PUBLICITY AND PRIVACY IN LAND REGISTRATION IN SCOTLAND

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Abstract

This dissertation takes two seemingly incompatible concepts, publicity and privacy, and analyses them in the context of land registration. In Scotland, generally the transfer or creation of real rights in land requires registration in the Land Register. This external act of registration meets the property law principle of publicity, which ensures third parties are protected by being able to gather information on rights which are enforceable against them. A number of reforms have been implemented recently in order to improve the fulfilment of the publicity principle and there have also been wide-ranging reforms to the law and practice of registration generally with the stated goal of improving transparency. At the same time, protection of privacy, particularly in relation to personal information, has become evermore important and is analysed as a significant aspect of personal autonomy, identity and self-determination. Recent legislation such as the Human Rights Act 1998 and the Data Protection Act 1998 have introduced a number of measures to protect against unjustified violations to privacy and the harms which can result from privacy invasions. This dissertation undertakes a detailed examination of how the publicity principle of property law and the protection of privacy can operate alongside one another in the modern land registration system of Scotland. It concludes that the publicity principle does not necessarily require unfettered public access to land information and recommends a number of law reform measures which would enhance privacy protection while still allowing for the publicity principle to be met.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Michael Arthur

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Abbreviations

4MLD	Fourth Money Laundering Directive
Berlee, *Access*	A Berlee, *Access to personal data in public land registers: Balancing publicity of property rights with the rights to privacy and data protection* (2017). Submitted PhD Thesis, Maastricht University.
DPA 1998	Data Protection Act 1998
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GDPR	General Data Protection Regulation
ICO	Information Commissioner's Office
King, "Completion"	J King, "Completion of the Land Register: The Scottish Approach", in McCarthy et al (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 317
KIR	Keeper-induced Registration
LR(S)A 2012	Land Registration etc. (Scotland) Act 2012
LRRG, "Land"	Land Reform Review Group, "The Land of Scotland and the Common Good" (2014). Available at http://www.gov.scot/Resource/0045/00451087.pdf

Nieuwenhuis, "Autonomy"	H Nieuwenhuis, "The Core Business of Privacy Law: Protecting Autonomy", in K S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (2007) 15
PSC	People with Significant Control
RCI	Register of Controlling Interests
Reid, *Privacy*	E Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010)
Reid, *Property*	K G C Reid et al, *The Law of Property in Scotland* (1996)
Reid and Gretton, *Land Registration*	K G C Reid and G L Gretton, *Land Registration* (2017)
RoS	Registers of Scotland
RoS, "Annual Report 2015-2016"	RoS, "Annual Report 2015-2016" (2016). Available at https://www.ros.gov.uk/__data/assets/pdf_file/0008/49598/RoS_Annual_Report_2015-16.pdf
RoS, "Completion Consultation"	RoS, "Completion of the Land Register. Public Consultation" (2014). Available at https://www.ros.gov.uk/__data/assets/pdf_file/0020/7265/consultation_lrc.pdf
RoS, "Completion Consultation Report"	RoS, "Completion of the Land Register. Report on the Public Consultation" (2015). Available at https://www.ros.gov.uk/__data/assets/pdf_file/0015/11670/LR-completion-consultation-report-v-0-9.pdf
RoS, "KIR Consultation"	RoS, "Keeper-induced Registration Consultation Document" (2015).

	Available at https://www.ros.gov.uk/__data/assets/pdf_file/0016/27331/KIR-consultation-2015.pdf
RUCCEC, "Land Reform"	Rural Affairs, Climate Change and Environment Committee, "Stage 1 Report on the Land Reform (Scotland) Bill" (2015). Available at http://www.parliament.scot/S4_RuralAffairsClimateChangeandEnvironmentCommittee/Reports/RACCES042015R10Rev.pdf
Scottish Government, "Controlling Interests consultation"	Scottish Government, "Improving transparency in land ownership in Scotland: a consultation on controlling interests in land" (2016). Available at http://www.gov.scot/Resource/0050/00505355.pdf
SLC	Scottish Law Commission
Solove, "Access and Aggregation"	D J Solove, "Access and Aggregation: Privacy, Public Records, and the Constitution" 2002 86(6) Minnesota Law Review 1137.
Solove, *Privacy*	D J Solove, *Understanding Privacy* (2008)
Van Erp, "Contract and Property Law"	S van Erp, "Contract and Property Law: Distinct, but not Separate" (2013) 9(4) ERCL 307
Van Erp, "Property Law"	S van Erp, "From 'Classical' to Modern European Property Law?" in A Sakkoulas and E Bruylant (eds), *Essays in honour of Konstantinos D. Kerameus: Festschrift für Konstantinos D. Kerameu,* vol I (2009). Available at https://ssrn.com/abstract=1372166. The page numbers used will be those in the online article.

Van Erp, “Transparency”	S van Erp, “The twilight zone of transparency and privacy” (2014) 3(1) EPLJ 1
Vennard, “Registration”	A Vennard, “Land registration: the next 30 years?” (2010) 1 SLT (News) 1

Chapter 1 Introduction

1.1 Aims

Robbie and Berlee recently posed the question: "is all publicity good publicity?"[1] The aim of this dissertation is to determine how the concepts of publicity and privacy can best operate alongside one another in land registration in Scotland. Such an analysis has rarely been undertaken but is essential in order to ensure that Scotland has a land registration system which protects both rights held in land and individuals' privacy rights.[2] The property law publicity principle, which protects third parties by allowing them to access information on rights which can be enforced against them, is fulfilled for land transactions through registration in a public register. Reforms have recently been introduced to improve the accessibility of information on land, which has extended further than that required to meet the publicity principle. This, in turn, has raised concerns about privacy. Privacy violations, in particular those related to personal information, can result in various harms and recent legislation such as the Human Rights Act 1998 and the Data Protection Act 1998 have been enacted to provide privacy protection. Through a detailed analysis of both the publicity principle and the protection of privacy, this dissertation examines the publicity principle from the point of view that it does not require unrestricted access to land information and makes a number of recommendations for law reforms which would improve privacy protection while still allowing for the publicity principle to be met. Due to space constraints, natural persons will be the focus of discussion, although it is recognised that legal entities such as companies have privacy rights under certain circumstances protected by Article 8(2) of the European Convention on Human Rights.[3]

1.2 Methodology

This dissertation takes a doctrinal approach with elements of comparative research. To achieve the research aim it was necessary to carry out an in-depth

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[1] J Robbie and A Berlee, "Publicity and Privacy in Land Reform in Scotland" (2015). Available at http://schooloflaw.academicblogs.co.uk/2015/09/24/publicity-and-privacy-in-land-reform-in-scotland/

[2] See Berlee, *Access* for a comparison of publicity and privacy in the Dutch, German and English jurisdictions.

[3] For example, see *Societe Colas Est v France* (2004) 39 EHRR 17 para 41.

analysis of the legislation which governs both land registration and privacy protection along with the case law which has interpreted such legislation. This analysis was enhanced through the use of secondary sources of literature, including books, articles, consultation documents and blogs. The consequences of privacy violations on society were also investigated along with an examination of the approaches used by other jurisdictions, in particular, England and Germany, to meet publicity and protect privacy.

1.3 Structure

This dissertation is largely split into two parts; one part dealing with publicity contained in Chapters 2-3 and one part dealing with privacy contained in Chapters 4-5. The same approach is used for both parts; first there is a chapter describing the theory which encompasses certain fundamental concepts, followed by a chapter analysing how the theory is put into practice. Chapter 2 explores the principles of *numerus clausus*, publicity and transparency while Chapter 3 investigates how the publicity principle is met through land registration, together with an outline of related registration developments. Chapter 4 introduces the concept of privacy and provides a taxonomy of the various harms which can result from privacy infringements. Chapter 5 then analyses these harms in relation to land registration and evaluates legislation which has been enacted to protect privacy. Finally, Chapter 6 then provides a number of recommended reforms based on the research undertaken and this is followed by the conclusion in Chapter 7.

Chapter 2 The principles of *numerus clausus*, publicity and transparency

2.1 Introduction

This chapter will introduce two important principles for property rights; the *numerus clausus* and publicity principles. The definition of publicity and what is required to meet this principle are of key importance for determining when the creation and transfer of these property rights is achieved and these are critically analysed in this chapter. This is followed by a discussion of the benefits which arise when the publicity principle is fulfilled. The chapter concludes with a critique of the Scottish Government's drive for accountability of landowners and its use of the term transparency to justify the collation and dissemination of increasing levels of personal data of landowners.

2.2 Background

Rights can be categorised as being either personal or real. Personal rights are legal relationships between two parties. An example of such a right is a contractual arrangement. In general, there is freedom to contract and individuals can decide the content of legally binding agreements. The law can provide a number of protective limitations, for example, to prevent fraud, force and fear, and undue influence but generally freedom to contract continues to drive the binding nature of contractual arrangements.[4]

As personal rights are only binding between the immediate parties,[5] it follows that third parties cannot be burdened by them.[6] This is not the case with real rights. Real rights are enforceable against the world, or are, in other words, '*erga omnes*.' As real rights can be significantly more powerful than contractual rights and can be enforced against third parties, there is less freedom to create such rights. This has resulted in a number of legal principles and rules which must be met in order for a right to be classed as real rather than personal. Van Erp states that in order to determine if a right is real and not personal, it has to

[4] Personal rights can, of course, also be involuntary such as in delict.
[5] The "offside goals rule" is one exception to this generalisation. See *Rodger (Builders) Ltd v Fawdry* 1950 SC 483.
[6] Third parties can, however, benefit from such agreements.

be a type of right from a predetermined list of real rights and the right has to be made public.[7] In his view, these two requirements have resulted in the leading principles of property law; the *numerus clausus* principle and the principle of transparency.[8] If a right meets these two filters, then it can be classed as a real right and certain property ground rules can then be applied, such as *nemo dat* and *prior tempore*. If it does not, then the right is a personal one. These two property law principles are further discussed below.

2.3 The *numerus clausus* principle

The *numerus clausus* principle results in the production of a limited set of real rights, including ownership, servitude etc.[9] Akkermans states that the *numerus clausus* principle "provides a filter to decide whether the law of property applies to a certain legal relation"[10] and Hansmann and Kraakman are of the opinion that limiting the number of real rights is to "facilitate verification of ownership of the rights."[11] Further, van Erp states that the principle requires that "the way in which these rights are created, transferred and extinguished is laid down in mandatory format."[12] This produces a set of verification rules which set out "the conditions under which a given right in a given asset will run with the asset."[13] The determination of which rights are classed as real rights and the rules relating to such rights is a matter of public policy which the legislative body can change when it considers appropriate.

For the real right of ownership, Reid notes that Scots law recognises three different procedures for transferring ownership: for corporeal moveable property,[14] incorporeal property and for land.[15] For land, transfer of ownership generally requires registration in a public register.[16] At common law, as with

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[7] Van Erp, "Property Law" at 9-10.
[8] Van Erp uses the term 'transparency' instead of 'publicity.' This is discussed in section 2.5.
[9] Reid, *Property* para 5.
[10] B Akkermans, *The Principles of Numerus Clauses in European Property Law* (2008) para 1.2.2.
[11] H Hansmann and R Kraakman, "Property, Contract, and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights" (2002) 31 Journal of Legal Studies 373 at 374.
[12] Van Erp, "Property Law" at 10.
[13] H Hansmann and R Kraakman, "Property, Contract, and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights" at 384.
[14] The Sale of Goods Act 1979 is an example of where a statute has changed the common law approach on the transfer of ownership. See, for example, Reid, *Property* paras 619-639.
[15] Reid, *Property* para 602.
[16] *Ibid*.

movables, an aspect of delivery was required when transferring land.[17] As delivering land was impossible, symbols were used such as earth or stone. These were formally delivered on the land itself in a ceremony known as the giving of the sasine. The transfer was subsequently recorded in a notarial deed known as an instrument of sasines, which, following the Registration Act 1617, was then registered in the Register of Sasines.[18] This was a complicated and time-consuming process which has been simplified by various statutes. For example, s1 of the Infeftment Act 1845 disposed of the requirement to carry out the actual ceremony of sasine, and s15 of the Titles to Land Consolidation (Scotland) Act 1868 provided that the instrument of sasine was no longer necessary with the conveyance itself being registrable.[19] The land registration process was then revolutionised following the enactment of the Land Registration (Scotland) Act 1979 which introduced registration of title.[20]

The current legislation governing land registration is the Land Registration etc. (Scotland) Act 2012, with s50 stating that "[a] disposition of land may be registered"[21] and "[r]egistration of a valid disposition transfers ownership."[22] Therefore, if the rules for registration contained within the 2012 Act are met then ownership will pass. Reflecting the *numerus clausus* principle for the real right of ownership in land, this provision details the rules for when such a right can be transferred. The detailed rules on the information which needs to be included and the process to be followed in order for the transfer of ownership by disposition are contained within an Act of the Scottish Parliament. This legislation was enacted to improve and simplify the previous rules on transfer of ownership contained in the 1979 Act.[23] However, further legislative changes based on public policy can be enacted to control the transfer of ownership.[24] This could be to "protect ownership rigorously or promote trade and give a

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[17] Feudal law required delivery. However, Reid states that "[i]n the Romanised feudalism characteristic of Scotland it was seen as the equivalent of the Roman law *traditio*" and he cites Erksine's *Institute* II, 1.19. Reid, *Property* para 640.

[18] *Ibid*.

[19] Both of these provisions were repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Section 4 (now repealed) of this Act stated that ownership of land would pass following either registration in the Land Register or recording a conveyance in the Register of Sasines.

[20] For a discussion on the 1979 Act and registration of title, see section 3.2.

[21] Land Registration etc. (Scotland) Act 2012, s50(1).

[22] *Ibid* s50(2).

[23] For a discussion on the criticisms of the 1979 Act see section 3.3.

[24] For example, the Land Reform Review Group recommended that legal entities not registered in a member state of the European Union should not have the competence to register title to land in the Land Register. LRRG, "Land" section 5, para 11.

strong position to third party acquirers"[25] or, it could be argued, to promote transparency of land ownership or reduce money laundering.

2.4 The publicity principle and protection of third parties

The publicity principle is concerned with the accessibility of information on real rights by third parties. Van Erp calls this principle of property law "transparency" and not "publicity."[26] In his view, the transparency principle has two aspects; publicity and specificity. He defines the requirement of publicity as "if third parties are to be bound by a right the creation of which happened without their consent, they must at least be able to gather information on such a right."[27] For specificity he states that "it must be clear which objects are controlled by that right"[28] because if "it were unknown what the object is of a proprietary right, third parties would still be insufficiently informed."[29]

Publicity has not been analysed extensively in the Scottish literature.[30] When it is mentioned, it is stated that the publicity principle requires that the transfer of property is carried out as a public act and this is to protect third parties.[31] As Reid states, "real rights cannot be conferred by a private act, known only to the immediate parties."[32] Such acts can affect third parties and therefore third parties need to know about them, or at the very least, have a way of ascertaining them. As van Erp highlights, there is a negative feature in a property right in that it can involve excluding others from accessing an object and if there was no visibility as to that right, then it would not be justifiable to enforce an infringement of this right.[33] For land transactions, Reid states that

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[25] Van Erp, "Contract and Property Law" at 314.
[26] See, for example, Van Erp, "Property Law" at 10.
[27] Van Erp, "Property Law" at 10.
[28] S van Erp, "General Issues: Setting the Scene", in S van Erp and B Akkermans (eds), *Cases, Materials and Text on Property Law* (2012) ch1 at part IV.
[29] Van Erp, "Property Law" at 10.
[30] For a discussion on the accessibility of the Land Register, see Report on *Land Registration* (Scot Law Com No 222, 2010) part 8.
[31] Interestingly, Ockrent highlights that this form of protection came about much later on. Originally it was for recognition and security, with vassals wishing to protect their acquisition. L Ockrent, *Land Rights* (1942) 1-2.
[32] Reid, *Property* para 602.
[33] Van Erp, "Transparency" at 1.

the publicity doctrine "finds its fullest expression"[34] in the requirement to register land in a public register.

Although Van Erp uses transparency to encompass publicity and specificity, Berlee takes a different approach. She argues that specificity is a part of the publicity principle.[35] Further, Berlee makes clear that it is not simply the object–right relationship which needs to be discoverable; the subject plays an important role and information on the person holding the right also needs to be discoverable. For example, a third party involved in a land transaction needs to determine if the person transferring ownership is, in fact, the right holder. For what Berlee calls a "fully working publicity principle,"[36] the information gathered needs to relate to the holder of the right as well as the object, the right itself and its substance. However, although this information is gathered, it does not necessarily follow that the information is made accessible to all. The view of Berlee is preferable as it emphasises the subject–object–right dimensions. Further, van Erp's use of the word transparency to define the principle can be problematic due to the various qualities that this term can denote. Transparency, with its natural meaning including qualities such as manifest, evident, obvious and clear,[37] can relate to, among other things, accountability, accessibility and openness,[38] and these should not be misconstrued with the purpose of the property law principle of publicity.

A key question is whether publicity is a requirement to achieve third party effect or if it is simply a consequence of real rights? Berlee, when discussing this point, argues that publicity can be a constitutive requirement for creation of a real right in land but it is not necessarily such a requirement for real rights generally.[39] This is evident in the Sale of Goods Act 1979, in particular, s17 which states that "[w]here there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred"[40] with goods defined in

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[34] Reid, *Property* para 602.
[35] Berlee, *Access* section 2.4.1.
[36] *Ibid*.
[37] Oxford English Dictionary (2000).
[38] For which, see section 2.7.
[39] Berlee, *Access* section 2.5.
[40] Sale of Goods Act 1979 s17

s61 as "all corporeal moveables except money."[41] Therefore, parties can decide between themselves when ownership of such goods will pass and this information can be kept private. It is therefore possible for there to be transfer of ownership with no publicity. In Scotland, it is different for land. Publicity is generally a mandatory requirement for the creation and transfer of real rights in land and the right does not become real until publicity is met through registration. However, there are instances where ownership is transferred or subordinate real rights are created without registration such as survivorship destinations,[42] prescriptive servitudes[43] and short leases.[44]

The publicity principle continues to plays an important role in the creation and transfer of real rights in land as shown by the litigation and discussion of *Sharp v Thomson*[45] and *Burnett's Trustee v Grainger*.[46] One interpretation of the decision in *Sharp*, which involved a competition between a receiver appointed by a floating charge holder and the holder of an unregistered disposition, was that some form of ownership transferred before registration of the disposition.[47] This approach was followed at the early stage of *Burnett*, a case involving the Graingers who had purchased a property, obtained the disposition but had not registered it. Burnett was subsequently sequestrated and her trustee registered a notice of title in relation to the property and therefore became the owner. The Sheriff Principal, using *Sharp*, ruled that the Grainger's had obtained a beneficial interest in the property. Following these cases, the SLC wrote a discussion paper[48] where they emphasised the principle of faith in the registers for the protection of third parties and for certainty,[49] and highlighted that if a creditor could be "defeated by the mere delivery of a conveyance, the main incentive to register disappears."[50] The SLC concluded with "the decision in *Sharp* represents a move in the direction of non-registration of rights in land."[51]

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[41] *Ibid* s61.
[42] G L Gretton and A J M Steven, *Property, Trusts and Succession* (3rd edn, 2017) para 29.21.
[43] Reid and Gretton, *Land Registration* para 4.28.
[44] *Ibid* para 4.27.
[45] 1997 SC (HL) 66.
[46] 2000 SLT (Sh Ct) 116.
[47] See G L Gretton, "The integrity of property law and of the property registers" 2001 SLT (News) 135.
[48] Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001).
[49] *Ibid* paras 2.11-2.12.
[50] *Ibid* para 2.14.
[51] *Ibid*.

The Sheriff Principal's decision in *Burnett* was subsequently overruled by both the Inner House[52] and the House of Lords.[53]

Van Erp also states that a right can only be classed as a real right when it is "transparent enough towards third parties for it to be justified that these third parties are *nolens volens* bound by it."[54] Therefore, the publicity requirements need to be met to a justifiable level for a right to be a real right. One issue with the way in which this requirement is usually expressed is its universal nature. It is not context driven. Should the information on the right be as available to any third party or are there degrees of publicity? Different groups of third parties may require different levels of information. For example, it is enough for a landowner to know that she has a servitude right of access through her neighbour's pend in order to exercise this right. No further information is required. Conversely, as highlighted by Berlee, a bank considering whether to loan money to a debtor in exchange for a real right of security over a property would require considerably more information about any relevant real rights linked to that object.[55] Some third parties might have no need to access information if they are not involved in any transaction with the land. Reid states that publicity is required, among other things, to "alert third parties with a legitimate interest in the property of the transferor that a change in its status has or may have taken place."[56] This indicates that the publicity required may be dependent on the circumstances and it is not necessary for all information about the subject-object-rights to be publicly accessible at all times for third parties to be given adequate protection. Further, as van Erp highlights, there have been "rapid developments during the past two decades in the area of telecommunication, digitisation and Internet technology."[57] The information provided to satisfy the publicity principle also requires to be reviewed against these technological changes and this will be further considered in the following chapters.

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[52] 2002 SC 580.
[53] 2004 SC (HL) 19.
[54] S van Erp, "European and National Property Law: Osmosis or Growing Antagonism?" (2006) Maastricht University Faculty of Law Working Paper 16. Available at https://ssrn.com/abstract=995979
[55] Berlee, *Access* section 2.9.
[56] Reid, *Property* para 602.
[57] Van Erp, "Contract and Property Law" at 314. Albeit for a different purpose. He argues that with the digitisation of land registers with common structures and software, there should be electronic cross-border land transfers.

