

# Final Business and Regulatory Impact Assessment

## **Title of Proposal**

Requirements of Writing (Scotland) Act 1995:  
The Electronic Documents (Scotland) Regulations 2013

## **Purpose and intended effect**

- **Background**

Directive 1999/93/EC of the European Parliament and of the Council of Europe on a Community framework for electronic signatures (the Directive) laid down the criteria that formed a basis for the legal recognition of electronic signatures throughout Europe. The Directive was transposed into UK law by the Electronic Communications Act 2000 (the 2000 Act) and the Electronic Signatures Regulations 2002. The aim of the legislation was to facilitate the use of electronic signatures and establish a legal framework for recognition of electronic signatures. The Directive and UK legislation does not apply to legal documents governed by the Requirements of Writing (Scotland) Act 1995 (the 1995 Act).

The 1995 Act governs the form and authentication of certain legal documents, most notably conveyancing documents and wills. It provides that for a document to be legally valid, it must be signed by the granter of the document. For a document to obtain the presumption that it has been signed by the granter, the granter's signature must be witnessed. In legal terms, a document that has been signed and witnessed is referred to as being self-proving. In its current form, the 1995 Act prescribes that such documents must be on paper and signed using pen and ink signatures.

Amendments were made to the 1995 Act using powers contained in the 2000 Act. The Automated Registration of Title to Land (Electronic Communications) (Scotland) Order 2006 (the ARTL Order) allowed for the limited use of electronic signatures and electronic documents in the Automated Registration of Title to Land IT system (ARTL) operated by the Registers of Scotland (RoS). The ARTL Order allows the Keeper of the Registers of Scotland to authorise the registration of prescribed conveyancing deeds in an electronic form in the Land Register. When the ARTL Order was made it was considered that primary legislation would be required to amend the 1995 Act to enable it also to govern electronic documents with electronic signatures.

The Scottish Law Commission's report on Land Registration and draft Bill, which was published in February 2010, included amendments to the 1995 Act to permit electronic documents and electronic signatures. The reforms

proposed by the Scottish Law Commission were included in the Land Registration etc. (Scotland) Bill that was presented to the Scottish Parliament in December 2011. The Bill was passed by Parliament and received Royal Assent on 10 July 2012. The provisions in the 2012 Act that amend the 1995 Act will be commenced by commencement order.

The 1995 Act will be amended to permit the use of paper documents or electronic documents. The amendments put in place a framework that will allow the legal documents governed by that Act to take an electronic form and be signed using electronic signatures. In addition, the 1995 Act contains a power to set out in regulations the requirements for the registration of electronic documents in the registers under the management and control of the Keeper of the Registers of Scotland. This power will be exercised at a later date.

Under Scots law, some legal documents, most notably conveyancing deeds, have to be registered to make the right that is being created, transferred, varied or extinguished in the deed enforceable against third parties and not just the parties to the deed. This enables third parties to transact safely with property knowing that the granter of a deed is the owner in law of the property.

The framework put in place for electronic documents closely follows the provisions contained in the 1995 Act for paper documents. The amendments provide that an electronic document can be legally valid and can be self-proving. Included in the amendments is a power for the Scottish Ministers to prescribe in regulations the details of what will constitute an electronic document and the electronic signatures required to make electronic documents legally valid and self-proving.

The purpose of the proposed regulations is to prescribe the requirements for electronic documents and electronic signatures under sections 9B and 9C that will be inserted into the 1995 Act. The amendments to the 1995 Act that provide for the registration of documents are being commenced at the same time; however, the regulations will not use the power in section 9G to prescribe the requirements for registration of electronic documents.

- **Objective**

The objective of the amendments to the 1995 Act is to modernise the legislation to allow the legal documents governed by that Act to take either a paper or an electronic form. The proposed regulations will provide the statutory requirements that will determine what will constitute an electronic document and the electronic signatures required to make the document legally valid and self-proving.

The proposed regulations for electronic signatures will adopt the definition of advanced electronic signatures and qualified electronic signatures used in the Directive. The regulations will state that for a legal document to be legally valid it must be signed using an advanced electronic signature as

defined in the Directive. For an electronic document to be self-proving, it must have been signed using a qualified electronic signature.

