

Public interest reasoning for full disclosure of who owns Scotland's land.

A Community Land Scotland contribution to public discussions on the need and justifications for full disclosure of who owns Scotland's land.

Introduction

An essential question that must be answered in the Scottish Parliament using its legislative competence to require the full disclosure of who owns Scotland's land, including the beneficial owners of legal entities which own land, is whether there is a public interest justification for such a general disclosure which outweighs any individual protections that may be given for non-disclosure under ECHR, particularly Article 1 Protocol 1, Article 8 and Article 14.

In the public dialogue about this issue arising from the provisions within the Land Reform (Scotland) Bill (as introduced 2015), the Scottish Government's response to the Stage 1 Committee report on the Bill reveals that it has yet to be fully convinced that there is sufficient public interest reasoning, such as to justify the general disclosure of such information. Current proposals seek to provide a mechanism which might allow disclosure when a justification to know can be reasoned by an individual with a specific issue with an area of land. Even then, there would be no guarantee the information sought would be forthcoming.

This paper seeks to capture key clear benefits which justify requiring full disclosure (public interests reasons). It sets out general public interests arguments which we believe are compelling, and the action needed to effect disclosure proportionate.

What are the public interest reasons for maximum disclosure?

There are at least three sets of public interest justifications for maximum disclosure and a further significant issue which touches on discrimination and equality of treatment under the law. The public interest reasoning builds around the following:

- A general and legitimate interest of citizens' in who owns land, as all of Scotland's land uses and management impact on all Scottish citizens all of the time, and land use and management is consequent upon who owns, controls, and ultimately benefits from that ownership.
- Citizens' democratic participation in the policies and life of the country is only fully enabled by maximum disclosure of ownership.
- The effective administration of a variety of statutes and policies, not least the Land Reform (Scotland) Act 2003, as amended by the Community Empowerment (Scotland) Act 2015, and the provisions envisaged in the Land Reform (Scotland) Bill 2015, are only fully effective with maximum disclosure.

Each of these matters is dealt with in turn.

The general and legitimate interest of citizens'

All of Scotland's population has a legitimate interest in how Scotland's land is owned, used and managed.

This legitimate interest derives from the impacts the ownership, use and management of Scotland's land has on the population as a whole, as well as individually in relation to particular circumstances associated with where a person lives and / or works.

Furthermore, all of Scotland's population is free to travel throughout Scotland, and every citizen has the 'right to roam' responsibly on land in Scotland, confirmed in the access provisions of the Land Reform (Scotland) Act 2003. In part, the 'right to roam' every person in Scotland enjoys is to further "understanding natural or cultural heritage". There are few nations on earth where the concentrated patterns of land ownership have been so material to our natural and cultural heritage, and remain so. The distribution of influence and power in history and contemporarily is significantly rooted in land ownership, which has had huge influence in shaping the look, bio-diversity, use and management of land – where people live, how they are employed, how cultural expression has developed. All these matters continue to be influenced and further develop in light of land ownership, use and management questions.

In travelling throughout Scotland and in exercising their 'right to roam', it is legitimate for all citizens to ask themselves questions and to examine the reasons why Scotland's landscape is the way it is, and to explore and seek to understand the impacts the ownership, use and management has upon them now and into the future; how it impacts upon their livelihoods, their well-being, and the well-being of the wider community of Scotland.

So, any citizen has a legitimate right, supported in law, to be able to access information, explore and understand land based issues, such as:

- Why does the land have the scenic qualities it has and which impact on me?
- Whether the land ownership, uses and management adds to or diminishes flooding impacts I experience or that of my family or community, or those communities through which I travel?
- Why some forests have significant bio-diversity benefiting me, and others don't?
- Whether the agricultural methods I see are aiding my food security and that of the nation, or not?
- Why some land is tended, and other parts vacant, derelict, neglected or abandoned, affecting how I experience the environment around me?
- Whether land available for social housing, employment and economic growth in some places, and not in others, and the impacts that has on my life and opportunities?
- Why are there raptors for me to see on some grouse moors, and virtually none on others?
- Why wind turbines are where they are, and who benefits from them, how that has impacts on me?
- Why deer numbers impacting on crop production I see and roads I travel differ and are as they are in any part of Scotland?
- Why some peatlands are drained and degrading potentially acting against climate change mitigation I would otherwise benefit from, while others are 'living' and assist assisting in climate change mitigation?
- Whether my access to the land is assisted in some places and hampered in others?
- Whether the newly bull-dozed hill track I see or otherwise encounter, I regard to be in the public interest, or not?
- Why my access to piers and jetties may be different in different places, affecting how I can access my leisure or economic opportunities?
- Why some communities I visit or travel through seem vibrant and economically developing with new businesses and shops opening up, whilst others seem worn down, neglected, with businesses shutting down?

