Written submission from Global Witness

Introduction

Global Witness welcomes the introduction of the Bill and the subsequent opportunity to provide written evidence to the Rural Affairs, Climate Change and Environment Committee (RACCE). We are an international non-government organisation, which is based in the UK and works globally to break the links between corruption, conflict and natural resources.\(^1\) We strongly support the overall principles of the Bill, particularly commitments to: prepare and publish a “land rights and responsibilities statement”; establish a Scottish Land Commission; improve transparency of land ownership; and promote and support community ownership of land.

However, we are disappointed by the removal of certain proposals since the December 2014 consultation and are concerned that this has created a gap between the reformist rhetoric of the Bill’s Policy Memorandum and the technical provisions of the Bill itself. It is our opinion that the Bill should be strengthened in certain areas, in order for it to be able to fully achieve the Scottish Government’s ambitious programme of land reform.

Building on our earlier submission to the Scottish Government’s December 2014 Consultation on the future of Land Reform in Scotland\(^2\), our evidence submission focuses on Part 3 of the Bill: Information about control of land.

In parallel to this submission of evidence for the RACCE’s 14\(^{th}\) August 2015 deadline, Global Witness is also undertaking an analysis of the Bill from a human rights perspective however this work will not be ready by the Committee’s deadline. This analysis focuses particularly how the Bill compares to the Voluntary Guidelines on the Governance of Tenure of Land, Forests and Fisheries in the context of National Food Security because Global Witness has worked intensively on these Guidelines and was one of the representative civil society groups during their negotiation at the UN-FAO.\(^3\) We expect to submit this to the RACCE and circulate it within broader discussion forums during Stage 1 of the Bill’s progress.

Global Witness continues to offer its support to RACCE and the important process of land reform in Scotland and makes itself available for further comment on any aspect of this submission.

Analysis of the Bill and specific proposals for strengthening its provisions relating to Part 3: Information about control of land

a) Changes to the scope of the proposed Bill since the December 2014 Consultation

Global Witness strongly supported two proposals in the December 2014 consultation which relate to Part 3 of the Bill: Proposal 2) Limiting the legal entities that can own land in Scotland, and Proposal 3) Information on land, its value and ownership.

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\(^1\) For further information, please contact Megan MacInnes, Land Advisor at Global Witness, 7\(^{th}\) Floor, 1 Portsoken Street, London, E1 8BT, mmacinnes@globalwitness.org +44(0)1520744352 - +44(0)7540891837

\(^2\) Dated 9\(^{th}\) February 2015 and available on request.

\(^3\) For further information, see the UN-FAO website http://www.fao.org/nr/tenure/voluntary-guidelines/en/
Our experience globally indicates that State administrative systems which enable those who own or control land to hide their identities cause not only the commonly recognised problem of tax avoidance, but also facilitate corruption as well as hindering accountability. Although corruption is not a significant problem in Scotland, research by Andy Wightman and a recent Private Eye article, for example, demonstrate the extent of large estates in Scotland owned by tax-haven registered companies. In addition to the financial implications of tax avoidance, there is one of accountability. It will not be possible to implement the Scottish Government’s proposals for improved community engagement over decisions relating to land, if the individual(s) who own or control the land wish to remain elusive and are not accessible to local communities. As such, we believed the combined impact of proposals to both limit the legal entities which can own land in Scotland and improve public disclosure of information on land, its value and ownership would take substantial steps towards addressing these problems.

It is disappointing therefore to see that neither Proposal 2 nor 3 have appeared in the introduced Bill. What is proposed instead will not, in our opinion, be able to achieve the outlined objectives of the current Programme of the Scottish Government (as outlined in paragraph 94 of the Bill’s Policy Memorandum).

