COMMUNITY*
LAND SCOTLAND

Legislating for a public interest test in land sales, transfers, and management

A Discussion Paper

Lloyd Austin

October 2022

Land and the Common Good

A discussion paper series on land reform in Scotland

Land and the Common Good

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This series is intended to stimulate informed discussion and debate on land reform in Scotland through the publication of independent papers on a wide range of issues from different perspectives. Its overarching aim is to explore the multi-faceted relationship between land ownership and land use in pursuit of the common good. The views expressed in the papers are those of the authors alone and do not necessarily reflect the views of Community Land Scotland.

About the Author

Lloyd Austin is a freelance advisor, and former Head of Department in RSPB Scotland, as well as a former Chair of Scottish Environment LINK.

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Executive summary

Like devolution itself, land reform is a process not an event and has been defined as:

> *"[...] measures that modify or change the arrangements governing the possession and use of land in Scotland in the public interest."*

This emphasis on the public interest has led to proposals for further land reform, including that a 'public interest test' be applied to land sales/transfers and/or to ongoing ownership/management. Such an idea was included in the 2021 manifestos of several political parties, including the SNP and the Greens, and is now reflected in the 2021-22 Programme for Government.

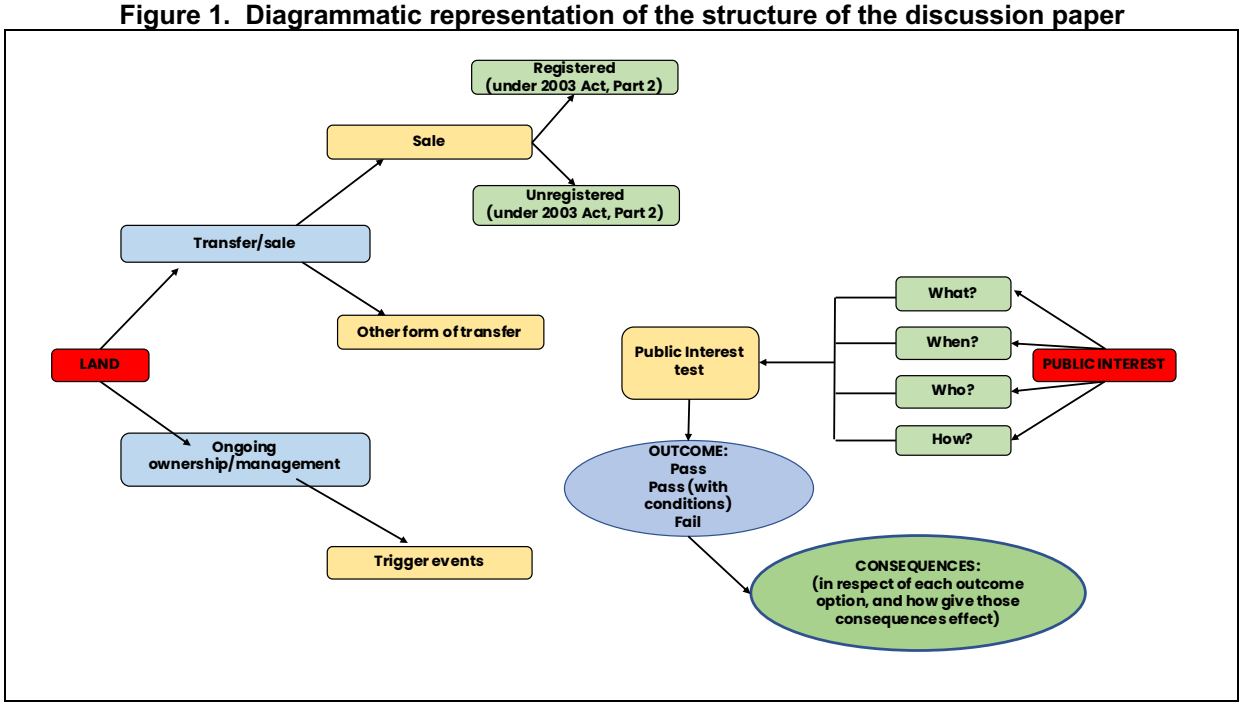
This paper seeks to build on existing Community Land Scotland ideas for a public interest test, and to explore the legislative options that might be available to implement this commitment, as well as outline the policy development that will be necessary to support and implement such a change in the law. The paper begins by exploring the policy context, especially the respective political and government policies, both directly concerning the 'public interest test' as well as related commitments to sustainable development and the environment. It then reflects on the use of "public interest" as a term and as a test in legislation and policy – both in general, and in relation to land, planning, etc.

In the light of this context, the paper then explores what a 'public interest test' for land should be – by seeking to answer a number of questions. These are:

- What? That is, what does a 'public interest test' test?
- When? That is, when – or on what occasions or under what circumstances – should a 'public interest test' be applied?
- Who and how? – that is, who should be responsible for undertaking the test and determining the outcome?
- Outcomes? – that is, what are the range of possible outcomes for such a test?
- Consequences or effect? – that is, what is the statutory effect of each possible outcome?

The second, substantive part of the paper seeks to ask when such a test might be applied and, in particular, how might legislation be framed. Figure 1, below, seeks to provide a diagrammatic illustration of the approach/structure used.

Figure 1. Diagrammatic representation of the structure of the discussion paper



While the paper does not seek to provide an answer to every question, it is offered for wider review/discussion and as a contribution to the debate leading to consultation and proposed legislation on this issue.

Purpose of paper

This paper has been produced by Lloyd Austin, as part of a commission from Community Land Scotland (CLS). It seeks to develop the narrative for CLS' policy and legislative proposals with regard to a 'public interest test' for land ownership/management. This follows CLS's calls for a statutory public interest test in their manifesto for the 2021 Scottish Parliament election.

The paper seeks to explore the details of how such a test might be applied, and to signpost the opportunities and challenges. The paper, is intended a contribution to the debate leading to consultation and proposed legislation on this issue. It is hoped that this will enable CLS, and others, to ensure that forthcoming legislation is as effective as possible.

Introduction

Like devolution itself[1], land reform is a process not an event. This process has long been debated and was given legislative impetus with the establishment of the Scottish Parliament in 1999. Landmark legislation has included the Land Reform (Scotland) Acts 2003 and 2016, the Land Registration etc. (Scotland) Act 2012, and the Community Empowerment (Scotland) Act 2015.

This legislative process was informed by considerable academic and political discussion, including work by the Scottish Office's Land Reform Policy Group (LRPG), established in 1997, and subsequently by the Land Reform Review Group (LRRG). The latter group published a seminal final report, *The Land of Scotland and the Common Good*, in 2014. This report included a contextual definition of land reform as:

> *"[...] measures that modify or change the arrangements governing the possession and use of land in Scotland in the public interest."*[2]

Both that report, and a 2015 SPICe briefing[3], provide an important background and history of land reform in Scotland, as well as proposals for further action.

Implementation of this legislation, as well as other policy development, has led to the establishment of the Scottish Land Commission, the publication of a formal Land Rights and Responsibilities Statement as well as a number of high-profile community land purchases and initiatives such as the Glasgow and Clyde Valley Community Ownership Hub[4].

Despite the successes of the process, to date, there remain a number of issues, including significantly unequal land ownership patterns as well as land matters that affect community aspirations such as the extent of vacant or derelict land. The extent of these unresolved issues has led to widespread support for more action, including further legislation and policy development. Community Land Scotland's manifesto for the 2021 Scottish Parliament election included a range of proposals for further land reform, including the introduction of a 'public interest test'[5]. This proposal was supported in the formal manifestos of a number of political parties, including the SNP and Scottish Greens, and is now reflected as Scottish Government policy in both the 2021-22 and the 2022-23 Programmes for Government.

This paper seeks to explore the legislative options that might be available to implement this commitment, and the policy development that will be necessary to support and implement such a change in the law.

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[1] https://www.localgovernmentlawyer.co.uk/governance/314-governance-a-risk-articles/36230-devolution-is-a-process-not-an-event

[2] https://www.gov.scot/publications/land-reform-review-group-final-report-land-scotland-common-good/

[3] http://external.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-28_Land_Reform_in_Scotland.pdf

[4] https://communityownership.scot/about-us/what-is-the-community-ownership-hub/

[5] https://www.communitylandscotland.org.uk/wp-content/uploads/2020/11/Land-for-the-Common-Good_CLS-manifesto-2020-2.pdf

Policy context

In November 2020, Community Land Scotland (CLS) published '*Land for the Common Good*', a manifesto for a sustainable Scotland which presented proposals that place communities' relationship with the land firmly at the centre of Scotland's journey towards sustainability[6]. In this manifesto, CLS called for a public interest test as the governing principle for determining circumstances in which land ownership of large scale and/or concentration should be permitted in Scotland (see box 1).

Box 1

Call for a Public Interest Test: CLS' manifesto for 2021 Scottish Parliament Election[7].

Community Land Scotland therefore calls for a new Land Reform Act to be passed early in the next Parliament to implement the following proposals to protect the public interest:

- Introduction of a power for Scottish Ministers to apply a pre-purchase Public Interest Test to significant land purchases in terms of their scale and/or concentration of ownership to ensure such purchases serve the public interest and support sustainable development.
- Introduction of a power for Scottish Ministers to apply a Public Interest Test on existing significant land holdings in terms of their scale and/or concentration of ownership to ensure such land holdings serve the public interest and support sustainable development. Introduction of a related power for Scottish Ministers to apply a Compulsory Sale Order to require the sale of part or all of such land holdings – including by lot – in the event of the above Public Interest Test not being met in the view of Scottish Ministers.
- Introduction of a duty on Public Authorities to apply a Public Interest Test when disposing of land assets over a set area/value threshold to assess whether prospective purchasers' future plans for the assets serve the public interest and support sustainable development.
- Introduction of a mechanism to regulate the creation of monopoly ownership(s) of land by any one individual acting alone or in consortia with specified beneficial interests by permitting a control on the total amount of land in Scotland that can be held in such ownership.
- Amendment of the Land and Buildings Transaction Tax to include an escalating supplement on sales of land holdings over a specific scale to private purchasers as a disincentive to creation of monopoly land holdings, with the generated supplementary revenue being added to the Scottish Land Fund to support community land ownership.
- Introduction of a statutory Land Rights and Responsibilities review process for landowners where there is evidence of adverse impacts on the sustainable development of their land holdings, with scope to apply a range of sanctions as appropriate.

This manifesto is complemented by internal CLS papers on "Public Interest Test – proposals for discussion with SG" (Sept 2021) and "What could a public interest test look like in the urban realm?" (Oct 2021). These proposals were reiterated in a formal CLS letter to the Minister for Environment and Land Reform, Màiri McAllan MSP, sent on 3 March 2022. This paper seeks to build on those proposals to provide a more comprehensive view of what a public interest test may look like in practice – with a particular focus on what nature/content of the forthcoming legislative proposals.

CLS's manifesto proposals clearly 'struck a chord' and, at the 2021 Scottish elections, the SNP, Scottish Greens, Scottish Labour and (to a limited extent) the Scottish Liberal Democrats all made commitments to legislate for the public interest to be more central to land ownership and management. The first three parties specifically committed to a new Land Reform Bill focused on a public interest test for large-scale landholdings and related issues.

