



Delivering improved transparency of land ownership in Scotland: Consultation on draft regulations
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THE SCOTTISH CHURCHES COMMITTEE

Phone number

0131 240 2209

Address

C/O THE SOLICITOR OF THE CHURCH
CHURCH OF SCOTLAND LAW DEPARTMENT
121 GEORGE STREET, EDINBURGH

Postcode

EH2 4YN

Email

lawdept@churchofscotland.org.uk

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- Yes
 No

CONSULTATION QUESTIONS

Questions on Policy Proposals

Question 1

Do you have any comments on our proposals for the form of the Register?

We have no comment on the form of the Register *per se*.

We think that there is scope for some confusion arising from the terminology used in Regulation 3 and in paragraph 1 of Schedule 1. Regulation 3 (3) defines the expression “recorded person” as being each person recorded in the RCI i.e (i) owners/tenants and (ii) associates. Paragraph 1 of Schedule 1 defines the “recorded person” as being simply the owner/tenant.

It would be helpful to set out clearly within the Regulations those categories of property owner who are not affected by the Regulations. It is not immediately clear from the Regulations, for example, that individuals who own or rent their own homes are not within their scope.

Question 2

Do you have any comments on our proposals for the role of the Keeper in relation to information in the Register?

Again, we have no comment on the role of the Keeper *per se* but we have significant concerns about the huge additional volume of work which this will create for the Keeper and her staff and the need for this to be suitably resourced. The Keeper’s staff are currently struggling to cope with their existing workload, and many experienced staff have been lost over the past few years. This has an inevitable impact on output, and in particular on the integrity of the Land Register. We understand that there is a current backlog of approximately 40,000 first registration applications to the Land Register. We would be very concerned should the Keeper’s new duties under these Regulations result in a material and adverse impact on her core duty of ensuring the accuracy of the Registers. It is a commercial necessity that all landowners in Scotland can properly and timeously evidence the accurate extent of their land ownership. This must be prioritised, and should not be put at risk as a result of the imposition of a new administrative regime relating to matters which are ancillary to this core duty.

The Regulations should make provision for compensation to be paid by the Keeper should the acts or omissions of her staff in relation to the Register cause loss or damage to any individual or result in them committing a criminal offence under the proposed Regulations.

Question 3

Do you consider the information that we are requiring to be provided for inclusion in the Register sufficient and proportionate?

We consider that the required details for each associate are excessive. It is difficult to see why the month and year of birth of such a person should be required and we anticipate resistance to the provision of this information. The public interest in transparency must be weighed against the individual right to privacy and the duty to include this information seems to us to fall on the wrong side of this balancing act.

Question 4

Are our proposals for the duties people will be under to provide information sufficient and proportionate?

Please comment below:

It is unclear to us how the land owner/tenant might fulfil their obligation to take “reasonable steps” to verify the accuracy of the associate’s required details. How is it anticipated that an associate’s date of birth might be verified, or ascertained if the associate simply refuses to provide it? If the person has no reason to know whether the associate’s stated contact address is accurate, what steps is it anticipated that the person should take to attempt to verify this? We are also of the view that a period of 60 days within which to provide the necessary information is too short.

Question 5

Is our proposed process for security declarations reasonable?

Please comment below:

Broadly, yes, although there should be further guidance as to the parameters for the exercise of the Keeper’s discretion in Regulation 14(4)(b).

Question 6

Are there people who you think should be able to apply for their information not to be disclosed in the Register, who may not be able to under our current proposals?

We have no comment on this.

Question 7

Do you have any comments on our proposals for referral of questions about the accuracy of the Register to the Lands Tribunal?

This appears to be a reasonable approach, given the existing jurisdiction of the Lands Tribunal to hear appeals against the Keeper arising out of matters relating to the registration of title to land.

Question 8

Do you have any comments on our proposals for criminal offences?

