

## **Improving transparency in land ownership in Scotland: a consultation on controlling interests in land**

Scottish Land & Estates represents landowners, land managers and rural businesses across Scotland. We welcome the opportunity to respond to this consultation and have found our communications on this issue with Scottish Government and with Registers of Scotland staff useful and constructive. As owners and managers of land our members are interested in the proposals put forward and in particular the impact of any changes to the current system from a practical perspective. We seek to ensure the integrity and accuracy of the Land Register for landowners across Scotland and specifically in rural areas and support transparency and accountability of landownership.

Firstly, we have a couple of general comments to make in relation to the implementation of the controlling interests powers. Reform should not be bureaucratic or onerous and the regulations themselves require to be clearly understood and proportionate. It is vital that the regulations are drafted with cognisance of existing rules such as Persons of Significant Control and upcoming rules on Overseas Companies Beneficial Owners and do not duplicate the provision of information under these schemes. In developing the regulations, it is imperative that their purpose is clearly understood by all and that any attempts to use these regulations for other purposes are resisted. It would be useful for the Scottish Parliament to take evidence from those with practical experience of the implementation and practice of other existing rules such as the Persons of Significant Control regime.

We would be happy to discuss any aspect of our response further.

### **QUESTION 1 – Do you have any comments about making information about persons with controlling interests in owners and tenants of land available?**

Scottish Land & Estates appreciates and supports the rationale for transparency and openness in landownership and specifically land management. Our Landowners' Charter visibly demonstrates this, setting out a commitment to the principles and responsibilities of modern landownership in Scotland and the need for all landowners to be open, inclusive, enabling and responsible. Specifically it calls for landowners to take all reasonable steps to ensure visibility of ownership. Changes to transparency will not be achieved by regulation alone and we are committed to undertaking further work in this area.

The Scottish Government will be aware that title to land and property can be held in a wide variety of legal structures and for a wide variety of legitimate reasons. As such it will not be a straightforward task to always identify a "controlling interest". Information which is to be

made available should be accurate and clearly bear in mind other legal considerations such as data protection.

It should be noted that there is already a requirement to register owners for the purpose of the valuation roll and it is also important that duplication with the Persons of Significant Control Register is specifically avoided as appears to be the policy intent.

**QUESTION 2: In your view, taking in to consideration the contents of this chapter and the associated annex C, what are the key considerations that Scottish Ministers should take in to account in defining a —controlling interest or —persons with controlling interests in land owners and tenants for the purposes of these regulations?**

Scottish Land & Estates agrees that the two main issues which underlie a “controlling interest” in landowners and tenants are the control of the decision-making and secondly, who gets the financial reward or is encumbered with the risk in relation to the land. We do not feel that the consultation paper adequately addresses the point that these can be two very different classes. In a trust situation for example, the trustees may well have the “controlling interest” in terms of decision-making, but the financial benefit and indeed financial loss may, ultimately be borne by the beneficiary of the trust. That “beneficial owner” may have little or no control in terms of decision making.

In the case of land under crofting tenure the owner has very little control in the day to day management of tenanted crofts and common grazings or the majority of the commercial decisions affecting such land. The same could be argued for secure agricultural tenancies whereby the control in terms of decision making lies with the tenant.

It will frequently be the case in a rural context that the landholding and agricultural-business will be split and it is necessary for Scottish Ministers to be clear as to exactly what information is sought and for what purpose.

**QUESTION 3: In your opinion, should the regulations apply to all types and uses of land? YES/NO. Please give details.**

Yes, the regulations should apply to all land regardless of type or usage. This is equitable and will also avoid unnecessary complexity in terms of defining exclusions. There is already appropriate definition of “land” in the Land Registration etc. (Scotland) Act 2012 for definition purposes. Specifically, secure 1991 Act tenancies should also be included.

**QUESTION 4: Do you think that particular categories of land should be exempt? YES/ NO**

No, we do not believe that there should be exemptions. As stated in response to question 3, the regulations should apply across Scotland.

**QUESTION 5: If YES, please give details.**

Not applicable.

**QUESTION 6: In your view, for the purposes of these regulations, should —land have the same meaning used for Land Registration purposes (outlined above)? YES/NO. Please give details.**

Yes, we believe it makes sense for “land” to have the same meaning as the definition for the Land Register. This is obviously the most straightforward solution and we see no reason to have a separate definition for these regulations which would add to complexity.

