

## **Community Land Scotland**

### **Response to Scottish Government Consultation: The Future of Land Reform in Scotland**

Community Land Scotland (CLS) is pleased to be able to respond to the consultation on the Future of Land Reform in Scotland.

CLS believes this consultation represents an important further step in the process of delivering change in Scotland's land ownership and governance, in order to pursue the aim of achieving greater people centred land governance, greater fairness and social justice, the progressive realisation of human rights, and the furtherance of sustainable development.

This response follows the structure of the consultation paper.

#### **Draft Land Rights and Responsibilities Policy**

Q1. We agree the Scottish Government should have such a policy.

Q2. We strongly support the need for such a statement as a basis for considering land questions into the future. The detail of this statement is progressive and there is nothing we would wish to see excluded from what is there, we support its content.

However, the statement could be strengthened by making clear securing diversity in the pattern of ownership is a key principle and policy objective in its own right and expressed as such, as a means to greater fairness and social justice.

The statement should also explicitly reference the part that changing land ownership patterns can contribute to the progressive realisation of human rights as one of the principles underpinning future policy.

It will be important for the Land Rights and Responsibilities statement to be formally adopted. This would preferably be achieved by including a clear requirement for such a policy statement to exist within the proposed Land Reform Bill, with a duty on the Scottish Government to refresh that statement every 5 years or so, following open consultation. In addition, requiring the approval of Parliament to any such statement would add to its significance and keep the matter open to full public scrutiny over time.

It may also be appropriate to reference the part that taxation policy can play in delivering change that would meet the land policy objectives. While the detail of taxation policy may be considered, at this time, through other mechanisms, a principled statement of the part taxation policy can play, for example through a possible Land Value Tax, would be worthy of explicit reference.

Wider international obligations encouraging new or adapted land ownership and management arrangements flowing from the Sustainable Development Goals and Climate Change agreements currently in negotiation should be seen as forming part of the frame of policy principles that should operate in Scotland.

Q3. In so far as priorities from among the proposals in the consultation are concerned.

Action 1

To establish a Land Reform Commission to provide the ongoing means to keep Scotland's land laws under scrutiny, and propose reforms to meet the objectives of national land policy (as above).

#### Action 2

To legislate to provide for Ministers to be able to consider whether current and emerging land ownership patterns serve the public interest and further sustainable development, and have powers of intervention to require change in actual or potential land ownership patterns which would not serve the public interest, when having regard to the vision, purposes and principles of land policy set out in the consultation and as improved by suggestions such as those set out above.

#### Action 3

To secure greater transparency in publicly available records of who owns Scotland including revealing whom the beneficial owners are which lie behind often complex ownership arrangements. This would include a requirement to only register title to land by entities registered within EU legal jurisdiction.

Actions out-with the proposals of the consultation paper.

More generally a continuing commitment to a Land Fund which can operate flexibly to ensure no good proposals are lost will be important, as will keeping the Land Fund under review as to the amounts of resource available and given the expansion of the Community Right to Buy to all communities.

Further, with the devolution of the Crown Estate in prospect shortly, urgent consideration will be required as to how the control and administration of the resources of the Crown Estate in Scotland will be given effect, with particular emphasis on the decentralisation of control to local communities of assets key to their sustainable future.

### **A Scottish Land Reform Commission**

Q4. We agree a Land Reform Commission would help ensure Scotland continues to make progress on land reform and would enhance the ability to respond to emergent issues.

#### Q5. Advantages

For too long land policy change has been left to ad hoc developments and arrangements. Land policy has not hitherto been looked at comprehensively and as a deliberate and continuous action, nor against any overarching policy principles. This can give rise to necessary reforms awaiting decades and even centuries, during which time the sort of principles of policy outlined in the vision and principles in this consultation cannot be advanced as fully as might otherwise be the case. The advantage of a Commission is that it would be charged to keep land policy and law under review on a continuous basis, researching and collecting evidence for change. This means change to meet policy principles and objectives could be effected more timeously and comprehensively.

Giving the Land Reform Commission a locus in considering the part taxation policy could play in delivering change to meet the land policy objectives should be considered as part of its remit.

