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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Subordinate Legislation considered by the Delegated Powers and Law Reform Committee on 4 September 2018**



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# Contents

<b>Introduction</b>	<b>1</b>
<b>Points raised: Instrument/document laid for consultation</b>	<b>2</b>
The draft Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021 [proposed draft SG/2018/103] (Environment, Climate Change and Land Reform)	2
<b>Points raised: Instruments subject to negative procedure</b>	<b>4</b>
Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2018 (SSI 2018/211) (Social Security)	4
<b>No points raised</b>	<b>7</b>
<b>Annex</b>	<b>8</b>

# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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# Committee Membership



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**Alison Harris**  
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# Introduction

1. At its meeting on 4 September 2018, the Committee agreed to draw to the attention of the Parliament the following instruments-

The draft Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021 (SG/2018/103)

Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2018 (SSI 2018/211)

2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.

# Points raised: Instrument/document laid for consultation

## The draft Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021 [proposed draft SG/2018/103] (Environment, Climate Change and Land Reform)

### Background and Purpose

4. These proposed draft Regulations would create a new register- the Register of Persons Holding a Controlled Interest in Land, under section 39 of the Land Reform (Scotland) Act 2016 (“the 2016 Act”). The register is known in the draft as “the RCI”. The Keeper of the Registers of Scotland must establish and maintain the RCI.
5. The Register will contain information sufficient to identify persons (“associates”) who can influence or control owners and tenants of land. There will be an entry for each controlled person detailing their “associate/s”. Subject to various exceptions, there will be a controlled interest where a person own or tenants the land for or on behalf of the associate, or the associate has the right to exercise, or actually exercises, significant influence or control over the owner’s or tenant’s dealings with the land.
6. The draft Regulations are divided into 5 Parts and 2 schedules as follows-
  - *Part 1* sets out that the Regulations would come into force on 1 April 2021. This will enable the RCI to operate from 1 April 2021. It also explains meanings of terms used in the Regulations.
  - *Part 2* sets out what information the RCI would contain, how and when entries should be amended or removed, and how people can search for information.
  - *Part 3* sets out the duties on persons to provide information for publication in the RCI, the information required, and the offences that are committed in case of non-compliance.
  - *Part 4* contains further miscellaneous provisions in relation to the offences, and as to how inaccuracies in the RCI can be corrected. Regulation 22 provides that the Keeper may specify the forms to be used in relation to the Register.
  - *Part 5* relates to application and transitional provisions. The regulations would commence on 1 April 2021. There would be a 6 months transition period when owners and tenants, and their “associates”, should provide the required information to the Keeper. However, offences for failing to comply with those duties would not come into force until 1 October 2021.

7. The explanatory document laid with the draft Regulations contains considerable further detail as to the purpose of the instrument and the provisions. The document requires to be laid before the Parliament under section 41(2) of the 2016 Act.
8. The draft Regulations are subject to a “super affirmative” form of scrutiny procedure in the Parliament. This initially proposed draft of the instrument is laid for consultation under section 41(2) of the 2016 Act.
9. Sections 40 to 42 of the 2016 Act set out the full procedure.

### **Committee consideration**

10. The Committee considered the responses provided by the Scottish Government to the various questions it had raised in regard to the draft Regulations. These questions and the responses received are detailed in the **Annex**.

### **Recommendations**

11. **The Committee draws the proposed draft Regulations to the attention of the Parliament on the following reporting grounds:**

**(1) On ground (h), as the meaning of paragraph 15(a) to (c) of schedule 1 could be clearer. The effect of those sub-paragraphs is to provide examples to explain the type of situation where significant influence or control may exist in respect of an overseas entity. Reference is made to “company”. This could be clearer as the provision is not intended to refer to U.K. companies.**

**(2) On the general ground, as there is an instance of drafting which is not gender neutral. Draft regulation 7(1) refers to the Keeper of the Registers of Scotland as “she”.**

12. **The Committee notes that the Scottish Government has undertaken to correct those matters in the next version of the draft Regulations which would be laid under section 40 of the Land Reform (Scotland) Act 2016.**

# Points raised: Instruments subject to negative procedure

## Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2018 (SSI 2018/211) (Social Security)

### Purpose

13. The Regulations make further amendments to the Council Tax Reduction (Scotland) Regulations 2012 and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (“the principal Regulations”).
14. The Regulations are subject to the negative procedure. They come into force on 27th October 2018.

### Background

15. The Scottish Government has introduced measures to reduce the council tax liability of persons who have a low income, following the UK Government’s abolition of council tax benefit from April 2013. The principal Regulations came into force on 28 January 2013.
16. The Policy Note to the principal Regulations states that they seek to ensure that persons previously in receipt of council tax benefit would not be disadvantaged by its abolition, and will receive an equivalent reduction in liability for council tax (provided their circumstances remain the same) to the support they would have received by way of council tax benefit.
17. The Policy Note to these amending Regulations states that they do not alter the policy intention of the principal Regulations.

