Question 1: Do you agree that Scottish Ministers should close the Sasine Register to standard securities?

Yes, but I consider this should be done by treating the grant of a standard security as a trigger for first registration. The legal fiction of a "compulsory voluntary registration" is difficult to understand and will not inspire public confidence. It is not clear to me why this approach has been taken. The implication is that it is forced by the provisions of the 2012 Act. But section 48 does not treat standard securities differently from dispositions, leases and assignations, except that the date when they are closed to the GRS may be different.

I consider that, following an order under section 48(2), a standard security will become registrable in terms of section 49(1), which provides that a deed is registrable if its registration is authorised by the 2012 Act "whether expressly or not". Accordingly the artificial and problematic concept of "compulsory voluntary registration" is unnecessary.

Question 2: Do you agree that the fee for the associated voluntary registration of the property should be waived?

Yes, I consider there is no justification for asking remortgaging borrowers to bear the cost of the Scottish Government's goal of completing the Land Register. The current position, whereby the fee for registering a standard security is low and not based on the value of the property, should continue.

Question 3: Do you agree that closure of the Sasine Register for standard securities should be introduced across Scotland at the one time or should it be introduced on a staggered basis by county or by groups of counties?

I can see no pressing reason to stagger closure by counties, but neither can I see any particular problem with doing so. Lenders are already in a position where some of their securities will be recorded in the GRS and some will be registered in the Land Register, so I cannot see what additional burdens would be created by staggering.

Conveyancers too are used to dealing with two registers, and indeed will usually be taking care of registration on behalf of lenders, who need not know the technical details. Most firms operate at a local level and so will not often need to know the position in counties on the other side of Scotland, as long as the commencement orders group counties together sensibly. After all, the profession managed to deal with the staggered introduction of the Land Register for 22 years between 1981 and 2003.

Accordingly, if it is considered that staggering introduction would bring advantages, then this should be done. However, if there is to be "voluntary" registration when a standard security is granted (with associated waiver of the usual fee) as is currently proposed, I consider that the waiver should extend to all of Scotland from the earliest section 48(2) closure date. This will allow conveyancers to adopt a policy of registering all new

standard securities, regardless of location, should they choose to do so. Obviously this would aid the goal of completion.

Question 4: What deeds do you consider it appropriate to close the Sasine Register to and so require voluntary registration of the title in order to give legal effect to the deed?

My short answer is “deeds that benefit the owner” (either in terms of the rights created or the consideration given therefor).

The consultation identifies (at para. 28) a problem with deeds that are not granted by the owner. I assume the Keeper has in mind government/local authority impositions such as Tree Preservation Orders and Entries in the Schedule of Monuments. Clearly it would be impractical, not to mention unfair, to try to force landowners to register their property in those circumstances.

However, there is no mention of deeds which are granted by the proprietor for the benefit of someone else. For example, the owner of a large estate with an enormously complex and vaguely defined title is approached by a neighbour for a Deed of Servitude to regularise an access which probably exists already due to prescription. In many cases this would be granted gratuitously. But if an order under section 48(3) simply refers to Deeds of Servitude without further qualification, this may entail registering the whole estate at enormous cost in legal fees to the parties. The owner may therefore be forced to refuse a request he would otherwise have granted gladly. (The alternative would be to register only the access route, but this would make the title even more complicated and be of little benefit in terms of Land Register completion).

A solution might be to require registration only of the benefited property, and/or to require registration of the burdened property only where consideration is given. It is more reasonable to ask the landowner to bear the legal costs of first registration if they are receiving a benefit (be this rights or payment).

I also consider that the final order under section 48(3) should be a “catch-all”, i.e. it should cover all deeds not already mentioned in the Act or previous orders. There is no definitive list of possible deeds and a list such as Appendix 1 to the consultation is bound to omit something.

For example, it is still technically competent (although never done) to record an Instrument of Sasine in place of a Disposition. If deeds are listed individually the possibility remains that a donee/legatee/heir of land, wishing to avoid the cost of first registration, gets around the 2012 Act by recording an Instrument of Sasine. Doubtless other lacunas will become apparent if orders are not drafted appropriately.

I also note that it is not clear from the terms of the Act that a Contract of Excambion will be registrable, though common sense would indicate that it will. Is a Contract of Excambion a Disposition?

Consideration should be given to how the Keeper would treat the evacuation or creation of a survivorship destination by means of a Disposition by A and B to themselves (which is thought by many to be the best way of doing so). Would this trigger first registration (as it bears to be a Disposition) or not (as it is not truly a conveyance)? The same would apply to a variation of liferent: the writer is currently engaged in creating conditions in an existing proper liferent by means of a Disposition by the fiar and the liferenters to themselves.

My answer to this question is subject to the caveat that I do not agree with the concept of "compulsory voluntary registration" and think the correct approach is to add to the list of triggers for first registration. But this is an issue with the wording of the question, not the substance.

Question 5: Do you agree that the fee for the associated voluntary registration of the property should be waived?

As per my answer to Question 2, I consider that where the fee for registering a deed is not currently based on the value of the subjects, neither should be the fee for a triggered first registration or "compulsory voluntary registration" caused by that deed after the Designated Day.

Question 6: Do you agree that the legal power the Keeper has to refuse a request for voluntary registration should be removed, irrespective of the outcome of the proposals on introducing additional triggers?

Yes. Clearly that power is at odds with the goal of completion.

