

POLICY NOTE

THE LAND REGISTRATION ETC. (SCOTLAND) ACT 2012 (COMMENCEMENT NO. 2 AND TRANSITIONAL PROVISIONS) ORDER 2014

SSI 2014/41 (C. 4)

1. The powers to make this instrument are conferred by sections 116(1), 117(1) and 123(3) of the Land Registration etc. (Scotland) Act 2012 (“the 2012 Act”). It is subject to the negative procedure, combining powers under section 116(2) of the 2012 Act and those laid with no further procedure under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 by virtue of section 33 of that Act.

Policy Objectives

2. The 2012 Act makes provision for land registration in Scotland and provides a new legislative basis for the Land Register of Scotland. Part 10 of the 2012 Act in particular makes provision about electronic documents, electronic conveyancing and the electronic registration of documents relating to land and certain other documents.

3. This Order brings into force provisions in the 2012 Act including amendments to the Requirements of Writing (Scotland) Act 1995 (“the 1995 Act”) that allow formal writing used for the creation of contracts, obligations, trusts and conveyances to be created in an electronic format. Regulations can be made under the new provisions setting out requirements for electronic documents to be valid, and to be electronically signed or authenticated, for those purposes.

The Requirements of Writing (Scotland) Act 1995

4. The 1995 Act sets out in section 1(2) legal transactions which require to be in writing to be effective. These include contracts and obligations in relation to land, trusts, other deeds in relation to real rights in land and wills. When first brought into force, the 1995 Act allowed only paper documents for these purposes.

5. The 1995 Act was amended by the Automated Registration of Title to Land (Electronic Communications) (Scotland) Order 2006 (S.S.I 2006/491) to permit the Keeper of the Registers of Scotland to operate the Automated Registration of Title to Land (ARTL) system within which electronic deeds are created and registered. Therefore the 1995 Act already permits a narrow class of electronic ARTL documents created within this system by virtue of section 1(2A).

Provisions brought into force

6. From 22 March 2014, provisions are brought into force to allow new Electronic Documents (Scotland) Regulations to set the requirements for new electronic documents to have equivalent status and standards of validity as paper documents and to enable electronic registration. They will also allow the Keeper to run an automated registration system, and to make regulations for that system.

7. From 11 May 2014, the new class of electronic document will be able to be used, in addition to those on paper, and ARTL documents, in line with the requirements put in place by those Electronic Documents (Scotland) Regulations. The new electronic documents will not be created in the ARTL system or immediately capable of registration in the Keeper's registers. The legislation will therefore allow two classes of 'electronic document' for a transitional period, until the designated day when the main provisions of the 2012 Act come into force.

8. From the designated day, the legislative basis for the ARTL system will be replaced by the powers in section 99 of the 2012 Act, and regulations made under it. The need for a separate definition of electronic document for ARTL documents will be superseded and the provisions of the 1995 Act which provide for ARTL documents will be repealed.

Transitional arrangements

9. From when the new class of electronic documents become usable on 11 May 2014 until the designated day, this Order also contains transitional arrangements. These provisions will enable the Keeper to continue to operate the current ARTL system, including the directions which apply to the making of ARTL documents, on the same basis at present, and allow the new class of documents to operate alongside that system.

10. By way of illustration, the **Annex** to this Note sets out and explains the application of section 1(2), (2A) and (2B) of the 1995 Act as amended by the provisions brought into force by article 2(1)(b) of this Order during that period, subject to the transitional provisions explained further in the **Annex**.

Wills etc. and electronic registration

11. The amendments made by Part 10 of the 2012 Act are not yet brought into force in respect of section 1(2)(c) of the 1995 Act, so as not yet to permit any will, testamentary trust disposition and settlement or codicil to take an electronic form. The Scottish Government is working with the Scottish Courts and the Registers of Scotland, respectively, to develop policy with regard to enabling the Courts and the Books of Council and Session to accept electronic wills and other testamentary documents.

12. In addition, section 9G(6) inserted into the 1995 Act by the 2012 Act is not yet commenced as it provides for electronic registration, as an exception to deeds which cannot be accepted for electronic registration unless they meet the requirements in regulations made under section 9G(3) of the 1995 Act. Until regulations are made under that section and section 100 of the 2012 Act, no deeds under section 9G(6) may be registered electronically.