The Commission should have an obligation to have regard to international land questions and to study and bring lessons from international practise into Scottish policy thinking.

We had made suggestions for the establishment of a Land Agency in earlier responses to land reform and community empowerment consultations. It is not suggested that our recommendations for a Land Agency are taken forward as a separate institution within the consultation. Community Land Scotland regrets this and believes there is still a case for this to be considered.

The Scottish Government propose a 'dedicated community ownership support team within Scottish Government'. This is broadly in line with what was recommended by the LRRG. We maintain that a Land Agency with the functions we have previously set out would be advantageous and consideration should be given to the potential benefits of incorporating them within the responsibilities of the Land Reform Commission. Otherwise, the approach proposed to meet the objectives of the Land Agency could change or disappear with the changing tides of political control and commitment.

None the less, we welcome an intention to strengthen the support team to carry out some of the functions of our proposed Land Agency. This support unit should embrace or at least link closely to HIE and Lottery/Land Fund utilising the high levels of expertise available there in this area of work. Considerations around these issues must ensure Ministers have all necessary powers to facilitate mediation between owners and communities when necessary.

Short term it will be important for the Scottish Government to spell out more clearly what this dedicated support team will comprise and consideration should be given to establishing a departmental advisory group to help guide its work.

Disadvantages

We can see no disadvantages.

Q6. The Commission should be independent of Government, with reporting relationships to Scottish Government Ministers and to Parliament.

Its remit should be to consider how the land ownership patterns, land laws, land (and taxation) policy and actions to support policy continuously serve the vision and principles for land in Scotland, and to recommend change.

The Commission should have necessary powers, such as those suggested in the consultation paper.

The Commission might usefully have powers to, exceptionally, buy and hold land if that served the meeting of the objectives of policy. The Commission might be given powers to investigate current ownership of land and whether that ownership serves the public interest, at the request of Ministers.

### **Limiting legal entities that can own land**

Q7. We agree.

Q8. We agree

## Q9 Advantages

Almost by definition, placing ownership restrictions to only those who can register title to land being those entities registered within EU legal jurisdiction, would assist openness and transparency and help act against the worst examples of aggressive tax avoidance.

Within this, the question of who are the beneficiaries of ownership requires to be addressed and revealed. Within the EU, Scotland should seek to take the lead in establishing the most open and transparent ownership arrangements.

The question of Trusts as well as companies needs to be explicitly provided for within the arrangements.

We regard the briefing by Andy Wightman on this issues to make many important points about why this arrangement would be beneficial and important, and commend its contents.

<http://www.andywightman.com/hot-topics/land-reform-2014-2016>

Further, we are aware of evidence submitted by Global Witness which has considerable experience of these issues internationally. Global Witness make some important points about international and definitional points and Community Land Scotland commends their evidence on these matters.

## Disadvantages

We can see no disadvantages that would outweigh the advantages.

Q10. Breaches of the restrictions, if not remedied within a set time horizon, should result in forfeiture of the land in question.

The measures proposed in the consultation should not only be prospective, a time limit should be given within which to bring any ownership not currently meeting these standards within them, or face the forfeiture of the land in question.

Beyond the strict legal requirements, there is also a moral dimension to these matters. It ought to be regarded as morally and socially unacceptable for owners of land in Scotland to seek to hide actual ownership and the beneficiaries of ownership by registering land in Scotland through complex legal entities and based in places outwith Scotland designed to obscure who owns the land. The motives for such lack of transparency require to be more widely understood and exposed and those who seek to purposefully obscure or disguise ownership questions ought to be regarded as pursuing morally unacceptable practises by wider society who do not behave in such ways and who respect their obligations to their fellow citizens. Global Witness has observed in relation to these matters that "it is important to note that some current land owners in Scotland are not registering their ownership in off-shore tax havens simply for tax-related purposes, they are also choosing to register in secrecy jurisdictions in order to hide or limit public knowledge of their relationship with the land in question. In doing so, they are attempting to avoid being held accountable for decisions they make about that land they own and how such decisions impact on others, particularly local communities and tenants". We endorse these sentiments.