**QUESTION 7: In your opinion, should the regulations also apply where the proprietor of land that is not recorded in the Register of Sasines or registered in the Land Register because either:**

**I. The property was acquired prior to the Register of Sasines commencing in 1617; or**

**II. They have acquired a personal right to property but have not yet registered the deed in their favour in the Land Register?**

There are only “a very small number of properties” according to the consultation document which are on neither Sasine nor Land Register and these are largely identifiable in terms of being historic institutions such as universities. We therefore do not believe in the overall scheme that application of the regulations to such proprietors should be excluded. Presumably they are also being encouraged to voluntarily register. In respect of category II above we again agree that the regulations ought to be applicable, but do not believe this will be a straightforward task. The most obvious example of category II is the case where landholdings due to the complexity of historic titles and/or the cost of completing registration continue to be held in the name of executors as “uninfert” proprietors under a will trust although this situation will eventually be resolved either by voluntary registration or compulsorily by Keeper induced registration. For these the regulations should apply at point of registration.

**QUESTION 8: In your opinion, should the regulations apply where a tenant in a high value lease that is not a long lease (a lease of 20 years or fewer) falls within the definition of persons with controlling interests in land owners and tenants?**

We note that the consultation paper refers to the concept of a lease of less than 20 years duration which is “high value”. Unfortunately no further guidance is given, which makes it difficult for us to respond to this question. While we appreciate that this could affect telecoms masts which are typically for less than 20 years and high rent residential tenancies, it could also affect very short term but high rent seasonal lets for say, potatoes or peas. We do not envisage buy-in to the regulations by people if there is a duty to report to the register at the start and end of the let by either landowner or tenant in these latter examples. If the question is referring to secure 1991 Act tenancies, under 20 years, which are not of high rent, but are of high value to the tenant there are various issues which we have outlined in response to question 10.

**QUESTION 9: In your opinion, are there instances where natural persons who own land have an undisclosed relationship with another person who has a controlling interest in land? For instance if the land in question is an asset of a partnership or trust, or part of a trust arrangement?**

The consultation document intimates that it is “theoretically possible that natural persons who own land could have some form of “secret” contractual or hidden trust relationship with another party”, but does not go into particular detail of what is being alluded to. We feel it would have been useful for this point to be expanded upon. In particular we are not clear as to the meaning of the reference “undisclosed”, since at present there is no requirement to disclose; to whom should such information be disclosed and by whom? We take from the

second part of the question that this is directed at situations where the land in question is an asset of a partnership or trust. As an example an older family member may hold the title to property in his or her name, but could in reality be holding it as a trustee for a family partnership of which he or she is no longer directly involved other than signing any relevant documents and the controlling interest may be his younger relatives, who will not see amending the property title as a top priority as they run the farming or other business. It is important therefore that the premise of the question is not that any such instances are automatically viewed as some form of concealment motivated by secrecy and a desire to avoid responsibilities.

**QUESTION 10: In light of the contents of this consultation, and this chapter in particular, can you foresee any ways in which the obligations under these regulations could be avoided, and, if so, what could the Scottish Government do to combat this?**

We can envisage problems identifying secure 1991 Act tenancies since there is no requirement to register such a lease and in which the controlling interest will be the tenant farmer. Unless the tenant's pre-emptive interest has been registered in the Register of Community Interest in Land (which is not definitive), the lease will effectively be completely under the radar. The repeal of sections 24 and 25 of the Land Reform (Scotland) Act 2003 will mean that even that limited resource is no longer available. Unless there is a way to capture such tenancies it will be possible to circumvent the regulations. Similarly in terms of question 7 above where rights are personal to property and not registered there is potential for avoidance.

**QUESTION 11: In your opinion, should a new register of persons with controlling interests in land owners and tenants be created? YES/NO**

No, Scottish Land & Estates disagrees with the creation of yet a further property register. The whole direction of travel with the promotion of voluntary land registration and with the development of ScotLIS is to consolidate information in a single hub to improve availability and access.

Unless there are fundamental difficulties we would suggest the most efficient way of meeting the regulations would be to extend the existing Land Register. For example, this could be achieved by having a new Part E. The default position should be that the titleholder/registered proprietor in Part A of the Land Certificate is the "controlling interest" (as will normally be the case in the vast majority of instances), unless otherwise intimated.

**QUESTION 12: What would the advantages be?**

We cannot see any advantage in a new register of persons with controlling interests being created and would be strongly opposed to this being established.

