



Law Society
of Scotland

Consultation response

Delivering improved transparency in land ownership
in Scotland: Consultation on draft regulations

November 2018



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.

Our Property Law Committee and Property and Land Law Reform sub-committee welcome the opportunity to consider and respond to the Scottish Government's *Delivering improved transparency in land ownership in Scotland*: consultation on draft regulations¹. We have the following comments to put forward for consideration.

General comments

We note concerns about the widespread nature of the proposed duties and the impact of these duties on a potentially wide range of individuals and bodies. There appears to be no differentiation between for example, a local sports club and a large commercial organisation, or between small family partnerships and major pension fund trusts.

There is a lack of comprehensive information about trust or partnership property available on public registers, and so there is no ability to produce a proper estimate of how many properties, or people, are likely to be affected by requirements of the Regulations. It cannot therefore be ascertained if the effect of the Regulations may be disproportionate to any benefit.

It appears to us that, often, without legal advice or some more formal determination, owners may be unwilling or unable to establish if they are affected by the requirements yet may be liable to, inadvertently, commit a criminal offence. As explained below, we believe that it is likely that offences under the proposed Regulations may be committed unintentionally, by individuals who are not seeking to hide anything. We would question whether the offences are proportionate, particularly when balanced against wider policy aims to ensure that Scotland is a good place to do business.

¹ <https://consult.gov.scot/land-reform-and-tenancy-unit/transparency-in-land-ownership/>

We consider that there are a number of provisions which would benefit from clarity and we provide comment on these matters below. In particular, we would welcome clarification in relation to the definitions of “control” and “significant influence”. Such definitions are crucial to the operation of the Regulations.

It is important that there is a clear exclusion of any extension of the Regulations to the role of "trusted adviser" often held by professional advisers, being those persons giving advice in a paid professional capacity. In addition, we note that we do not consider it would be appropriate for solicitors to require to certify those who hold a controlling interest.

Finally, it is crucial that the Register is properly and timeously maintained and therefore, vital that the Keeper has adequate resources to implement and maintain the register.

Response to consultation questions

Q 1. Do you have any comments on our proposals for the form of the Register?

With regards to the form of the Register, we previously indicated that we considered that a new register is necessary². We remain of the view that it is important that neither the requirements of the Regulations nor a breach of the Regulations should in any way affect the ownership of land as disclosed in the Land Register. There is the potential that if the relevant information was supplied in a title sheet, purchasers of property or their advisors would be cautious and could raise questions as to who should be signing deeds and whether any other consents from other parties ‘in the background’ were necessary. We recognise, however, the potential resource and cost implications of setting up, maintaining and enforcing a new register. This would require duplication of information. It is important that the Register is set up on a basis that will enable the Register to be established, maintained and enforced at an appropriate cost. On balance, the establishment of a new Register may not be cost and resource efficient.

The Regulations use the expression "controlled"³ and occasionally "controlling". We consider that clarification is required on this point as it is open to different interpretation.

We understand that the purpose of the Register is to seek to identify those who have control over decision making in land and therefore use of the expression "controlling" may be most appropriate as being the correct characterisation of the interest of an associate. "Controlled" means someone who is under the control or influence of another or is supervised or governed by them; "controlling" means the person who supervises, governs or regulates. The Register is of persons who can supervise, govern or regulate.

² <https://www.lawscot.org.uk/media/9773/prop-improving-transparency-in-land-ownership.pdf>

³ Title, Regulation 3 and elsewhere

It would appear to be unnecessary to hold details of the controlled persons as those people are either an owner or a tenant under a long lease, and their details are therefore already recorded or registered in one of the property registers.

In addition, it may be of assistance to extend the definition of “control”, as referred to in Regulation 2, to incorporate the concepts of “controlled” and “controlling” in order to clarify that different interpretations of the concepts are not expected.

