



**Registers
of Scotland**

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Registers of Scotland

Keeper-Induced Registration

**Analysis of the responses to the
Public Consultation**

February 2016

Background

The purpose of Registers of Scotland

Registers of Scotland (RoS) is the non-ministerial government department responsible for registering a variety of legal documents in Scotland. We are self-funding, having been established as a trading fund in 1996. RoS is headed by a statutory office holder, the Keeper of the Registers of Scotland, who is responsible for compiling and maintaining 17 public registers.

The largest registers maintained by the keeper are the registers of rights in land. The General Register of Sasines (the sasine register), established in 1617, is a register of deeds. This is gradually being replaced by the map-based Land Register of Scotland, established by the Land Registration (Scotland) Act 1979 (the 1979 Act). The 1979 Act was largely superseded on 8 December 2014, with the commencement of the main provisions of the Land Registration etc. (Scotland) Act 2012 (the 2012 Act).

The consultation on keeper-induced registration

One of the main purposes of the 2012 Act is to allow for the completion of the land register. The rationale for completion of the land register was summed up succinctly by the Scottish Law Commission: *“The short answer is that the land register is better than the register of sasines.”* The keeper was invited by Scottish Ministers in May 2014 to complete the land register over a 10-year period.

In October 2015, RoS published a consultation paper setting out our proposed approach to the use of keeper-induced registration (KIR) to assist in completing the land register. The consultation closed on 8 January 2016. In total, 70 responses were received. These included responses from:

- stakeholder groups, including the Law Society of Scotland, the Council of Mortgage Lenders, Scottish Land & Estates and the Scottish Property Federation;
- 4 local authorities and the Society of Local Authority Lawyers & Administrators (SOLAR);
- a variety of public and private bodies including Sport Scotland, the Church of Scotland and banks;
- 11 firms of solicitors; and
- 25 individual solicitors or legal professionals.

A number of respondents declined permission for the publication of their responses, or requested anonymity. As a result, 48 responses will be published in the Scottish Government library and placed on the RoS website at <https://www.ros.gov.uk/consultations/keeper-induced-registration>.

As part of the consultation, we held public meetings in Aberdeen, Dundee, Edinburgh, Glasgow, Inverness and Perth, which were attended by a total of 120 people. We would like to express our thanks to all who took the time to respond to our consultation paper or to attend the consultation meetings.

The majority of questions invited the respondent to reply either Yes or No to the proposition with an option to comment further. In a number of cases, respondents elected not to respond Yes/No but simply provided comments expressing their views. The response rate for the questions ranged from a high of 64 responses (for question 1) to a low of 43 (for question 10).

Consultation Responses

Q1. Do you agree with the proposed approach to KIR starting with residential properties in research areas?

Yes: 53

No: 11

A substantial majority of respondents agreed with the central proposal of embarking on KIR in research areas, taking advantage of the pre-work already carried out by the keeper and focusing on urban areas that have a high concentration of properties on the land register. Professor Stewart Brymer commented: *"It is entirely sensible that KIR be commenced with residential properties in research areas. This represents an easy 'win' and builds on work already done within Registers."*

Similarly, Dr Jill Robbie commented: *"I agree with the reasons put forward by Registers of Scotland (RoS) that beginning with residential properties in research areas would build on existing work and it would also allow the keeper to acquire experience of undertaking KIR."*

Conversely, some respondents felt that the use of research areas targeted properties with a higher likelihood of triggered applications. Stuart Paterson commented: *"This is very much picking the low hanging fruit. With the additional triggers which have been introduced such as voluntary registration and the closure of the GRS to transfer deeds and soon to standard securities the registration of these properties will be increased without the need for KIR."*

Respondents generally agreed that it was sensible to focus on urban titles but differing views were expressed as to how this might impact on the roll out of KIR. CKD Galbraith generally agreed with the proposal commenting: *"We are broadly in agreement that rural land is generally more complicated to register and therefore research areas appear to be a reasonable starting point. We are therefore in agreement with the keeper's approach."*

Scottish Land & Estates made a similar point: *"We are concerned that the current proposed approach is about endeavouring to avoid any complexities and acting in isolation from owners who may have a valuable contribution to make. It should also be borne in mind that it is in residential property where the most transactions take place. While such an approach may therefore go some way to meeting the objective*

of benefiting the end consumer, the wider value is questionable, given that such property would be placed on the land register in any event."