[6] https://www.communitylandscotland.org.uk/wp-content/uploads/2020/11/Land-for-the-Common-Good_CLS-manifesto-2020-2.pdf

[7] https://www.communitylandscotland.org.uk/wp-content/uploads/2020/11/Land-for-the-Common-Good_CLS-manifesto-2020-2.pdf

Box 2

Manifesto commitments: 2021 Scottish elections

SNP

- Land Reform Bill ensuring "public interest considered on particularly large-scale land ownership".
- Strengthen compulsory purchase powers for local authorities and introduce new compulsory sale orders.
- Introduce a Community Wealth Building Act "to redirect wealth, control and benefits to local economies".
- Introduce Wellbeing and Sustainable Development (Scotland) Bill.

Scottish Labour

- Legislation to ensure that no one individual can acquire large swathes of Scotland's land and prevent land ownership via offshore tax havens.
- Intervene when land is not used in ways that serve the public interest.

Scottish Greens

- Bring forward a Land Reform Act to tackle monopolies, promote fairer management of land and regulate the sale of land.
- Require significant landholdings to produce a transparent land management plan and be subject to a public interest test.
- Introduce restrictions on overseas ownership of land.
- Give Scotland's Land Rights and Responsibilities Statement a statutory footing, requiring large landowners - private, public and third sector - to act responsibly.
- Regulate the sale of land of national or community significance.
- Land held by Scottish Ministers, public bodies, the Ministry of Defence, the Crown and large charities will be subject to a public interest test and greater public oversight.
- Appoint an independent Future Generations Commissioner and turn the Just Transition Commission into a statutory body to protect the rights of future generations and oversee the transition to net zero.

Scottish Liberal Democrats

- Give the Scottish Land Commission the power to legally enforce the voluntary Rights and Responsibilities Protocols that govern the relationship between landowners and communities, like the mandatory codes of practice overseen by the Tenant Farming Commissioner.

The May 2021 Election resulted in the return of the SNP-led Scottish Government, but the SNP were just short of an overall majority in the Scottish Parliament. In the summer, the Scottish Government and the Scottish Green Party agreed a co-operation deal[8], including the appoint of two Green junior ministers and a "Shared Policy Programme"[9]. The latter includes the commitment that: -

> "*Recognising that devolved competence constrains what we can do, we aim to deliver legal mechanisms to tackle scale and concentration of land ownership in rural and urban Scotland. This will include a public interest test to apply to transfers of particularly large-scale land holdings which will include a right of pre-emption in favour of community buy out where the public interest test applies.*"

This commitment is reflected in the 2021-22 Programme for Government, the first under the new SNP-SGP co-operation agreement, which states: -

> "*We will legislate within this Parliament to tackle the concentration of land ownership, which can have detrimental effects for rural communities in particular. Subject to devolved competence constraints, we will aim to bring forward a Land Reform Bill to tackle the scale and concentration of land ownership across rural and urban Scotland, including provision for*

[8] https://www.gov.scot/publications/cooperation-agreement-between-scottish-government-scottish-green-party-parliamentary-group/

[9] https://www.gov.scot/publications/scottish-government-scottish-green-party-shared-policy-programme/

a public interest test to apply to transfers of particularly large-scale landholdings, with a presumption in favour of community buy-out when the test applies."[10]

In addition to the specific legislative proposals in the 2021-22 Programme for Government, other potentially relevant manifesto commitments should be noted. These relate to the wider issues of community development, land/asset ownership and use, sustainable development, etc. While the 'narrow' commitment in the Programme for Government is important, its implementation may be affected by wider developments. For instance, there is as yet, no further detail as to the scope or purpose of the SNP's proposed "Community Wealth Building Act" – yet, it could be that the application of a public interest test might form part of such a (possibly) wider Bill.

Secondly, the SNP's proposal for a "Wellbeing and Sustainable Development Act" and the Scottish Greens' proposed "Future Generations Commissioner" now appear to be conjoined by the following commitment in the Scottish Government and Scottish Green Party Shared Policy Programme:

"*We will agree a new approach to ensuring the interests of future generations are accountable in decisions made today, including exploring a Future Generations Commission.*"[11]

This is reflected in the 2021-22 Programme for Government with a (virtually identical) commitment: -

"*We will also consider a new approach to ensuring the interests of future generations are taken into account in decisions made today, through a Future Generations Commission.*"[12]

The responsibility for "considering" this issue rests with Patrick Harvie MSP, the Minister for Zero Carbon Buildings, Active Travel and Tenants' Rights. At the time of writing, no formal process has been stated publicly as to how this process will be undertaken. It is understood that the rationale for this proposal (at least in regard to the Greens' proposal) is based on the Future Generations Commissioner for Wales. This is a post/role created by the Well-being of Future Generations (Wales) Act 2015 (see s.17 *et seq* and Sch.2)[13]. The Commissioner's general duty (s.18) is to: -

(a) to promote the sustainable development principle, in particular to—
  (i) act as a guardian of the ability of future generations to meet their needs, and
  (ii) encourage public bodies to take greater account of the long-term impact of the things that they do, and
(b) for that purpose to monitor and assess the extent to which well-being objectives set by public bodies are being met.

These additional and/or related commitments, or policy proposals, are set out here as they affect either the way in which any land-related public interest test is legislated (that is, might new land reform measures form one or two 'chapters' of a wider 'well-being' or 'future generations' bill?) or how it is subsequently applied or implemented.

For instance, while any central government role would, undoubtedly, always remain with Scottish Ministers, any advisory (including research, guidance, etc) or regulatory function might be allocated to an executive agency, a non-ministerial department or a Non-Departmental Public Body (NDPB). Clearly, the Scottish Land Commission already exists and has clear land reform related roles and functions. However, the above discussion demonstrates that where land reform is related to the objective of community development, sustainable development and/or future well-being, there are potentially a number of other (or overlapping?) bodies that might play a role.

[10] https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/ (page 86)
[11] https://www.gov.scot/publications/scottish-government-scottish-green-party-shared-policy-programme/documents/
[12] https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/
[13] https://www.legislation.gov.uk/anaw/2015/2/contents/enacted

The 'public interest' or other such 'tests' in legislation

The "public interest" (or the closely analogous "public benefit") is a term that occurs widely in UK and Scottish legislation (see annex 1). It appears to be used to achieve three broad purposes:

a) As a statutory defence to permit an otherwise criminal offence;
b) As a means to protect (sometimes defined categories of, or otherwise general) public interest/benefit from activities carried out for private (individual, collective or corporate) benefit; or
c) As a goal to be achieved or test to be applied in administrative law governing the carrying out of government (or public body) functions.

In the context of land sales, transfers, and management, which is the topic of this paper, the second and third of the above purposes are the example to consider. Two of the most significant examples, within the third purpose, are the "public interest test" in Freedom of Information (FoI) legislation and the "public benefit test" in Scottish charity law. In relation to land, however, any new test will also seek to fulfil the second purpose – especially where it is considered that that the public interest is being adversely affected by the nature, scale or type of private/corporate land ownership/management.

Both the FoI and charity examples illustrate another key issue with the use of public benefit in legislation and policy. The underlying legislation does not define the "public interest" or "public benefit" but it is left to others (SIC and OSCR, in these examples) to provide guidance and interpretation.

This illustrates the general observations that : -

> "*The public interest is such a complex and tricky concept to navigate because it has intentionally evolved as ambiguous and mutable. It has no overarching definition because it is contextually determined in scope and purpose.*
>
> *"This means, in any particular instance, political, legal and regulatory authorities make judgement calls. And what may be deemed in the public interest today may not be in a decade; it changes with social mores and values*."[14]

and

> "*The 'public interest' is a term for which there is no single precise and immutable definition. The answer to the question "what is the public interest?" depends almost entirely on the circumstances in which the question arises. However, as a general concept it has been described as referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. It has also been described as the 'common good'. Equivalent concepts to the public interest have been discussed since at least the time of Aristotle (common interest), including by Aquinas and Rousseau (common good) and Locke (public good).*"[15]

In relation to land, the balance and relationship between the (flexible) public interest and the owners' property rights, as expressed in Article 1 of the First Protocol to the European Convention on Human Rights (see box 3) is much discussed.

[14] https://theconversation.com/whose-interests-why-defining-the-public-interest-is-such-a-challenge-84278
[15] https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0009/41967/What-is-the-public-interest-Presentation-Government-Solicitors-Conference,-Sydney-6-September-2016.pdf

Box 3

Article 1 of the First Protocol to the European Convention on Human Rights.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions*. No one shall be deprived of his possessions* ***except in the public interest*** *and* ***subject to the conditions provided for by law*** *and by the general principles of international law.*

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest *or to secure the payment of taxes or other contributions or penalties.* (emphasis added)

In considering this Article, however, it is important to note that it is heavily caveated (see, especially, the emphases added above) and that there is, therefore, no absolute right to the ownership of land or the use of that land. Both ownership and use might be limited or controlled in the public or general interest, so long as these controls are provided for in law (and subject to the general principles of international law).

This right of a state to regulate, subject to conditions provided by law and in accordance with the general interest, is the right exercised in the implementation of a wide range of public policy, including legislation, related to land ownership and management, as well as wider conservation and environmental issues. It essentially permits governments, if supported by Parliaments, to interfere with so-called property rights to ensure that the ownership/use/management of that property is compatible with the wider public interest (including, for instance, the public interest issues discussed, in this paper, as forming part of the proposed 'public interest test').

This question of balancing rights and interests (especially the public or wider general interests) in Scottish land reform is the subject of a valuable discussion paper by James Mure QC, commissioned by the Scottish Land Commission[16]. This important review sets out the legal framework in which policymakers and legislators considering reform of Scottish land law, and its summary is worth quoting in full: -

> *"Property rights in Scotland have long been protected under both the common law and statute. More recently, international treaties entered into by the United Kingdom have not only obliged the state to protect property rights but also to promote fair use and access to land for the public as a whole. The incorporation of the European Convention on Human Rights into domestic law in the Human Rights Act 1998, and the limits placed on the devolved institutions by the Scotland Act 1998, have created a legal framework the limits of which are still being worked out.*
>
> *"The concept of the 'public interest' is a broad one, and democratic legislatures like the Scottish Parliament have a broad discretion in identifying what is in the public interest. When it comes to particular legislation, however, and especially individual decisions that have an impact on a person's property rights, it ultimately falls to the independent judiciary to consider the evidence and to apply legal rules to decide whether in the circumstances the individual property owner has been asked to bear an excessive burden in order to allow the public interest to be promoted.*
>
> *"As previous research commissioned by the Scottish Land Commission shows,* ***many European countries have laws restricting the acquisition, use and management of land, some of which go further than Scots law currently does. As long as all parties abide by***

[16] https://www.landcommission.gov.scot/downloads/620f73b06cbc1_Land%20Lines%20-%20Balancing%20rights%20and%20interests%20in%20Scottish%20land%20reform.pdf

> ***the legal framework discussed in the paper, there is in principle no reason why similar measures could not be introduced in Scotland."***[17]
> (emphasis added)

As the above paper concludes, further laws, in Scotland, to advance the application of a 'public interest test' to the ownership and management of land should be possible within the existing framework of international laws related to property. The ideas that follow in this paper present some suggestions as to how this might be achieved.

