

## Land Rights and Responsibilities Statement

Submission from Community Land Scotland in response to the consultation on the proposed Land Rights and Responsibilities Statement – February 2017.

### Key points on the draft Statement

- Community Land Scotland strongly supports the principle of there being a Land Rights and Responsibilities Statement (LRRS). Land Rights are well established in various statutes, but the concept of Land Responsibilities less well established, beyond obvious legal requirements. It is a powerful concept to explore what are the societal expectations of landowners to wider society, their responsibilities to wider society. An LRRS which sets expectations as a basis for delivering changed and improved landownership behaviours to wider society can only be of value, but such a statement will only be of value if it is clear as to the expectations and actually delivers change and improvement.
- The context for the LRRS is the continuing high concentration of land ownership in Scotland where very few people hold vast amounts of land, or land of local strategic importance in more urban contexts. With heavily concentrated ownership patterns, arguably, the responsibilities of owners to wider society are even greater and need to be ever clearer, particularly where most are in receipt of substantial public funds or tax breaks associated with the land they own.
- Community Land Scotland welcomes aspects of the draft Statement but is disappointed overall that the Statement does not go considerably further in setting out a more radical vision of what Scottish Ministers might legitimately regard as landowners' responsibilities to wider society, and at very least the sort of considerations of the interests of wider society landowners should have in their land-ownership and use decisions. These are not responsibilities in a legally enforceable sense, but responsibilities that it can be legitimately felt by wider society that landowners should have toward society's needs and aspirations and to which land is fundamental.
- From a landowners' perspective the statement does not offer any particular insights or encouragement as to what might be considered differently or embraced when making decisions about their land. If the statement is not going to encourage new thinking, the development of a stronger culture of perceived responsibilities, and additional or new actions or priorities in relation to land, it is not clear that it will have any real value. The consultation narrative states that the Statement is seen as part of creating "culture change" and should inform the practises of all those who own and manage land, yet it is not clear that the Statement as drafted will incentive or drive tangible, practical change and improvement.
- Some phrases within the Statement's principles are at a high level and they are open to wide interpretation, compromising their value.
- Although the narrative around the Statement emphasises a human rights approach, the Statement itself never uses the term "human rights" and is much weaker as a consequence. Further, aspects of the human rights approach advocated are in practise missing from the Statement, specifically the question of accountability and remedy. A statement with a human rights approach would be expected to mention specific human rights (eg. Right to food and adequate housing), and how each principle worked to support the fulfilment of that right
- Some of the suggested changes from the 2014 draft of the Statement serve to weaken it.

## **Improving the Statement**

In the remainder of this submission CLS offers constructive practical suggestions as to how the Statement might be improved from where it is currently. These points are set out in response to the specific questions in the consultation.

As indicated above CLS would have liked a much more radical and full approach to the Statement than that which appears to be being considered. The full thinking on this in an Annex to this submission, and while what is contained in this Annex remains CLS' preferred position and something it would wish government to consider and adopt, the rest of this submission focusses on the more limited approach currently being proposed in the draft as issued for consultation.

## **Responses to the specific consultation questions.**

### **Question 1 – Links to other policies.**

There are no further specific agreed strategies we would draw attention to, but we note the current Planning Consultation and proposals for a new framework for Planning, which include, for example, local community led plans. We believe this could be particularly significant in conjunction with the LRRS in so far as it potentially complements very well the idea of communities 'visioning' their place; considering a range of land questions in that regard; and their need for land for their sustainable development and to further their social, economic, environmental and cultural interests and rights.

More generally however, the referencing of all the other strategies at Paragraph 21 and subsequently in Chapter 4 may tend to detract from the importance of the LRRS as the only Statement from government designed to specifically address land responsibilities in the round.

### **Question 2a – do you agree with the human rights approach proposed.**

Broadly yes, **however**, Paragraph 31 sets out matters that, although the paragraph concludes the matters raised run through the Statement, the Statement itself omits key aspects of the human rights approach set out. This relates to the question of "accountability" and "remedies" when things go wrong. Any framework which did not include such could not be regarded to be complete in terms of a human rights approach.

