



Law Society
of Scotland

Consultation Response

Scottish Parliament Public Audit and Post-legislative Scrutiny Committee Consultation: Post-legislative Scrutiny

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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 solicitor 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 solicitor 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.

The Society's Public Policy Committee welcomes the opportunity to consider and respond to the Scottish Parliament's Public Audit and Post-legislative Scrutiny Committee consultation: Post-legislative Scrutiny. We are delighted to provide the following suggestions to the Committee for post-legislative scrutiny:

Land Registration etc. (Scotland) Act 2012 (and its subordinate legislation)

Various problems have been identified with the Land Registration etc. (Scotland Act) 2012. A number of the most pressing issues have been identified as follows.

1. One shot rule

Section 21(2) says "The Keeper must accept an application ... to the extent the applicant satisfies the Keeper that, as at the date of application, the general application conditions are met and the specific application conditions referred to at Sections 21 (2) (a) (b) and (c) are met".

If the Keeper is not satisfied then the application is rejected in its entirety and no registration date is given. A problem can arise where the Keeper's initial assessment is favourable but the application is later rejected as the initial registration date is lost and a further registration date is only given once the application is resubmitted.

Under the previous legislation, the Land Registration (Scotland) Act 1979, the Keeper could accept the application and would then apply the requisition process to the application. This involved returning a document to the applicant for amendment or for the provision of supplementary evidence in support of the application for registration. When this occurred the date of registration would be maintained and the proprietor's solicitor would be given a reasonable amount of time to make amendments to satisfy the Keeper.

When a date of registration is lost it can be a real problem (especially if months later), and if there are onward deeds it can be catastrophic as they will all be rejected too.

The date of registration being lost is by far the biggest risk and it would be preferable if there was greater use of the requisition process to allow correction of de minimis errors and omissions. For example, if a document which contains an erroneous reference to the date of a historical deed, that can result in the whole application being rejected as a consequence. If the application had been taken as a whole, it might have been registered.

This provision should be reviewed to ensure that it creates a more practical and workable arrangement.

2. Prescriptive claimants (section 43)

Before the Act an a non domino disposition (a disposition granted by someone who is not the owner) could be used to acquire a title to land. If a piece of land was lying vacant and the owner could not be traced it used to be possible for someone who did not own the land to acquire it by such a disposition. This was a hugely valuable means of clearing up minor title defects and anomalies.

Section 43 introduced additional requirements. These have proved so difficult to satisfy in practice that they have, in effect, removed the ability to use this means of acquiring title.

The only type of document which can be used under section 43 is the disposition. One view is that section 43 should be extended to apply to other deed types, not just dispositions, to reflect prescription under the [Prescription and Limitation \(Scotland\) Act 1973](#) sections 1 and 5.

Returning to a simpler procedure could reinstate some of the benefits of the traditional approach.

3. Keeper's warranty

The indemnity as it existed under the 1979 Act – has been replaced by Keeper's warranty that offers a much narrower protection. It protects only the applicant, i.e. the client (generally speaking) unlike the old indemnity. The exclusions are more or less the same though there is less chance a client can successfully make a claim under the warranty if in bad faith.

One of the 2012 Act exclusions from warranty is where the Keeper issues a title sheet showing too much land (or additional rights). In other words, no matter the cause, there is no claim if the Keeper issues a title sheet which does not correspond to the original deed submitted for registration. This should be reviewed because people will naturally rely on the information contained in the title sheet.

4. Reliance on the Register

Different registered title types now have different protections and this has significantly increased the complexity of property law and decreased the reliance on the Register.

Titles that have been registered by Keeper Induced Registration, Voluntary Registration and Automatic Plot Registration have no 1973 Act prescriptive possession fall-back because they are not founded on a deed.

5. Encumbrances

Under the 1979 Act overriding interests were protected even if not shown on the title sheet. There are very few overriding interests (e.g. public rights of way). If a good faith purchaser relies on the title sheet and it omits an encumbrance, that encumbrance is extinguished. On a literal interpretation this might apply to the entire encumbrance, not just the part affecting that purchaser's title; and it is extinguished for good, not just vis-à-vis that purchaser.

