proprietorship section of the relevant Title Sheet will give that person's name and address. Where subjects are owned by a juristic person with a unique identifying number (for example, the company number of a registered company), the practice is also to include that number in the Proprietorship Section if it is given in the deed inducing registration.

11.2 The SLC have recommended juristic persons should be uniquely identified. This is unlikely to be controversial and, as the SLC note, merely puts good practice onto a statutory basis.

11.3 The SLC also recommend that, in future, the dates of birth of natural persons must be given and captured into the Proprietorship Section of Title Sheets. They note that whilst currently the Land Register defines property with great accuracy, it does not define the owners of property with precision. Persons' names are far from unique and (unlike companies) can change without any official process. Whilst offering some assistance toward identifying a specific individual, addresses are often changed, and often shared. Accordingly, to avoid ambiguity as to the identity of the actual holders of rights in land, the SLC recommend that date of birth should be given and recorded in the relevant Title Sheet entry.

11.4 Dates of birth are, of course, already a matter of public record and the SLC have noted that they are captured in other countries' land registration systems. However, it might be thought that there would be privacy or data protection issues with this information about individuals being made available in the Land Register. The SLC discuss the tensions between public registration and current ideas of privacy and data protection. Their view is that the privacy agenda should not prevent information being captured in the public register in the first place, although it might influence the amount of information made available in particular ways, for example online. They suggest that this point is not an issue for the draft Bill itself, but could simply be dealt with as a matter of for the Keeper. Alternatively, rules could be made on the point under section 90(1)(b) of the draft Bill, which permits Scottish Ministers to make provision as regards the information to be made available by the Keeper, and the manner in which it is to be made available.

Question 37: Do you agree that in future the dates of birth of natural persons holding rights in land should be captured in the Land Register?

Chapter 12 — Issues going beyond the SLC Recommendations

12.1 In this part, we seek consultees' views on two proposals that go beyond the SLC recommendations. Both are aimed at increasing the use of electronic interactions with RoS in place of paper deeds, so realising benefits for applicants for registration and the Keeper in terms of increased speed and security and reduced costs.

A future power to make use of ARTL compulsory in certain cases

12.2 At present, use of the ARTL system is optional; those who cannot or wish not to use it can still transact and register rights using traditional paper deeds. The SLC considered the question of making use of electronic deeds compulsory and concluded, for reasons which they give, that compulsion was not appropriate. Instead, they took the view that the savings to be gained from using ARTL do all that is necessary without any element of compulsion. However, as more applications for registration are dealt with through ARTL, it will become increasingly less efficient and more costly to provide two separate methods of transacting.

12.3 Accordingly, we wish to seek views on whether the draft Bill should include a power allowing Scottish Ministers to prescribe the use of ARTL (and its successors in eRegistration). (Such powers have already been used in New Zealand, the only other country with an equivalent eRegistration system.)

Question 38: Do you agree that a provision should be included in the Bill delegating power to the Scottish Ministers to prescribe the use of ARTL (and its successors in eRegistration)?

New options for discharging standard securities

12.4 Section 17 of the Conveyancing and Feudal Reform (Scotland) Act 1970¹⁰ (the 1970 Act) provides that a standard security may be discharged by a discharge deed which follows a prescribed style. Tens of thousands of such discharges are presented to the Land and Sasine Registers each year. Before introduction of ARTL, such discharges required to take the form of a signed paper deed. Within the ARTL system, for compatible Land Register titles, discharges can now be in electronic form, authenticated by electronic signature. The proposed e-Conveyancing provisions discussed in Chapter 4 of this paper would permit electronically signed electronic discharges in the Sasine Register and for non-ARTL Land Register cases as well. However, these provisions still require a deed and a signature, albeit that both could be in electronic form.

12.5 As noted in Chapter 4, there are important reasons why the law imposes requirements of form on conveyancing deeds and contracts. We would not seek generally to change these requirements of form; that would be a major law reform project in its own right with implications going far beyond

¹⁰ c.35

the property registers. However there is one area in which we think that there would be significant benefits if the inflexibility of the current requirements of form were relaxed. This is where an institutional lender wishes to communicate directly to the Keeper the desire that a standard security in their favour should be removed from a Title Sheet (or, as the case may be, shown as being discharged on the Register of Sasines). As noted, tens of thousands of discharges are registered every year, almost all of which originate from institutional lenders. There is huge scope for efficiencies, both for the Keeper and for these lenders, if agreement that a security should cease to subsist could be communicated from lender to Keeper as part of a secure, authenticated data feed the format of which was not constrained by section 17 of the 1970 Act.

12.6 One particular driver on this point is that all of the major lenders operating in Scotland also operate in England and Wales, where technical developments in the communication of electronic discharges to HM Land Registry are further developed than in this jurisdiction. Increased flexibility in the means by which institutional lenders may discharge their own securities could allow such lenders to have a single discharge process for loans in both jurisdictions. It may be noted that most lenders charge a fee to the borrower at the end of a mortgage for processing the discharge. If, efficiencies can be achieved here, the public may also benefit if lenders feel able to reduce exit charges.

12.7 Assuming that the principle of allowing for other discharge processes is agreed, our inclination is not to set out the detail of these processes on the face of the bill as these may be subject to change over time. Our preference is for an additional power to be conferred on Scottish Ministers to specify the detail of the processes that would be required in subordinate legislation.

Question 39: Do you agree that, in addition to the process provided for in section 17 of the Conveyancing and Feudal Reform (Scotland) Act 1970, it should also become possible for the creditor in a standard security to discharge it by such other means as Scottish Ministers may prescribe by statutory instrument?

Chapter 13 — Miscellaneous and General

(Draft Bill sections 87 and 90)

RoS Services

13.1 RoS is the only non Ministerial Department in Scotland that operates as a trading fund. This means that financially we are wholly dependent on the fees we charge for registration and for providing information – we receive no funding from the Scottish Government. The RoS Accountable Officer is answerable to the Scottish Parliament for RoS' financial affairs.

13.2 The Keeper and RoS Board see RoS as expert registrars that underpin the Scottish economy. Commercial success makes us better able to maintain and improve our registers, serve the people of Scotland and deliver real and commercial benefits for our customers. This means we must have the ability to develop and charge for services that will add value to Scotland.

13.3 The SLC Report largely deals with the mechanics of land registration and in general does not attempt to widen or restrict the Keeper's powers in relation to the Land Register or any of the other registers currently under her control. However, section 87 of the draft Bill does allow the Keeper to provide consultancy or advisory services in relation to registration generally and to form or participate in the formation of a company that provides these services. These provisions are similar to those conferred on the Chief Land Registrar in England and Wales by the Land Registration Act 2002.