2.5 Publicity for protection of direct parties

Beyond protection of third parties, Reid lists one of the reasons for publicity is "to promote certainty and, in cases of challenge, to facilitate proof."[58] However, it could be argued that registration of the relevant documentation would achieve this with no requirement to make this publicly available. For example, Guthrie highlights that registration can "save the deed from being lost by preserving the original"[59] but does not state that this needs to be publicly accessible.

2.6 Publicity and the supervisory role

Van Erp recently added a new benefit for publicity, namely that it "facilitates public authorities in fulfilling their supervisory role."[60] RoS recognise this, stating that a fully populated land register will benefit bodies such as Police Scotland, HMRC and utility companies.[61] Berlee also notes that maintaining a good land administration system can produce a number of monetary and non-monetary benefits[62] and she cites those listed in the Land Administration Guidelines of the UN Economic Commission for Europe which include efficient tax collection, reduced land transaction costs and a decline in land disputes.[63] She highlights that such benefits are additional to a land register's purpose of meeting publicity and for legal certainty. In her view, this can influence the justification for collecting, holding and disclosing information which can result in privacy concerns when this information is personal data. It could be argued that information collection is a benefit resulting from the observance of the publicity principle in relation to land. The Land Register was set up on the basis of meeting the publicity principle. However, it can be questioned whether this information then requires to be publicly accessible. As argued above, full accessibility is not necessarily required for third party protection.

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[58] Reid, *Property* para 602.
[59] T Guthrie, *Scottish Property Law*, 2nd edn (2005) para 18.59.
[60] Van Erp, "Transparency" at 1.
[61] RoS, "Completion Consultation" para 15.
[62] Berlee, *Access* section 3.2.
[63] United Nations, "Land Administration Guidelines" (1996) Executive Summary. Available at http://www.unece.org/fileadmin/DAM/hlm/documents/Publications/land.administration.guidelines.e.pdf

2.7 Publicity and Transparency

Reid states that a further reason that publicity is required is "because public knowledge of ownership is conceived as a good itself."[64] Gretton highlights that "our registers have always been public, and there has always been a principle that the registers have a public information function."[65] In a similar vein, publicly accessible information about landownership has recently been linked to transparency. Transparency is seen as one of the facets of the doctrine of open government. An open government is one which operates on the principle that its citizens have the right to obtain government documents and information resulting in the public having an oversight of its proceedings. In the UK Government's view, "[o]penness and transparency can save money, strengthen people's trust in government and encourage greater public participation in decision-making."[66] Transparency, in this case, is seen as a tool for holding governments to account and minimising corrupt behaviour.

When it comes to land information, the Scottish Government appear to be going further than the doctrine of open government. Rather than only providing access to data and information currently held by public bodies, it also wants similar information about private citizens to be made available. In the recent Land Rights and Responsibilities Statement, its vision was stated as being:

> "A Scotland with a strong and dynamic relationship between its land and people, where all land contributes to a modern and successful country, and where rights and responsibilities in relation to land are fully recognised and fulfilled."[67]

There then follows six principles in regards to how policy makers should use land reform measures to achieve the goals of their vision such as to achieve social justice, community engagement, responsible landowners and an increased

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[64] Reid, *Property* para 602.
[65] G L Gretton, "The integrity of property law and of the property registers" (2001) 15 SLT (News) 135 at136.
[66] UK Government, "Government efficiency, transparency and accountability" (2016). Available at https://www.gov.uk/government/topics/government-efficiency-transparency-and-accountability
[67] Scottish Government, "Scottish Land Rights and Responsibilities Statement" (2017) 9. Available at http://www.gov.scot/Resource/0052/00525166.pdf. In their draft statement, the vision included a "democratically accountable and transparent system of land rights." See http://www.gov.scot/Resource/0046/00464887.pdf

diversification of land ownership. Principle four appears to have a different purpose:

> "There should be improved transparency of information about the ownership, use and management of land, and this should be publicly available, clear and contain relevant detail."[68]

What is clear from the above is that, though it concerns the provision of information related to land, it is not suggesting changes to the property law principle of publicity nor, it could be argued, is it linked to real rights *per se*. It appears that the Government is using transparency for two separate reasons. First, in order to meet the Scottish Government's vision, additional information from landowners is required. This would also allow it to monitor landowners and report on progress towards national outcomes, providing high-level statistical information to electorates. Again, this does not require the Government to provide publicly and fully the information they have obtained for assisting with their policy analysis. Second, similar to open government, they are striving for open land ownership. There is public interest in the ownership and use of land, and landowners have responsibilities that must be met. In the Government's view, such public interest includes the ability to identify individuals who are, for example, carrying out wildlife crime and to help local authorities when using their compulsory purchase powers, while a landowner's responsibility can include felling trees which cause visibility issues for drivers.[69]

Interestingly, Solove, in relation to transparency, discusses the danger whereby a principle can "drift to different uses over time." He writes:

> "J.M. Balkin explains this problem as "ideological drift." "Ideological drift in law means that legal ideas and symbols will change their political valence as they are used over and over again in new contexts." Laws fostering transparency are justified as shedding light into the dark labyrinths of government bureaucracy to expose its inner workings to public scrutiny, and preventing the harrowing situation in Kafka's The Trial—a bureaucracy that worked in clandestine and mysterious ways,

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[68] *Ibid*.
[69] See Scottish Government, "Controlling Interests consultation" paras 18-19.

> completely unaccountable and unchecked. These are certainly laudable goals, for they are essential to democracy and to the people's ability to keep government under control. However, sunshine laws are increasingly becoming a tool for powerful corporations to collect information about individuals to further their own commercial interests, not to shed light on the government."[70]

It could be argued that such a drift has happened in Scotland with the word transparency being used as a justification for the increased gathering of information about private parties. Another example given by Solove is of a case in the USA where "the court formalistically invoked the principle of transparency, relying on the vague argument that total transparency fosters "confidence.""[71] Words such as confidence make it hard to argue against unfettered transparency and an opposing view can result in the opinion that there must be something to hide. Land information can have a public interest but private parties do not have the same level of accountability as public figures and the question is what level of available information is required to be public to meet this interest. As noted by Solove, "public records [are] altering the power that the government can exercise over people's lives."[72] It is difficult to disagree with gathering data to assist the democratically elected body to achieve its goals and vision. However, caution must be exercised when extending the principle of transparency to landowners in order to obtain the appropriate balance between the public interest in landownership and the private, in this case privacy, interests of landowners.

2.8 Conclusion

This chapter has discussed the two important property law principles of *numerus clausus* and publicity. The publicity principle plays an important role in the third party effect of property rights and generally ensures that for a third party to be bound by a right they must be able to gather information on the right, the objects controlled by the right and the right holder. However, importantly, it is argued that the publicity principle does not necessarily require unfettered public

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[70] Solove, "Access and Aggregation" at 1191.
[71] *Ibid*.
[72] *Ibid* at 1187.

access at all times. Instead, it is suggested that the accessibility of such information could be context driven and take into account the interest of the party seeking the information. This may be desirable in light of technology developments and privacy concerns discussed below. As well as to meet publicity, land registers provide additional benefits and contain information which can be used for numerous purposes. Making land information publicly available, however, should not be confused with the publicity principle and may result in privacy infractions, which will be discussed below.

The Scottish Government is extending one of the values of transparency, namely accountability, on to private persons, in particular landowners. This has no link to the publicity principle, although it is within their legislative powers to gather such information. This raises a number of issues, in particular as citizens do not have the same obligations as public bodies. It is essential that the correct weightings are given to both the desire for increased information on land and the privacy rights of landowners.

The next chapter will examine how the publicity principle is put into practice and will discuss improvements that have been made to the accessibility of information gathered to meet publicity. It will also look at measures that have been implemented to address the Scottish Government's aspiration for openness of land information.

Chapter 3 Public registers, publicity and transparency

3.1 Introduction

The previous chapter introduced the basic principles of publicity and *numerus clausus*. The publicity principle is implemented in Scotland through the use of public registers. Public registers are used to store important information and legal documents related to various subjects such as land, companies and the environment, and are made widely accessible to the public. This chapter will focus on the Scottish land registers and will examine recent initiatives to improve the coverage, accessibility and quality of information they hold. This chapter will also discuss the planned establishment of a Register of Controlling Interests, a public register to hold additional information on landowners with little connection to the publicity principle. The chapter will then conclude with a brief discussion on the implementation of UK-wide registers to hold information on those with significant control of companies and to meet EU money laundering reporting requirements. The latter discussion, although not directly linked to the publicity principle in property law, is required to give a comprehensive overview of ongoing relevant reforms to public registers.

3.2 The Register of Sasines

The Registration Act 1617 established the Register of Sasines which is claimed to be the "oldest public land register in the world."[73] The requirement for such a register was due to the "gryit hurt sustened by his Maiesties Liegis by the fraudulent dealing of pairties … whiche can not be avoyded vnles the saidis privat rightis be maid publict and patent."[74] Therefore, this Register was introduced with an objective to "suppress fraud and protect third parties."[75] Legal agreements relating to land were recorded in this public register in chronological order, allowing for proof of property rights and to allow third parties to take "land free from unregistered deeds".[76] Registration was required to establish a real right as opposed to a personal right, and it was through

[73] RoS, "Registers we hold". Available at https://www.ros.gov.uk/about-us/registers-we-hold. This claim has been disputed, see Reid and Gretton, *Land Registration* para 1.12.
[74] Registration Act 1617 s1.
[75] Reid and Gretton, *Land Registration* para 1.4.
[76] *Ibid*.

registration that ownership of land passed.[77] Following the introduction of this register, land information was publicly accessible and deeds were discoverable.[78]

Improvements were made to the accessibility of the information in the Sasine Register in the late 19th century when the register was indexed by property unit and search sheets were introduced.[79] However, as the SLC noted in 2012, the register was seen as "slow and expensive and needed a conveyancing expert to turn the data into usable information."[80] The register also did not require map-based information with textual boundary descriptions being used to delineate the extent of properties.[81] Further, even though deeds were discoverable, there was no guarantee that they were valid.[82] It was a register of deeds which required complex investigation to determine the subject-object-right relationship so there could be improvements to the way publicity was being fulfilled. This was epitomised by the Glasgow Corporation who, as cited by Reid and Gretton,[83] described the Register of Sasines as "a system of books with no balance sheet struck, no columns added up, and containing only part of the entries necessary to arrive at the balance."[84] In 1963, the Reid committee, following a review of land registration practices in other jurisdictions, recommended the introduction of registration of title[85] which resulted in the creation of the Land Register.

3.3 The Land Register

A radical change to land registration occurred following the enactment of the Land Registration (Scotland) Act 1979. Vennard described this is "one of the most significant legislative changes implemented in Scotland during the last century."[86] It created a "public register of interests in land in Scotland"[87] which would be "under the management and control of the Keeper of the Registers of

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[77] This followed the decision of the majority of the Court of Session in *Young v Leith* (1847) 9 D 932, see Reid and Gretton, *Land Registration* para 1.5.
[78] There is land which has not changed ownership since 1617 and will not be recorded in a public register. See RoS, "Completion Consultation", para 7.
[79] Report on *Land Registration* (Scot Law Com No 222, 2010) para 1.3.
[80] *Ibid* para 1.9.
[81] RoS, "KIR Consultation", para 23.
[82] Report on *Land Registration* (Scot Law Com No 222, 2010) para 2.6.
[83] Reid and Gretton, *Land Registration* para 1.15.
[84] Noted in Anonymous, "Land Transfer Reform in Scotland" (1904) 16 JR 316.
[85] Report on *Land Registration* (Scot Law Com No 222, 2010) para 2.15.
[86] Vennard, "Registration" at 1.
[87] Land Registration (Scotland) Act 1979 s1(1).

Scotland."[88] It would still be through registration that ownership would pass,[89] but the Land Register would have the benefit of being map based[90] and would provide registered owners with a state backed guarantee of title through indemnity protection.[91] This new system provided key publicity benefits. Instead of being a register of deeds, it was a title register with the Land Register listing real rights (including ownership and subordinate real rights) and who held them.[92] Such a system was, in the Glasgow Corporation's view, like "a balance sheet bringing out the net results"[93] which would result in reduced transaction and information costs.[94]

This new register was rolled out on a county-by-county basis, starting in 1981 with Renfrewshire and all counties were operational 22 years later.[95] Not all land transactions could be recorded in the Land Register. It was only following certain triggers that registration could take place such as "on a transfer of the interest for valuable consideration."[96] Voluntary registrations could take place at the Keeper's discretion,[97] which were used rarely and acceptances were determined by the effect on the Keeper rather than on any benefits to the applicant.[98] The Register of Sasines therefore remained in use.

Following a number of criticisms of the 1979 Act, the SLC commenced a review of the legislation in 2003. They identified a number of issues with the Act, including the protection given to acquirers based on possession, the principle of title being achieved through registration alone regardless of the legality of the underlying deeds, and the slow completion rate of the Land Register.[99] In 2010,

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[88] *Ibid* s1(2).
[89] *Ibid* s3(1).
[90] *Ibid* s6(1)(a).
[91] *Ibid* ss12-14.
[92] *Ibid* s1(1) and s28 definition of "interest in land".
[93] Noted in Anonymous, "Land Transfer Reform in Scotland" (1904) 16 JR 316.
[94] *Ibid*.
[95] RoS, "Land Mass Coverage Report, Statistical Report, January 2014 – December 2014" (2015) at 5. Available at https://www.ros.gov.uk/__data/assets/pdf_file/0017/14921/LandMassCoverageReport2015-proofed.pdf
[96] Land Registration (Scotland) Act 1979 s2(1)(a)(ii).
[97] *Ibid* s2(1)(b).
[98] The majority of these registrations were individual plots of building sites being sold or a *pro indiviso* being transferred from the Register of Sasines. See King, "Completion" 329.
[99] For a discussion on these and other criticisms, see Reid and Gretton, *Land Registration* paras 2.11-2.16.

the SLC produced a set of reform recommendations and a draft Land Registration Bill to address these concerns.[100]

3.3.1 Completion of the Land Register

It has been stated that "[a] completed land register will be a national asset for Scotland"[101] which will provide "clear and unambiguous knowledge of who owns land."[102] It is also RoS's view that having land information stored across two registers is not "transparent", cost effective nor efficient.[103] Indeed, the publicity principle requires that complete and accurate information is held on the subject-object-right relationship, which will be assisted by a complete Land Register. As at October 2016, 60% of titles are on the Land Register, which is 1.6 million titles or 29% of the land mass of Scotland.[104] Therefore there are still 40% of titles remaining to be registered which equates to 1.1 million titles.[105] As King notes, "[t]he focus of the 1979 Act was not a completed Land Register."[106] In 2012, it was estimated that using existing methodologies for transferring information between the registers would result in only 80% coverage by 2052,[107] with Reid and Gretton of the opinion that full completion would take centuries.[108] To achieve completion, it was clear that two things were required. As King notes, there must be legal powers to enable the completion[109] as well as "a political commitment to maximising the use and effect of those powers."[110]

3.3.2 Land Registration etc. (Scotland) Act 2012

Following the publication of SLC's report on Land Registration, a Bill was produced to enact, in the main, the report's recommendations.[111] It was introduced to the Scottish Parliament on 1 December 2011 and received Royal

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[100] Report on *Land Registration* (Scot Law Com No 222, 2010).
[101] For example, see RoS, "Annual Report 2015-2016" at 19.
[102] RoS, "Completion Consultation" para 15.
[103] RoS, "Completion Consultation" paras 12-14.
[104] RoS, Land Registration Completion webpage. See https://www.ros.gov.uk/about-us/land-register-completion
[105] *Ibid*.
[106] King, "Completion" 327.
[107] LRRG, "Land" section 4, para 17.
[108] Reid and Gretton, *Land Registration* para 2.14.
[109] King, "Completion" 323.
[110] *Ibid*.
[111] Reid and Gretton, *Land Registration* para 2.17.

Assent on 10 July 2012.[112] The Act addressed the criticisms which had been raised in regards the 1979 Act.[113] In particular, it had the "closure of the Register of Sasines and the completion of the Land Register"[114] as one of its primary objectives and provided the legal powers required to increase registration rate.

This was followed by the political commitment to Land Register completion. In 2014, the Scottish Government requested that RoS complete the Land Register for public land within five years and achieve full completion of the Register by 2024.[115] However, with the Environment and Climate Change Minister, then Paul Wheelhouse, stating that "[t]his is a vital underpinning step in Scotland's land reform journey and will ensure that at last everyone will know who owns Scotland"[116] it is apparent that the Scottish Government viewed transparency of land information, as explained in Chapter 2, as a principle factor behind the drive for completion rather than improvements to aid publicity.

LR(S)A 2012 provided the Keeper with a number of "technical tools" to meet the completion target.[117] These included changes to the triggers for registration and the process of voluntary registration, and the introduction of Keeper-induced registration (KIR).[118] These changes are described below.

3.3.2.1 Triggers

Instead of using the trigger approach in the 1979 Act, LR(S)A 2012 lists deeds which cannot be recorded in the Register of Sasines; a disposition, a lease and an assignation of a lease.[119] Further, it allows the Scottish Ministers to prescribe the date for the closure of the Registers of Sasines to standard securities[120] and other types of deeds.[121] Following a consultation, the Register of Sasines was

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[112] Scottish Parliament, Passage of the Land Registration etc. (Scotland) Bill. Available at http://www.parliament.scot/parliamentarybusiness/Bills/44469.aspx
[113] See section 3.3.
[114] LRRG, "Land" section 4 para 16. The long title of the Act includes "to provide for the closure of the Register of Sasines in due course."
[115] Scottish Government, "Target set to register all of Scotland's land" (2014) Available at https://news.gov.scot/news/target-set-to-register-all-of-scotlands-land
[116] *Ibid*.
[117] King, "Completion" 332.
[118] RoS, "Annual Report 2015-2016" at 19.
[119] Land Registration etc. (Scotland) Act 2012 s48(1).
[120] *Ibid* s48(2).
[121] *Ibid* s48(3).

closed to standard securities on 1 April 2016.[122] There is no longer a distinction between dispositions with value and those without.[123] Further, there is now a requirement to register a property currently in the Register of Sasines if a lease is to be registered on that property.[124] This means that when an owner registers a lease for a plot of land still in the Register of Sasines, it will induce registration of the owner's plot.[125]

3.3.2.2 Voluntary Registration

LR(S)A 2012 Act allows for an owner of a plot to apply for registration of an unregistered plot.[126] This is not a new power; it was also in the 1979 Act.[127] In both Acts, the Keeper had discretion to accept registrations only if she felt they were "expedient", even if they met all the requirements for registration.[128] In respect of the 2012 Act, the Keeper proposed that this discretion was removed[129] and following a positive response during a public consultation, the provision giving her discretion was repealed.[130] Voluntary registration is especially useful for properties which are less likely to be sold and therefore do not trigger registration, including larger estates,[131] farms and commercial properties, as well as land owned by local authorities and the Scottish Ministers.[132]

To encourage landowners to use voluntary registration there is a 25% registration fee discount[133] which will be in place until at least 2019.[134] RoS have also been adopting an engagement approach and during the 2015-2016 reporting period,

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[122] RoS estimated that this will result in 4,000-5,000 new registrations *per annum*. See RoS, "Completion Consultation" para 13. During the consultation process there were divergent views in relation to other deeds and it was decided to re-visit these at a later stage. See RoS, "Completion Consultation Report" para 24.

[123] RoS estimate that this will generate around 8,500-10,000 new registrations. See King, "Completion" 332.

[124] This is known as "automatic plot registration" and results from s24, s25 and s30 in the 2012 Act. RoS estimate 1,000 such leases are registered annually. Such landowners may subsequently see the benefit of voluntary registration for the remainder of their land. See King, "Completion" 333.

[125] King, "Completion" 333.

[126] Land Registration etc. (Scotland) Act 2012 s27.

[127] Land Registration (Scotland) Act 1979 s2(1)(b).

[128] *Ibid* and Land Registration etc. (Scotland) Act 2012 s27(3)(b).

[129] RoS, "Completion Consultation" para 26.

[130] Registers of Scotland (Voluntary Registration, Amendment of Fees, etc.) Order 2015/265 (Scottish SI) article 2.

[131] LRRG, "Land" section 4, para 18.

[132] Vennard, "Registration" at 1.

[133] Registers of Scotland (Voluntary Registration, Amendment of Fees, etc.) Order 2015/265 (Scottish SI) article 4.