[17] *ibid*

Describing a public interest test in relation to land

In light of the discussion above regarding the nature of public interest tests' in other policy areas, as well as the policy objectives for such a test (both those set out in party political manifestos and the Programme for Government, and those proposed by CLS), there are a number of issues that arise as to how to turn these policy intentions into workable legislation. These are:

- **What?** That is, what does a 'public interest test' test?
- **When?** That is, when – or on what occasions or under what circumstances – should a 'public interest test' be applied?
- **Who and how?** – that is, who should be responsible for undertaking the test and determining the outcome?
- **Outcomes?** – that is, what are the range of possible outcomes for such a test?
- **Consequences or effect?** – that is, what is the statutory effect of each possible outcome?

What? That is, what does a 'public interest test' test?

Defining the 'public interest' is, as discussed above, not straightforward. However, a guide to the issues that CLS would expect to form part of such a consideration is provided by the five chapters of their 2021 manifesto; namely: -

- Controlling land monopolies to protect the public interest.
- Empowering communities to build local resilience.
- Tackling the climate emergency while ensuring a just transition to net zero carbon emissions.
- Repopulating our rural places to help them thrive.
- Developing a fiscal framework for a fair and sustainable Scotland.[18]

Those headings suggest that the (similarly hard to define, in practice) concept of sustainable development, with its social, economic and environmental components, might be a unifying feature of any 'public interest test' in relation to land ownership/management. Clearly, from CLS' perspective the social and economic vitality of the relevant community would be a significant concern, but the manifesto's reference to the climate emergency [a significant public policy priority for the Scottish Government] illustrates that the environmental elements are not ignored/overridden – but that such policy objectives must be met in a way that benefits local communities (that is, a just transition).

Beyond the high level conceptual interpretation of the public interest, there are a number of specific questions that might be asked about the elements that would constitute a 'public interest test'. These include: -

- What land?
- Scale/pattern of ownership?
- Current/planned land use/management?
- Economic activity, including monopoly questions?
- Social issues, including potential for repopulation?
- Environmental matters?

These matters are discussed briefly below, but there are, no doubt, others that might be added – or these expanded.

What land?
The first question is clearly: to what land should a 'public interest test' apply?

Originally, the 2003 Act excluded areas defined in (subsequent) Ministers Orders from the Community Right-to-buy provisions. These were essentially Scotland's urban areas or settlements[19]. However,

[18] https://www.communitylandscotland.org.uk/wp-content/uploads/2020/11/Land-for-the-Common-Good_CLS-manifesto-2020-2.pdf
[19] See, for instance, The Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2004 (https://www.legislation.gov.uk/ssi/2004/296/introduction/made)

the Community Empowerment (Scotland) Act 2015 altered that arrangement to extend Community Right-to-buy to virtually all land[20] and the current version of s.33 of the 2003 Act now defines excluded land as: -

> (2) In subsection (1) above, "excluded land" means land consisting of a separate tenement which is owned separately from the land in respect of which it is exigible (subject to subsection (2A)).
>
> (2A) Land consisting of—
>
> (a) salmon fishings, or
>
> (b) mineral rights (other than rights to oil, coal, gas, gold or silver), which are owned separately from the land in respect of which they are exigible is not "excluded land" (and so is land in which a community interest may be registered under this Part).

A similar approach to the application of a 'public interest test' would seem logical – and thus, such a test should apply, in theory, to all land[21]. The 'in theory' caveat is added as there is clearly some land which, for one reason or another, it might be determined that such a test need not apply – or that, if applied, it clearly passes. Such exclusions might include land in existing community ownership, land owned by public bodies used to deliver public services (e.g., NHS Scotland, local authorities, Scottish Ministers) and/or charities whose ownership and management of land must contribute to delivering their charitable objectives (and thus the public benefit).

Thus, **a statute to introduce a 'public interest test' should apply such a test to all land**. The caveat discussed above could then be applied in one of two ways: -

1. The use of an exclusion – by defining such land in the statute; or
2. Clarity that, should such a test be applied to such land, the operation of the test would be sufficiently 'light-touch' to, usually, lead to rapid 'pass'.

There is probably no ideal option – as both of the above options would have some disadvantages. For instance, defining the exclusion to be used in the first approach (especially in primary legislation) might be problematic and/or too inflexible (especially in relation to future changes) and there may be cases (unusually?) where such land/landowners should be subject to a rigorous 'public interest test'. Such 'unusual' cases might include:

- Community landowners where it is argued that land use/management is not in the public interest (perhaps related to neighbouring communities' concerns, or the national community, or to environmental issues);
- Ownership/management by public bodies (e.g., Forestry and Land Scotland or Scottish Water) of land owned by the Scottish Ministers; or
- Ownership/management by local authorities, or their 'arms-length bodies', in a manner that causes concern to local communities.

This approach of applying the 'public interest test' to all land, with the expectation and clarity that, for 'obvious cases' this would be a 'light touch' process is consistent with the CLS paper "Public Interest Test – proposals for discussion with SG" (Sept 2021), which said:

> "*It should apply to all landowners who cannot otherwise demonstrate a democratic and open form of management control over activities on their land, which is to be in the public interest and have beneficial ownership limitations.*"[22]

There may be merit (not least in providing re-assurance to some concerned parties) in seeking to define those owners who can demonstrate democratic and open form of management control and provide those with a statutory exclusion (perhaps, however, one that might be overridden if exceptional circumstances can be demonstrated). At the very least, there should be no assumption that ownership/management of land by central/local government (and/or their agencies, companies or 'arm's length bodies) is automatically excluded. The same approach should also apply to charities and community landowners. All these group might, by virtue of their status/constitution, be likely to

[20] See Part 4: https://www.legislation.gov.uk/asp/2015/6/contents

[21] CLS may wish to consider whether the exclusion of "land consisting of a separate tenement which is owned separately from the land in respect of which it is exigible" is appropriate for the PIT and/or whether they should press for its removal from the 2003 Act. This does, however, appear to be a narrow technical issue related to tenement law.

[22] Internal CLS paper, submitted to Scottish Government officials.

pass a 'public interest test' but while they might be generally excluded, a means to apply the test, where circumstances require, will also be needed.

A further area where discussion is required relates to private, primary residences. There should be no suggestion that an individual owner-occupier of a private residential property (and its normal curtilage/garden) used as a main or primary residence should be subject to any form of public interest test. This is, of course, stated in a manner that does not include second/holiday properties (especially as the preponderance of such properties, in some areas, can have significant adverse impacts on the public interest). The associated curtilage/garden areas included in any such exclusion should also be determined in the same manner as that for planning and/or the access legislation.

In considering the issue of primary, private residences, it should be noted that the Community Right to Buy (Part 2, 2003 Act) does not include any such exclusion. This is, presumably because it is triggers only by a (voluntary) sale and because many such sales will, in fact, include one or such properties. Thus, any exclusion of such properties from any new public interest test should not apply to such (voluntary) sale circumstances but should probably be considered for other "trigger events" (see discussion of "when – or on what occasions or under what circumstances", below).

Scale/pattern of ownership?

"Controlling land monopolies" is the central objective of CLS' call for a 'public interest test'. This is based on evidence that: -

> "*Scotland still has one of the most concentrated patterns of land ownership in the world, "dominated by just over 400 private owners (0.008% of the population) who have been estimated to own 50% of privately owned rural land"*[23]*. That pattern of concentrated monopoly ownership matters because how land is owned and used and, crucially, who benefits from these arrangements, are central issues in determining Scotland's progress towards becoming a greener, fairer, socially just and more sustainable nation.*"[24]

Thus, addressing this concern is central CLS' expectation of a 'public interest test' (see box 1, above). To define a test, for operation, therefore, will require an analysis of the scale/pattern (and impact on the public interest) of existing land ownership (such work has already begun with, for instance, the 2019 report from the Scottish Land Commission[25]). However, more detailed analysis will be required; as well as work to determine the thresholds for intervention (that is, at what scale or concentration should a 'public interest test' be failed?). In particular, it should be noted that the SLC report comments that "scale and concentration are distinct concepts, and this has important implications for policy". In addition, the issue of scale/pattern will need to be considered in context: different scales/patterns of ownerships may or may not be damaging to the public interest or local communities in different contexts, such as island, rural, suburban or urban areas. Thus, this aspect of the test will need to be flexible to reflect the context of the land being assessed.

Notwithstanding the above, it is clear that the introduction and operation of a 'public interest test' has the potential to address the concerns raised in the SLC report. Depending on when, on what occasions, or under what circumstances (see "When?" below) the test is applied, these concerns can be addressed by influencing future land sales and/or influencing the management (and future sale decisions) of land.

Current/planned land use/management?

The public interest is not only affected by scale/pattern of ownership *per se* but also by the use/management of that land (which itself is sometimes influenced by scale/pattern). However, irrespective of questions of scale/pattern it is important that any 'public interest test' addresses whether land use/management is in the public interest. The public interests that might be considered cover the full range of economic, social and environmental issues that affect the land's contribution local/national outcomes.

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[23] Land Reform in Scotland: History, Law and Policy (2020). Edited by Malcolm M. Combe, Jayne Glass and Annie Tindley. Edinburgh University Press.

[24] https://www.communitylandscotland.org.uk/wp-content/uploads/2022/03/Green-finance-land-reform-and-a-just-transition-to-net-zero-a-discussion-paper_CLS_Feb-2022.pdf

[25] https://www.landcommission.gov.scot/downloads/5dd7d6fd9128e_Investigation-Issues-Large-Scale-and-Concentrated-Landownership-20190320.pdf

Those outcomes might be considered to be the UN Sustainable Development Goals[26] and/or the National Outcomes[27] adopted under s.1 of the Community Empowerment (Scotland) Act 2015 in the National Performance Framework. In practice, of course, Scottish Ministers assert that "The National Performance Framework (NPF) and the Goals share the same aims. The National Performance Framework is Scotland's way to localise the SDGs." In addition, many aspects of the use (or development) or land is governed by the planning system. Section 3ZA(1), inserted in 2019, of the Town and Country Planning (Scotland) Act 1997 states that:

> "*The purpose of planning is to manage the development and use of land* ***in the long term public interest.***" (emphasis added).[28]

In addition, section 3A(3)(c) of the Town and Country Planning (Scotland) Act 1997 sets out a range of public policy outcomes to which the National Planning Framework must contribute, including the national outcomes[29]. These outcomes include, in particular, increasing the population of rural areas and meeting housing needs – both outcomes that are highly affected by the ownership and use of land.

To be an effective element of a 'public interest test', however, it will be necessary to be able to determine how much any particular area of land should be expected to contribute to local/national outcomes – and to assess this against how it is delivering, and it could deliver in the future (under different management). How such questions should be addressed would need to form part of any system for the application of a 'public interest test'. Any new 'public interest test' also needs to work alongside, and not overlap with, the operation of the planning system (which itself might be further amended to deliver its stated public interest purpose).