**QUESTION 13: What would the disadvantages be?**

A new register would increase pressure on the Keeper of Registers of Scotland and her staff at a time when they are driving forward voluntary land registration and the ScotLIS project. We do not believe there is resource available to assume a completely new register. As stated in response to question 11, we also feel that this would go against the general approach to consolidate information and make it more accessible. It would be yet a further register for solicitors and their clients to deal with and generally would be unnecessarily

onerous for what is required. There would also presumably be initial set-up and ongoing running costs.

**QUESTION 14: In your view, in addition to the names of persons with controlling interests in land owners and tenants should other information about them be disclosed? YES/NO.**

Yes, we believe that in addition to the name of the persons with controlling interests, there should be a postal address for service. Essentially we agree with having a clear point of contact, but provided there is an address for service we do not see the need to have e-mail and telephone contacts required. We consider the list on page 24 of the consultation document strays from the purpose of the regulations. This level of personal detail, including nationality, should not need to be disclosed and we question its relevance.

**QUESTION 15: If YES, how would disclosure of that information fulfil the regulations' aim(s) (as per chapter 1 and your answer to question 1)?**

Provision of name and a postal address for service means that the controlling interest is clearly set out and can be easily contacted, without being unduly onerous or unnecessarily interfering.

**QUESTION 16: If NO, why not?**

Not applicable.

**QUESTION 17: In your view, should information about the nature and extent of a person's —controlling interest be disclosed? YES/NO.**

No. This unduly complicates what we understand is intended by the regulations. The register is to record "controlling interests" and this is surely the key factor. Regardless of size all controlling interests will be regulated and it is surely unnecessary and would not serve useful purpose for exact shareholdings to be disclosed. The exact form of that interest in terms of extent may well be difficult to quantify and is not the pertinent issue.

**QUESTION 18: In your view, should the nature and extent of a person's —controlling interest be disclosed on a public register? YES/NO. Please give details.**

No.

**QUESTION 19: If YES, how would this information fulfil the purpose of the regulations'aim(s)?**

Not applicable.

**QUESTION 20: If NO – why not? Please give details.**

We believe the premise of this question is wrong. If the Scottish Government wishes the nature and extent of the controlling interest to be disclosed then we believe this should have been discussed during the passage of the Bill. From a commercial viewpoint, we can foresee significant difficulties with requiring provision of detail on the nature and extent of the controlling interest. On a basic level the administration requirements may become a factor in

a person or entity not investing in Scotland. The regulations should not operate in such a way that they deter investors in the Scottish economy; commercial confidentiality should remain a factor. There may also be challenges in identifying all connections manually, not least in terms of time and in legitimate, but complex ownership structures spanning national boundaries. To require details of the nature and extent to be disclosed will remove the focus from the overriding concern which is disclosure of the identity of the controlling interest.

**QUESTION 21: Thinking about the information which in your view should be disclosed, are you aware of any potential sensitivities relating to this? YES/NO.**

**Please give details.**

Yes, on the basis that only name and address is publicly disclosed we do not see any difficulty in relation to that. The more information which is sought and the more tenuous that information is to the purpose of the regulations, the risk of sensitivities obviously increases and also arguably diminishes the transparency of the information provision through an overload of and potentially irrelevant and extraneous additional detail.

**QUESTION 22: If YES – in your view what are the advantages of keeping this information up to date?**

The register will be an accurate record at a point in time. At present we understand that there is around a six months backlog for first registrations in the Land Register of Scotland and it would be very rare for information to be absolutely up-to-date. A review period may be sensible. Please see our answer to question 42.

**QUESTION 23: If NO – why not? Please give details.**

Not applicable.

**QUESTION 24: In your view, are there instances in which the information about the nature and extent of a person's —controlling interest is commercially sensitive and should not be revealed? YES/NO.**

Yes.

**QUESTION 25: If YES, please explain why you think that this information should not be revealed?**

Scottish Land & Estates has concerns regarding investment in the economy if the regulations are perceived to be overly intrusive requiring disclosure of information which goes beyond " who owns and manages what " ; they should not become a deterrence. Should enthusiasm for Scottish property investment diminish then this will have an impact upon investment asset values. If Scotland becomes viewed negatively as an investment location then we have reservations about the ability of rural and urban areas to generate significant economic development. It needs to be borne in mind that present day investment funds and equity are mobile. There is a danger of prejudicing investment potential if this information is disclosed.

**QUESTION 26: If NO – why not? Please give details.**

Not applicable.

