



Law Society  
of Scotland

# Written evidence

Land Reform (Scotland) Act 2016 (Register of  
Persons Holding a Controlled Interest in Land)  
(Scotland) Regulations 2021

February 2020



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 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 provide evidence to the Environment, Climate Change and Land Reform Committee's on the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021 (the Regulations). We have the following comments to put forward for consideration.

## General comments

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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 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 yet may be liable to, inadvertently, breach a statutory obligation and even 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.

We consider that there are a number of provisions which would benefit from clarity and provide comment on these matters below.

We welcome the exclusion of professional advisors which has now been provided for in Schedule 1, Part 1 of the Regulations. As previously noted, we do not consider it would be appropriate for solicitors to require to certify those who hold a controlling interest.

## Specific comments

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### "Controlled" or "Controlling"

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

We understand 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.

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.

### Definitions of control and influence (Regulation 2(2) and para 23 of Explanatory Document)

We recommend further thought be given to the definitions of "control" and "significant influence". We consider that there would be merit in the 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.

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.

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 quite different from that of the PSC Register, and the terminology should reflect that, and take account of the principal objective of the Regulations.

### **Details of recorded person (Regulation 3 and 11)**

It is important that there is clarity around the address which is to be provided. It should be sufficient that the recorded person's address be that of the property in question, or a contact address at which they are able to be reached, such as a business address. For privacy reasons, we do not consider it appropriate for a recorded person to be required to give their home address.

We note that under regulation 3(3), the Register is to contain:

- “(b) in relation to the land owned or tenanted by the recorded person—
- (i) if the land is registered in the Land Register, the title number of the land,
- (ii) if the land is not registered in the Land Register, a description of the land that is sufficient for it to be identified”

In practical terms, for Sasine titles we note that this may require a Land Registration etc. (Scotland) Act 2012 compliant plan in order for the land to be clearly identified. This will be particularly significant if the register is to be accessed via ScotLIS. This may be a challenge for those who are seeking to register record their details without the advice of a professional advisor.

### **Making or amending an entry (Regulations 4 and 6)**

In the context of security declarations, we welcome the insertion of Regulation 4(2) which provides that an entry in the register may not be made “during the period of 30 days beginning on the day on which the Keeper received the information”. We consider that this will help to protect associates in circumstances where details of the associate have to be submitted before the security declaration is available. However, we do note that without a fixed time frame for making an entry or amending an entry in the Register, those

inspecting the Register will not be able to have certainty about the state of the accuracy of, and reliance on, the information in the Register. This may impact on the usability of the Register.

### **Protection of and access to the Register (Regulations 8 and 9)**

Given the nature of the information that the Register will hold, it is essential that there are robust security and protection measures in place. 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 8 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 46 and 47 of the Explanatory Document imply that Regulation 9 sets out the criteria for persons to have access to the Register, but the wording of Regulation 9 leaves this to the discretion of the Keeper, so it is 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 – will the Register operate in the same way as ScotLIS, for example, 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. 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.

### **Persons to whom the Regulations apply (Regulation 2 and others; Schedules 1 and 2)**

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 10(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 that they do 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);
- 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 at 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 continue to perceive difficulties 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.

We consider that there would be merit in clarifying in guidance that pension investment and asset managers will be potential associates under this regime.

We welcome the Scottish Government's previously stated intention to continue to monitor progress of the UK Government's proposals for a Registration of Overseas Entities Bill and note that it is possible that the draft Regulations may be amended in due course. We previously suggested that this matter could be dealt with by including such entities at this stage but providing 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 note the HMRC proposals in connection with an extended Trust Registration Service, arising in the context of the implementation of the Fifth Money Laundering Directive<sup>1</sup>. Given the fairly wide

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<sup>1</sup> <https://www.gov.uk/government/consultations/technical-consultation-fifth-money-laundering-directive-and-trust-registration-service>

scope of the intended requirements of that regime, it is likely that some trustees will be registering details under both this Register and the Trust Registration Service.

We note that as now framed, regulation 3(3) and regulation 10 may be circular - in regulation 3(3), a recorded person is a person recorded in the Register while regulation 10 sets out the obligations on a recorded person.

### **Details of associate (Regulation 11)**

It should be sufficient that the 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, a recorded person should not be required to give their home address. We previously noted that there may be some merit in requiring an email address to be provided and note that Registers of Scotland will consider the benefits of an optional request for this information. We also welcome the introduction of provisions in the Regulations, particularly Regulation 7, for a unique reference number to be allocated to each associate. Practical arrangements for this will need to be considered, for example, arrangements for where associates do not know their unique reference number or a recorded person is not aware that an associate has a number.

We welcome the fact that while associates' dates of birth will still be collected, these will no longer be made publicly available.

### **Offences and defences**

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. Since failure to comply with any of the requirements under the Regulations is a criminal offence attracting a potentially substantial fine, we consider that it is important to recognise the potential that the majority of offences that will be committed are likely to be in this category. 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. We suggest that 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 10(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.

As referred to above, we welcome the removal of the criminal offence in circumstances where an executor fails to notify the Keeper of the death of an individual who is a recorded person or an associate or in the event of the winding up or dissolution of a non-natural person who is an associate.

### **Security Declaration (Regulations 10 and 16 - 18)**

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 10(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 10(5) 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 10(5) 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.

As we refer to above, we welcome the insertion of Regulation 4(2) which will help to protect associates in circumstances where details of the associate have to be submitted before the security declaration is available.

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 suggest 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 17(2)(b).

We welcome Scottish Government's intention to alter the rules of the Lands Tribunal for Scotland to allow for appeals in relation to security declarations to be held in private and for personal details to be redacted from published decisions. In order to allow scrutiny of this arrangement, it would be welcome if the draft SI were published for consultation in advance of the final version of these Regulations being introduced.

### **Referrals (Regulation 19)**

We note the potential for an individual to make a referral to the Lands Tribunal for Scotland in connection with certain questions about the Register. We anticipate that the implementation of the rules will be largely corporate and commercial focused given the potential for complex structures interacting with the register. Where questions or complexities arise, this is likely to involve complex corporate or commercial structures rather than property matters. Given the focus of the Lands Tribunal on land and property matters, we wonder whether such referrals may sit more appropriately within the wider remit of the Sheriff Courts.

### **Individual culpability (Regulation 22)**

We note this Regulation 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 14, 15 and 20. 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 another area which may give rise to inadvertent breaches of the Regulations.

### **Notification of Keeper on event of death, winding up or dissolution (Regulation 23)**

We welcome the removal of the criminal offence in circumstances where an executor fails to notify the Keeper of the death of an individual who is a recorded person or an associate or in the event of the winding up or dissolution of a non-natural person who is an associate. As we previously noted, the winding up of an individual's estate generally deals with the personal assets of that individual and an 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. While we welcome the removal of the criminal offence provisions in

these circumstances, we note the potential for there to be practical challenges around ensuring that the necessary notifications are given.

### **Application (Regulation 25)**

We welcome the extension of the proposed transitional period from 6 months to 12 months. We consider that this longer period will support awareness-raising of the new requirements.

**For further information, please contact:**

Alison McNab  
Policy Team  
Law Society of Scotland  
DD: 0131 476 8109  
[AlisonMcNab@lawscot.org.uk](mailto:AlisonMcNab@lawscot.org.uk)