These questions are simply illustrative of a much wider range of legitimate interests citizens' have and which derive from land ownership, use and management, all of which have impacts for all of Scotland's population, all of the time.

Who owns the land, and who lies behind that ownership by way of being beneficiaries of that ownership matters. This is because those who lie behind the legal ownership are material in determining how the land is used and managed, and therefore the impacts that use and management has on all citizens in many different ways.

Benefits to understanding natural and cultural heritage and enabling the wider understanding by Scotland's population of key land issues are realised by full transparency on ownership of land.

Citizens' democratic participation in the policies and life of the country is fully enabled by maximum disclosure of ownership.

Scotland's people are not only entitled to consider and assess the above questions and issues, but political discourse and democratic participation is affected by the extent to which citizens can understand these questions and issues, consider the effects of land ownership, use and management decisions upon them, and make informed judgements accordingly.

Society attaches specific importance to a wide range of land policy questions. So, for example, matters concerning the scenic quality of our land feature in planning policy and guidance; local authorities are required to have land strategies for housing supply; government, local government and specific development agencies have responsibilities toward the creation of employment and land uses to achieve such; government has responsibilities for a land use strategy rooted in climate change management; SEPA and others have responsibilities for flood management; SNH has specific responsibilities toward bio-diversity, designation and protecting areas of specific environmental importance; and so on, and so on...

In addition to the legitimate interest of citizens to be able to be fully informed to take part in the democratic life of the nation, various statutes give citizens' rights under the law to engage effectively in the life of the nation.

For example, there are a range of statutory provisions which require public consultation within decision-making affecting land, or best practise in policy and law making determines this is required, and offers opportunities for comment in the scrutiny of performance, for example, in relation to:

- Local authority statutory land use development plans
- The national Land Use Strategy
- In relation to statutory land (protection) designations
- Forest plans
- Flood management plans
- Climate change target monitoring
- Local and national housing strategies

There are many, many more such matters which offer participation opportunities for citizens.

In land questions, the ability of citizens to take advantage of these statutory and other opportunities would be fully enabled only by maximum disclosure of who owns Scotland's land, and compromised by not having

such disclosure, given that many land use and management decisions are determined by who owns the land, or has a beneficial interest in or controls the land ownership.

How land ownership, use and management policies are shaped effectively, and from which effective participation society clearly benefits, ultimately depends upon citizens being able to be fully informed in order to completely exercise their rights of participation in open consultation processes established as part of effective local and national governance arrangements.

Supporting to the maximum level the effective administration of a variety of statutes and policies, not least the Land Reform (Scotland) Act 2003, as amended by the Community Empowerment (Scotland) Act 2015, and the provisions envisaged in the Land Reform (Scotland) Bill (as introduced 2015).

There are specific statutory matters flowing from the Land Reform (Scotland) Act 2003, as amended by the Community Empowerment (Scotland) Act 2015, and the provisions envisaged in the Land Reform (Scotland) Bill (as introduced 2015), and in relation to wildlife crime, which are relevant here.

Within these statutes citizens are given particular rights and opportunities which, to a significant extent, depend upon having access to full information about who is the beneficial owner of land in which the community(ies) have an interest. For example:

- the requirement upon a community to show they have not been able to acquire the land (voluntarily) before seeking a Community Right to Buy
- the ability to engage properly with a landowner on land use and management matters under the proposals at Part 4 of the current Land Reform (Scotland) Bill
- the ability to effectively engage in the mediation enabled by the Community Empowerment (Scotland) Act 2015 and envisaged in the current Land Reform Bill.

These provisions could only be regarded as being capable of being administered fully effectively if there was knowledge of the beneficial owner of the ownership vehicle, as those persons would be influential or might determine the approach taken by the legal owners in their dealings with the community.

Moreover, Scottish Ministers' ability to fully judge whether granting a Community Right to Buy application was in the public interest would be further enabled and enhanced by a full understanding of who the beneficial owners were.

Equally, in citizens' understanding how public funds via, for example, the Scottish Land Fund, are used, that understanding would be fully enabled if they knew who were the ultimate recipients of such public funds used in land purchases.

Further still, in the interests of public scrutiny of the Scottish Ministers' decisions in these matters, it would be in the public interest for citizens to be able to know who were the beneficial owners of land affected by any decision to deprive them of their ownership, in order to make informed judgements in a democratic society about the merits of such decisions.

In a separate statute concerning the question of vicarious liability in acts of wildlife crime (The Wildlife and Natural Environment (Scotland) Act 2011), arguably the law cannot be fully effective unless law enforcement agencies are able to know who lies behind any ownership vehicle, an employee of which may have committed a wildlife crime. In such an important area of law it is not acceptable that those who are

behind any such ownership are not known and therefore cannot themselves be held liable under the vicarious liability provisions.

Full transparency enables and assists the public interest in the effective administration of a variety of devolved statutes and policies.

Questions of discrimination in treatment under the law.