### Consideration

18. The Committee considers that these Regulations raise a devolution issue. This is for the same reasons that the Committee considered apply to the Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2017 (SSI 2017/236). The Committee considered that instrument on 31 October 2017.<sup>i</sup>
19. The Committee's consideration is the same as in relation to that instrument. The question before the Committee is whether or not these Regulations relate to the reserved matter of "a scheme supported from central or local funds which provides assistance for social security purposes to or in respect of individuals by way of benefits", as defined in Section F1 (social security schemes) of Part 2 of Schedule 5 of the Scotland Act 1998.
20. These Regulations amend and further the objective of the principal Regulations. The principal Regulations had as their objective the establishment of a scheme which replicated existing entitlements to council tax benefit support for persons as

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<sup>i</sup> 50th Report, 2017.

far as possible, for the financial year commencing 1 April 2013 and subsequent years.

21. The Committee notes that "providing assistance for social security purposes" at the end of the Section F1 reservation is defined to expressly include providing assistance in relation to an individual's liability for local taxes. The council tax is a local tax. The Committee also notes that the term "benefits" includes any form of financial assistance. The previous reserved social security scheme, council tax benefit, provided that assistance primarily in the form of a deduction from council tax, which is the mechanism applied in the principal Regulations.<sup>ii</sup> The Committee therefore concludes that there is a question as to whether the principal Regulations (and regulations which modify them) can therefore be said to fall within the F1 reservation.
22. The Committee recognises that the Scottish Government takes a contrary view. The Scottish Government contends that no question is raised as to whether the Regulations relate to matters which are reserved by Section F1 as referred to above. In relation to the principal Regulations, the Scottish Government has contended that they were properly made under section 80 of the Local Government Finance Act 1992. Section 80 gives the Scottish Ministers powers to prescribe conditions under which an individual's liability for council tax may be reduced. The Scottish Government has contended that this allows the Scottish Ministers to make provision which takes into account detailed information about an individual's financial situation in order to determine entitlement to a reduced council tax liability. The Scottish Government has contended that the principal Regulations make provision for a reduction for individuals with low income and some factors indirectly related to needs arising out of disability or other needs if, as a result of that disability or need, an individual is on a low income. The Scottish Government contends that the purpose of the Regulations is as described above and is not to provide assistance for social security purposes or by way of benefits.<sup>iii</sup>
23. The Committee's function in respect of these Regulations is to consider whether or not to draw attention to any potential devolution issue.
24. An Exception 10 has been inserted into the Section F1 reservation by section 28 of the Scotland Act 2016. This exception has given the Scottish Parliament powers to create new benefit schemes in areas of devolved responsibility where the requirements of the exception are satisfied, including that the new scheme must be funded from the Scottish Consolidated Fund.
25. In relation to the Council Tax Reduction (Scotland) Amendment Regulations 2017 and the Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2017 (SSIs 2017/41 and 326), the Committee suggested to the Scottish Government that framing a new discrete scheme could avoid the Committee's concern were that scheme to comply with the requirements of Exception 10. The Committee also highlighted that a new discrete scheme would have a further benefit of accessibility

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<sup>ii</sup> The council tax benefit scheme was previously contained in the Council Tax Benefit Regulations 2006 (SI 2006/215).

<sup>iii</sup> See [55th Report, 2012](#) of the Subordinate Legislation Committee, which provided the Scottish Government's analysis for the principal Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303).

to readers, if consolidated regulations could be produced. The principal Regulations are well in need of consolidation, as this is the fourteenth amending instrument.

26. On 23 January 2018, the Committee wrote to the Cabinet Secretary for Finance and the Constitution seeking a timetable for consolidation. The Cabinet Secretary responded on 7 February 2018 and indicated that he would update the Committee in the summer.<sup>iv</sup>
27. **The Convener proposed that the Committee considers that the Regulations raise a devolution issue and should be drawn to the attention of the Parliament on that basis.**
28. **The proposal was agreed by division (For 3, Against 2, Abstentions 0).**

### Recommendations

29. **Accordingly, the Committee draws the Regulations to the attention of the Parliament on reporting ground (f). The Committee considers that the Regulations raise a devolution issue as they may relate to matters which are reserved by Section F1 of Part 2 of Schedule 5 of the Scotland Act 1998 (social security schemes).**
30. **The Committee also agreed to write again to the Cabinet Secretary for Finance, Economy and Fair Work seeking an update on the issue of consolidation of the Regulations in light of the commitment given in his letter of 7 February 2018.**

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<sup>iv</sup> Letters from the Cabinet Secretary for Finance and the Constitution on this issue are available [here](#).