[134] "Keeper extends voluntary registration fee discount until mid-2019" (2016). Available at http://www.journalonline.co.uk/News/1022642.aspx#.WEqDJLKLSUl

their advisers travelled over 10,000 miles to meet with landowners and their advisors, and those working in the public sector.[135] However, voluntary registration could be impeded by the use of KIR[136] with landowners deciding to not register and wait for the Keeper to register their property for no charge. It has been noted that some practitioners are advising clients who have property in a 'research area'[137] and whose title is recorded in Register of Sasines not to use voluntary registration and wait for either a trigger or KIR.[138]

3.3.2.3 Keeper-induced Registration

Section 29 of LR(S)A 2012 provides that "[o]ther than on application and irrespective of whether the proprietor or any other person consents, the Keeper may register an unregistered plot of land or part of that plot." This new legal concept does not require the Keeper to interact with the proprietor prior to registration. She must, however, notify the proprietor of the plot post-registration.[139]

In order to investigate how best to use this new power, RoS carried out three pilots during 2015; research areas, heritage assets and other properties outwith research areas such as rural land.[140] The research area pilot was successful. These areas were defined as "land that has been, or is likely to be, split up into a number of units of property sharing common burdens."[141] As there has been pre-registration examination for some of the properties in a grouping, the Keeper can use information on rights and burdens to register the remaining properties in that cluster. Over 35,000 research areas were identified, mainly residential housing developments.[142] It is estimated 700,000 titles can be registered using this method.[143] As this will be mostly urban residential areas it is not apparent what percentage of land mass this will register. Due to the complexity involved in investigating the titles in the second and third streams,

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[135] RoS, "Annual Report 2015-2016" at 19.
[136] See section 3.3.2.3.
[137] For which, see section 3.3.2.3.
[138] Anonymous, "Keeper induced registration of land" (2015) 53 SPCLR 5 at 5.
[139] Land Registration etc. (Scotland) Act 2012 s41.
[140] RoS, "KIR Consultation" para 6.
[141] *Ibid* Annex B.
[142] RoS, "Keeper Induced Registration" website. Available at https://www.ros.gov.uk/about-us/land-register-completion/keeper-induced-registration
[143] RoS, "KIR Consultation" para 10.

these pilots were not successful.[144] This echoes King's views that registering rural and commercial properties will be a difficult process.[145] Rural plots of land still in the Register of Sasines can have either no map-based information, relying instead on text descriptions of the extent of the ownership,[146] or the plans are of low quality. As these properties have often not changed hands for value for some time, no legal investigation of title has recently taken place. King also highlights issues with attempting to use KIR for titles to minerals and other separate tenements; both identifying them and mapping them onto the cadastral map.[147]

Following RoS's review of the three pilots, they released a public consultation document.[148] The majority of respondents agreed with their proposal to focus on research areas using a geographical approach, starting with areas which would have the largest impact.[149] RoS subsequently established a dedicated project team to develop the various systems and processes to commence KIR in the research areas. These were tested at the end of 2016, followed by full implementation commencing in 2017.[150]

3.3.3 Barriers to Land Register completion and improvements to publicity

3.3.3.1 Funding

As detailed above, there are a number of initiatives being implemented to complete the Land Register. A key question is how these new and future activities will be funded. As Wightman highlights, RoS is "an Executive Agency of the Scottish Government and is self-funding."[151] The Scottish Parliament does not provide RoS with public funds and it has to generate its resources through

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[144] *Ibid* paras 11-13.
[145] King, "Completion" 338.
[146] See, for example, RoS, "Completion Consultation" para 34, King, "Completion" 339 and RoS, "KIR Consultation" para 13.
[147] *Ibid* 338-339.
[148] RoS, "KIR Consultation"
[149] RoS, "Keeper-Induced Registration. Analysis of the responses to the Public Consultation" (2016) p3. Available at https://www.ros.gov.uk/__data/assets/pdf_file/0011/35867/KIR-analysis-of-responses-Feb-2016.pdf The proposed methodology on communication received the greatest level of consternation. There were strong opinions that there should be pre-KIR activities, in particular with owners and councils. *Ibid* p10.
[150] RoS, "Keeper Induced Registration" website. Available at https://www.ros.gov.uk/about-us/land-register-completion/keeper-induced-registration
[151] A Wightman, "Rethink required on ten year land registration goal" (2014). Available at http://www.andywightman.com/archives/3816

registration fees, search fees and consultancy. Will these revenue streams be sufficient to cover the complexity of registering property such as that belonging to National Rail which Vennard notes will "likely run into several million pounds?"[152] Vennard was of the view that the charge for registering land may need to be increased.[153] The Keeper, however, in 2014 did not propose any change to fees and stated that RoS reserves would be increased through efficiency gains.[154]

3.3.3.2 Underlaps and slithers of land

Underlaps occur when it becomes apparent through registration that there will be a gap between a property and its neighbouring land. It has been noted that there is a "growing practice" of parties taking "a pragmatic view" [155] and not including the underlap in the registration. Advice is not provided by the Registers of Scotland on this matter.[156] The effect of this, states Donald Reid, will be that these undergaps or "slivers" will "live around unregistered like spent confetti until Keeper-induced registration can get round to them."[157]

3.3.3.3 Land in neither register

RoS has recognised that once all title deeds have moved from the Registers of Sasines there will be other pieces of unregistered land, the extent of which is currently unknown.[158] This will include land where ownership passed via royal charters and deeds prior to the introduction of the Register of Sasines such as parts of St Andrews University and Edinburgh's Old Town.[159] Some land may have never been alienated and thus still be owned by the Crown.[160] The occupier of such land could assist in establishing ownership, though unused land will be more

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[152] Vennard, "Registration" at 2.
[153] *Ibid*.
[154] RoS, "Completion Consultation" para 41.
[155] R Mackay, "That's fine in theory, but…?" (2016) 142 PropLB 5 at 6.
[156] RoS, "Land Registration Completion FAQ webpage". Available at https://www.ros.gov.uk/about-us/land-register-completion/land-register-completion-faqs
[157] D Reid, "Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie (Publication Review)" (2016) 1 JurRev 75 at 77.
[158] RoS, "Completion Consultation" para 7.
[159] *Ibid*.
[160] *Ibid*.

problematic.[161] Without knowing the extent of this land it will be difficult to make any guarantees on when a full cadastral map will be achieved.

3.3.3.4 Engagement of public bodies

A number of councils have predicted that it will be KIR rather than voluntary registration which will result in registration of the property they hold. For example, Glasgow City Council stated that "[g]iven the resources (both in terms of fees and employee time) required, the Council is unlikely to undertake voluntary registration except on isolated occasions. As a consequence, substantial progress towards completion of the Register would then fall on the Keeper through Keeper Induced Registration."[162] This is even more concerning given that the LRRG found that "[t]here appears no readily accessible information on the extent of land held by the Local Authorities."[163] King also highlights that there is significant land owned by UK public bodies.[164] It is not clear what level of priority the Ministers responsible for the various public bodies are giving the 2019 target and how much pressure is being placed on these bodies. There are currently no statutory requirements for the target to be met but if it fails to be achieved, there could be political ramifications.

3.3.3.5 The sea-bed, minerals and separate tenements

LR(S)A 2012 provided the Keeper with the power to register titles located in or extending into territorial waters.[165] In July 2014, RoS stated their intention to carry out a pilot to test how this could work in practice and how the map of the seabed could be linked with the cadastral map.[166] It is not clear if any such work has been completed or if this land is included in the 2024 target. Further, as mentioned previously, the identification and mapping of minerals and other separate tenements are likely to be time-consuming and complex, particularly when registered through KIR.[167]

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[161] *Ibid*.
[162] RoS, "Completion Consultation Report" para 38.
[163] LRRG, "Land" section 9 para 13.
[164] King, "Completion" 342. He uses the example of the Ministry of Defence's ownership of 2% of Scotland's land mass.
[165] Land Registration etc. (Scotland) Act 2012 s113(1).
[166] RoS, "Completion Consultation" para 37.
[167] See section 3.3.2.3.

3.3.3.6 Time to register complex properties

It has been stated that "[l]and registration is a complex and time–consuming business. Some titles take up to 5 years to be generated."[168] Delaying the commencement of KIR for the more complicated properties will result in less time available to meet the 2024 target. This echoes Robbie's comment in relation to the roll out of KIR on heritage assets where she stated that "[i]f the process is time-consuming, it is best to start the process as soon as possible instead of rushing registration at the end of the 10 year deadline."[169]

3.3.3.7 Quality

Wightman has described the push to have the Land Register completed by 2024 as resulting in Scotland embarking onto a "reckless and dangerous path."[170] He raises concerns about the subsequent accuracy of the Register and states that completion "should not be made solely to secure a political goal."[171] In order for the publicity principle to be met in full it is essential that both a complete and accurate Land Register is achieved. Gains in coverage at the expense of quality standards will result in incorrect information being held on subject-object-right relationships. This will be to the determinant of the Register's purpose of meeting the publicity principle with subsequent rectifications having cost implications for both individuals and RoS.

3.3.3.8 Conclusion

The above discussion provides an outline of the methods being implemented to increase coverage of the Land Register. These measures will ensure there is complete and accurate information about real rights in land in Scotland and thereby improve the fulfilment of the publicity principle. Based on the identified barriers to completion, however, it remains highly unlikely that RoS will meet either target set by the Scottish Government. Further, if the process of Land Register completion is rushed, the quality of title sheets could be

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[168] A Wightman, "Rethink required on ten year land registration goal".
[169] RoS, "Keeper-induced Registration. Analysis of responses to the Public Consultation" (2016) p5.
[170] A Wightman, "Rethink required on ten year land registration goal".
[171] *Ibid*.

compromised and this would in turn affect the fulfilment of the publicity principle.

3.3.4 Accessibility and the Land Register

As noted in Chapter 2, the publicity principle does not necessarily require unfettered public access. Nevertheless, the Land Register is a public register, with s1(1) of LR(S)A 2012 providing that "[t]here is to continue to be a public register of rights in land in Scotland."[172] Extracts from the Land Register are covered under s104 which states that:

> "A person may apply to the Keeper for an extract—
>
> (a) of, or of any part of, a title sheet,
> (b) of any part of the cadastral map, or
> (c) of, or of any part of, a document in the archive record."[173]

The Keeper is not provided with any discretionary powers. She must provide this information (provided that a fee is paid or arranged).[174] There is nothing in the Act allowing for an individual to be exempt from this provision or to have any of this information redacted.

The title sheet will contain:

- the property extent on the Ordnance Survey map;
- details of price;
- names of current owners;
- if there is a standard security on the property;
- any conditions affecting the property.[175]

Those with access to Registers Direct can retrieve this information online. The only prerequisite to obtain such access is passing a credit check.[176]

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[172] Land Registration etc. (Scotland) Act 2012 s1(1).
[173] *Ibid* s104(1).
[174] *Ibid* s104(3).
[175] *Ibid* ss5-10. Text taken from RoS, "Searching the Registers" webpage. Available at https://www.ros.gov.uk/services/ownership-search/searching-the-registers

As well as title sheets, requests can be made for records held in the archive record, defined in s14 as, amongst other things, "copies of all documents submitted to the Keeper"[177] which will include deeds.[178] Requests can also be made for historic information held as at a certain date.[179] There can be various pieces of personal information included in copy deeds, for example, marital status, date of birth and signatures.[180] These copy deeds will be provided without need for justification for the request.

3.3.5 Restrictions on Accessibility in England

The following sections will examine two protective measures on land registration information which are in place in England but not Scotland, and provide examples of ways that public information can be restricted whilst still meeting the publicity principle. Other possibilities for Scotland will be explored in Chapter 6.

3.3.5.1 Searching the Land Register by Name

The Scottish Land Register can be searched by name, although there is no statutory obligation for RoS to offer this.[181] Those using Registers Direct are restricted to search only three counties at a time,[182] requests made directly to RoS for a name search have no such restriction. This is not the case in England where searching by name is subject to strict conditions. Section 66 of the Land Registration Act 2002 provides that:

> (1) Any person may inspect and make copies of, or of any part of—

[176] RoS, "Registers Direct, Frequently Asked Questions" webpage. Available at https://www.ros.gov.uk/services/online-services/registers-direct/frequently-asked-questions
[177] Land Registration etc. (Scotland) Act 2012 s14. This was not the case in the 1979 Act which only allowed the Keeper to provide authenticated copies of documents which had been referred to in the title sheet. See Land Registration (Scotland) Act 1979 s6(5).
[178] RoS, "Services, Copy Deeds" webpage. Available at https://www.ros.gov.uk/services/copy-deeds
[179] Land Registration etc. (Scotland) Act s104(4). The Keeper has discretion to provide this information if it is reasonably practically for her to do so.
[180] Signatures, it could be argued, are required for the publicity principle to determine validity the deeds. However, such information can be used for identity theft, discussed in section 5.2.2.
[181] Reid and Gretton, *Land Registration* para 3.11.
[182] RoS, Registers Direct Frequently Asked Questions webpage. Available at https://www.ros.gov.uk/services/online-services/registers-direct/frequently-asked-questions

> (a) the register of title,
> (b) any document kept by the registrar which is referred to in the register of title,
> (c) any other document kept by the registrar which relates to an application to him, or
> (d) the register of cautions against first registration.

However, the index of names is not included in the register of title. Section 68 provides that the registrar must keep indexes on matters provided by rules and rule 11 of the Land Registration Rules 2003 states that "the registrar must keep an index of proprietors' names."[183] Crucially, the ability to use this index is available to someone who "can satisfy the registrar that he is interested generally (for instance as trustee in bankruptcy or personal representative)."[184] This restriction was interpreted in *Parkinson v Hawthorne*[185] as being only available to people who "succeed to the estate of the registered proprietor."[186] In this case, the judge agreed with the Chief Land Registrar that the 2002 Act and the 2003 Rules did not give the registrar the power to carry out such a search on the request of a judgement creditor such as Parkinson and therefore the court had to use statutory powers contained in the Supreme Court Act 1981 to require the registrar to carry out the requested search and to disclose the relevant documents. Interestingly when deciding to exercise this statutory power, the judge stated that:

> "a distinction needs to be drawn between applications made to the court for the disclosure of the information contained in the index or the register in order to assist a party to proceedings to enforce his or her legal rights in those proceedings … as opposed to an application to the court, the only purpose of which is to obtain access to the register or index for other reasons including mere curiosity."[187]

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[183] Land Registration Rules 2003 rule 11.
[184] *Ibid* rule 11(3).
[185] [2008] EWHC 3499 (Ch).
[186] *Ibid* para 8.
[187] *Ibid* para 11.

3.3.5.2 Damage and Distress

The right, under section 66 of the 2002 Act, to inspect the register of title and the documents kept by the registrar and which are referred to in the register of title is subject to exceptions and conditions. Rule 136 of the Land Register Rules 2003 provides that a "person may apply for the registrar to designate a relevant document an exempt information document if he claims that the document contains prejudicial information."[188] Prejudicial information is defined as information that:

> "if disclosed to other persons (whether to the public generally or specific persons) would, or would be likely to, cause substantial unwarranted damage or substantial unwarranted distress to the applicant or another."[189]

The wording in this rule is similar to the right to prevent such processing in the Data Protection Act 1998[190] and the provisions in place in the Companies Act for directors and persons with significant control.[191] There are no such protective measures in LR(S)A 2012.[192]

3.4 ScotLIS

3.4.1 Background

ScotLIS (Scotland's Land and Information System) is another drive to make information on land more accessible. It has been stated that ScotLIS will provide a "comprehensive information system about any piece of land or property in Scotland."[193] It will be hosted and operated by RoS and is part of their overall

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[188] Land Registration Rules 2003 rule 136.
[189] *Ibid* rule 131.
[190] The registrar is exempt from providing this right. See section 5.5.4.
[191] See section 3.6.1.
[192] For a discussion on whether data protection must be in the same in England and Scotland, see *Christian Institute v Lord Advocate* [2016] UKSC 51. It was ruled at para 44 that the DPA "allows scope … for derogation from certain of its requirements by legislation which need not be UK wide in application."
[193] The Journal of the Law Society of Scotland, "Scotland to get new online land and property information system" (2015). Available at http://www.journalonline.co.uk/News/1020905.aspx#.WAyag_krKUl RoS, "New Digital Land and Property Information System for Scotland" (2015). Available at https://www.ros.gov.uk/about-us/news/2015/new-digital-land-and-property-information-system-for-scotland

digital transformation programme.[194] It does not have any statutory status. It does, however, have political backing. Deputy First Minister John Swinney announced that he was committed to a "one-stop-digital database for land and information services"[195] with the Keeper being set a target of October 2017 for getting this system operational.[196] ScotLIS's usefulness is linked to and dependent on the completion of the Land Register, with Brymer calling it the "cornerstone" of this goal[197] and the Keeper highlighting that the Land Register "will form the base layer" of the ScotLIS hub.[198]

The intention is for the initial version of ScotLIS to focus on transactional property data from RoS and other public authorities[199] which are required in the conveyancing process,[200] such as title reports, property enquiry certificates and energy performance certificates.[201] It is therefore apparent that the initial focus is on improving accessibility and usability of land information using new technological solutions. Some of this information is obtained to meet the publicity principle but some of it is not linked to the publicity principle, for example, information contained in energy performance certificates. The following phases will introduce additional datasets and will "enable the sharing and linking of further layers of data from a wide range of public sources"[202] including pieces of ancillary information that individuals might need when considering purchasing property such as school catchment areas, public transport and council tax bands.[203] This data is clearly not linked to the publicity

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[194] RoS, "Annual Report 2015-2016" at 21-22.
[195] RoS, "A Digital Land and Property Information Service for Scotland" (2015) para 1. Available at https://www.ros.gov.uk/__data/assets/pdf_file/0016/28033/Digital-land-and-property-information-system-report-July-2015.pdf
[196] *Ibid* para 21. The system became operational on 24 October 2017, see https://scotlis.ros.gov.uk/
[197] S Brymer, "Information about land and property: a one-stop shop" (2015) 170 SPEL 84 at 84.
[198] Anonymous, "Keeper-induced Registration to enable title transfer from Sasine to Land Register this year" (2016) Available at http://www.scottishlegal.com/2016/03/02/keeper-induced-registration-to-enable-title-transfer-from-sasine-to-land-register-this-year/
[199] This includes the Improvement Service, Ordnance Survey, and Unifi Scotland. RoS, "A Digital Land and Property Information Service for Scotland" (2015) para 1.
[200] RoS, "ScotLIS gets the green light" (16 November 2015) JLSS. Available at http://www.journalonline.co.uk/Magazine/60-11/1020971.aspx
[201] See RoS, "A Digital Land and Property Information Service for Scotland" (2015) Annex D.
[202] RoS, "Registers of Scotland's Written Submission to the Independent Review of Planning" (2016) Available at http://www.gov.scot/Resource/0049/00492789.pdf RoS, "Briefing for the Core Paths Working Group" (2016). Available at http://www.outdooraccess-scotland.com/sites/default/files//docs/national_access_forum_-_paper_-_land_registers_of_scotland_briefing_note_-_martin_tyson_lrs_-_september_2016_.pdf
[203] RoS, "A Digital Land and Property Information Service for Scotland" Annex D section 2.

principle; it is information linked to land but not related to the subject-object-right relationship or the third party effect.

3.4.2 Previous attempt at ScotLIS

Interestingly, in 1996, Lord James similarly announced plans for a "sophisticated new Scottish land information system"[204] called ScotLIS which would allow users access to a wide range of information such as photographs, digital maps and information on land ownership.[205] A pilot, carried out by RoS, took place in Glasgow during 1997-98.[206] Along with property information, geographical data and mining information was included.[207] Following this pilot no report or subsequent plans for full implementation were provided.[208] Funding has been claimed to be one of the reasons why ScotLIS did not proceed past the pilot stage.[209] Brymer has also stated that there were no IT solutions available to continue the project.[210] Kennedy, who was involved in the pilot between 1999 and 2001, takes a different view and states it failed because "some of the public sector bodies did not want to give up important sources of revenue" and therefore "some members of the committee kept putting up obstacles in the way of progress."[211] His recommended solution was to expand the Land Register to include additional information such as mineral rights, planning applications and building control reports.[212]

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[204] Scottish Office, "Lord James announces details of sophisticated new Scottish land information service" (1996) Press release 1829/96.

[205] *Ibid*.

[206] The Law Society Gazette, "Legal net benefit -- legal information is starting to become available on the Internet" (1997). Available at http://www.lawgazette.co.uk/news/legal-net-benefit-legal-information-is-starting-to-become-available-on-the-internet/20572.fullarticle

[207] Scottish Executive Central Research Unit, "Ownership of land holdings in rural Scotland" (2015). Available at http://www.caledonia.org.uk/land/documents/Ownership-of-Land-in-Scotland.pdf

[208] Scottish Law Agents Society, "Submissions to Communities Committee Scottish Parliament regarding provisions of the Housing (Scotland) Bill relating to single surveys and purchaser information packs", (2005) para 2.4.2. Available at http://www.scottishlawagents.org/sites/default/files/news/attachments/submission_by_scottish_law_agents_society_copy.pdf

[209] S Brymer, "The shape of conveyancing in practice in 2007 and beyond" (2006) 17 SLT (News) 105-208 at 107.

[210] S Brymer, "Written submission from Professor Stewart Brymer OBE, WS, Land Reform (Scotland) Bill" (2015). Available at http://www.parliament.scot/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/20150630_Written_submission_from_Professor_Stewart_Brymer_OBE.pdf

[211] E G Kennedy, "Answers to Consultation on Land Reform" (2015). Available at https://consult.scotland.gov.uk/land-reform-and-tenancy-unit/land-reform-scotland/consultation/download_public_attachment?sqId=question.2013-10-30.9602267046-publishablefilesubquestion&uuId=346030033

[212] *Ibid*.

