

SUBMITTING EVIDENCE TO A SCOTTISH PARLIAMENT COMMITTEE

DATA PROTECTION FORM

Name:	
Date:	16th August 2018
Organisation: (if required)	Scottish Land & Estates
Topic of submission:	Register of Controlling Interests in Land Draft Regulations

I have read and understood the privacy notice about submitting evidence to a Committee.

I am happy for my name, or that of my organisation, to be on the submission, for it to be published on the Scottish Parliament website, mentioned in any Committee report and form part of the public record.

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Non-standard submissions

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Environment, Climate Change and Land Reform Committee

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

SUBMISSION FROM SCOTTISH LAND & ESTATES

Scottish Land & Estates (SLE) represents landowners, land managers and rural businesses across Scotland. We welcome the opportunity to respond to this call for evidence. As owners and managers of land, our members are interested in the proposals put forward and especially from a practical perspective.

While SLE broadly welcomes the principles behind the regulations and is fully supportive of achieving transparency in ownership, we have highlighted some of the practical and technical issues we foresee at present which we feel it is worth flagging up to the Committee as per below.

We are pleased to recognise that some of the points made previously by us around the need for the regulations to be proportionate and not unduly onerous have been taken on board by the Scottish Government, but we do have concerns about the drafting of the regulations. In order for successful implementation, these regulations need to be clearly understood, not least due to the criminal sanctions proposed for non-adherence. As currently drafted, the view from SLE members, including solicitors and other professional members, is that they are not sufficiently comprehensible or accessible. We are all keen to ensure that there is transparency and have workable regulations in place which achieve this.

Essentially, we do not believe the regulations in current form are accessible or easily readable. 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, we are happy to be involved in such an exercise and to continue our dialogue with the Scottish Government.

Role of the Keeper

SLE has some concerns given resourcing issues that the Keeper/Registers of Scotland has ambitious 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. On a positive note, we are certainly agreeable to a link with ScotLIS as we believe that making this as comprehensive and user friendly as possible should be a key area for concentration.

We also note from the partial Business and Regulatory Impact Assessment that the ongoing running costs of the Register are yet to be determined. Further work is required during the consultation period to develop robust estimates as to costs associated with

compliance. We look forward to seeing this work and hope that the Committee will be reviewing the further work being undertaken.

Schedule 1 – Persons having significant control over another

Part 1 of Schedule 1 is incredibly wide in scope as currently drafted. 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.

We also 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 and need for clarification.

Schedule 1 to the regulations is therefore not easy to follow and due to its complexity, it is quite conceivable for a landowner to fall down through misunderstanding. An example of this would be 2(a) of Schedule 1 Part 1 which is unclear.

There is also a lack of consistency in terms of the exceptions listed in the different Parts of Schedule 1. We believe that aspects such as this require to be addressed.

Required details of an associate – Regulation 9

We are broadly happy with the level of details sought, but 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 potentially goes beyond what is required.

Referral to Lands Tribunal – Regulation 17

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.

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.

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

Criminal Sanctions – Regulation 18

We believed 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. 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.

Notification on Death - Regulation 21

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.

Contractual Arrangements which have been omitted

SLE notes that various arrangements have not been included in the register and would suggest the inclusion of the following:

- 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.

This would assist in the goal of having complete transparency and ensure there were not loopholes or inequality in application.

Trusts

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.

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 to be contained in the Statutory Instrument. This 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 and with other new regulations to help ensure they are fit for purpose.