## Information on land, its value and ownership

Q11. We agree.

Q12. All community owners hold data which, by virtue of the nature of the ownership type, will be in the public domain. Community owners would be happy to co-operate in arrangements to increase access to data.

Q13. We commend the briefing on this issue by Andy Wightman which makes many important points. <http://www.andywightman.com/hot-topics/land-reform-2014-2016>

### **Sustainable development test for land governance**

Q14. We agree

Q15. We very strongly support this proposal. Except in the case of small and particular areas of land required to be compulsorily purchased for a specific public project, at present in Scotland it is not generally possible to formally ask, within the terms of the law, whether the ownership of any land by particular individuals or legal entities serves the public interest. The proposal, for the first time in Scotland, would allow this question to be asked within the context of what best serves sustainable development of land and the public interest. As has been suggested by the Chair of the Land Reform Review Group, the larger the land holding in any one individual's hands, the greater the moral hazard. It can only be right that Ministers, accountable to Parliament, are given powers of intervention to be able to ask what serves the public interest in ownership of specific land, and to be able to take actions to require change in that owner's actions or in that ownership itself.

The formal mechanisms here could be potentially complex and there is a need to balance the interests of the owner with the wider public interest, but ECHR considerations provide the framework for that balance to be considered, and should not be regarded as an obstacle, per se, to interventions or even the potential expropriation of land.

Communities should be given rights to request intervention by Ministers, as part of the arrangements. The Land Reform Commission might be given the examining role and could itself have powers to request to examine particular cases upon request to do so.

The concept of the effect of a monopoly of ownership being detrimental in a particular area ought to be capable of examination in the context of these wider and overall proposals. While there may be some consideration of reserved/devolved aspects of the law, at very least, Scottish Ministers ought to have referral powers to the CMA over questions of monopolistic land ownership. Preferable, however, powers to examination detrimental effects from monopoly land ownership ought to exist within the arrangements surrounding the Land Reform Commission and powers to Scottish Ministers.

At present, although implied, there is no specific duty on landowners to own and use that land to further the achievement of sustainable development. Scottish Ministers do have such obligations, ie, to act to further the achievement of sustainable development in their actions. The policy base proposed for potential intervention is where Ministers perceive ownership is or might be a barrier to sustainable development. It will be important to consider how this is best given practical effect and one consideration must be as to whether a general duty can be placed on owners of land (beyond

their home and reasonable curtilage of their home) to further the achievement of sustainable development.

As to specific intervention powers, one means of designing the detail of intervention powers more generally would be to have a system analogous to that pertaining in France in relation to certain land under SAFER. In essence, this provides a period during which and before any land transaction can be regarded as complete that a public authority can ask whether that sale would serve the public interest. There are, however, other international examples of potential mechanisms. The detail of what might be the best way of delivering might be best achieved under secondary legislation, with the principle of allowing consideration and intervention established in primary legislation at the earliest possible opportunity.

The provisions considered under this policy should not be limited to prospective sales, but should be able to be applied to existing land holdings which might be deemed not to be serving the public interest.

Q16. No concerns about the principle of powers to examine and intervene.

It is important and seems right in principle that Ministers should have the power to ask what is in the public interest in any given case of land ownership. This should be available, irrespective of any other arrangements or considerations as a back-stop power to protect the public interest.

### **A more proactive role for public sector land management**

Q17. We agree (as qualified below).

Q18. If this implies that there would be a liberalisation of law and regulation to remove what may now be regarded as unnecessary restrictions to freedoms to operate in innovative ways, and to better manage Scottish Government owned land, then we would be supportive of this.

Regulation relating to Local Authorities should be considered part of this.

It would be important to provide for the opportunity for Ministers generally, through their agencies, to have powers to be able to purchase land, potentially to hold it, but specifically to effect longer term change in its ownership and management by providing new opportunities for entrants and communities into land ownership and management generally, and not only for agricultural purposes.

There may be an opportunity here in any new legislation to clarify that Community Councils could be able to hold land assets.