The amendments to the 1995 Act and the proposed regulations to allow for legally valid electronic documents align with the Scottish Government's *Scotland's Digital Future* strategy. The regulations will enable businesses and individuals to use legally valid electronic documents. This contributes to the Scottish Government's aim of ensuring that Scotland is well placed to take full advantage of all the economic, social and environmental opportunities offered by the digital age.

The wording of the Directive, and consequently the regulations, is technology-neutral but the most commonly used type of electronic signature that meets the requirements is one based on the technology that is referred to as Public Key Infrastructure (PKI)<sup>1</sup>. At present in Scotland, there is no publicly available electronic signature capable of meeting the requirements for advanced and qualified electronic signatures as defined in the Directive. In setting up ARTL, RoS had to set up a PKI and distribute electronic signatures to solicitors and other legal practitioners using the system. It is understood that the Law Society of Scotland intend to issue qualified electronic signatures to their members that will enable solicitors to sign legal documents electronically.

- **Rationale for Government intervention**

The 1995 Act did not anticipate the growth of electronic communication and the digital age and, in its current form, does not allow the legal documents governed by that Act to take an electronic form. It will not be possible to make legal documents governed by the 1995 Act take an electronic form without legislation. The amendments to the 1995 Act contained in the 2012 Act set up the framework, and contain powers to make subordinate legislation (the proposed regulations), which will provide the legal requirements for electronic documents and electronic signatures. This could not be achieved without government intervention.

The current wording of the 1995 Act is problematic for solicitors involved in conveyancing transactions. A part of a normal conveyancing transaction involves what is termed the conclusion of missives. This is the term applied to the exchange of a series of letters between solicitors concluding with a formal acceptance by one party of the other party's offer. Once these letters have been exchanged, the formal contract for the purchase of a house is concluded. In Scotland the contract letters are normally signed by the solicitors, not the purchaser and seller themselves. Modern technology now enables these letters to take an electronic form, for example a PDF attached to an email. The case management systems used by many conveyancing firms could be used to facilitate this process but the

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<sup>1</sup> A **public-key infrastructure (PKI)** is a set of hardware, software, people, policies, and procedures needed to create, manage, distribute, use, store, and revoke digital certificates. An electronic signature is generated from the digital certificate which identifies the individual and provides the assurance that the document has been signed by that person.

terms of the 1995 Act requires that these letters must be on paper and signed using a pen and ink signature. The proposed regulations would allow missives to take an electronic form and would help improve the business processes of conveyancing firms.

This proposal contributes towards the Scottish Government National Outcome: *We live in a Scotland that is the most attractive place for doing business in Europe.*

## **Consultation**

- **Within Government**

RoS are the policy lead for the proposed regulations. To inform and help develop the policy, RoS set up and chaired an electronic signatures working group that includes representatives from:

- Scottish Government Digital Directorate
- Scottish Government Family Law Directorate
- The National Records of Scotland
- The Accountant in Bankruptcy
- Office of the Public Guardian (Scotland)
- Scottish Courts Service
- The Scottish Law Commission

- **Public Consultation**

A public consultation on the draft regulations was carried out between 1 July 2013 and 29 September 2013. The consultation paper was published on the RoS and Scottish Government websites and distributed to 327 individuals and groups. During the consultation period there were 491 unique views of the consultation page on the RoS website. The document was also distributed by email to those of our customers signed up to receive the RoS news eZine.

In addition, the consultation was publicised in the Journal of the Law Society of Scotland. RoS participated in five Law Society of Scotland conveyancing conferences held in September where the details of the consultation and the proposed regulations were highlighted. Policy officials from RoS also met separately with representatives from the Scottish Law Commission and the Scottish Courts Service to discuss the proposed regulations

- **Business**

The RoS electronic working group on electronic signatures included representatives from the Law Society of Scotland and the Edinburgh

Solicitors Property Centre. The Law Society represents the interests of all law firms throughout Scotland and the ESPC is a property marketing company that advertises properties for sale from a network of member firms based in Edinburgh, the Lothians and Fife.

During the consultation period RoS took part in 9 conveyancing conferences, attended by members of the law profession, where the proposed regulations were highlighted. .

## **Options**

**Option 1** - Do not commence the amendments to the 1995 Act and do not make regulations to provide for electronic documents and electronic signatures

- **Benefits**

There are no benefits associated with this option. Without commencing the amendments to the 1995 Act and making regulations, it will not be possible for legal documents governed by that Act to take an electronic form.

