

Rob Gibson MSP

Convener, Rural Affairs, Climate Change and Environment Committee

The Scottish Parliament

Edinburgh

EH99 1SP

3 March 2016

Dear Rob

Land Reform (Scotland) Bill

Transparency of land ownership – new powers for requiring the disclosure and publication of information on controlling interests in landowners and tenants.

I am writing to confirm that I will lodge amendments to Part 3 of the Land Reform (Scotland) Bill at Stage 3 for new powers to provide for the disclosure and publication of information on controlling interests in landowners and tenants.

The regulation-making powers will enable Scottish Ministers, by regulations, to make provision requiring the disclosure of information about persons who have a controlling interest in landowners or tenants and for the publication of that information in a public register to be kept by the Keeper of the Registers of Scotland.

The Government's intention is to ensure the powers enable draft regulations to be brought forward early in the next Parliamentary term, to deliver our shared objective for greater transparency of land ownership in Scotland.

Regulations

In undertaking detailed work to determine what is required to achieve this aim the Scottish Government has identified a number of areas that will be covered by the regulations. These are set out in Annex A, will be reflected in the wording of the regulation-making powers and set out on the face of the Bill.

Annex A to this letter sets out our proposals for the content of the regulations, subject to the further consultation necessary to ensure that we develop the best and most effective mechanisms for delivering transparency. The amendments will be lodged next week and debated at Stage 3 in Parliament on 16 March but I thought it would be helpful to write now to provide further detail of our intentions.

Consultation and Parliamentary procedure

The Scottish Government will carry out a public consultation on developing the regulations, including seeking views on the specific issues covered in this letter and the attached annex.

Subject to Parliament's approval of the Land Reform Bill, the Government intends to publish the consultation this summer. Responses to the consultation will be analysed and published and will help to inform the subsequent drafting of the regulations.

In light of concerns expressed by your Committee and the Delegated Powers and Law Reform Committee I confirmed at Stage 2 that the draft regulations will be subject to an enhanced affirmative procedure for the first use of the regulation-making powers.

Once the draft regulations have been developed following the public consultation, they will be laid before Parliament along with an explanatory document setting out the reasons for the specific provisions in the regulations.

The enhanced affirmative process will allow Parliament to undertake further consultation on the content of the draft regulations and any representations received during this process will be considered in finalising the provisions.

The draft regulations, including any changes resulting from the consultation, will then be laid before Parliament for approval. The regulations will be accompanied by an explanatory document setting out details of the consultation, representations made, any changes to the draft regulations and the reasons for the provisions contained in the draft regulations that have been laid before Parliament.

The current section 35A

The provisions in Graeme Dey's amendment at Stage 2 were a clear signal of our shared aims for delivering transparency of land ownership in Scotland. The Scottish Government has carefully considered the detail of the amendment as part of the work undertaken since then.

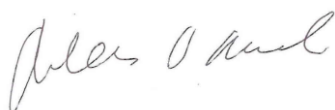
As I said during Stage 2, while we support the principle behind the current section 35A we have real concerns over the ability of the provisions to effectively deliver the transparency sought. The section is also outwith the legislative competence of the Scottish Parliament. I believe the Scottish Government's proposals, which have been informed by Mr Dey's amendments and the Committee's discussions during Stage 2, are the best vehicle for increasing the transparency of land ownership in Scotland. I will therefore lodge amendments at Stage 3 to remove section 35A from the Bill.

Conclusion

I believe our proposals offer the best way forward in developing effective mechanisms for ensuring the transparency of land ownership in Scotland that we all desire. I hope you and the Committee will support the Government amendments at Stage 3.

A copy of this letter will go to the Convener of the Delegated Powers and Law Reform Committee.

Kind regards



AILEEN MCLEOD

Land Reform (Scotland) Bill

Transparency of landownership – proposed regulation power for new register.

1. The Bill, once amended, will explain that the purpose of the regulation-making power is to require the public disclosure of information about persons with a controlling interest in landowners and tenants in Scotland. The Scottish Government has identified a number of areas that will be covered by the regulations:

- A. Provision for the information disclosed to be held on a public register.
- B. The definition of controlling interest in a landowner or tenant.
- C. The information about persons with a controlling interest that will have to be disclosed to the Keeper.
- D. A duty to provide the information.
- E. An on-going duty to keep up to date information about persons having a controlling interest.
- F. Setting out the landowners and tenants the duty to provide information applies to.
- G. Effective and proportionate enforcement measures and sanctions.
- H. Setting out the types of land in respect of which the duty to disclose information applies.
- I. A process for challenging whether information disclosed should be held or published on the register on accuracy or privacy grounds.