13.4 The powers set out by the SLC in this part of the draft Bill are in general a refinement on existing arrangements. However, we believe there is now a greater economic imperative for self-funded public services such as ours to develop commercial activities.

13.5 We therefore wish to ensure that Scottish Ministers and the Keeper have the powers necessary to allow us to operate effectively and appropriately in a commercial environment.

Question 40: What are your views on the proposals to allow the Keeper to provide consultancy or advisory services in relation to registration generally and to form or participate in the formation of a company that provides these services?

Question 41: What wider powers if any would you wish to see given to Scottish Ministers and the Keeper in relation to commercial activities linked to registration?

Fees and Information

13.4 Section 90 of the draft Bill allows Scottish Ministers by secondary legislation to fix fees for registration and information in relation to any register under the Keeper's management and control. In terms of section 90(4) the power to charge fees is restricted to those reasonably sufficient for defraying the expenses of the Keeper, although this includes improvement of the

systems of registration. Ministers may additionally authorise the Keeper to fix some fees subject to limitation and conditions. In addition, the current arrangements are set around fixed services and rates. This is very inflexible and does not offer scope for charging for different levels of services and different styles of products. Furthermore, this inflexibility does not recognise the need to make cost recovery charges for unique packages of work. In such circumstances there is merit in allowing the Keeper and her customers to agree an appropriate fee and other contractual arrangements.

13.5 While section 90 gives some leeway to the Keeper, there is potentially inbuilt inflexibility where secondary legislation is required to change fees. This may limit the ability of the Keeper to provide new or different services within appropriate timescales, especially where a particular type of product or service was not envisaged when any current Fee Order was drawn up. We would like to widen this to ensure that the Keeper can respond positively to demands from customers for new or different services and we are considering how best this can be built in to the Bill.

Question 42: Do you agree with the continuing caveat that fees set should only be reasonably sufficient to defray expenses including improvements in registration and completion and improvement of the land register?

Question 43: Do you think there are specific or general activities where the Keeper should not be subject to the restriction set out in Question 42?

Question 44: To what extent do you think there is merit in combining Ministers' current fee-setting powers with an express power for the Keeper to make charges for services not covered by the Fee Order then in operation or for non-standard and added-value services and products?

Question 45: Are there particular fees which in your view must always be specified in subordinate legislation by Ministers?

13.6 At present, the Keeper does not have the authority to specify the form in which fees must be paid. Experience has shown that this leads to increased costs and delays. We therefore intend to include in the Bill a provision to enable the Keeper to specify how fees must be paid.

Question 46: What are your views on the Keeper rather than Scottish Ministers being given the power to specify how fees must be paid?

Question 47: What are your views on Ministers continuing to set fees for core registration activities and specifying mechanism e.g. time and line rather than a specific fee for the Keeper to charge where a premium or expedited or other commercial service is provided?

13.7 The current fee structures do not take account of the value of the warranty provided by the Keeper to the owners of titles registered in the Land

Registers. The exposure of the Keeper in relation to the warranty is clearly greater or lesser depending on the value of the property in question.

Question 48: Do you think there is merit in fees specifically reflecting the value of the warranty by way, for example of a cap beyond which an additional fee is charged or by some other method?

Appendix A — List of Consultation Questions

Question 1: Do you agree with the recommendations in the Scottish Law Commission's Report?

Question 2: Do you want to comment on or do you disagree with any particular recommendations in the Scottish Law Commission's Report, not specifically covered by the other questions in this consultation paper? If so please identify the recommendation in question and provide comments.

Question 3: Do you agree that it should remain possible for the proprietor of unregistered land to seek voluntary registration and that after a date to be prescribed the Keeper should cease to be able to decline such applications?

Question 4: Do you agree that all transfers of unregistered land should induce first registration in the Land Register?

Question 5: Do you agree that, after a date to be prescribed, it should cease to be possible to create a security (mortgage) by recording in the Register of Sasines?

Question 6: Do you agree that the Keeper should be empowered to register plots without any application having been made?

Question 7: If you do not agree, what difficulties do you foresee with such an approach?

Question 8: Do you agree that the long term aim should be to complete the Land Register and relegate the Register of Sasines to a purely historical record?

Question 9: Do you agree that a system of advance notices should be introduced?

Question 10: Do you agree that 35 days is an appropriate length of protected period and if not what alternative period would you view as appropriate?

Question 11: Do you agree that an advance notice should have the effect that a protected deed takes effect as if any prior competing deed received within that protected period had not been registered and that the grantee of the protected deed should be protected from adverse entries in the Register of Inhibitions taking effect during that period?

Question 12: Do you agree that deeds conveying rights in land should be permitted to be in electronic form?

Question 13: Do you agree that land contracts should be permitted to be formed electronically?

Question 14: Do you agree that there should be controls on the format and authentication of acceptable electronic land deeds and land contracts and that power should be delegated to the Scottish Ministers to prescribe standards for legal validity, probativity, and registrability?

Question 15: Do you think that some safeguards should be included in the primary legislation rather than secondary legislation? If so, what should those overarching safeguards be?

Question 16: Do you agree that there should be no registration without mapping?

Question 17: Do you agree that within tenement steadings individual plots do not need to be mapped?

Question 18: Do you agree that co-owned areas should become the subjects of separate Title Sheets?

Question 19: Do you agree that the Keeper should have the discretion to make up such title as shared plot Title Sheets?

Question 20: Do you agree with the proposals for provisional shared plot Title Sheets and ascertainment?

Question 21: Do you agree that registration of the rights in land should only be permissible where specifically authorised by legislation?

Question 22: Do you agree that, in order to be registered, a deed must be (a) valid and (b) probative?

Question 23: For an *a non domino* disposition to be registered, do you agree that the applicant or granters should have been in possession for the preceding year?

Question 24: For an *a non domino* disposition to be registered, do you agree that the owner should have been out of possession for at least 7 years?

Question 25: Do you agree that a 'one-shot' rule should be introduced?

Question 26: Should specific exceptions to the proposed rule apply for any specific types or classes of application?

Question 27: Do you agree that the granters of deeds presented for registration and their advisers should owe a statutory duty of care to the Keeper?

Question 28: Do you agree that applicants for registration and their advisers should owe a statutory duty of care to the Keeper?

Question 29: Do you agree that the statutory duty of care owed by the granters of deeds and their advisers to the Keeper should subsist until the delivery of the deed?

Question 30: Do you agree that such a duty of care by applicants for registration and their advisers should subsist until delivery of the application to the Keeper?

Question 31: Do you agree that the consequences of registration in the Land Register should be better aligned with the normal rules of property law?

Question 32: Do you agree that the Keeper should be required to rectify all inaccuracies in the Land Register as and when they come to light?