In commenting on how any subsequent phase of KIR might develop, Caroline Auld on behalf of Maclay Murray Spens suggested: "*Consideration should be given, perhaps after another public consultation, to expanding the use of KIR to complex and larger titles.*"

Q2. 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: 55

No: 5

There was very strong support for the proposal to proceed initially with KIR in areas that will maximise the impact in terms of completing the land register as well as supporting conveyancing. Of the 1.2 million properties that have yet to be registered in Scotland, our estimates indicate that around 700,000 fall within research areas. In these cases, RoS would be able to build upon both the pre-work carried out when the research area was set up, and the information available from titles that have already been registered as a result of trigger-based applications. This view was reflected by a number of respondents including Rebecca MacLeod on behalf of Anderson Stathern: "*We agree that starting KIR with residential properties in research areas will have a significant impact on completing the land register.*"

While there was strong support for the proposition, a number of alternatives were suggested with one organisation stating: "*It is suggested that the keeper should be actively considering other initiatives to move other types of properties onto the land register, particularly those where the introducing of further registration triggers will not lead to registration. The current reduction in registration fees is unlikely to persuade many landowners to register voluntarily, given the other costs involved.*"

A further suggestion for alternatives to KIR was raised by Neil Ross, who stated: "*If the intention is to complete the land register it would be more sensible to encourage voluntary registration by offering incentives of a positive nature such as no registration costs and a contribution to legal costs based on the value of the property or the size of the plot being registered.*"

John Glover on behalf of the Community Land Advisory Service suggested vacant and derelict sites should be afforded higher priority than public sector land when proceeding with KIR and commented: "*...early inclusion of all vacant and derelict sites in the land register will support beneficial use of those sites and align with Scottish Government's policies.*"

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: 55

No: 3

There was also overwhelming support for this proposition, with the National Trust for Scotland being one of many respondents who agreed that we should continue to work

in partnership with the owners of heritage assets to complete registration of their titles by KIR.

CKD Galbraith reflected a commonly held view that a more collaborative approach around KIR is appropriate with the owners of heritage assets: *"We firmly believe that the owner of such assets should be heavily involved and consulted throughout the registration process"*.

Graeme Warren on behalf of SSE (formerly Scottish & Southern Energy) suggested that partnership work be more actively pursued following the initial focus on research areas: *"Whilst working closely with owners of heritage assets in the method outlined in the pilot scheme may not be of use at present, we would suggest that affected parties are contacted and invited to insist in KIR where possible, albeit on the basis that KIR will proceed by a set date, regardless of input by that proprietor."*

The complexities frequently experienced in these types of titles were acknowledged by a number of respondents, including Dr Jill Robbie: *"I understand that there are challenges involved in working in partnership with the owners of heritage assets and their external advisors to complete registration of their titles. However, if the aim of KIR is to accurately and comprehensively register the titles of properties on the land register which otherwise would not be registered, working in partnership with owners is the only viable option. If the process is time-consuming, it is best to start the process as soon as possible instead of rushing registration at the end of the 10 year deadline."*

Some respondents expressed concerns about the impact of this type of activity on the day to day operation of the register with Janet Taylor stating: *"KIR should not be utilised to provide a "free" service to owners of heritage assets at the cost of ordinary ongoing applications."*

Q4: 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: 53

No: 11

There is very strong support for the proposition that KIR titles should be identified separately from trigger-based or voluntary registrations. As envisaged in the consultation document, it is proposed that a KIR title will be identified by means of an entry in the property section of the title sheet.

