

## SUBMITTING EVIDENCE TO A SCOTTISH PARLIAMENT COMMITTEE

### DATA PROTECTION FORM

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<b>Date:</b>	15 August 2018
<b>Organisation: (if required)</b>	Scottish Property Federation
<b>Topic of submission:</b>	Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021

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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## 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 PROPERTY FEDERATION**

Our members response to the questions raised by Committee are as follows:

#### **1) The proposed Regulations fulfil the requirements of Section 39 of the Land Reform (Scotland) Act 2016.**

The SPF recognises that the Scottish and UK governments are working together on measures to improve transparency in property ownership. Both governments of course have established land registration systems and there is a commitment in Scotland to complete the land register. We believe that improving the transparency of property ownership in Scotland is best done through the focus on completing and as necessary enhancing the land register to include 'controlling interests'. The government is already taking steps to consolidate its land registration data and we believe that moves to improve the transparency of property ownership should be aligned with this existing agenda.

Our members have also pointed out that cognisance should be taken of the different laws in England, Wales and Scotland in relation to persons with legal interests and beneficial interests in land. In England and Wales there can be two separate interests in land, but this may not be apparent in the land register of the legal owner. In Scotland there is only one interest in land – the legal interest.

Feedback from members suggests that this is an area where there is very little sense of clear objectives. The investors or beneficiaries of a collective investment fund may also be somewhat removed from controlling the fund and this does raise the issue of what the Register of Controlling Interests will achieve.

#### **2) The proposed arrangements for a Register of Persons Holding a Controlled Interest in Land are likely to be fit for purpose from the perspective of a) landowners and tenants b) associates and c) individuals and community organisations.**

A key concern of our members is that the Regulations are practical and do not make it harder or less attractive for overseas investment in Scottish real estate. If the new register is implemented without due consideration to unitised investments or the relationship between pension funds and their asset managers, then the implication could be very negative. Likewise, if Scotland creates an unwieldy system of regulation compared to other parts of the UK, then we risk the outcome of making it more difficult for Scottish companies to raise capital internationally for the benefit of development and investment of Scottish real estate.

Our investment fund members explain that their real estate funds will be formed of a series of investors who may hold different levels of interest in a fund, possibly through units of investment. Clarification is required on how these interests should be addressed for the purposes of registration' or whether it is sufficient to know the identity of the fund manager or general partner depending on the type of investment fund structure. In most urban

investments our members would argue that the owner is already known through the land register.

The investors, or beneficiaries of a collective investment fund, may be somewhat removed from controlling the fund and this begs the question of what the Register of Controlling Interests will actually achieve. For example, where a Limited Partnership is formed as a collective investment scheme for property investment purposes the individual investors and beneficiaries will have no controlling interest.

Pension funds are also major investors in real estate. This could be a corporate pension scheme or a local authority fund for example. This also raises the question of who the controlling interest is. Day to day property management decisions are likely to be taken for or on behalf of asset managers. It is therefore unclear who the correct persons to enter into a register of controlling interests would be, even if they are not the direct beneficiaries of income generated by the property. An overseas trust company operated by a professional trustee services company may nominally (and for legal and tax purposes) exercise control, but in practice they exercise their discretion based on non-mandatory recommendations from a pension fund. Clarity is required as to how the regulations would apply in this sort of scenario, which is common among offshore fund structures.

Members have also noted that in the case of a listed entity with public shareholders keeping the detail up-to-date is unrealistic. The Scottish Government's proposals accept that entities such as UK companies and listed overseas companies do not require to report further, and we consider this to be important and right.

We also note that Part 2, Part 3 and Part 4 of Schedule 1 do not apply where a person's relationship to the partnership, trust or unincorporated body is only that of a paid professional advisor to the partnership, trust or body (such as a solicitor or accountant). Our members are of the view that professional advisors should not be considered associates of recorded persons. We note in the explanatory notes that it may be possible for such people to nonetheless meet the conditions to be considered an associate should they meet other conditions in addition to the role of paid professional advisor. We are concerned to ensure that it is clear that a solicitor/accountant who is acting for a client who is a recorded person where the solicitor or accountant is giving professional advice is not caught by the Regulations, even if the client follows the professional advice given. Solicitors are trusted advisors to clients and could be viewed as falling within the definition of significant influence over the decision making of the recorded person. Our members would like the Regulations to make it clear when a solicitor or accountant would be considered to have met the requirements of being an associate. We appreciate that there are some situations where solicitors and accountants act as trustees or executors when they will fall within the Regulations.

### **3) There are any improvements that could be made to the proposed arrangements to make information more accessible.**

Our members believe that in terms of transparency of land interests the government is right to focus on the completion of the land register (and the entry / closure of the Register of Sasines). We do not see the purpose of having a separate land register and a separate register of controlling interests.

We understand that this may require some amendment of existing legislation, for example the requirement on the Keeper to keep the land register up to date at all times. We believe that this process of identifying controlling interests should not be bureaucratic and should

not prevent land registration, but we also recognise there must be a means of ensuring compliance within an appropriate time-frame.