Question 33: Do you agree that the guarantee of title should be adjusted to make it less likely that a true owner will be deprived of their property?

Question 34: Do you agree that one year is an appropriate length of possession required as condition for operation of the realignment principle?

Question 35: Do you agree that there should be a statutory basis for the Land Register archive record?

Question 36: Do you agree that the Archive Record should be searchable by (a) Title Number; (b) application date; and (c) names of proprietors, registered tenants, heritable creditors and proper liferenters?

Question 37: Do you agree that in future the dates of birth of natural persons holding rights in land should be captured in the Land Register?

Question 38: Do you agree that a provision should be included in the Bill delegating power to the Scottish Ministers to prescribe the use of ARTL (and its successors in eRegistration)?

Question 39: Do you agree that, in addition to the process provided for in section 17 of the Conveyancing and Feudal Reform (Scotland) Act 1970, it should also become possible for the creditor in a standard security to discharge it by such other means as Scottish Ministers may prescribe by statutory instrument?

Question 40: What are your views on the proposals to allow the Keeper to provide consultancy or advisory services in relation to registration generally and to form or participate in the formation of a company that provides these services?

Question 41: What wider powers if any would you wish to see given to Scottish Ministers and the Keeper in relation to commercial activities linked to registration?

Question 42: Do you agree with the continuing caveat that fees set should only be reasonably sufficient to defray expenses including improvements in registration and completion and improvement of the land register?

Question 43: Do you think there are specific or general activities where the Keeper should not be subject to the restriction set out in Question 42?

Question 44: To what extent do you think there is merit in combining Ministers' current fee-setting powers with an express power for the Keeper to make charges for services not covered by the Fee Order then in operation or for non-standard and added-value services and products?

Question 45: Are there particular fees which in your view must always be specified in subordinate legislation by Ministers?

Question 46: What are your views on the Keeper rather than Scottish Ministers being given the power to specify how fees must be paid?

Question 47: What are your views on Ministers continuing to set fees for core registration activities and specifying mechanism e.g. time and line rather than a specific fee for the Keeper to charge where a premium or expedited or other commercial service is provided?

Question 48: Do you think there is merit in fees specifically reflecting the value of the warranty by way, for example of a cap beyond which an additional fee is charged or by some other method?

Appendix B — The Scottish Government Consultation Process

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective, and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the relevant website enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups, or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals;
- be used to finalise legislation before it is implemented.

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence. While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Appendix C — Respondent Information Form

Please Note that this form **must** be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation

Organisation Name

Title *please tick as appropriate*

Mr Ms Mrs Miss Dr

Surname

Forename

2. Postal Address

Postcode	Phone	Email

3. Permissions

<input type="checkbox"/> Individual	I am responding as... <i>please tick as appropriate</i>
<input type="checkbox"/> Group/Organisation	
(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government website)? <i>Please tick as appropriate</i> <input type="checkbox"/> Yes <input type="checkbox"/> No	(c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you content for your response to be made available? <i>Please tick as appropriate</i> <input type="checkbox"/> Yes <input type="checkbox"/> No
(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis <i>Please tick ONE of the following boxes</i> Yes, make my response, name and address all available <input type="checkbox"/> or Yes, make my response available but not my name and address <input type="checkbox"/> or Yes, make my response and name available, but not my address <input type="checkbox"/>	(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in relation to this consultation exercise? <i>Please tick as appropriate</i> <input type="checkbox"/> Yes <input type="checkbox"/> No
(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in relation to this consultation exercise? <i>Please tick as appropriate</i> <input type="checkbox"/> Yes <input type="checkbox"/> No	(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in relation to this consultation exercise? <i>Please tick as appropriate</i> <input type="checkbox"/> Yes <input type="checkbox"/> No

Appendix D — List of Consultees

List of Consultees

Primary Distribution List

1. Accountant in Bankruptcy
2. Association of British Credit Unions
3. British Banking Association
4. Building Societies Association
5. Church of Scotland
6. Citizens Advice Scotland
7. Clydesdale Bank plc
8. Commission for Racial Equality
9. Committee of Scottish Clearing Banks
10. COSLA
11. Council of Mortgage Lenders
12. Crofting Commission
13. Crown Estate Commissioners
14. Disability Rights Commission
15. Dunfermline Building Society
16. Equal Opportunities Commission
17. Free Church of Scotland
18. Faculty of Advocates
19. Forestry Commission Scotland
20. General Register Office for Scotland
21. HM Land Registry (England and Wales)
22. HM Revenue & Customs
23. Historic Scotland
24. Homes for Scotland
25. In-house Lawyers Group
26. Land Registry Northern Ireland
27. Land Registry Republic of Ireland
28. Law Society of Scotland
29. Legal Software Suppliers' Association
30. Lloyds Banking Group
31. National Archives of Scotland
32. National Trust for Scotland
33. Nationwide Building Society
34. NFU Scotland
35. NHS Scotland Central Legal Office
36. Northern Rock plc
37. Ordnance Survey
38. Public and Commercial Services Union
39. Queen's and Lord Treasurer's Remembrancer
40. Railtrack
41. Registrar of Companies for Scotland
42. Roman Catholic Church
43. The Royal Bank of Scotland
44. Royal Institution of Chartered Surveyors

45. Santander UK PLC
46. Scottish Consumer Council
47. Scottish Law Commission
48. All Scottish local authorities
49. Scottish Environmental Protection Agency
50. Scottish Episcopal Church
51. Scottish Federation of Housing Associations
52. Scottish Information Commissioner
53. Scottish Law Agents' Society
54. All Scottish local law faculties (39)
55. All Scottish MEPs
56. Scottish Paralegal Association
57. Scottish Parliament Economy, Enterprise and Tourism Committee
58. Scottish Property Federation
59. Scottish Rural Property and Business Association
60. All Scottish University Law Schools
61. Scottish Water
62. Society of Advocates in Aberdeen
63. Society for Computers and the Law
64. Society of Local Authority Lawyers and Administrators
65. Society of Scottish Searchers
66. Society of Solicitors in the Supreme Courts
67. Society of Writers to Her Majesty's Signet
68. Solitaire (an association of sole practitioner solicitors)
69. Transport Scotland
70. Yorkshire Building Society

Appendix E — Partial Business Regulatory Impact Assessment

Title of Proposal: Land Registration (Scotland) Bill

Purpose and intended effect

Objectives

This Bill would implement recommendations contained in Report Number 222 by the Scottish Law Commission (SLC) on Land Registration. These recommendations seek to:

- provide a new legislative basis for the system of land registration in Scotland, strengthening existing protection and safeguards so that Scotland benefits from a secure system of land registration that gives confidence to investors and domestic property owners alike;
- introduce a system to protect purchasers of property before the registration process;
- make provision for electronic conveyancing; and
- provide for the completion of the Land Register and the closure of the Sasine Register.