This will ensure anyone dealing with a subsequent transaction will be aware that the property entered the land register by way of KIR and can satisfy themselves as to the accuracy of the information appearing on the register and this point was acknowledged by many respondents with a typical response stating: *"If an inspection of the property on the ground is not being undertaken it should be identified so that a proper investigation can be carried out thereafter if the keeper is simply relying on registering a unit identified on the OS as the title extent."*

Many of the 17 respondents who were not content with this proposal expressed concern that a KIR title might be regarded as inferior. Caryn Auld on behalf of Maclay Murray Spens commented: *"The concern was raised that this would, potentially, have the effect of creating a two-tiered system of land registration, at least initially pending any transfer being effected. A solicitor dealing with property registered under KIR may presumably require to treat a first transfer of it as, in effect, a first registration application"*

A question about how KIR titles sheets will be treated following the first post-KIR application was raised by Frances Rooney on behalf of Harper MacLeod: *"We would however like to see some process to allow the KIR marking to be removed following the first dealing after registration. That first dealing will in all likelihood involve sasine vs KIR examination by a solicitor, so the title should be able to be reissued as a "clean" title sheet afterwards so that unnecessary concerns are not raised for every subsequent dealing."*

Q5: Do you agree with the keeper's general approach to the KIR mapping of legal extent?

Yes: 43

No: 14

A significant proportion of those responding agreed with the proposed approach to mapping legal extent under KIR. This broadly follows the practice adopted by the keeper when processing conventional triggered or voluntary registrations.

The broad agreement with the proposal was reflected in the comments of Brian Simpson on behalf of the Law Society: *"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."*

Notwithstanding the general support, a number of issues around conflicting titles raised further comment, such as those provided by Graeme Warren on behalf of SSE: *"The proposed approach on mapping and prescription in particular appears to adequately preserve the rights of affected parties. Where an overlap or other potential discrepancy or uncertainty is uncovered, we would encourage the keeper to do their utmost to engage with affected parties prior to proceeding, and only proceed with KIR where a "standstill" period has expired, and the affected parties have not responded."*

A number of respondents commented on what should be done if a conflict was identified, with Jill Andrew on behalf of Burness Paull stating: *"...the keeper should not complete KIR where she seeks to limit or exclude warranty without direct recourse to the property owner."*

Queries around the keeper's ability to map subjects in the absence of input from the applicants were raised by respondents, including Janet Taylor who expressed the following concern: *"It is essential that the mapping from sasine deeds is confirmed by the current land owner with personal knowledge and checked against the OS and where appropriate other titles."*

Other respondents, including Elizabeth Bodman, queried the effect of the keeper's warranty in the context of KIR: *"If no solicitor is to be involved, the scope for major errors in title area seems too high a risk to take, what indemnity will RoS provide should title be found to be incorrect say on a subsequent sale, if there is limited warranty and the landowner needs legal representation who will foot the bill for legal fees?"*

Q6: Do you agree with the keeper's proposed approach to incorporeal pertinents?

Yes: 45

No: 10

Respondents were broadly supportive of the proposition in relation to incorporeal pertinents. As outlined in the consultation document, the proposed approach provides that pertinents will be set out in detail in the tile sheet, where they exist and it is possible to do so. Where the description of a right in a deed is unclear, for example where the route of a servitude relies on a poor quality plan, then the pertinent will be included by reference to the relevant deed with a note explaining the issue.

While there was general consensus about the thrust of the proposal, a number of respondents queried how matters might be addressed subsequent to KIR where new or additional evidence was brought to light. For example, Catherine Reilly on behalf of Brodies commented: *"Yes but we would suggest that there is an appeal mechanism available to those benefiting from such pertinents to vary, amend or add to what has been noted."*

Rachel Oliphant on behalf of Pinsent Masons commented: *"Generally we agree with the proposed approach. We wonder how the keeper will be able to establish if incorporeal pertinents have been extinguished without consulting with the owner of the property so again we think involvement with the owner would be useful before the title is registered rather than the title sheet being rectified after KIR. We note the proposed approach in paragraph 36 (iii) and wonder if this approach could be adopted by applicants where the description of a right in a prior deed is unclear?"*

