Thank you for your letter dated 28 March. Following your letter, we requested an ECHR Memorandum from the department responsible for the Draft Bill, BEIS, which we received late last week.

The JCHR fully supports efforts to combat money laundering in the UK, including through using the UK property market and understands the need for this legislation. We also appreciate the difficulties in legislating for entities that may not be subject to the jurisdiction of the UK in all respects.

We agree with the BEIS analysis that the Draft Bill potentially engages Article 8 (right to private and family life), Article 1, Protocol 1 to the ECHR (right to peaceful enjoyment of one’s possessions) and Article 1, Protocol 1 to the ECHR as read with Article 14 ECHR (non-discrimination in relation to property rights).

**Article 1, Protocol 1 (Property) and the potential impact on innocent third parties**

Considering the aim of the legislation (combatting money laundering), the means employed (provision of information) and the consequences of non-compliance (limitations on the use of property), the potential interference with the property rights of overseas entities is capable of being justified.

A more pressing concern under the Draft Bill is the protection of the Article 1, Protocol 1 rights of innocent third parties. The reason this concern arises is because of the potentially adverse effects on the rights of such third parties of Schedule 3 to the Bill, in that any purchase by a third party of land in the UK from an overseas entity that has not completed the registration requirements (or annual update) would prevent the (potentially innocent) third party from registering and obtaining legal title and therefore legal recognition of their purchase of property in the UK.

As we understand it, where an overseas entity is registered as proprietor of a qualifying estate, the Schedule requires the Land Registry to “insert a restriction into the title register for the estate. The restriction will prohibit the registration of certain dispositions in respect of the estate unless the entity is a registered overseas entity (or is exempt) at the time of the disposition (or an exception applies). The dispositions are (a) a transfer of the estate (i.e. sale); (b) the grant of a lease of over 7 years out of the estate; and (c) the creation of a charge over the estate” (Explanatory Notes, para. 9).

The Explanatory Notes explain (para. 33) that “[t]he practical effect of the restriction is that where an overseas entity makes a relevant disposition at a time when it is not a registered overseas entity, is not exempt and no exceptions apply, those dispositions cannot be completed by registration” (emphasis added). Clearly, any innocent third-party acquiring rights to property
in these circumstances could suffer significant loss by, for instance, having paid for a property, and then not being able to register the transaction in their name.

While the JCHR is aware that there are exceptions aimed at protecting the rights of third parties, these exceptions are rather narrow and would not protect the innocent third party to a contract for the sale of property who sought to register the transaction after the overseas entity was required to be registered. This is particularly concerning given the implications for the property rights on that third party and is especially concerning given that it is not clear how transparent the system will be, so it could unfairly impact upon innocent third parties who then find themselves in a situation which they are unable to get out of as they have bought and paid for the property but are unable to register it to get the legal title to the property.

While a restriction on the title deed of property owned by an overseas entity might alert an innocent buyer, this will not be the case in Scotland, for instance, where there is no mechanism to place such a restriction on the title deed (EN, para. 33). Furthermore, where there is such a restriction, it is not clear to us how apparent the restriction will be on the title deed of the overseas entity, nor how the innocent third party will know whether the register is up-to-date. It may be that those undertaking the conveyancing will easily be able to cover these issues, but that is not clear from the information we have seen. These are issues which, in our view, require closer explanation or scrutiny.

The reason we think this is problematic is that the Draft Bill provides no mechanism to assist an innocent third party who seeks to register such a transaction: the transfer of property cannot be registered, and it is not clear how, if at all, the situation can be rectified or resolved. Potential criminal sanctions against an unregistered overseas entity who may already have received payment for property which can now not be transferred, would count for little.

In order to protect innocent third parties, the system of registers should ensure that it is very easy to determine whether a seller is an overseas entity and whether they are adequately registered at the time of sale. Moreover, in order to make the interference with property rights justified and proportionate, it would also be better to ensure that there is a method to resolve legal ownership of property where an innocent third party has bought real estate from an overseas entity that was not properly registered.