- **Costs**

There are no apparent costs to this option as without the regulations being made there will be no requirement for parties wishing to use electronic signature to invest in a PKI. Without the regulations, the benefits that solicitors' firms could realise through being able to conclude missives electronically could not be realised. The cost of doing nothing is that the legal profession in Scotland will not be able to benefit from the advantages of being able to conduct their business electronically.

**Option 2** - Commence the amendments to the 1995 Act and make regulations to provide for electronic documents and electronic signatures.

- **Benefits**

Commencing the amendments to the 1995 Act and making regulations will allow legally valid documents governed by that act to take an electronic form. This will allow solicitor firms involved in conveyancing to conclude missives electronically.

- **Costs**

The commencement of the amendments to the 1995 Act and the making of the regulations will provide legal practitioners and the granters of legal documents the option of doing this electronically. This option will be voluntary. After these provisions are made, the option for using paper and pen and ink signatures will still be available. If someone did want to sign a document with an electronic signature that met the requirements set out in

the regulations, they would have to obtain an electronic signature.

In Scotland, there is currently no publicly available electronic signature that meets the standards set out in the regulations. It is therefore not possible to provide an estimate of the costs to business.

It is understood that the Law Society of Scotland is committed to providing an electronic signature that meets the required standard to all its practising members as part of their membership of the society.

### **Sectors and groups affected**

The proposed regulations could affect any individual or business that wants to sign a legal document governed by the 1995 Act. As previously mentioned, in Scotland there is currently no publicly available electronic signature available that will meet the requirements set out in the regulations. When the regulations come into force, it is anticipated that the use of electronic signatures for the purposes provided for in these regulations will be confined to solicitors who are members of the Law Society of Scotland and have been issued with an electronic signature.

### **Scottish Firms Impact Test**

It is considered that the proposed Regulations will only affect law firms operating in Scotland. To establish the effect the proposed regulations may have on these firms interview were carried out with following 6 law firms:

Cullen Kilshaw – Galashiels  
Hastings & Co – Kelso  
RA Direct - Edinburgh  
Jeff Gibson – Edinburgh  
Pinsent Masons – Glasgow  
Blackwood and Smith – Peebles

These firms represents a cross section of law firms within Scotland including a single practitioner, small and medium sized firms, a firm concentrating in bulk conveyancing and a larger city firm with interests in commercial conveyancing.

Before the interview the firms were provided with a link to the consultation and the proposed regulations. As part of the interview the representatives of the firms were given an overview of the proposals and were asked to the following questions:

- 1) Do you perceive that any of the provisions will have an impact on the competitiveness of your firm?
- 2) Will the provisions have any negative impact on you as a firm in terms of cost?

- 3) Will the provisions have any positive impact on you as a firm?
- 4) Will the provisions impose any additional costs on your firm?
- 5) Can you foresee any cost savings for your firm from the new legislation?
- 6) As a whole do you view the provisions contained in the draft Bill as positive or negative?

The general view of the firms interviewed was that the proposed regulations would not have a negative impact on the firms in terms of costs. There may be some IT costs incurred but they were perceived to be minimal. The firms did not foresee any substantial costs savings. There was a view that there may be some minor costs saving in terms of paper, postage and some staff time savings but these were not quantifiable. The firms did not foresee that the regulations would have any adverse affect on the competitiveness of their firms. Of the 6 firms interviewed 4 saw the proposed regulations as a positive development, with 2 firms saying they were neutral or ambivalent towards the regulations. A table giving a breakdown of the responses to the questions appears in Appendix 1.

- **Competition Assessment**

The proposed regulations put in place the legal requirements for electronic signatures and electronic documents that will enable legal documents that are governed by the 1995 Act to take an electronic form. There is currently no publicly available electronic signature available in Scotland that meets the requirements set out in the regulations. When the regulations come into force, the Law Society of Scotland are planning to have capability to issue electronic signatures to their members. As previously stated, it is anticipated that initially the use of electronic documents will be restricted to solicitors involved in conveyancing. As the electronic signatures will be available to all Scottish solicitors involved in conveyancing through the Law Society, it is anticipated that the regulations will have no impact on competition between law firms.

- **Test run of business forms**

The regulations prescribe no new business forms.

### **Legal Aid Impact Test**

The introduction of these regulations should have no impact on the Legal Aid Fund. The Scottish Legal Aid Board has confirmed this assessment.