Background

The Land Register for Scotland was set up under the Land Registration (Scotland) Act 1979 (the 1979 Act) as a replacement for the Register of Sasines, which has been in use as the property register for Scotland since 1617. The new register was brought into operation gradually, county by county, over a period from 1981 to 2003. The change of register marked a change of registration system. The Register of Sasines is a register of deeds, while the Land Register is a register of title, and rather than simply recording a deed, registers its legal effect and the legal effect of all previous relevant deeds. The result is a guaranteed statement of title for each registered property, making it simple to discover ownership of land and the encumbrances to which it is subject. It is a map-based register of property titles, backed up by a State guarantee. After nearly 30 years of operation, the Land Register currently encompasses over 55% of property titles, representing around 19% of the landmass of Scotland.

The Land and Sasine Registers each comprise 33 counties and the trigger for transferring a property from the Sasine Register to the Land Register is usually the first sale for a valuable consideration. As the pace of bringing properties into the Land Register is dictated by actual sales of property, there are many properties that remain within the Sasine Register and may do so for some considerable period. The result is that only a proportion of Scottish property is contained in the Land Register and not all property owners enjoy the benefits of a registered title.

The 1979 Act is relatively short, containing only 30 sections and four schedules, and its brevity has caused uncertainty in several areas concerning property rights, leading to disputes in law and litigation that has challenged aspects of the operation of the system of land registration. There is currently an underlying tension between property law and registration law.

While the 1979 Act set up a scheme of indemnity, so that those who had suffered loss resulting from inaccuracies in the Land Register could be compensated, experience has demonstrated that there are problems with the application of the scheme.

Having recognised the need for reform and at the behest of the Keeper of the Registers of Scotland (RoS), the SLC undertook a review of the 1979 Act and issued three discussion papers (for details, see Consultation). Following consultation on these, the SLC published their Report on Land Registration (Scot law Com No 222, 2010), which includes the draft Bill in February 2010.

RoS commissioned a report by BiGGAR Economics Limited to assess the economic impact and contribution to the Scottish economy arising from a secure system of land registration and this was included in the SLC Report (as Appendix C).

Rationale for Government intervention

The Land Register is operated under statutory authority and the proposals recommended by the SLC can only be implemented by government intervention in the form of introducing the proposed Land Registration (Scotland) Bill into the Scottish Parliament. Without this legislative step it would not be competent for RoS to implement the proposals.

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. The proposals in the Bill identify areas where there are deficiencies in the law and seek to amend these, strengthening the existing system of land registration. By doing this, the proposals are not only entirely complementary to the target in the National Performance Framework of raising GDP growth, but are an essential part of this process.

The work of RoS is essential to the Scottish economy: security of land ownership is a prerequisite for anyone wishing to invest in property. This includes both commercial investors and the Scottish house-buying public, as well as major landowners such as local authorities, the Forestry Commission etc. All these bodies rightly demand security of land and property rights. The proposed amendments to the legislation and the practical process of Registration of Title to land will assist in ensuring that Scotland is an attractive place to do business in Europe

and will reinforce the long-standing benefits of our systems of registering title to land.

BiGGAR Economics' analysis has demonstrated that there will be very significant economic benefits if the ongoing transition from the Register of Sasines to the Land Register can be completed to achieve a single, conclusive map-based register. This will not be possible unless the Bill is enacted.

The draft Bill will permit the development of electronic conveyancing, which again is expected to bring significant economic benefits and ancillary environmental benefits.

The draft Bill introduces a system of advance notices that will protect those transacting with property from fraud. Introducing new statutory methods of dealing with land where there is currently no title will enable land to be brought back into economic use, helping to encourage investment.

The draft Bill proposes establishing a historical aspect to the Land Register. This will preserve information for posterity and will benefit not only historians but all those interested in exploring the rich heritage of our country.

The overarching principles of the draft Bill will ensure that the services offered by RoS are high quality, continually improving, efficient and responsive to local people's needs. By enhancing the systems of registration, a large volume of information will be available electronically, removing all barriers of location. RoS will make accessible a huge amount of up-to-date, accurate information.

As with any Act that creates a new system, the period since the introduction of Land Registration has seen litigation that has highlighted flaws in the current legislation. The draft Bill will address these issues and put the land registration system on a sound statutory basis for the future.

The proposals in the draft Bill are as a direct result of experience gained in the practical process of land registration and the problems arising through the implementation of the 1979 Act. The process of consulting about reform began with three discussion papers produced by the SLC in 2004 and 2005. Information gained from the consultation process led to the SLC Report on Land Registration 2010. In the foreword to the Report, the SLC notes that: "our recommendations are evolutionary: the great achievements of the 1979 Act should be consolidated and developed. We think the result should be one of the best land registration systems in the world".

Finally, the draft Bill forms an important part of an on-going process of legislation that is reforming and modernising land law in Scotland. The proposals contained in the draft Bill address real issues and seek to provide a sound basis that will take the process of land registration into

the 21st century and help to ensure that Scotland is an attractive place to do business and where the property rights are protected by law.

Consultation

Consultation within Government

The SLC engaged with Ordnance Survey and the Queen's and Lord Treasurer's Remembrancer. The SLC received no consultation responses from any other area of Central or Local Government. Within the current consultation we are seeking to engage with local authorities, the Land Registries in England and Wales and in Northern Ireland, Her Majesties Revenue and Customs, the Crofters Commission, the Accountant in Bankruptcy, the Forestry Commission, the Registrar General for Scotland, the Keeper of the Records of Scotland, Historic Scotland, NHS Central Legal Office, Registrar of Companies for Scotland, SEPA and Transport Scotland.

Public Consultation

Before producing the report on Land Registration the SLC produced three discussion papers:

- Discussion Paper on *Land Registration: Void and Voidable Titles* (Scot Law Com DP No 125, 2004)
http://www.scotlawcom.gov.uk/download_file/view/125/;
- Discussion paper on *Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP No 132, 2005)
http://www.scotlawcom.gov.uk/download_file/view/132/ and
- Discussion Paper on *Land Registration: Miscellaneous Issues* (Scot Law Com DP No 141, 2005)
http://www.scotlawcom.gov.uk/download_file/view/141/.

These discussion papers were prepared to canvas the views of any interested parties on the proposed amendments to Land Registration that were addressed therein. The discussion papers were circulated widely to interested parties and were available on the SLC's website and for purchase through TSO. The consultation process carried out by the SLC on their discussion papers is vital to their work. The comments enable the SLC to draw upon the experience and expertise of others involved and interested in the particular area of law under review.

