

BUSINESS AND REGULATORY IMPACT ASSESSMENT

Title of Proposal

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

Purpose and intended effect

Background

The Land Reform (Scotland) Act 2016

The passage of the 2016 Act was a substantial step in the development of land reform in Scotland. The Act represented the culmination of a significant debate with contributions from across Scottish society, and the proposals introduced in the Bill were developed and strengthened during its Parliamentary stages. This was particularly the case in the sections dealing with transparency of land ownership.

The inter-related provisions of the 2016 Act provide a range of measures to progress land reform, driving change in how Scotland's land is owned and used. These provisions include:

- The Scottish Land Rights and Responsibilities Statement, which was published in September 2017 and aims to support a strong relationship between the land and people of Scotland, where rights and responsibilities in relation to land are fully recognised and fulfilled.
- The Scottish Land Commission became operational on 1 April 2017 with a remit to review the effectiveness and impact of laws and policies relating to land, and to make recommendations to Scottish Ministers. A key part of its Strategic Plan is to examine options for future land reform including the concentration of land ownership in Scotland.
- Guidance on Engaging Communities in Decisions relating to land, which was published in April 2018 and expects land owners and those with control over land to engage constructively with communities across rural and urban Scotland.
- A new Right to Buy to Further Sustainable Development is expected to come into force in 2020. This follows the Right to Buy Abandoned, Neglected and Detrimental Land which came into force in June 2018. These will deliver increased opportunity for Scotland's communities to own land.

Register of Controlling Interests in Land

Section 39 of the 2016 Act is the result of Government amendments that were agreed at Stage 3 of the Bill. These gave Scottish Ministers new powers to provide for the disclosure and publication of information about controlling interests in land owners and tenants across Scotland. The proposals were widely welcomed and the Scottish Parliament voted unanimously to support them.

Section 39 requires Ministers to make regulations requiring information to be provided about persons who have controlling interests in owners and tenants of land, and about the publication of that information in a public register kept by the Keeper of Registers of Scotland (“RoS”).

Objectives

The overarching purpose of the Regulations is to increase public transparency in relation to individuals who have control over decision-making in relation to land. They are intended to ensure there can no longer be categories of land owner or tenant where, intentionally or otherwise, control of decision-making is obscured. In conjunction with other transparency regimes, this means that it will be possible to look behind every category of entity in Scotland, including overseas entities and trusts, to see who controls land. We do not require double reporting for entities subject to other regimes as we do not want to duplicate existing publicly available information. The Regulations will also aid policy making by enabling a fuller picture of those individuals who have control over decisions about land in Scotland.

The creation of the Register of Persons Holding a Controlled Interest in Land will deliver this increased transparency and will comply with Part 3 of the Land Reform (Scotland) Act 2016; namely, in Section 39:

(1) The Scottish Ministers must by regulations make provision—

(a) requiring information to be provided about persons who have controlling interests in owners and tenants of land, and

(b) about the publication of that information in a public register kept by the Keeper of the Registers of Scotland.

Rationale for Government intervention

The rationale for these proposals is set out in the introduction of this draft explanatory document.

The proposals are anticipated to provide benefits which contribute to the following National Outcomes:

- We live in communities that are inclusive, empowered, resilient and safe.
- We value, enjoy, protect and enhance our natural environment.
- We tackle poverty by sharing opportunities, wealth and power more equally.

Consultation

• Within Government

We have consulted across Scottish Government agencies, directorates and enforcement bodies including Registers of Scotland and the Lands Tribunal for Scotland.

• Public Consultation

An initial consultation ran from September to December 2016. A second formal public consultation ran until 8 November 2018.

• Business

Policy officials have engaged with businesses and representative organisations during the public consultation and beyond as required. This engagement informed completion of a Scottish Firms Impact Test.

Options

Option 1 - create a new register (The Register of Persons Holding a Controlled Interest in Land)

To comply with Part 3, Section 39, of the Land Reform (Scotland) Act 2016, a new Register of Persons Holding a Controlled Interest in Land will be established. The aim of this Register is to improve transparency about the identity of the individuals who are taking decisions in matters relating to land in Scotland.

