

KIR Consultation Survey Response

PAGE 2: Information about you

Q3: Are you responding as: (please select below)
on behalf of a group or organisation

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Q4: Individuals Do you agree to your response being made available to the public (in the Scottish Government library and on the RoS website)?

Respondent skipped this question

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Q5: Where confidentiality is not requested, we will make your response available to the public on the following basis (Please select ONE of the options)

Respondent skipped this question

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Q6: On behalf of groups or organisations The name of your organisation WILL BE made available to the public (in the Scottish Government library and on the RoS website). Are you content for your response to be made available?

Yes

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Q7: 1. Do you agree with the proposed approach to KIR starting with residential properties in research areas?

Yes

Q8: 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?

Comment: We agree that starting KiR with residential properties in research areas will have a significant impact on completing the Land Register. Given the purpose of KiR as facilitative of Land Register completion, and that many of these residential units are unlikely to be Land Registered outwith KiR before 2024, we agree that residential research areas are a reasonable place to start.

Q9: Q3. Do you agree that we should work in partnership with the owners of heritage assets to complete registration of their titles by KIR?

Yes

Q10: Q3. 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

Comment: As is acknowledged in the consultation paper, particular issues of uncertainty will affect some KiR titles. The first transaction following KiR will often be the first opportunity of an owner or right holder to consider and make representations about the title. A clear note on the title is thus desirable, and fits with the nature of a public register. There should be consistency between title sheets created following KiR and title sheets created following a voluntary registration in this respect: it facilitates understanding of the Register if this information is always found in the same place. We have received a title sheet following a voluntary registration in which the words “voluntary registration” appear instead of the consideration. We suggest the same approach for KiR titles. Links, or at least a list of references, to the deeds used during the KiR should also be available. A note on the Keeper’s Warranty under s74 (also emailed separately to Sarah Duncan) The consultation paper discusses the Keeper’s warranty in the text preceding question 3, which warranty is provided for in s74 of the 2012 Act. There are two issues, as follows. Firstly, the paper states that the Keeper’s warranty under s74 provides: “a twofold guarantee to the person or persons shown in the proprietorship section of the title. The first part of the guarantee is that, at the time of registration, they are the proprietor.” This is not quite in accordance with the 2012 Act. S74(1)(a) provides that: “The Keeper, on registering a plot of land by virtue of section 25 or under section 29, warrants to the owner that, as at the time of registration, the title sheet of the plot is accurate in so far as it shows the owner to be the proprietor or proprietor in common.” The consultation paper states that the warranty is “to the person or persons shown in the proprietorship section”. As can be seen from s74(1)(a), the warranty is to the owner, who may or may not be the person shown in the proprietorship section. Secondly, s74(1)(a) does nothing. To paraphrase it: the Keeper warrants to the owner that the owner is the owner. “The Keeper, on registering a plot of land by virtue of section 25 or under section 29, warrants to the owner that, as at the time of registration, the title sheet of the plot is accurate in so far as it shows the owner to be the proprietor or proprietor in common.” [emphasis added] This warranty is pointless. It can never be breached. It only arises if the owner is shown on the Register as the proprietor at the time of registration. If that is the case, the Register is – of course – accurate and, as such, there can be no breach. If a person who is not the owner is shown on the Register as proprietor at the time of registration the warranty does not arise (and so cannot be breached as it does not exist). It does not arise because the owner is not shown as the proprietor and so the conditions for existence of the warranty in the legislation are not met. There was no equivalent to s74 in the Scottish Law Commission’s proposed Bill as it was not the Commission’s intention that titles registered by KiR would be warranted. It would appear that in drafting s74(1), the corresponding provision in s73(1) has been copied across, with a minor amendment. The amendment was required because the s73 warranty is given to the applicant (who may or may not be, for example, the recipient of the right with which the registration is concerned, in terms of the principles of property law). Because it is possible for there to be a divergence between the face of the register and the underlying legal position, this warranty makes sense; this warranty is meaningful. This can be contrasted with the warranty of s74(1)(a): in KiR there is no applicant. For applicant has been substituted “owner”, but – as is explained above – this means that the Keeper is warranting the veracity of the register under circumstances in which the register can never be wrong. In order to make s74(1)(a) a truer analogue of s73(1)(a), and so to have some meaning, it should be a warranty to the person who appears as proprietor in the relevant title sheet. At present, s74(1)(b) does legislate for a meaningful warranty. However, if s74(1)(b) were amended as suggested, it may be desirable to amend s74(1)(b) also, for the sake of consistency. In addition, it may be observed that the position proposed by the SLC was not without merit: the fee for registration effectively includes a one-off insurance premium. If KiR titles are warranted, the people to whom those titles pertain are given the benefit of warranty without paying for the same. The warranty given to some is effectively subsidised by those with titles on the Land Register that have not been subject to KiR.