It seems to us to be wholly disproportionate to criminalise people who fail to comply with the Regulations in all respects. We do not think that it is reasonable to apply a criminal penalty to a failure to attend to an administrative process arising out of merely owning or tenancing land. It is likely that the bulk of offences under the Regulations will be committed by people who are, in all meaningful senses, innocent and are not intentionally seeking to obstruct the stated aim of the Regulations. For example, in the case of religious bodies where title to church buildings may have been vested in a number of office-bearers *ex officio*s for a century or more, it is quite likely that the current holders of these offices will be unaware of the fact that by virtue of their office they hold title and thus fall within the definition of recorded person or associate in the Regulations. It is very unlikely that the executors of such individuals will be aware of this fact.

Also, justice requires certainty and the rule of law requires that citizens should be aware of their legal obligations. It is therefore essential that all of the requirements of the Regulations are sufficiently well publicised to ensure that this is the case and that those on whom the duties fall are aware of them. It is not difficult to envisage circumstances in which this does not happen, particularly in the case of small organisations who do not have ready access to property advisers. We would urge the Scottish Government to depart from the proposal of criminalisation, but if it does not do so then it must take all possible steps to ensure that the requirements are well publicised and that help and support is available for property owners or tenants so that they do not inadvertently find themselves facing a criminal penalty.

Question 9

Are there alternative or additional means of enforcement that we should be considering?

We think that an offence should only be committed, and a fine payable, where someone delays or refuses to provide the required information within a reasonable period after having been asked to do so by the Keeper.

Question 10

Do you have any comments on our proposed process for notification of the Keeper in the case of a person's death or an entity's winding up or dissolution?

We consider that this is likely to prove oppressive in practice, particularly if a failure to do so is criminalised. There will be many instances where an executor will not be aware that the deceased person was a "recorded person" in terms of Regulation 3 (2), particularly in the case of associates. We refer below to our concerns in relation to the impact of the Regulations on faith-based organisations, who are for the most part constituted at local level as unincorporated associations, and for which the numbers of associates could run into double (if not treble) figures. It is not realistic to expect, for example, that an executor should know that the deceased was a member of the Congregational Board in their local Parish church and that their duty in terms of the Regulations is therefore engaged.

We are unclear what is intended by the obligation in Regulation 2(2). What "further information" must an executor provide to the Keeper?

Question 11

Do you have any comments on our proposals for a transitional implementation?

A transitional period of 6 months is far too short. This is a significant change to land purchase/lease procedures with which people have become familiar over decades. It is not intuitive for a purchaser or tenant of land to understand that in addition to the information which appears on the Land Register they are also required to submit additional information to a separate Register. In the case of properties which may not have changed hands for a generation, people will have no reason to be alert for this change.

We consider that a more proportionate implementation proposal would be that the obligation to record the required information would in the first instance only be triggered by a dealing with the land, in terms of the current triggers for first registration as per the Land Registration (Scotland) Act 2012 e.g the grant of a long lease; the grant of a standard security; any transfer of title including a gift to family members or transfer after death to beneficiaries under a will; or the grant of other rights such as servitudes. This could be backed up by a "longstop" implementation date of, perhaps, 10 years within which the obligation would apply to all land (unless exempted) regardless of whether or not a trigger event had occurred.

For bodies with a large number of individual properties, it will require a huge expenditure of time and money to achieve compliance within 6 months. This is disproportionate to any perceived benefit. For example, the Church of Scotland General Trustees hold approximately 4,500 separate titles to churches, halls, manses and glebes throughout the country. Based on the example provided in the answer to Question 27 below, compliance with the Regulations would require 855,000 separate notifications to the Register by the General Trustees.

Question 12

Can you provide examples where land is owned or leased by individuals subject to contractual arrangements such as those described in the explanatory document?

We have no comment on this.

Question 13

Are there other contractual arrangements we should be looking to capture?

We are not aware of any such arrangements.

Question 14

Do you have any comments on this proposal?

We consider that this is very problematic. More clarity is required as to the meaning of the words “*control*” and “*significant influence*”. The definitions in Regulation 2(2) simply do not fit all situations, particularly the ownership of property by a group of people as trustees or members of an unincorporated association. There is unlikely to be any one individual in such cases who can “*direct the activities of another*” or “*ensure that another person will typically adopt the approach that the person desires*”: does this mean that **no-one** is caught by the definition, or alternatively does it mean that **every** member of such bodies is caught?

