

# Identifying decision-makers behind land ownership in Scotland

July 29, 2019

Land reform is high on the Scottish Government's agenda, and transparency of land ownership is one of the main areas of focus. The Scottish Government believes that as a matter of public policy it is important to know who controls and benefits from Scottish land. The legal owner of land or buildings can be ascertained by looking at the property registers. However, at present those registers do not necessarily show who actually controls and makes decisions about the land or buildings. For example, if the legal owner is an overseas entity, a trust or a partnership, you cannot tell from looking at the existing property registers who is in control of the legal owner.

Draft regulations (Regulations) were introduced by the Scottish Government last summer to implement the creation of a new public Scottish register: the Register of Persons Holding a Controlled Interest in Land (RCI). A consultation on the Regulations took place last year, a parliamentary committee report on the Regulations was published in November 2018, and in April 2019 the Scottish Government published an analysis of the consultation responses. This article summarises the main provisions of the Regulations, mentions proposals for a UK-wide Register of Overseas Entities and highlights key concerns about the Regulations, as raised both in the parliamentary committee report and in responses to the consultation.

## The regulations

### The new register

The RCI is proposed to become operational in April 2021 and is to contain details of the individuals who control or influence decision-making in respect of Scottish land and buildings. These individuals are known in the Regulations as "Associates".

The Regulations seek to address two main scenarios where there is currently a lack of transparency:

- where an owner or tenant is an "opaque legal entity" (i.e. a partnership, unincorporated body or overseas company); and
- where a title or lease is held in an arrangement which is not necessarily apparent from looking at the Land Register (i.e. a trust arrangement, or contractual arrangement such as where property is held on a nomination or agency basis).

In both such scenarios, the legal owner or tenant will be required to submit to the RCI information which identifies the relevant Associates. Note that in the case of leases/tenants, only registrable leases of Scottish land and buildings are caught by the Regulations (i.e. leases exceeding 20 years in duration).

### Associate information

Information about each Associate must be submitted to the RCI by the owner/tenant within 60 days of the association between the owner/tenant and the Associate first starting. The required information includes the date on which the association started and the Associate's name, address and month/year of birth if a natural person, or the Associate's name, registered number and registered/contact address if a non-natural person. If an Associate in respect of a property is a non-natural person, then the individuals who control that entity will also be Associates in respect of that property (and so on, where there are complex ownership structures). The Regulations aim to drill down through the layers of ownership to highlight the ultimate parties in control of land.

Prior to the owner/tenant submitting the Associate's details to the RCI, the owner/tenant must have taken reasonable steps to verify the accuracy of the Associate's details with the Associate, and to notify the Associate about their rights and duties under the Regulations. If the Associate does not receive this notification within 60 days of the association starting, the onus is then placed on the Associate to inform the owner/tenant that they are an Associate and to provide the relevant details.

Once the information has been submitted to the RCI, the owner/tenant must notify the Associate that this has been done.

## Timing

The duty to register does not only arise on a change of ownership of relevant land/buildings. It will also arise:

- for existing owners/tenants of relevant land/buildings, immediately when the Regulations come into force; and
- whenever there is a change of control in the ownership of the entity that owns or leases the relevant land/buildings, such as a change in the trustees of a trust.

It will be important for existing owners/tenants to be prepared to submit the required information as soon as the RCI becomes operational. However, there is to be a grace period (currently proposed as six months from when the RCI becomes operational) during which penalties for failure to comply will not be charged.

## Exceptions to duty to disclose Associate information

**Duplication:** There is an exception to the duty to disclose associate information to the RCI if the Associate is already subject to other transparency regimes. This is known as the Duplication Exclusion. Its rationale is to avoid double-reporting of information which is either already publicly available or which can be accessed via a request under freedom of information (FOI) legislation. It results in the exclusion of an extensive range of Associates from the scope of the RCI, for example:

- UK companies, limited liability partnerships and eligible Scottish partnerships (on the basis that they are covered by the UK-wide People with Significant Control Register (PSC) which was established in June 2016 under the Companies Act 2006);
- mutual and public authorities (on the basis that they are subject to the FOI regime); and
- overseas entities (once the UK Register of Overseas Entities is up and running – see below).

**Protection:** There is no general exemption on grounds of confidentiality or privacy, but there is a right to be excluded from the RCI where the information to be disclosed would put the relevant person at serious risk of violence, abuse, threat of violence/abuse or intimidation (e.g. in the case of domestic abuse).

**Certain relationships:** It appears that the Regulations are not intended to catch the relationships which owners/tenants may have with creditors, administrators, paid professional advisers or landlords, even though those

relationships may involve an element of control/influence.

## Enforcement of duties under the Regulations

It is to be a criminal offence, punishable by a fine of up to £5,000, to fail to provide the required information to the RCI, to provide false or misleading information, or to fail to comply with various other requirements. The Scottish Government has suggested that fines might be reapplied if non-compliance continues for a period of time.

Individuals within an organisation may be found personally culpable if they hold a controlling position in the organisation and have consented to or conspired in an offence or where their lack of care caused such an offence.

It is a defence if the relevant party can prove that it took all reasonable precautions or exercised all due diligence to avoid committing an offence. As mentioned above, there is to be a grace period (currently proposed as six months from when the RCI is intended to become operational, on 1 April 2021) during which penalties for failure to comply will not be charged.