The Scottish Government is keen to ensure that land in Scotland is sustainably owned, used and developed in the interests of land owners, communities and wider society. Improved information about who controls land owners and tenants in Scotland will therefore help empower people, including community groups, and give them the opportunity to understand who is in control of land owners and tenants. This transparency should also allow people to engage constructively with any person with a controlling interest who makes decisions in relation to land that might have an impact on sustainable development.

The Register's secondary purpose will be to collect information which will enable policy-makers to make better policies relating to land by revealing concentrations of ownership and influence.

Option 2 - do nothing

To do nothing would constitute a failure to comply with the duty placed upon Scottish Ministers by s.39 of the 2016 Act.

It would also be unsatisfactory within the context of wider Scottish Government objectives. The Scottish Government are committed to progressing land reform to create sustainable, empowered communities, and for more people to benefit from, and to have a say in the development of, Scotland's land. Measures to achieve this, however, will be negatively impacted upon if communities and individuals do not have accurate information about the person in control of land.

For these reasons we can conclude that this option is not suitable. The remainder of this Impact Assessment accordingly refers only to Option 1.

Sectors and groups affected

We have identified that the persons, bodies and entities that will be affected by the proposals in the draft regulations are:

- Persons who own or tenant land subject to contractual or other arrangements with an individual;
- Partnerships and persons who own or tenant land on their behalf;
- Trusts and persons who own or tenant land as trustees of a trust;
- Unincorporated bodies and persons who own or tenant land on their behalf;
- and,
- Overseas legal entities.

Registers of Scotland will also be impacted in their capacity as the body responsible for holding and maintaining the new Register.

To avoid requiring the duplication of existing information we are proposing in the draft regulations that entities which currently report under the UK Government's People with Significant Control (PSC) regime do not also have to report their associates (i.e. their controlling interests) in the new Register. This means that the following categories of entity would not have to report their controlling interests in the Register:

- UK companies;
- Limited Liability Partnerships;
- Eligible Scottish Partnerships – Scottish Limited Partnerships (SLPs) and Qualifying Scottish Partnerships (general partnerships where each of the partners is a limited company);
- Societas Europaeae; and,
- Unregistered companies.

We are also proposing in the regulations that Scottish Charitable Incorporated Organisations, Charitable Incorporated Organisations, mutual and public authorities do not have to report their associates under the new Register on the basis of other reporting duties they are under.

However, some information about the entities subject to other transparency regimes may appear on the Register, if such an entity (e.g. a UK company) is an associate of a recorded person. In such a case, that associate is required to provide:

- its name;
- if applicable, a registered number;
- the address of its registered office, or where it does not have a registered office, a contact address; and
- the paragraph of Schedule 2 of the regulations (list of persons subject to other transparency regimes) that applies to it.

Benefits

We anticipate benefits accruing in the following areas:

- sustainable development;
- community empowerment;
- regeneration;
- environmental management; and,
- housing.

Costs

We have worked during the consultation period to develop a robust estimate of the costs associated with compliance with the proposals in the draft regulations. It has proved difficult to identify the numbers of persons, bodies and entities likely to be affected. We have also spoken with a range of stakeholders in order to determine costs for the respective entities complying with the regulations. A full BRIA has now been completed, including a Scottish Firms Impact Assessment which

includes the estimated costs associated with compliance with the proposals in the draft regulations based upon the evidence gathered.

There are a number of challenges to identifying the numbers of persons, bodies and entities likely to be required to report information for inclusion in the new Register. We understand that around 10% of titles (approx. 260,000 titles) held in Scotland are held by legal entities. Many of these will be categories of entities that we propose will not be required to report information in the new Register, such as UK companies. It is, however, impossible at this stage to accurately estimate the breakdown of categories of owner within that 10%. It should be noted, however, that for the most common vehicles for holding land, primarily understood to be UK companies or LLPs, the draft regulations would not require them to also provide information for publication in the new Register.

