

Written submission from Community Land Scotland and Global Witness

Transparency of landownership

Considerations arising from the Scottish Government letter of 13th January to RACCE Committee regarding Part 3 of the Land Reform Bill with new proposals to deliver transparency of ownership and control of legal entities owning land.

18th January 2016

1. Introduction

1.1 As the RACCE Committee is aware, Community Land Scotland and Global Witness have been working collaboratively on the above issue; have given written and oral evidence to the RACCE Committee; and worked closely with Graeme Dey MSP on a particular amendment¹ to the Land Reform Bill as one way to seek to achieve the transparency of landownerships the Committee has been exploring and advocating.

1.2 The Scottish Government letter of the 13th January represents a welcome development of policy thinking. It also raises a number of questions and issues which it will be important to consider and bottom-out before Stage 3.

1.3 The proposals now before the Committee for a new regulation making power to Scottish Ministers are significant. They signal that reservations expressed in the Scottish Government response to the Committee's Stage 1 Report about the justification for public disclosure of persons of significant control of entities owning land, have been overcome.

1.4 This is very welcome and results no doubt from the further consideration of, and the improved reasoning of why the public interest is served through full transparency over landownership. These matters have been drawn out through Committee scrutiny of the issues. Community Land Scotland and Global Witness has developed and published papers on these matters recently.²

1.5 This further submission to the Committee seeks to raise matters the Committee may wish to consider when further engaging with and responding to the Scottish Government on their new proposed way of proceeding with Part 3 of the Bill.

1.6 The paper is designed to be a constructive contribution to discussion of the issues and to arriving at a sound, well understood and well-constructed outcome to the current debate. It is hoped that the matters addressed in this paper are helpful in

¹ Tabled amendment numbers 29, 30 and 36

² Community Land Scotland (2016) Public interest reasoning for full disclosure of who owns Scotland's land, available at: <http://www.communitylandscotland.org.uk/wp-content/uploads/2016/01/Public-interest-reasoning-for-full-disclosure-of-who-owns-Scotlands-land-updated-10-1-17.pdf>; Megan MacInnes has also compiled a memo entitled "Key points on improving transparency and information disclosure in the Land Reform (Scotland) Bill", on 11th January 2016, which has been circulated to the RACCE committee clerks and is available on request from mmacinnnes@globalwitness.org. In addition to these Community Land Scotland and Global Witness have both provided oral and written evidence to the RACCE and Scottish Government during earlier stages of the Bill's consideration.

enabling the Committee to undertake full consideration of and participation in the more detailed design of the proposal of the Scottish Government and the issues raised may help inform any initial response the Committee make to the Scottish Government on their proposal.

2. Considerations arising from the new proposal.

2.1 Justification for action

2.1.1 It would be of considerable value to have the Scottish Government confirm that they are satisfied that their proposed actions to bring about public disclosure are now capable of meeting ECHR and EU Law requirements in this regard (ie. are they justified)(the question of proportionality dealt with later in paper), as well as within the competence of the Scottish Parliament.³

2.1.2 The reason for doing so is that the letter from the Minister highlighted ongoing concerns in these areas and these critical details should not be left till Stage 3.

2.2 Why this route to a solution?

2.2.1 The proposal

2.2.1.1 Viewed from outside the internal considerations of the Scottish Government, there is a lack of clarity about the logic and necessity of the proposed route to resolve the issues, as opposed to a suitable amendment at Stage 3 of the Bill to completely achieve the objectives, building on what Graeme Dey MSP has tabled.

2.2.1.2 In summary, Graeme Dey's proposal is to require the registration of the beneficial owners of land (the same proposal as made by the Government), but instead of achieving this through a separate public register, he proposed it to be done through the Land Register. It should be borne in mind that the Scottish Government had not seen the specific text of this amendment prior to the evolution of their new position; however they were aware of Community Land Scotland and Global Witness' overall intention for Part 3 of the Bill since mid-December.

2.2.1.3 The Stage 2 discussions relating to Part 3 of the Bill and any Committee discussions on the Scottish Government letter can add further value to the whole process in securing an agreed outcome to what are currently two options – securing beneficial ownership transparency through the Land Register, or through a separate public register.

2.2.1.4 As such, identifying the pros and cons of each option to help enable Parliament to choose the most appropriate to Scotland's needs requires considerations of a number of issues, as follows.