Question 7: Do you agree that a reduced fee should apply to voluntary registrations? If so, do you agree with the proposed 10% reduction?

I agree that voluntary registrations should cost less than compulsory ones. However, a 10% reduction will not encourage many people to apply. Even if it were free the cost would be prohibitive for most people due to legal fees.

Currently, no-one expects to pay value-based registration dues until the property is transferred for value. Why should this change? Say I own land on a Sasine title and anticipate selling it in 2025. I can either (1) voluntarily register my title now and pay registration dues in 2014, in addition to the registration dues the purchaser will pay in 2025, or (2) do nothing until 2025. Only option (1) helps the goal of completion by 2024, but it increases the cost to me. Even if I would particularly like to have a registered title, I could wait for a KIR rather than paying for a voluntary registration.

If voluntary registrations were free, one incentive to do nothing would be removed, and the Keeper would still receive value-based registration dues on the next sale.

I should also point out that, under the current proposals whereby the fee for a "compulsory voluntary registration" will be waived, a landowner could achieve first registration at minimal cost by granting a standard security to a friend, relative or personal company for a fictitious debt, and having it discharged as soon as the Land Certificate is received. The registration dues would then be in effect £120 regardless of the land's value. Given this it seems pointless to charge 90% of the usual amount for a genuinely voluntary registration.

Question 8: Do you agree with the proposed approach to piloting KIR to inform a consultation on the detailed approach to and strategy for KIR?

I agree with the concept of piloting KIR in order to identify problems at an early stage.

I consider there should be a policy of notifying landowners of a proposed KIR as soon as possible, and engaging with them, rather than waiting until registration is complete to tell the landowner about the KIR. The Keeper will not know if a transaction is already underway, leading to potential duplication of work. Also it is clearly preferable for any issues to be dealt with at first registration rather than by rectification.

I am gravely concerned at the attitude taken in para. 34 of the consultation, namely that over-mapping in KIRs is not a problem due to the general exclusion from the Keeper's warranty. The point of the Land Register is that the public can rely on it absolutely. Over-mapping may not be a problem from the point of view of the Keeper's budget for warranty claims, but it is certainly a problem for purchasers who may find they have paid huge sums for land which is then taken away from them without compensation. There may be ECHR considerations here.

Currently there is no indication whether the fact of a KIR will be noted on Land Certificates, and if so for how long. If it is not, the whole purpose of the Land Register is utterly defeated, since nobody will be able to rely on an apparently valid Land Certificate: any registered title might come under the exclusion of section 74(3)(a)(ha). Quite frankly this is the conveyancing profession's worst nightmare.

In theory the Keeper could achieve the stated goal of completing the Land Register in 10 years by giving herself a registered title to ALL and WHOLE Scotland, without any risk of having to pay warranty to over a million dispossessed landowners. This example is absurd but is permitted by the legislation, hence the need for a clear policy to mitigate that absurdity.

Question 9: Should other elements be included in the pilot and what should these be?

If proximity to the goal of completion is to be measured in terms of surface area rather than number of titles, the Keeper may wish to engage Scotland's largest private landowners as part of the pilot exercise.

Presumably the “public land” which the Scottish Ministers have committed to registering within five years does not include Crown Estate land? If not, the Keeper may wish to engage with the Crown Estate Commissioners as part of the pilot exercise, with a view to achieving early registration of Scotland’s foreshore and territorial seabed as well as unalienated salmon fishings.

Question 10: Do you agree with the proposed approach to completion?

Broadly, yes. However, I consider that the ten-year timeframe is highly ambitious given that, at present, first registrations often take several years.

It would be good to have reassurance that suitable efforts will be made to identify the true owner of unregistered land. The consultation mentions land owned by St Andrews University and the City of Edinburgh Council, but there is unregistered land in private ownership too. No doubt the Keeper is aware of the controversy in the early 2000s over ownership of the Black Cuillins, which were granted to the Chief of Clan MacLeod by a Crown Charter in 1611 (shortly before the Register of Sasines was established) and have been passed down the generations off-register ever since, no trigger for first registration or even “first recording” ever having occurred.

There may be other land in a similar position; if so it is likely to be large in extent, and there may be no obvious occupier (as with the Black Cuillins). Simply to assume that such land belongs to the Crown and register it as such without taking steps to alert the true owner (who may well be able to produce an ancient Charter if asked) would risk breaching the ECHR (Article 1 of Protocol 1).

Question 11: Have you any views on our proposals for funding the completion of the Land Register?

Regarding para. 43 of the consultation, this approach appears startlingly complacent. The vast majority of people are not in a position to check their own titles, and cannot know if the Keeper has made an error without taking professional advice. It is stated that KIR will not change a person’s legal rights – this is true only if the Keeper makes no mistakes. I am sure the Keeper will admit her staff are not infallible.

The general exclusion of Keeper’s warranty for KIRs makes this problem far worse than it would be under the current indemnity scheme. Any landowner subject to a KIR would be taking a big risk not to have the title checked, and it is unfair to put people in this position without offering to pay at least some of the cost.

It is not clear that section 84 would cover legal costs for investigations carried out on a speculative basis (*i.e.* if the landowner asks their solicitor to check the title out of prudence rather than because they believe there is a mistake), even if a mistake is indeed discovered. Will the Keeper pay the costs of the investigation which discovered the mistake in the first place, as well as the cost of having it rectified once discovered? I consider there should be a clear policy on this.