# No points raised

## **Environment, Climate Change and Land Reform**

CRC Energy Efficiency Scheme (Revocation and Savings) Order 2018 (SI 2018/841)

## **Health and Sport**

National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2018 (SSI 2018/212)

## **Justice**

Firefighters' Pension Scheme (Scotland) Amendment Order 2018 (SSI 2018/215)

Firemen's Pension Scheme (Amendment) (Scotland) Order 2018 (SSI 2018/216)

Regulation of Investigatory Powers (Prescription of Offices, etc. and Specification of Public Authorities) (Scotland) (SSI 2018/218)

Licensing (Fees) (Scotland) Amendment Regulations 2018 (SSI 2018/256)

Scottish Administration (Offices) Order 2018 (SI 2018/781)

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Approval of Sentencing Guidelines) 2018 (SSI 2018/229)

## **Local Government and Communities**

Regulation of Social Housing (Influence of Local Authorities) (Scotland) Regulations 2018 [draft]

Letting Agent Registration (Scotland) Amendment Regulations 2018 (SSI 2018/196)

Housing (Amendment) (Scotland) Act 2018 (Commencement and Savings Provisions) Regulations 2018 (SSI 2018/253 (C.18))

## **Rural Economy and Connectivity**

Scalpay Island, Isle of Skye, Scallops Several Fishery Order 2018 (SSI 2018/245)

## **Social Security**

Public Services Reform (Poverty and Inequality Commission) (Scotland) Order 2018 [draft]

Public Bodies etc. (Scotland) Act 2003 (Treatment of Poverty and Inequality Commission and Scottish Commission on Social Security as Specified Authorities) Order 2018 [draft]

# Annex

## Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021 [proposed draft] (SG/2018/103)

**On 27 July 2018, the Scottish Government was asked:**

1.(a) Is it considered that the requirements in the draft Regulations to disclose, and publicly register, information may interfere with rights conferred by Article 8 of the Convention (right to private life)?

(b) If not, please explain the grounds on which that view is based.

(c) If so, please explain why it is considered that the requirements comply with the “well established four stage test”, used to determine whether the interference can be justified:

(i) Why is the legitimate aim of the requirements sufficiently important to justify limiting a fundamental right?

(ii) Why are the requirements which have been designed to meet it rationally connected to the aim?

(iii) Why are they no more than are necessary to accomplish the aim?

(iv) Why do they strike a fair balance between the rights of the individual and the interests of the community? (E.g. R. (on the application of Steinfeld and Keidan) [2018] UKSC 32).

(d) Please explain accordingly why the provisions are considered to be compatible with Article 8 with reference to-

(i) the requirements of owners or tenants of land to disclose information about “associates” contained in draft regulations 8 to 10, which would require to be publicly registered by the Keeper in accordance with draft regulation 3, and

(ii) the requirements of “associates” to provide information of association in accordance with draft regulations 12 and 13.

2. Draft regulation 3(4) provides that the Register of persons holding a controlled interest in land (RCI) is to be in such form as the Keeper considers appropriate. Section 39(1)(b) of the 2016 Act provides that the RCI would be a public register.

Should there be some adjustment made to draft regulation 3(4), to clarify that (despite the Keeper’s discretion otherwise as to its form) the register must be public?

3. Draft regulation 7(1) refers to the Keeper as “she”. Should this be adjusted to gender neutral drafting (and as a subsequent Keeper may be male)?

4. Draft paragraph (6) of regulation 8 requires the notice of the information to be provided in terms of paragraph (3) to be given within 60 days beginning with the day on which the “associate” becomes [and not “becomes or became”] an “associate” of the person who requires to provide the information to the Keeper. Breach of that requirement is an offence in terms of regulation 8(7).

Draft paragraph (1)(a) of regulation 23, however, provides that the Regulations apply in relation to a “recorded person” (RP) whether the “association” with the person was formed before or after the commencement of these Regulations. Paragraph (2)(a) provides that during the transitional period (from 1 April to 1 October 2021) the offence in regulation 8(7) does not have effect.

(a) Please clarify the intended effect of that transitional exemption in respect of regulation 8(7)?

(b) Could the draft provisions be made clearer, in particular in relation to an “association” which may be formed prior to 1 April 2021?

5. Draft head (iii) of paragraph 12(b) of schedule 1 provides for some criteria (among others) when Part 5 of the schedule (overseas entities) applies. The Part applies to an “associate” where the associate has the right to exercise significant influence or control over “a partnership or unincorporated body which is not a legal entity or a trust, but in respect of which head (i) or (ii) would apply if the partnership, body or trust were an individual”.