### **Enforcement, sanctions and monitoring**

The proposed regulations do not require enforcement and impose no sanctions. The regulations will modernise Scots Law to allow legal documents governed by the 1995 Act to take an electronic form. Any disputes that arise as regards the validity of an electronic document would have to be resolved through litigation by the affected parties.

### **Implementation and delivery plan**

As respondents agreed to the terms of the proposed regulations, we are commencing the amendments to the 1995 Act and making the regulations as soon as practically possible after the end of the consultation.

- **Post-implementation review**

The amendments to the 1995 Act provide the Scottish Ministers with additional powers to make regulations that will set out the requirements for electronic documents and electronic signatures for the legal documents governed by the 1995 Act that can be registered in the registers under the management and control of the Keeper. Registers of Scotland is not presently in a position to implement this provision, which will depend to a large extent on the growth of the use of electronic self proving documents after the present regulations come into force. Registers of Scotland will review this from 2015-2016 from a practical and commercial perspective once the major legislative changes to which it is subject have bedded down and once it can provide a suitable electronic infrastructure to support such registers.

### **Summary and recommendation**

The proposed regulations on electronic documents and electronic signatures will allow legal documents governed by the 1995 Act to take an electronic form and be legally valid. The effect of the regulations will be to allow the legal profession to use electronic documents where at present the law prescribes that they must use paper. In the long run it is hoped that the advantages to be gained from e-commerce will extend to the legal profession and the making of these regulations will unlock this potential. If the regulations were not made, this would prevent legal documents taking an electronic form.

These regulations are enabling in nature. There is no requirement on individuals or businesses to use electronic documents as a result of these regulations.

We therefore recommend that option 2 is implemented.

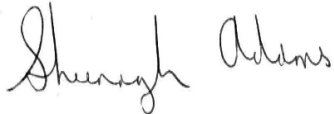


**Declaration and publication**

*I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.*

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**Signed:**



**Date: 21 March 2012**

**Sheenagh Adams, Keeper of the Registers of Scotland**

**Registers of Scotland Contact point: Matthew Smith, Registers of Scotland: email - matthew.smith @ros.gov.uk tel. no. - 0131 659 6111 ext 3381**



Appendix 1 – Scottish Firms impact test summary

FIRM	Location	date	Q1 – Do you perceive that any of the provisions will have an impact on the competitiveness of your firm?	Q 2 Will the provisions have any negative impact on you as a firm in terms of cost?	Q 3 Will the provisions have any positive impact on you as a firm?	Q 4 Will the provisions impose any additional costs on your firm?	Q5 Can you foresee any cost savings for your firm from the new legislation?	Q 6 As a whole do you view the provisions contained in the draft Bill as positive or negative? neutral
Cullen Kilshaw	Galashiels	9/10/2013	No change. This will not affect the client therefore will not become a competitive tool for the client.	no	no	no	no	neutral
Hastings & Co	Kelso	9/10/2013	No as long as other solicitors sign up and this doesn't put users ahead of the game	No. Does not foresee any cost implications.	yes - e-docs are the way forward. It's a cultural shift and speeds up the process.	No - the systems can cope.	Possible savings on stationary, postage although very minor savings.	positive
RA Direct	Edinburgh	10/10/2013	No as long as everyone uses it.	no	Although it's a different method of communication	If LS decided to charge there may be a possible smart	Possible savings on stationary, postage	positive

Jeff Gibson	Edinburgh	10/10/2013	No	no	there will be no real difference No- clients will not be aware of the process so does not affect competitiveness.	card reader cost. There may be IT costs involved in using the smart card. New IT element may have training implications	although very minor savings. IT may have an impact on cost savings.	positive
Pinsent Masons	Glasgow	10/10/2013	No , as long as everyone uses it then there will be no competition	May have IT changes to cope with which may have a cost impact and training impact	Its important to keep up with the times and being more innovative. It makes for a quicker process although there are no benefits to the client. Its more secure.	Possible IT costs. Training and changing policies and procedures	Courier costs saving. Takes away the need for staff to deliver docs.	positive
Blackwood and Smith	Pebbles	30/10/2013	No	If it is easy to use no additional costs	yes	If there are costs connected to obtaining the	Potential time saving costs. Convenience for the client	

												Law Society esignature there may be additional costs.		
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