**QUESTION 27: In your view, should a duty to provide information about persons with controlling interests in land owners and tenants apply to land owners and tenants with titles in the Land Register or Register of Sasines and:**  
**I. Land owners and tenants where the property was acquired prior to the Register of Sasines commencing in 1617;**  
**II. Land owners or tenants who have acquired a personal right to property, but have not yet registered the deed in their favour in the Land Register; or**  
**III. Tenants in a high value lease that is not a long lease (a lease of 20 years or fewer)?YES/NO.**

At questions 7 and 8 the consultation document asks whether the regulations should apply to these situations and we have indicated that they should in relation to I, also in relation to II though have mentioned the practical difficulties, but have concerns in relation to application of regulations to III. If the regulations are to apply, then consequently the duty should also apply.

**QUESTION 28: If NO, why not?**

Not applicable.

**QUESTION 29: If YES, in your view what are the advantages of this arrangement?**

There should be a level playing field and if the regulations are to apply across the whole of Scotland and to all types of land, it would seem inequitable to then except disclosure in respect of some types of land in Scotland, depending upon the original title. No sector or group should feel unfairly penalised or disadvantaged.

**QUESTION 30: If YES, in your view what are the disadvantages of this arrangement?**

Where title has not been registered, this can clearly make circumvention of the regulations much easier.

**QUESTION 31: In your view, should a duty to provide information apply to the —person with the controlling interest? YES/NO.**

Yes we believe the duty should apply to the person with the controlling interest.

**QUESTION 32: If NO, why not?**

Not applicable.

**QUESTION 33: If YES, in your view what are the advantages of this arrangement?**

If the obligation is straightforward and obvious, then transparency is increased.

**QUESTION 34: If YES, in your view what are the disadvantages of this arrangement?**

We do not believe there are disadvantages.

**QUESTION 35: In your view or experience, are there parties who serve as intermediaries between registered proprietors and persons with a controlling interest in land? YES/NO.**

Yes, we would envisage that there are such situations. However, in advance of consulting we would have welcomed a definition of “intermediary” and a clear indication of what Scottish Government is contemplating under this and the following questions. Is it intended to refer to solicitors, land agents, factors, accountants?

**QUESTION 36: If YES to Q35, in what scenarios do you think that there are parties who serve as intermediaries between registered proprietors and persons with a controlling interest in land?**

We are unclear what is anticipated by the questions 35 to 38. In a rural context the day to day on the ground operation of an estate may well be conducted by an in-house factor; a similar role may be played by professional land agents.

**QUESTION 37: If YES, in what capacity are there parties who serve as intermediaries between registered proprietors and persons with a controlling interest in land?**

In the context of factored estates, tenants and other parties dealing with “the estate” may have little, if any contact with the owners. Factors, depending on their experience, expertise and relationship with the owners may have considerable autonomy in making day to day decisions (for example selecting tenants, contractors, determining farming methods etc.). Professional land agents may play a similar, but less autonomous, role where there is no in-house factor

**QUESTION 38: In your view should a duty to provide information apply to such intermediaries? YES/NO.**

No.

**QUESTION 39: If NO, why not?**

It is unclear to us what is intended by this set of questions.

If it is aimed at in-house factors and professional land agents the duty should not apply to them as (a) they may well not know full details of complex ownership structures and (b) it places them in a conflict situation with respectively their employers and their clients if they are required to disclose information which those parties consider to be confidential.

If it is aimed at solicitors and accountants we consider it also introduces a conflict with the duties to their clients and client confidentiality. The question of what penalties are to apply if there is a failure to provide information has to be considered- is there an intention of imposing a policing role on intermediaries? Solicitors and accountants have such a role in relation to anti-money laundering but we would distinguish the two situations. Laundering money is a crime; legitimate owners re-arranging ownership structures in a manner which suits them is not. We would recommend that solicitors and other professionals are directly contacted and consulted on this question. There are already a number of safeguards such

as anti-money laundering regulations which are in force and Law Society of Scotland obligations with which solicitors must comply and other professionals also have their own governing bodies and rules. There would no doubt be liability/insurance points to be borne in mind. Ultimately if there were extra costs involved, the intermediary would in all likelihood also pass these on to the client, perhaps dissuading individuals from taking professional advice to the detriment of the overall registration system.

**QUESTION 40: If YES, in your view what are the advantages of this arrangement?**

Not applicable.

**QUESTION 41: If YES, in your view what are the disadvantages of this arrangement?**

Not applicable.

