

Scottish Land Commission Response to Scottish Government's Land Reform Bill Consultation

October 2022



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The Scottish Land Commission welcomes the consultation paper which puts forward a set of proposals that would mark a significant next step in Scotland's ongoing programme of land reform.

The Commission has worked with Scottish Government and stakeholders to bring forward evidence, analysis and fresh thinking that has helped inform the proposals. We also look forward to working with government and stakeholders to support and inform the next steps in developing a draft bill through the parliamentary process.

Our response focuses on some of the core considerations we see as being required in taking forward the proposals.

Parts 4-7

We focus first on parts 4-7 of the consultation paper which set out proposals that are based on the Commission's recommendations to strengthen implementation of the LRRS and to introduce a Public Interest Test and requirement for Management Plans.

We consider the combination of the proposed measures in 4-7 is an effective way to introduce systemic change in the way our land market operates, in order to:

- a) Increase the accountability of large scale and concentrated land holdings. The evidence of the Commission's review of scale and concentration of land ownership found the core issue to be the risk of monopoly power. Recent evidence focused on rural land market activity in the context of natural capital investment also shows the risks inherent in a concentrated pattern of ownership, affecting how new value and investment in Scotland's land is shared fairly. It also highlights the effects of high land values and high demand on participation in the market.
- b) Introduce effective means for government to intervene in order to secure the public interest. In addition to increased accountability, the proposals introduce the means for government to act in a targeted way, when required, to secure specific actions or outcomes in the public interest – for example in relation to housing, community control, nature, local economies, or delivering the just transition and net zero objectives.
- c) Secure a just transition through stimulating a more productive and diverse pattern of land ownership, use and investment. The proposals establish means to help achieve a just transition by addressing monopoly power in the underlying pattern of land ownership.

Taken together, the proposals in parts 4-7 provide a proportionate way to regulate localised monopoly power in the public interest, recognising the critical role of land in meeting Scotland's public policy objectives in the economy, net zero, a just transition and fulfilling human rights. While being distinct to the Scottish context, they would bring Scotland more in line with international practice in which it is the norm for land ownership and use to be regulated in the public interest.

In developing the proposals further key considerations will be proportionality, targeting, and impact; all of which can best be considered through a clear focus on the intended purpose.

When looking at how these proposals would be administered and where responsibilities should sit, it will be helpful to consider the spectrum of options for decisions to be determined at local or national level. We see opportunities to strengthen the role of local democracy and decision making in the way these measures are structured. In many international examples, these kinds of functions would naturally sit at a local municipality level. While Scotland does not have directly equivalent local governance structures, we see advantages to considering the role of local authorities or other ways through which these functions could help build greater local involvement and democratic accountability in decisions about land. This could also support more integrated land use planning for a just transition to net zero, enabling a joined-up use of these functions with the wider land use planning system, regional land use partnerships, and local place plans.

Part 4 – Definition of large scale land holdings

We support the intention to provide a clear single definition that provides sufficient certainty on the land holdings to which the proposed measures will apply. In line with our evidence, it may be more appropriate to frame this definition as of ‘*significant*’ rather than ‘*large scale*’ land holdings. This would support the intention that the measures relying on this definition are intended to target issues of power, control, and risk to the public interest.

We consider it important that any definition for these statutory measures is set within the wider expectation that the Land Rights and Responsibilities Statement continues to apply to all, and that there remains an expectation that all land owners, managers, communities and other relevant parties adopt responsible practice. While it is right that implementation via statutory measures is targeted in order to be proportionate, the wider need for good practice and culture change will also remain important. We have seen over the last five years an increasing cultural shift within land ownership across all sectors in line with the LRRS and the work of the Scottish Land Commission continues to support this.

We support the policy intention that most family farming units are not unduly burdened by the proposals and consider that this is best achieved through the development of proportionate and transparent criteria, rather than seeking to define an exemption for a particular type of land holding or business.