The justification for not including Proposal 2 in the Bill is that complex corporate structures could still be used to obscure land ownership and also makes reference to parallel efforts in the EU and the UK to improve the transparency of trusts and companies. Firstly, if potential loopholes have already been identified (such as the increased use of trusts) then the drafting of this Bill is the ideal opportunity to address these challenges through comprehensive regulation, rather than just setting the entire proposal aside. Secondly, Global Witness has been heavily involved in campaigning to strengthen the measures for beneficial ownership transparency in both the Anti-Money Laundering Directive (2015) in the EU and the UK’s Small Business, Enterprise and Employment Act (2015) and we are concerned that neither would deliver substantial improvements for transparency of land ownership in Scotland, for the following reasons:

- The EU’s Anti-Money Laundering (AML) Directive does require the disclosure of the beneficial owners of both companies and some trusts. However this will not be done through a publicly accessible database, only governments and those with “legitimate interests” will be able to access this information which, given that the target of the Directive is money laundering and terrorism financing, will not include "persons affected by land" as currently defined by the Bill Part 3 (35.2.b-c);

- The UK’s Small Business, Enterprise and Employment Act will result in a publicly accessible database of beneficial ownership, but only for companies, not trusts. Therefore if a company which owns land in Scotland is ultimately

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6 For further information see: http://services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html
owned by a trust, then the names of the trust and trustees will be disclosed in this database as the beneficial owner of the company, regardless of the jurisdiction in which the trust is based. However because charitable trusts usually do not include companies in their ownership structures, this Act will not help improve the transparency of land owned by charitable trusts;

- Also of concern however, given the role of British overseas territories and crown dependencies as tax havens and secrecy jurisdictions, is the limited geographical application of either regulation. Jersey and Gibraltar are the only British overseas territories and crown dependencies who will be implementing the EU AML Directive. At the end of 2014, the British overseas territories and crown dependencies were consulted on the new beneficial ownership registry being created by the Small Business, Enterprise and Employment Act and decided not to implement the public database beneficial ownership registry requirements;

- Finally, although the measures to disclose beneficial ownership by both regulations are mandatory in principle, their enforcement will depend on capacity and political will. The regulatory agencies in the UK have not got a strong track record of enforcing regulations governing companies and nothing during the Act’s negotiation and passing indicate anything is likely to change when it comes to these new disclosure requirements.

We therefore recommend that the Committee and broader Scottish Government reconsider the removal of Proposal 2) Limiting the legal entities that can own land in Scotland and undertake further research and legal analysis of the options available.

Despite the above limitations, both regulations adopt robust definitions of “beneficial owners” which are based on money laundering legislation and the international Financial Action Task Force.\(^7\) Under this definition the beneficial owner of a company, trust or other form of legal entity is an individual person (rather than a “legal person”) and this “person of significant control” can exert their control through holding at least 25% shares or voting rights in a legal entity, and / or the right (directly or indirectly) to appoint or remove a majority of the board of directors, and / or the right to exercise (or actually exercises) significant control over the entity.\(^8\) The purpose of this definition is to ensure that the ultimate beneficial owners of companies, trusts and other legal entities are actually identified, rather than just a series a shell companies and trusts within complex corporate structures. We refer to this definition of “persons of significant control” and its potential use in the Bill further below.

**b) Analysis of Part 3 of the Bill and its ability to improve transparency of land ownership in Scotland**

Part 3 of the Bill, which focuses on regulating Proposal 2 of the December 2014 consultation, is entitled “Right of access to information on persons in control of land” and aims to “provide affected parties, e.g. individuals or groups, with the right to

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\(^7\) This definition is available online: [http://www.fatf-gafi.org/pages/glossary/a-c/](http://www.fatf-gafi.org/pages/glossary/a-c/)

\(^8\) For further information see: [http://services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html](http://services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html)
request information about individuals that have control of land but who are not the legal owners” (paragraph 109 of the Bill’s Policy Memorandum).