Q19. The caveat to what is above would be that any greater freedoms should not be at the expense of a culture of public agencies working with and facilitating communities to take more actions, and moving to a culture where public agencies were using any new freedoms granted to act instead of where communities could act.

Additionally, the consultation paper spells out responses to all the specific Land Reform Review Group Report recommendations. Among those responses the Land Use Strategy recommendations are explicitly rejected. This appears symptomatic of a wider attempt, it might appear, to keep the Land Use Strategy separate from other aspects of land policy. This seems unsound and illogical, in

principle. There is a need to look at land policy comprehensively, therefore including the Land Use Strategy firmly within wider land policy, is essential.

### **Duty of engagement on land management decisions to be placed on charitable trustees.**

Q20. It is not fully clear what exactly the policy intent is here and whether all charities should be caught in this?

If this is designed to deal with charities created for the sole purpose of continuing management of a single estate previously in private ownership, the duty is not very strong – i.e. that they should 'engage' with the community. This would be possible, but does not seek to require that they do anything different as a consequence of engaging. This could be strengthened by, for example, and where such a body did not have open local membership of the Trust, making it a duty to have an estate management plan which had to demonstrate it furthered the achievement of sustainable development and that they must seek to secure agreement with the community on that plan.

A possible approach might be through:

- any charities which were created for the sole purpose of continuing management of a single estate previously in private ownership, and which had within the boundaries of their ownership recognised settlements of people, be placed under a duty, in order to be eligible for charitable status, to have purposes that were compatible with furthering the sustainable development of that land
- that membership would have to be open to any residents within the boundary of the estate
- open membership would remove the need to formally consult community organisations as all individuals in the place would be entitled to membership and could express aspirations and seek to influence events through that membership

In any scenario where there was not open membership the approach might be:

- by virtue of any charitable status granted, the trustees would be required to establish arrangements to consult with any Community Council(s) and organisations in the community which had purposes which included furthering rural or sustainable development of the land
- the charity trustees being placed under an obligation to seek to agree a sustainable development plan for the estate with the consultees
  - which failing, the charity being under an obligation to set out to OSCR why agreement had not been possible
  - with consultees given the opportunity to comment on any such reasoning
  - if OSCR were unconvinced that the charity had good reason not to be able to agree with the community their sustainable development plan or had not made reasonable effort to seek to so agree, OSCR could remove their charitable status.

An alternative approach, which would not carry the strength of potential change along the lines immediately above, would be that OSCR could review of such estates as a sector, with OSCR issuing guidance to that sector on what expected of them by reference to the objectives of government policy and through a framework of engagement as above, on furthering the achievement of sustainable development – which itself should perhaps be given status as a charitable purpose.

Q 21. Every charity is caught up in a provision only intended for a few, with significant additional demands being placed on small charities which may technically own land, for example, a charity shop in a town centre. It would seem preferable to make clear and to avoid unintended consequences, that this would only apply to Charities which have recognised wholly or partly settlements within their boundaries.

An alternative approach would be to make provisions similar to those on participation requests in the Community Empowerment (Scotland) Bill, to allow those communities which wished to be engaged, consulted and to have their agreement to plans sought, to make a request to Ministers to be granted such rights. This would automatically limit the effect of the provisions to communities which sought a 'participation' role, yet still give a community participation rights when so granted.

Q22. A community could be defined by reference to, for example, the Community Council, or Community Councils for the land in question, or specifically identified within the participation right referred to above.

However, many community council areas will have Development Trusts to whom they defer on sustainable development matters within their area, or with whom they consider to have joint interests.

Q23. If the requirement was to seek to find agreement with the community on future direction, but this was either never forthcoming or that it could be regarded that only token effort was put in to this, the matter could be considered by OSCR with the ultimate sanction of the loss of charitable status.

### **Removal of the exemption from business rates for shooting and deerstalking**

Q24. We agree the exemption should be ended.

Q25. We can see no principled case for an exemption from rates for these activities/business type (as distinct from any other rateable activity/business type).