3.4.3 Barriers to the success of ScotLIS

3.4.3.1 Lessons learned

Brymer states that "[t]he goal is to deliver improvements to the current system, which only those with a vested interest in preserving the status quo should be likely to object to."[213] Have lessons been learned following the original pilot? In particular, will necessary incentives or pressures be in place to persuade organisations to partake in the project and to remove any barriers? For example, in Norway, the municipalities who construct the data for their Infoland portal receive income from the charges for search results which allows them to improve their services.[214]

3.4.3.2 Indemnity

During the selling and purchasing process, the examination of title plays a key role and a simpler way of obtaining accurate results will assist the conveyancing process. What is not clear at this stage is what the indemnity provision will be for errors in the data which will be relied upon by users with mistakes in information having significant cost implications.[215] The Keeper has confirmed that she would provide a guarantee for the information she provides to ScotLIS but it would be up to the other providers how to handle this for their own data.[216]

3.4.3.3 Who will use it

It will be of interest to see who will use ScotLIS. Users could be anyone and members of the public will have access to the system.[217] The question of who will determine what the general public "need to know"[218] will be important.

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[213] S Brymer and McKay, "What is ScotLIS?" (2016). Available at http://www.journalonline.co.uk/Magazine/61-1/1021209.aspx
[214] S Brymer, "Information about land and property: a one-stop shop" at 84.
[215] S Brymer and I McKay, "What is ScotLIS?"
[216] RoS, "A Digital Land and Property Information Service for Scotland" (2015) para 19.
[217] The system will be "for the citizens and businesses of Scotland." See RoS, "Annual Report 2015-2016" at 15.
[218] RoS, "New Digital Land and Property Information System for Scotland" (2015).

3.4.3.4 ScotLIS and Publicity

The initial implementation of ScotLIS will have links with the publicity principle, in particular, if it replicates the information accessible through the Registers Direct system. However, its purpose is not to meet this principle. It is a land, not a real rights, information system. As ScotLIS continues to be developed, with the introduction of additional layers of data and new ways of searching, there could be resultant data protection or privacy issues, discussed further below, and different levels of access rights might be required. It is also not evident where ScotLIS will 'sit' following the implementation of the various waves, especially as the information it contains moves further away from the role and purpose of RoS.

3.5 Register of Controlling Interests

3.5.1 Background

As discussed above, there is a drive by the Scottish Government to make information on land ownership more, to use its terminology, transparent. A recent development of this type is the planned Register of Controlling Interests. The policy memorandum for the Land Reform (Scotland) Bill states that "[a]s a matter of public policy it is of fundamental importance to know who owns land, who has the power to make decisions on how the land is managed and who is benefitting from the land."[219] The memorandum also claims that there is "anecdotal evidence"[220] that individuals, who are not named as owners on the public registers, are exerting considerable influence over land resulting in issues such as access to land and ensuring sustainable development of local communities.[221] Wightman goes further, stating that it is not in the public interest to allow those "who enjoy landed power to secrete their assets and identity behind a cloak of anonymity in legal personalities designed to avoid tax and secure the line of inheritance beyond their lifetime."[222]

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[219] Scottish Parliament, "Land Reform (Scotland) Bill Policy Memorandum" (2015) para 95. Available at http://www.parliament.scot/S4_Bills/Land%20Reform%20(Scotland)%20Bill/b76s4-introd-pm.pdf

[220] *Ibid* para 108.

[221] *Ibid*.

[222] A Wightman, *Scotland: land and power: the agenda for land reform* (1999) 97.

3.5.2 Land Reform (Scotland) Act 2016

The Land Reform (Scotland) Bill was introduced in the Scottish Parliament on 22 June 2015. The Bill was passed by Parliament on 16 March 2016 and received royal assent on 22 March 2016.[223] One of the Bill's aims was to "improve the transparency and accountability of land ownership."[224] Section 35 of the Bill provided for regulations to be made to allow "access to information on persons in control of land by persons affected by that land"[225] and s36 provided a power to produce regulations which would allow the Keeper of the Registers of Scotland to request certain pieces of information from proprietors, such as their category (for example, charity, trust etc) and under what circumstances these pieces of information could be released.[226]

Evidence was gathered by the Rural Affairs, Climate Change and Environment Committee during the latter half of 2015. In particular, Part 3 of the Bill received significant criticism with some suggesting that it should be deleted completely.[227] Concerns raised included that the legislation as drafted did not meet its aims, it lacked enough detail to determine potential human rights issues,[228] and it did not provide the Keeper with enough power to obtain the required information.[229] The Committee agreed with these concerns and requested that "the Scottish Government brings forward amendments to strengthen the powers given to the Keeper so she can require information and impose sanctions for non-compliance."[230] The Committee also disagreed with the Bill's provisions which limited the provision of information to only those affected by the land,[231] stating "it does seem anomalous to seek to improve

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[223] Available at http://www.parliament.scot/S4_Bills/Land%20Reform%20(Scotland)%20Bill/LandReformScotlandBillsummary.pdf

[224] SPICe, Land Reform (Scotland) Bill Summary (2016). Available at http://www.parliament.scot/S4_Bills/Land%20Reform%20(Scotland)%20Bill/LandReformScotlandBillsummary.pdf

[225] SPICe briefing "Land Reform (Scotland) Bill" (2015) 10-11. Available at http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-49_Land_Reform_Scotland_Bill.pdf

[226] *Ibid*.

[227] RUCCEC, "Land Reform" para 219.

[228] *Ibid* para 181.

[229] s36(2) provided the Keeper with the power to "request" information.

[230] RUCCEC, "Land Reform" para 204.

[231] s35 of the Bill was "The Scottish Ministers may by regulations make provision about access to information on persons in control of land by persons affected by that land."

transparency and then put limits on that transparency"[232] and recommended the Bill was changed to "allow everybody in Scotland the right to access the information."[233]

There was also a discussion in the evidence sessions on potentially limiting ownership of land to legal entities which had a registered place of business in the EU.[234] A significant number of those who responded to the consultation agreed that restricting the type of entities who can own land would increase transparency.[235] However, the Scottish Government identified a number of legal issues with this proposal stating that it would be necessary to determine if such restrictions were "within the legislative competence of the Scottish Parliament."[236] Regardless of these concerns, the Committee recommended that the Government amended the Bill to make this restriction.[237]

During the Stage 3 debate, the Government's proposals to amend Part 3 to give the Scottish Ministers the regulation making powers to necessitate the disclosure of who controls land to be recorded in a public register under the control of the Keeper[238] were agreed.[239] This information had to be available to all.[240] The proposal on limiting ownership to EU entities did not get passed.[241] Supporters of the restriction expressed their disappointment, highlighting that the Government were ignoring a "central [recommendation] in relation to transparency that came through the consultation."[242] The Committee's co-convenor, Patrick Harvie, was of the view that the "bold measure" should have been approved and then defended in court rather than simply claimed to be not within the competence of the Scottish Parliament.[243]

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[232] RUCCEC, "Land Reform" para 195.
[233] *Ibid*.
[234] *Ibid* para 206.
[235] 79% of 944 responses. See *Ibid* para 207.
[236] *Ibid* para 214.
[237] *Ibid* para 220.
[238] Scottish Parliament, Meeting of Parliament Wednesday 16 March 2016 p72. Available at http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10440&mode=pdf
[239] This resulted in Land Reform (Scotland) Act 2016 ss39-40.
[240] *Ibid*.
[241] M Gray, "Tax haven Scotland: Government blocks move to end offshore land ownership" (2016). Available at https://www.commonspace.scot/articles/3686/tax-haven-scotland-government-blocks-move-end-offshore-land-ownership
[242] *Ibid.*
[243] *Ibid.*

3.5.3 Register of Controlling Interests

Under s39 of the Land Reform (Scotland) Act 2016, the Scottish Ministers must introduce regulations to require information to be provided about the persons who have controlling interests in owners and tenants of land and for publication of that information in a public register kept by the Keeper.[244] On 9 September 2016, the Government issued a consultation document containing a number of questions to assist with the development of these regulations.[245] There were three areas on which the Government was seeking feedback and advice. First was the definition of what is a "controlling interest." This was followed by practical matters for collecting this information, the types of land to be included, to whom the rules will apply, what information is required and where the information should be stored. Finally, there where the disclosure aspects such as what should be available to the general public, should there be exceptions, and what the enforcement and sanction powers should be.[246] Interestingly, for accessibility of information, it was stated that:

> "The Scottish Government considers that privacy exemptions will be necessary in some limited circumstances such as where publication of information about persons will put them at serious risk of harm. It will be necessary to develop a mechanism and process to allow applications to be considered and decided."[247]

Following the consultation, the Scottish Government published an analysis of the 58 responses which had been received.[248] In relation to the question on the inclusion of privacy exemptions in relation to the publication of information, 22 out of the 34 responses were in favour of not including any exemptions[249] for reasons such as completeness of information, to minimise appeals and to ensure transparency.[250] All the private sector and professional bodies who responded to

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[244] Land Reform (Scotland) Act 2016 s39.
[245] Scottish Government, "Controlling Interests consultation"
[246] Thorntons, "Who Owns Scotland? Consultation Launched on Controlling Interests in Land" (2016). Available at https://www.thorntons-law.co.uk/knowledge/blog/blog-overview/who-owns-scotland-consultation-launched-on-controlling-interests-in-land
[247] Scottish Government, "Controlling Interests consultation" para 21.
[248] Scottish Government, "Improving Transparency in Land Ownership in Scotland. Consultation Analysis" (2017). Available at http://www.gov.scot/Resource/0051/00517690.pdf
[249] *Ibid* para 7.26.
[250] *Ibid* para 7.27.

the question were in favour of exemptions.[251] Five respondents felt that there should be a protection mechanism in place for valid situations, such as when there is a "risk of violence."[252] The analysis of responses also highlights that a number of respondents had "emphasised the need for the proposals to comply with ECHR and data protection protocols, with mixed views on the likelihood of possible challenges on these grounds."[253] Further, it is noted that

> "A recurring view was that whilst some land owners and tenants might view disclosure of their details as an infringement of their privacy, their concerns will be inconsequential when set against the public gains from reliable, accessible and transparent data on ownership."[254]

The consultation analysis report does not contain details on either the Government's conclusions or their intended development of the regulations and the register.

It is clear that the Land Reform (Scotland) Act 2016 and the planned RCI are linked to the Scottish Government's vision on land matters and not to the property law publicity principle. The stated intent of the new register is to "ensure that land in Scotland is sustainably owned, used and developed in the interests of land owners, communities and wider society"[255] and therefore its purpose is related to accountability in regards to the use of land. Whilst it could be argued that the controlling interest information to be held in the register is an element of the subject-object-right relationship, it does not have any direct link to information about real rights *per se* or to third party effect. In contrast with the Land Register, privacy protection and access exemptions are being considered. However, with the stated opinion that such matters are "inconsequential" in comparison with the benefits, it is not apparent whether any privacy measures will be implemented.

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[251] *Ibid* para 7.26. This totalled seven respondents.
[252] *Ibid* para 7.28.
[253] *Ibid* para 8.11.
[254] *Ibid* para 1.33.
[255] Scottish Government, "Controlling Interests consultation" para 18.

3.6 Related Developments

The following sections provide a brief discussion on the creation of new registers to hold information on those with significant control over a company and to meet an EU money laundering reporting directive. Although not directly linked to the publicity principle in property law, they provide insight into the introduction of registers to meet a government's supervisory role, the identification of potential privacy issues and what protective measures have been included within the legislation.

3.6.1 Register of People with Significant Control

There has been a recent drive to gather and provide information on who controls companies. This commitment was made during the G8 summit at Lough Erne in June 2013[256] and was followed by the EU and G20 countries also agreeing to implement such measures. To meet this agreed collective goal within the UK, the Small Business, Enterprise and Employment Act 2015 came into force in 2015. Section 81 of the Act states that:

> "Schedule 3 amends the Companies Act 2006 to require companies to keep a register of people who have significant control over the company."

Schedule 3 of this Act inserts a new Part 21A and schedules 1A and 1B into the Companies Act 2006. Part 21A details which companies are required to hold such a register along with the information which needs to be included and the company's duties for retaining and updating the register. It also includes provisions for non-compliance sanctions, accessibility rights and a protection regime for certain information and people. Schedule 1A provides various definitions for determining whether someone has significant control. These include, as an example, where an individual holds, directly or indirectly, more than 25% of the shares in the company.[257]

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[256] UK Government, "'People with Significant Control' register comes into force" (2016). Available at https://www.gov.uk/government/news/people-with-significant-control-register-comes-into-force

[257] Companies Act 2006, Sch 1A, paras 2-5.

Following a consultation exercise the detailed Register of PSC regulations came into force on 6 April 2016.[258] From 30 June 2016, companies have had to declare to Companies House who controls them. This information must be included in their annual confirmation statement or when incorporation takes place.[259] If there are changes to this information, then updates must take place in the company's own PSC register as soon as possible.[260] Any person or legal entity can request to view a company's PSC register for no charge (or receive a copy for the prescribed fee of £12).[261] Keeping a PSC register is compulsory.[262] It is a criminal offence for both the company and defaulting officers if a register is not kept.[263] It is also a criminal offence for companies not to have taken "reasonable steps" to identify PSCs.[264] PSCs who do not receive requests for information from a company for which they have a controlling interest have an obligation to inform the company of their standing.[265]

When the draft regulations were laid before Parliament, the Minister of State for Universities and Science reported that the Government "appreciates that transparency is usually in the public interest" but "in certain rare circumstances publication of [people with significant control] information could put individuals at serious risk of violence and intimidation."[266] There are therefore a number of safeguards in place to protect individuals. The full date of birth is not held in the publicly held register at Companies House (though it will be stored in a company's register).[267] Residential addresses will not be disclosed.[268] There are also provisions in place which would provide full non-disclosure rights for people, or those they live with, who would be at serious risk of violence or intimidation

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[258] Register of People with Significant Control Regulations 2006, SSI 2016/339 reg 1(2).
[259] Companies Act 2006 s853I.
[260] *Ibid* s790M and s790E.
[261] *Ibid* s790O and Register of People with Significant Control Regulations 2016 reg 6(1).
[262] *Ibid* s790M(1).
[263] *Ibid* s790M(13)-(14).
[264] *Ibid* s790D and s 790F. Notices need to be sent to those who a company think could be PSC. *Ibid* s790D(3)-(4). If these persons do not respond to such notices then the company can impose various restrictions on their shareholdings without requiring a court order. *Ibid* Sch 1B paras 1-3.
[265] *Ibid* s790G.
[266] Parliament, "Transparency About Who Controls UK Companies: Written statement - HCWS488" (2016). Available at http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-01-26/HCWS488/
[267] *Ibid* s1087(1)(da).
[268] *Ibid* s790ZF.

either due to the activities of the company or a combination of these activities and the individual's characteristics or attributes.[269]

This register has clear accountability benefits, allowing interested parties to access further information on the operation of companies to ensure that they are meeting their statutory duties to their members and to society.[270] However, importantly, it is recognised that a number of controls are required to protect personal information in certain situations and these have been incorporated into the legislation.

3.6.2 The Fourth Money Laundering Directive

There has been similar legislation to the PSC Regulations enacted at the EU level. However, the scope of which entities come under the 4MLD is wider than the PSC legislation and includes trusts and Scottish Partnerships. The 4MLD[271] was approved by the European Parliament on 20 May 2015[272] with the purpose to prevent "the use of the financial system for the purposes of money laundering or terrorist financing." The EU Member States had to implement the measures in the Directive into their national law by 26 June 2017,[273] which included a new beneficial ownership reporting requirement for legal entities and trusts.

3.6.2.1 Legal Entities

The preamble to the Directive states that there "is a need to identify any natural person who exercises ownership or control over a legal entity."[274] This requirement resulted in the following provision contained in Article 30:

> "Member States shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold

[269] Register of People with Significant Control Regulations 2016/339 reg 36.
[270] See, for example, the duties listed in Companies Act 2006 s172.
[271] Council Directive 2015/849 OJ 2015 L141/73. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_141_R_0003&from=EN
[272] European Commission, "European Parliament backs stronger rules to combat money laundering and terrorism financing" (2015). Available at http://europa.eu/rapid/press-release_IP-15-5001_en.htm
[273] Council Directive 2015/849 OJ 2015 L141/73 art 67. There was subsequently a request made by the European Commission to implement this by 1 January 2017. See European Commission, "Anti-Money Laundering and countering Terrorist Financing: Stronger rules to respond to new threats" (2016) p4. Available at http://ec.europa.eu/justice/criminal/document/files/aml-factsheet_en.pdf
[274] Council Directive 2015/849 OJ 2015 L141/73 recital 12.

> adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held."

For what they call "effective transparency" the scope of the reporting coverage is extensive, with Member States being required to "ensure that the widest possible range of legal entities incorporated or created by any other mechanism in their territory is covered"[275] with information "stored in a central register located outside the company."[276] Beneficial ownership is defined in Article 3(6) as "any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted." The information retained must be accessible "in a timely manner by competent authorities and [EU Financial Intelligence Units]."[277] This access has to be without restriction. The information should also be accessible to "any person or organisation that can demonstrate a legitimate interest."[278] However, this does not need to be full access and the Directive provides a list of the information categories which must be provided at a minimum.[279] A "legitimate interest" is not defined.

Clearly the recent implementation of the UK's PSC register regime meets and in part exceeds the obligations contained in Article 30. However, there were a number of new requirements which needed transposed into national law which resulted in the issue of two consultation documents by the UK Government.[280] Following the consultation process, the Information about People with Significant Control (Amendment) Regulations 2017[281] and the Scottish Partnerships (Register of People with Significant Control) Regulations 2017[282]

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[275] *Ibid.*
[276] *Ibid* recital 14. "Competent authorities" are not defined.
[277] *Ibid* art 30.
[278] *Ibid* art 30(5)(c).
[279] At least the name, the month and year of birth, the nationality and the country of residence of the beneficial owner, and the nature and extent of the beneficial interest. *Ibid* art 30(5).
[280] HM Treasury, "HM Treasury, "Consultation on the transposition of the Fourth Money Laundering Directive" (2016). Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553409/4mld_final_15_sept_2016.pdf and Department for Business, Energy & Industrial Strategy, "Implementation of the Fourth Money Laundering Directive. Discussion paper on the transposition of Article 30: beneficial ownership of corporate and other legal entities" (2016). Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565095/beis-16-38-4th-money-laundering-directive-transposition-discussion-paper.pdf
[281] SI 2017/693.
[282] SI 2017/694.

were produced and came into force from 26 June 2017.[283] These regulations extend the scope of the PSC coverage to include Scottish Limited Partnerships and companies listed on a prescribed market. A Scottish Partnership's PSC information will be held on a central register at Companies House[284] but partnerships do not need to keep their own PSC registers. Initial registration had to take place by 24 July 2017.[285] Changes to PSC information must be reported within 14 days.[286] Parts 7 and 8 of the regulations provide privacy protection with residential addresses not disclosable[287] and applications can be made to Companies House to refrain it from disclosing information if it "will put the applicant or a person living with the applicant at serious risk of being subjected to violence or intimidation."[288]

3.6.2.2 Trusts

Recital 17 of the 4MLD states that "[i]n order to ensure a level playing field among the different types of legal forms, trustees should also be required to obtain, hold and provide beneficial ownership information to obliged entities taking customer due diligence measures and to communicate that information to a central register or a central database and they should disclose their status to obliged entities."[289]

Article 31 provides that:

> "Member States shall require that trustees of any express trust governed under their law obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust. That information shall include the identity of:
>
> (a) the settlor;
> (b) the trustee(s);
> (c) the protector (if any);

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[283] *Ibid* reg 1(2).
[284] *Ibid* reg 19.
[285] *Ibid*.
[286] *Ibid* reg 20(2).
[287] *Ibid* reg 41.
[288] *Ibid* reg 48.
[289] Obliged entities include financial institutions, auditors and legal professionals involved in the buying and selling of real property. Council Directive 2015/849 OJ 2015 L141/73 art 2.

(d) the beneficiaries or class of beneficiaries; and

(e) any other natural person exercising effective control over the trust."

Again this information must be held on a central register,[290] be "adequate, accurate and up-to-date"[291] with unrestricted access in a timely manner to competent authorities and Financial Intelligence Units,[292] and a level of access may be provided to obliged entities for carrying out customer due diligence.[293] The requirement in Article 31 is placed only on express trusts. Other trusts such as implied, constructive and statutory trusts are therefore not in the scope of the Directive.[294]

The HM Treasury's consultation document on the transposition of 4MLD stated that the "government welcomes efforts to improve the transparency of trusts and trust-like legal arrangements."[295] However, it also emphasised the government's view that tax-payer information is confidential and should be protected. Therefore, as opposed to the information held through Article 30, the trust information held centrally will not be shared with private entities or individuals.

Following the consultation process, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017[296] were produced and came into force from 26 June 2017.[297] Trustees of a relevant trust[298] must keep "accurate and up-to-date records in writing of all the beneficial owners"[299] of the trust while trustees of a taxable relevant trust[300] must provide information to HMRC on the beneficial owners of the trust[301] by 31

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[290] *Ibid* art 31(5).
[291] *Ibid.*
[292] *Ibid a*rts 31(3)-(4).
[293] *Ibid* art 31(4).
[294] During the legislative process, the trusts within scope had changed radically and the reporting obligation had been placed on all trusts. The SLC had found this objectionable, stating that it would have had the "capacity to destabilise the Scots law of trusts." See Scottish Law Commission, *Report on Trust Law* (Scot Law Com No 239, 2014) paras 2.27-2.36.
[295] HM Treasury, "Consultation on the transposition of the Fourth Money Laundering Directive" para 10.11.
[296] SI 2017/692.
[297] *Ibid* reg 1(2).
[298] Defined in reg 42(2)(b).
[299] *Ibid* reg 44(1).
[300] Defined in reg 45(14).
[301] Defined in reg 6.