Does that provision require any clarification or adjustment, in respect that heads (i) and (ii) do not refer to control over an individual, but refer to control over entities which voting rights exist in, and over a board of directors or equivalent management body? Otherwise please explain why head (iii) is considered to be in appropriate terms?

6. Why is it appropriate that paragraph 15(a) to (c) of schedule 1 each cite examples related to companies only, and rather than “legal entities”, given that paragraph 2(1) of schedule 2 lists companies as being subject to other transparency regimes?

7. Is there is an error in paragraph 18 of schedule 1, which refers to a definition of “unincorporated body” in paragraph 9, but that paragraph does not appear to describe such types of bodies?

8. Why are the draft Regulations titled “2021” (but the heading on the first page states “2018 No.”)? Is this an error, or is it proposed that the Regulations would be made in 2021?

## **The Scottish Government responded as follows:**

### **Question 1**

(a) The Scottish Government considers that Article 8 ECHR would be engaged by the provisions of the draft regulations. The concept of “private life” is not to be interpreted restrictively, and it seems clear from the case law of the Strasbourg court that respect for private life comprises the right to establish and develop relationships with other human beings and there is no reason in principle to justify excluding activities of a professional or business nature from the concept: see, for example, *Amann v Switzerland*.<sup>v</sup>

(b) On the basis of what has been said above, this question falls.

(c) Article 8(2) ECHR sets out the grounds on which an interference with Article 8(1) rights can be justified. On the basis of what has been said in response to question 1(a), it is

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<sup>v</sup> App. No. 27798/95, ECtHR (Grand Chamber), Judgment, 16 February 2000) para. 65.

necessary to ensure that public disclosure of information must be (i) in accordance with the law, (ii) pursues one or more of the legitimate aims set out in article 8(2) and (iii) is necessary in a democratic society to achieve the legitimate aim or aims.<sup>vi</sup>

In order to assess the proportionality of an interference, the four stage test as set out in the *Bank Mellat* case<sup>vii</sup> must be met. The Scottish Government's views on each limb of the test are set out below:

(i) the legitimate aim that these draft regulations pursue is to increase the transparency of land ownership in Scotland, with the broader aim that land in Scotland should be sustainably used and developed. The Scottish Government's view is that this is a sufficiently important aim to justify the limited interference with the right to respect for private life involved in the disclosure of information under the RCI.

(ii) The Scottish Government considers that the draft regulations are rationally connected to this aim. In the *Bank Mellat* case, the majority in the Supreme Court held that the test of rationality will be failed where a measure is arbitrary in creating a distinction that treats qualitatively similar situations differently. The draft regulations seek to apply consistently where associations are formed, taking account of the different types of entity to which the draft regulations apply. Regulation 10 provides that the RCI must be updated on an event driven basis, which means that changes which occur after the initial registration of an individual's information are treated in the same way as when they initially register information. The draft regulations recognise, however that certain types of entity are already subject to other transparency regimes, which despite pursuing different policy objectives, in practical terms require the public disclosure of the same or similar information that the RCI would seek from such entities. On that basis, the Scottish Government considers that there is a rational justification for taking a different approach in such cases.

(iii) The Scottish Government considers that the information required to be disclosed under the draft regulations is no more than is necessary to achieve the legitimate aim. The information required is the minimum necessary to enable identification of a recorded person or an associate and does not, for example, request any information about financial status. The reason for requiring information about an individual's month and year of birth is simply to allow for distinction between different individuals with the same name (e.g. John Smith). The Scottish Government considers that the information required to be provided under the draft regulations is within the margin of discretion that should be afforded to a lawmaker in determining what would unacceptably compromise the achievement of the objective.

(iv) The Scottish Government considers that the proposals strike a fair balance between the rights of the individual and the interests of the community. As has already been noted, they pursue a legitimate aim in a way that does no more than necessary, as regards the individual, to achieve that aim. Draft regulations 14-16 also create a system of security declarations that individuals who are associates may use to prevent information being made public if the inclusion of one or more of the associate's required details would put the associate or an individual connected with the associate at risk of violence, abuse, threat of violence or abuse, or intimidation.

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<sup>vi</sup> *Buck v Germany* [2005] ECHR 267, paragraph 31

<sup>vii</sup> *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39

Furthermore, schedule 3 of the draft regulations provides a list of evidence that will support an application for a security declaration. Under regulation 14(4)(b), it is possible for the Keeper to consider other evidence not listed in schedule 3 in certain circumstances. This recognises that there is a broad and to some extent unforeseeable range of circumstances in which disclosure of information might put an individual at risk, and seeks to ensure that, in such circumstances, it is possible for an individual to benefit from the protection of a security declaration.