We consider that there should be more detailed and clearer guidance on the persons to whom the Regulations do not apply. The paragraphs in the Explanatory Document relating to Regulation 8(2), and also the Regulation itself, should be expanded to clarify the types of owner or tenant who are exempt from the Regulations, in addition to those subject to other transparency regimes. It should be clear on the face of the Regulations to whom they apply, without having to read the whole Regulations to work out whether they apply or not.

While we appreciate it may be difficult to provide an exhaustive list, a large number of property owners and tenants who are not affected by these Regulations could have that fact set out clearly, for example:

- individuals who own or rent and occupy their own home;
- that a non-entitled spouse or non-entitled civil partner is not an associate (as arguably, the definition of associate in paragraph 1(b) of Schedule 1 Part 1 could be interpreted as applying to them);
- partners in partnerships, where all of the partners are individuals and all hold title or are tenants under the lease (where there is no non-partner individual exercising control); and
- trustees in trusts, where all of the other trustees are individuals, and all hold the titles or are tenants under the lease (where there is no non-trustee individual exercising control).

It is appreciated that for a person to be able to establish that there is no non-partner or non-trustee individual exercising control, some investigation or conscious personal interrogation may be required. We believe, however, that it would add considerable clarity and simplification to the Regulations if the categories of persons (other than Schedule 2 exempt bodies) to whom the Regulations do not at a given time apply, were to be detailed. This would be subject to the possibility that those categories of persons could come within the ambit of the Regulations at some point in the future, if a new partner or trustee, who was not an owner or tenant, was assumed.

We are concerned about the potential difficulties in identifying associates in unincorporated bodies. Such bodies, such as sports clubs or local community groups, may not have any formal constitution, and the "general control and management of administration of the body" may not necessarily vest in the same person or people all of the time, but may be assumed from time to time by different individuals on an *ad hoc* basis.

One area where we perceive difficulties arising is in cases where title to a property is held by trustees *ex officio*, where the property has been owned for many years and the relevant office holders are unaware of the role they have assumed in holding title.

The Explanatory Document highlights some of the difficulties in identifying relevant parties. It would be of benefit if it were to offer suggestions and solutions for identifying the relevant personnel that have to be disclosed and provide that it is a reasonable excuse for not registering a person as an associate if the current 'holder' of an *ex officio* position cannot be located.

Given the declared intention of the UK Government to enact legislation creating a Register of Beneficial Owners of Overseas Companies and other legal entities which will apply to the whole of the UK and for that register to be operational in 2021, we recommend that consideration is given as to how overseas entities are to be included in these current arrangements. This could be dealt with by including such entities at this stage but including in the Regulations a provision that they will no longer be subject to the requirements of the Register when the Register of Beneficial Owners of Overseas Companies comes into effect.

We also suggest that associates are given a unique identifying number for ease of maintaining the register. This would assist registration and ongoing accessibility of the Register where associates have controlling interests in multiple land holdings.

Q 2. Do you have any comments on our proposals for the role of the Keeper in relation to information in the Register?

Given the already substantial role of the Keeper, it will be necessary for the proper operation of the Register that the Keeper has adequate funding and resource to create and maintain the Register.

With regards to Regulation 5, we consider that there may be merit in imposing a time limit on when the Keeper must make or amend an entry in the Register, so that those inspecting the Register will have certainty about the state of the accuracy of, and reliance on, the information in the Register. For example, if there was a requirement that the entry or amendment had to be made within 60 days of a submission being made, persons inspecting the Register would know that it was accurate to within that margin. A consistent timescale for making entries or amendments would help to ensure that there is the increased transparency which the Regulations seek to establish.

In addition, given the nature of the information that the Register will hold, it is essential that there are robust security and protection measures in place for the Register. We note that the standard referred to in the Regulation "[a]s appear reasonable to the Keeper" is not a recognisable independent standard. While the Keeper, as custodian of a number of public registers, exercises a high standard of security from interference and unauthorised access, we recommend that Regulation 6 should make it clear that the highest standards of security of the system are expected.

The Regulations should provide that anyone who suffers loss or damage, whether actual, financial or reputational, from a security breach of the Register, or an error in its contents, should be compensated.