A. Provision for the information disclosed to be held on a public register

2. The Scottish Government intends that the information to be disclosed will be published in a public register. It is for further consideration whether the information should be published as part of the Land Register or held in standalone public register. In considering this question the Scottish Government will take account of the fact that the Land Register discloses information on the legal titles for properties that cover only approximately 28% of the land mass of Scotland.

3. The remaining legal titles are recorded in the Register of Sasines ('Sasines'), or not recorded or registered at all. To achieve the maximum level of transparency it is essential that the regulations are capable of ensuring the duty to disclose information applies regardless of whether the land is included in the Land Register or not. Registers of Scotland are currently working to complete the Land Register by 2024. By that date the legal titles for all properties in Scotland should be registered in the Land Register

4. In providing for the disclosure of information on controlling interests in landowners and tenants ('information on controlling interests') we will consider what the best solution would be to achieve the maximum level of transparency and ensure information about controlling interests can be obtained for legal titles that may not be in the Land Register before 2024. The Scottish Government intends to consult on the following options:

- For properties that are registered in the Land Register should the title sheet for those properties disclose the names of any persons having a controlling interest in the land owner?

- For properties where the legal title is recorded in the Sasines, or not recorded or registered, should information about any persons with a controlling interest in land owners or tenants be disclosed in a new public register?
- Should regulations provide for a new public register of persons with a controlling interest in proprietors, providing one register where the names of all persons that have a controlling interest in land owners or tenants will be published?

5. All these options are valid and the detail of the pros and cons of each should be explored further during the consultation process.

B. The definition of controlling interest in a landowner or tenant.

6. To ensure that the policy objective of increasing the transparency of land ownership in Scotland can be achieved, the definition of controlling interest in landowners and tenants will be one of key provisions set out in the regulations.

7. The regulation-making power will enable the term ‘controlling interest’ to be defined in the regulations. The meaning of this term will not be constrained by how the term may have been used previously or the definition of similar concepts in other legislation. The Scottish Government intends that tenants of registrable leases (over 20 years long) will be included.

8. We are aware that there are existing definitions in relation to people with significant control of UK companies and definitions used in money laundering legislation for persons that have a beneficial interest in legal entities. The Scottish Government will consider these definitions and whether they could be used or adapted for the purposes of defining persons that have a controlling interest in landowners and tenants.

9. The Scottish Government intends to consult on the details of what will need to be covered within the definition of ‘controlling interests’ in the initial consultation.

C. The information about persons with a controlling interest in landowners or tenants that will have to be disclosed.

10. The Scottish Government intends that the name of any person having a controlling interest in a landowner or tenant and their contact details will be disclosed.

11. The Scottish Government will consider what would be appropriate contact details, for example whether an email address would be sufficient or whether a postal address either within Scotland or outwith Scotland would also be required. The consultation will also need to consider how this information can be kept up to date.

12. In relation to the nature of the person’s controlling interest, it will have to be considered whether this should be disclosed and published on the register. For example, if a person has a controlling interest in a landowner because they hold a certain percentage of the shares in a company, should the percentage shareholding be disclosed on the register or would it be sufficient for the register to only disclose the name and contact details of the shareholder?

13. Information about the nature of the control may be commercially sensitive information and the detail of the interest may not be necessary to understand who controls the landowner or land. Whether this information needs to be disclosed will be explored through the initial consultation.

D. A duty to provide the information

14. The Scottish Government intends that the duty to provide information on persons with controlling interest in land will be imposed on landowners and tenants.

15. Where there are complex ownership structures lying behind a landowner or tenant, such as a chain of companies owned in off-shore jurisdictions, it may not be possible for the landowner to obtain information about controlling interests.
16. Therefore the duty on the landowner or tenant should be to “take all reasonable steps” to ascertain if there is a controlling interest.
17. The Scottish Government will also explore the possibility of applying a duty to intermediate persons who hold information necessary to determine who has a controlling interest, and directly to persons with a controlling interest. However, there may be challenges in enforcing these duties if it cannot be ascertained if such a person exists from available information or if these persons are established or resident outwith the UK, especially if they are established or resident in ‘secrecy’ jurisdictions.
18. Enforcing a duty in these circumstances may present difficulties and, to the extent this is possible, could be expensive. The Scottish Government will consult further on those persons to whom the duty will apply and, as set out below, what the most effective and proportionate enforcement mechanisms would be.

E. An on-going duty to keep information about persons having controlling interests up to date.

19. Information about persons with a controlling interest must be kept up to date and this information should be updated whenever there is a material change.
20. A duty to update the Keeper on any changes to the information held on the register will be required. This will include a duty to disclose where a person acquires or loses their controlling interest, for example if the controlling interest is based on the ownership of shares, and a person sells the shares and is no longer a person with a controlling interest.
21. There are a number of practical issues to be considered about who the duty should be imposed on and how best to enforce such a duty, which will be explored further during the initial consultation.