It is possible to appeal any decision of the Keeper in relation to security declarations to the Lands Tribunal for Scotland under regulation 16. In addition to security declarations, under regulation 4 it is possible for the Keeper to amend the RCI if they become aware of an inaccuracy and it is possible for a person to refer a question of the accuracy of the register to the Lands Tribunal for Scotland under regulation 17. The Scottish Government's view is that, taken together, these provisions strike a fair balance and create sufficient safeguards to protect individuals' rights.

**(d)(i)** In relation to the requirements of owners or tenants of land to disclose information about "associates" contained in draft regulations 8 to 10, which would require to be publicly registered by the Keeper in accordance with draft regulation 3, the Scottish Government considers that these are compatible with Article 8.

For the reasons described above, we consider that draft regulations 8 to 10 are compatible with Article 8. Information about the owners or tenants of land to which the draft regulations relate is already to some extent publically available through the Land Register. The RCI is considered to be an additional measure designed to disclose where land is held by one person on behalf of another. This is why it is necessary to place a duty on the owner or tenant of land under regulation 8.

The information required by regulation 9 is the minimum necessary to achieve the objective of the draft regulations.

Regulation 10 allows for the RCI to be updated when changes to associations occur. This ensures that any interference with an individual's right is minimised on an ongoing basis and only occurs when it is necessary for the achievement of the legitimate aim.

**(d)(ii)** The duties on associates imposed by draft regulations 12 and 13 of the proposed draft regulations are ancillary duties to the primary duty in regulation 8. They are intended to ensure the information about associates is obtainable.

Regulation 12 is a duty on associates to self-report. This is designed to ensure that information about associates is capable of being included in the register (i) where the person to whom regulation 8 applies has not been able to identify that a new association has been created, or (ii) where a person to whom regulation 8 applies is deliberately trying to avoid placing information about that associate on the register.

Regulation 13 is intended to ensure that, when a person to whom regulation 8 applies seeks to verify an associate's required details under regulation 8(4), the associate must respond to that request.

The Scottish Government's view is that these draft regulations comply with Article 8 ECHR on the basis that they pursue the legitimate aim described above, and are rationally connected to that aim because they apply consistently to all associates. They are considered to be the minimum necessary to achieve the aim, because as described without these measures it would be possible for an associate to withhold information or not

respond to requests without sanction. This would unacceptably undermine the effectiveness of the regulations. The provisions strike a fair balance because the associate retains the ability to make a security declaration if need be, notwithstanding the requirements of regulations 12 and 13. The draft regulations still allow for changes in the associate's status to be taken into account (see regulations 10 and 17). The Scottish Government's view is that there are sufficient safeguards in place to protect individual's privacy rights.

## Question 2

The Scottish Government considers that draft regulation 3(4), when read together with regulation 7, ensures that the RCI is a publicly accessible register. However, in response to the Committee's question, we intend to adjust draft regulation 3 to make express reference to the public nature of the register there.

## Question 3

The Scottish Government will adjust this in the next version of the draft regulations. We are grateful to the Committee for drawing this to our attention.

## Question 4

(a) The effect of the provisions here is that recorded persons who already have associates prior to 1st April 2021, and associations formed during the transitional period, have up until 1st October 2021 to give notice of the association under regulation 8(3).

Draft regulation 8 is framed to be forward looking, as that will become the norm. However, existing associations will need to be registered. The Scottish Government's view is that the simplest way to do that is to suspend the penalty for a failure to comply in respect of all associations for a transitional period.

This will allow time for the Scottish Government to raise awareness of the RCI and for people who may be affected by the regulations to take advice before the penalty becomes available. While persons who should give notice and associates may therefore be in breach of some of their reporting obligations during that time, they are not subject to the criminal sanction.

(b) The Scottish Government will consider whether it is possible for this to be made clearer in the next version of the draft regulations and will include suitable text in the explanatory note to the draft regulations describing the effect of the provisions.

## Question 5

Paragraph 12 of schedule 1 of the proposed draft regulations sets out who may be an associate where the recorded person is an overseas entity.

"Overseas entity" is defined in paragraph 17 of schedule 1. Overseas entities must be "legal entities" (as defined in paragraph 16 of schedule 1). Therefore, in Part 5 of schedule 1, the **recorded person** whose associates must be disclosed is a legal entity.

An associate of an overseas entity is a "person" by virtue of paragraph 12 of schedule 1. Therefore **an associate** can be an individual or a legal person, and both individuals and legal persons are capable of exercising the control set out in the conditions in heads (i) and (ii) of paragraph 12.

Paragraph 12(b)(iii) addresses the situation where there is a person who controls a thing which doesn't have legal personality - but which thing nonetheless has control over the recorded person the way described in the condition in paragraph 12(b)(i) or (ii).