We support the combination of the three criteria proposed. A key consideration for effectiveness will be matching proportionality with ensuring sufficient land is within scope to achieve the intended purpose. In developing the proposal further it will be important to help people visualise what the data zone criteria looks like on the ground.

We consider that within the detailed design of the mechanisms there will be a need for discretion, for example on its application in different island contexts. It would also be desirable for the threshold criteria to be able to change over time in response to evidence of effectiveness and/or changes in public interest pressures.

Finally we consider that the definition should address the question of aggregate, or discontinuous, land holdings so that the measures are capable where necessary of addressing risks to the public interest where these arise through common control of a number of individual land holdings.

Part 5 – Strengthening the LRRS

The proposal to give statutory weight to the Land Rights and Responsibilities Statement, and a linked duty on defined land holdings, is a clear mechanism to facilitate accountability and transparency. As stated above, it will be important in framing this that it is set within the wider expectation that all land holdings, including those out of scope for this duty, should be adhering to the principles of the LRRS through responsible practice, while the legislative duty is rightly targeted.

We acknowledge that the LRRS itself would need to be reviewed and likely redrafted in order to support implementation of such a duty. Similarly the LRRS Protocols published by the Scottish Land Commission would require revision if intended to be used as enforceable Codes of Practice. In general we believe this offers a proportionate approach to supporting good practice while ensuring the necessary backstop. Our experience in implementing the functions of the Tenant Farming Commissioner, which operates through Codes, Guidance and an ability to inquire into alleged breaches, suggests a similar dynamic could support a wider cultural shift that extends beyond use of the formal legislative mechanisms.

Part 6 – Compulsory Management Plans

We support the proposal to require management plans for defined land holdings. We see the purpose being to improve accountability, collaboration and the delivery of public interest outcomes. There has already been a significant shift in the extent of community engagement taking place in land use planning and the requirement for appropriate community engagement should be built into the process for developing the required management plan. We also see significant benefit in expecting the plans to support delivery of Regional Land Use Frameworks as these are rolled out. Taken together the development of Regional Land Use Frameworks and the requirement for management plans on large land holdings can take a significant step in delivering more local participation and accountability in land use decision-making, as well as joined up, landscape-scale planning.

In developing the required legislative provision, the relationship to potential requirements for similar plans in the Agriculture Bill should be considered in order to ensure clarity of purpose and avoid duplication. The requirement could be delivered through a standalone legislative provision or alternatively through a duty to comply with a Code of Practice under a revised Land Rights and Responsibilities Statement, with the potential to inquire into breaches.

Embedding the requirement for a management plan within the framework of an empowered LRRS, articulated through a Code of Practice, would enable close links to the LRRS and other associated Codes. This would aid proportionality and enable flexibility for the future requirements for a management plan to evolve in line with the Land Rights and Responsibilities Statement.

Part 7 – Public Interest Test and Prior Notification of Intention to Sell

We support the proposed Public Interest Test which draws on the Commission's proposals and agree that its purpose should be focused on mitigating the risk of monopoly power that arises from concentrated land ownership. Previous land reform acts have introduced a significant suite of community rights to buy and the overall framework of the Land Rights and Responsibilities Statement. We see the Public Interest Test being a measure that addresses the underlying systemic risk of concentrated land ownership, much in the same way the

Competition and Markets Authority assesses the risks of corporate mergers and acquisitions in the wider economy.

It may be helpful to emphasise that the proposed test is intended as a process of assessment, not an end in itself. As we see it, the process should be capable of enabling transactions to proceed where appropriate, or for conditions to be applied where risks to the public interest are identified.

The potential outcomes of such a test could further support community ownership where this is an appropriate outcome, but should also be capable of delivering on wider public interest outcomes relevant to net zero, nature, housing, local economies, and diversification of land ownership.

For example, the potential outcomes should include the possibility to apply conditions making available to others smaller or specific areas of land to meet particular local needs such as housing, crofts, community facilities, local enterprise, agriculture, etc.