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Q11: Q4. Do you agree with the Keeper's general approach to the KIR mapping of legal extent?

Comment: Where there are obvious problems with the boundary between plots, we suggest that the affected parties should be contacted at that stage by the Keeper, with a proposal of where the boundary will be drawn. The anticipation in the consultation paper is that such titles would not be a great proportion of the whole, so the administrative burden would not be great. This would give the parties an opportunity to agree the boundary line. A timescale for agreement could be set, in order that the KiR process is not unduly delayed. Where there are unresolved overlaps, gaps, or other uncertainties it is desirable that these areas are highlighted on the cadastral map. The position of the boundary would be for the parties to determine by agreement or recourse to the courts.

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Q12: Q5. Do you agree with the keeper's proposed approach to incorporeal pertinents?

Yes

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Q13: Q6. 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?

Yes

Comment: Yes, under the observation that, in either case, the register is not inaccurate. For example, in the case of a survivorship destination, the B-Section shows as proprietor "A and B, spouses, [address] equally between them and the survivor of them". This information is correct in any of the three following cases: (1) both spouses are still living; (2) A has died; or, (3) B has died. Where there is a survivorship destination, the designation of the proprietor on the register is unusual because it contains a contingent, future element, but this alone does not render the register inaccurate.

Q14: Q7. Are there any other circumstances where the sasine register may not show the last person with a completed title?

None comes to mind.

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Q15: Q8. 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?

Comment: The answer to this question is given together with the answer to question 9, below.

Q16: Q9. 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?

At the Edinburgh KiR session which we attended there was some suggestion that the original deeds could be scanned in and appended to the title sheet. We are in favour of this approach for all Land Register titles, including those consequent on a voluntary registration (which is not a triggered registration). Ideally, hyperlinks would be provided in addition to the text of the deeds in typeface, formatted with paragraphs, in the D-Section. This option would meet the needs of both simple and complex conveyances and would best facilitate the quicker conveyancing with which the Land Register is associated. If burdens writs are not scanned and appended to the relevant title sheets merely listing the deeds may be too great a shift to be acceptable to the profession. As adverted to above, one of the selling points of the Land Register is that it speeds up the process of conveyancing in comparison to a title which is recorded in the General Register of Sasines. This is so because the Land Register is register of title, rather than a register of deeds, and the content of each title is set out in a single title sheet, rather than discernible from a pile of individual deeds. This important advantage would be greatly diminished were the burdens writs to be listed, but not contained in the title. Whether scanned burdens writs were appended or not, the proposed approach would make title examinations more time-consuming. Although a conveyancer will be able to identify the burdens section in a deed easily, added difficulties would be two-fold. First, if the writs are not appended, there will be additional time and cost in locating or obtaining these. Second, handwritten or faded deeds are harder to read than the typewritten text on the Land Register. Any scanning of deeds would need to be carefully checked. Against these disadvantages is the advantage of seeing the original titles. The burdens will be seen in the context of the whole deed in which they appear, which is sometimes critical when seeking to interpret them or establish whether they are still enforceable. What will happen to the "old" title sheets. Will they be rendered in the "new" style? Will excerpts from deeds in the D-Section be removed? When will the removal take place? If scanned deeds are appended to title sheets in the future, will this process also take place for "old" title sheets? Will this be done county by county? What advertisement of timescales for this would be made to the profession?

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Q17: Q10. Are you content with how we plan to communicate KIR?

Comment: We propose that a copy of the title sheet should be sent to the owner with the notification that KiR has taken place in order to promote transparency of the KiR process and to make it easier for owners, many of whom will have little or no knowledge of this area, to raise any issues at an early stage. Alternatively, the notification should include instructions on how to access an electronic copy of the title sheet free of charge, with an option to request a single, free paper copy.

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Q18: Q11. Do you agree the keeper should produce guidance on the additional information likely to be required at the next transaction after a KIR?

Yes

Comment: Yes, together with access to the bundle of deeds used by the Keeper to create the title sheet.