A significant minority of respondents expressed concerns about the proposed approach, typified by Neil Ross of Grigor Young who stated: *"It is essential that the detail from sasine deeds is confirmed by the current land owner and where appropriate other titles. The information is not within the keeper's knowledge and it is unacceptable to include any matter which may be misleading."*

Q7: 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: 45

No: 8

There is very strong support for the proposed approach to reflecting titles held by ex-officio trustees or that include an 'equally and survivor' destination, most respondents agreeing with the proposal to reflect the names and designations shown on the sasine search sheet. On the basis that this is information that may have changed off-register, outwith the keeper's knowledge, the proposal includes adding a note clarifying this point.

Most respondents agreed that this was a practical solution, one commenting that: *"So long as it is clear at the time of the original recording of the deed the information was accurate there should not be any confusion that at the time the property was registered it may not still be accurate."*

The view was mirrored by Kennedy Foster on behalf of CML: *"We believe that there is no alternative under KIR but to show in the land register the name and designation of those shown as being recorded as proprietors in the sasine register."*

Whilst agreeing with the proposal in broader terms, a number of respondents again raised the potential for engagement with proprietors during the KIR process, Joyce Moss on behalf of West Lothian Council suggested: *"This seems reasonable but is also an opportunity for the keeper to write to the current owner(s) asking for confirmation. If no reply is received within 40 days then the statement as suggested can be attached."*

Andrew Gray raised similar concerns and called for dialogue with the proprietor: *"it is obvious that this will be affected where links in title are necessary. Again if the owner was warned this problem would be reduced"*.

Q8: Are there any other circumstances where the sasine register may not show the last person with a completed title?

Twenty-five respondents highlighted alternative scenarios that they considered might result in out-of-date information being relied on by the keeper when compiling a title sheet under KIR. By far the most commonly raised instance is, where following the death of a sasines proprietor, a successor's right has been obtained by means of a docquet transfer on the deceased's confirmation.

Another commonly mentioned scenario concerned off-register transfers by bodies such as local authorities or asset transfers by financial institutions.

In addition to the circumstances outlined above, which generally affect titles resting on deeds currently recorded in sasines, the issue of pre-sasines titles was raised by Iain Strachan on behalf of SOLAR: *"there would be a potentially large volume of properties for local authorities where the last recorded title was held by a predecessor authority, prior to the creation of the unitary authorities, and indeed for certain royal burghs there will be no recorded title."*

Q9: 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?

Yes: 27

No: 20

The proposal in the consultation paper that the burdens section should list the deeds that the keeper considers contain encumbrances rather than setting out the text of the burdens in full attracted mixed responses. Of those in favour of the proposition, one

commented: *"it would certainly be easier for lawyers let alone lay people to be able to read deeds as set out in the deed than in the way the keeper reproduces at present."*

The response of Diane Yates on behalf of Neilsons was typical of many respondents who would prefer the existing practice be maintained: *"By only listing the list of deeds, effectively we would still need to examine the sasine deeds. We would prefer to see the burdens edited and narrated in the D Section as per a normal first registration."*

A number of those who expressed views expanded on the difficulties they anticipated, for example: *"I accept that keeper-induced registration may make it more difficult to determine which burdens are still enforceable at registration, but application can be made in subsequent transfers to have unenforceable burdens removed. Leaving unenforceable burdens in PDFs of old deeds does not strike me as progress. At a practical level, the downloading of multiple PDFs, the storage of them and transmission of them between parties is a time-consuming and tedious administrative process. It is much better to have all of the information readily available in one electronic document which can be printed in one action and stored and saved as one document."*

Many of those who considered a list of deeds with a link was useful considered that this should be done in conjunction with the current practice rather than as an alternative, including Rachel Oliphant on behalf of Pinsent Masons: *"We agree that it can be useful to have a link to the deed which created the burden for further clarification and in fact this would be useful in all title sheets but we think the burden should be set out in full in the title sheet as well. If the keeper proceeds with the link approach the deeds must form part of the title sheet and be available at no extra cost."*

Another respondent commented: *"Links to the deeds narrated should be easily accessible via Registers Direct, and presumably they would be available at no extra cost?"*

Q10: 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?