January 2018[302] and of any changes by 31 January after the tax year of the change.[303] An online Trusts Registration Service has been introduced to enable trustees to supply the required pieces of information.[304] The new Register of Beneficial Ownership, which is the responsibility of the HMRC, is not currently publicly accessible.[305] Monteith, however, highlights that this restriction could be removed if the fifth EU Anti-Money Laundering Regulation is passed and introduced into UK legislation.[306]

It is apparent from the above discussion that the use of such registers for a stated purpose will have supervisory benefits and provide relevant institutions with information to allow them to reduce money laundering or terrorist funding. As with the PSC Register, requirements for privacy protection were identified and measures introduced within the legislation. However, for trusts, the Government went one step further, recognising that holding trust information in a register to meet the objective of the Directive did not require the register to be made publicly accessible.

3.7 Conclusion

Adherence to the publicity principle, as described in Chapter 2, requires accurate and complete information about real rights in land. A completed Land Register in Scotland will help to achieve this. Third parties will be able to obtain information on real rights relating to land from one register and the information will meet the specificity requirements.[307] There are, however, a number of barriers to full completion of the Land Register and it is unlikely the 2024 deadline will be met. Technological initiatives, such as ScotLIS, could make land information more easily accessible, with some of this information being related to the publicity principle. However, some information on ScotLIS

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[302] *Ibid* reg 45(3).
[303] *Ibid* reg 45(9).
[304] HMRC, "HMRC Trusts and Estates Newsletter: September 2017" (2017) Available at https://www.gov.uk/government/publications/hm-revenue-and-customs-trusts-and-estates-newsletters/hmrc-trusts-and-estates-newsletter-september-2017
[305] Interestingly, reg 41(1) provides that "Any personal data obtained by relevant persons for the purposes of these Regulations may only be processed for the purposes of preventing money laundering or terrorist financing."
[306] M Monteith, "Trusts: New Register of Beneficial Ownership must be kept by trustees" (2017) Available at https://www.harpermacleod.co.uk/hm-insights/2017/september/trusts-new-register-of-beneficial-ownership-must-be-kept-by-trustees/
[307] See section 2.4.

will be unrelated to real rights and unnecessary for the protection of third parties.

Although the Land Register is currently publicly accessible to all, it is argued in this dissertation that unfettered access to all the data held in the Land Register is not required for publicity. There are various public registers such as the English Land Register and the Companies Register which have restrictions on the information which can be obtained and allow for individuals to request that their data is not made publicly accessible for legitimate reasons. However, those with real rights in land in Scotland do not have such protection available to them.

Reforms such as ScotLIS, the RCI and the PSC Register are being implemented to achieve improvements to 'transparency' such as accountability, accessibility of information and openness, which are not necessarily linked to the property law publicity principle. These reforms have different purposes and aims; for example, with ScotLIS it is public accessibility of land information while 4MLD it is to reduce money laundering and terrorist funding. It is through examination of the purpose for the reform that it can be determined whether full accessibility by the public is required. In relation to land, consideration has to be given to both the roles of RoS in implementing the reforms and whether there needs to be any safeguards for individuals to meet privacy concerns. The next chapter will analyse the concept of privacy and examine the various measures which have been developed to protect it.

Chapter 4 The Concept of Privacy

4.1 Introduction

The previous chapters have focussed on the property law publicity principle and its relationship with public registers such as the Land Register, the new initiative of ScotLIS and the planned RCI. This part of the dissertation will now consider the concept of privacy and will then examine how the areas of privacy and land registration operate in tandem.

What is privacy? This is usually answered with examples. Nieuwenhuis likens the search for a definition of privacy to the discussion between Socrates and Euthyphro on the meaning of piety.[308] Euthyphro provides various instances of piety but fails to come up with a concrete definition. In Barber's view,

> "Privacy is a concept of quite remarkable, and rather uncomfortable, flexibility. It is hard to isolate what values or interests an ethical right of privacy would seek to protect, and, consequently, what form the right should take."[309]

This chapter will discuss the various values and conceptions of privacy and will conclude with a discussion of Solove's taxonomy of privacy.

4.2 Values of Privacy

Whitman has identified two values which are discussed in Western privacy cases; namely dignity and liberty.[310] His research identified a "transatlantic clash" where the underlying justification for the protection of privacy in Europe tended to be a right to respect and personal dignity while in America, liberty was the dominant justification, in particular, freedom from state intrusion into a person's home.[311]

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[308] Nieuwenhuis, "Autonomy" 15.
[309] N W Barber, "A Right to Privacy?", in K S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (2007) 70.
[310] J Q Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty" (2004) 113 Yale Law Journal 1151.
[311] *Ibid* at 1161.

In Nieuwenhuis's view, the values of dignity and liberty are less diverse than Whitman claims. He argues that the connecting factor for the values is autonomy. He acknowledges that the traditional viewpoint for the concept of dignity is that it is concerned with honour, respectability and status. Therefore, in cases such as *Campbell v MGN Ltd*[312] which concerned the publication of information about a model's treatment for a drug addiction, the court protected what they felt a reasonable person in a similar situation would find offensive to publish. However, as Nieuwenhuis highlights, there will be information which is not offensive but "should nevertheless be signposted 'keep off'."[313] For this type of information, he adopts the Kantian idea of dignity being formulated as personal autonomy. Using cases concerned with a woman's right to abortion[314] and the freedom to decide on the size of your family, both of which highlight an individual's right to self-determination, he notes that "the courts pay tribute to personal autonomy as the core of human dignity."[315] For liberty, he notes the commonly held view that this concept is concerned with the absence of interference. However, as well as the negative aspect of the liberty right, he acknowledges that there is a positive element. Using the following citation from an analysis carried out by Isaiah Berlin, he construes that liberty can be "conceived of as autonomy"[316]:

> "The 'positive' sense of the world 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend upon myself, not on external forces of whatever kind."[317]

Nieuwenhuis concludes, therefore, that at a higher level, "liberty and dignity meet."[318] The concept of autonomy is "the overarching value linking such diverse cases as a woman's right to an abortion and her right to prohibit the publication of a photograph showing her attendance at meetings of Narcotics Anonymous."[319]

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[312] *Campbell v MGN Ltd* [2004] UKHL 22.
[313] Nieuwenhuis, "Autonomy" 18.
[314] Including *Rees v Darlington Memorial Hospital* [2004] 1 AC 309.
[315] Nieuwenhuis, "Autonomy" 19.
[316] *Ibid* 20.
[317] I Berlin, *Four Essays on Liberty* (1969) 131.
[318] *Ibid*.
[319] *Ibid*.

The UK courts have also recognised these two inherent values of privacy. In the English case of *Campbell v MGN Ltd*,[320] it was stated that "[privacy] lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual."[321] In *Mosley v News Group Newspapers Ltd*,[322] a case concerning the publication of two stories with explicit pictures and a video detailing Max Mosley's involvement in sado-masochistic parties, it was stated that "the law is concerned to prevent the violation of a citizen's autonomy, dignity and self-esteem."[323]

While there has not been the same number of cases with a focus on privacy in Scotland, both liberty and dignity have been values identified as worthy of protection. For example, in *Henderson v Chief Constable of Fife*,[324] the request made by a police officer that a woman remove her brassiere before entering a police cell was seen as "an interference with her liberty"[325] which the law should protect. In *Sutherland v HM Advocate*,[326] an appeal heard at the High Court of Justiciary following Sutherland being made subject to the notification requirements of the Sexual Offenders Act 2003 after admitting to posting a sexually explicit image of a woman on social media, the court stated that the sheriff had "failed to separate out the protection of the complainer's privacy and dignity, to which she was entitled …"[327] Further, in *Christian Institute v Lord Advocate*,[328] a judicial review of an Act of the Scottish Parliament in relation to data protection, the Supreme Court noted the centrality of autonomy with the statement: "[t]he notion of personal autonomy is an important principle underlying the guarantees of the ECHR."[329]

4.3 Conceptions of privacy

The above discussions attempt to home in on the values which privacy protects but do not provide a definition of the right of privacy. A succinct and useful

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[320] [2004] UKHL 22.
[321] *Ibid* at para 12.
[322] [2008] EWHC 1777 (QB)
[323] *Ibid* at para 7.
[324] 1988 SLT 361.
[325] *Ibid* 367.
[326] 2017 SLT 721.
[327] *Ibid* at para 34.
[328] [2016] UKSC 51.
[329] *Ibid* at para 75. For a discussion on ECHR, see section 5.3.

definition has been stated by the Consultative (Parliamentary) Assembly of the Council of Europe:

> "The right to privacy consists essentially in the right to live one's life with a minimum of interference."[330]

Reid provides an even shorter definition for privacy: "the individual's right to be left alone."[331] This is likely to have been influenced by the "right to be let alone" discussed in the famous "The Right to Privacy" article by Warren and Brandeis[332] which resulted in the creation of a tort of interference with privacy in the USA. This idea of privacy is open to criticism as, in particular, it cannot cover all aspects of privacy. For example, peeping Tom cases would not fall under this definition. In *Macdougall v Dochree*n,[333] Macdougall had been caught staring at undressed women in a solarium through a small hole in an adjacent locked lavatory. The women here were left alone, there was no annoyance, distress or physical harm. Nevertheless, it is clear that their privacy had been impinged. Similarly, the "left alone" definition could include other wrongs not linked to privacy such as assault.

Privacy is sometimes linked to secrecy; if someone does not wish to disclose something then, it is argued, he or she must have something to hide or have done something wrong.[334] This argument has little merit. The fact that, for example, someone does not want to include a photo of themselves on their LinkedIn page has no sinister aspects to it and does not imply that person must have done something nefarious in the past. That person has merely exercised autonomy and self-determination to decide that they do not wish to share this part of their personal identity with an indiscriminate section of the population.

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[330] Most recently following the death of Princess Diana in Resolution 1165 (1998), 1998 Session (third part).
[331] Reid, *Privacy* para 1.01.
[332] S Warren and L D Brandeis, "The Right to Privacy" (1890) 4 Harvard L.R. 193 at 195.
[333] 1992 JC 154.
[334] See Berlee, *Access* section 4.4.

Moreham uses a different conception in her development of a framework for privacy protection in New Zealand.[335] She states that:

> "The protection of privacy in New Zealand common law has at its heart the idea of *retreat* or *inaccessibility*. It is about the ability to remove oneself from the world, to keep certain information beyond the reach of others, to exclude strangers from our innermost spaces. Privacy therefore protects a realm in which we are entitled to choose, on our own terms, the extent to which we are accessed by others."[336]

This is key in the modern conception of privacy as it highlights that individuals should be able to control what they impart, who they share it with and how their personal information is cascaded through other networks. This is connected to the argument that privacy is linked to autonomy, self-determination and identity building, and goes further than wanting to keep information secret from others. It emphasises that information is strongly connected to individuals and they should be able to determine how it is used in an evolving process as they develop their personalities. People should be in control of the data that defines them. Viewing privacy this way also posits why privacy should be protected rather than first assuming that it should.[337]

4.4 Solove's Taxonomy of Privacy

As is apparent from the above, there are various opinions and theories on privacy. Indeed, in his book *Understanding Privacy*, Solove describes privacy as a "concept in disarray"[338] and he criticises theories of privacy as being either too narrow, broad or vague.[339] In his view, these theories view privacy as "a unitary concept with a uniform value that is unvarying across different situations"[340] and they fail because they attempt to characterise privacy through the use of a single factor which is common across all aspects of privacy. In his opinion, privacy should be viewed as "a set of protections against a plurality of distinct

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[335] N A Moreham, "A Conceptual Framework for the New Zealand Tort of Intrusion" (2016) 47(2) Victoria University of Wellington Law Review 283.
[336] *Ibid* at 284, emphasis added.
[337] See Berlee *Access* section 4.5.
[338] Solove, *Privacy* 1.
[339] *Ibid* 8.
[340] *Ibid*.

but related problems"[341] and it through understanding these problems that laws can be developed to best protect privacy. He therefore, through the use of a taxonomy, conceptualises privacy as a cluster of problems which share "family resemblances"[342] and, in his opinion, it is through studying these issues collectively that a better understanding of the overall grouping can be achieved. Solove identifies these problems using a "bottom-up cultural analysis,"[343] using various sources such as historical, political and sociological resources. However, he concentrates on the law because "it provides concrete evidence of what problems societies have [recognised] as warranting attention."[344] Solove recognises that this is neither a normative approach nor one based on any overarching principles. His view is that focussing on the activities which cause problems that affect private matters can assist in the development of protective legal and policy privacy measures. Further, viewing privacy as a pluralistic concept highlights that the value of privacy does not have a uniform value; its value is contextual, driven by "which form of privacy is involved and what range of activities are imperilled by a particular problem."[345]

His taxonomy has four high level groupings of harmful activities which are further broken down to sixteen privacy problems:

[341] *Ibid* 171.
[342] *Ibid* 172.
[343] *Ibid* 102.
[344] *Ibid*.
[345] *Ibid* 173.

1	Information Collection	Surveillance
		Interrogation
2	Information Processing	Aggregation
		Identification
		Insecurity
		Secondary use
		Exclusion
3	Information Dissemination	Breach of confidentiality
		Disclosure
		Exposure
		Increased accessibility
		Blackmail
		Appropriation
		Distortion
4	Invasions	Intrusion
		Decisional interferences[346]

The first three groupings involve data moving further from an individual, while the last grouping includes activities which directly impact on the individual but do not always comprise information.

In his view, grouping the privacy problems in this way helps to determine why and how they cause harm to individuals and society. He notes that "there is a distinction between recognising a problem and understanding a problem"[347] and highlights that law makers often have difficulties in identifying such privacy problems and even when they do, they fail to understand their character and impact. He therefore uses his taxonomy to ascertain a number of different harms which the various groupings of these problems can cause such as physical

[346] *Ibid* 104.
[347] *Ibid* 179.

injury, financial loss, property harm, damage to reputation, emotional and psychological injuries, and vulnerability harm.[348]

4.5 Conclusion

On the back cover of Solove's "Understanding Privacy" he highlights that privacy is "one of the most important concepts of our time, yet it is also one of the most elusive."[349] The above discussion highlights the various complexities in analysing what privacy is, what its values are and what harm privacy infringements can cause. Despite Solove's objections, it is suggested that the idea of autonomy is a useful overarching normative value of privacy protection, which brings together both liberty and dignity, and emphasises why privacy should be protected beyond that it causes harm. Allowing an individual to have the autonomy to control the flow of their private information, including the ability to make it inaccessible if so determined, provides advantages to identity building and the development of personality. However, Solove's taxonomy validly highlights that information collected legitimately from an individual can still be processed and disseminated in various ways which can result in harm. This is relevant for the land registration context and is discussed further in the next chapter.

[348] *Ibid* 174-179.
[349] *Ibid*.

Chapter 5 Privacy Protection

5.1 Introduction

Lord Mance, in his article "Human Rights, Privacy and the Public Interest – Who Draws the Line and Where?"[350] stated, after noting the famous article published in the USA in 1890 entitled "The Right to Privacy,"[351] that "it has taken a century before privacy has achieved prominence in European jurisprudence. That it has done so in this country is very largely due to the Human Rights Convention."[352] The passing of the Human Rights Act 1998, which incorporated the rights of the ECHR into domestic law, resulted in a new focus on how privacy is and should be protected. While, in the main, the law of privacy appears to be slow to adapt with modern times, one privacy element which was unusually ahead of societal and technology changes was the field of data protection. This chapter will start by examining the harm infringements to privacy can cause in the context of land registration, using three problems from Solove's taxonomy; aggregation, insecurity and intrusion. It will then discuss the privacy aspect of human rights and in particular the Article 8 right to respect for private and family life. Finally, data protection statutory frameworks and how they relate to the developments in registration outlined in Chapter 3 will be analysed.

5.2 What harm could privacy invasions cause?

As mentioned in Chapter 3, there is a significant amount of information about individuals held on the Land Register and this will be increased following the implementation of the planned RCI. There are a number of ways in which unfettered access to such information in the Land Register, ScotLIS and the RCI[353] could cause harm, including data aggregation, identity theft and physical or psychological injury. These relate to the aggregation, insecurity and intrusion privacy problems in Solove's taxonomy and are discussed below.

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[350] (2009) 30 Liverpool Law Rev 263.
[351] S Warren and L D Brandeis, "The Right to Privacy" (1890) 4 Harvard L.R. 193.
[352] (2009) 30 Liverpool Law Rev 263 at 264.
[353] This dissertation will not focus on the Registers of Sasines due to the plans to close this register.

5.2.1 Aggregation

One view of privacy protection in relation to information is that it prevents the sharing of "information that is embarrassing or harmful to one's reputation"[354] and it protects only disclosure of "sensitive or intimate information."[355] However, as Solove points out, "[m]uch of the information contained in public records … is relatively innocuous."[356] Does this mean it should not be protected? For example, triviality has been seen as a limiting principle in the English breach of confidence actions with the action applying "neither to useless information, nor to trivia."[357] However, as Reid highlights, "information that is regarded as "trivial" or "tittle-tattle" to the extent that there is no public interest in its disclosure is not necessarily trivial from the point of view of the individual asserting its confidentiality."[358] Lord Walker similarly stated in the House of Lords decision of *Douglas v Hello! Ltd*,[359] a case regarding wedding photographs taken by a freelance journalist without consent, that the "argument that information is trivial or anodyne carries much less weight in a case concerned with facts about an individual's private life which he or she reasonably expects to be kept confidential."[360] It is therefore clear that data may be innocuous to some but as Lord Hope surmised in *Campbell*, "[t]he mind that has to be examined is … the person who is affected by the publicity."[361] Further, there is a concern that a piece of data which by itself can be viewed as trivial can be used alongside other pieces of information and become less innocuous. As Solove states, "it is the totality of the information, aggregated together, that presents the problem."[362] He describes a "digital biography" where advances in technology have allowed data to be gathered and combined from various sources to "paint a portrait of a person's life."[363] He notes that certain pieces of information in public records which do not "make one blush or reveal one's

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[354] Solove, "Access and Aggregation" at 1140.
[355] *Ibid* at 1179.
[356] *Ibid* at 1140.
[357] *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 282.
[358] Reid, *Privacy* para 15.07.
[359] [2008] 1 AC 1.
[360] *Ibid* para 291.
[361] [2004] UKHL 22 para 99.
[362] Solove, "Access and Aggregation" at 1185
[363] *Ibid*.

deepest secrets"[364] can "sometimes be the missing link … or the key necessary to unlock other stores of personal information."[365]

This aggregation problem has reached the UK courts. Following the English High Court decision of *Venables v News Group Newspapers Ltd*,[366] an injunction had been granted to stop the disclosure of the identify or the future whereabouts of the two killers of the 2-year old James Bulger. At the time of this case, the murderers, who had been ten when the murder took place, where about to be released from secure units after attaining the age of eighteen. On the day of their release, a newspaper published an article which, it was claimed, contained information which could lead to identification of their current location. During the ensuing contempt case,[367] it was argued that "in the article there was enough information, taken with other information widely known … to lead anyone with local knowledge or anyone tapping the local knowledge of another to pinpoint where one of the boys was at the time."[368] The opposing argument put forward by the newspaper was that "it would be wrong for the court to rely on information which might be a piece in the jigsaw of identification where the newspaper might not be aware of the significance of the piece supplied by its article."[369] In this instance the judge ruled in favour of the former argument and found that the newspaper had breached the injunction order. The aggregation issue has also affected providers of information society services. In the recent Northern Ireland Court of Appeal case *CG v Facebook Ireland Ltd*,[370] Facebook was found to be liable for misuse of private information after information was shared which could identify the residence of a released sex offender and which was not removed until nine days after Facebook were alerted to this fact.

In the Supreme Court's ruling in *PJS v News Group Newspaper*,[371] regarding an application for an injunction to restrain a newspaper from publishing details in England and Wales of the extra-marital sexual activities of someone in the entertainment business, Lord Neuberger accepted that "the internet and other

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[364] *Ibid*.
[365] *Ibid* at 1181.
[366] [2001] EMLR 10.
[367] *Venables v News Group International (Breach of injunction)* (2002) 99(6) LSG para 30.
[368] *Ibid* para 23.
[369] *Ibid*.
[370] [2016] EMLR 12.
[371] [2016] UKSC 26.

electronic developments are likely to change our perceptions of privacy."[372] It is clear that advances in technology and the widespread use of social media have changed how information is shared. The aggregation problem will only continue to increase and measures are required to protect data that, when considered in isolation, could be viewed as harmless but which have the potential, when linked to other pieces of data, to allow a digital biography to be built. This aggregation may lead to an encroachment into the control of individuals over information which is central to their autonomy and identity.