The examples of significant influence and control given in the case of Trusts (paragraph 8 of Part 3 of Schedule 1) include someone who has the right to appoint or remove a trustee, direct the distribution of assets, amend a trust deed or direct investment decisions: this means that every trustee is a person who “has significant influence or control”, since it is the duty of every trustee to manage the trust estate in the ways enumerated.

We find the difference in approach between the treatment of trustees and the treatment of members of unincorporated bodies in terms of paragraphs 9 and 11 of Part 3 of Schedule 1 perplexing. We note that in relation to these bodies, paragraph 9 defines associates as persons having “*general control and management of the administration*” of the body, which reflects the definition of a charity trustee in terms of the Charities and Trustee Investment (Scotland) Act 2005. However, paragraph 11 narrows this to persons who “*hold an office or position*” such as chair, treasurer or secretary with such a body. It is very unhelpful to have, in effect, competing statutory definitions of what it means to be a

trustee of an unincorporated association. On the one hand, OSCR guidance is clear that it regards **all committee or board members** of a charity as being the trustees of the charity i.e the people who have “*general control and management of the administration of the body*” in terms of the 2005 Act. On the other hand, the Regulations say that **only office-bearers** have such a role. This reflects an imperfect understanding of how such bodies actually operate: office-bearers such as the chair, secretary or treasurer should not, in the usual case and in line with good governance, exercise “control” of an unincorporated association. The reality is that control should be exercised by all committee or board members as a group.

The difference in treatment of Trusts and unincorporated associations also creates problems in that it offers no guidance as to which regime is to apply should an unincorporated association be constituted as a Trust. Is it intended that the former should be treated as a sub-set of the latter? If so, what is the policy justification for the different requirements?

We wish to be clear that we are not of the view that the Regulations should require every committee or board member of an unincorporated association or every charity trustee to be classed as an associate. We consider that this is disproportionate. It will result in the Keeper being swamped with information, which by virtue of its volume alone will do little to achieve the policy aim of transparency. It will also place a huge burden on the administrators of such bodies, who are often volunteers who are already struggling under the weight of other compliance obligations.

Question 15

Does this reflect how land is typically owned or leased by or on behalf of partnerships or, can you provide examples of other ways in which land is owned or leased by or on behalf of partnerships?

We do not have any comment on this.

Question 16

Do our proposals reflect sufficiently how control is exercised over partnerships?

We do not have any comment on this.

Question 17

Do our proposals reflect how land is typically held in trust ?Can you provide examples of other ways in which land held in trust

We have no particular comment to make on this, other than to highlight that title to land owned by most religious denominations in Scotland will be held in trust for that denomination. Title is usually held in the names of three or four office-bearers for the individual congregation although it can be held in the names of all of the members of a managing committee and, in the case of the Church of Scotland, is often held in the name of the Church of Scotland General Trustees, who are a statutory corporate body with perpetual succession.

Question 18

Do our proposals sufficiently capture how control is exercised over trusts including through financial interests?

We have no comment on this.

Question 19

Do our proposals reflect how land is owned or leased on behalf of unincorporated associations? Can you provide examples of other ways in which land is owned or leased on their behalf?

We refer to our response to Question 14 for comment on this.

Question 20

Are there other types of groups than those mentioned who may be affected by these proposals? If so, please can you provide examples.

We have no comment on this.

Question 21

Do our proposals sufficiently capture how control is exercised over unincorporated associations?

We refer to our response to Question 14 for comment on this.

Question 22

Do our proposals reflect how land is typically owned or leased by overseas legal entities? Can you provide other ways in which land is owned or leased by overseas legal entities?

We have no comment on this.

Question 23

Do our proposals sufficiently capture how control is exercised over overseas legal entities? Are there other examples that you are aware of where control is exercised over an overseas legal entity?

We have no comment on this.

Question 24

Are there examples where transparency is lacking as to control over a legal owner or tenant of land that we have not taken account of in our proposals?

We have no comment on this.