Paragraphs 42 and 43 of the Explanatory Document infer that Regulation 7 sets out the criteria for persons to have access to the Register, but the wording of Regulation 7 leaves this to the discretion of the Keeper. It is therefore not clear whether, how, and to what extent access will be controlled or restricted. We anticipate that those who will be submitting information to the Register will want to know how their information can be accessed – for example, will the Register operate in the same way as ScotLIS which has a free-to-access public platform for certain types of information, and a business platform, access to which must be by registered users, which provides more detail?

We consider that the Explanatory Document should be enhanced to contain more information on this, and other, Regulations, rather than merely explaining in plain language what the Regulation says. Section 42 of the Land Reform (Scotland) Act 2016 requires that the Explanatory Document must give reasons for the provisions contained in the Regulations. We consider that such explanations would enhance users' understanding of the requirements of the Register.

Q 3. Do you consider the information that we are requiring to be provided for inclusion in the Register sufficient and proportionate?

It should be sufficient that the recorded person's and associate's address be that of a contact address at which they are able to be reached, such as a business address. For privacy reasons, neither a recorded person or associate should be required to give their home address. We appreciate that there may be some merit in also requiring an email address or contact telephone number to be provided.

Q 4. Are our proposals for the duties people will be under to provide information sufficient and proportionate?

We consider that the proposals are sufficient and in light of the aim of the legislation, appear to be proportionate.

Q 5. Is our proposed process for security declarations reasonable?

Given the critical nature of the circumstances in which a person will need or want to make a security declaration, we consider that it is vital that the opportunities for making a security declaration are given the highest priority in the registration process. We are concerned that, as currently drafted, there are potential

gaps in the process where a vulnerable individual's details may be publicly available on the Register, before that individual has had the opportunity to make a security declaration to the Keeper.

The specified form for the information that is to be supplied to the Keeper under Regulation 8(3) must contain a declaration from the responsible person that they have taken the steps required to notify the associate of the requirements under Regulation 8(4) that the associate may make a security declaration. If none accompanies the specified form, the information must be provided that the person submitting the form knows of no reason why the associate would need to make a security declaration, or, that the associate has confirmed that it does not intend to make a security declaration.

The information to be supplied to the associate under Regulation 8(4) must clearly inform the associate that its details will be made available in a public register, and that the security declaration, if appropriate, must be made within the 60 day timescale for submission of the particulars of the associate to the Register, failing which their details will be in the public realm.

If the form with details of the associate has to be submitted before the security declaration is available, the Keeper should be required to treat the matter as though the security declaration had been received, and not publish the associate's details for a specified period of time, to allow the associate to complete and submit the security declaration. There is a danger that even if the vulnerable associate's details are exposed on the register for even a short period of time, they may be susceptible to risk of violence or abuse.

The decision as to acceptability of the security declaration appears to be at the discretion of the Keeper. We consider that there requires to be clear and thorough guidelines for this process, and we would strongly suggest that the default position should be that the declaration is to apply, rather than not. Victims of abuse, intimidation, or threat may find it difficult to obtain sufficient evidence in a short period of time, and yet be no less at risk. It is essential that the requirements of a register which is about providing transparency of ownership and a means for communities to engage with landowners about the use and management of land must not cause harm to individuals at risk.

For the same reasons, consideration should be given to some flexibility in relation to the revocation provisions in Regulation 15(2)(b).

Registers of Scotland staff who are taking decisions in relation to security declarations will require a sufficiently high-level of training to take those decisions. This supports the need for proper resourcing.

Any referral to the Lands Tribunal for an appeal against a decision not to accept a security declaration, must be considered on a confidential basis and any decisions either not published, or published with personal information redacted.

Q 6. Are there people who you think should be able to apply for their information not to be disclosed in the Register, who may not be able to under our current proposals?

We have no comment.

Q 7. Do you have any comments on our proposals for referral of questions about the accuracy of the Register to the Lands Tribunal?

We note that in the interests of access to justice, the process for referral and the costs involved will require to be straight-forward and accessible.