Unlike the proposals for a UK Register of Overseas Entities (described below), the Regulations do not impose any civil sanctions in the event of failure to provide the required information.

## UK Register - overseas entities owning UK land

We cannot talk about the RCI proposals without also mentioning draft legislation which has been published by the UK government to create a register of beneficial owners of overseas entities which own UK land (UK Register of Overseas Entities). Like the RCI, it aims to identify the people who actually control land. However, as the name suggests, it is restricted only to overseas entities.

The UK Register of Overseas Entities is also intended to launch in 2021. Its main motivation is to "create a hostile environment for money launderers who want to use the UK property market to hide unlawful funds". Overseas entities will be required to annually submit updated information or confirm that the existing information is still correct.

Criminal sanctions will apply in the event of non-compliance, and in addition there is to be a civil sanction in the form of a bar on registration of title in the property registers until the required information has been submitted to the UK Register of Overseas Entities.

It is still to be confirmed how the UK Register of Overseas Entities and the RCI will interact.

## Responses to the Regulations

Returning to the Regulations, various concerns were raised in a report published by the Environment, Climate Change and Land Reform Scottish Parliamentary committee (Committee) in November 2018 and in an analysis of consultation responses published by the Scottish Government in April 2019.

### Concerns regarding Duplication Exclusion

Much of Scotland's land would not fall within the scope of the Regulations due to the Duplication Exclusion. The Committee believes that it is in the public interest for all Associate information to be included in the RCI, even where it would duplicate other registers, and that the administrative inconvenience of double-reporting is not a sufficient justification for excluding this information. There might otherwise be a fragmentation of information, making it difficult for the general public to find out who controls Scottish land. Other transparency regimes/registers might not require exactly the same type/level of detail as the Regulations, which could create a loophole for certain Associates. The

Committee believes that potential FOI request information should be included in the RCI, as it would otherwise not meet the "aspirations of a transparent and accessible system". Various consultation participants raised similar concerns.

## Concerns regarding enforcement

The Committee is concerned that the proposed level of fine is not sufficient to deter breaches. It suggests that certain Associates might think this a price worth paying for anonymity. Comparable regimes such as the PSC and the proposed UK Register of Overseas Entities have more stringent sanctions, such as higher fines (e.g. £10,000) and even imprisonment. The Committee recommends that the Scottish Government raises the level of fine and also considers civil sanctions, such as a bar on registration of title in the property registers. The consultation participants were divided on this point, with some favouring stronger sanctions, whilst others do not want criminal sanctions at all on the basis that people may inadvertently fail to comply with the Regulations.

## Other concerns

The Committee and several of the consultation participants make calls for various other changes to the Regulations, such as:

- clarification of various points in the Regulations and accompanying explanatory notes, e.g. precisely which entities are exempt from the Regulations; exactly what constitutes "control" and "influence"; and the extent of the powers to make and amend entries in the RCI;
- that the grace period (during which penalties will not be charged for non-compliance) should be longer than six months;
- that more information should be provided about how the RCI will be accessed (and why it is proposed to be accessible free of charge when most other public registers are not) and what the plans are to publicise the Regulations to ensure that people do not inadvertently fail to comply;
- in the event of a breach of the Regulations, the relevant individual to be given notification of their breach and a period of time within which to comply, prior to imposition of a penalty; and
- proper consideration of data validation and verification procedures.

In contrast to the UK Register of Overseas Entities, which is proposed to be administered by Companies House, the RCI is proposed to be administered by Registers of Scotland. The Committee and the consultation participants are concerned about the likely additional work and cost which establishing and maintaining the RCI would involve for Registers of Scotland, as well as for the Lands Tribunal for Scotland and Police Scotland, and they question how this is to be resourced.

It is worth noting that the draft legislation creating the UK Register of Overseas Entities has also been subject to criticism. A pre-legislative scrutiny report published in May 2019 raised various concerns about the draft legislation, many (unsurprisingly) involving the same issues that surround the RCI, such as exemptions, clarity and enforcement. The UK government published a response to the report on 18 July 2019, agreeing with some of the report's recommendations but rejecting various others.

## Conclusion

Identifying decision-makers behind land ownership in Scotland is a contentious issue among stakeholders. The Regulations go some way to implementing the Scottish Government's requirement for a register of decision-makers,

and it will be important for owners/tenants to be ready to submit the required information once the RCI becomes operational. However, significant concerns have been expressed that the Regulations do not go far enough to meet the aims of the Scottish Government's land reform programme. It is now for the Scottish Government to respond to these concerns. It remains to be seen how much this will change the current proposals, so watch this (transparent) space...

## Your Key Contacts



**Lisa Cruickshank**

Senior Practice Development

Lawyer, Edinburgh

D +44 33 0222 1705

M +44 7789 877179

[lisa.cruickshank@dentons.com](mailto:lisa.cruickshank@dentons.com)



**Graeme Myles**

Associate, Edinburgh

D +44 33 0222 1884

[graeme.myles@dentons.com](mailto:graeme.myles@dentons.com)



**Allan Cairns**

Partner, Edinburgh

D +44 33 0222 1679

[allan.cairns@dentons.com](mailto:allan.cairns@dentons.com)