The proposals in these documents were generally supported by the respondents. There were 14 written comments on Discussion Paper No.125, 11 on Discussion Paper No. 128 and 13 on Discussion Paper 130. Representations were also received from the legal profession through the Law Society of Scotland, the Faculty of Advocates, the Scottish Law Agents Society, Judges of the Court of Session and the Society of Writers to HM Signet.

Business

A number of legal firms responded to the SLC's Discussion Papers. In addition, the SLC had specific dialogue with Homes for Scotland in relation to their proposals for provisional shared plots.

In the current consultation exercise we hope to engage with the following business interests.

Legal Profession: Law firms are businesses. Most law firms in Scotland are either small or micro businesses. The consultation is being issued to the Law Society of Scotland as the representative body, to local law faculties, and to other collective bodies such as the Scottish Law Agents Society. In addition, we plan to hold individual meetings with a cross-section of firms, including but not limited to: specialist conveyancing practice; traditional chamber practice; sole practitioner, rural firm, and city-based commercial firm.

Lending Industry: The lending industry is UK-wide and only Scottish lending operations will be affected by this consultation. The consultation will be issued to the Council of Mortgage Lenders as the industry body and we also intend to consult individually with representative large PLCs and mutual lenders and also with smaller players.

Private Search Firms: These businesses search and provide information from public records, including the Land Register. Most are members of the representative Society of Scottish Searchers to whom the written consultation will be issued. We also intend to hold an individual meeting with this sector.

Legal Software Suppliers: The draft Bill itself has few implications for this sector; however, if in due course subordinate rules are made under the Bill, these are likely to contain forms and styles that may need to be integrated into legal software products. We are issuing the consultation to the industry body, the Legal Software Suppliers Association, and intend to meet individually with a representative from this sector.

Housebuilders: The provisions of the draft Bill relating to provisional shared plots have potential to make a significant change to the way in which units in new housing developments are conveyed. The SLC had already engaged with Homes for Scotland, the representative body for this sector. As well as issuing the current consultation to Homes for Scotland, we will meet individually with examples of both major national and smaller local enterprises.

Options

Option 1 Do nothing.

Under this option the Bill would not proceed. Land Registration would continue under the statutory framework of the Land Registration (Scotland) Act 1979. The benefits discussed under Option 2 would not be realised.

Option 2: Introduce a New Bill

This option is to adopt the SLC's recommendations and promote a new Land Registration Bill. The sections of the Bill that will provide the greatest benefit and which RoS is currently consulting on are as follows:

Completion of the Land Register

Proposed acceleration of completion of the Land Register by:

- giving the Keeper a power to instigate registration;
- adding new triggers that will induce registration of a property into the Land Register; and
- providing for the eventual closure of the Sasine Register to the intake of any deeds.

The secured property rights that land registration affords are of economic importance to Scotland and are fundamental to the workings of the Scottish property investment market. Without these proposed changes, the Land Register is still likely to be incomplete in another 400 years time. Furthermore, completion of the Land Register will mean that all land in Scotland is mapped in terms of title boundaries with all the title data easily available online. This does not just carry advantages for those in the world of conveyancing but for any party seeking information as to who has what rights in which land e.g. public bodies, creditors and local amenity associations

The costs associated with completion of the Land Register are likely to be significant and RoS would undoubtedly face an additional workload, but there is also potential cost saving to RoS once the work has been carried out. Completion of the Land Register would facilitate investment in new systems and automated procedures that could deliver efficiencies when compared to current practices. Work to identify the costs and savings will be carried out prior to the introduction of the Bill.

Advance Notices

The Bill introduces a system of advance notices to Scotland. Most other title registration systems have such a system in place. This system is designed to replace Letters of Obligation, which act as a guarantee by a grantor's solicitor in favour of the grantee in a conveyancing transaction. Their purpose is to cover the gap period between the delivery of a deed and its registration. In this period there is a risk that the grantor of the

deed may become insolvent and a risk that the granter grants a deed to another party; both may affect the right of the grantee.

The advance notice will be a notice placed on the Land Register notifying that the owner of the property (X) is intending to grant a deed to Y. The notice has the effect of giving the grantee a protected period 35 days to register the deed. The grantee's title is protected from the risks outlined above.

Electronic Conveyancing

All land contracts and most land deeds are excluded from the benefits of new technology by the terms of the Requirements of Writing (Scotland) Act 1995. With a few exceptions, the provisions of this Act require a hard-copy document that is authenticated in a physical format.

RoS, the conveyancing profession and mortgage lenders all agree that a move to enable electronic conveyancing would have considerable benefits. The draft Bill proposes that it should be permissible to create and authenticate land deeds in electronic format. This would:

- meet external stakeholder expectations;
- increase speed of processing and communication;
- give increased scope for automation within conveyancing firms, lending institutions and RoS, increasing efficiency and leading ultimately to reduced costs for consumers;
- comply with EU and UK policy on developing electronic commerce; and
- be consistent with Scottish Government policy on making Scotland an attractive place to do business.

Cadastral Map

The Bill provides for the reformation of the Land Register's mapping by the introduction of a Cadastral Map. The Cadastral Map will cement the principle that there will be no registration without mapping. The result will be every plot of land that is included in a registered title will be represented by a unit on the Cadastral Map. Eventually, all the landmass of Scotland will be represented by a unit on the map; and in the future it will be easy to identify the owner of any area of land in Scotland.

Shared Plot Title Sheets

The provision for shared plot Title Sheets introduces a new approach for the registration of areas of land that are owned in common. A separate cadastral unit and a separate Title Sheets for a common area will be created for areas that are owned in common between multiple proprietors. This Title Sheet will simply list the Title Numbers of the sharing plots. The title for the individual properties will include a reference to the shared plot Title Sheet, which will result in the ownership of the right to the common area being included in this title. The

combination of this and the improved mapping requirements will reduce uncertainties as to the extents and proprietorships of shared areas.

Acceptance and Rejection of Application for Registration

The draft Bill contains three proposals that will provide a statutory basis governing the content of applications and the deeds contained therein.

Registration must be authorised by an enactment. This rule creates certainty about what can be registered and preserves the integrity of the Land Register as a record of real rights. It enables the Keeper to reject unacceptable applications, for example where a deed is invalid.

All deeds submitted for registration must be valid and probative. This clarifies and gives a legislative basis for the safeguards already employed to ensure land is not registered without right or on the basis of unsatisfactory evidence and removes the need for the Keeper to exercise discretionary powers. Statutory rules will govern deeds granted by a person without title to the ground in question. The draft Bill sets up conditions that give the Keeper a statutory basis to decide if the application should be accepted for registration. These also safeguard any true identifiable owner of the property.