That said, CLS recognise that this is the first iteration of the Statement and discussion around even the concept of land responsibilities is at an early stage in the general discourse about land in Scotland. In years to come questions of accountability and remedy can and should be more fully addressed even if it may be regarded as premature currently given the lack of maturity of the concept and its implications, and that the Statement is not intended as a legally enforceable set of responsibilities.

### **Question 2b – Further thoughts on the best way to ensure human rights are given full consideration.**

The best way would be to ensure the term "human rights" is specifically referenced within the Statement itself, if necessary tying that to the definition of human rights considerations contained within the 2016 Land Reform (Scotland) Act which gives rise to this Statement, and thus already and unanimously agreed by Parliament. Specific suggestions are given in response to questions about the content of the Statement itself. The Annex contains much fuller thinking on the question of human rights.

### **Question 3 – do you agree with the vision in the Statement.**

**CLS suggest the following minor but significant changes marked in [red]:**

***Vision for a strong [and developing] relationship between the people of Scotland and the land of Scotland***

*[With land rights come responsibilities]. The ownership, management and use of land and buildings in Scotland should [be in the public interest and] contribute to the collective benefit of the people of Scotland. A fair, inclusive and productive system of land rights and responsibilities should deliver greater public benefits and [delete – promote] [fulfil] economic, social and cultural rights.*

## Explanation

CLS believes the vision could be strengthened in three key respects.

First, by the vision title including the words [and developing], recognising this is an ever developing process.

Secondly, by the addition shown above [With land rights come responsibilities] to give a clear and unambiguous statement on responsibilities up front.

Thirdly, the 2014 draft Statement which was consulted on and received overwhelming support referenced the “public interest” in the way shown [be in the public interest and] and this should be included.

Fourthly, the term [fulfil] should replace the much weaker “promote”. Building on the intention to take a human rights approach, there could usefully be a footnote reference to the effect that the reference to “economic, social and cultural rights” is intended to include “human rights” as set out in the Land Reform (Scotland) Act 2016.

## Question 4

### Do you agree with Principle 1?

*1. The overall framework of land rights, responsibilities and associated public policies governing the ownership, management and use of land, should contribute to building a fairer society in Scotland and [the holders of land rights] should promote environmental sustainability, economic prosperity [delete `and`], social justice [, and fulfil human rights].*

## Explanation

The specific mention of the fulfilling of “human rights” is of fundamental importance as it links to specific considerations and would be consistent with the intended human rights approach. Without such a reference the Statement will be greatly diminished and of much less value than otherwise.

## Question 5.

### Do you agree with Principle 2?

*2. There should be an increasingly diverse [and widely dispersed] pattern of land ownership and tenure, which properly reflects national and local aspirations and needs.*

## Explanation

CLS strongly supports the principle that there should be an increasing diverse pattern of land ownership. It is simply not clear what “and widely dispersed” means. If it has specific meaning that should be explained, or it may be better just to delete this phrase.

## Question 6.

### Do you agree with Principle 3?

*3. More local communities should be given [the opportunity] to own buildings and land which contribute to their community's wellbeing and future development.*

## Explanation

We strongly support the intention of this principle.

It could be argued that more communities do now have the “opportunity” to own buildings and land with the commencement of the Community Empowerment Act and the passing of the 2016 Land Reform Act, and with the Land Fund in place, etc. Perhaps the point here should be that more communities should also be “supported” and perhaps that the words [and supported] should be added after “the opportunity”.

## Question 7.

### Do you agree with Principle 4?

4. The holders of land rights should [*exercise these rights in ways that*] recognise their responsibilities to meet [*high standards of land ownership, management and use*], acting as the stewards of Scotland's land resource for future generations.

### Explanation

The draft version of the Statement consulted on and widely supported in 2014 contained [*exercise these rights in ways that*] where shown above. This principle would be considerably strengthened if this were included again. This is an encouragement to a set of considerations and potential actions rather than simply recognition of certain matters.

The terms [*high standards of land ownership, management and use*] are general terms and mean many different things to different people. For example, responses to the 2014 consultation, as revealed in the analysis given in the consultation paper, make clear some owners already regard themselves to be fulfilling this requirement. In short, those who believe this – a judgement on themselves – will feel under no encouragement or responsibility to even contemplate new or further considerations.