Article 14: Prohibition of Discrimination (in the enjoyment of other Convention rights) and the impact of “restrictions” in the land register

Given the fact that the provisions will only be applicable to overseas entities (i.e. those legal entities that are governed by the law of a country or territory outside the United Kingdom), a further consideration is whether the scheme under the Bill engages Article 14 (prohibition of discrimination), in conjunction with Article 1 Protocol 1 property rights, on the basis of nationality.
We recognise fully that the scheme under the Draft Bill is intended to mirror, to the extent possible, the People with Significant Control scheme applicable since 2016 to UK entities, and that it is not meant to be any more onerous.

Nevertheless, the differential treatment of UK and overseas entities means it may be necessary to examine aspects of the Bill more closely. In our view, the mere requirement to be a “registered overseas entity” in order to be able to register as proprietor of a “qualifying estate” is not, by itself, problematic.

What does concern the JCHR is the requirement, introduced into the 2002 Act by paragraph 3(1) of Schedule 3 to the Draft Bill, for the registrar to enter a “restriction” in the register in relation to a qualifying estate if an overseas entity is registered as the proprietor of the estate. This is irrespective of whether or not the overseas entity has already registered as such (i.e. as a “registered overseas entity”) or not.

The entry of such a “restriction” may have serious adverse effects on the proprietor’s property rights, which would not affect a UK entity in a similar way under the PSC scheme; if this were the case, it is possible that this discriminates against overseas entities.

In particular, the potentially “chilling effect” on the ability of overseas entities to deal effectively with their property because of wariness of potential buyers, lenders etc, whenever they were dealing with restricted property could become a serious problem for compliant overseas entities.

Again, the main issue is transparency: how easy it would be for banks and other lenders, potential buyers and tenants to assess whether a particular owner of property is compliant and can be trusted. If the system is not sufficiently transparent and user-friendly, the effect of the scheme could constitute a disproportionate interference with their property rights. Our view is that this is an area which requires further consideration and information from the Department.

Article 8: Right to respect for private and family life

We consider that the Draft Bill engages Article 8 rights. This is because of the requirement to provide personal information to the registrar about the beneficial owners of the overseas entities. For the most part, we believe this interference with privacy rights are justifiable, taking into account the reasonably limited nature of the information, the aims of the Bill and the consequences that follow.

One aspect that causes us some concern is the provision that allows for information of “managing officers” to be provided where the overseas entity has no beneficial owners, or they cannot be found or cannot provide complete information. The ECHR Memorandum summarises the position as follows:

“20. A condition of registration is that the overseas entity discloses information about its beneficial owners. Where the entity has none, or they...
cannot provide complete information about them, details about their managing officers (e.g. a director) are required - see clause 4.”

While this provision makes sense, it is unclear how much effort an overseas entity would have to make to find its beneficial owners before simply providing information of individuals who could provide a useful front for what might be a corrupt entity. Given the potentially serious consequences that could result for innocent third parties, outlined above, we are a little uneasy with a system that is apparently reasonably easy to circumvent. This aspect requires further clarification.

We also note that the clause 22 of the Draft Bill allows for regulations which will allow an individual to apply for their details to be protected from public disclosure. The ECHR Memorandum suggests that this will be done on the basis that disclosure would put them at risk of “physical harm”. We note that although clause 22 does not address the standard to be used (this is to be set out in the regulations), we would have concerns about such a high standard. While that would clearly be a good justification for not disclosing information, it appears to us to be rather too high a threshold, and would not, for instance, allow for such an application to be made if the person’s family members could be harmed as a result of disclosure, or if some lesser, yet still serious, level of harassment, threat or harm was likely. We note that this aspect will be dealt with in regulations, and we would recommend that this aspect is revisited at the appropriate time.

We remain willing to provide any further assistance we can.

*The Rt Hon Harriet Harman MP*

*25 April 2019*