Q 8. Do you have any comments on our proposals for criminal offences?

We note that section 39(3) of the Land Reform (Scotland) Act 2016 states:

“(3) Regulations under subsection (1) may include provision for offences and civil penalties (including fixed penalties) for failure to comply with requirements imposed under the regulations.”

This provides powers for offences and for civil penalties to be introduced. As currently drafted, failure to comply with any of the requirements under the Regulations is a criminal offence attracting, a potentially substantial, fine.

There is concern that many individuals to whom these Regulations are to apply will fail to comply with the various duties and requirements innocently and inadvertently. We consider that it is important to recognise the potential that the majority of offences that will be committed inadvertently and without an intention to provide false information or to hide information. It is entirely just that persons should be penalised for giving false or misleading information or seeking to withhold key facts or subvert the purpose of the Register, however it may be disproportionate to criminalise individuals for being owners or tenants of land and innocently failing to provide information due to a lack of awareness. In view of the nature of the individuals whom these Regulations will cover, it may be appropriate for there to be greater use of civil penalties than as presently stands. Account needs to be taken of mitigating circumstances, such as ignorance of the existence of an associate, and indeed ignorance of the requirement to register details of an associated person.

We note that the requirements to update information at the time of changes, for example, when there are changes to the make-up of a partnership or changes to the trustees in a trust, may be considered fairly onerous.

For example, Regulation 8(8) suggests that it would be a reasonable excuse to be unable to establish the existence of any associates, after having taken reasonable steps to do so, but many individuals will not

necessarily know that they have to take these reasonable steps in the first place. It is important that legislation gives individuals effective guidance as to the necessary standards of conduct and therefore it is important that individuals know about and can understand the requirements upon them.

We suggest that a requirement be introduced that, before an offence is deemed to have been committed, the individual concerned is given a period of time, after receiving notification from the Keeper that they have failed to comply with any of the duties under the Regulations that attract a penalty, to comply with the duty, and only after failure to comply within a reasonable period after notification should it be possible for an offence to be committed.

Q 9. Are there alternative or additional means of enforcement that we should be considering?

We refer to our answer to question 8. We note that by virtue of section 39(3) of the Land Reform (Scotland) Act 2016, there are powers for civil penalties to be included in the Regulations and we suggest consideration is given to this in some of the Regulations rather than creation of a criminal offence. We do not consider that any further means of enforcement to those already provided are required.

Q 10. Do you have any comments on our proposed process for notification of the Keeper in the case of a person's death or an entity's winding up or dissolution?

It is of concern that the failure of an executor to notify the Keeper of the death of an individual who is a recorded person or an associate is to be a criminal offence. The winding up of an individual's estate generally deals with the personal assets of that individual. The executor may have no knowledge of the deceased's business affairs. The existence of the deceased's details on the Register may be unknown to the executor. We consider that there would be merit in considering the terms of this Regulation, particularly in relation to the creation of an offence, in light of the likely circumstances that will apply in many cases.

In relation to the duties of a person winding up an entity which is a recorded person or associate, we note that the entities affected by this provision may be most likely to be overseas entities. This raises the question of enforceability of the sanctions for failure to disclose, and the difficulties of recovery of fines.

Q 11. Do you have any comments on our proposals for a transitional implementation?

It will be important for owners and tenants in land, and their associates, to be made aware of the requirements of the Regulations in good time in order to meet the requirements. This is particularly significant given the criminal offences which may be committed. Given the awareness raising which will be

required, alongside the training and upskilling of Registers of Scotland staff and legal advisors, we suggest a transition period of at least one year. We note that in terms of the Register of Beneficial Owners of Overseas Companies, a transitional period of 18 months is proposed.

Q 12. Can you provide examples where land is owned or leased by individuals subject to contractual arrangements such as those described in the explanatory document?

We note the very wide extent of circumstances covered by the Regulations: “where the person who owns or tenants the land is an individual who has entered into a contract or other arrangement”⁴. The scope of this is not entirely clear and we consider there would be merit in further guidance on this point.