A 'one-shot' principle is proposed. This places the onus on those applying for registration to ensure their applications are complete before they are submitted for registration and would give the Keeper a statutory power to reject incomplete applications, which are a drain on RoS resources.

Effect of Registration and rectification of inaccuracies

In order to re-align the existing effect of land registration with the general rules of property law, the Bill provides that registration of an invalid deed will not in itself confer the relevant right affected by the deed. This change in the effect of registration means that administrative error or error induced by forgery does not of itself deprive the true proprietor of his or her rights.

In respect to rectification, the Bill provides that an inaccuracy is constituted in the Land Register where the Land Register fails to reflect the true legal position. The legislation then places a duty on the Keeper to rectify all demonstrable inaccuracies. This change removes some of the obstacles that very often prevent the Keeper rectifying, resulting in an inaccurate Register.

Guarantee of title

The 1979 Act introduced to Scotland for the first time state guarantee of registered titles. This protects those transacting with properties from latent invalidities in deeds and from errors. It supports the 'curtain principle', which permits the solicitor acting for a proposed purchaser or secured lender to rely on the terms of the Title Sheet in question.

Experience since the introduction of the 1979 Act has shown that there are some problems in the detail of the current system that has led to disputes, litigation and, in some cases, the feeling that the present rules result in unreasonable outcomes.

Under the current legislation, if a deed is registered that contains inaccuracies or errors or is in fact invalid, the effect of registration can be to cure these deficiencies. The effect can also be to deprive someone with good title of their land. The way the current legislation works is to protect the registered proprietor's title. The other party is likely to be compensated by a payment from the Keeper, termed indemnity.

Under the proposed Bill, registration of a defective deed would not itself transfer ownership and once an error appears on the face of the Land Register, if the registered proprietor possess for a prescribed period of time (one year) and then conveys on to a third party in good faith, registration of the deed in favour of that third party has the effect of realigning the parties' rights to what they would have been if the Land Register had been inaccurate. If the problem comes to light in the prescribed period, the true owner of the land retains their right to the land regardless of what the Land Register says.

The simplification in conveyancing and resulting cost savings that flow from the curtain principle should be retained in the vast majority of cases. However, unlike the present system, 'true' owners would not normally be irremediably deprived of ownership as soon as an inaccurate deed is registered. Rather, before deprivation of ownership occurs - in favour of a party who is also deserving - there would need to have been the combination of a second transaction taking place involving reliance on the Land Register and possession by other parties for the prescribed period.

Archive record

The electronic Archive Record currently consists of all historic and current deeds on which the terms of the Title Sheets in the Land Register are based, along with copies of any other relevant documentation that has been submitted with an application for registration. The Bill introduces legislation to regulate the Archive Record, making it officially part of the Land Register and to improve the searchability of the Record. The obvious benefits these provisions bring, including the ability to obtain official extracts of deeds held on the Record, should come at little expense since the Archive Record is unofficially already in existence and already enabled with some search functions.

Sectors and groups affected

The Bill will impact on all owners of heritable property in Scotland and tenants in long leases that are registered in the Land Register. There will also be substantial implications for lawyers, the conveyancing industry and mortgage lenders. The change in legislation and the impact on internal processes will also have a great impact on RoS.

Benefits

Completion of the Land Register

Significant costs will be incurred in completing the Land Register, as the process of completing an application for First Registration is labour-intensive and requires highly-experienced staff. However, once property is in the Land Register, the time taken by the Keeper's staff to complete subsequent applications for registration can be reduced by up to 75%. Automated processes can further reduce the amount of time required to process an application and turn-around times will be reduced. Completion of the Land Register will also provide a single source of information for anyone wishing to search for property records in Scotland.

Disputes

The draft Bill strengthens the legislative basis of the current land registration system and removes many uncertainties. It is therefore reasonable to assume the number of disputes will decrease. BiGGAR Economics estimate that increased certainty over property rights could result in savings of £810,000 per annum in litigation costs.

Keeper's Guarantee of Title

The proposed changes will simplify the current indemnity scheme and provide greater clarity on the rules of the scheme. It is estimated that this would deliver annual savings of 10% of indemnity costs. At current levels, this would result in a saving of £40,000 per annum.

Advance Notices

Moving to a system of Advance Notices could result in annual savings of £9.9 million for those involved in property purchase, as well as providing protection against fraudulent claims of ownership. BiGGAR Economics estimate that approximately £230,500 per annum could result from savings associated with court cases involving fraud.

One-Shot Rule

The one-shot rule proposed will enable the Keeper to reject defective or incomplete applications, reducing the requirement to deal with some applications more than once and making savings in administrative costs for RoS and conveyancing professionals. The average savings for RoS were estimated by BiGGAR Economics to be £4.4 million per annum and those for solicitors to be £10.7 million.

Prescriptive Claimants

These provisions will enable land that is not used and where there is uncertainty of ownership to be put back into economic use. They will also provide statutory rules governing the acceptance of *a non domino*

applications for registration and the way in which such applications will be reflected in the Land Register. With around 50 applications to register a *non domino* dispositions annually, along with 598 pre-registration enquiries received by RoS in 2009, the provisions will have a positive impact on the use of RoS staff resource and also that of solicitors.

The Scottish Vacant and Derelict Land Survey 2009 showed 10,863 hectares of derelict and urban vacant land, of which 12% (1,322 hectares) has unknown ownership. There is significant potential economic benefit from bringing this land into use and there may also be environmental benefits as a significant proportion of derelict land is contaminated and returning it to use would prompt remediation. BiGGAR Economics estimate that bringing one-third of derelict sites back into economic use would have an economic impact of around £32 million in increased value to the economy.

Information Provided to Public Sector

The economic benefits of efficiency savings and collection rates for local authorities were quantified in the Property Ownership service Transforming Government Feasibility Survey, where an increase to 80% coverage of the Land Register could increase the benefits associated with the National Property Ownership Service by almost £9 million.

Information Provided to Private Sector

The draft Bill makes no changes to the procedures or rules that govern the information that can be made available to private sector organisations and therefore no impact has been calculated. However, as the coverage of the Land Register grows, it is likely that there will be more requests for information from the private sector.

Electronic Conveyancing

The greater efficiency of electronic conveyancing would reduce human error and increase business efficiency, resulting in more prompt updating of the Land Register and associated reductions in administrative and business costs.

Costs Associated with Changes

As well as strengthening the foundations of the land registration system, the Bill proposes a number of changes to the Land Register and its operation. As with any change to any system there are likely to be short-term costs involved in introducing the reforms, for both RoS and conveyancing solicitors and their clients.