It would be possible to set out more detail in the Statement itself and CLS is very strongly of the view that the Statement cannot be left as it stands or a huge opportunity to further the question of land responsibilities which would help drive modernising land use, ownership and management will have been lost.

There are at least two possibilities for strengthening the approach.

The first possibility is the inclusion in the Statement, or as a linking footnote to Principle 4, the seven issues the Minister must have regard to in drafting the Statement: human rights; promoting respect for internationally accepted principles and standards for land practises; equal opportunities; reducing socio/economic disadvantage; facilitating community empowerment; increasing diversity in ownership; furthering sustainable development. Making clear that in considering the exercise of their responsibilities to meet “high standards of land ownership, management and use”, the holders of land rights should have regard to the matters which Scottish Ministers must have regard to in preparing this Statement, as set out in Part 1 of the 2016 Act. This would to some extent, but not in any strict legal sense, pass expectations and encouragement of matters to be considered by landowners in land ownership and use decisions through to the holders of land rights, matters the consideration of which it was unanimously agreed by Parliament should be placed for consideration on Scottish Ministers.

Secondly, in addition to that above, to encourage a changing culture through considerations that might exemplify key land responsibilities, it would be possible to include an aspirational statement at the conclusion of the Statement to the effect that Ministers: “believe that progressive and innovative holders of land rights will wish to exercise their rights in ways which: optimise the land’s productive use, without compromising conservation priorities; furthers sustainable economic growth and development; mitigates and does not contribute adversely to climate change; contributes to achieving climate justice; minimises the effects of flooding; delivers greater bio-diversity; protects and enhances the condition of soils; improves water quality; enhances local environments having regard to scenic considerations; assesses their plans and land decisions against how they will fulfil peoples’ human rights; meets the principle of ‘responsible investment’; furthers inclusive growth; and contributes to the achievement of the sustainable development goals.” This approach begins to explicitly set out an aspirational standard of considerations the most progressive and responsible owners could use to judge their actions, and which might also gain wider currency over time among all owners. It could be made clear that these aspirations are a first iteration intended to

encourage a changed culture and should be built on through debate and development of the ideas over the period to the first LRRS and to its first review five years hence.

**Question 8.**

**Do you agree with Principle 5?**

*5. Information on land should be publicly available, clear and detailed.*

CLS agree with this.

**Question 9.**

**Do you agree with Principle 6?**

*6. There should be wide community engagement in decisions about land.*

CLS agrees with this.

**Questions 10.**

CLS has no further observations to offer on this beyond points made above.

**Question 11.**

See Annex to this submission.

**Question 12.**

CLS believes that the Statement, if improved by the measures suggested above, will play a very important role in further changing the relationship between the people of Scotland and the land, and would lead to important improvements in the considerations land owners have in exercising their land rights to help deliver wider public benefits.

**Question 13.**

There are no specific additional costs or burdens required by this Statement, although the wider considerations CLS wishes to see the holders of land rights consider and act on should involve them in new and innovative thinking which need neither be costly nor burdensome.

**Question 14.**

CLS believes that the considerations it wishes to see emanating from the encouragements in the Statement can only serve to enhance the environment.

**Finally**

The Annex sets out a much fuller set of considerations which CLS, ideally, would wish the LRRS to embrace.

Community Land Scotland

February 2017

## Community Land Scotland - Position paper on Land Rights and Responsibilities Statement

### Background

Community Land Scotland see the Land Rights and Responsibilities Statement as of fundamental importance. It will inform and in part develop future policy and will help condition the work of the Land Commission. The government should seek to take the opportunity of the statement to develop thinking, expectations and potential actions on land reform, land ownership, land use and management. The statement deserves detailed consideration as a major plank in the policy toward land in Scotland.

It is to be noted that this matter is largely uncharted territory. Research by CLS suggests that there is no other country that has sought to set out a statement of land rights and responsibilities in quite this way. International observers are excited by the prospects and will watch progress in Scotland with interest.

An earlier iteration of a LRRS in consultation around the proposals for a draft Bill and was rooted in the policy concept that the greater the land holding the greater the responsibility the owner had and, in Scotland, this has particular relevance given the concentration of our ownership patterns.