The Commission's proposal envisaged the ability to place conditions on the incoming acquirer of the land. We recognise the potential utility of the proposed approach in being able to place conditions on the seller as well, though note this will engage property rights considerations to a greater degree.

Prior notification

We support the principle that prior notification of a significant land sale should be provided to a local community and others. In our advice on land and natural capital we advised that as well as high land values, the pace of the rural land market and the increasing prevalence of private (i.e. not advertised) transactions make it increasingly difficult for communities (and others) to participate in the market. We see the purpose of a prior notification being to enable a community to act when there is an opportunity to acquire land – not only when there may be a desire to acquire a whole estate holding, but also to have the opportunity to negotiate land for particular purposes when a sale or transfer is being planned.

We acknowledge the advantage of the proposed time period for a community to consider whether they wish to acquire the land, but we also see significant complexity in introducing this kind of measure and an additional register alongside existing rights to buy. To deliver on the policy intent we see value in exploring other options as well. For example, there may be scope to introduce a simpler notification obligation if it is combined effectively with greater support for communities to register an interest in land under the existing Community Right to Buy provisions, together with the operation of the public interest test as proposed.

While this proposal could be of benefit to communities seeking to acquire land, our evidence indicates there is a significant appetite from individuals, local businesses, farmers, and others who face similar challenges in participating in the land market, and that a broader, more inclusive notification requirement would further support aspirations for diversifying the pattern of land ownership. For example, there are precedents in the way that notification processes are required by planning or crofting legislation.

Other proposals

Part 8 – Conditions on public funding

We support the principle of using conditionality of public funding to require compliance. We see this as a proportionate and effective means of securing compliance, in particular with a strengthened Land Rights and Responsibilities Statement and proposed management plans. As land use changes and new land uses emerge it will be vital for Government to continually examine the direction and targeting of public support required to enhance public goods.

In relation to the proposed requirement for land registration we note that consideration will need to be given to both the resource capacity to deliver and potential implications for tenants or other parties with an interest in land holdings where they are not the title holder.

Part 9 – Land Use Tenancy

The introduction of a new form of tenancy has the potential to provide the opportunity to create a simpler and more flexible basis on which to let land for a variety of land uses. We therefore support the intention of the proposal to enable tenants and landlords to contribute to and benefit from wider public policy goals by carrying out activities beyond the traditional scope of agriculture.

Further discussion and agreement is required around what issues are dealt with in the legislation attached to the new form of tenancy and what is left to negotiation between landlord and tenant. There would be little value if the result was just an importation of all the constraints and checks and balances in the existing legislation. If a new land use tenancy does create a simpler and more flexible basis for letting land it may help to reverse the decline in the letting of land in a similar way to the success of the Farm Business Tenancy in England.

We envisage that a new land use tenancy could sit alongside current tenancy arrangements so that there is a choice between using the existing or new form of tenancy to let land. Landlords and tenants could have the ability to switch from the current form to the new form but only by mutual consent.

At this stage consideration should be given to clarity of purpose for a new tenancy and its relationship with proposed changes to agricultural holdings in the Agriculture Bill. Some of these changes in relation to the definition of diversification, rules of good husbandry and amendments to Schedule 5 may help achieve the same purpose.

We recognise that action is required to reverse the decline in the letting of land and this is one possible way forward.

Part 12 – Other

It will be important that the proposed legislative changes are seen as one part of a wider ongoing programme of reforms to land ownership, tenure and use in which culture, practice and policy are also significant in driving change. We set out briefly below other key components that we consider will support a wider programme alongside the proposed Bill.

Taxation

In addition to the proposed legislative measures we see a significant role for reforms in taxation to support delivery of the government's objectives for land ownership and use. In our advice of January 2022 we note that taxation is a significant lever in influencing decisions about land ownership and use.

In this advice we recommend systemic changes that would enable government to tax land values more effectively, including:

- a) Establishing a programme to bring all land onto the valuation roll;
- b) Committing to the development and use of a cadastral approach which would enable the integration of information on land ownership, use and value, building on the current work of Registers of Scotland.

