

Delivering Improved Transparency of Land Ownership in Scotland: Consultation on Draft Regulations

Scottish Land & Estates (SLE) represents landowners, land managers and rural businesses across Scotland. We welcome the opportunity to respond to this consultation and have found previous communications on this issue with Scottish Government and Registers of Scotland useful and constructive. As owners and managers of land our members are interested in the proposals put forward and especially from a practical perspective. We are all keen to ensure that there is transparency and have workable regulations in place which achieve this.

While we recognise that points made before around the need for the regulations to be proportionate and not unduly onerous have been taken on board, we do have concerns about the drafting of the regulations. These regulations need to be clearly understood, not least due to the criminal sanctions proposed for non-adherence. As currently drafted the view from members, including solicitors and other professional members is that they are not sufficiently comprehensible or accessible. We have commented further on this in response to the questions below.

We have previously given evidence to the ECCLR Committee and responded to its call for evidence and we are happy to discuss any aspect of this response further.

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

SLE was opposed to the formation of yet another property register and had suggested the most efficient way of meeting the regulations would be to extend the Land Register. However, given the direction of travel we confirm that we are broadly content with the proposals under consideration for the form of the Register and we continue to appreciate and support the rationale for transparency and openness in land ownership. We agree that where land is not in the Land Register, an identifiable description of the land is appropriate and any requirements beyond that in terms of production of plans would be disproportionate in terms of time and cost against outcome.

However, we do have serious concerns regarding the drafting of the regulations. Schedule 1 to the regulations is not easy to follow and due to its complexity, it is quite conceivable for a misunderstanding to arise. An example of this would be 2(a) of Schedule 1 Part 1 which is unclear.

1 of Part 1 of Schedule 1 is extensive and we assume this could encompass clients with powers of attorney; a factor holding considerable autonomy; option agreement holders etc. However, there is a vagueness around the provision.

There is also a lack of consistency in terms of the exceptions listed in the different Parts of Schedule 1.

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

SLE has some concerns that the Keeper/Registers of Scotland has targets to meet in terms of voluntary land registration for both publicly and privately-owned land, with some way to go before these targets are met. In addition, there is the new register in relation to the abandoned, neglected and detrimental land provisions in the Community Empowerment (Scotland) Act 2015. There are therefore other priorities and we feel that resourcing is possibly an issue if the role is not to be overwhelmed.

We are also aware from professional members that there is concern about inconsistency in dealing with representations about inaccuracies which have been made to Registers of Scotland by solicitors. The fact that criminal sanctions are intended to be applicable for enforcement purposes increases the importance of ensuring that the Register is accurate and therefore consistency of approach by Registers of Scotland is vital.

We also note from the partial Business and Regulatory Impact Assessment that the on-going running costs of the Register are yet to be determined.

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

SLE agree that the required information is by and large sufficient and proportionate and in terms of property description would reiterate our response to question 1 above. However, we do have concerns regarding the required details of an associate under section 9. Specifically, we do not believe that regulation 9(2)(a)(iii) requiring the “month and year of birth” is necessary and indeed with the enhanced data protection legislation brought in this year would suggest it goes beyond what is required.

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

We feel that this cannot be fully answered until the regulations are more clearly drafted.

5. Is our proposed process for security declarations reasonable?

The evidence required to support the proposals as set out in Schedule 3 to the Regulations is fairly substantial. There seems to be an imbalance in the Regulations between what a vulnerable person requires to show to support a security declaration and the fact that any “person” can refer a question to the Lands Tribunal in terms of our comments in response to question 7.

Effectively an entire legal process needs to have been followed and resulted in an Order or interdict before the individual can be opted out.

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 will leave this to other organisations to comment, but cannot see any glaring omission from the proposals.

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

SLE is concerned by regulation 17 in Part 4. “A person” at 17(1) allows anyone to make a referral regardless of their interest. This could potentially create a massive increase in work and result in vexatious complaints. The referral of “a question” is also extremely light compared to an application to the Land Court with much more stringent criteria.

In terms of regulation 17(1)(b) “what is needed to rectify an inaccuracy”, we do not believe that it is for the Lands Tribunal to determine this.

The “person” should be required to demonstrate their interest and to state clearly what they are asking to do or be done, and the full facts and circumstances as known to them. Otherwise there is potential for the Lands Tribunal to become bogged down and be party to a vexatious process.

We strongly suggest regulation 17 is revisited to make it of more practical benefit and workable.

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

SLE notes the civil penalties were considered by Scottish Government and would strongly suggest that these be reconsidered. We believe that compliance requires to be proportionate and that criminal sanctions are unnecessary. Deliberate acts of fraud or negligence would be caught by existing legislative measures such as through Companies House or Anti-Money Laundering/Proceeds of Crime legislation. It is likely that most “offences” under the proposed Regulation will be committed unintentionally, by people with nothing to conceal.

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

As per our answer to question 8 above we believe that civil penalties should be reconsidered and that these would be a more proportionate deterrent. It should be borne in mind that as well as large pension fund trusts these regulations will be just as applicable to small family partnerships and local clubs and a civil penalty is more appropriate in the context of the regulations.

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?