This further links to the thinking of the Land Reform Review Group that land is a finite and crucial resource that requires to be owned and used in the public interest, for the common good – thinking which underpins so much contemporary policy thinking on land. While owners carry many specific obligations under various statutes, nowhere are the fundamental responsibilities of owners toward the land clearly articulated, with all the implications of land ownership and use on people.

### The Key Arguments

The LRRS is introduced by Part 1 of the Act, states that the Scottish Ministers “*must prepare and publish a LRRS*” (s.1(1)), describes the LRRS as a “*statement of principles for land rights and responsibilities in Scotland*” (s.1(2)) and outlines how in preparing the LRRS, Ministers must have regard for (s.1(3)) – in summary:

- relevant human rights and internationally accepted principles and standards
- equal opportunities
- reduction of inequalities
- supporting and facilitating community empowerment
- increasing diversity of land ownership
- and furthering the achievement of sustainable development in relation to land

The relevant human rights and international standards are then explicitly defined as the International Convention on Economic, Social and Cultural Rights (ICESCR) and includes the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (VGGTs), one specific example of internationally accepted principles and standards.

Section 2 of Part 1 then outlines the procedure for preparing and publishing the LRRS, Section 3 describes how Ministers have a duty to promote the LRRS and “*must, in exercising their functions and so far as reasonably practicable, promote the principles set out in the LRRS*”, and this is then reflected in the duties of the Scottish Land Commission (SLC) who must also have regard for the LRRS when exercising of their functions (Part 2, Chapter 3, s.22(3)(a)(i)).

Collectively, these provisions make the LRRS an extremely powerful tool for moving a progressive land reform agenda forward, for three key reasons.

Firstly, Ministers and the SLC have a duty to reflect the LRRS in their decisions and activities, which means that the LRRS will have the potential to influence each and every land-based policy and legislative process in Scotland, not just those within the Act itself.

Secondly, in explicitly linking the LRRS to the objectives of reducing inequalities, facilitating community empowerment, increasing the diversity of land ownership and furthering the achievement of sustainable development, the Statement is given a clear direction and progressive agenda.

Thirdly, in explicitly requiring the LRRS to be drafted in consideration of economic, social and cultural rights and the VGGTs, Scotland might hope for an end to debate on human rights and land being solely dominated by a singular focus on property rights within the European Convention on Human Rights (ECHR) in the interests of owners (notwithstanding that ECHR requires to be honoured).

As noted above the 2016 Act makes an explicit connection between the LRRS, and consideration of the International Covenant on Economic, Social and Cultural Rights, and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, and this enables it to focus attention on the promotion of the five human rights most closely associated with land, the rights to:

- food
- housing
- work
- physical and mental health
- a cultural life

They also enable the LRRS to draw upon the responsibilities of the State to protect these rights, the responsibilities of “non-state actors” (including business enterprises, which includes landowners) to respect these rights, and the subsequent responsibilities of both State and non-State actors to provide remedy if these rights are violated.

The VGGTs explicitly require “non-state actors” including business enterprises, inter alia, to “have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence (our emphasis) to avoid infringing on the human rights and legitimate tenure rights of others.”

Other key human rights instruments, internationally accepted principles and standards, include the Guiding Principles on Business and Human Rights. Those guidelines also reference the States’ responsibilities to respect human rights and “business enterprises’ responsibilities to respect human rights”. They further articulate the need for business enterprises to “avoid infringing on the human rights of others and that they should address adverse human rights impacts”. These Guiding Principle also reference that business enterprises should have in place human rights policies, including an overarching commitment to human rights due diligence (our emphasis) processes. Arising from the foregoing CLS argue the LRRS should include:

- outlining the various relevant rights, rights holders and accompanying responsibilities relating to land, whilst differentiating between individually held rights (as human beings) and the rights and responsibilities of people as part of larger organisations who own, use or manage land;
- adopting and expanding the concept of “human rights due diligence” as the framework for all land owners and lease holders (eg. private / public / community land owning groups / non-for-profit land owners);
- reflecting responsibilities which already exist within Scots Law;
- explicitly outlining responsibilities currently just implied by law (or required by grant funding etc.) as positive responsibilities and expectations on land owners and lease holders
- respecting and promoting human rights and fulfil the Scottish government’s objectives to address inequality and increasing diversity of land ownership;
- a clear expectation (currently implicit through the new community rights to buy granted in the 2016 Act) that owners should not manage their land in ways detrimental to local communities or sustainable

development. In short, they should manage it for sustainable development purposes and for the common good of communities.