So for example A sells to B, B registers title but does not include e.g. a written servitude that benefits a neighbour C. So then B sells to D and D is unaware of C's servitude. C is not involved in any of this and has no knowledge of it. At the point of D's purchase, C loses the servitude. This could result in damage to the value of C's property which has human rights implications: see ECHR, Protocol 1 Article 1 regarding the right to peaceful enjoyment of property.

6. Title sheet contents

There are issues as to what is included in the Title Sheet, for example, tenements are extremely difficult to deal with now. The whole building (or larger area) in which there are common rights has to be mapped and this puts a burden on the first applicant to register within that unit. This results in more costs to the client as it imposes on the first applicants higher costs.

Moreover there are often discrepancies between existing title sheets e.g. the same building might have been mapped different ways for different flats, so that could necessitate rectification which incurs greater expense for the client.

7. Boundaries

Under the 1979 Act it was possible to have a boundary agreement between parties. This is not possible under the 2012 Act. This should be reintroduced to avoid remedial conveyancing.

8. Liability and Duty of Care

Under section 111, the [duty of care to the Keeper](#) is very widely drawn. This should be reviewed to ascertain whether it works properly.

We believe the provisions regarding criminal liability under [section 112](#) should also be reviewed to ascertain their functionality since the Act has been in effect.

9. Costs

Voluntary registration allows the owner of a property (whose title is currently in the Sasine Register) to apply to register a title on the Land Register. This provision should be reviewed in the light of the target set by the Registers of Scotland of 2024 to have all land in Scotland registered in the Land Register.

Licensing (Scotland) Act 2005

The Licensing (Scotland) Act 2005 (“the 2005 Act”) as amended and the related statutory guidance and regulations should be examined by the Scottish Parliament’s Public Audit and Post-Legislative Scrutiny Committee. The law in this area requires consolidation and simplification.

The Society’s Licensing Law Sub- Committee has commented extensively on the practical difficulties encountered by both Licensing Boards and the licensed trade in Scotland. The Licensing Act 2003 which applies to England and Wales has been the subject of post legislative scrutiny which has resulted in considerable criticism of the existing system in that jurisdiction.¹ The following are examples of some of the issues with the current provisions.

Transfer of Premises Licences

Section 49 of the Air Weapons and Licensing (Scotland) Act 2015 will, when it comes into force, amend sections 33 to 35 of the 2005 Act by providing for an application for transfer of premises licence by someone other than the licence holder in circumstances less restrictive than as set out at the prospectively repealed section 34 of the 2005 Act.²

We have outlined the practical difficulties in that a transfer is rarely if ever at the instance of the premises licence holder and is much more likely to be someone other than the premises licence holder. Section 34 of the 2005 Act did not take into account the situation where a premises licence holder who was tenant of the premises had simply disappeared.

Section 33A(4) of the 2005 Act as inserted by section 49 of the Air Weapons and Licensing (Scotland) Act 2015 will provide for such a situation, but only where the transferee has taken all reasonable steps to obtain the licence holder’s consent, but has failed to obtain this consent. It does not, however, deal with a situation where a premises licence holder has been contacted, but refuses to grant consent.

We suggest that the transfer provisions should be subject to post legislative scrutiny to allow the premises licence to be transferred to any person who can demonstrate that they are in a position to legitimately occupy the premises.

Variation of Premises Licence

Sections 29 to 32 of the 2005 Act deal with variations of premises licences. However, the provisions do not provide a correct time to lodge an application for a variation.

¹ <https://publications.parliament.uk/pa/ld201617/ldselect/ldlicact/146/146.pdf>

² <http://www.legislation.gov.uk/asp/2015/10/contents/enacted>

For example, if an operator wishes to change the layout of a premises in a manner which does not affect the operating plan, this will be considered a minor variation. A minor variation must be granted. If the operator proceeds with the work prior to the application being granted, then when it is granted, the layout on the ground will not reflect the layout covered by the licence. Conversely, if the operator waits until the application is granted before carrying out the work then, from the period that application is granted until the work is completed the drawings approved will not reflect what is on the ground. This puts the operator in a difficult situation; it would seem disproportionate to require them to close until the layout matches what is on the ground.

Lack of Site Only Application for Premises Licence

We note that there is no guarantee at present that an application for a Provisional Premises Licence under Section 45 of the 2005 Act will be granted by the Licensing Board.