In considering the proposals which would require land owners to disclose who ultimately is the beneficial owner of the land, at the point of registering the land in Scotland's Land Register, it is important to consider existing disclosure requirements for other Registers in Scotland.

Of particular interest is the Crofting Reform Act 2010, in which crofting owner-occupiers and tenants are required (upon certain trigger events including a change of tenant or owner-occupier) to register their croft (or update the information contained) in the Crofting Register held by the Keeper.

This new Crofting Register was introduced to replace provisions which required the (then) Crofters Commission to keep a Register (including 1955, 1993 and 2007 Acts) but which was regarded to be ineffective for contemporary purposes for a variety of reasons. Persons who could show a need to know could make a request to the Crofters Commission for information from the register and this evolved in 2007 to any person being able to ask for an extract of the Register held by the Commission. In this regard the provision was and remains similar to that now being proposed for access to ownership information through the Land Register.

The Crofting Reform (Scotland) Act 2010 requires the Keeper (as distinct from the Crofting Commission to establish and maintain a free to search, public register of crofts, common grazings and land held runrig. This process requires crofters to disclose information upon certain trigger events, including their name and a map of their croft, all of which is then made ordinarily available in public from the on-line register held by the Keeper. In the Policy Memorandum to the Bill that became the 2010 Act it was made clear there were no human rights implications flowing from this provision. The Policy Memorandum to the 2007 Act makes clear that its provisions were regarded to be compliant with ECHR in various respects. In other words, such general disclosure must have been considered compatible with Articles 1 Protocol 1, Article 6, Article 8 and Article 14 of the ECHR of these various enactments.

So, for the Scottish citizen exercising their access rights, or simply travelling within crofting areas, they would be entitled, in relation to any of the questions and issues set out above in relation to land generally, or in relation to any other matter that concerned them about public policy toward land or otherwise interested them, to be able to access the Crofting Register and ordinarily expect to find details of who the registered parties (persons) were, whose use and management practises had impacts on them. They could do so there and then.

However, if the wider ownership of that land was held by an off-shore company where none of the persons who were beneficial owners is currently disclosed, as matters stand, only citizens who can show they will benefit, and in order to deal with issues they are having with an area of land, are directly enabled to make a request for further information of a requesting authority, following which there is no obligation falling upon the legal owner to disclose the information sought.

Article 14 of the ECHR prevents discrimination between different classes of persons and the Scottish Government would have to be satisfied that a general disclosure of beneficial owners of land would not be discriminatory. It would be hard to show that full disclosure would have this effect, given that disclosure of this kind is already required of crofters.

There is a general public interest in seeking equality of treatment under the law.

Note: While it may be theoretically possible for a croft to be 'owned' or tenanted by a company or firm (offshore or otherwise), this is unlikely to ever feature as a significant part of crofting and there seems very little experience of this being the case in practise, unlike land other than in crofting tenure where hundreds of thousands of acres are so held. For all practical purposes therefore all owner-occupiers of crofts information is generally disclosed and publicly available upon registration.

Conclusion

The above paragraphs set out arguments in relation to three distinct sets of public interest matters, and a fourth matter which touches on discrimination and questions of equality of treatment under the law. Any one of the three, in its own right, ought to be sufficient to warrant maximum disclosure of who owns Scotland's land, and who are the beneficiaries of such ownership - in the public interest. In aggregate, the matters set out represent compelling reasons for the Land Reform (Scotland) Bill (as introduced 2015) to be amended to ensure maximum disclosure of beneficial owners in ownerships of land in Scotland.

Indeed, it is hard to think of any other area of contemporary public administration, or in relation to private matters which have material impacts upon the public, where there is a right to maintain secrecy of those who can significantly determine material impacts on others. If, however, it was regarded that there could be reasons for such secrecy in particular instances, this could be provided for through a provision to allow a case to be made at the time of registration, on grounds that could be defined in Regulation.

A general disclosure requirement would further reduce the workload and costs to the Keeper over any system that required an application for disclosure of information which had then to be processed and considered, and this would be in the public interest.

Article 8(2) of the ECHR provides for interference in what would otherwise be matters of the privacy of family life, for reasons of public safety and economic well-being, for the prevention of disorder or crime, and the protection of health, among other matters. All these qualifications to the right to privacy have relevance in the context of the issues above.

Set against this detailed reasoning are of course various protections for owners of property, to privacy and not to be discriminated against under Article 1 Protocol 1, Article 8 and Article 14 of ECHR which, even then, are qualified by what is in the general interest. It is strongly contended here that the benefits set out justify the general interest considerations prevailing, and that they significantly outweigh the interests of individuals afforded consideration of protections provided for by the various ECHR provisions. As such, action on full transparency would be readily defensible if challenged.

Community Land Scotland
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This paper was drafted by Peter Peacock, who acts as Policy Director for Community Land Scotland with input from Megan MacInnes, in her capacity as an independent researcher.