SLE is concerned regarding regulation 21. It can take months to obtain confirmation and for the transfer of a property to take place. We feel that the obligation at regulation 21(1) “as soon as reasonably practicable” is inappropriate in the circumstances. This is especially the case in this instance given that the duty attracts a criminal penalty if it is not complied with.

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

The transitional period in our view requires to be longer, especially in relation to trusts the 6 months grace period which is proposed is not sufficiently long. We note the Register will not become operational until 1 April 2021 and we would very much like advance sight of the proposed form. Advanced sight of the form to be contained in the Statutory Instrument would allow us to hopefully practically input towards the final version, as we did with the Private Housing (Tenancies) (Scotland) Act 2016 in relation to the model tenancy.

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?

Part 1 of Schedule 1 is incredibly wide in scope as currently drafted. We would refer you to our response to question 1. In terms of a contractual relationship this could conceivably include pre or post-nuptial contractual arrangements; or purchase with extended date of entry meaning the purchaser would be included in the provisions. We presume this is not the intention. Option agreements are another contractual arrangement which would similarly be affected.

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

We would suggest the following should be captured:

- 1991 Act secure agricultural tenancies – unless the tenant’s pre-emptive interest has been registered in the Register of Community Interests in Land (which is not definitive), the lease will be completely under the radar as there is no requirement to register such a lease in which the controlling interest will be the tenant farmer;
- crofting tenancies;
- protected and secure tenancies prior to the Housing (Scotland) Act 1988.

14. Do you have any comments on this proposal?

It is vital that it is clear who is deemed an “Associate”. We are also aware of concerns previously expressed regarding a scenario involving a company that was about to be sold. If that company entered into exclusivity or lock-out agreements to prevent it from dealing with its assets, the other company that had entered into the arrangement would technically be an “associate” and would therefore need to be disclosed on the register. That means that there would be a public record of a discussion that, for legitimate reasons, could be seen as commercially sensitive and which would cause disquiet among the employees of the company—the registered proprietor—if the information got out.

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?

We agree that the quoted examples are how land is owned or leased by or on behalf of partnerships but are concerned that there is potentially a level of unnecessary interference with the running of a business without a clear public benefit.

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

Please see our answer question 15.

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?

Please see our answer to question 18.

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

The premise of this question is of concern to us. The references in Schedule 1 Part 3 at 6(b)(ii) and 6(b)(iii) to an individual with significant control over an entity which is a trustee or over the trust would seem to be at odds with Scots Law. Trustees should not be under the “control” of another and there is a whole body of case law which established their duties.

Charity trustees are under a duty in terms of the Charity and Trustees Investment (Scotland) Act 2005 to ensure that the charity acts in a manner which is consistent with its purposes and they must also act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person. In so doing they must provide a public benefit.

In cases where a charity is a Company Limited by Guarantee (as is the case with most land-owning charities) the trustees are also under a duty to act in accordance with the duties laid out in the Companies Acts including an obligation to have regard to the impact of their activities on the community and the environment.

The Charity and Trustee Investment (Scotland) Act 2005 contains a number of remedies for breach of duty by a trustee including ultimately debarment from acting as a Charity Trustee by the Court of Session.

We do have a concern that many charities already have difficulty attracting Trustees and imposing additional sanctions may exacerbate that problem.

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?

Yes, we agree that these examples are reflective.

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

SLE is not aware of any other affected groups.

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

It needs to be borne in mind that small clubs or associations may well be run by volunteer management committees with office bearers and committee members elected annually and if these are subject to regular change then the updating could well become onerous for that club or body.

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 feel other respondents will be better placed to answer this question.

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?

The approach appears to be similar to the PSC regime.

24. Are there other 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?

Not that we are aware.

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

SLE does not have specific direct experience of the PSC regime, but we understand from professional members that it is very useful in this regard.

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

SLE considered these exclusions from the Register to be reasonable. Clearly if there was any alteration to the law in relation to SCIOs this would need to be revisited. We also assume any land owned by Council arms-length companies would be included in the Register.

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

SLE is content with the conclusions insofar as they go but notes that further work is required during the consultation period to develop robust estimates as to costs associated with compliance.

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

SLE has ongoing concern regarding the cost of compliance with the regulations and potential hassle for landowners and their agents. Clearly compliance will be an additional consideration in the purchase of land which will consequently impact on professional fees and increase purchaser costs. It is important that the practical impact for solicitors and agents is considered. We note that only a "partial Business and Regulatory Impact Assessment" was prepared and are pleased to note that a full Assessment will follow.

While the direct environmental impact is perceived to be "minimal", if the regulations are such that investment is deterred this could have a consequential impact for rural areas and businesses such as tourism.

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

We note the references in the consultation is the role of ScotLIS which is a good resource for both professionals and lay persons. We believe that making this as comprehensive and user friendly as possible should be a key area for concentration.

As indicated previously we do not believe the regulations in current form are accessible or easily readable. They are a minefield for those unwary or the careless. We suggest these need to be made more understandable to ensure compliance and additionally there will need to be a communications campaign well in advance of April 2021 to assist with explanation. As an organisation, where appropriate we are happy to be involved in such an exercise.

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