As outlined in Chapter 3,[373] there is a significant amount of information contained within public registers such as the Land Register which could be used in this process of aggregation, for example full and previous (such as maiden) names, addresses, marital status, and dates of birth. With advances in technology and accessibility initiatives such as ScotLIS, it could become easier for individuals or private sector bodies to obtain large amounts of data from the Land Register and RCI, which could then be combined with information from other sources and processed for various objectives not linked to the purpose of the registers.[374]

5.2.2 Identity theft

Insecurity was another of the privacy problems in Solove's taxonomy. In Solove's 2002 article[375] he states that, in America "[o]ne of the most rapidly escalating forms of crime is identity theft."[376] This can include "when an individual's personal information is stolen to open new bank accounts, acquire credit cards [and to] obtain loans."[377] It is a global issue, with Griggs and Low noting that there is "no doubt that a significant portion of the billion-dollar fraud that occurs relates to land transactions."[378] They cite an article by Matthews who

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[372] *Ibid* at para 70.
[373] See section 3.3.4.
[374] For a discussion on purpose, see section 5.5.3.2.
[375] Solove, "Access and Aggregation."
[376] *Ibid* at 1185. He cites a NY Times article which claimed the FBI had called "identity theft the fastest-growing white-collar crime in the United States." Available at http://www.nytimes.com/2001/04/08/business/personal-business-fighting-back-when-someone-steals-your-name.html
[377] *Ibid*.
[378] L Griggs and R Low, "Identity fraud and land registration systems: an Australian perspective" (2011) 4 Conveyancer and Property Lawyer 285 at 285.

claims that such frauds are "laughably simple."[379] Matthews, after examining the English land registration system at the time, stated, in his view, how easy identity theft could be:

> "I would do a search on the--public--Land Register (it cost me £2) and obtain details of your registered property, I would download a form TR1 from the Land Registry's website (free), type in your name and details of the property, and my name as transferee, and then forge your signature at the bottom. I would send in the form, and, within a few weeks, receive confirmation that I was now the registered proprietor. Under the Land Registration Act 2002 s.58, the mere fact of registration makes me legal owner, so-called "statutory magic". Having applied to a bank for a loan secured on the property, I granted a charge to the bank, which charge was then registered, the bank paid me the money, and I disappeared into the sunset, leaving no forwarding address. My name was probably not my real name, either. The result was that one of two innocent people had to suffer: either the bank (which relied on the Land Register) or you (who knew nothing about it)."[380]

Griggs and Low provide a number of examples of identity fraud cases in relation to land which had occurred in Australia. Interestingly, they ask the question "[h]ow will these frauds translate to an electronic environment … where users of the system log in to the system, prepare land title documents online, which are digitally signed and electronically lodged for registration?"[381] They note that it had been shown that identified paper based examples could occur again with an electronic system. However, they also identify new ways for such crimes to be committed, including through careless use of user names and passwords or by an imposter successfully applying for registration to an electronic scheme.[382] They note that such electronic based crimes remove any pre-relationship between parties which was common in paper-based fraud. They conclude that for either paper or electronic based transactions, "the more steps that can be put in place to ensure that the parties to the transaction are the people who they say they

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[379] P Matthews, "Registered land, fraud and human rights" (2008) 124 Law Quarterly Review 351.
[380] *Ibid* at 351.
[381] L Griggs and R Low, "Identity fraud and land registration systems: an Australian perspective" at 296-297.
[382] *Ibid* at 298-299.

are, without compromising the efficiency of the system, can only lead to greater reliance, understanding and confidence."[383] This would not, in their opinion, just benefit the potential direct victims as with "State guaranteed compensation scheme[s] in place to compensate those who suffer loss, the purse of the public is protected by a system that takes the necessary steps to minimise fraud."[384] In England, the threat of identity theft on land transactions has resulted in the provision of a system where a landowner can either (a) track any changes made to the register of their property or (b) place a restriction on their title such that a registration of sale or mortgage on their property will not be allowed unless there is evidence from a solicitor or conveyancer to validate that it was made by the landowner.[385]

Clearly there is information stored in the Land Register and RCI which could be used for identity theft and fraud both on and off the Land Register. For example, a maiden name and date of birth are common security questions used by the private sector and copy deeds or other documents held by the Keeper can include signatures. There is increased potential for identity theft in Scotland through the implementation of e-conveyancing. The Land Registration (Scotland) Act 2012 amended the Requirements of Writing (Scotland) Act 1995 resulting in an electronic document becoming valid for a land transaction if it includes an electronic signature which is "incorporated into, or logically associated with, the electronic document"[386] and the signature is an "advanced electronic signature".[387] Solicitors in Scotland now use a smart card which stores their digital signature and allows them to digitally sign documents which can be authenticated.[388] If this system were to be compromised, then, together with

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[383] *Ibid* at 285.
[384] *Ibid*.
[385] UK Government, "Protect your land and property from fraud" website. Available at https://www.gov.uk/protect-land-property-from-fraud. In 2007, the Land Registry also removed online access to documents referred to on the register. Previous to that, mortgage deeds and leases were available through Land Register Online. Access was removed due to the potential misuse of scanned documents. See Land Registry, "Changes to Land Register Online" (2007). Available at http://webarchive.nationalarchives.gov.uk/20080726223017/http://www1.landregistry.gov.uk/about_us/pressoffice/notices/default.asp?article_id=16489
[386] Requirements of Writing (Scotland) Act 1995 ss9B(1)-(2).
[387] Electronic Documents (Scotland) Regulations 2014 reg 2.
[388] For further information, see https://www.lawscot.org.uk/members/smartcard/

the personal information held in the Land Register or RCI, there could be a rise in the number of cases of land transaction fraud.[389]

5.2.3 Physical or psychological injury

Solove identified intrusion as another of the harmful activities in his privacy taxonomy. As Solove points out, "[p]ublic record information also proves useful for stalkers."[390] As an example he describes the murder of actress Rebecca Shaeffer outside her house by an obsessed fan who obtained her home address through the help of a private investigator who had used Californian motor vehicle records.[391] This raises the question as to whether residential information is something which is private and if so, should it be protected and should one have the ability to control who can discover it? The UK Government consider that accessibility of information held in the electoral register should be under the control of the individual. The open electoral register with details such as name, address, national insurance number and age is available for anyone to purchase.[392] An individual can, however, "prevent [their] personal details on the electoral register from being made more widely available."[393] Further, "[a]nyone who believes that having their name and address on the electoral register would put them or anyone who lives with them at risk can apply for anonymous registration."[394] As the British Library put it, the open register "omits the names of electors who have exercised their right to opt out to protect their privacy."[395] For the full register, which is not available to the general public, it is a crime for anyone with access to pass on information to someone with no lawful reason to have it.[396]

There have been a number of cases involving requests that residential information is not published in newspapers. In *Venables v News Group*

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[389] Reid and Gretton note that fraud in conveyancing "remains active", which they split into three categories; payment-instruction fraud, owner-impersonation fraud and security-discharge fraud. See K G C Reid and G L Gretton, *Conveyancing 2016* (2017) 197-203.
[390] Solove, "Access and Aggregation" at 1185.
[391] *Ibid* at 1185-86.
[392] ICO, "Electoral register" Available at https://ico.org.uk/for-the-public/electoral-register/
[393] *Ibid*.
[394] *Ibid*
[395] British Library, UK electoral registers. Available at https://www.bl.uk/collection-guides/uk-electoral-registers
[396] Representation of the People (Scotland) Regulations 2001/497 regs 95 and 115.

Newspapers Ltd,[397] discussed earlier, Justice Butler-Sloss, when granting the injunction, recognised the shortcomings of the voluntary press code, noting that "the Press Code cannot adequately protect in advance … [r]ecourse to the courts after the event would be too late."[398] Two years later, Justice Butler-Sloss was asked to decide a similar case. *X, A Woman Formerly known as Mary Bell v O'Brien*[399] concerned a request for a permanent injunction to restrict the publication of the identities and addresses of a mother and a child. The mother, previously known as Mary Bell, had murdered two small children when she was eleven. When granting the injunction, Justice Butler-Sloss took into account evidence from various parties in regards the "significant risk of intrusion and harassment"[400] should the information be disclosable. For example, a forensic psychiatrist had stated that if the information was published it would lead to "stalking, public stigmatisation, and serious interference with the daily lives of her loved ones."[401]

Conversely, no such protection was granted to the model Heather Mills who wanted to stop The Sun newspaper publishing either photographs or details which would identify the home she had recently purchased.[402] She had bought the house using an alias as she was "anxious to ensure that details of her address [were] not given public circulation, since she fears that she might be subject to physical threats or even injury."[403] Justice Lawrence Collins noted that the Press Complaints Commission had applied the privacy element of the Editor's Code of Practice to prohibit addresses of celebrities being published in certain instances due to problems with stalkers or if the person is potentially vulnerable.[404] In his view, "[i]t is not for the court to act as an arbiter of public taste, but I can take into account the *relatively trivial character of the information*, against the serious consequences which Ms Mills says may flow if the information is made generally available."[405] Justice Lawrence Collins felt that personal security was clearly not "uppermost in her mind"[406] due to her selecting to live in a "busy and

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[397] [2001] EMLR 10. For the background on the case, see section 5.2.1.
[398] *Ibid* para 97.
[399] [2003] EWHC 1101 (Fam).
[400] *Ibid* para 40.
[401] *Ibid* para 41.
[402] *Mills v News Groups Newspapers Ltd* [2001] EMLR 41.
[403] *Ibid* para 2.
[404] *Ibid* para 27.
[405] *Ibid* para 33, emphasis added.
[406] *Ibid* para 35.

populous town"[407] which would result in her location being known to a limited extent to the public. After stating that he had "no reason to doubt Ms Mill's sincerity in expressing her concern about the adverse consequences which may flow from disclosure of her address or information which may lead to it being known,"[408] his view was that "the evidence which she puts forward for a real risk is very slight,"[409] and he refused her request for the interim injunction. It is arguable that this case would now be decided differently following the enactment of the Human Rights Act 1998, discussed below.

In a recent case heard at the Northern Ireland Court of Appeal, mentioned above, regarding the posting of information on Facebook detailing the current general location of a convicted sex offender, it was stated that "[w]hether an address or location is private information is likely to be highly fact sensitive."[410] However, there is no ability to control who has access to residential addresses on the Land Register.[411] Given the discussion above, this could result in potential physical or psychological injury. As an example, there could be case where a Children's Hearing decides that address information should be withheld in a fostering or adoption situation for the protection of the child; such a decision could be undermined by the opposing party requesting the same information from the Land Register.

5.3 Human Rights Act 1998

After Labour's victory in the 1997 General Election, the Human Rights Act 1998 was enacted to give "further effect to rights and freedoms guaranteed under the European Convention on Human Rights,"[412] and came into force on 2 October 2000.[413] From this date, legislation, both primary and secondary, must be "read and given effect in a way which is compatible with the Convention rights."[414] If this cannot be achieved then a competent court can make a declaration of

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[407] *Ibid*.
[408] *Ibid* para 34.
[409] *Ibid*.
[410] *CG v Facebook Ireland Ltd* [2017] EMLR 12 para 47.
[411] There are restrictions in place for the disclosure of residential information contained in the Companies Register. For example, see section 3.6.1.
[412] Long title of the Human Rights Act 1998.
[413] Human Rights Act 1998 (Commencement No.2) Order 2000 para 2.
[414] Human Rights Act 1998 s3.

incompatibility.[415] Further, it became unlawful for public authorities, which includes the Registers of Scotland, [416] courts and tribunals,[417] to act in a manner incompatible with Convention rights,[418] unless bound by primary legislation.[419] Similarly, the Scottish Government cannot act in an incompatible manner[420] and an Act of the Scottish Parliament contrary to Convention rights is void.[421]

A number of the ECHR rights are absolute, meaning they cannot be breached in any circumstance. An example of an absolute right is Article 3 which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[422] Privacy is protected through Article 8:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."[423]

This is not an absolute right; it is a qualified right and there can be instances where a violation of this right can be justified. Article 8(2) provides that:

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[424]

Therefore, in order to meet the qualifications in Article 8(2), the activity which breached the right must have a legal basis and it has to be necessary to protect one of the exhaustive list of interests.

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[415] *Ibid* s4. The competent courts are listed in s4(5) and include the Supreme Court, High Court of Justiciary and Court of Session.
[416] See http://www.gov.scot/Topics/Government/public-bodies/about/Bodies
[417] *Ibid* s6(3)(a).
[418] *Ibid* s6(1).
[419] *Ibid* s6(2).
[420] Scotland Act 1998 s57.
[421] Scotland Act 1998 s29(2)(d).
[422] Human Rights Act 1998 Schedule 1, Article 3.
[423] *Ibid* Article 8.
[424] *Ibid*.

The introduction of the Human Rights Act 1998 has significant implications for the protection of privacy. The courts, when ensuring that human rights are protected, need to address how the ECHR interacts with other statutes and the common law. The courts also have a duty to take into account jurisprudence of the European Court of Human Rights when ruling on a question in relation to human rights.[425] Even though the protection of personal information is not explicitly stated in Article 8, Berlee notes that there have been a significant number of ECtHR cases on this matter.[426] She highlights the cases of *Z v Finland*,[427] in which the ECtHR were of the opinion that the protection of personal data was within the scope of Article 8 and *Köpke v Germany*,[428] where aspects of personal identity such as names or images were held to be included within the concept of private life. Further, Berlee emphasises that the ECtHR have included the storing and dissemination of personal information as being under the ambit of Article 8, even if this data was public information held by public bodies.[429] This is linked to the discussion on privacy in Chapter 4 with the ECtHR recognising the values inherent in privacy and providing protection through Article 8 to the potential harms identified by Solove.

Further, it has been stated by the ECtHR that the Convention is "a living instrument"[430] which requires a "dynamic interpretation"[431] in order to allow for current conditions. Therefore, consideration of the development of Article 8 protection is necessary when examining the disclosure of information through registers such as the Land Register and RCI. In particular, data protection laws, discussed below, may need to be re-evaluated to allow for changes in technology and other circumstances. This is confirmed by Solove who states, in his discussion on the future of privacy and the fluidity of his taxonomy, that "new technologies and ways of thinking will create new privacy problems and transform old ones."[432]

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[425] Human Rights Act 1998 s2(1).
[426] Berlee, *Access* section 5.5.2.
[427] (1998) 25 EHRR 371.
[428] (2011) 53 EHRR SE26.
[429] Berlee, *Access* section 5.5.2.
[430] *Cossey v United Kingdom* (1991) 13 EHRR 622 para 4.4.2.
[431] *Societe Colas Est v France* (2004) 39 EHRR 17 para 41.
[432] Solove, *Privacy* 196-197.

The question of whether residential information is private information protected by Article 8 has been discussed by the ECtHR. The case of *Alkaya v Turkey*[433] concerned the publication of a story about a burglary which had taken place at a property belonging to Alkaya, a cinema and theatre actress. The newspaper included a photograph of her and her exact address in their article. The national courts refused Alkaya's action for damages against the newspaper due to her celebrity status. Alkaya subsequently complained to the ECtHR that the state had failed to protect her Article 8 rights. Alkaya did not have issue with the story or the image but she complained that disclosure of her address had no public interest. She submitted that since the publication of where she lived she had been "regularly disturbed in her home and that she had become fearful and afraid of staying at home on her own."[434] The decision of the ECtHR was that:

> "The choice of one's place of residence was an essentially private matter and the free exercise of that choice formed an integral part of the sphere of personal autonomy protected by Article 8. A person's home address constituted personal data or information which fell within the scope of private life[.]"[435]

As the national courts had not "taken into consideration the repercussions on the applicant's life of disclosure of her private address", their decisions could "not be considered compatible with the State's positive obligations under Article 8 of the Convention."[436]

From this ruling, it could be argued that there is a positive obligation on the state to protect disclosure of residential information based on an examination of potential consequences. Ideally, this should take place before any such disclosure as "once lost, privacy could not be regained"[437] and "[r]ecourse to the

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[433] Application 42811/06.

[434] ECtHR Press release ECHR 371 (2012). Available at http://hudoc.echr.coe.int/eng-press?i=003-4110933-4833593 Official case report of application no. 42811/06 only available in Turkish and French.

[435] *Ibid*.

[436] *Ibid*.

[437] *Mosley v United Kingdom* [2012] EMLR 1 para 80. Mosley, however, was unsuccessful in his argument that the UK had violated its obligations under articles 8 and 13 by not imposing a legal requirement on newspapers to provide pre-notifications of publications which would violate an individual's right to respect of his private live.

courts after the event would be too late."[438] As highlighted above, there is no such system in place for the information held in the Land Register and therefore the LR(S)A 2012 could be in violation of Article 8. In order to justify such unfettered access to these registers through Article 8(2), the measures must be "necessary" to achieve a legitimate objective linked to one of the listed interests. As highlighted in the Supreme Court *Christian Institute v Lord Advocate*[439] case, this is a proportionality test which requires, amongst other things, a determination as to whether "a less intrusive measure could have been used without unacceptably compromising the achievement of the objective."[440] The English Land Registry's approach to restricting prejudicial information[441] is one example of a less intrusive method which does not appear to have caused detrimental effects to their economy or the rights of others.

5.4 Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union[442] details a number of civil, political, economic and social rights which European citizens and residents have and is based on the ECHR.[443] It was adopted in 2000 and obtained full legal effect following the Treaty of Lisbon in 2009. Article 7 of the Charter, the respect for private and family life, matches the ECHR Article 8 except it uses the word "communications" rather than "correspondence" to take into account changes to technology.[444] The explanatory notes to the Charter state that the ECHR Article 8(2) limitations are also relevant to the Charter's Article 7. The Charter, in Article 8, also explicitly includes protection for personal data. In *Volker und Markus Schecke GbR v Land Hessen* and *Bundesanstalt für Landwirtschaft und Ernährung*,[445] the Court of Justice of the European Union ruled that, for Article 8 of the Charter, "the limitations which may lawfully be imposed on the right to the protection of personal data correspond to those

[438] *Venables v News Group Newspapers Ltd* [2001] EMLR 10 para 94.
[439] [2016] UKSC 51.
[440] *Ibid* para 90.
[441] See section 3.3.5.2.
[442] Available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2007:303:FULL&from=EN
[443] European Parliament, "The Charter of Fundamental Rights of the European Union" (2000). Available at http://www.europarl.europa.eu/charter/default_en.htm.
[444] Charter of Fundamental Rights of the European Union, explanatory notes to Article 7.
[445] Joined Cases C-92/09 and C-93/09.

tolerated in relation to Article 8 of the Convention."[446] Therefore Article 7 and 8 are not absolute and infringements can be justified.

Berlee notes that the Charter, though a relatively new instrument, has played a significant role in the Court of Justice of the European Union's interpretation of the protective measures contained in the 1995 Data Protection Directive, which will be discussed in the following section.[447]

5.5 Data Protection Act 1998

5.5.1 Background

At the start of the 1970s there was an emerging fear about personal privacy due to the increased use of computers and their mass data manipulation capabilities.[448] In 1972, the Younger Committee's Report on Privacy[449] included 10 guiding principles for the use of personal data. A White Paper[450] was produced but did not result in the enactment of new legislation. This was followed by the Lindop Committee's report in 1978[451] which was concerned specifically with data protection. The Committee's report included a Code of Practice, with similar principles to those in the Younger report and it proposed that a Data Protection Authority was commissioned. Again, these recommendations were not acted upon.

This area of data protection was left untouched until the Council of Europe's Treaty 108 "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" was opened for signature in 1981.[452] This was again principle based.[453] The Data Protection Act 1984 was enacted in the

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[446] *Ibid* para 52.
[447] Berlee, *Access* section 5.5.4.
[448] For further information on the history of data protection, see R Jay and A Hamilton, *Data Protection Law and Practice* (2nd edn, 2003) Chapter 1, P Carey, *Data Protection in the UK* (2000) Chapter 1, D Bainbridge, *Data Protection* (2000) Chapters 1-3 and A Charlesworth, "Implementing the European Union Data Protection Directive 1995 into UK Law: The Data Protection Act 1998" (1999) 16(3) Government Information Quarterly 203.
[449] Cmnd 5012, 1972.
[450] Cmnd 6353, 1975.
[451] Cmnd 7341, 1978.
[452] Council of Europe, "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" (1981). Available at https://rm.coe.int/1680078b37
[453] In tandem with this, there was a data protection drive by the worldwide Organisation for Economic Co-operation and Development which also produced a set of privacy guidelines in 1980. Available at

UK to meet the Council of Europe's requirements. This Act used the principles[454] contained in the Convention rather than those that Lindop had recommended and was a brand new regime for holding and processing data. Data users had to register with the Data Protection Registrar (DPR).[455] Failure to comply with the principles could result in enforcement notices being served on a data user by the DPR.[456] Interestingly the focus of the Act was on data protection and not privacy, a term which was not mentioned in the Act itself, including in the long title.

Despite the Council of Europe Convention, there remained a lack of harmonisation of data protection rules across Member States. Data protection then became the focus of the EU and the EU Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[457] was adopted in 1995 with Member States having three years to implement the measures into national law. The Directive was again principle based and included conditions under which processing of personal data was lawful, the rights of data subjects and standards of data quality.[458]

The Data Protection Act 1998 was enacted to transpose this Directive into national law. It repealed the 1984 Act in full.[459] The 1998 Act introduced a new definition of data processing making it significantly wider in scope than the 1984 Act.[460] Reflecting the Directive, it was principle based with the first seven principles matching those in the 1984 Act along with additional details.[461] The eighth principle was new and concerned the transfer of data outwith the European Economic Area.[462] Privacy is again not mentioned in the Act, even though the Directive explicitly states that "data-processing systems … must, whatever the nationality or residence of natural persons, respect their

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http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm

[454] Data Protection Act 1984 Schedule 1.

[455] *Ibid* s4.

[456] *Ibid* s10.

[457] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML

[458] *Ibid* Article 6.

[459] Data Protection Act s74(2) and Sch 16.

[460] *Ibid* s1(1).