More specifically, CLS propose a matrix of rights and responsibilities be included in the LRRS embracing:

## 1. Rights holders and their rights

Recognise that there are a range of different rights holders, who may have different rights and subsequent responsibilities, even though the boundaries between these groups may be difficult to define and change in specific circumstances:

- a) All human beings are rights holders in terms of the fundamental land-related human rights (although none are absolute), including the:
  - right to food and housing, right to physical and mental health, right to work and right to a cultural life (ICESCR)
  - right to property (UDHR and ECHR)
- b) Property ownership rights:
  - rights holders include different land owning groups - private / public / community land owning groups / non-for-profit land owners (eg. RSPB)
- c) Tenancy, occupation or lease rights:
  - rights holders include crofters, agricultural and other types of tenants
- d) The general public as rights holders have a number of land use and access rights:
  - right to roam (as determined by the Land Reform (Scotland) Act 2003 and the Scottish Outdoor Access Code)
  - foraging rights (as determined by the Nature Conservation (Scotland) Act 2004)
  - hunting, shooting and fishing rights (to carry out any of these activities, a member of the public must have permission from the landowner)
- e) Scots Law also recognises a relatively unique type of rights holders – local communities vis a vis public and private land owners:
  - the community right to buy land (including the associated rights to register an interest in land and assets which are currently privately owned land, as well the procedures for acquiring public land);
  - new rights added by the Community Empowerment (Scotland) Act, 2016 in relation to community right to buy abandoned, neglected and detrimental land (Part 4, s.74) and the Land Reform (Scotland) Act 2016 on the community right to buy land to further sustainable development (Part 5, s.45-73) and right to be “engaged with” on decisions relating to land (Part 4, s.44).

Differentiation needs to be made between the rights and responsibilities of individuals as human beings, who should enjoy equal access to all fundamental human rights (a) and access and use rights afforded to all in Scots Law (d), and the rights and responsibilities of individuals, as singular persons or organisations, with particular ownership and lease rights and responsibilities (b) and (c).

2. Specific responsibilities associated with land ownership, use and access, are suggested as follows. Owners to:

- a) Undertake human rights due diligence with respect to their ongoing land ownership, use and management. (The largest landowners desirably publishing a policy statement; periodically assessing actual and potential impacts; integrating commitments and assessments into control and oversight systems; and tracking and reporting performance)
- b) Undertake all activities in line with “responsible investments”, defined as: doing no harm, being undertaken in partnership with local communities and contributing to positive social, economic and environmental objectives, and highlights the importance of consultation and participation by local communities who are potentially affected

- c) Take proactive steps to assist achieve the progressive realisation of the rights to food and housing, work, physical and mental health, and cultural life through land ownership, use and management which:
- i. has regard for promoting the human rights of those living within, or dependent on, their land for housing, livelihoods, welfare and culture
- d) Take proactive steps to own, use and manage land with regards for the underlying objectives of the LRRS, including:
- i. promoting equal opportunities and reducing inequalities
  - ii. supporting and facilitating community empowerment
  - iii. contributing to diversity of land ownership
  - iv. contributing to sustainable development in relation to land
  - v. Promoting more resilient, sustainable communities
- e) Consider and act to own, use and manage their land to protect the needs of others in relation to bio-diversity, climate change, flooding, amenity, access, its scenic qualities, etc.
- f) Proactively provide opportunities for more communities and people to have a direct stake in the land by means of ownership and through tenancies, crofts and leases, including those currently in other locations.
- g) Own, manage and use land in ways which furthers sustainable development and ensures land is not abandoned, neglected or left in a state which is detrimental to local communities or the environment.

## **Conclusion**

CLS believes the foregoing would be a strong basis for developing an innovative and progressive set of Land Rights and Responsibilities Statement.

Community Land Scotland  
February 2017