The proposed changes to how information about control of land is disclosed, particularly the powers given to the Keeper, are some of the weakest parts of the Bill and do not yet provide the people of Scotland with the “right to access information on persons in control of land”, as the title suggests. The main concerns we have about the Bill’s proposals in Part 3 is: that the right of citizens to request information about land ownership is conditional on their ability to prove they are “affected”; a fee will be charged for such requests; the proposed Bill will still allow information about the controller and / or proprietor to be withheld from disclosure; and finally the information which can be requested may not actually disclose either the ultimate proprietor or controlled of the land.

In comparison, the Voluntary Guidelines on the Governance of Tenure of Land, Forests and Fisheries state that “States should ensure that information on tenure rights [previously defined in the document as covering ownership and use rights] is easily available to all, subject to privacy restrictions. Such restrictions should not unnecessarily prevent public scrutiny to identify corrupt and illegal transactions” (para 17.5). Meanwhile Denmark, which has already been recommend to the Scottish Government by others as a best practice example of land ownership transparency, has established a free, internet based and publicly available registry of all land ownership, including the identity of the registered owner.

In order for Part 3 of the Bill to achieve its stated objectives and be in line with international best practice, we would suggest the consideration of revisions in three areas. Firstly that disclosure of both the proprietor (paragraph 36) and those who control the land (paragraph 35) is done on the basis of a “person of significant control”, ie. the beneficial owner, as legally defined by the EU AML Directive and the UK’s Small Business, Enterprise and Employment Act, see above. Secondly, that such disclosure is a binding requirement on either the proprietor or those who control land, subject to privacy restrictions (see below), rather than the current proposal which will in practice be no more than voluntary. Such an approach is supported by global business leaders who recently called for regulations for corporate beneficial ownership disclosure because it makes good business sense as well as being good for society. Thirdly, removing the conditionality’s placed on access to information to only those directly affected and for the Government to adopt an approach of a presumption of disclosure of who owns land for public interest purposes.

As explained above, a “person of significant control” is an individual person (rather than a “legal person”) who exerts their control through holding at least 25% shares or

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10 This position was made by the “B Team”, global business leaders lead by Mo Ibrahim and Richard Branson, among others, who have come together to advance the wellbeing of people and the planet, further information is available here: [http://bteam.org/resources/ending-anonymous-companies-report-published/](http://bteam.org/resources/ending-anonymous-companies-report-published/). Similar statements have been made by Mark Moody Stuart, the Chairman of Hermes Equity Ownership Services, a member of the UN secretary-general’s High Level Advisory Group Panel on Sustainable Energy for All and Chairman of the Foundation for the UN Global Compact. He has previously served as the chairman of Anglo-American, and Shell, available here: [http://www.euractiv.com/development-policy/commonsense-solution-money-laund-analysis-533479](http://www.euractiv.com/development-policy/commonsense-solution-money-laund-analysis-533479)
voting rights in a legal entity, and / or the right (directly or indirectly) to appoint or remove a majority of the board of directors, and / or the right to exercise (or actually exercises) significant control over the entity. The adoption of this definition within paragraph 35.24.a as the meaning of persons in control of land would ensure the Scottish Government was able to identify those who actually, ultimately control Scotland’s land, rather than just a series of anonymous shell companies registered overseas.

It is even more important that this more robust definition of “person of significant control” is adopted within paragraph 36 on the proposed amendments to the powers of the Keeper, in Land Registration etc. (Scotland) Act. The current Bill proposes that the Keeper be empowered to request information about “individuals having a controlling interest in proprietors of plots of land and leases” (36.2.c) and the meaning of such “controlling interest” (36.2.d). Then term “controlling interest”, based on company law, would only disclose whichever single entity has the majority controlling share and could just result in the identification of another company, rather than all the named individual persons achieved through the use of “person of significant control”. In terms of closing the potential loophole of complex corporate structures identified in the Bill’s Policy Memorandum, this section could be further strengthened by the explicit inclusion of not just companies, but trusts and other legal entities, which would consequently take the Scottish Government beyond what the UK Government is currently considering.