The overlap between planning decisions that seek to deliver the public interest and a 'public interest test' on land use is significant. Planning decisions, of course, have consequence [to the land] at any time when a land use change, within the definition of development, is proposed. By contrast, a 'public interest test' for land would (based on the proposals below) have consequence [to the land] at any time that a sale/transfer takes place or, subject to certain test, when legitimate concerns are raised about ongoing land ownership or use. It would make sense, therefore, to exclude land use changes, within the definition of development, from within this new 'public interest test' as the public interest should already be protected by the planning system. That said, however, the planning system is far from perfect (from anyone's perspective), and it may be that the 'public interest test' delivered by the planning system might also be improved as an integral part of the changes introduced by this process. In particular, the ability to hear and take account of the views of communities (and their rights to be heard, even in appeal) might be improved to match the proposals herein in relation to other land-related decisions. A public interest test on land use could also support the implementation of land use planning decisions—such as check on land use planning proposals being implemented. Thus, while a new 'public interest test' should not overlap with the planning system – the planning system could benefit from evolution to reflect the public policy objectives set for the new 'public interest test'.

Finally, depending on when, on what occasions, or under what circumstances (see "When?" below) the test is applied, the questions of land use/management will vary. Thus, if the test is applied only at the point of sale, the test will relate to the potential contribution of likely new owners. Whereas, if the test is applied to current land use/management, where ownership is to be unchanged[30], it will need to relate to what changes in land use/management could be required of the existing owner (and how, if so, they might be enforced).

Economic activity, including "monopoly" questions?

Land is a basic (capital) resource that underpins a range of economic activity, and thus supports the creation/maintenance of employment and of income (both direct and indirect). Such employment and income may be generated directly by the landowner's use/management of the land, or by businesses sited on the land. As such, the scale and pattern of landownership, and the management choices of

[26] https://nationalperformance.gov.scot/sustainable-development-goals
[27] https://nationalperformance.gov.scot/national-outcomes
[28] https://www.legislation.gov.uk/ukpga/1997/8/part/1ZA
[29] https://www.legislation.gov.uk/ukpga/1997/8/part/1A
[30] Unless the introduction of test introduces, under certain (extreme?) conditions, the power of compulsory purchase and/or sale.

the owner, can have a significant impact on the economic activity on, and in the region of, that land. Such impacts might be either positive or negative to the overall employment and/or income generating potential of the land. In different ways, this may or may not be of wider public benefit (that is, in or against the public interest).

One of those impacts may, in some circumstances, be the creation of local "monopolies" that distort the local or regional market in one of more goods or services to such an extent that there are negative/adverse impact on other interests. Examples might include some large rural properties that are of such a scale that a single owner, in effect, controls the development opportunities of one or several communities. By contrast, in urban areas, the ownership of contextually large, often vacant or derelict, land for long periods by owners who make little or no attempt to use the land (often despite planning consents to do so) can significantly impact on a community[31]. In such or similar cases, it might be considered against the public interest in the same way that national monopolies are deemed inappropriate and controlled by e.g., the Competition and Markets Authority[32].

These economic impacts (their nature, scale, etc) and their effect on contributing to public benefit would all form part of any assessment under a 'public interest test'.

Social issues?

Land is a basic (capital) resource that underpins a range of social concerns – especially matters such as the availability of (social/affordable) housing or the provision of schools or health care. The distributional effects of the economic issues, discussed above, such as how employment opportunities, wealth or income is shared across a local/regional population may also be considered a social issue (albeit with economic roots), as any inadequacies often result in demand on the state (social security etc).

Social issues, and the impact of current/planned land ownership or use, might be viewed through a human rights lens, especially economic, social, cultural and environmental rights. This would be consistent with the Scottish Government's approach to human rights[33], and with its proposals to legislate[34]. As such, it would be appropriate for any 'public interest test' to consider issues through the framework of social and cultural rights, including "the basic social and economic conditions needed to live a life of dignity and freedom, relating to work and workers' rights, social security, health, education, food, water, housing, healthy environment, and culture"[35]. The development of the 'public interest test' should therefore take account of the Scottish Government's proposals for Human Rights' legislation – and, of course, those responsible for the new test will need to apply it in a manner consistent with that legislation.

One of the most significant drivers of the land reform movement, and of the legislation/policy introduced since 1999, has been the issue of rural depopulation – and the repopulation of rural and island communities has been a consistent policy objective. Any 'public interest test' on land ownership/use should therefore include proper consideration of the potential for appropriate and sustainable repopulation.

These social issues (their nature, scale, etc) and their effect on contributing to public benefit would all form part of any assessment under a 'public interest test'.

Environmental matters?

The environmental element of such a test might include issues of whether the land is being used/managed in the most appropriate manner to contribute to climate change mitigation and/or adaptation. As such, the application of such a test might be used to implement the CLS suggestion of

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[31] https://www.landcommission.gov.scot/downloads/5dd7d4dfa39b6_VDL%20in%20Scotland%20Final%20Report%20201910 08.pdf

[32] In considering if/how monopoly concerns should be included in any Scottish legislation related to land, it will be necessary to address the possible reservation of "monopolies" in the Scotland Act 1998 (Sch5, Section C3: "Regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers."). This provision may only be interpreted as only referring to national (UK-wide?) issues, and the CMA, etc) while local issues might be considered as part of (devolved) local economic development responsibilities. This may or may not be an issue – but should be clarified.

[33] https://www.gov.scot/policies/human-rights/

[34] https://www.gov.scot/news/next-step-towards-scottish-human-rights-bill/

[35] https://www.escr-net.org/rights

the introduction of a Community Right to Buy to further Climate Change Adaptation and Mitigation. The role of land in achieving the public policy objective of 'net zero' and the potential for land reform and/or community ownership/management to further that role is the subject of a recent discussion paper, commissioned by CLS[36].

It might also include a 'biodiversity test' – including consideration of whether any protected areas are in (or will be in) favourable condition, whether there is evidence or concern related to wildlife crime, etc.

The 'public interest test' as a whole
All of the above questions would constitute parts of a 'public interest test'. All, by necessity, are matters of judgement, albeit based on whatever evidence can be collected and/or provided. Similarly, the view as to whether an overall 'public interest test' is passed or failed on the basis of one or more of the individual elements that make up the test also depends on judgement – for instance, does "passing with flying colours" on one element compensate or balance for "marginally failing" on another?

In addition, it should be stressed that the elements of the test are not "is the public benefit in relation to (an individual economic, social or environmental concern) maximised?" Such an approach would be both absurd, and contradictory – for instance, 'maximum' social/affordable housing would suggest endless houses and no agriculture or land for nature. Rather, the core questions in of the test should be "is the public benefit being delivered by (an individual economic, social or environmental concern) at the appropriate level in the context of the local circumstances" and/or "does the land ownership or management prevent, or adversely affect, the public benefit being delivered by (an individual economic, social or environmental concern)?" The test should therefore seek "optimal" outcomes for the public interest – not the theoretical maxima for individual outcomes (which would, in any case, conflict with one another).

In addition to these assessments of 'public benefit' (and whether that benefit is 'appropriate' or 'not adversely' affected), the test as a whole may also need to consider 'public costs' – that is, what public expenditure (and at what scale/duration) does the current and possible future arrangements entail? This would then enable a judgement to be made about 'net' public benefit (both in relation to individual concerns and the public interest as a whole).

The precise construction of these tests and the issue of judgement, as well as the fact that the nature of the 'public interest' may evolve over time as public policy evolves, suggest that it is unlikely that the details of the test should be included in the primary legislation. Rather the legislation should empower Ministers and/or a regulator/advisory body (see "who and how" below) to develop and operate the test and to apply the results. It should also require the production (by the regulator/advisory body?) of detailed guidance that would steer its operation/application and could be updated when necessary.

That said, notwithstanding that the primary legislation cannot include full details of the test and the guidance, it should not be totally silent on these issues. It should, perhaps in the form of an easily amendable schedule, include references to the issues that must be considered and addressed – and potentially the discussion above provides a steer as to the form of such a list.

When? That is, when – or on what occasions or under what circumstances – should a 'public interest test' be applied?

The CLS paper "Public Interest Test – proposals for discussion with SG" (Sept 2021) included the suggestions that: -

"*There could be a number of triggers for consideration whether a PIT is necessary:*

1. *Transfer (by sale, long lease or inheritance or other disposition (sale of shares etc)) of landholdings of scale*
2. *Where there is concern over the monopoly impact on local economies and communities of landholdings, irrespective of scale*
3. *Where landowners fail to meet their responsibilities under a statutorily enforceable LRRS*

[36] https://www.communitylandscotland.org.uk/wp-content/uploads/2022/03/Green-finance-land-reform-and-a-just-transition-to-net-zero-a-discussion-paper_CLS_Feb-2022.pdf

4. *All landholdings over a certain scale would need to demonstrate the continuance of a landholding at that scale by a single controlling owner (whether individual, family, family trust, other trust or business) is in the public interest*

What might be the trigger mechanisms for a public interest test be? All of these could apply:

- *Transfers of holdings of scale – through sale, long term lease, grant of development options, inheritance, sale of shares (others?)*
- *For all existing amalgamated holdings over an agreed limit*
- *Where the regulatory body believe they should trigger a test/review process*
- *When Minister formally asks the regulatory body to commence a test/review process?*
- *When the regulator body are petitioned by people resident within a land holding or their representatives (or who can otherwise justify such an action in the public interest)?*
- *When a local authority requests a review/test process (having consulted those it believes have an interest in any reference?)?*
- *Reference by a court in light of other proceedings (unexplained wealth order, Land Court, etc).*
- *In exceptional circumstances a test might be triggered in land below the stated size limits where the ownership is dominant within geography of small scale or is strategically significant to adjacent residents or of particular environmental significance (e.g., islands or the urban context)*".

Essentially, this suggests that there are two types of occasion when the 'public interest test' should apply; these being either on transfer or, outwith of any transfer, if specified conditions are met. Such specified condition might be termed 'trigger events' – that is, events or processes that can lead to the application of a 'public interest test' in the absence of any sale proposal. Each of these would need to be subject to appropriate conditions and procedures which are further explored in the "Legislating for a public interest test" section, below.

In the case of sales (or proposed sales), the 'trigger' for a 'public interest test' is clear – it is the initiation of a proposed sale, that is then 'stalled' for the duration of the test, and the sale thereafter continues either unaltered or subject to the outcomes of the test. In such a situation, the application of the test would be 'automatic' where either the defined criteria were met, or the land was included in a Register of Land to which such a test was to apply. In addition, there should be a provision for stakeholders (community, other public, Land Commission, etc) to make an application for such a test to be carried out in other (limited but strategic/significant) cases. As such, this, therefore, implies a twofold decision-making process – first, the determination that a test is appropriate (which, in itself might be subject to appeal) and then, if it does take place, the determination of the test itself.

Outwith proposals for the sale of land, however, it will be important to define clearly what 'trigger events' will (or could) cause the application of a public interest test. On the assumption that landowners (individual or corporate) would be unlikely to volunteer for such a test to take place, these 'trigger events' would be based on arguments submitted to the decision-maker by third parties (most likely community representatives, but possibly also other NGOs and/or public bodies). Thus, it is likely that the process would be some form of application, supported by relevant evidence, to enable the decision maker to approve the application of a test.