We note that current charitable exemptions and, to the extent it applies, the small business bonus scheme, is likely to apply, consistent with all rating non-domestic policy (but not fixed elements of the law so could change at any time)

One approach to any notion of reliefs (as distinct from exemptions) would be for those who manage their sporting interests in line with recognised environmental standards (such as through SNH), where such standards exist, to be eligible for any reliefs. This would, however, potentially act against the ideal that all land should be managed according to recognised environmental standards, irrespective of incentives or reliefs.

We do not seek an exemption for community owners as a 'class' of owners – they could, like others, benefit through good environmental management regimes, if such were to apply.

Q.26. Some community owners may have additional costs, but so would others running similar enterprises and therefore in competition terms may not be worse off in practise.

Some private landowners do not use their estates for wider economic benefit, only enjoying them for private sporting use. If an estate has extensive sporting rights and they are not used, this could be construed as constraining local economic activity and the potential for sustainable development.

However, some owners may choose not to exercise their sporting rights, and where they could show their alternative uses were consistent with and delivered wider sustainable development plans consented to by the local community, they should not be regarded as constraining such development.

More widely, under the potential intervention powers, the question of whether any land use, including sporting uses, was furthering or was a barrier to sustainable development could be considered.

### **Common Good**

Q27. We agree.

Q28. Decision by the local authority, with an appeal mechanism to Scottish Ministers.

Q 29 The answer would depend on what that definition would be.

Q30 and 31. We commend the briefing by Andy Wightman on these matters as bringing helpful insights and suggestions on a way forward. <http://www.andywightman.com/hot-topics/land-reform-2014-2016>. Additionally, Community Councils might be give specific powers to hold Common Good land.

The idea that new Common Good land could be created should be part of any further considerations.

### **Agricultural Holdings**

Q32. The answer to Q32 is not a simple yes or no. We have no difficulty with the proposed Land Reform Bill being the vehicle for change in this area.

Q33. The advantage would be that there is a proposal to deliver this Bill within the current Parliament.

Equally, if those principally affected by this Bill sought a separate legislative vehicle we would have no principled objection to this.

It seems to us this is a matter principally for Government.

Q34. Any disadvantage that might accrue by inclusion in the Land Reform Bill, but this is by no means certain, would be if the agricultural aspects so dominated this Bill that it was a distraction from the other and wider policy aspects proposed for this Bill.

### **Wild Deer**

Q35. We agree.

Q36. The case within the consultation paper on the need for more powers is well made and shows the potential advantages.

It has to be right to allow for interventions to protect the public interest in the question of deer management through additional powers which will, of course, only be exercised when there is a demonstrable need.

Q37. It is difficult to envisage any disadvantages.

#### **Public Access: clarifying core paths planning process**

Q38. Agree.

Q39. Agree.

Q40. Agree.

#### **Assessing Impact**

Q41. It cannot be envisaged that the Rights and Responsibilities Policy can have anything other than a positive impact on all the issues mentioned above.

At the core of the policy is the better delivery of land policies and potentially changed land ownership structures that by their very nature are likely to widen economic opportunity, distribute wealth more widely, promote greater social justice, and assist relieve poverty.

Q42. Those most likely to be disadvantaged are those who are already significantly advantaged by their long established monopoly control of land through their ownership of that land. This can only contribute to greater fairness and social justice and will not leave those interests in any significant way disadvantaged as a result of change which would involve compensation for any loss.

Q43. By making sure they happen. By creating new legal powers that can be exercised in the public interest. By creating new institutions to assist look into and after the public interest. By making sure the powers and intervention instruments are well understood.

Costs are likely to be incurred to administer the new legal provisions and any institutions created. These should be examined by Parliament in scrutiny of the legislation through the Financial Memorandum. However, it is readily justifiable to incur costs to bring about necessary change toward greater fairness and social justice.

Q44. Existing land owners may argue that their 'private enjoyment' of their land may be affected by some proposals, and this may be so. The provisions of the ECHR are there to help weigh in the balance where those private interests are outweighed by public interests in the question of any actions to affect their ownership.

Q45. The proposals are designed to advance environmental benefits through the proposition that sustainable development sits at the heart of key aspects of the policy. Considering sustainable development requires the consideration of the balance between environment, social, and economic factors. ENDS