[461] *Ibid* Schedule 1.

[462] *Ibid*.

fundamental rights and freedoms, notably the right to privacy."[463] Therefore, by taking a purposive approach to interpreting UK legislation by considering the Directive it was implementing, privacy protection is an important aim of DPA 1998. The Human Rights Act 1998 and the protection of private and family life in Article 8 of the ECHR could also have an influence on how the Act is interpreted.[464]

5.5.2 Definitions

Before discussing the data protection principles, it is necessary to outline a number of the key data protection concepts defined in ss1 and 70 of DPA 1998.

5.5.2.1 Data

The definition of data includes information which:

> "(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
>
> (b) is recorded with the intention that it should be processed by means of such equipment."[465]

The Information Commissioner's Office guidance is that, based on these definitions, data is "information that is held on computer, or is intended to be held on computer"[466] and includes instances where "information is recorded in a manual form and the information is then either input manually onto a computer system or is scanned onto such a system."[467] Information contained within the Land Register, ScotLIS and the planned RCI will therefore meet this definition of data.

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[463] Directive 95/46/EU recital 2.
[464] See section 5.3.
[465] Data Protection Act 1998 s1(1).
[466] See https://ico.org.uk/for-organisations/guide-to-data-protection/key-definitions/
[467] ICO, "Determining what information is 'data' for the purposes of the DPA" p5. Available at https://ico.org.uk/media/for-organisations/documents/1609/what_is_data_for_the_purposes_of_the_dpa.pdf

"Personal data" is "data which relate to a living individual who can be identified from those data."[468] For the identification element, the ICO state that "[a]n individual is 'identified' if you have distinguished that individual from other members of a group [and in] most cases an individual's name together with some other information will be sufficient to identify them"[469] while the "relate to" requirement can mean data that is "processed to learn or record something about that individual."[470] Again, information contained within the Land Register, ScotLIS and the planned RCI will often meet this definition of personal data.[471]

5.5.2.2 Data Subject

A "data subject" is defined as "an individual who is the subject of personal data"[472] or as the ICO reword it; "the data subject is the individual whom particular personal data is about."[473] In relation to information held (or intended to be held) by RoS, the data subject could be the holder of any real right and the person with a controlling interest.

5.5.2.3 Processing

"Processing" has a very wide definition[474] covering "obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

> (a) organisation, adaptation or alteration of the information or data,
> (b) retrieval, consultation or use of the information or data,
> (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

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[468] Data Protection Act 1998 s1(1).
[469] ICO, "What is personal data? – A quick reference guide" p3. Available at https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf
[470] *Ibid*.
[471] Berlee also notes that the Dutch Minister of Security and Justice had concluded that all information in the Dutch Land Register would meet the personal information definition in the EU Directive. Berlee, *Access*, section 5.6.4.3.
[472] Data Protection Act 1998 s1(1).
[473] See https://ico.org.uk/for-organisations/guide-to-data-protection/key-definitions/
[474] The ICO state that "it is difficult to think of anything an organisation might do with data that will not be processing." See https://ico.org.uk/for-organisations/guide-to-data-protection/key-definitions/

(d) alignment, combination, blocking, erasure or destruction of the information or data"[475]

All of these are acts which are carried out by RoS in relation to personal data.

5.5.2.4 Data controller

A "data controller" is defined as "a person who … determines the purposes for which and the manner in which any personal data are, or are to be, processed."[476] It is not evident from this whether the Keeper would be classed as a data controller. However, the definition is subject to s1(4) of the 1998 Act, which states that "[w]here personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller"[477] with "enactment" including "any enactment comprised in … an Act of the Scottish Parliament."[478] Given that the Land Register is "to continue to be under the management and control of the Keeper of the Registers of Scotland"[479] it is evident that the Keeper would be classed as the data controller of the Land Register. The ICO are also of the opinion that "if performing a legal duty necessarily involves processing personal data, the person required to process such data will be the data controller and will be legally responsible for ensuring that the processing complies with the Act." The Keeper would also be the data controller for the RCI as Scottish Ministers can make provisions "about the publication of that information in a public register kept by the Keeper of the Registers of Scotland."[480]

For ScotLIS, for which there is currently no such legal duty to process data, the determination of the data controller would be dependent on the data governance model implemented and the Keeper (or RoS) could either be the data controller or a data processor. A "data processor" is defined as "any person (other than an employee of the data controller) who processes data on

[475] Data Protection Act 1998 s1(1).
[476] *Ibid*.
[477] *Ibid* s1(4).
[478] *Ibid* s70.
[479] Land Registration etc. (Scotland) Act 2012 s1(2).
[480] Land Reform (Scotland) Act 2016 s39(1).

behalf of the data controller."[481] For determining who is the data controller, the ICO "place greatest weight on purpose – identifying whose decision to achieve a "business" purpose has led to personal data being processed."[482] It is the data controller's duty to ensure that processing is compliant with DPA 1998 and therefore data processors are not directly subject to the Act. In order to determine who is responsible for the data protection compliance of the ScotLIS system, there should be clarification of who the data controller is.

Section 17 of DPA 1998 states that "personal data must not be processed unless an entry in respect of the data controller is included in the register."[483] The Keeper of the Registers of Scotland has a record in this register[484] with her reason for processing personal data: "to enable us to promote our goods and services, to maintain our accounts and records and to support and manage our staff". No mention is made of the publicity principle or the 2012 Act. However, this is due to the exception in s17(4) which states that the registration requirement "does not apply in relation to any processing whose sole purpose is the maintenance of a public register." A public register is defined in s70 as "any register which pursuant to a requirement imposed by or under any enactment … is open to public inspection."

Section 20 places a duty on data controllers to notify the Commissioner of any changes to practices or intentions. This could, depending on who is determined to be the data controller, be required following the introduction of ScotLIS.

5.5.3 The Data Protection Principles

Section 4(1) of DPA 1998 states that the "data protection principles" are those detailed in Part I of Schedule 1.[485] They must be interpreted using the guidance detailed in Part II of Schedule 1.[486] Section 4(4) places a duty of compliance on a data controller, who must adhere to the data principles with regards to the

[481] Data Protection Act 1998 s1(1).
[482] See https://ico.org.uk/for-organisations/guide-to-data-protection/key-definitions/
[483] *Ibid* s17.
[484] See https://ico.org.uk/ESDWebPages/Entry/Z5397958
[485] Data Protection Act 1998 s4(1).
[486] *Ibid* s4(2).

personal data for which they are the data controller.[487] This duty is subject to a list of exceptions defined in Part IV of the Act.[488]

The data protection principles include:

> 1) Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
> (a)at least one of the conditions in Schedule 2 is met, and
> (b)in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
> 2) Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
> 3) Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
> 4) Personal data shall be accurate and, where necessary, kept up to date.
> 5) Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
> 6) Personal data shall be processed in accordance with the rights of data subjects under this Act.[489]

The first three principles, which are most relevant to this dissertation, are further discussed below.

5.5.3.1 Fairly and Lawful

To meet the first data protection principle, one of the conditions, defined by the ICO as the "conditions for processing,"[490] listed in Schedule 2 must be met. These include that the data subject has given consent to the processing,[491] it is necessary for the performance of a contract[492] and the processing is necessary for "compliance with any legal obligation to which the data controller is

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[487] *Ibid* s4(4).
[488] *Ibid* s27(1).
[489] *Ibid* Schedule 1.
[490] ICO, "The conditions for processing" Available at https://ico.org.uk/for-organisations/guide-to-data-protection/conditions-for-processing/
[491] Data Protection Act 1998 Schedule 2 Para 1.
[492] *Ibid* Schedule 2 Para 2.

subject.[493] The last of these will be relevant to the information held in the Land Register and RCI, which would therefore remove the need for the data subject to consent to the processing of their data. The Keeper is not exempt from meeting one of these conditions for processing under the exemptions discussed further below. For ScotLIS, which currently has no statutory basis, it could be argued that it would either be processing "necessary for the exercise of any functions conferred on any person by or under any enactment"[494] or "necessary for the purposes of legitimate interests."[495] However, it is not clear whether ScotLIS would come under these categories and placing ScotLIS on a statutory footing would therefore help ensure that it met the first data protection principle.

The use of the word "necessary" in a number of the conditions for processing is significant. ICO note that this "imposes a strict requirement, because the condition will not be met if the organisation can achieve the purpose by some other reasonable means."[496] In the recent case in the Supreme Court regarding judicial review of data sharing provisions in the Children and Young People (Scotland) Act 2014, *Christian Institute v Lord Advocate*,[497] it was stated that "[w]here the disclosure of information constitutes an interference with rights protected by Art 8 of the ECHR … the requirement that disclosure is 'necessary' forms part of a proportionality test: the disclosure must involve the least interference with the right to respect for private and family life which is required for the achievement of the legitimate aim pursued."[498] The court was of the opinion that where an information provider had an obligation to make a disclosure then the *disclosure* itself would meet the processing to comply with a legal obligation condition for processing in Schedule 2. However, if the *content* of such a disclosure was to be determined by what the information provider considered to be likely relevant then this would not meet the condition for processing requirement of being *necessary* to achieve a function conferred on a person by an enactment. Under s104 of LR(S)A 2012, the Keeper is not given any discretion and she has a legal obligation to provide information upon request.

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[493] *Ibid* Schedule 2 Para 3.
[494] *Ibid* Schedule 2 Para 5(b).
[495] *Ibid* Schedule 2 Para 6(1).
[496] ICO, "The conditions for processing".
[497] [2016] UKSC 51.
[498] *Ibid* para 56.

The content of title sheets that she must hold is, in the main, required by sections 3-10 of the 2012 Act. However, s10 provides that a title sheet can contain "such other information (if any) as the Keeper considers appropriate."[499] Further, the archive record, as well as containing copies of all documents submitted to the Keeper and those required under the land register rules, is to consist of "copies of such other documents as the Keeper considers appropriate."[500] Based on the reasoning of the Supreme Court, it could be argued that for such processing, the Keeper would need to carry out a proportionality test before including such information in the Land Register which should take into account the aim which is being pursued and that such information would become publicly available.[501]

Interestingly, regarding a provision in the Children and Young People (Scotland) Act 2014 in which "a data controller 'may' disclose information to a third party if he 'considers' that to do so is 'necessary or expedient'"[502] the Supreme Court found that "those conditions are less demanding than any of the conditions in [sch] 2 … to the DPA."[503] In the view of the Supreme Court "[c]ondition 3 in sch 2 is not satisfied, since the disclosure does not have to be necessary for compliance with any legal obligation imposed on the data controller. Condition 5(b) in sch 2 … [is] not satisfied, since the processing does not have to be necessary for the exercise of any of the named person functions." It could be argued that the similar provision for KIR, "[o]ther than on application and irrespective of whether the proprietor or any other person consents, the Keeper may register an unregistered plot of land or part of that plot,"[504] would also not meet the conditions for processing and therefore would require consent from the data subject before such processing could take place. However, it could also be reasoned that in the context of the completion of the Land Register and the

[499] Land Registration (Scotland) Act 2012 s10(2)(e).
[500] *Ibid* s14(c).
[501] She also has discretion in s104(4) to provide historical information when it is reasonably practical for her to do so.
[502] [2016] UKSC 51 para 57.
[503] *Ibid*.
[504] Land Registration etc. (Scotland) Act 2012 s29(1).

resulting benefits to publicity, KIR could be justified as being necessary for the purpose of a legitimate interest.[505]

For the lawful requirement of the first data protection principle, the disclosure of information from the Land Register could classed as lawful simply based on s104 of LR(S)A 2012.[506] The RCI will also have a statutory basis. As noted above, ScotLIS does not have a clear statutory basis. The ICO note that processing could be unlawful if it breaches a duty of confidence or the Human Rights Act 1998.[507]

Recital 38 in the Directive provides guidance on the fairness requirement; to be fair "the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection."[508] Bainbridge also states that fairness requires that "the data subject is informed of any non-obvious uses to which the data controller intends to put the data to at the time the data are collected."[509] In ICO's view, "[f]airness generally requires you to be transparent – clear and open with individuals about how their information will be used."[510] From this, it is not apparent if the Keeper would meet the fairness test. There is a requirement that a data controller provide a data subject with information such as who the data controller is and the purpose for which their information will be processed.[511] However, the Keeper is exempt from this requirement, as discussed below.[512]

5.5.3.2 Purpose Limitation

The second principle requires that data must only be processed for the specified purposes for which it was obtained. The interpretation guidance in DPA 1998

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[505] This would require that KIR is being carried about accurately. The Keeper must still notify proprietors after KIR has taken place; an obligation which is not currently taking place. See J Robertson, "Ticking Timebombs at the Land Register" (2017) 85(2) Scottish Law Gazette 28 at 29.
[506] See section 3.3.4.
[507] ICO, "Processing personal data fairly and lawfully" Available at https://ico.org.uk/for-organisations/guide-to-data-protection/principle-1-fair-and-lawful/
[508] EU Directive 95/46 Recital 38.
[509] D Bainbridge, *Data Protection* (2000) 58.
[510] ICO, "Processing personal data fairly and lawfully."
[511] *Ibid* para 2(1).
[512] See section 5.5.5.

states that this purpose can be obtained from either the information given to the data subject or in the notification provided to the Commissioner.[513] Interestingly, the ICO state that if an organisation is exempt from notifying their purpose to the ICO, as is the case with RoS,[514] and they process personal data only for an "obvious purpose" then "the "specified purpose" should be taken to be the obvious purpose."[515] However, earlier in their guidance they note the benefit of clearly defining a purpose to avoid "function creep."[516] As Berlee notes, when data is processed to meet a legal obligation, the purpose is generally stated explicitly in the statutory provisions.[517] This is not the case with LR(S)A 2012, with the closest definition of purpose contained in the undefined "[t]here is to continue to be a public register of rights in land in Scotland."[518] While it could be argued that this meets the obvious purpose of the Land Register and therefore would meet the second data protection principle, it would be of benefit for a clearly defined purpose to be explicitly included in Acts which create public registers to ensure that processing is meeting data protection requirements. This is particularly relevant given the discussion in Chapter 3 on the publicity principle and the role of the Land Register. The RCI also needs a clear and explicit purpose to ensure that the processing of information in RCI is only for the specific purpose for which the data was obtained.[519]

As Jay and Hamilton highlight, a data controller may want to "use personal data for a purpose not specified to the data subject at the time the data were obtained."[520] In their view, it will be a "question of fact as to whether it is genuinely a new purpose."[521] Solove describes this issue as

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[513] Data Protection Act 1998 Schedule 1 Part 2. See section 5.5.2.4.
[514] See section 5.5.2.4.
[515] ICO, "Processing personal data for specified purposes" Available at https://ico.org.uk/for-organisations/guide-to-data-protection/principle-2-purposes/
[516] *Ibid*.
[517] Berlee, *Access* section 5.6.7.3.
[518] Land Registration etc. (Scotland) Act 2012 s1(1). The long title of the Land Registration (Scotland) Act 1979 included: "An Act to provide a system of registration of interests in land in Scotland in place of the recording of deeds in the Register of Sasines." The RoS website states that "[o]ur registers ensure that every property in Scotland is protected for its owners, which in turn enables confident land and property transactions." See https://www.ros.gov.uk/about-us/what-we-do
[519] See section 3.5.3 for a discussion on the purpose of RCI.
[520] Jay and Hamilton, *Data Protection Law and Practice* (2003) 164.
[521] *Ibid*.

> "personal information in public records is often supplied involuntarily and typically for a purpose linked to the reason why particular records are kept. The problem is that, often without the individual's knowledge or consent, the information is then used for a host of different purposes[.]"[522]

He notes that "[o]ne of the longstanding Fair Information Practices is purpose specification – that personal information obtained for one purpose cannot be used for another purpose without an individual's consent."[523] Berlee provides a further aspect in her multi-purpose Land Registries discussion.[524] In her view, the purpose for land registers has been evolving, and legal certainty and publicity are no longer seen as the sole reason for land information being gathered and made accessible to the public. For example, provision of land information can be seen as providing a social benefit.[525] However, this flexibility can be to the detriment of data subjects having certainty that the processing of their data is meeting data protection requirements. She states that such certainty is best met when data is processed solely for the purpose for which it was collected as this processing would be subject to the protective measures originally implemented for such processing. This discussion is of relevance to the implementation of ScotLIS.

When the Keeper has an obligation to provide the public with information from the Land Register or RCI then she is exempt from this principle to a certain extent. This is discussed further in the non-disclosure exemption section below.

5.5.3.3 Relevance limitation

The third principle requires that the data processed is relevant and not excessive in relation to its purpose. Interestingly, no interpretative guidance is provided for this principle. To meet this principle, ICO recommend the practice of "data minimisation"[526] which requires an organisation to ascertain the

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[522] Solove, "Access and Aggregation" at 1188-1189.
[523] *Ibid* at 1192.
[524] Berlee, *Access* section 9.3.5.
[525] See section 2.6.
[526] ICO, "The amount of personal data you may hold (Principle 3)" Available at https://ico.org.uk/for-organisations/guide-to-data-protection/principle-3-adequacy/

minimum amount of personal data needed to meet its purpose and then "hold that much information, but no more."[527]

This principle, albeit in relation to the same principle in the 1984 Act, was discussed in English Land Tribunals cases in relation to information gathered to administer the community charge. In *Community Charge Registration Officer of Runnymede BC v Data Protection Registrar*[528] it was held that holding information on the type of property (eg flat, bungalow, caravan) was excessive, even though "there was unlikely to be any prejudice to the data subjects."[529] Similarly, in *Community Charge Registration Officer of Rhondda BC v Data Protection Registrar*,[530] requesting date of birth was ruled to be in breach of the principle. Carey cites the relevant extract from the Tribunal's judgement where they stated that date of birth data "exceeds substantially the minimum amount of information which is required in order … to fulfil the purposes … namely … to compile and maintain the Community Charges Register."[531] The Tribunal was satisfied that "the wide and general extent of the information about dates of birth is irrelevant and excessive."[532] Based on this and the discussion above, there may be information held, and disclosed, in the Land Register and the planned RCI which goes beyond that which is required to meet the publicity principle or the purpose of the RCI.

As above, when the Keeper is required to provide information from the Land Register or RCI then she is exempt from this principle to a certain extent. This is discussed further in the non-disclosure exemption section below.

5.5.4 Rights of the Data Subject

Part II of the Act contains the various rights data subjects have. These include the right to access their personal data,[533] the right to prevent processing for purposes of direct marketing[534] and the right to the rectification, blocking,

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[527] *Ibid*.
[528] DA/90 24/49/3 (1990).
[529] Jay and Hamilton, *Data Protection Law and Practice* (2003) 165.
[530] DA/90 25/49/2 (1990).
[531] Carey, *Data Protection in the UK* (2000) 31.
[532] *Ibid*.
[533] Data Protection Act 1998 s7.
[534] *Ibid* s11.

erasure and destruction of the data.[535] Of particular interest is s10, the right to prevent processing likely to cause damage or distress. This provision allows an individual to "require the data controller … to cease, or not to begin, processing … any personal data in respect of which he is the data subject" if processing is "causing or is likely to cause substantial damage or substantial distress to him or to another, and that damage or distress is or would be unwarranted."[536] The Act does not provide any further clarification on what would be covered within this right. In the ICO's view:

- substantial damage would be financial loss or physical harm; and

- substantial distress would be a level of upset, or emotional or mental pain, that goes beyond annoyance or irritation, strong dislike, or a feeling that the processing is morally abhorrent.[537]

These data subject rights are subject to exemptions. For example, included within s34 of DPA 1998 is an exemption from the "subject information provisions" for personal data which the data controller is obliged by an enactment to make available to the public for inspection for free or on payment of a fee. The subject information provisions, defined in s27(2), include the rights provided in s7 and an element of the fairness requirement,[538] and comprise, for example, the right of the data subject, upon request, to access their personal information and be provided with or given accessibility to information about the identity of the data controller and the purposes for which the data is intended to be processed. As the provision of information from the Land Register and RCI to the public falls under the scope of the s34 exemption, data subjects are not guaranteed such rights under DPA 1998. It would be questionable as to whether ScotLIS would come under the s34 exemption as its provision of information to the public does not have a statutory basis.

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[535] *Ibid* s14.
[536] Data Protection Act 1998 s10. This is similar to the protection for Persons with Significant Control, see section 3.6.1.
[537] ICO, "Preventing processing likely to cause damage or distress". Available at https://ico.org.uk/for-organisations/guide-to-data-protection/principle-6-rights/damage-or-distress/
[538] Data Protection Act 1998 Schedule 1, Part II, para 1(2). See section 5.5.3.1.

Section 10(2) also provides for exemptions to the right to prevent processing if it could cause damage or distress. For example, if the processing is necessary for compliance with a legal obligation to which the data controller is subject then data subjects are not guaranteed a right to request to the data controller that the processing of their data should not take place. Again, this exemption would cover the provision of information from the Land Register and RCI. This does not mean they could not provide such a right, as is the case for both the English Land Register[539] and the Scottish Government's intention for the Register of Controlling Interests.[540] Again, it is unclear if ScotLIS would be exempt from s10.