The CLS paper "Public Interest Test – proposals for discussion with SG" (Sept 2021) included the suggestion that such a process could be framed in terms of being an action available where people believe the ownership and use of the land:

- is not matching the expectations of the LRRS;
- is believed to be inimical or sub optimal in meeting their economic, social, cultural, or environmental rights;
- is failing to contribute to meeting the climate emergency, or doing so with unjust outcomes; and/or
- is failing to contribute sufficiently to the building of community wealth.

These ideas provide a basis for the development of a process for such a non-sale-related application of a 'public interest test'. In practice, however, the legislation would simply set out the mechanistic

aspects of the process: who can apply, who provides guidance/interpretation, who makes the decision, and/or what appeal process are available. The detail of the evidence required and the process by which that evidence is assessed and the decision reached (to apply the test or not) would be the subject of detailed guidance (from, see below, the Scottish Land Commission).

That said, notwithstanding that the primary legislation cannot include full details, it should not be totally silent on these issues. It should, perhaps in the form of an easily amendable schedule, include references to the issues that must be considered and addressed in the guidance and by the test.

Who and how? – that is, who should be responsible for undertaking the test and determining the outcome?

(a) Who?
Given that the outcome of any 'public interest test' would potentially affect the property rights of an individual (and/or entity) to either own land *per se*, or how it must be managed (see above), those responsible for determining the outcome must be part of the elected government (and thus accountable to Parliament and the Courts).

Accordingly, **it is proposed that the key decision maker in regard to the outcome of a 'public interest test' should be the Scottish Ministers**. This is similar to their role as the key decision maker in the Community Right-to-buy provisions of the 2003 Act as well as in relation to planning matters of national concern. In practice, while decisions would be made in the name of Scottish Ministers, and some significant or large decisions, might be made by Ministers personally – there should also be a provision for DPEA reporters[37] (who act in a similar regard for a wide range of planning and environmental decisions) to make 'routine' decisions in the name of Ministers.

Ministers (and/or the DPEA) should be supported in their decision making role by guidance on the interpretation of the public interest and the application of the 'public interest test'. Such guidance should be provided by the Scottish Land Commission – this represents and appropriate role for such a body that is essentially advisory[38]. The guidance would, of course, need to reflect the potential two-stage nature of the process: first, the potential decision to determine whether or not a 'public interest test' was necessary (on application during a sale or in relation to a 'trigger event' that justifies the use of the test outwith a sale process); and secondly, the decision in relation to the test itself.

The content of this 19uidancee would be a matter for the Scottish Land Commission, informed of course, by appropriate consultation, and not a matter for inclusion in the legislation (beyond, perhaps, some high level objectives or principles – or, as indicated above, some form of list of the issues that must be included). However, the CLS paper "Public Interest Test – proposals for discussion with SG" (Sept 2021) included the suggestion that this part of the process would include an assessment of, for instance: -

- compliance with the expectations in the LRRS;
- the extent to which it can be said the ownership and use of the land is achieving the progressive realisation of economic, social, cultural and environmental rights (or has credible plans to do so within timescales);
- whether the ownership and uses contribute sufficiently to a just transition through the climate emergency and assists in building community wealth;
- whether the public interest for water, flood protection, food, repopulation, improved diversity in ownership, etc, etc can be said to be being adequately met;
- whether other public policy objectives are bring met, such as the provision of locally affordable housing, or enabling communities to appropriately share in the value of local natural capital or carbon; and/or
- Whether the land use is detrimental to local community and/or causes significant harm.

Ministerial decisions of such effect must of course be subject to challenge/appeal to the Courts. In this case, the appropriate venue for such appeals would, as with other such land-related issues, be the Scottish Land Court. The Land Court should be empowered, on hearing arguments, the determine

[37] https://www.gov.scot/policies/planning-environmental-appeals/
[38] See functions at s.22 of the Land Reform (Scotland) Act 2016 (https://www.legislation.gov.uk/asp/2016/18/contents/enacted)

that the outcome may be unchanged, or substitute, as appropriate, its alternative outcome or condition. Any subsequent appeals to Court of Session would probably be limited to points of law and not substance.

Such appeals (and the subsequent *corpus* of caselaw that would result) would involve the interpretation of, and contribute to the better understanding (as well as revision, where appropriate), of the SLC guidance.

(b) How?
Whether the Scottish Ministers' assessment and determination occurs during the process of a sale or as a result of a 'trigger event' (see above under "when?") that causes the application the 'public interest test' to ongoing ownership/management, the process and potential outcomes should be the same (albeit that they would have different effects).

The process by which Ministers (and/or DPEA) reach a decision would be similar to other land, planning and environmental decisions by these decision-makers. That is, it would involve collection of information, determining findings of fact, application of appropriate guidance, and the reaching of decisions. All of these would be informed by representations from the parties, including the owners affected and any other interested parties, such as those who applied for the test to be used (see above under "when?"). Such representations would usually be in writing and the assessment/decision also made in writing, set out in a decision letter (as with e.g., planning appeals). In significant cases, Ministers (and/or DPEA) should be permitted to require a public inquiry, with representations made orally and/or the examination of evidence.

In any case, the decision by the Scottish Ministers (and/or by delegation to DPEA reporter) should be required to be based on clear policy – both as set out in legislation and in more detailed, contextual guidance (it is suggested above that the latter should be produced by the Scottish Land Commission, albeit that this might be subject to approval by Ministers and/or Parliament).

Outcomes? – that is, what are the range of possible outcomes for such a test?

The three logical potential outcomes of a 'public interest test' are that:

a. It is passed without conditions;
b. It is passed subject to conditions; and
c. It is failed.

In addition, in a two stage process, there is the issue of whether any assessment of whether such a test should proceed, in itself, has an outcome. If so, then this is a binary one: either the test proceeds (to one of the three above outcomes); or it does not and the process ends.

Such thinking is consistent with the CLS paper "Public Interest Test – proposals for discussion with SG" (Sept 2021) which suggested that conclusions might be: -

1. there are not sufficient grounds to proceed to a test/review process;
2. that the ownership and uses meet the public interest and there should be no further action;
3. that the arrangements for the land are not fully satisfactory and specify in what respects. This could be followed by the requirement for:
    - the submission of a plan for approval by the regulatory body to institute changes to use and management of land to meet LRRS, human rights realisation, etc. This might include certain benefit sharing arrangements and could require significant community engagement in decision making and delivery of the approved plan
    - require disposal of assets (through a Compulsory Sale Order) in order to promote greater realisation of economic, social, cultural and environmental rights

The latter suggestion above begins to explore the consequences of the outcome (b), pass subject to conditions, or (c), fail, in that it begins to describe what such conditions might be or the consequences of failure. These are discussed, more fully, below.

Consequences or effect? – that is, what is the statutory effect of each possible outcome?

The description of possible outcomes, above, is simply a statement of logic. However, the issue of consequences or effect of each of those outcomes is much more complex – not least because the issue of public interest (which the test is seeking to advance) is complex.

First, however, the consequences or legal effect of the initial stage (the question of whether a test should take place) is simpler. Should it be considered that the issue raised does not raise questions of sufficient importance that no 'public interest test' is necessary, the consequence is straightforward: there is no test and either the sale or ongoing management continues unaffected. Alternatively, should it be considered that the issue raised does raise questions of sufficient importance, then the test process begins.

Should a test process thus be underway, one clear consequence (in the case of tests caused by a proposed sale or other transfer) should be that such a transfer is prohibited until or unless the outcome of the test is known and, if appropriate, its conclusions applied. It would be appropriate to ensure that both prospective purchasers/lessees, relevant public bodies and the general public were aware of this prohibition (that might take the form of some kind of notice or charge, linked to the Registers). These arrangements are akin to the prohibition on the transfer of land subject to the Community Right-to-buy provisions and legislation to apply this prohibition might be modelled on those.

Secondly, should a test process result in outcome (a), above, that the test is "passed without conditions", the consequence is straightforward: there is no test and either the sale/transfer resumes or ongoing management continues unaffected.

The more challenging or complex consequences to describe are those that should result if the test process results in outcomes (b) or (c); that is, "passed subject to conditions" or "failed". Such consequences will also depend on what "conditions" have been proposed and whether the test has taken place as a result of a sale/transfer proposal or in the case of harm arising from ongoing use/management.

Due to the potential diversity of situations that might arise under these varied types of outcomes, it is not possible (and is probably not desirable) to list all possible consequences. However, a range of possible options is suggested in box 4, including some previously suggested in the CLS paper "Public Interest Test – proposals for discussion with SG" (Sept 2021).

Box 4

Possible consequences of a "failed" or "passed with conditions" public interest test

1. In relation to sales/transfers:

- The sale/transfer of all, or part of, the land might be prohibited – and a presumption in favour of purchase of the relevant land by a community body applied. This would be similar approach to the Community Right-to-buy provisions[39].
- The sale/transfer of all, or part of, the land might be prohibited – and a requirement applied that the sale/transfer be to a specific (or a specified type of) person/entity. Such an entity might be one that involves local people as owners or in shared ownership (through for example a charitable trust with open membership and membership control) and/or with appropriate benefit sharing arrangements.
- The sale/transfer of all, or part of, the land might be permitted – but subject to conditions that the land, or part thereof, is used or managed in a specified manner. Such conditions might include lease to a community body or other specified entity, or subject to social or environmental covenants (e.g., for the provision of social housing or the establishment/management of certain habitats), or that public subsidies for future activities/management should be subject to conditions.

2. In relation to ongoing ownership/management

- The sale/transfer of all, or part of, the land might be ordered (via some form of Compulsory Purchase/sale arrangement[40]) to which a presumption in favour of purchase of the relevant land by a community body might be applied.
- The sale/transfer of all, or part of, the land might be ordered (via some form of Compulsory Purchase/sale arrangement[41]) to which a requirement might be applied that the sale/transfer be to a specific (or a specified type of) person/entity. Such an entity might be one that involves local people as owners or in shared ownership (through for example a charitable trust with open membership and membership control) and/or with appropriate benefit sharing arrangements.
- No sale/transfer is required, but certain management/use issues require to be addressed (that is, existing practices ended/amended or new practices introduced). The diversity of such possibilities is great: from the requirement to lease/rent out certain buildings to environmental measures.
- No sale/transfer is required, but certain public subsidies (and/or the conditions of those subsidies) are limited or varied.

Any/all of the above consequences could be 'delivered' either by voluntary arrangement (contract, management agreement or plan, etc?) entered into by the landowner and other relevant parties during the course of the process. However, in the absence of such an arrangement Ministers must be empowered to give legal effect to the consequences – either by the use of existing powers or through new powers set out in the 'public interest test' legislation.

In addition, the application of any/all of these consequences would need to take account of practical implications and parallel legal rights and responsibilities. For example, the rights of any existing tenants would require to be protected and the landowners/managers should be given reasonable time to make any required adjustments.