³ Independent legal advice on the compatibility of the basis of Graeme Dey MSP's amendments was obtained by Global Witness which analysed the proposal's compliance with ECHR (articles 8, 14 and article 1, protocol 1), as well as the provisions of the EU Treaty. This legal advice has been circulated to the RACCE committee clerks and is available on request from mmacinnnes@globalwitness.org

2.2.2 Technical drafting matters

2.2.2.1 It is readily accepted that the Stage 2 amendment tabled by Graeme Dey MSP might be capable of improvements at a technical and drafting level, but these matters are unlikely to be of such magnitude that they would not be capable of being overcome prior to Stage 3, or necessarily be any greater than developing a suitable amendment to give new regulation making powers proposed.

- **Question** - It would be helpful to know if any impediment to the progress of Graeme Dey MSPs' proposal by the route of an improved amendment at Stage 3 is technical (and if so, how that could be overcome), or more than technical (see further questions below)?
- **Question** – It would further be important to understand from the Scottish Government how their alternative route overcomes these technical concerns?

2.2.3 Competence and compatibility with ECHR and EU Law

2.2.3.1 The proposed amendment put forward by Graeme Dey MSP has attempted to reconcile issues of competence and ECHR / EU Law compliance (supported by the legal advice obtained and the memo mentioned in the footnote above). Nevertheless, an impression has been given by the Government that they continue to have associated concerns about this amendment.

2.2.3.2 However, it would be difficult to reconcile any such remaining Scottish Government concerns with Graeme Dey's amendment with their own proposal to achieve the same outcome, in so far as the underlying principle of creating a publicly available register of beneficial ownership is concerned.

- **Question** - Are there competence or ECHR / EU Law concerns with the amendment proposed by Graeme Dey MSP, and if so, why would such competence questions not arise in relation to creating a regulating power to deliver a public register in the same way as delivering a public register by the means proposed in the (GD) amendment?
- **Question** - Beyond this, and if this is surmountable, as presumably it is regarded to be by virtue of the proposal now made by the Scottish Government, why and in what way would any regulation finally made, which sought to deliver a public register, be any more competent or compliant with ECHR / EU Law than that (GD) amendment itself?

2.2.3.3 It is extremely important for there to be absolute clarity about these matters before we move into Stage 3 and the Bill is enacted.

2.2.3.4 There could be little worse than the Committee and the various interests around the Committee buying into the way forward now proposed by the Government, simply to be told at some point in the preparation of the actual Regulation that it was considered not possible to proceed further due to competence issues.

2.2.3.5 Further, and emerging from these considerations is the question of whether what is now being proposed by the Scottish Government is, in principle and

so far as any competence or ECHR / EU Law compliance questions are concerned, significantly different in intent to that proposed by the (GD) amendment and to the extent it would be competent while the (GD) amendment would not be.

- **Question** - If what is being proposed is significantly different in principle, although it is not perceived to be in the way in which it has been presented, in which ways is it to be different in principle? For example, it will be important to establish if what is being now proposed by the Scottish Government is to have any lesser a purpose?

2.2.3.6 In considering compliance with ECHR and EU Law, the other factor needing consideration is proportionality – is the proposal fair and could it have been achieved through a less intrusive means.

2.2.3.7 This raises an important discussion around which of the possible options currently proposed to improve beneficial ownership transparency, which is most proportional.

- **Question** – Can the Government clarify if they have remaining concerns about proportionality relating to Graeme Dey MSP’s proposal?
- **Question** - If so, it will be helpful for them to explain why their proposal would meet the proportionality threshold when the (GD) amendment would not?
- **Question** - In particular, it would be helpful if they can set out why requiring the beneficial owners of land to register their details in a second register, in addition to the existing land title registration requirements, is believed to be a less intrusive means of achieving this objective than adding such a requirement directly to the Land Register itself?

2.2.4 A preferred approach?

2.2.4.1 If there are no insurmountable technical drafting, competence, ECHR or EU Law barriers, as we hope is now established as the case, the discussion around Part 3 should be able to focus on if the Scottish Government’s proposed approach simply represents a preferred approach, in light of all the scrutiny, discussion and debate around the issues, which as a matter of principle we could accept as entirely reasonable.