Question 25

Do you have any comments on the usefulness of the PSC regime in revealing control of corporate entities which own land in Scotland?

We have no comment on this.

Question 26

Do you have any comments on our proposals to not require SCIOs, CIOs, mutuals or public authorities to provide information for inclusion in the Register?

We agree with this but consider that the exemption should be widened to include all charities, regardless of how they are constituted. All charities are already subject to other transparency regimes: this is not limited to charities which are incorporated as SCIOs. Section 23 of the 2005 Act obliges a charity to provide to any person who requests it a copy of (a) its constitution and (b) its latest statement of account. The relevant charity SORP requires charities with income over £250,000 p.a to include the names of all trustees within their audited accounts; those charities with annual income under this figure who only require to submit Receipts & Payments accounts must disclose the names of up to 50 trustees in their accounts.

In addition to this, a contact address for every charity in Scotland is already publicly available via the OSCR Charity Register.

We are of the view that this provides more than enough by way of transparency to enable any concerned individual to be able to identify the appropriate person or persons to engage with over decisions about land owned by the charity.

Question 27

Do you agree with the conclusions in the impact assessments?

We think that the argument used to justify the inclusion of information about the month and year of birth in the Register is weak. If third parties try to engage with an individual erroneously in relation to a property, it can be assumed that the individual will readily correct any misunderstanding.

We note the expectation stated within the Partial Business and Regulatory Impact Assessment, under the heading "Costs", that the benefits of transparency will supersede the cost of compliance. We do not agree that this expectation is likely to be met, with particular reference to the cost of compliance in relation to the titles to land owned by faith and belief groups.

Such groups represent both communities of interest and communities of place. They are not grafted on to a separate "community" which requires to be "empowered" to engage with them. They spring from and are an integral part of the communities where they are situated and which they serve. We are not aware of any observed difficulties arising from a lack of transparency in the ownership of such properties: on the contrary, it is immediately obvious to a casual passer-by who owns most buildings held by religious denominations, because this is advertised on the building itself. It is then not difficult for anyone who wishes to do so to engage with the denomination in relation to that property.

For the most part, the only properties owned by religious bodies other than churches or other public worship spaces, where ownership is apparent to a casual passer-by, will be the dwellinghouses in which clergy reside. It is hard to discern any public interest in a transparency regime such as is provided for in the Regulations applying to such

residential properties.

In contrast to what we understand to be a minimal problem of lack of transparency, we think that the cost of compliance by faith and belief groups will be huge, both to the Keeper in maintaining the required details on the Register and to these bodies in arranging to supply it.

We offer the example of a Church of Scotland congregation in Edinburgh with a membership of 150 people, holding separate titles to a church, hall and manse. Title is held by the Church of Scotland General Trustees as trustees on behalf of the congregation, which itself is both a trust and an unincorporated association. The congregation's affairs are regulated by a Kirk Session of 30 people and a Congregational Board of another 20 people: all decisions in relation to the properties are taken by these bodies, with the concurrence of the General Trustees where major issues such as a disposal or development of the property is concerned. The General Trustees being a body corporate which does not appear to benefit from the exemptions in Schedule 2, our interpretation of the Regulations is that the Register will require to hold – as a minimum – the details of both the General Trustees and the 50 members of the Kirk Session and Congregational Board. Each congregation is subject to the oversight of the Presbytery in which it sits, and major decisions such as the sale or development of congregational property have to be approved by the Presbytery, which also exercises a supervisory function over each congregation in its bounds. Edinburgh Presbytery has a membership of 140. The end result seems to be that this congregation's church building will carry with it 190 separate entries in the Register and that each time any individual joins or leaves the Session, Board or Presbytery, this information will have to be recorded in the Register. The same will apply to the hall and the manse. One single congregation will be responsible for 570 separate notifications in relation to a building which is publicly advertised as being owned by the Church of Scotland and for which contact details are available on a public notice-board. This cannot be what is intended by the legislation.

Question 28

Are there potential impacts that we have not considered?

We refer to our answer to Question 27 above.

Question 29

What measures, if any, do you think we should take to inform and publicise information about land in Scotland.

We have no comment on this.