Paragraph 12(b)(iii) seeks to prevent the use of interposed non-legal persons to hide (or inadvertently obscure) who is actually in control of the recorded person.

Although such situations may also be caught under paragraph 12(b)(iv), the Scottish Government considers that it is useful to have the express provision in paragraph 12(b)(iii) as it is something which we think may come up regularly in practice.

For example:

RP is an overseas body corporate with legal personality which owns land in Scotland.

An English partnership (EP) (which does not have legal personality) holds 30% of the voting rights in RP.

A is a former managing partner who retains significant control over EP. A has no direct relationship with RP.

Although EP is an associate of RP, because it does not have legal personality and may not be subject to its own reporting requirements, it is necessary to look for the natural or legal person who controls EP to obtain the full picture. The draft regulations therefore provide that because A has that control over EP, A is therefore also an associate of RP.

"Individual" in the context of paragraph 12(b)(iii) does not refer to the **recorded person** (an overseas entity) but refers to the unincorporated body in which the associate exercises significant influence or control. Paragraph 12(b)(iii) seeks to explain how such bodies are to be treated – in the example above, EP is treated as if it is an individual for the purposes of determining whether it meets the conditions in heads (i) or (ii) of paragraph 12(b). This then makes it possible to determine whether or not A needs to be registered as an associate of RP.

## **Question 6**

The effect of paragraph 15(a) to (c) of schedule 1 is to provide examples to explain the type of situation where significant influence or control may exist in respect of an overseas entity. The expression "company" was used because it was felt this was the most readily understandable type of overseas entity.

This provision is not intended to refer to UK companies, which as the Committee note are listed in paragraph 2(1) of schedule 2 of the draft regulations.

The Scottish Government accepts, however, that this use of the expression "company" may be unclear in this context and we will consider whether a different expression may be preferable in the next draft of the regulations.

## **Question 7**

The reference to paragraph 9 of schedule 1 refers to the wider description of "unincorporated body" in paragraph 9 as "an unincorporated body of persons". The Scottish Government agrees that this is unclear and thanks the Committee for drawing it to attention. Suitable adjustment will be considered for the next draft of the regulations.

## Question 8

It is intended that the draft regulations will be laid in 2021. The numbering in the headnote is an error. We are grateful to the Committee for pointing this out and will correct the error in the next version of the draft regulations.

### **On 22 August 2018, the Scottish Government was asked the following supplementary questions:**

(1) It is indicated that, in relation to Article 8 of the Convention, the legitimate aim of the draft Regulations is to increase the transparency of land ownership, with the broader aim that land in Scotland should be sustainably used and developed. We assume that it is considered that this aim comes within the justification available in Article 8(2) for provisions which further "the economic wellbeing of the country", as none of the other justifications specified in Article 8(2) appear to relate to the sustainable use and development of land.

Please further explain on what grounds it is considered that transparency of land ownership and the sustainable use and development of land properly further one of the justifications for an interference with the right which are specified in Article 8(2)?

(2) (i) Paragraph (c)(iii) of the response to Question 1 states that the Scottish Government considers that the information required to be disclosed under the draft Regulations is no more than necessary to achieve the legitimate aim, with reference to the information required to be disclosed to enable the identification of a recorded person or "associate".

Please explain, however, why the requirements for registration and publication of controlled interests in land (subject to the safeguards available where persons are at risk of violence, abuse, threat of violence or abuse, or intimation in draft regulations 14 to 16 and schedule 3) do no more than necessary to achieve the aim of sustainable use and development of land - given that the requirements for the registration and publication of information do not appear to relate to how particular land is being developed and used, but might apply, for instance, in circumstances where a controlled interest has been created for reasons connected with tax, financial or corporate planning?

(ii) In that respect, why is it considered that the legitimate aim of sustainable development and use could not be achieved by a less restrictive alternative which might, for example, define which owners or tenants the regulations apply to, what constitutes a controlling interest, and/or which persons are treated as having a controlling interest, by reference to adverse effects on persons affected by the land or on neighbouring land, or a right of persons affected by the land (only) to have information disclosed to them?

(3) Paragraph (c)(iv) of your response to Question 1 explains how it is considered that the "fair balance" test is met, in terms of a balance between the interests of the community to have the information disclosed, and the interests of individuals not to disclose if this would put them at risk of violence, etc. However the Regulations also appear to involve the balance between the community interest in disclosure of the information, balanced against persons' rights not to have private information disclosed, for example in circumstances where a controlled interest may have been created for reasons connected with personal tax, financial or corporate planning. Please explain how the "fair balance test" is considered to be met, in relation to the balancing of those interests?