- **Question** – Can the Government helpfully set out why this route is preferred, in comparison to the proposal made by the Graeme Dey MSP amendment?
- **Question** – Can clarity be given as to the advantages seen through this route? For example, is it due to concerns relating to requiring disclosure of the beneficial ownership of land being not a primary objective of the Land Register? Or is it due to the route avoiding the need for a “request authority” to be identified and established (as proposed by the original s.35)? I.e. this question is trying to identify if the underlying principle of the Government is the same as the GD amendment, or not, and if not, how does it differ?

Question – If the underlying principle does not significantly differ from the GD amendment, why does the Government not consider that it would be preferable to

accept the GD amendment with whatever revisions they consider necessary, or, alternatively, to incorporate into their proposal the substantive elements of the GD amendment?

2.2.4.2 The Scottish Government's suggested route (setting up a public register of beneficial ownership, in parallel to the existing Land Register) raises some questions about whether this may add complexity to Scottish land title registration procedures; and how at a technical level the two registers will interact and enable the Scottish public to still be able to readily find out who owns land.

- **Question** – Will more detail be given before Stage 3 as to how these two registers will interact and how potential administrative complexities be overcome?

2.2.4.3 The foregoing points are extremely important as points of principle and as a starting point for considering how a regulation making power might work, allowing external stakeholders the opportunity to see the justifications for the approach and shape their input effectively.

3. The Regulation making power for the face of the Bill

3.1 Turning now to consideration of the proposed regulating power itself.

3.2 This route is of course, at this point in time, necessarily less certain as to its outcome as a lot of detail can only be finally considered within the Regulation itself when it comes to be made.

3.3 That is not necessarily a bad thing, however at a basic level; giving a power does not mean that power would necessarily ever be used (although we do not doubt the Scottish Government's stated intentions here); the eventual provisions of the Regulation may seek to deliver a less powerful answer than a developed (GD) amendment might otherwise deliver; currently unanticipated exemptions may be introduced to the Regulation, rendering it less powerful or effective; (as discussed above) there is still scope for competence questions to arise which may drive a lesser provision than would currently be seen as acceptable; the Regulation route is more open to change and alteration than the Primary legislative route. These are matters inherent to the approach being now proposed.

3.4 In this context, it will be important to provide as much re-assurance and certainty as possible to all those with a legitimate interest in the importance of this matter, given the absence of a full provision for the new public register on the face of the Bill. This points to the need to secure as much on the face of the Bill as to what is intended, leaving as little as reasonable and possible for subsequent interpretation.

3.2 Important considerations for what is put on the face of the Bill

3.2.1 Our preliminary thinking is that, at least, this should seek to require:

- Scottish Ministers being given a duty to bring forward a Regulation under the provisions, not that the matter of bringing forward a regulation is discretionary

- The Regulation to be brought forward within a year of the commencement of the Act
- A clear specification of what the Register would be, ie, a public register for inspection by members of the public of person(s) of significant control of proprietors of land, and which is kept up to date
- That person(s) of significant control are defined in the Regulation. We would suggest this definition to be based on the one already applicable to Scotland through the UK-wide Small Business, Enterprise and Employment Act, 2015⁴
- That the register is appropriately linked to the land register
- That it provides for appropriate anti-avoidance measures
- That it would provide for non-disclosure of information held in appropriate exceptional circumstances to defined in the regulation.
- That exemptions from the registration requirement should be only available to exceptional and limited types of legal entities (ideally named on the face of the Bill)
- That a commencement date for this section is clear and immediate upon Royal Assent
- That it would be for super-affirmative procedure, embracing full and open consultation before it is tabled and such procedure should apply to changes to subsequent the regulation
- That it would only be possible not to have such a register, which continues to meet the requirements set out on the face of the Bill, following the repeal of the requirement for this

4. Conclusion

4.1 We believe it will be important that the RACCE Committee and stakeholders have the opportunity to see a draft of the regulation well in advance of the deadline for the Scottish Government tabling its amendment for Stage 3.

4.2 As indicated at the start of this paper, it is hoped that the matters addressed here are a helpful contribution in enabling the Committee to continue its detailed and effective scrutiny of the Bill, to participate in the more detailed design of the proposal of the Scottish Government, and may be helpful background in informing any response the Committee make to the Scottish Government on their proposal.

Community Land Scotland and Global Witness

18th January 2016

⁴ The full Act is available for download here:
http://www.legislation.gov.uk/ukpga/2015/26/pdfs/ukpga_20150026_en.pdf