The diversity of the possible consequences (illustrated in box 4) underlines that it is not possible (and is probably not desirable) to list all possible consequences. Thus, each and every potential consequence could not be provided for in legislation – and, indeed, powers to apply some already exist or simply need to be applied to the new process. Thus, the legislation to provide for a 'public interest test' would include a framework that enabled Ministers to give legal effect, as necessary and determined by the process (including appeals), the outcome of such tests. This will need to include

[39] Note, however, that the provisions of Part 2 of the 2003 Act would not cease to apply due to the application of a 'public interest test' and thus, a community interest was already registered (or a late registration could be applied), such a transfer to a community could happen irrespective of these new proposals, subject to Ministerial consent. It is that consent process that could be amended (improved?) by these new proposals (see below).

[40] This, in itself, would need to be subject to appropriate 'checks and balances'.

[41] This, in itself, would need to be subject to appropriate 'checks and balances'.

the power to, for instance, require the 'lotting' of land sales – so as to apply different outcomes to different parts of the land. There may also need to be provision to enable the Scottish Land Commission to undertake a 'mediation or brokering' role to implement the decisions reached – for instance, in the form of management agreements and/or the approval of sale conditions etc.

Notwithstanding the above, whatever the legislative framework, it is important to ensure that the consequences are meaningful and workable. In particular, should the 'public interest test' be "passed subject to conditions", the conditions that are applied must be such that their application can be monitored/assessed and, if necessary, are legally enforceable. Should the 'public interest test' be "failed", the effect of this cannot simply be to revert to the status quo ante but that some alternative must be available and that this alternative can be monitored/assessed and, if necessary, are legally enforceable.

Legislating to apply a public interest test (PIT) to land

As indicated above, there are, essentially, two types of occasion when the 'public interest test' should apply; these being either on transfer or, outwith of any transfer, if specified conditions are (depending on how those conditions are drafted) met or contravened. Such conditions are the so-called 'trigger events' as discussed below.

Application of a PIT to transfers is, legally, the more straightforward – because there is (for most such transfers) a legal process into which an additional legal process may be inserted. This is similar, in principle, to the application of the 'public benefit test' to charity – it forms part of a wider legal process (the inclusion of the charity concerned in the Scottish Charity Register). In the charity case, OSCR, the regulator, is required to maintain a register of charities and organisations may only be added to the register if they pass the 'charity test', a decisive element of which is the 'public benefit' test.

This section will therefore first address the issue of land transfers, with ongoing land ownership, use or management issues considered thereafter.

1. Transfers

There are, of course, many ways in which land might be transferred from one person (or entity) to another. The first, and most simple, is sale (at market or other valuation). This is the form of transfer to which the "community right to buy" provisions of the Land Reform (Scotland) Act 2003 apply. The effect of registration (s.40) is that sale of that land is prohibited unless or until the community right-to-buy has been exercised or declined. However, it should be noted (as illustrated by s.40(4)) that there are many types of transfer excluded from these provisions (see below)[42].

Land subject to a 'simple' sale (for value) may, by virtue of the 2003 Act, be divided into two categories:

1. Land subject to an approved registration of community interest and thus recorded in the "Register".
2. Land not subject to the above registration – either because no process has begun because the process is incomplete[43].

Registered land

In relation to the first of the above categories, it should be noted that the 2003 Act already provides for consideration of the public interest. In particular, s.51(3) relating to Ministerial consent of the exercise of the right to buy includes a condition (in paragraph (d)) that "the proposed purchase of the land is in the public interest"[44]. This provision sets out the procedure for determining whether a community purchase under the right to buy mechanism should go ahead – and is, thus, the pivotal provision of Part 2 of the 2003 Act.

It is therefore arguable that, in relation to land subject to an approved registration of community interest and thus recorded in the "Register", there is already a 'public interest test' in effect should that land be subject to transfer/sale within the definitions of the 2003 Act. Notwithstanding that argument, however, there are a number of issues that arise, including that, as with most such references to the public interest in legislation (see annexes 1 & 2), it is not defined.

In considering the approach to take in relation such land, there are a range of options available: -

1. This existing test may be viewed as already providing for a 'public interest test' in relation to (specified types of) transfers of such registered land; or
2. This existing test needs to be defined in more detail, and possibly broadened, to ensure that it fulfils all the purposes of a 'public interest test' described above.

[42] There is, of course, also a (small?) exclusion within the definition of 'land' that can be subject to community right to buy under the 2003 Act (see s.33(2)). This may or may not be significant in relation to wider public interest discussions.
[43] Notwithstanding the apparent clear distinction between the above two categories, there is the potential for some land in category (2) to, effectively, be treated as in category (1) by virtue of s.39 (Procedure for late applications) of the 2003 Act.
[44] There are also public interest 'tests' in s.34(2), on Ministerial approval of community bodies; s.38(1)(e), on Ministerial approval of the registration of community interest; and s.39(3)(c), in the late registration procedures.

If option (1) above is pursued, then any proposals/legislative provisions for other types of land transfer (that is, either other types of transfer and/or 'unregistered' land) will need to specify that they do not apply to transfers under Part 2 of the 2003 Act. If option (2) above is pursued, then any proposals/legislative provisions for other [or all] types of land transfer need to be applied to transfers under Part 2 of the 2003 Act. This latter option might be achieved by an amendment to s.51 of the 2003 Act to specify that condition (d) of subsection (3) must be subject to the 'public interest test' procedure introduced for other [or all] land.

In considering the approach to registered land, it must be recognised that the current Community Right to Buy provisions provide for only two outcomes (sale to the registered community body or no intervention). However, the discussion of the 'public interest test' above suggests that a more diverse range of possible outcomes might be desirable in the public interest. For this reason, as well as issues related to the operation of the Community Right to Buy[45], it is suggested that any legislation for a 'public interest test' should apply to all land, with all possible outcomes available – and that this new process is then used to inform (and speed up?) the application of the Community Right to Buy process, if appropriate (and not pre-empted by the 'public interest test' process).

Unregistered land

In the case of land that is not registered under Part 2 of the 2003 Act (or could not secure late registration), provisions for a 'public interest test' will require a legal mechanism being inserted into the general provisions relating to the sale of land[46] that puts a 'hold' on the process until the process is undertaken and completed.

Such a mechanism should probably not be applied to all land sales – there are probably many such sales that do not, and could not, raise significant concerns related to public interest matters. Thus, it is necessary, first, to identify which such sales should be subject to the test.

There are two possible such 'routes' that might be constructed (which are not mutually exclusive and might operate in parallel). One might be described as an 'automatic' route that requires a prospective seller to notify Ministers (or regulatory body?) if/when a sale is proposed. Such a notification might be required either due to certain specified conditions (e.g., for any land sale over a certain hectarage or subject to certain public policy designations such as SSSIs, ancient monuments, a community designation such as Assets of Community Value, etc). Alternatively, or as well (?), the automatic route might be 'triggered' by the prior registration of interest or concern by a community and/or a policy interest body. This registration approach might, in turn take two forms: that based on application by interested persons/communities, or a proactive approach by Ministers (perhaps undertaken, on their behalf by the Land Commission) to identify and 'designate' land as to be subject to a 'public interest test' should any transfer be proposed.

In addition, provision should be made to subject a proposed sale to a 'public interest test' on application by a community and/or a policy interest body – at any time from them becoming aware for the proposed sale but before any formal conclusion of missives. Such an application should then prohibit any formal conclusion of missives until such time as a decision has been reached on either whether a 'public interest test' is necessary (the first stage) or, if it is to proceed, its outcome.

An alternative (drafting) approach, possibly with the same effect as described above, might be to (in principle) apply a 'public interest test' to any land transfer, but then to specify exceptions. The first such exception would, in line with the discussion above, relate to land registered under Part 2 of the 2003 Act. Other obvious exceptions might include the transfer of a dwelling (and its associated land) from one sole occupier to another proposed sole occupier. The sale/transfer of farming/crofting land from one occupier to another with no change of use might also be excluded, subject to the application for instance of a maximum hectarage.

Although the latter approach is offered as an alternative, the author prefers the former (that is registration or application) due to the challenge of appropriately defining (in the semi-permanent form

[45] Such as reluctance of communities to register and/or the challenges of the late registration system in the light of a fast-moving land market – as well as the complexities and duplications involved in the processes (see box 5).

[46] Probably the Requirements of Writing (Scotland) Act 1995 which governs the Missives of Sale (the contract between seller and buyer). This is the approach applied in Annex 1(B1), but should be subject to review/amendment by formal legal advice.

of primary legislation) the necessary exclusions necessary for the alternative approach. Notwithstanding this preference, the challenges of establishing and maintaining a register (and encouraging relevant communities and others to apply for inclusion) are recognised – hence, the suggestion of a "proactive" system of registration (as well as, of course, the application option). It should, however, be noted that the 'application option' does not necessarily ensure that all sales/transfers are 'caught' given the ability for such sales/transfers (of unregistered land) to move at pace and without interested communities becoming aware.

The only way to address the last issue would be to legislate for a statutory timescale for all land sales/transfers – and for such a timescale to include a process of notifying interested communities. Such an approach – or a blanket notification system (see box 5) – might be less complex than other mechanisms. It would, however, have consequences for the 'market'[47] and might be subject to same challenges of defining 'routine' types of sales/transfers that could be excluded.

Box 5

Registration and notification processes

This discussion of registration – both under the 2003 Act and any new scheme for the application of a public interest test - highlights that that the current process is seen as complex, bureaucratic and burdensome.

Such a streamlining of the 2003 Act process might be possible as part of legislation introducing a 'public interest test'. If this is pursued, it would be logical to extend such automatic registration (for CRtB) to become, as well, automatic registration for the application of a 'public interest test'.

Alternatively (or in addition), it may also be valuable to consider proposals to sell/transfer land in a manner similar to proposals to develop and/or afforest land. For development, all applications for planning permission are subject to requirements in relation to notification of neighbours, communities, and other interested parties (especially statutory consultees). Similar notification and consultation arrangements apply to forestry proposals. The sale/transfer of land can have as much (or greater) impact on both local communities and the public interest as any planning or forestry proposal.

Thus, there might be merit in considering a 'blanket' approach of requiring the notification (to a statutory body and/or public register open to community and public inspection) of any proposal for the sale/transfer of land. Upon such notification, the relevant statutory body could then determine if a 'public interest test' was appropriate and, if so, take steps to ensure it was applied in the manner discussed below.

Such streamlining and 'blanket' notification proposals would reduce the complexities (and address some challenges) of the approaches described above under 'registered land' and 'unregistered land'.

[47] In internal 'Scottish market' terms any such legislation would have no impact as the new rules would apply equally to any/all sales. However, it might be argued that the UK/international 'market' would be distorted – but, it should also be recognised, that any such distortion would be (a) no more than land laws in other jurisdictions and (b) entirely related to securing the public interest (that is, a matter that permits such limited market distortions).

Other types of transfer

There are a range of other types of transfer (that is, not by sale, either under the 2003 Act procedures or otherwise) to which it would be desirable, in principle, to apply a 'public interest test'. These include: -

- Not for value transfers – including inheritance, gifts, etc.
- Transfer by sale of (shares in) a company owning land. This form of transfer raises the issue of devolved/reserved competence, and whether any action related to such transfers would require amendment of the Companies Acts or other reserved legislation[48].
- Asset transfers under Community Empowerment (Scotland) Act 2015 (although it might be argued these are already subject to a 'public interest test' – albeit one that might be made more explicit).
- Public sector disposal programmes – including e.g., Forestry and Land Scotland's policy related to disposals to communities or local authority disposal polices, including those for Arm's Length External Organisations.