As RoS derives its income through registration fees, any increase in costs incurred is likely to be passed on through increased fees to be paid by the purchasers of domestic and commercial property and those re-mortgaging properties or re-financing investments whose deeds will be registered in the Land Register.

Registers of Scotland Costs

The introduction of the new legislation will require RoS staff to be trained on the new legislation and the effects it will have on their working practices. The cost of this is estimated at £2million.

The draft Bill introduces a number of changes that will require some investment in new systems. These include the proposals, among others, for Advance Notices, shared plot Title Sheets and electronic conveyancing. The BiGGAR report gave a provisional estimate of £1 million to introduce an IT system to support Advance Notices, but at this stage insufficient development work has taken place within RoS to allow any accurate estimate. Development work to assess the other costs has yet to be undertaken as RoS need to know what the final legislation will entail.

Land Register Completion Costs

RoS have made an initial provisional estimate of the cost of completing the Land Register, based on current practices, of almost £400 million. However at this stage this is a very broad estimate and further work needs to be done.

Additional Costs

There will also be additional costs to RoS in publishing the changes to the Keeper's practices as a result of the Bill. This information needs to go to the conveyancing industry and the public at large. RoS will also have to update their publications, such as the Registration of Title Practice Book. These costs have not yet been quantified.

Solicitor Training Costs

There will be cost in training solicitors and their support staff to ensure they are familiar with and able to practice within the new legislation. All solicitors holding a practicing certificate in Scotland are required to complete 20 hours of continuing professional development (CPD) training in a year. It is likely that solicitors will incorporate their training a part of their CPD.

The cost of the Professional Competence Course CPD is £18.50 per hour. At this rate 20 hours of CPD would cost £370. There are 10,082 solicitors registered with the Law Society of Scotland, including 6,859 in private practice. If 50% of those in private practice used one year's CPD to undertake activities associated with the new legislation and associated new systems, the total training costs might be £1.3 million. If the costs of training support staff were also included, this might increase to £2 million (BiGGAR Economics).

There would also be opportunity costs associated with this time spent training. Based on the Law Society's estimate of an hourly cost for a

solicitor's time of £166.28, the opportunity costs of 20 hours CPD for 50% of solicitors in private practice would be £10 million.

The total estimated one-off cost of training associated with becoming familiar with the new legislation and systems could therefore be £12 million. It should be noted that such costs would not necessarily be additional costs, since solicitors are required to spend time on CPD.

Solicitor System Cost

Many solicitors use case management systems to improve the quality of the service offered to clients, manage time more effectively, improve organisation of cases and staff time spent on each, reduce administrative/transaction costs and errors. Ultimately, these systems aim to increase productivity and improve the service offered and can in the long term provide savings.

The Bill could encourage the further adoption of such systems by solicitor firms, especially with the advent of electronic conveyancing. These systems typically have installation and set up costs (of perhaps £2000 to £3000 (BiGGAR report) and then a small variable cost per transaction, which is generally passed onto the client. Approximately 10% of the firms have these systems already in use, the cost of the remaining 90% of conveyancing firms (estimated to be 860 in Scotland) of installing a case management system would amount to an estimated £1.5 to £2.5 million (BiGGAR Report).

These costs are not necessarily additional costs. If firms want to take full advantages of the opportunities for efficiency savings associated with e-enablement and remain competitive in the market it is this rather than the introduction of Bill that will increase the adoption of these systems by solicitors firms. The Bill would only compel firms to become e-enabled if electronic conveyancing was made compulsory, the Bill does not prescribe this.

Scottish Firms Impact Test

Our intentions to visit and consult with businesses of various sizes within the sectors identified as being affected by the Bill are outlined above.

Competition Assessment

Whilst stakeholders such as law firms, lenders and private search firms operate in competitive markets and will be affected by the provisions of the Bill, it will not bring about any distortion to those markets. None of the provisions of the Bill amount to either direct restraints on any specific players within those markets or to indirect restraints to entry into those markets.

Test run of business forms

The draft Bill contains styles of Ascertainment Deed and Notice of Title for use in the Land Register. These are more legal deeds than business forms and as such should pose no difficulty for the conveying industry; however, we will seek views on them in the consultation visits outlined above. The form of Ascertainment Deed has already been the subject of dialogue between the SLC and Homes for Scotland.

Legal Aid Impact Test

It is not expected that the proposed Bill will have a significant impact on the Legal Aid Fund because Legal Aid is not usually available in connection with Land Registration applications.

Enforcement, sanctions and monitoring

The draft Bill does not introduce any new obligations or burdens that would require to be enforced. As at present, the sanction for non-compliance with statutory requirements for land registration will be refusal of registration by the Keeper.

If the draft Bill is duly enacted by the Scottish Parliament RoS will employ project methodology to manage its implementation and this will include a post implementation review.

Appendix F — Equalities Impact Assessment

Registers of Scotland Land Registration (Scotland) Bill Consultation

What is the purpose of the proposed policy (or changes to be made to the policy)?

The Bill will implement the Scottish Law Commission (SLC) Report No. 222 on Land Registration. The Report can be found at <http://www.scotlawcom.gov.uk/publications/reports/2010-present/> .

The purpose of the Bill is to improve the system of Land Registration in Scotland. The Bill will also make amendments to the Requirements of Writing (Scotland) Act 1995 to permit electronic conveyancing.

Who is affected by the policy or who is intended to benefit from the proposed policy and how?

The policy will impact on land owners, tenants and other parties with an interest in land. It will also impact on conveyancing practitioners, mortgage lenders and the general public using the Land Register to obtain information. The benefits include reducing complexity; improvements to the mapping of registered titles to land; improvements to the state guarantee of title; additional protection for buyers during the purchase process; enablement of electronic conveyancing; improving the law in relation to inaccuracies in the Land Register and how they are dealt with; and permitting the achievement of a single, complete and accessible Land Register containing data for all land in Scotland.

How have you, or will you, put the policy into practice, and who is or will be delivering it?

The Keeper of the Registers of Scotland is publishing and will analyse responses to this consultation in order to assist Scottish Ministers in considering whether to introduce a new Land Registration Bill into the Scottish Parliament. Any Bill will depend on the responses to this consultation, the wishes of Scottish Government and the availability of Parliamentary time. Registers of Scotland will continue to be responsible for maintaining the Land Register and for implementing the various proposed changes to the existing system if the proposed Bill is duly enacted.

How does the policy fit into our wider or related policy initiatives?

The Bill will simplify, update and improve property and registration law in Scotland, attracting businesses to Scotland and increasing investor certainty.

Have the resources for your policy been allocated?

Resources have been allocated for the current consultation. Following consultation, if the Scottish Ministers are minded to introduce the Bill consideration will be given to allocating resource in connection with passage and implementation of the Bill.