**QUESTION 42: In your view, should the duty to disclose information about any person with a controlling interest in a land owner or tenant apply either when a person is a person with a controlling interest in a land owner or tenant when the regulations come into force, or becomes a person with a controlling interest in a land owner or tenant when the regulations are in force?**

Yes, we agree that it would make sense for the duty to come into force at the time of the regulations and thereafter for the duty to apply to those who have controlling interests. However, we would suggest that the register would be best seen as a "point in time" record. There should be a way to differentiate between minor and substantial changes and a review of similar length to that for community bodies renewing their interest in pre-emptive right to buy of five years may be the best option to ensure a relatively up-to-date register, without being overly burdensome.

**QUESTION 43: If NO, why not?**

Not applicable.

**QUESTION 44: If YES, in your view what are the advantages of this arrangement?**

Please see our response to question 42.

**QUESTION 45: In your view, should a civil penalty be imposed for failure to comply with any of the duties contained in the regulations? YES/NO. Please give details.**

Scottish Land & Estates would agree with the imposition of a civil penalty. However, the sanctions regime has to be genuinely proportionate and start from a zero base. Clearly there should be some form of grace period and genuine mistakes should not be penalised.

**QUESTION 46: In your view, should failure to comply with any of the duties contained in the regulations be a criminal offence? YES/NO. Please give details.**

No, we believe that compliance requires to be proportionate and that criminal sanctions are unnecessary. Deliberate acts of fraud or negligence would be caught by other legislative measures, such as the Companies House or Anti-Money Laundering / Proceeds of Crime legislation.

**QUESTION 47: In your view, should an application for land registration be rejected if the applicant fails to supply information about any —person with controlling interest? YES/NO. Please give details.**

As indicated in response to question 11, we believe that the default position should be that the applicant is the titleholder or registered proprietor per Part A of the Land Certificate and is the “controlling interest” (as will normally be the case in the vast majority of instances), unless otherwise intimated.

**QUESTION 48: In your view, should an application for land registration be rejected if the applicant fails to certify that no such —person with controlling interest exists? YES/NO. Please give details.**

No, we do not think an application should be rejected. Many applications will involve heritable creditors and their security should not be put at risk.

**QUESTION 49: In your view, taking in to consideration all of the sanctions and enforcement options set out in this chapter, what mechanisms would be most appropriate to enforce the duty to provide information? Please explain your answer.**

Scottish Land & Estates would reiterate our response to questions 11 and 47 that the most straightforward approach would be for the “controlling interest” to be deemed to be the applicant/titleholder, unless otherwise intimated. Failure to declare would be the starting point for any sanction, with obstruction or repeated failure increasing the severity of the sanction. Once the Scottish Government commits to more specific sanctions we believe that there should be further consultation with stakeholders on these, as we had recently with wildlife crime penalties.

**QUESTION 50: In your view, are there instances in which there should be exemptions? YES/ NO.**

Yes

**QUESTION 51: If NO, why not?**

Not applicable.

**QUESTION 52: If YES, in your view what is the justification for such exemptions?**

In a clear case of genuine error which is resolved in a set time period.

**QUESTION 53: Please tell us about any potential impacts, either positive or negative, that you consider that the proposals in this consultation may have in respect of equality issues. Please be as specific as possible.**

We are not aware of any equality issues, unless exemptions are granted, at which point this would require to be reviewed.

**QUESTION 54: Please tell us about any potential costs and burdens that may arise as a result of the proposals within this consultation, and any increase or reduction in the burden of regulation for any sector. Please be as specific as possible.**

Scottish Land & Estates considers that there will be additional work, cost and presumably registration dues, as well as penalties for non-compliance, which will clearly increase the burden of regulation for business, rural and urban. If the information to be disclosed is particularly burdensome or detailed, there will also be commercial issues which may affect competition and the wider economy. Any perceived restrictions on ownership could send a negative signal to international investors. This concern is particularly pertinent given the difficulty of funding for property investment following the credit crunch and consequent restrictions of traditional sources of funding through banks.

**QUESTION 55: Please tell us about any potential impacts, either positive or negative, upon the privacy of individuals that may arise as a result of any of the proposals contained in this consultation. Please be as specific as possible.**

Where private property rights are involved, ECHR should always be contemplated. Privacy issues will depend upon the extent to which information is required to be disclosed. Clearly the regulations will need to comply with existing data protection and other legislation. Until we see more detailed proposals and the level of Scottish Government intervention we are not able to comment in-depth.

**QUESTION 56: Please tell us about any potential impacts, either positive or negative, that you consider that any of the proposals in this consultation may have on the environment. Please be as specific as possible.**

We are not aware of any environmental impacts, although if the regulations are such that investment is deterred this could have consequential impact for rural areas in terms of tourism.

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