These types of transfers are governed by specific (and varied) legislation and/or policies. Some or all of these may, if considered appropriate, be amended to introduce the concept of, and application of, a 'public interest test'.

Some will require legislation, but others might be delivered by policy decisions by Scottish Ministers. For instance, any of Forestry and Land Scotland's disposals are, in effect, simply sales of land by Scottish Ministers – who are free to determine if and how such disposals take place. This is already subject to policy (focused to some extent on FLS' budgets) but also with some provisions related to disposals to communities and/or public interest bodies. This policy could be amended to include a 'public interest test' at any time by a decision by Scottish Ministers. The same probably applies to wide range of land currently owned by the public sector.

The above transfers/sale of public sector land could and should be subject to a 'public interest test' as a matter of policy – this could and should be introduced by Scottish Ministers without the need for any further legislation. In addition, Scottish Ministers could choose to apply such a test to the ongoing ownership, use or management of land by the public sector – this might be achieved by introducing such a test, as a matter of policy, into regular reviews of assets held by public sector bodies (including, of course, those by Scottish Ministers themselves).

Whilst identifying the need, if a 'public interest test is to be comprehensively applied, for it to address not for value transfers (including inheritance, gifts, etc.) and transfer by sale of (shares in) a company owning land, further work is needed to ascertain if/how this might work. For example, what legislation governs these transfers, and what, if anything, is reserved?

Application of the public interest test to land transfers

When it is determined, as above, that the sale or other transfer of land (whether registered or not) should be subject to a 'public interest test', the process by which that test is applied should be the same irrespective of the nature of the transfer/land. The variations will apply in the means by which any consequences are applied.

In effect this means that once a sale/transfer is 'paused' (whatever the process that leads up to that pause might be), then the 'public interest test' must be formally carried out, the result determined and the outcome notified to relevant parties and applied. Depending on the outcome this would mean that the sale/transfer is permitted to continue with no new requirements, or it might be permitted to continue subject to conditions, or it might be prohibited (until alternative proposals are offered). If the latter, it is clear that return to the *status quo ante* should be avoided – but that the outcome should specify one (or more) acceptable alternatives. Such alternatives might be the exercise (and thus presumption) of a Community Right to Buy, irrespective of the lack of a prior or late registration), or

[48] The Scotland Act 1998, as amended in Sch 5, Section C1 reserves "The creation, operation, regulation and dissolution of types of business association" – this may mean that adding legal restrictions to the sale of shares and/or whole companies may be a reserved matter. (Note 2: a community right to buy registration does not apply to "a transfer between companies in the same group" – see 2003 Act, s.40(4)(e). Is this because of the above reservation, or due to other rationale, and is "between companies in the same group" the main way that land owned by companies is transferred?)

the sale to a (specified) public body (in effect compulsory purchase), or the sale to some form of specified body (a CIC or NGO with relevant objectives).

Of course, it is important that such outcomes may be applied to the whole of the land in question or to any part of it; and different outcomes may be applied to different parts.

The procedure for reaching the determination would be a matter for Scottish Ministers as the decision maker. However, it would be appropriate that, as a public policy decision that seeks to balance the rights of a private individual/corporate landowner with matters of public/general interest, that these procedures mirror those for similar decisions (such as used in planning or the consideration of environmental appeals).

As such, the legislation should set out that the Scottish Ministers are the decision makers (subject to the power to delegate to DPEA). It would also need to require the decision to be made in a manner that permits evidence/representations to be made by interested parties, and to be made in accordance with guidance (published by Scottish Ministers, approved by parliament – but perhaps developed and consulted on by the Scottish Land Commission).

The final decision would need to be in the form of a legal notice, with a requirement (as for planning and environmental appeals) to state reasons and explain any conditions. The decision should also be required to set out the consequences of those conditions and/or alternatives (if the test has been 'failed'). The legislation should also set out the right for (and scope of) appeal – potentially to the Scottish Land Court.

2. Ongoing land ownership, use or management

As set out above, the application of any 'public interest test' to ongoing land ownership, use or management would be a two stage process. First, a process to determine that such a test was necessary – based on a judgement of the significance of the public interest concerns over that ongoing ownership, use or management. Such a transparent, decision-making process is required to ensure that the public policy intervention of a 'public interest test' is consistent with the (caveated) property rights, as described above. As such, an intervention of this kind is no different, in principle, from other public interest constraints on the exercise of property rights, such as planning and environmental law. The second stage would be the application of the test itself and the consequences.

The first stage would require the description of clear 'trigger events' that demonstrate the significance of the concerns. Such a stage is necessary in the case of 'ongoing concerns' as there is no 'trigger' in the same way that a proposal to sell/transfer land provides in the circumstances above. The procedure to determine that circumstances had arisen, either over time or as a result of a one-off decision, that merited intervention should be straightforward – it would be a Ministerial decision, made in response to an application by an interested party (usually a community body, but potentially also a CIC, NGO or appropriate individual[49]).

As with planning, compulsory purchase or other such public policy decisions, the decision-making must be transparent, fair and in accordance with procedures set by law. To achieve this, it is necessary to ensure that the policy to be applied is transparent and consistent, as well as subject to consultation and Parliamentary oversight. This is best achieved by a statutory requirement to make decisions in accordance with guidance – guidance that must be published, consulted on and approved by Parliament.

This guidance would be able to set out in detail the range of circumstances where a 'public interest test' should be considered appropriate, as well as the range of considerations to consider when reaching such a decision and the weight to be attached to these various considerations.

This approach is preferable to setting out criteria for application of a 'public interest test' in primary legislation – as such criteria would need to be legally clear "black and white" tests. By contrast, the

[49] If applications by individuals are permitted, provision would need to be made to prevent vexatious applications by e.g., neighbours as part of a boundary dispute.

desirability of, and decision to proceed with, a 'public interest test' is more likely to be a matter of judgement, by Ministers and/or DPEA reporter. This is especially the case given the "undefinable" nature of the public interest (see discussion above) and the possibility that what is/isn't a public interest concern might change over time. Some examples of the issues that might be covered in the guidance, and lead to the application of a 'public interest test' to ongoing land ownership, use or management is set out in box 6.

Box 6

Issues that might lead to the application of a 'public interest test' to ongoing land ownership, use or management (to be developed in relevant policy/guidance)

- Significant harm to communities over the long term. Such 'harms' would need to be explored/described but might include shortage of affordable housing, lack of economic opportunity or activity, environmental harms (pollution, flood risk, lack of greenspace, etc) and/or inability of community or relevant public body to provide public services (health, social care, education, etc) due to land-related constraints. Similarly, what is meant by "the long term" would need to be defined – it is suggested that, depending on the issue a period over 5 or 10 years might be appropriate (with, of course, the caveat that that a different period might be set for different issues).
- Lack of implementation of development in the public interest over long term. This would relate to locally significant development, designated in local plan or consented planning permission (so already subject to scrutiny over the public interest), but not forthcoming over long enough time period to allow for market changes. The "long term" would again require clarification.
- Failure to comply with 'public interest' regulations (e.g., health and safety, environmental law) or to contribute effectively to approved public policy targets (especially those for which incentives were available e.g., emissions reductions, energy efficiency).

The test itself should address the similar issues and take the same form as described above for sales/transfers. In contrast, however, the consequences are likely to be different as they would need to be applied in the absence of any (voluntary) proposal for sale/transfer. Despite that difference, however, the outcomes (unless the test was "passed" and no further action was deemed necessary) would still need to be expressed clearly – setting out either the conditions that would need to be met for the test to be passed or the alternative arrangements that were to be required. In either case, the outcome would need to make clear who was responsible for doing what by when. If the outcome included a change of ownership for all/part of the land, the decision would need to set out how the compulsory purchase, auction, Community Right to Buy or other change would be progressed and, if necessary, enforced. If the outcome required a change of use/management, it would also need to specify both the changes required and how the changes would be monitored and enforced (and by whom).

Finally, of course, each of the two stages might require to be subject of a right of appeal (to the Scottish Land Court?).

Conclusion

This paper has sought to develop the narrative for CLS' policy and legislative proposals with regard to a 'public interest test' for land ownership/management.

It has set out the policy context, and explored the concept of the 'public interest', both in general and in relation to use of that phrase (or such 'tests') in legislation. It has then sought to describe a 'public interest test' in relation to land, by seeking to answer or discuss a series of questions:

- What? That is, what does a 'public interest test' test?
- When? That is, when – or on what occasions or under what circumstances – should a 'public interest test' be applied?
- Who and how? – that is, who should be responsible for undertaking the test and determining the outcome?
- Outcomes? – that is, what are the range of possible outcomes for such a test?
- Consequences or effect? – that is, what is the statutory effect of each possible outcome?

In the light of that discussion, it has sought to describe, how the Scottish Government (if it wished) might proceed to legislate to apply a public interest test (PIT) to land, both in relation to land sales (distinguishing between land registered under Part 2 of the 2003 Act and other land) and to ongoing land ownership, use or management. The paper notes the need to explore further the issue of land transfers that fall outwith the category of simple sales (notably inheritance, gifts, etc but also others such as company transfers).

The paper does not represent finalised CLS policy. Rather, it seeks to make an informed contribution to the process leading to provisions for a Public Interest Test being included in the forthcoming Land Reform Bill due to be introduced to Parliament by the end of 2023. And in so doing, ensuring that the forthcoming legislation is as effective as possible in relation to the public policy objectives it seeks to achieve.

ANNEX 1

The "public interest" in legislation

A search for the term "public interest" on www.legislation.gov.uk, the site that records all UK and devolved legislation, returns more than 200 results in primary legislation[50]. There are undoubtedly many more uses in secondary legislation of various types. This illustrates the widespread use of the term, which is also reported is other English-speaking jurisdictions. For instance, Wheeler (2016) notes that

> "There is a reference to the "public interest" in over 200 Acts of the NSW [New South Wales] Parliament, and over 50 Regulations."[51]

Charities and Trustee Investment (Scotland) Act 2005[52]

s.7 creates a "charity test" and states that: -

(1) A body meets the charity test if—
  (a) its purposes consist only of one or more of the charitable purposes, and
  (b) it provides (or, in the case of an applicant, provides or intends to provide) **public benefit** in Scotland or elsewhere.

s.8 provides further guidance on defining "public benefit"

8 Public benefit

(1) No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.

(2) In determining whether a body provides or intends to provide public benefit, regard must be had to—
  (a) how any—
    (i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and
    (ii) disbenefit incurred or likely to be incurred by the public,
  in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and
  (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

s.9 requires that OSCR must publish guidance on how it determines whether a body meets the "charity test" (and, consequently, how it determines that public benefit is provided.

The current version of the OSCR guidance on the charity test was published in 2015[53]. Details of the guidance on "public benefit" are set out on pp74-78 of the document. Key extracts, to illustrate how "public benefit" is judged include: -

> "In general, public benefit is the way that a charity makes a positive difference to the public. Not everything that is of benefit to the public will be charitable. Public benefit in a charitable sense is only provided by activities which are undertaken to advance an organisation's charitable purposes.
>
> Charities can provide public benefit in many different ways and in differing amounts.

