



Consultation Response

Registers of Scotland: Keeper Induced Registration consultation

The Law Society of Scotland's response

January 2016

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's legal profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective legal profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Registers of Scotland consultation on Keeper Induced Registration ("KIR"). This response has been prepared on behalf of the Law Society of Scotland by members of our Property and Land Reform Sub-committee.

General Comments

We suggest that there are a number of wider questions which are not addressed by the specific questions asked in the consultation document. We consider that there is an issue relating to the difference between the warranty proposed under KIR and that proposed under triggered or voluntary registration. We understand that the original draft bill proposed no warranty for KIR, with the practical effect that the unit was mapped, but was still effectively a Sasine title. This for some reason was deemed unacceptable, and so there is now a

limited (and pretty circular) warranty proposed for KIR titles. We think this needs to be brought out in any publicity about the whole process – not only is the Keeper going to be doing this, but there will be warranty of what is done.

In relation to burdens, we are of the view that if a link, rather than a burden is to be listed, it is much less clear what rights are being obtained – you can perhaps be sure of the owner, but of not much else. For KIR, we have no objection to this – in fact we think it is actively positive as it will ensure that the deeds are looked at thoroughly on the first ‘proper’ registration. As regards extending this to all deeds, we think it is a good idea as it potentially limits Keeper mistakes, but it may erode the warranty being offered and at the general ease with which the public can identify their property rights without professional input.

We question the proposal to include only links to burdens writs in that there is potential to omit some burden writs. The point is to be able to rely on the Register and we are of the opinion that that would not work if the legal professionals need to tidy it up afterwards. It also raises the question of who bears the cost of that. Land Registration has been a very busy area for some thirty years. The proposal that the balance (the larger part) can be done in ten years seems unrealistic without huge resource being made available for that. Albeit this might seem an expensive business, if that avoids compensation claims (these are going to be warranted titles) then the cost is inevitable. We consider the principle to be commendable, but the implementation may be a very different matter both in terms of cost and complexity.

In response to the questions contained in the Consultation on Keeper Induced Registration, we should like to respond as follows:

Question 1 - Do you agree with the proposed approach to KIR starting with residential properties in research areas?

Yes, we consider this to be a sensible approach.

Question 2 - Do you agree that we should start KIR in areas that will have the highest impact on completing the Land Register and supporting conveyancing?

Yes, we consider this to be a sensible approach.

Question 3 - Should land that has entered the Land Register through KIR be identified differently from a trigger-based or voluntary registration through a note in the property section of the title sheet, and/or a separate field marking the date of keeper-induced registration?

Yes, we consider that KIR registered land should be identified separately.

We are of the view that the acknowledgement that the title had been generated by a KIR registration would give the public and the profession perspective to:

(i) the possible cause of any limitation or exclusion of warranty; and

(ii) the range of information about the title that was likely to have been available to the Keeper at the time of the KIR registration.

Question 4 - Do you agree with the Keeper's general approach to the KIR mapping of legal extent?

Yes, we consider this to be a sensible approach.

However, we consider that Section 86 of the Land Registration (Scotland) 2012 Act could deprive an original owner of title, more rapidly than would have occurred by prescription.

Question 5 - Do you agree with the Keeper's proposed approach to incorporeal pertinents?

We agree in general with the Keeper's intended approach to identify incorporeal pertinents. We would though ask what the Keeper's approach will be to update burdened properties in the Land Register which are subject to the incorporeal pertinent. For example, if a servitude right is identified and the Keeper proposes to set them out in detail, then will the Keeper also update any cadastral unit or title sheet affected by it? Also, in relation to rights to common property will the Keeper also create a shared plot title sheet to the common area?

Question 6 - Do you agree with the Keeper's proposed approach to property titles that include an equally and survivor destination or are held by ex-officio trustees?

We consider that the Keeper's approach to show names and designations as shown on the Sasine search sheet alongside a note explaining that current details are unknown is a sensible approach.

Question 7 - Are there any other circumstances where the Sasine register may not show the last person with completed title?

Yes. If the person has, for whatever reason, an unfeft or unregistered title. We imagine though that they will still be able to record their title after KIR so, in practice, this will not make any difference to the KIR process.

Question 8 - Do you foresee any practical difficulties in narrating a list of the deeds that contain encumbrances, rather than setting out the burdens in full? If so, how could these difficulties be addressed?

We consider that if a list of deeds is provided rather than a narration of the burdens, it will still be necessary for time to be spent in considering all the potentially relevant deeds for the burdens which may still apply – not all will still be applicable or enforceable, or even relevant. This will limit the benefit in cost and time of the KIR process.

It may be however that this is not a problem, as given the other limitations on a KIR title it will usually be appropriate for the first sale after KIR to effectively work as a first registration – or at least, it is to be hoped that this is what will happen given that the scrutiny applied on KIR can never be the same as in a private transaction.

Question 9 Do you agree that the Keeper should adopt the same approach to listing deeds in the burdens section for triggered registrations with a hyperlink to the text of the deed?

We consider that there are some significant questions to be asked here about the whole ethos of registration. As we note above, if the deeds rather than the burdens are listed, this leaves the responsibility for checking the burdens with the transferee or his or her solicitors. Ultimately, this is a policy decision as to whether the Register will be a complete picture of the sum of the rights, or whether there will still be an element of legal skill required.

Question 10 Are you content with how we plan to communicate KIR?

Pre-KIR

We would favour wider public engagement and you may wish to consider press advertising, liaising with local MSP/MPs and the Citizens' Advice Bureau. It may also be helpful to provide more detailed information to those communities within research areas as they will be affected more immediately.

Post-KIR

Without sufficient pre-KIR notification a person receiving a communication advising their title has been updated may be concerned as to any effect this has on their property rights. We would suggest it is made clear in any correspondence why KIR has been completed and confirm the owner's rights have not changed. There may be owners that do not have the facilities or skills to access a copy of the title sheet online and they should be given the option to request a paper copy.

Question 11 Do you agree that the Keeper should produce guidance on the additional information likely to be required at the next transaction after a KIR?

Yes, we would consider that this would be useful to both property owners and their agents.