We note that Regulation 20, concerning individual culpability, includes references to directors and other officers of limited companies, and to members of Limited Liability Partnerships. These entities are exempt from the Regulations but appear to be subject to Regulations 12, 13 and 18. We consider it likely that many of these “exempt” entities will think that the Regulations do not apply to them at all, particularly as they are subject to another regime and are therefore, in theory at least, already fully disclosed. We consider that this is an area which may give rise to inadvertent breaches of the Regulations.

As referred to above, further clarification is required in relation to the definitions of “control” and “significant influence”. We deal with this point in further detail at question 14. We consider that without further clarification, there is the potential for a wider-than-anticipated application of the provisions, to include for example, standard options, exclusivity agreements, and short-term lock-out agreements.

Q 13. Are there other contractual arrangements we should be looking to capture?

We do not have any substantive comment on this question but note that any contractual arrangements which are sought to be included must be defined sufficiently specifically.

Q 14. Do you have any comments on this proposal?

We note that it is crucial that it is clear and unarguable who is ‘caught’ by the Regulations. As such, we recommend further thought be given to the definitions of “control” and “significant influence” set out in Regulation 2(2) and para 22 of Explanatory Document. We consider that there would be merit in the

⁴ Regulation 1

Explanatory Document being expanded in relation to the types of circumstances in which there is to be considered that "control" or "significant influence" exists or will arise.

In Regulation 2(2)(a), we are of the view that the expression "direct the activities of another" is open to wide interpretation and could easily apply to situations which are not intended to be caught by the Regulations. We appreciate that this wording, and the wording referred to below, reflect wording used in the provisions relating to the Register of People with Significant Control (PSC) under the Companies Act 2006. There is statutory guidance to accompany these requirements of the PSC regime, with examples of where the requirements would be established. In addition, we note that although the purposes of the Register of Controlled Interests in Land and the Persons of Significant Control Register (PSC Register) overlap, their purposes are not identical. We deal with this further at question 25.

We are of the view that the Explanatory Document should be expanded to make clear what situations are envisaged by this wording, if it is to be maintained. While generally there is merit in consistency of definitions across legislation, consideration should be given to the differentiation in the wording that it may be necessary to make, given the stated purpose of this Register. We recommend that this be considered carefully to ensure that there are no unintended consequences flowing from this and the other expressions used in these definitions.

We consider that Regulation 2(2)(c) is equally open to uncertainty and could potentially extend to the role of "trusted adviser" often held by professional advisers. It should be made clear that this does not apply to persons giving advice in a paid professional capacity. While paid professional advisers are excepted from the definitions of associates in partnerships, trusts, unincorporated bodies and overseas entities in Schedule 1, the effect of the qualification "only" ("where that person's relationship to the [entity] is only that of paid professional adviser") is uncertain. We consider that there is potential for uncertainty around the terminology used. For example, the advice of a trusted adviser will often be adopted by a client, perhaps "typically", or a client will look to the advice of a trusted adviser to direct its activities. These situations do not appear to be what is intended to be caught by the Regulations, but the uncertainty of the terminology means that there will be many instances where it is not clear on which side of the line an individual falls. The statutory guidance for the PSC regime excludes from categories of those deemed to be exercising significant control "[persons providing] advice or direction in a professional capacity" such as lawyers, accountants, tax advisers, financial advisers and others. We suggest this or other similar expression should be adopted in the Regulations.

Clarification of what is meant or intended by the expressions "able to ensure" and "adopt the approach that the person desires" is required. In the context of the Regulations, it would appear that these matters should be tied into the making of business decisions about the land, and the ability arising due to the business relationship.

We would submit that adopting much of the language and terminology of the PSC regime may be misguided: the purpose of the Regulations is different from that of the PSC Register, and the terminology should reflect that, and take account of the principal objective of the Regulations.

Q 15. Does this reflect how land is typically owned or leased by or on behalf of partnerships or can you provide examples of other ways in which land is owned or leased by or on behalf of partnerships?

See comments at Q12 above.