However, if the Scottish Government’s intention to improve transparency of land ownership through this Bill is to focus on amendments to the Land Registration etc. (Scotland) Act, then some other sections of this Act should also be considered for revision, based on the results of the December 2014 consultation. The basic overall change would be to move the Act towards a presumption of information disclosure, in the public interest:

- Efforts should be made to speed up the recording of land ownership within the Land Register, this could most easily be done by changing the title of paragraph 48A to “power to require disclosure of information relating to proprietors” and further strengthening Keeper-induced registration powers (section 29 of the Act);

- The disclosure of the “persons of significant control” is only valuable if it is kept up to date, therefore systems need to be in place to ensure this information is regularly updated to the Keeper;

- Mechanisms to simply and further enable free public access to the Registry, under for example the principles of Open Data, should be introduced, potentially through amendments to paragraph 48A.2.f and g.

The gap between the reformist rhetoric of the Bill and the technical detail is also evident in the conditionality’s placed on those who can request information under paragraph 35. As described above, there are significant public interest reasons why the disclosure of those who control or are the proprietors of land should be freely and easily accessible for everyone. Therefore we could suggest that the clauses limiting

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11 Further information is available here: [http://data.gov.uk/](http://data.gov.uk/)
such a right to only those affected be removed and this route of disclosure be opened to all.

If robust amendments to the Land Register are made whereby information about the proprietor and “persons of significant control” are required, kept regularly updated and are freely and easily available to the public (as we hope our suggestions to paragraph 36 would allow) then the purpose of paragraph 35 potentially changes. The Bill currently proposes two routes to improve transparency of land ownership; one (paragraph 35) through an adhoc means for people directly affected by land to pay to request information on those who control it, in addition paragraph 36 empowers the Keeper to request additional information from proprietors than that which is currently kept in the Land Register. However, the relationship between these two processes is not clear, for example if a request from persons affected for information about those who control land is rejected, are they then able to request the Keeper to subsequently request that information from the registered proprietor instead?

Our suggested revisions to paragraph 36 would enable the Land Register to be the primary source of information about who owns and controls land and paragraph 35 to be become a publicly accessible compliance and accountability mechanism. In this way, members of the public could alert authorities to investigate cases where the Land Register is incorrect or incomplete, for example where those who control land do not appear to be the registered proprietor. This change of role for the authorities would be less administratively burdensome than paragraph 35 currently proposes, but would only successfully function if all requests and the responses from the investigative authority were publicly disclosed. One potential existing model for this change of role for government authorities under paragraph 35 is what is being developed by the UK Government in order to implement the EU’s Accounting Directive on corporate revenue payment reporting requirements. Because it is difficult for the UK’s Department of Business, Innovation and Skills to know which UK companies should be reporting revenues through this mechanism and therefore which should be investigated for non-compliance, a system is being established through which members of the public can recommend companies for investigation and the authorities are required to respond.

Our final comment on the draft Bill relates to the balance between disclosure of land ownership and control for public interest purposes and the need to protect personal privacy. This is a long and ongoing debate in Scotland but has also been raised within the UK through two recent regulatory processes which Global Witness has been involved. We would like to bring RACCE’s attention these two processes because until now progressive agreements have been made in both which prioritise disclosure of beneficial ownership, for public interest purposes:

- The Persons of Significant Control register which is being established through the enactment of the EU AML Directive and the UK’s Small Business, Enterprise and Employment Act;

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12 Further information is available here: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0034
13 Further information can be provided by Global Witness on request.
14 Further information on both of these processes can be provided by Global Witness on request.
The requirements placed on extractive industry companies in the UK for reporting revenue payments to governments (under the UK Government's commitment to the Extractive Industry Transparency Initiative), wherein companies in the UK have to disclose the name, date of birth and service address of the owner of a company, and their means of exerting control over the company.