Within current devolved powers we recommend consideration is given to the use of Land and Buildings Transaction Tax to reflect high land values, for example through adjustments to the rates or the use of a surcharge to secure an appropriate public share of high land values created in part through public policy on climate and net zero land use. We also propose the role of taxation is considered as part of a well-planned approach, alongside regulation and incentives, to securing a fair share of public value from Scotland's natural capital.

Leadership by public land owners

There is much that can be done without legislation through new approaches to land governance and public land owners have a leadership role to play in this. In particular, public land owners can take a lead now in developing more shared governance models that bring communities into greater ownership, control, and decision-making. Public land owners can also play a dynamic role in acquiring land with the deliberate intention of transferring some or all of that land into community control over a longer time frame, helping address some of the challenges for communities of acting in the current land market.

Community Wealth Building Bill

This Bill is focused on addressing changes in rural Scotland. There is also a need to progress reforms to the ownership and use of land in a more urban context, to unlock opportunities for town centre and city regeneration, tackle vacant and derelict sites, and shift to a more public interest-led approach to providing an effective housing land supply. The Commission has published a proposal for Compulsory Sales Orders, and advice on new measures to improve land assembly that would unlock ownership constraints on development and a more active role for public bodies in creating a housing land bank in public-interest control.

We also identify an opportunity for the Community Wealth Building Bill to address reforms to Scotland's Common Good land. Common Good land is a latent asset in towns and cities across Scotland that could help underpin community wealth building. Legislative reform is needed for Common Good land to be used in a more dynamic way that unlocks its potential and enables this ancient form of community ownership to deliver more benefit for communities. The Commission published research on options for reform in 2019.

Other Bills

As well as the Community Wealth Building Bill we note the relevance of other Bills to land reform objectives, in particular the Agriculture Bill and the Human Rights Bill. The interactions with these will need to be carefully considered through bill development. For example, a joined-up approach will be needed with the Agriculture Bill in securing the public interest in land use and the use of compliance mechanisms. The Human Rights Bill will be significant in framing the interaction of property rights with economic, social and cultural rights, and the right to a healthy environment, and may further shift the balance or introduce new routes through which rights can be fulfilled and safeguarded.

Evidence

Finally, we highlight the evidence and analysis available to support the proposed mechanisms and the work needed to develop them further.

In doing so we note that evidence takes several forms, both quantitative and qualitative, and the evidence base for considering the proposals is more robust because of this. Quantitative data is important in understanding the current pattern of ownership and being able to target measures effectively. Qualitative data enables the complexity of lived experience to be considered, providing greater depth of understanding of impacts, experience, drivers and motivations. Trends, patterns and analysis can be drawn from both.

The Commission has published a range of relevant evidence and analysis including:

- [Research on Interventions to Manage Land Markets and Limit the Concentration of Land Ownership Elsewhere in the World](#) (2018)
- [Review of the Effectiveness of Current Community Ownership Mechanisms and of Options for Supporting the Expansion of Community Ownership in Scotland](#) (2018)
- [The Effects Associated with Concentrated and Large-Scale Land Ownership in Scotland: A Research Review](#) (2019)
- [Investigation Into the Issues Associated with Large Scale and Concentrated Landownership in Scotland](#) (2019)
- [The Range, Nature and Applicability of Funding Models to Support Community Land Ownership](#) (2019)
- [Review of International Experience of Community, Communal and Municipal Ownership of Land](#) (2020)
- [The Role of Land in Enabling New Housing Supply in Rural Scotland](#) (2020)
- [An Investigation into Land Banking in Scotland](#) (2020)
- [The Value of Early Engagement in Planning](#) (2020)
- [Community Ownership Financing: Options to Complement the Scottish Land Fund](#) (2021)
- [Balancing Rights and Interests in Scottish Land Reform](#) (2022)
- [Rural Land Market Insights Report](#) (2022)
- [Rural Land Market Data Report](#) (2022).