F. Setting out the land owners and tenants that the duty to disclose is imposed on.

22. There are currently 2.8 million titles to land in Scotland. Approximately 1.6 million titles are registered in the Land Register and 1.2 million in Sasines.
23. The Scottish Government intends that the duty to provide information should extend to all applicants for registration and all existing proprietors in the Land Register and Sasines who are legal persons (e.g. companies and Scottish limited liability partnerships) as well as to individuals such as trustees who hold title in a special capacity.
24. The Scottish Government intends to exclude properties owned by individuals in their own right from the duty to provide information, given that the concern expressed during the consideration of the Bill has centred on situations where legal entities are used to conceal the individuals that have control of land.
25. Consideration will also be given to excluding other land owners or tenants where there can be no person with a controlling interest (e.g. government bodies and local authorities) although this may depend on the definition of “controlling interest”.
26. The Scottish Government will also consider whether the duty to provide information should extend to individuals who own land in their own name but have some form of ‘secret’ contractual or hidden trust relationship between the landowner or tenant and another party, which would mean that the other party can exercise control over the individual and in turn the land.

27. However, there is currently no evidence that this is an issue, or any evidence as to the extent to which it would likely be an issue. This will be a matter for consultation to obtain the views of stakeholders to establish if this is a legitimate concern that the proposed draft regulations would have to provide for.

28. Processes will be put in place to ensure that existing landowners and tenants are aware of the duty to disclose information and how the duty is to be complied with.

29. There are a number of options that will be explored and consulted upon (and practical issues with each of them):

- Should there be some form of census of all 2.8 million property owners in Scotland to establish if there is person with a controlling interest in the land owner or tenant?
- Should the census apply only to legal entities, approximately 10% of legal titles?
- Should there be a general duty on land owners and tenants to provide the information within a specified time backed up with a nationwide publicity campaign?

30. The Scottish Government will develop the policy in these areas further following the initial consultation on the potential options.

G. Effective and proportionate enforcement measures and sanction.

31. Effective and proportionate enforcement will be developed to ensure that the duties to disclose information are complied with, both in relation to new registrations as well as to existing titles in the Land Register and Sasines. There will need to be a duty to keep the information about persons with a controlling interest updated and an appropriate sanction for non-compliance.

32. Consideration will be given as to whether the duty imposed should require that all reasonable care was taken to provide accurate information, making it an offence to mislead or provide false information, or to intentionally fail to disclose information – similar to current duties on applicants to the Land Register in the Land Registration etc. (Scotland) Act 2012.

33. A further mechanism will be required to allow challenges by third parties to the accuracy of the information about controlling interests that is published, where there is evidence that the information is inaccurate. The detail of the mechanism will depend on the sanction to be imposed for the provision of false or misleading information or for the failure to disclose material information. The options are to impose either criminal offences or civil penalties.

34. Whether it is appropriate to impose criminal sanctions and the appropriate level for any civil penalty or criminal offence will be considered as part of the consultation process to ensure they are proportionate and effective.

Alternative or additional sanctions to a criminal offence or civil penalty may be required and this will also be considered further as part of the intended consultation. One option that will be explored further is making the provision of information a condition of registration in the Land Register.

H. Setting out the types of land in respect of which the duty to disclose information applies.

35. The Scottish Government intends that the duty to disclose information about persons having controlling interests in land owners and tenants will apply in relation to all land, including all urban and rural land.

36. This will be explored further during the initial consultation to ensure there are strong policy reasons to require the information in respect of all categories of land.

I. A process for challenging whether information disclosed should be published on the register on accuracy or privacy grounds

37. A mechanism will be required to allow persons whose details have been disclosed and have been, or are about to be, published to challenge the accuracy of the information published or to request an exemption from publication for privacy reasons.
38. Privacy exemptions will be necessary in some very limited circumstances such as where publication of information about persons will put them at serious risk of harm from domestic abuse.
39. It will be necessary to develop a mechanism to allow applications to be considered and decided. An appeal of that decision to the courts is also likely to be required.
40. If provision of information is to be a condition of registration in the Land Register (see below) then it will also be important that a decision on applications for a privacy exemption is reached quickly to avoid any unnecessary delay in registering land in the Land Register.
41. The exact nature of the exemptions and requests to correct inaccurate information and the process for determining whether an exemption applies, or information should be updated, will be developed following further consultation.

Conclusion

42. The overall framework of the intended proposals is clear. The Scottish Government will develop effective mechanisms (informed by consultation on the range of options and issues set out above) to be set out in proposed draft regulations.