From a practical point of view, the detailed information required for the layout plan and the operating plan will not yet have been decided at the early pre-construction stage, yet the requirements for a Provisional Premises Licence Application are identical to those for applying for a full Premises Licence, apart from there being no need to specify a Designated Premises Manager and the requirement under Section 50 being simply for a Provisional Planning Certificate.

As a consequence, a developer may incur significant time and expense in the preparation of the Provisional Premises Licence Application with there being no guarantee of a grant. Also, from a practical point of view, it is highly unlikely that both the layout plan and the operating plan will remain unchanged throughout the development of a project, resulting in more expense for variations of both layout plan and operating plan at the confirmation stage.

We refer to the now repealed Licensing (Scotland) Act 1976 Section 26 (2).

We accept that particular procedure under Section 26 (2) of the 1976 Act was criticised in that it was considered by Licensing Boards and those who were entitled to object or pass comment on such an application, notably the Police, being given too little information. However, in order to meet this criticism, we suggest that certain specified information, being the types of matters of most concern to Licensing Boards should be provided by the applicant before the licence comes in to effect, the full confirmation procedure, including production of a full layout plan and operating plan will require to be produced.

We therefore suggest that on the basis that a site only application can be granted, there would be no need to reinstate the old affirmation procedure. Licensing Boards should have the discretion to refuse to confirm a Provisional Premises Licence if the layout plans and operating plans differ materially from the information provided in the initial application.

Surrender of Premises Licence

Section 28(5)(f) and 28(6) of the 2005 Act deal with the surrender of a premises licence. There are obligations incumbent upon a premises licence holder, not least the requirement to pay an annual fee, so it is right that the Act provides a way to renounce those obligations.

However, this is a problem where the premises are owned by another person such as a landlord. The 2005 Act offers no safeguards for the owner.

An example is the situation where a disgruntled tenant, being the premises licence holder, has surrendered a licence and disappeared. It is also possible for some premises licence holding companies to be dissolved without the landlord ever being aware.

The risks posed by these scenarios mean that often a landlord will choose to hold the licence in their own name.

The problem with this is that it means that the premises licence holder is not complying with the expectation to be aware of what goes on in the premises for which it holds the premises licence.

We therefore suggest the following proposals:-

1. Provision should be made, similar to Section 50 of the Licensing Act 2003 applicable to England and Wales to allow reinstatement of a licence following a surrender
2. Provision should be made for any party having an interest in licensed premises to note that interest with the Licensing Board and to be notified in the event of a proposed surrender of the licence or of circumstances which might affect the premises licence such as a premises licence review or non-payment of the statutory fee.
3. The Licensing Board should have a discretion to waive a time limit on cause shown in the interests of justice.

Interaction between Section 46 and Section 50 of the 2005 Act

There are issues with the interaction between Section 46 (confirmation of provisional premises licence) and Section 50 (certificates as to planning, building standards and food hygiene) when licensed premises are about to open.

Section 46(2)(d) requires the holder of a provisional premises licence who wishes to apply for confirmation of the provisional premises licence to submit with their application the certificates required by Section 50(3) such as a building standards certificate. This certificate is only issued when either a certificate of completion or temporary occupation certificate has been granted i.e. when the premises are complete.

From a practical point of view, it is more or less impossible to get the certificate, lodge the Section 46 application for confirmation and have it granted in time for the premises to trade when the operators want to. The result is that it is common practice to apply for an occasional licence to

cover the period between application and confirmation. This is not the purpose for which occasional licences were intended.

Section 110 Notice

There is an inconsistency between the duty to display notice provisions at section 110 of the 2005 Act and the disapplication of the offence of supplying alcohol to a young person in terms of Section 104B(2)(b).

Section 110 requires a premises licence holder to display a notice that advises, among other things, that it is an offence to buy or attempt to buy alcohol on the premises for a person under the age of 18. Section 104B(2)(b), however disapplies the provision that makes it an offence to purchase alcohol for a child or young person by allowing a person over 18 to purchase wine, beer, cider or perry for a young person (16 -17) for consumption on the premises where purchased with a meal. The notice required by Section 110 is therefore incorrect.

Moreover, failure to display this “incorrect” notice is an absolute offence of which both the premises licence holder and the premises manager would be guilty with no “due diligence” defence available to either.



For further information, please contact:

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