It should be relatively easy to access information in the RCI about property which is already land registered as the user will be able to search using the title number. Difficulties may arise accessing information held in the RCI about property recorded in the General Register of Sasines (GRS) because the description of land in GRS is not in a standardised format.

We agree with the notion in Chapter 3 of the consultation document that ScotLIS is the best forum for making relevant information available.

**4) There is any information that won't be covered by the proposed Regulations that you believe should be (and why).**

No

**5) The contact details, which must be provided to the Keeper of the Registers of Scotland are sufficient.**

Only corporate contact details should be required. There are existing corporate arrangements for disclosure of a commercial interests in companies – these should be followed for recording and disclosing a person's interests in property.

We are not clear why an individual's month and year of birth should be required. A contact address will be supplied and that should suffice. Requiring unnecessary information to be supplied runs counter to principles of data protection and adds to the risks for individuals' data security in the event of any misuse of data.

**6) The Security Declaration process outlined in the proposed Regulations is fit for purpose.**

Our members do **not** think that the process is fit for purpose and that some information should not be disclosed on a public register. For example, if a controlling interest is how much of an asset is owned by a particular person, then it will be necessary to avoid issues of commercial confidentiality because disclosure of a corporate interest at a certain time may influence the outcome of a commercial transaction. Similarly, there must be a concern over security and identity theft.

Whilst we appreciate that the rationale for the Regulations is to improve the transparency of land ownership in Scotland this also needs to be balanced against the security of the data of associates. We agree with the provisions allowing a security declaration to be made by certain individuals who may be put at risk by publishing their required details. We note the discussion about making the RCI information available through ScotLIS, which would streamline information access for business users. However, we do not think that the information should be available on the public access version of ScotLIS, without the person requesting the information being required to register to use the system, so that there is this minimal level of security.

**7) The offences set out in the proposed Regulations are appropriate.**

The SPF does **not** support criminal sanctions for non-compliance with the regulations. It is our understanding that the purpose of the Regulations is to increase public transparency

and since the Regulations are not targeted at criminal activity to introduces a criminal sanction would seem disproportionate.

Our members are concerned that without sufficiently rigorous promotion of the new Regulations there may be many owners and associates who inadvertently fail to comply with the Regulations and will find themselves committing a criminal offence. An increased transitional period will assist with this giving the government, professional bodies and the Registers of Scotland time to advise owners of land about the new Regulations. In addition we consider that there should be a notification requirement. An owner should be served notice that they must provide the required information within a given a period of time and only if they fail to respond within that time period will they be guilty of an offence.

If regulations are introduced and not adhered to our members are of the view that reasonable civil penalties could apply. However, there may be a significant programme of compliance awareness required and we would hope to see a positive engagement process, to raise awareness with those who advise, and are controlling interests in land in Scotland.

It can be anticipated that the scale of inadvertent non-compliance will be significant. Immediate criminalisation of persons due to their ignorance of the requirements is entirely inappropriate and disproportionate. At the very least, there should be a mechanism for identified instances of non-compliance to be subject to formal notice requiring compliance within a reasonable period, with penalties only kicking in if there is still no compliance following that.

#### **8) Any other aspect of the proposed Regulations requires amendment.**

The draft Registration of Overseas Entities Bill on which the UK Government is currently consulting is intended to come into force on 1 April 2021, at the same time as the Scottish Regulations. Our members are therefore of the view that part 5 of Schedule 1 should be deleted and overseas entities should be included in Schedule 2- list of persons subject to other transparency regimes to avoid double reporting requirements.

It is proposed to have a six-month transitional period during which time the criminal penalty will not apply for failing to register the appropriate information in the new RCI. Our members note that the proposed transitional period under the Registration of Overseas Entities Bill is 18 months. While we **disagree** that criminal penalties should apply to the Regulations it is important that if they are introduced that the transitional period must be the same for both. The proposed transitional period of six months is not long enough given the number of people likely to be affected by the Regulations, the difficulty in ensuring that everyone who needs to register is aware of the new Regulations, the need for the people affected to gather the information they need to submit an application to the RCI and the potential of technical issues given that this will be a new register.

It would be also helpful for the Regulations to make it clear who is exempt from the Regulations in addition to the entities set out in Schedule 2. The explanatory notes make it clear that "the Regulations are not intended to impact upon owner-occupier situations in which only one party is registered as the legal owner of the land, e.g. a couple where only one party is the legal owner etc. On the face of the Regulations the cohabiting partner or spouse could fall within the Regulations and this needs to be made clear within the Regulations. Similarly, it is unhelpful to state that Part 2 of Schedule 1 "does not apply where the recorded person who owns or tenants the land is a Scottish qualifying partnership within the meaning of regulation 3(2)(b) of the Scottish Partnerships (Register of People with Significant Control) Regulations 2017". This requires the owner to consult the PSC regulations to establish if they are required to comply or not.