(4) Can other examples within Europe be provided where analogous requirements for the registration and publication of controlled interests in land are in force?

## The Scottish Government responded as follows:

### Question 1

To the extent that the draft regulations interfere with the right to a private life, the Scottish Government considers that the requirements of the draft regulations are justifiable under Article 8(2) ECHR and necessary in a democratic society in the interests of the economic wellbeing of the country.

In terms of ECHR, the European Court of Human Rights has held that a wide range of matters have been justified as being in the interests of the economic well-being of the country.

For example in *Gillow v UK*<sup>viii</sup>, the ECtHR considered a licensing scheme for housing in Guernsey and held that it was legitimate for the authorities to maintain the population within limits that would permit the balanced economic development of the island.

In *Buckley v UK*<sup>ix</sup>, the enforcement of planning controls in relation to a Gypsy traveller pursued the legitimate aim of the economic wellbeing of the country.

There is also a wide margin of appreciation given to national authorities in the pursuance of economic and social policies.<sup>x</sup>

#### *The aims the draft regulations seek to achieve*

The increased transparency that the draft regulations seek to achieve is intended to further two main aims relating to the economic wellbeing of the country-

(i) to provide individuals and communities with the information necessary to engage those who control decision making in relation to land.

(ii) to support the design and delivery of policies that ensure that land in Scotland is sustainably used and developed.

These concepts are reflected in the Scottish Land Rights and Responsibilities Statement, published under powers set out in the Land Reform (Scotland) Act 2016.

There are three main factors that influence decisions over land and, therefore, outcomes from land – ownership, potential for use and potential for development. The way a government taxes, subsidises, regulates and controls these factors affects their respective influence on decisions over land and in turn the outcomes achieved from land (including economic outcomes). Greater transparency of land ownership and control over land is necessary to understand:

- patterns and diversity of landownership and control of land in Scotland at a national, regional and local level; and
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viii App No 9063/80

ix App No 20348/92

x *James v United Kingdom* (1986) 8 E.H.R.R. 123

- impacts of changes on inputs on land based decisions (laws, policies, taxation, subsidies) at a micro level and how these, in turn, affect outcomes from land at the strategic level;
- links between, and effects of, land based decisions on the sustainable development of communities and land, including how to promote better engagement between landowners, tenants and communities.

Greater transparency about the individuals who control land, i.e. who ultimately influence decisions on how land is owned, used and managed, is a significant part of achieving this understanding and in promoting and enabling sustainable development. It is not possible to develop an accurate understanding of patterns and influences on landownership without a clearer understanding of who controls land in Scotland and what influences their decision making.

### *The draft regulations*

The draft regulations are part of a wider package of land reform measures enacted by the Land Reform (Scotland) Act 2016. They seek to increase the transparency of who controls decision-making relating to land in Scotland.

Information about the legal owners of land in Scotland is generally available publicly through the Land Register, and Register of Sasines. In some cases, the availability of information about the legal owner of the land may not tell the full story of who controls the decision-making in relation to that land.

For example, in the case of a trust, the title to land will be held in the name of the trustees and there may be named beneficiaries or a class of beneficiaries. The purpose of the trust will be set out in the trust deed. There are examples of trusts being used for inheritance planning by traditional land owners, so that land is held by the trustees, who may change over time. Where such a change occurs, or where there are changes to trust purposes, it is likely that this would not be apparent from the Land Register. Such a situation would prevent clarity about the decision-making in relation to that land, potentially hampering the sustainable development of that land, with reference to the aims listed above.

Similarly, an overseas entity that owns land in Scotland may not be subject to reporting requirements in the UK or elsewhere. That can make it difficult to engage with in terms of its decision making over land.

Decision-making in relation to land can impact significantly upon individuals and communities. The Scottish Government has recently published guidance on engaging communities in decisions relating to land to support greater dialogue between those who make decisions about the use and management of land and people who are likely to be affected by such decisions. Decisions taken in relation to land can impact on the environmental development and maintenance of the land, the development of housing and commercial enterprise and the provision of public and community services. All of these factors can affect the economic wellbeing of the country.

For the reasons outlined above, the Scottish Government is of the view that the draft regulations are necessary in a democratic society in the interests of the economic wellbeing of the country.

## **Question 2**

**(i)** The Scottish Government recognises that a controlled interest may be created for legitimate reasons connected with tax, financial or corporate planning. Nothing in the regulations prevents, or interferes with, a person's ability to enter into such arrangements, or alters the legal effect of such arrangements.

The Scottish Government's view is that, while there are various reasons why a controlled interest may be created, the ultimate effect is the creation of an interest which has the potential to affect decision-making in relation to land in Scotland. The Scottish Government's interest is in increasing transparency about who controls decision-making in relation to land, and that is the purpose of these regulations.

