

LAND REGISTRATION ETC. (SCOTLAND) ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10: Electronic Documents, Electronic Conveyancing and Electronic Registration

Electronic documents

Section 96: Where requirement for writing satisfied by electronic document

214. This section makes changes to section 1 of the Requirements of Writing (Scotland) Act 1995 (the 1995 Act). Subsection (2) makes textual adjustments to section 1 of the 1995 Act to ensure that where a document is required to be in writing (and many documents do not require to be in writing), the form of that document can be either as a traditional document (for example on paper) or an electronic document (as long as it is a document capable of being electronic and is in the form specified in regulations).
215. Subsection (2)(a)(iv) provides that agreements under section 66 of the Act (about shifting boundaries of subjects bounded by a water boundary) must be in writing.

Section 97: Electronic documents

216. This section inserts a new Part 3 into the Requirements of Writing (Scotland) Act 1995 (the 1995 Act) comprising seven new sections on electronic documents.
217. The new Part contains powers for Scottish Ministers to carry out two major reforms by subordinate legislation. First, it permits Scottish Ministers to make regulations making documents electronically valid. This will allow, for example, regulations to make contracts relating to transactions over land, known as missives, electronically valid. This will lead to solicitors not needing to exchange paper documents. Second, it permits Scottish Ministers to make regulations allowing electronic registration of electronically valid documents in the Keeper's registers.
218. Consequential amendments to the 1995 Act (particularly to ensure law on paper documents continues to operate) are provided for in schedule 3.
219. Inserted section 9A defines electronic documents.
220. Inserted section 9B allows Scottish Ministers to make regulations in respect of the types of documents under section 1(2) of the 1995 Act capable of being electronically formally valid. Subsection 1 makes provision that in order for an electronic document to reach the threshold of being formally valid, the document needs to be authenticated by the granter or granters. Subsection (2) provides that an electronic document is authenticated if it bears an electronic signature. In this way, authentication can be said to be akin to the wet signature applied to a traditional document. The conditions that the electronic signature must comply with are stipulated in subsection 2(a) to

*These notes relate to the Land Registration etc. (Scotland) Act
2012 (asp 5) which received Royal Assent on 10 July 2012*

- (c). A document must be of a type authorised to be a valid electronic document under subsection (1)(b) and are authenticated in accordance with regulations under subsection (2)(c). Subsection (3) allows a contract mentioned in section 1(2)(a) of the 1995 Act to be constituted by a mix of electronic and traditional documents.
221. Inserted section 9C gives Scottish Ministers a power to specify in regulations what level of authentication and certification is necessary to ensure the document can be presumed to be authenticated. On being authenticated alone, the document can be valid under section 9B. However, in order for an electronic document to have probative status, certain documents may have to have third party certification. Traditional documents receive self-proving status by witnessing. Once electronically signed in accordance with regulations made under section 9C(2), an electronic document is capable of being automatically valid without witnessing (as the equivalent evidence of who signed the electronic document (and when) is securely encrypted into the constituent data of the document).
222. Inserted section 9D makes provision allowing courts to grant decree that an electronic document is self-proving even if there is no presumption in respect of the document under section 9C.
223. Inserted section 9E allows the regulations to make provision in relation to alteration and authentication of and annexations to, electronically valid documents.
224. Inserted section 9F allows electronic documents to be delivered electronically (such as over the internet) or by other reasonable means (such as physical delivery of USB memory stick). Subsection (2) is self-explanatory.
225. Inserted section 9G (1) to (3) allows Scottish Ministers to make regulations allowing for electronic registration of electronically valid documents in any of the Keeper of the Registers of Scotland's registers. Such a document must be of a type specified in regulations under subsection (3) and be electronically authenticated under section 9C, 9D or 9E(1). Subsection (6) list the documents to which the regulations need not apply.

Section 98: Amendment of Requirements of Writing (Scotland) Act 1995

226. This section is self-explanatory. See below on schedule 3.