We have noted the report released by Registers of Scotland in March 2019, which found that as at 31 December 2018 there were 3,159 titles to land registered in the Land Register that were held by overseas companies. The report indicates that there will be other titles that are held by overseas companies which cannot be identified as such at this point as information about the country of incorporation was not required until 2014. There may also be titles held within the Register of Sasines. It is, however, clear that substantially fewer than 260,000 titles will be subject to the new Register.

Some holders of titles who are not legal entities are, however, proposed to be required to report within the Register. This will include individuals who hold the land in their capacity as a trustee or as an asset within a partnership. The numbers expected here cannot be accurately estimated at this point. We have attempted to develop more figures for the numbers of bodies or entities to be included in the new Register, however this has proved difficult.

The proposals in the draft regulations aim to increase transparency of control of land owners and tenants. We also aim for the duties associated with the Register to be straightforward and easy to comply with which will in turn minimise the associated costs. We expect the benefits of transparency to supersede the cost of compliance.

We anticipate costs in relation to compliance with the draft regulations to include costs associated with:

- Familiarisation with the requirements and procedures of the new Register;
- Gathering the required information and verifying its accuracy;
- Administration tasks including providing the requiring information and maintaining it as current and accurate on the Register.

We have noted previous impact assessments carried out in relation to the People with Significant Control (PSC) Register held by Companies House. The duties placed on entities to provide information for inclusion in that register are similar to those proposed in the draft regulations to establish this new Register. For that reason those impact assessments provide a potentially helpful guide.

There are, however, a number of key differences between the PSC register and the proposals in the draft regulations. In particular, the PSC regime applies on a UK-wide basis to predominantly corporate entities. Affected entities may hold their own PSC registers, access to which can be subject to a charge. The new Register will apply to different persons and bodies who may be relatively informal in their constitution and governance. The Register will also be held centrally by Registers of Scotland and there will be no fees required for access to it.

Based upon the BRIA for the PSC register, we can see that:

- Costs associated with compliance with the new Register are likely to be higher during the transition year (the set-up phase). In relation to the PSC register, the UK Government estimated these costs to be 4.8 times as much as regular annual compliance costs.
- We can therefore expect average annual on-going costs (following the transition year) to be significantly lower.

We will specifically engage with affected persons and business to determine both the costs likely to be incurred in the set-up phase of the new Register, and the average annual on-going costs.

We will also seek views on how those costs can be minimised through the simplification of processes and systems.

Impacts on other organisations – Registers of Scotland

Registers of Scotland (RoS) hold a number of registers. The Keeper of the Registers of Scotland will establish and maintain the new proposed Register. RoS will therefore incur costs associated with this function. We have given consideration to the impact of the Register on RoS and have engaged with them on this issue.

Registers of Scotland currently operate as a trading fund and so rely on the income they receive to meet the costs of the services they provide. We note the decision by the Office of National Statistics to change RoS's classification to 'central government' for the purposes of the National Accounts. Discussions are ongoing between RoS and Scottish Government as to what this will mean in practical terms for RoS.

The Scottish Government policy approach to public services aims to make them as accessible as possible, and as low cost as possible, in the public interest. The draft regulations do not propose that a fee be charged either for the entry of information onto the Register, or for searching for and accessing that information. This is unlike several of the other registers held by RoS.

We are in the process of working with RoS to determine on-going running costs of the Register.

Scottish Firms Impact Test

In setting out to understand the impact of the draft regulations on Scottish businesses, a number of member organisations were approached and asked to provide contact details of members who would be affected by the draft regulations.

The feedback from the majority of organisations, such as the federation of small businesses, was that it would be incredibly difficult to identify members who own or tenant land in terms of a long lease and were a type of entity that would be required to report into the new register.

Subsequently, a number of private sports clubs that we felt may be affected by the draft regulations were contacted directly. Many did not respond and many responded to advise that they were set up as limited companies and therefore would not be required to report their details into the new register.