5.5.5 Non-disclosure Exemptions

As mentioned above, there are a number of exemptions in s34 for personal data that a data controller has an obligation to make available to the public.[541] This includes exemptions to the "non-disclosure provisions"[542] which would therefore "allow [the Keeper] to disclose personal data that would otherwise be protected from disclosure."[543] However, this is "not an automatic exemption from all (or any) of those provisions."[544] The exemption to the non-disclosure provisions is only "to the extent to which they are inconsistent with the disclosure in question."[545]

Section 27 defines "non-disclosure provisions" as:

> (a) the first data protection principle, except to the extent to which it requires compliance with the conditions in Schedules 2 and 3, [Schedule 2

[539] See section 3.3.5.2.
[540] See section 3.5.3.
[541] Interestingly the explanatory notes in the Freedom of Information Act 2000 state, when discussing section 34 of the DPA: "Section 34 provides that personal data are exempt from the Act's provisions relating to subject access and accuracy, and from certain other restrictions on disclosure, if they consist of information which is subject to a statutory duty to make it available to the public. That is because such statutory access provisions – such as those governing the Register of births, marriages and deaths or the Land Registry – make their own detailed arrangements for access, accuracy, and disclosure, which are accordingly made to prevail over the more general provisions of the 1998 Act." It is not clear how this is checked. Available at https://www.legislation.gov.uk/ukpga/2000/36/notes/division/4/7/data.xht?view=snippet&wrap=true
[542] Data Protection Act 1998 s34.
[543] ICO, "Exemptions" Available at https://ico.org.uk/for-organisations/guide-to-data-protection/exemptions/
[544] *Ibid*.
[545] Data Protection Act 1998 s27(3).

> is discussed in section 5.5.3.1 and Schedule 3 concerns sensitive data and is not relevant to this dissertation]
>
> (b) the second, third, fourth and fifth data protection principles, and
>
> (c) sections 10 and 14(1) to (3).[546]

This groups together the various elements of the Act which restrict what information a data controller can disclose. For example, without these exemptions, if the provision of information did not meet the fairness, purpose or relevance principles then the data controller has a duty not to disclose the information.

Exactly how these exemptions apply is complex. The ICO provide the following example, albeit in relation to s29 which exempts personal data from the non-disclosure provisions if it is likely to prejudice a criminal matter:

> "The police ask an employer for the home address of one of its employees as they wish to find him urgently in connection with a criminal investigation. The employee is absent from work at the time. The employer had collected the employee's personal data for its HR purposes, and disclosing it for another purpose would ordinarily breach the first and second data protection principles. However, applying those principles in this case would be likely to prejudice the criminal investigation. The employer may therefore disclose its employee's home address without breaching the Act."[547]

In applying these exemptions to the Keeper it is apparent that the Keeper is exempt from, in particular, the purpose and relevance principles when disclosing information that she is obligated to make available to the public under an enactment, to the extent that the disclosure is inconsistent with one or both of these principles.

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[546] *Ibid* s27.
[547] ICO, "Exemptions."

The purpose principle restricts processing to a specified and lawful purpose. As mentioned above, the Keeper would benefit from having a specified purpose for processing data for various reasons. Nevertheless, the Keeper would be exempt from complying with this data protection principle when disclosing information under her statutory obligation in s104 of LR(S)A 2012 and RCI provisions. Therefore, if a member of public requests information from the Land Register for a reason which does not match the purpose of the register then the exemption would become relevant and the Keeper could provide the extract without breaching DPA 1998. However, she would not be exempt from the purpose principle when processing information for the purpose of ScotLIS as this would include processing which would not be a disclosure, and therefore would need to meet the purpose of meeting the publicity principle and maintaining the Land Register.[548] As discussed above, placing ScotLIS on a statutory basis would resolve this issue.

In relation to the relevance principle, which requires data to be adequate, relevant and not excessive in relation to the purpose for which they are processed, the Keeper would again obtain an exemption to this principle to the extent that this principle was inconsistent with her statutory obligation to disclose information to the public under s104 of LR(S)A 2012 and RCI provisions. This means that when disclosing information held in the Land Register and RCI, the Keeper does not have to ensure that the data she provides is adequate, relevant and not excessive in relation to the request for the disclosure.

The application of these exemptions raises the question as to whether they contain an appropriate protection of privacy or whether there is an assumption that privacy would be protected through the enactment responsible for requiring the information to be made public. As discussed above, publicity and third party protection do not require unfettered public accessibility to all the information contained in the Land Register. Further, there is the potential for significant harm through allowing such information in the Land Register and RCI to be publicly available.[549] The protection of the right to a private and family life under Article 8 of the ECHR and advances in technology should both be considered when determining the extent to which the personal data in these

[548] See discussion on the publicity principle at section 2.4.
[549] See discussion on Solove's taxonomy at section 4.4.

registers is made accessible. In particular, it needs to be determined if publicity and third party protection in the Land Register could be achieved alongside the introduction of measures to protect privacy which would restrict the level of information available to different parties.

An example of such an approach has been implemented in Germany where access to information held in the German land register is restricted to those who can evidence that they have a legitimate interest in the information.[550] While the legislator has developed a list of parties for which it is presumed will have a legitimate interest,[551] the development of the legitimate test has been provided for by case law through the examination by the court of individual factual situations which take into account the type of party making the request, the nature of the interest and what section of the land register holds the information.[552] The interest may be of a "legal, economic or mere factual nature."[553] The owner has no right of audience during the proceedings to determine a legitimate interest and has no right to appeal.[554]

It should be noted that s34 of DPA 1998 appears to allow significant data protection exemptions for a much larger grouping than the 1995 EU Directive, which allows Member States to enact legal measures restricting application of the data protection principles if they are *necessary* to safeguard an exhaustive list of interests such as national security, economic matters such as monetary and taxation matters and the protection of the data subject or the rights and freedoms of others.[555] Section 34 makes no explicit mention of these categories and does not require any justification to show that the legislative measures are necessary; it simply provides exemptions to a data controller who has a statutory duty to provide information to the public.[556]

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[550] Grundbuchordnung §12. See Berlee, *Access* Chapter 8.
[551] For example, see Grundbuchverfügung §43.
[552] See Berlee, *Access* section 8.5.
[553] *LG Mannheim, 22 January 1992* NJW 1992, 2492. Translated in M Hinteregger and L van Vliet, "Transfer", in S van Erp and B Akkermans (eds), *Cases, Materials and Text on Property Law* (2012) para 8.75.
[554] *Ibid*.
[555] EU Directive 95/46 Article 13.
[556] Unfortunately, in *Christian Institute v Lord Advocate*, the court noted that the parties had "not suggested that the DPA fails to transpose the Directive." [2016] UKSC 51 para 103.

5.6 EU General Data Protection Regulation

In May 2016, Hasan wrote that "[t]he clock has started on the biggest change to the European data protection regime in 20 years."[557] This is because on 27 April 2016, after a number of years of negotiation, the European Parliament adopted the EU General Data Protection Regulation.[558] It will be enforceable in the UK from 25 May 2018.[559] Brexit will not affect the GDPR becoming part of domestic law.[560] As opposed to the 1995 Directive (which will be repealed following the commencement of GDPR), the GDPR is a Regulation and therefore will have direct effect in the UK. This means that it will be enforceable in courts and tribunals without the need for transposition into UK domestic law.[561] Article 5 lists the data protection principles, which match those in DPA 1998 but condensed to six. Two significant changes are new rights to be forgotten[562] and stricter requirements for consent.[563]

The situations for which processing shall be lawful match those in DPA 1998 and therefore, again, consent would not be required if, for example, "processing is necessary for compliance with a legal obligation to which the controller is subject" or "processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller".[564] However, the exemptions in GDPR require a stricter test than the 1995 Directive.[565] While the exhaustive list of interests which an exemption can protect is comparable with the 1995 Directive, the GDPR requires that a Member State's legislative measure which restricts rights and obligations must now be "necessary and proportionate"[566] to safeguard the interest.[567] Further, when a Member State uses an exemption, the restrictive legislative measure must contain, where relevant, provisions detailing, for example, the purpose for processing the data, the categories of personal information processed, the scope

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[557] I Hasan, "Data protection rewritten" (2016). Available at http://www.journalonline.co.uk/Magazine/61-5/1021701.aspx
[558] Available at http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf
[559] ICO, "Overview of the General Data Protection Regulation (GDPR)" (2016) Available at https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/
[560] *Ibid*.
[561] It will therefore automatically supersede the Data Protection Act 1998.
[562] Regulation (EU) 2016/679 art 17.
[563] *Ibid* art 7.
[564] *Ibid* art 6.
[565] See discussion at section 5.5.5.
[566] Regulation (EU) 2016/679 art 23.
[567] EU Directive 95/46 art 13 only required the measure to be necessary.

of the restriction, the risk to a data subject's rights and freedoms, and the right for a data subject to be informed about the use of restriction (unless prejudicial to reason for using the restriction).[568]

5.7 Data Protection Bill 2017

The Data Protection Bill 2017 was introduced to the House of Lords on 13 September 2017 and the Committee stage is due to take place on 30 October 2017.[569] It contains detailed provisions for how GDPR will apply in the UK along with data protection measures for areas which do not fall under EU law such as immigration and national security.[570]

Schedule 11 of the Bill contains a number of exemptions to the rights and obligations provided for in the Bill. Paragraph 3 of Schedule 11 contains a similar exemption to s34 of DPA 1998:

> "The listed provisions do not apply to personal data consisting of information that the controller is obliged by an enactment to make available to the public, to the extent that the application of the listed provisions would prevent the controller from complying with that obligation."[571]

The listed provisions include the data protection principles, apart from the requirement that processing is lawful and that it meets one of the conditions for processing, and the rights of data subjects.[572] The final part of the exemption is a clearer re-wording of the "to the extent to which they are inconsistent with the disclosure in question" element of the DPA 1998 s27 non-disclosure exemptions.

This exemption matches (or enhances) that in DPA 1998 and a legal obligation placed on the Keeper to make information available to the public would therefore allow the Keeper to provide information regardless of whether it met

[568] Regulation (EU) 2016/679 art 23(2).
[569] See "Data Protection Bill [HL] 2017-19" website. Available at https://services.parliament.uk/bills/2017-19/dataprotection.html
[570] See ICO, "Data Protection Bill" Available at https://ico.org.uk/for-organisations/data-protection-bill/
[571] Data Protection Bill Sch 11, para 3.
[572] Data Protection Bill Sch 11, para 1.

the data protection principles or the rights of the data subject. ScotLIS processing is not required for the Keeper to comply with such an obligation and therefore would not be subject to this exemption.

The explanatory notes to the Bill[573] note that the Bill includes a number of exemptions to the rights a data subject has been given in GDPR and the obligations a data controller must meet, and such restrictions could result in an interference with an individual's ECHR Article 8 right. However, the Government is of the view that the restrictions "meet the balancing test in Article 8(2) and therefore do not constitute an unlawful interference with Article 8 as they are proportionate in pursuit of a legitimate aim … and they are no more than are necessary and proportionate in a democratic society."[574] It is not apparent how the Government could make such a general determination for all legislation which places an obligation on a data controller to make information available to the public.

5.8 Conclusion

This chapter details some of potential harm that infringements to privacy can cause, in particular, through disclosure of information held in the Land Register or RCI. There are various statutory frameworks which have been implemented to minimise such damage and to protect privacy rights, and the Keeper is subject to such legislation as the Human Rights Act 1998 and Data Protection Act 1998. However, based on the Keeper's legal obligations to make data publicly available, she is entitled to a number of significant data protection exemptions when processing and disclosing information. It is questionable as to whether such exemptions provide for an adequate level of privacy protection and protective measures could be introduced to ensure that an individual's ECHR Article 8 right is not violated and to minimise the potential of harm resulting from disclose of information from the Land Register and RCI. Adopting an approach such as the German legitimate interest model could result in an enhanced level of privacy protection. Further, it would be beneficial to ensure that an explicit purpose for a public register is included within the relevant

[573] Data Protection Bill, Explanatory Notes (2017). Available at https://publications.parliament.uk/pa/bills/lbill/2017-2019/0066/18066en.pdf
[574] Ibid, para 808.

legislation and consideration is required for giving a statutory basis to ScotLIS in order for it to meet the requirements in the Data Protection Act 1998, the GDPR and the Data Protection Bill.

Chapter 6 Recommendations for Reform

6.1 Introduction

The preceding chapters introduced basic property law principles including the publicity principle and outlined various reforms to registration against the background of these principles. An examination of privacy was then undertaken in the context of land registration, including the harms infringements to privacy can cause and the statutory frameworks for privacy protection. This chapter will make a number of recommendations for reform based on the previous analysis which allow for both publicity requirements and privacy protection to be met.

6.2 The Land Register: Publicity and Privacy – black and white?

It has been noted that the law generally treats information in a "black-and-white manner; either it is wholly private or wholly public."[575] Solove is of the opinion that "information privacy must be [reconceptualised] in the context of public records to abandon the longstanding notion that there is no claim to privacy when information appears in a public record"[576] which he terms the "secrecy paradigm."[577] In particular, he is of the view that the Government, in the USA at least, is not providing sufficient protection against how information it provides to the public is being used.[578] He states that "[l]ife today is [fuelled] by information, and it is virtually impossible to live as an Information Age ghost, leaving no trail or residue".[579] In his view, this makes privacy impossible if "we adhere to the dichotomous conception of privacy as a status, with information being in either a secret private realm or an open public realm."[580] To solve this issue he is of the view that individuals should expect that there will be a certain amount of accessibility of information but with controls and limits in place to control how the information is used.[581] In his view, "[p]rivacy is about degrees

[575] Solove, "Access and Aggregation" at 1173.
[576] Solove, "Access and Aggregation" at 1140.
[577] *Ibid*.
[578] *Ibid* at 1189.
[579] *Ibid* at 1173.
[580] *Ibid*.
[581] *Ibid*.

of accessibility."[582] Determining what levels of accessibility should be given to information before disclosure is key, as once full disclosure is made, the opportunity for privacy protection could be lost and never regained.[583] Public registers can adopt Solove's solution which "is not to eliminate all access to public records, but to redact personal information where possible and to regulate specific uses of the information."[584] This raises the possibility of introducing a general legitimate interest test following the German model for access to Land Register information as outlined above in section 5.5.5.

6.2.1 Searching by Name

Beyond a general legitimate interest test, other less significant reforms can be considered. As highlighted above, the Land Register can be searched by name. Such searches can be carried out by RoS following a request or by those with access to Registers Direct. In England and Wales, searching by name is restricted to parties which the Government have determined have a legitimate interest. It is arguable that searching by name has no particular justification in terms of the publicity principle. If an approach such as searching by name can be shown to infringe Article 8, then it must be shown to be necessary to meet a legitimate aim. The measure would need to be proportionate and only justifiable if there were no less restrictive measures available. There are other approaches available, such as defining groupings of verifiable parties who can search the Land Register by name, such as the HMRC for the purposes of investigating tax evasion, and allowing for others to apply for such searches to be undertaken if they can show they have a legitimate interest, for example a creditor wishing to enforce a judgement. Such a methodology could also be adopted for the RCI.

6.2.2 Redacting signatures

Following on from Solove's comments above, there will be certain pieces of information in the Land Register that are not required to be disclosed. Items on copy deeds such as signatures could be classed as excessive pieces of personal data which are not required to meet the publicity purpose of the Land Register

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[582] *Ibid* at 1209.
[583] See section 5.3.
[584] Solove, "Access and Aggregation" at 1192.

and therefore could be redacted pre-disclosure.[585] The necessity for such redacting would become more relevant if RoS made deeds available online such as through a copy deed system, ScotLIS or via links on title sheets.[586] The determination of the list of information to be redacted could be the responsibility of the Scottish Ministers and would need to include data items which could be objectively and easily ascertained by RoS so as not to introduce significant delays to processing times.

6.2.3 Protection for damage or distress

As discussed in section 3.5.3, the Scottish Government intends to include protective measures in the RCI legislation to allow individuals to request that their information is not made publicly available if it is likely to cause damage or distress. Such measures, based on section 10 of DPA 1998, are also included in company law, money laundering legislation and the English Land Register. Once the Scottish Government's approach to such protection in RCI has been developed, it could be replicated for the Land Register.

6.3 Publicity, Privacy and Technology

As mentioned above, technology has required a rethink on the privacy protection for personal data. As Solove states, as "records are increasingly computerized, entire record systems rather than individual records can be easily searched, copied, and transferred."[587] With advances in the Information Age, he concludes that "[p]ersonal information in public records, once protected by the practical difficulties of gaining access to the records, is increasingly less obscure."[588] Technology is therefore being used for gains in accessibility instead of making use of its ability to enhance protection. For example, Solove provides the example where "individuals are never even given notice or an opportunity to

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[585] While it is accepted that signatures may be required for determining validity of deeds and are not subject to the purpose or relevance data protection principles when included on a copy deed (see section 5.5.5), they could be routinely removed for deeds granted within the last 100 years unless the applicant can show a legitimate interest in verifying the signature.

[586] The latter was the suggested approach for KIR, see RoS, "KIR Consultation" paras 43-45. The majority of respondents were of the opinion that such an approach should be extended for all title sheets. See RoS, "Keeper-Induced Registration. Analysis of the responses to the Public Consultation" (2016) p9. Available at https://www.ros.gov.uk/__data/assets/pdf_file/0011/35867/KIR-analysis-of-responses-Feb-2016.pdf

[587] *Ibid* at 1151.

[588] *Ibid* at 1152.

assert a privacy interest when records containing their personal information are disclosed."[589] Berlee similarly promotes the use of access logs which would give the data subject the ability to find out who had been accessing their information.[590]

6.4 The purpose for the Register of Controlling Interests

As outlined above, in order to justify a breach of Article 8, one of the reasons available in Article 8(2) need to be met and the measure must also be proportionate. This exhaustive list of available factors is "the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[591] RCI needs a clearly defined purpose which should be included within the legislation, and in the event that the resulting RCI breaches Article 8, this purpose should meet one of the listed justifications. The use of the generic goal of transparency, as discussed in Chapter 2,[592] is arguably not sufficient and needs to be further specified in order to meet human rights and data protection requirements.

6.5 A statutory basis for ScotLIS

As it has been highlighted, it is not clear who is the data controller for ScotLIS and it currently does not have a statutory basis. This can cause various problems, particularly as the processing of the personal data would not be subject to the same data protection exemptions as the Land Register and the RCI receive. This issue will become more relevant when additional data streams from other sources start to be included in ScotLIS and therefore, it should be clarified who is the data controller and a statutory basis should be established.

6.6 The role of RoS in relation to RCI and ScotLIS

As discussed in Chapter 2, arguably the purpose of the Land Register is to meet the publicity principle and protect third parties. RoS is responsible for

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589 *Ibid* at 1168.
590 Berlee, *Access* section 9.6.2.2.
591 European Convention on Human Rights, Article 8(2).
592 See section 2.7.

maintaining this Register and has been given a deadline for full completion of the Land Register to ensure that the register meets its publicity principle. Initiatives such as RCI and ScotLIS, which are not necessarily linked to publicity and the function of RoS, should not be allowed to affect the effective operation of RoS and to consume valuable resources which could be used for publicity linked activities such as KIR and the provision of information from the Land Register to aid conveyancing. At present, the RoS Copy Deeds webpage[593] notes that RoS cannot achieve their target for providing copy deeds within the two day period with requests currently taking 3-5 days to complete and this may be due to supplementary activities being undertaken.

[593] Available at https://www.ros.gov.uk/services/copy-deeds

Chapter 7 Conclusion

The stated aim of this dissertation was to determine how the concepts of publicity and privacy could best operate alongside one another in land registration in Scotland. This chosen field for study was complex for a number of reasons. Bell and Parchomovsky describe registries as "the dark matter of the property universe"[594] because "their existence is vital to our understanding of the property system, but we know precious little about them."[595] Reid describes the violation of privacy as something which "until recently, had received scant recognition"[596] in Scotland and Solove notes that "[d]espite the wide-ranging body of law that addresses privacy issues today, commentators often lament the law's inability to adequately protect privacy."[597]

It was therefore necessary to examine in detail both recent reforms to registration in light of the publicity principle and the harms which violations to privacy can cause. It is apparent how critical both publicity and privacy are in modern society. However, it also became clear through the research that these are not opposing principles and privacy measures can be used to protect the information which is required to be held to meet the publicity principle. Further, it is evident that the Scottish Government can use public registers to enhance accountability. However, it is not clear what level of accountability landowners should be expected to have and drives to increase what the Scottish Government call transparency should not be confused with the publicity principle and the purpose for maintaining a Land Register. Nevertheless, privacy measures still need to be adopted to protect information held in a public register. While the DPA 1998 and the new Data Protection Bill contain significant exemptions for disclosing information which a data controller is legally obliged to provide, the use of these exemptions has to be compatible with human rights legislation and should only be used when the measure adopting the exemption is necessary. Further, while these exemptions are applicable when disclosing information from the Land Register and RCI, this does not prevent measures being introduced to protect privacy and to ensure that the

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[594] A Bell and G Parchomovsky, "Of Property and Information" 2015 (116) Columbia Law Review 237 at 286.
[595] *Ibid*.
[596] Reid, *Privacy* para 1.01.
[597] Solove, *Privacy* 8.

data protection principles are met. Advances in technology can be used to aid accessibility to this information but they can also be utilised to help protect this data from illegitimate access. Restrictions on which parties can obtain what pieces of information based on why they need the information can therefore be used to improve privacy protection.

This research has resulted in the development of a number of recommended reforms which would allow for publicity and privacy to both be protected without any detrimental effects to land transactions. If adopted, these reforms would result in legal measures or processes which would provide an enhanced level of privacy protection without affecting fulfilment of the publicity principle.

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