Yes 18

No: 25

A majority of respondents did not agree that the proposed approach to listing deeds should be extended to first registrations.

For example, Frances Rooney on behalf of Harper MacLeod stated: *"We do not think this should be the practice across the board (i.e. outwith KIR) unless in addition to the terms being typed out in Section D, because that would represent a step backwards from the Curtain Principle of the Land Register. Transacting with land register titles would be more expensive than ever before if that were to become the practice."*

Those in favour broadly welcomed the certainty of examining the burdens writ itself rather than the version typically reproduced in the a title sheet such as Morag Inglis: *"It would certainly be easier for lawyers let alone lay people to be able to read deeds as set out in the deed than in the way the keeper reproduces at present."*

Q11: Are you content with how we plan to communicate KIR?

Yes: 26

No: 21

The proposals for communicating KIR attracted mixed responses, which divide fairly equally between those who are content with the proposal and those who felt that further measures were necessary. Of those who felt the proposed approach did not go far enough, a number suggested that RoS should engage with individual proprietors in advance of registration, for example David Robertson on behalf of the Church of Scotland General Trustees commented: *"The General Trustees consider that the keeper should communicate with owners pre-KIR as well as after."*

Suggestions about what additional steps might be taken included the following comments:

Catherine Reilly on behalf of Brodies: *"We are content with the proposed communication plans but would suggest that some further communications should be made. Where a plans report or a legal report is requested in respect of a property which is undergoing KIR, a note should be added to the reports to alert the solicitors dealing with the property that KIR is happening. The owner and any creditor with a security registered against the title should be notified of the KIR"*

Catriona Robertson on behalf of North Lanarkshire Council: *"The Council should also be informed about KIR affecting its area, as KIR may have an impact on adjacent Council properties"*

Caryn Auld on behalf of Maclay Murray & Spens: *"Perhaps the submission of an advance notice application for a deed in respect of a property should stop any KIR process in relation to that property"*.

Graeme Warren on behalf of SSE: *"We would suggest that greater emphasis be placed on pre-KIR communication with individual landowners. Proprietors may be willing and able to assist in the process, and furnish the keeper with information which can resolve mapping discrepancies and result in better title sheets."*

Anonymous organisation: *"We think that care needs to be taken in communicating KIR to registered owners so as not to cause alarm, particularly to those who are elderly and may not have access to the internet. Particular care should be taken if there have been any issues with the KIR (e.g. in mapping as per question 4) in advising owners and making it clear that they can seek legal advice (for which they will have to pay)."*

Q12: 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: 53

No: 1

There was almost unanimous support for the proposition that the keeper should provide guidance on post KIR activity, highlighting areas in which parties to the first transaction after KIR may wish to provide additional or more up-to-date information.

Suggestions about what additional guidance might be provided included the following:

David Melhuish on behalf of the British Property Federation: *"This is very important and particularly in order to ensure legal advisers are on top of the additional requirements that will be expected at first transaction after KIR."*

Tim Macdonald: *"Guidance would be helpful to conveyancers. Conveyancing at the first transaction after KIR will require a bit more care and scrutiny by the solicitors than for many other registered titles, but will still be much simpler than dealing with a sasine title."*

Rebecca MacLeod on behalf of Anderson Strathern: *"Yes, together with access to the bundle of deeds used by the keeper to create the title sheet."*

Jill Andrew on behalf of Burness Paull: *"We would say it was essential that the keeper produces guidance on the additional information likely to be required at the next transaction after the KIR and that should be given to the owner at the point of KIR registration with communications saying that this should be given to their solicitors. It should not only cover information likely to be required for the next transaction but information as to how they can have their KIR amended, adjusted etc. with you, for free, if they believe you have got it wrong."*