POLICY NOTE

THE ELECTRONIC DOCUMENTS (SCOTLAND) REGULATIONS 2014

SSI 2014/83

1. These Regulations are made in exercise of the powers conferred by sections 9B(2)(c), 9C(2) and 9E(1)(d) of the Requirements of Writing (Scotland) Act 1995 ("the 1995 Act"). The Regulations prescribe the requirements for electronic documents and electronic signatures for documents referred to in section 1(2) of the 1995 Act as amended by the Land Registration etc. (Scotland) Act 2012 ("the 2012 Act"). They are subject to the negative procedure.

Policy Objectives

2. The Regulations form part of the subordinate legislation relating to the implementation of the 2012 Act. One of the purposes of the 2012 Act was to enable electronic conveyancing and to allow electronic documents to be used for certain contracts, unilateral obligations, and trusts and conveyances, including in relation to real rights in land, that must be constituted by writing and to provide for the formal validity of those electronic documents.

3. Before amendment by the 2012 Act, the 1995 Act prescribed that the legal documents governed in terms of their formal validity by the 1995 Act must be in writing and must be written on paper, parchment or some similar tangible surface. The signatures used to authenticate the document have to be subscribed using pen and ink. The Scottish Law Commission in their report into land registration[1] recommended that the 1995 Act should be amended to allow the legal documents governed by that Act to take an electronic form and be authenticated using electronic signatures.

4. The 1995 Act provides that for a document covered by the requirements in the Act to be legally valid it must be subscribed by the granter and, for a document to gain the legal presumption that it has been subscribed by the granter, the document must bear the signature of a witness and his or her name and address. Provision is also made in Schedule 3 to that Act for signing in special cases by companies and other bodies.

5. Section 9B of the 1995 Act as added by the 2012 Act provides that an electronic document can be legally valid and section 9C provides that an electronic document can gain the legal presumption that is has been authenticated by the granter, to achieve the same legal effect as creation, execution and witnessing for traditional documents. Both sections provide that the Scottish Ministers may in regulations prescribe the requirements for an electronic document and an electronic signature required to authenticate the document. Section 9E provides similar regulation-making powers in relation to annexations to electronic documents.

[1] Scottish Law Commission – Report on Land Registration (SCOT LAW CON No. 222)

6. These Regulations prescribe that under section 9B(2)(c) for an electronic document to be legally valid under the 1995 Act it must be authenticated (i.e. signed) using an advanced electronic signature. An advanced electronic signature is defined in the Electronic Signatures Regulations 2002[2] (the 2002 Regulations) as an electronic signature;

(a) which is uniquely linked to the signatory,
(b) which is capable of identifying the signatory,
(c) which is created using means that the signatory can maintain under his or her sole control, and
(d) which is linked to data to which it relates in such manner that any subsequent change of the data is detectable.

7. Under section 9C(2) the Regulations provide that, for an electronic document to obtain the presumption that it has been signed by the granter, the document must be signed using an advanced electronic signature and that signature must be certified by a qualified certificate as defined in Schedule 2 to the 2002 Regulations.

8. Under section 9E(1)(d), the Regulations provide that annexations to an electronic document must be referred to in the document and identified as an annexation to that document before it is signed using the electronic signature.

Commencement and Transitional arrangements

9. Provision is made by Commencement and Transitional Order[3] to bring into force from 11 May 2014 relevant provisions of the 2012 Act amending the 1995 Act including those noted above, together with important transitional arrangements. In particular the provisions will not initially enable electronic documents to be registered in the registers held by Registers of Scotland except Automated Registration of Title to Land (ARTL) documents nor will they enable wills, testamentary trust dispositions and settlements or codicils. Details are set out in the Policy Note for that Order.

Consultation

10. On behalf of the Scottish Ministers the Keeper of the Registers of Scotland carried out a public consultation on the Regulations**.** The consultation took place between 1st July 2013 and 29th September 2013. It was published on the Registers of Scotland and Scottish Government websites. A report on the consultation and the responses are available on the Registers of Scotland website[4].

Impact Assessments

11. A Business and Regulatory Impact Assessment was carried out for the draft Regulations. This is available to view on the Scottish Government and Registers of

[2] S.I. 2002/318.
[3]The Land Registration etc. (Scotland) Act 2012 (Commencement No. 2 and Transitional Provisions) Order 2014 (S.S.I. 2014/41).
[4] http://www.ros.gov.uk/consultation/edocsBRIA_final_v10.pdf

Scotland websites[5]. A pre-screening exercise was carried out and established that the Regulations will have no impact on equality or environmental issues.

Registers of Scotland on behalf of the Scottish Government
26 March 2014

[5] http://www.ros.gov.uk/consultation/edocsBRIA_final_v10.pdf