We did however, manage to speak directly to three businesses to discuss the impact of the draft regulations. All interviews were conducted on the premises on the following businesses:

- Annandale Estate
- Postal Bowling Club
- Craigmillar Park Golf Club

The businesses interviewed all own land and are established as either a Trust or an Unincorporated Association. Representatives of each business made the point that the ease of entering the information onto the online system was of paramount importance. Assuming this was the case, the businesses would enter the information themselves rather than paying a professional advisor (such as a solicitor or accountant) to carry out the task on their behalf.

The unincorporated associations commented that the holders of the management positions, such as the chair or treasurer normally change on a yearly basis. As such, updating the register would form part of the yearly administration of the club and normally only need to be carried out once each year, unless there is a change during the year. An easy to use system would enable this to become a quick and straightforward task.

The owner of the Annandale Estates did comment that although they would likely enter the information onto the register themselves, they would most likely seek legal advice as to the effect of the draft regulations on the liability and obligations of the trustees.

We are also aware of the impact that the Covid-19 pandemic has had on businesses. We believe the actual cost to most businesses to comply with these regulations will be relatively small.

Competition Assessment

The proposals in the draft regulations will place some costs on businesses and other bodies which directly or indirectly own or tenant land in Scotland. It is considered that these costs will not impact upon the ability of any category of body to compete.

Test run of business forms

New forms will be introduced as a result of the proposals in the draft regulations. The forms will be designed by Registers of Scotland and will therefore be subject to their standard development processes and testing methods.

Legal Aid Impact Test

We consider that the proposals in the draft regulations could give rise to some occasions when a person may need to either approach the Lands Tribunal or a solicitor, and therefore may require use of the legal aid fund. The main reason for this is that it is mandatory for a person to whom the Register applies to provide accurate and relevant information and that knowingly or recklessly failing to do so may be an offence.

From a policy perspective, although we have provided for circumstances such as this in the regulations we do not envisage this being a common occurrence. The offence is intended to apply to persons who deliberately seek to evade the duties placed upon them by the regulations and not persons who make honest mistakes in their compliance.

Genuine error may be a particular risk when a new register is created. We will take steps to minimise this by publicising the duties associated with the Register and the means of complying with them, including by working with representative groups.

It is therefore considered that there will be minimal impact on the Legal Aid Fund. The Scottish Government Access to Justice Team has been consulted on this subject.

Enforcement, sanctions and monitoring

It is proposed in the draft regulations that the Keeper of the Registers of Scotland will be responsible for keeping and maintaining the new Register. Where the Keeper becomes aware of an inaccuracy she can amend the Register to either remove or correct information as necessary.

The draft regulations propose a duty on the Keeper to ensure that the Register is kept free from interference, unauthorised access and damage, in respect to all persons and situations. There is also proposed to be a duty on persons who are submitting information for inclusion in the Register to provide accurate information. Consideration may be given to security declarations by all persons involved in the inclusion of information in the Register.

Due to the proposed mandatory nature of the new Register, it is an offence to not comply with the duties proposed in the draft regulations. A person who commits an offence can be penalised by way of a fine of up to level 5 on the standard scale (£5,000). As stated above, it is the Keeper's responsibility to ensure that the Register remains void of interference, unauthorised access and damage. The police and the courts are responsible for identifying where offences may have been committed and referring them for subsequent prosecution.

Implementation and delivery plan

The Register will become operational subsequent to the passage of the relevant legislation. We will work with Registers of Scotland during the register-development process. This will include testing processes and associated materials, such as forms, with affected groups and persons.

The operation of the Register will be reviewed regularly as a matter of course.

Summary and recommendation

We had two options:

Option 1 - create a new register (The Register of Persons Holding a Controlled Interest in Land)

Option 2 - do nothing. This option was deemed not to be suitable.

Option 1 is therefore the preferred and chosen option. Progressing this option means the Scottish Government is complying with Part 3, Section 39, of the Land Reform (Scotland) Act 2016. This will bring many benefits to Scotland including: empowering people and communities, encouraging constructive engagement between land owners, communities and individuals, promoting sustainable development and supporting improved policy making through collection of data relating to concentrations of ownership and influence.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: Roseanna Cunningham

Date: 7/12/20

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