[50] https://www.legislation.gov.uk/primary?text=%22public%20interest%22
[51] https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0009/41967/What-is-the-public-interest-Presentation-Government-Solicitors-Conference,-Sydney-6-September-2016.pdf
[52] https://www.legislation.gov.uk/asp/2005/10/contents
[53] https://www.oscr.org.uk/guidance-and-forms/meeting-the-charity-test-guidance/

Whether an organisation provides public benefit or (in the case of applicants) intends to provide public benefit, the following elements must be considered:

- The comparison between the benefit to the public from an organisation's activities; and
  - any disbenefit (which is interpreted as detriment or harm) to the public from the organisation's activities
  - any private benefit (benefit to anyone other than the benefit they receive as a member of the public).

- The other factor that we must take into account in reaching a decision on public benefit is whether any condition an organisation imposes on obtaining the benefit it provides is unduly restrictive. This includes fees and charges. See undue restrictions for more information.

While considering these factors, we make a judgement on the whole picture of public benefit in the organisation being looked at. We do this based on all the facts and circumstances applying to the organisation."

Commons Act 2006[54]

An Act related to the management of Common Land in England and Wales.

s.31 provides for the establishment of "Commons Councils" and ss6 & 7 state that:

(6) A commons council must discharge its functions having regard to—
(a) any guidance given by the appropriate national authority; and
(b) the **public interest** in relation to the land for which it is established.

(7) The reference in subsection (6)(b) to the **public interest** includes the public interest in—
(a) nature conservation;
(b) the conservation of the landscape;
(c) the protection of public rights of access to any area of land; and
(d) the protection of archaeological remains and features of historic interest.

Criminal defence

May be used as an exception to the generality. For instance, the Prisons (Scotland) Act 1989 (as amended) provides that it is an offence to use, possess, give to another, etc a "personal communication device" (i.e., a mobile phone). However, one of the statutory defences to such an offence, set out in s.41ZB(7)(b) is that:

"in the circumstances there was an overriding **public interest** which justified the person's actions."

Balancing a public right

An exception is often provided to an otherwise general public right. For instance, the Freedom of Information Acts provide that the public interest in releasing information be weighed against that of not so releasing.

"the **public interest** in maintaining the exemption outweighs the **public interest** in disclosing the information" (s.2(2)(b), Freedom of Information Act 2000[55] – UK/reserved legislation)

[54] https://www.legislation.gov.uk/ukpga/2006/26/contents
[55] https://www.legislation.gov.uk/ukpga/2000/36/contents

"in all the circumstances of the case, the **public interest** in disclosing the information is not outweighed by that in maintaining the exemption2 (s.2 (1)(b), Freedom of Information (Scotland) Act 2002[56] – Scotland/devolved).

SIC guidance on public interest test under FOISA: https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx and under EIRs: https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx

From the former:

"FOISA does not define the public interest. It has been described elsewhere as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been described as "something that is "in the interest of the public", not merely "of interest to the public." In other words, it serves the interests of the public.

"When applying the test, the public authority is deciding whether, on balance, it serves the interests of the public better to withhold or disclose information. The "public" in this context does not necessarily mean the entire population. It might relate to a relatively localised public (e.g., a small community or interest group) or to the wider public at large."

ICO guidance on public interest test in FoI: https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

(An MoD guidance note to staff on the FoI public interest test: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/16835/E420090701MOD_FOI_Guidance_Note.pdf)

Town and Country Planning law

The Town and Country Planning (Scotland) Act 1997, as amended by the 2019 Act includes the following definition of the purpose of planning:

3ZA Purpose of planning

(1) The purpose of planning is to manage the development and use of land **in the long term public interest**.

(2) Without limiting the generality of subsection (1), anything which—

(a) contributes to sustainable development, or

(b) achieves the national outcomes (within the meaning of Part 1 of the Community Empowerment (Scotland) Act 2015),

is to be considered as being in the long term public interest.

(3) This section applies only to the Scottish Ministers' and planning authorities' exercise of functions under Parts 1A and 2."

In addition to the reference above to the "national outcomes", the provisions related to the National Planning Framework (the national policy defining the spatial 'vision' for Scotland to which all planning decisions should be compatible) also requires that Framework to include "a statement about how the Scottish Ministers consider that development will contribute to each of the outcomes listed in subsection (3A)". Those outcomes are:

(a) meeting the housing needs of people living in Scotland including, in particular, the housing needs for older people and disabled people,

(b) improving the health and wellbeing of people living in Scotland,

(c) increasing the population of rural areas of Scotland,

(d) improving equality and eliminating discrimination,

(e) meeting any targets relating to the reduction of emissions of greenhouse gases, within the meaning of the Climate Change (Scotland) Act 2009, contained in or set by virtue of that Act, and

[56] https://www.legislation.gov.uk/asp/2002/13/contents

(f) securing positive effects for biodiversity.

These issues (both the national outcomes and those specified) give an impression of the matters that the Scottish Parliament has determined should be issues that planning system must seek to consider/deliver in the public interest.

Land and land reform

The procedure for activating the community right to buy provisions of the Land Reform (Scotland) Act 2003[57] includes the requirement for Ministerial consent, which is subject to a number of conditions, including, in section 51:

(4) Ministers shall not consent for the purposes of subsection (1) above unless the community have given their approval and Ministers are satisfied—
….
(d) that the proposed purchase of the land is in the **public interest**.

There are also public interest 'tests' in s.34(2), on Ministerial approval of community bodies; s.38(1)(e), on Ministerial approval of the registration of community interest; and s.39(3)(c), in the late registration procedures.

A similar provision exists, in Part 3 of the 2003 Act at section 74, in relation to a crofting community right to buy.

Crofting legislation

The "public interest" is a factor that the Crofting Commission must consider when determining whether to designate new crofts. Section 3A(8) of the Crofters (Scotland) Act 1993 (as amended)[58] states: -

"In so determining, the Commission shall have regard to—
(a) such comments, if any, as are duly made by virtue of subsection (6) above;
(b) the **public interest** and as the case may be the interests of the crofting community in the locality of the land; and
(c) whether social or economic benefits might be expected as a consequence of so constituting it.

Meanwhile, a Crofter is required to cultivate or "put to purposeful use" the land, with such use being defined, in s.5C(8), as: -

"purposeful use" means any planned and managed use which does not adversely affect—
(a) the croft;
(b) the **public interest**;
(c) the interests of the landlord or (if different) the owner; or
(d) the use of adjacent land.

International law

ECHR[59]

Article 1, Protocol 1 to ECHR: -

[57] https://www.legislation.gov.uk/asp/2003/2/contents
[58] https://www.legislation.gov.uk/ukpga/1993/44/contents
[59] https://www.echr.coe.int/documents/convention_eng.pdf

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the **public interest** and subject to the conditions provided for by law and by the general principles of international law."

(COE guidance on Art 1 of Protocol 1:
https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf)

Article 2.4, Protocol 4 to ECHR: -

> "The rights set forth in paragraph 1 [to freedom of movement] may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the **public interest** in a democratic society."

Other ECHR rights are subject to exceptions that, while not using the general term "public interest" are often more detailed explanations/examples of public interest concerns. For example, Article 8.2 of ECHR reads: -

> "There shall be no interference by a public authority with the exercise of this right [to respect for private and family life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This exception might be read as a fuller version of the "public interest" (although, in some ways, it also limits the interpretation of the "public interest" to the issues mentioned – notwithstanding that those issues are very broad). Similar exceptions apply in article 10 (Freedom of expression) and article 11 (freedom of association).

From: https://jusmundi.com/en/document/wiki/en-public-interest

> States may invoke public interest as a defence against an investor's claims for breach of treaty standards of protections (*e.g.*, Fair and equitable treatment, National treatment, or unlawful expropriation) to justify "*regulation[s] with a basis other than a state of necessity, national security or the public order*."2 Public interest exceptions may also be incorporated into treaties to safeguard the state's ability to regulate. See further State regulatory power; Police powers.
>
> Public interest exceptions/defences commonly cover the areas, among others, of (i) environment;3 (ii) health;4 (iii) labour rights;5 (iv) culture;6 (v) taxation or financial services7 (vi) public morals;8 and (vi) social or consumer protection.9

(footnotes not accessible)

The right to regulate in the "public interest" is also a matter that is addressed in international trade treaties. In such a context, "the right to regulate in the public interest is understood as a State's power and right to regulate certain activities affecting the public interest, which may originate in a duty to regulate such activities. Such regulation in some cases may interfere with individual rights. The limitations on a specific State's authority to regulate private investments in a way that affects investors' rights depend significantly on the international and domestic obligations of that State."[60]

Such references to the right to regulate in the "public interest" leads to considerable debate, among academics as well as business/investors, as to the definition of "public interest" and the interpretation of such provisions in international investment treaties[61].

[60] https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-public-interest

[61] For example: https://cjil.uchicago.edu/publication/interpreting-public-interest-provisions-international-investment-treaties or https://www.cambridge.org/core/books/abs/global-public-interest-in-international-investment-law/global-public-interest-theory/A8B011187E412248A8DCD6A0594DBD38

ANNEX 2

Public interest definitions

A simple dictionary definition of the public interest (excluding the "of interest to the public" version) might be "the welfare or well-being of the general public"[62].

A more detailed explanation might be: -

> "The public interest is a concept that can be defined in several ways. It is often treated as an ideal standard to which appeals for validation of political claims and policies are directed. References to the public interest commonly occur in editorials, political speeches, and other utterances of an admonitory or edifying character. The term is also often encountered in judicial and regulatory pronouncements. The significance of the conception is normative rather than analytical.
>
> "In efforts made to define the term systematically, several categories appear. There is the formal meaning wherein the public interest is viewed as the objective of the duly authorized organs of government or as the expression of majority rule. In substantive or policy terms, the public interest may be envisaged as embracing those activities necessary to the safety of the state and the welfare of the community: defence, police protection, education, and public health and sanitation. The public interest has no *a priori* content waiting to be revealed. Public responsibilities regarded as being in the public interest in one setting may not be so regarded in a different context. The fact that the concept is elastic and relative rather than fixed and absolute makes it of greater utility in the quest for a supporting consensus as social changes occur and efforts at accommodation are made. The public interest then serves to remind the parties immediately concerned that there are considerations extending beyond their own goals or their particular rivalries or negotiations. Thus, in labour-management disputes, or when subsidies or favourable tariff rates are sought for special groups, the consumer interest may be identified as the public interest. The individual may find himself in one role seeking to advance his self-interest and, in another capacity, allied with the larger good. Hence the term, whether for manipulative ends or for hortatory or inspirational purposes, is neither the device nor exclusive goal of any one group or class. As an aim to be articulated or an ideal to be enunciated, the public interest stands for the broad versus the narrow, the more inclusive versus the limited."[63]

Both the brief definition and the longer explanation demonstrate the flexibility of the concept, as well as the raising of further questions, including "who is the public (in any particular case)?".

An accountancy or market-based approach: https://www.icaew.com/-/media/corporate/files/technical/ethics/public-interest-summ-web.ashx

[62] https://www.dictionary.com/browse/public-interest
[63] https://www.encyclopedia.com/social-sciences-and-law/law/law/public-interest