What do you already know about the diverse needs and/or experiences of your target audience?

Registers of Scotland is not aware of any impact that the new legislation would have on any of the six equality strands of age, disability, gender lesbian, gay, bisexual and transgender, race or religion and belief.

What else do you need to know to help you understand the diverse needs and/or experiences of your target audience?

Registers of Scotland is not aware of any evidence that the proposals affect different groups in different ways.

What does the information you have tell you about how this policy might impact positively or negatively on the different groups within the target audience?

There is no evidence that the Bill has any differential or discriminatory impact on persons defined by any of the six equality strands of age, disability, gender lesbian, gay, bisexual and transgender, race or religion and belief.

Will you be making any changes to your policy?

Since this assessment has concluded that the Bill does not discriminate persons defined by age, disability, sexual orientation, race and religion and belief, no changes are required to address these issues. Should consultation responses disclose any potential discrimination issues, the policy will as necessary be reconsidered.

Does your policy provide the opportunity to promote equality of opportunity or good relations?

Whilst the Bill does not discriminate against persons defined by any of the equalities sectors, the subject matter is such that it does not present any material opportunities to promote equal opportunities or good relations.

Based on the work you have done - rate the level of relevance of your policy

There is no evidence that people from different groups or communities are, or could be, affected differently (either positively or negatively) by the new legislation.

Do you need to carry out a further impact assessment?

No

Please explain how you will monitor and evaluate this policy to measure progress

Registers of Scotland will employ project based methodology to manage the implementation of the Bill and this will include post implementation review. Existing consultative arrangements with stakeholders will continue to be employed in this regard.

Sign off and publish impact assessment

Policy Title	Registers of Scotland Land Registration (Scotland) Bill Consultation
Strategic Outcome	Wealthier & Fairer
Branch	Registers of Scotland
Name	Sandy McNeil
Position	Legal Director
Sign off date	13 August 2010

Authorisation

Authorised By	Catriona Hardman
Deputy Keeper Legal and Corporate Services	
Date Authorised	13 August 2010

Appendix G — Strategic Environmental Assessment

Registers of Scotland Land Registration (Scotland) Bill Consultation

Purpose: The aim of the Bill is to make further provision for land registration and to pave the way for a complete, single, accessible national register of accurately mapped, guaranteed title to land in Scotland and to enable electronic conveyancing

What prompted the consultation: In December 2009, the Scottish Law Commission (SLC) submitted its Report on Land Registration (SLC No.222) to Scottish Ministers. The Report includes a draft new Land Registration (Scotland) Bill. The Report can be found at:

<http://www.scotlawcom.gov.uk/publications/reports/2010-present/> .

The consultation seeks to obtain views on aspect of that report to assist Scottish Ministers in considering whether to introduce a new Land Registration (Scotland) Bill into the Scottish Parliament.

Subject: Land registration law and the law relating to form and authentication of conveyancing contracts and deeds.

Period covered: All comments received by the end of the consultation period will be considered by Scottish Ministers prior to any decision to introduce a new Land Registration (Scotland) Bill to the Scottish Parliament.

Frequency of updates: Not applicable. The legislative changes proposed would be permanent changes to the law.

Area covered: Scotland.

Summary: The Keeper invites consultees' views on the draft Bill and in particular on the questions highlighted in the consultation document. Subject to comments from consultees, and the availability of Parliamentary time, Scottish Government will then consider the introduction of a Bill to reform and improve the system of land registration, and to permit electronic conveyancing.

The main reforms proposed are:

- To provide for completion of single, map based, guaranteed register of title;
- To improve the approach to mapping of titles in the Land Register;
- To improve the operation of the system of State guarantee of title;
- To introduce a system of advance notices, that would protect buyers of property from frauds;
- To provide a statutory basis for the Land Register Application and Archive Records;

-
- To clarify the circumstances in which an application for registration is to be accepted;
- To clarify the circumstances in which the Land Register is inaccurate, and when inaccuracies may be rectified by the Keeper;
- To introduce new criteria for dealing with applications where the grantor has no title to land;
- To enable electronic conveyancing.

LIKELY SIGNIFICANCE OF EFFECTS ON THE ENVIRONMENT

1(a) the degree to which the Bill sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources

The Land Registration (Scotland) Bill would not set a framework for projects and other activities, and would have no environmental impact in this regard.

1(b) the degree to which the Bill influences other plans, programmes or strategies including those in a hierarchy

Nil. This would be a free-standing Bill with no implications for other plans, programmes or strategies.

1(c) the relevance of the Bill for the integration of environmental considerations in particular with a view to promoting sustainable development

The provisions of the Bill permitting electronic conveyancing contracts and deeds are expected to have minor positive environmental impacts including savings in physical resources (paper, ink etc) and removal of the need for physical transportation of such deeds and contracts.

1(d) environmental problems relevant to the Bill

There are no specific environmental problems relevant to the Bill. Minor positive effects are expected as outlined in the foregoing paragraph.

1(e) the relevance of the Bill for the implementation of Community legislation on the environment

The Bill has no relevance for the implementation of Community legislation on the environment.

2 (a) the probability, duration, frequency and reversibility of the effects

There will be no adverse environmental effect of the Bill. The minor positive benefits already mentioned are likely to arise and would represent a permanent change in conveyancing practice.

2 (b) the cumulative nature of the effects

The Bill does not have multiple environmental effects.

2 (c) transboundary nature of the effects (i.e. environmental effects on other EU Member States)

There will be no transboundary environmental effect of the Bill. The provisions are territorially limited to Scotland and would not impact on other EU Member States.

2 (d) the risks to human health or the environment (for example, due to accidents)

The Bill would not give rise to any such risks.

2 (e) the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected)

The Bill would apply to the whole of Scotland, and the minor positive benefits identified associated with electronic conveyancing would be applicable wherever in Scotland conveyancing is carried out.

2 (f) the value and vulnerability of the area likely to be affected due to-

- (i) special natural characteristics or cultural heritage;**
- (ii) exceeded environmental quality standards or limit values; or**
- (iii) intensive land-use.**

Given the nature of the Bill (changes to property law and land registration) there would be no environmental impact on specific areas.

The proposed formalisation of the Land Register Archive Record would enable the history of ownership land to be searched and would thus preserve a part of the cultural heritage of Scotland.

2 (g) the effects on areas or landscapes which have a recognised national, Community or international protection status

The Bill would have no effect on such areas or landscapes.

SUMMARY OF ENVIRONMENTAL EFFECTS

The Land Registration (Scotland) Bill will have no adverse environmental impact, and its provisions relating to electronic conveyancing are anticipated to have a minor positive impact.

Sandy McNeil
Legal Director
Registers of Scotland
13 August 2010