Consultation

13. A public consultation was carried out on a draft Land Registration (Scotland) Bill in 2010: <http://www.scotland.gov.uk/Publications/2010/09/landregistrationbill>
There has also been a consultation in 2013 on aspects of implementing Part 10 of the 2012 Act:

<http://www.scotland.gov.uk/Publications/2013/07/6800>

Impact Assessments

14. A Business and Regulatory Impact Assessment, an Equalities Impact Assessment and a pre-screening report for Strategic Environmental Assessment were carried out before the introduction of the Bill:

<http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/partial-assessments/full/2011/LandRegistrationBill>

<http://www.ros.gov.uk/lrbillconsultation/consultation.html>

15. The Bill had Accompanying Documents in the usual way

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/44469.aspx>

Financial Effects

16. No Business and Regulatory Impact Assessment (BRIA) has been prepared for this Order as no financial effect or impact on the private, voluntary or public sector is foreseen.

Registers of Scotland on behalf of the Scottish Government
February 2014

Position from 11 May 2014 to the designated day, and transitional arrangements

For the period from 11 May 2014 to the designated day, section 1 of the Requirements of Writing (Scotland) Act 1995 as amended by the provisions of the 2012 Act brought into force by article 2(1)(b) of this Order and transitional arrangements will apply as follows —

In relation to ARTL documents

“1. (1) Subject to subsection (2) below and any other enactment, writing shall not be required for the constitution of a contract, unilateral obligation or trust.

(2) Subject to subsections 2A and (3) below, a written document complying with section 2 of this Act shall be required for—

(a) the constitution of—

(i) a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land;

(ii) a gratuitous unilateral obligation except an obligation undertaken in the course of business; and

(iii) a trust whereby a person declares himself to be sole trustee of his own property or any property which he may acquire;

(b) the creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law; and

(c) the making of any will, testamentary trust disposition and settlement or codicil.

(2A) An **electronic document** complying with section 2A shall be valid for—

(a) the constitution of a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land;

(b) the constitution of a gratuitous unilateral obligation; and

(c) the creation, transfer, variation or extinction of a real right in land.

(2B) In this section, “electronic document” means a document created as an electronic communication within the ARTL system.”

Note that the reference to an “electronic document” in section 1(2A) relates to ARTL documents as defined in section 1(2B). The transitional provision in article 3(3) of the Order disapplies both of those subsections from the new class of electronic documents – see below.

In relation to the new class of electronic documents

"1. (1) Subject to subsection (2) below and any other enactment, writing shall not be required for the constitution of a contract, unilateral obligation or trust.

(2) Subject to subsection (3) below, a written document which is a traditional document complying with section 2 or an **electronic document** complying with section 9B of this Act shall be required for—

(a) the constitution of—

(i) a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land;

(ii) a gratuitous unilateral obligation except an obligation undertaken in the course of business; and

(iii) a trust whereby a person declares himself to be sole trustee of his own property or any property which he may acquire;

(b) the creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law; and

(c) the making of any will, testamentary trust disposition and settlement or codicil."

Note that the reference to an electronic document in section 1(2) relates to the new class of electronic documents. The transitional provision in article 3(2) of the Order disapplies this reference from ARTL documents – see below.

Articles 3 and 4 of the Order - transitional arrangements

From when the new class of electronic documents become usable on 11 May 2014 until the designated day, this Order contains transitional provisions. They enable the Keeper to continue to operate the current ARTL system, including the relevant directions which the Keeper has made for the operation of the ARTL system, and also allow the provisions for the new class of electronic documents to operate alongside the ARTL system.

- Article 3(1) confirms the transitional period for which the transitional provisions in Article 3 apply – they apply from 11 May 2014 and end at the beginning of the “designated day” under section 122 of the 2012 Act.
- Article 3(2) provides that none of the amendments made to the 1995 Act by commencing Part 10 of the 2012 Act apply to ARTL documents, so they only apply to the new class of electronic documents outwith the ARTL system, and do not confuse the operation of the existing ARTL provisions.

- Article 3(3) provides that certain sections of the 1995 Act apply only to ARTL documents and not to the new class of electronic documents generally.
- A definition of “traditional document” is added by article 3(4). This allows certain provisions to operate until paragraph 2 of schedule 3 to the 2012 Act is brought into force to provide that nothing in what will become Part 2 of the 1995 Act applies to electronic documents. This is needed because at present what will become that Part 2 of the 1995 Act contains ARTL provisions.

Article 4 of the Order applies Schedule 2 to the 1995 Act (subscription and signing: special cases) to the new class of electronic documents generally created outwith the ARTL system for the same transitional period. These arrangements will be replaced by regulations making provision as to presumptions with regard to authentication of such electronic documents made under section 9E(1)(b) of the 1995 Act, to come into force on the designated day. The reference to “authentication” will be to the definition in new section 12(4) of the 1995 Act as added by paragraph 19(b) of schedule 2 to the 2012 Act, in force during the transitional period.