Q 16. Do our proposals reflect sufficiently how control is exercised over partnerships?

We have no comment.

Q 17. Do our proposals reflect how land is typically held in trust? Can you provide examples of other ways in which land held in trust?

We have no substantive comment on this question. As referred to above, we note that where trustees (which would include executors) are not registered owners of the land held by the trust, they will be subject to individual liability and could face criminal penalties if Regulations are not adhered to. There is the potential for this to cause individuals to be disinclined to take on trustee roles. This does not appear to be the kind of situation at which the Register is aimed, and we question whether such information is necessary.

Q 18. Do our proposals sufficiently capture how control is exercised over trusts including through financial interests?

We have no comment.

Q 19. Do our proposals reflect how land is owned or leased on behalf of unincorporated associations? Can you provide examples of other ways in which land is owned or leased on their behalf?

We have no comment.

Q. 20. Are there other types of groups than those mentioned who may be affected by these proposals? If so, please can you provide examples.

We have no comment.

Q 21. Do our proposals sufficiently capture how control is exercised over unincorporated associations?

We have no comment.

Q 22. Do our proposals reflect how land is typically owned or leased by overseas legal entities? Can you provide other ways in which land is owned or leased by overseas legal entities?

We have no comment.

Q 23. Do our proposals sufficiently capture how control is exercised over overseas legal entities? Are there other examples that you are aware of where control is exercised over an overseas legal entity?

We have no comment.

Q 24. Are there examples where transparency is lacking as to control over a legal owner or tenant of land that we have not taken account of in our proposals?

We have no comment.

Q 25. Do you have any comments on the usefulness of the PSC regime in revealing control of corporate entities which own land in Scotland?

As referred to above, although the purposes of the Register of Controlled Interests in Land and the PSC Register overlap, their purposes are not identical. We note the potential vulnerability for difficulties if there are differences in application of the two regimes.

In Regulation 2(2)(a), “control” is defined as being where a person “can direct the activities of another”. We consider that this is open to a wide interpretation. The expression “significant influence” (as defined in Regulation 2(2)(c)) refers to a situation where one person is able to “ensure” that another person will “typically adopt” the approach of that first person. We consider that this phrase carries a degree of uncertainty due to the juxtaposition between the words “ensure” and “typically”.

Paragraph 5 of Schedule 1A, Part 1 of the Companies Act 2006 (2006 Act) refers to significant influence or control as being:

“Person X has the right to exercise, or actually exercises, significant influence or control over Company Y”.

The 2006 Act provides for the Secretary of State to provide additional guidance.

The wording in the 2006 Act wording appears to provide for “significant influence or control” as a composite concept; in contrast the draft Regulations separate out the concepts of “control” and “influence”. This structural difference could lead to different interpretations of the concepts.

As referred to above, the lines between significant influence and control and providing professional advice and counsel could be unclear as a result of the uncertainty around the terminology used.

We would welcome the introduction of guidance in Scotland as to the meaning of the terms referred to above. It would be of assistance if such guidance was as consistent as possible with the guidance for England and Wales as this would support the usefulness of the PSC regime in revealing control of corporate entities which own land in Scotland. In addition, we suggest that any such guidance should contain a sufficient range of examples to help those responsible for maintaining the register and those advising on compliance with the regulations to allow for application of the Regulations with certainty and for any intended differences in interpretation between the two regimes to be highlighted.

Q 26. Do you have any comments on our proposals to not require SCIOs, CIOs, mutuals or public authorities to provide information for inclusion in the Register?

We have no substantive comment on this matter. We note that information is widely available about how such bodies are set up and managed.

Q 27. Do you agree with the conclusions in the impact assessments?

We have no comment.

Q 28. Are there potential impacts that we have not considered?

We have no comment.

Q 29. What measures, if any, do you think we should take to inform and publicise information about land in Scotland?

We do not make comment about any particular measures. We note however that there will require to be significant awareness-raising undertaken for the public and relevant professionals in relation to the Regulations.

For further information, please contact:

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