As described above, the purpose of increasing the level of transparency in relation to who controls decision making in respect of land in Scotland is to improve the levels of information available in relation to the control of decision making in relation to land. This is to allow people affected by such decisions to better understand who is making them, particularly with a view to engaging with them about the use and management of the land, and to improve the ability of policy makers to design and implement policies in relation to land, especially with a view to the principles set out in the Scottish Land Rights and Responsibilities Statement.

The provisions of the draft regulations are focussed on how to identify a controlled interest, and this means the regulations are concerned with the arrangements put in place by individuals.

The regulations do not focus on particular types of land or particular uses of land because the focus of the power in section 39 is on defining what constitutes a controlling interest. The regulations relate to the arrangements that can be used to own land and control decisions about that land, rather than the uses of the land itself. Given the diversity of land in Scotland, the ways in which it may be used and managed and the potential effects on local communities, we have chosen not to prejudge the potential impact of a given use of land. Rather, the policy is to enable greater transparency so that affected people are better able to engage with those who control decision making as necessary. Additionally, increased transparency of ownership, use and management of land is one of the principles of the Scottish Land Rights and Responsibilities Statement.

The regulations do not apply in a blanket fashion to all types of arrangement. The list of persons in Schedule 2 who are exempted from the duty to report in regulation 8 recognise that other transparency regimes already exist in relation to certain entities or arrangements. Corporate structures, such as U.K. companies, will be subject to other reporting requirements and as such will not have to disclose their controlling interests under these regulations.

The draft regulations do not require purely financial interests to be registered as associations (see for example the conditions set out in paragraph 12 of Schedule 1 of the draft regulations). This is because the draft regulations are concerned with a person's ability to control decision making in relation to land. A purely financial interest may not equate to control, nor are financial interests the policy objective at the root of the regulations.

The Scottish Government's view is that these factors demonstrate that the information required by the draft regulations is no more than is necessary to achieve the objective of increased transparency with a broader aim of ensuring that land in Scotland is sustainably

used or developed because it seeks to provide a complete picture of land ownership in Scotland.

(ii) In considering whether the current proposals are no more than necessary to achieve the legitimate aims pursued, the Scottish Government's view is that the application of this test should not be unduly strict.

The storage and disclosure of the names and addresses of persons with a controlling interest in the proprietor is one that in the Scottish Government's view is reasonably open to regulation by law.

The key point in that context, which also overlaps with the question of fair balance, is that an adequate opportunity should be afforded to the individuals whose names and addresses will be stored and made public to either refute that they have a controlling interest or to make representations as to why there are stronger reasons for preserving their anonymity than any benefit that may occur from the disclosure of their identity. The existence of sufficient and adequate guarantees against arbitrariness and the possibility of effective control of the measure at issue are important aspects of the Convention case law: see, for example, *M.N v San Marino*.<sup>xi</sup>

As set out in our previous response of 14 August 2018, the Scottish Government considers that there are suitable safeguards in the draft regulations to ensure that an individual can challenge the accuracy of information in the register.

### Question 3

The Scottish Government considers that the fair balance test, in terms of the balance between the community interest in disclosure of the information, against a person's right not to have private information disclosed (for example when a controlled interest is created for reasons connected to tax, corporate or financial planning) is met.

The information that is to be provided in relation to an associate is set out in draft regulation 9. Where that person is an individual, the information that will appear on the register is their name, contact address and month and year of birth. The draft regulations do not require persons to disclose why they have entered into a particular arrangement that gives rise to a controlled interest, and no further information is required to be provided about the nature of any arrangements they have.

Therefore, publication of detailed information about a person's personal tax, corporate or financial affairs is not required (although in some cases this information may have to be disclosed for other purposes, e.g. a person may have to disclose the nature of their interests in a UK company under the Persons of Significant Control regime as set out under Part 21A of the Companies Act 2006).

The Scottish Government takes the view that it will not be possible to ascertain from the RCI register details of an individual's personal tax affairs or financial status.

However, insofar as the regulations pursue the aims described in the answer to question 1, the provision of the information required by regulation 9 of the draft regulations helps to achieve these aims by disclosing the existence of the association, making it clear that in relation to a particular piece of land, the person who owns or tenants the land is subject to

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the control of another person or persons, how many such persons exist and who they are. This allows for better engagement in relation to decisions as to the use or management of the land in question, and allows policy makers to understand the way in which land is owned and decisions in relation to land are controlled in Scotland.

Accordingly, the draft regulations strike a fair balance between the aim pursued and the right of an individual to privacy.

#### **Question 4**

The Scottish Government is not aware of any analogous approaches taken elsewhere in Europe.

