

Land Reform Bill 2024: Public Interest Test vs ‘Transfer Test’

5 key points:

1. A public interest test (PIT) is a much more effective means of meeting the stated objective of diversifying landownership than a transfer test
2. The transfer test based on ‘community sustainability’ is legally weak and vaguely defined which restricts its utility and applicability
3. The public interest (not community sustainability) is the justification for any government to interfere with property rights – it has a strong existing precedent in Scotland and internationally
4. The Scottish Land Commission (SLC) have produced detailed research and guidance which details how and why a public interest test would work
5. A public interest test was a key part of the Land Reform Bill consultation and a version of a PIT featured in the SNP, Green and Labour 2021 party manifestos¹

Community Land Scotland (CLS) welcomes the introduction of a mechanism at the point of significant land transfer to assess whether the landownership is excessively concentrating power. However, **the introduction of a ‘transfer test’ in the draft Bill is a disappointing watering down of a meaningful Public Interest Test (PIT)**, as has been proposed by the Scottish Land Commission over the past five years, and which the Scottish Government had previously committed to. The principle of a PIT was strongly supported (72%) in response to the government’s consultation on this matter.²

The transfer test does not make any assessment of the wider public interest in landownership, nor assess whether the buyer or their plans for the land meets the public interest.³ Successive Scottish Governments have made consistent commitments to diversifying landownership patterns in Scotland. As it stands the transfer test is not an effective mechanism for achieving this.

This short briefing sets out the precedent and practicalities of a PIT, as well as the significant advantages it offers compared to the proposed Transfer Test. This relates to the legal robustness of the new legislation, the ability to more firmly centre human rights and more clearly centres an assessment of the potential monopoly impact of prospective buyer and how their ownership will meet the public interest.⁴ **CLS recognises that a Public Interest Test which interferes with the European Convention on Human Rights must be lawful, legitimate and proportionate.** The proposals set out here, and those prepared by the SLC, factor in these considerations.

¹ [Scottish National Party Manifesto 2021 : Scottish National Party : Free Download, Borrow, and Streaming : Internet Archive](#), p.15, [ScottishGreens 2021Manifesto Full web version.pdf](#), p.43 and [Scottish Labour Manifesto 2021 : Scottish Labour : Free Download, Borrow, and Streaming : Internet Archive](#), p.108.

² The majority of respondents, 72% of those answering the question, agreed with the application of a public interest test to transactions involving large-scale landholdings, [Land Reform in a Net Zero Nation: Analysis of responses to the consultation exercise](#), p.99.

³ CLS have published research which details when, how and why a public interest test on land could be applied in Scotland: [Legislating for a public interest test in land sales, transfers, and management – Community Land Scotland](#)

⁴ The SLC published legal advice from James Mure KC on this topic in Feb 2022: [620f73b06cbc1_Land Lines - Balancing rights and interests in Scottish land reform.pdf \(landcommission.gov.scot\)](#)

What is the ‘public interest’?

The ‘public interest’ is a widely used term in Scottish and UK legislation – with over 200 mentions in primary legislation, including existing land reform legislation which centres the public interest in Ministerial approval of community bodies, registration of interests and Part 3a and Part 5 Rights to Buy.⁵ **The Court of Session has already rejected the suggestion that the term ‘public interest’ in the 2003 Land Reform Act is too vague to have legal force.** In *Pairc Crofters Limited v The Scottish Ministers* 2013, Lord President Gill said: “I consider that there is nothing in the submission that the expression “public interest” lacks any legal force. The public interest is a concept that is to be found throughout the statute book. There is no need for a general definition of it.”⁶

The concept of the public interest is widely accepted in international law as research by James Mure KC and Dr Kirsteen Shields has shown.⁷ It also forms an integral part of the protection of private property within the European Convention of Human Rights (ECHR), Article 1 Protocol 1 (A1P1) – ‘No one shall be deprived of his possessions except in the **public interest**’.⁸ Parliament and Government can interfere with that right in particular circumstances which must be provided for in law, must be in pursuit of a legitimate aim, and be proportionate. These circumstances are determined by a Public Interest Test. Courts are led by what Parliament and Government set out as public interest considerations.⁹

In terms of land reform, the public interest can be thought of to achieve two key purposes:

1. 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
2. As a goal to be achieved or test to be applied in administrative law governing the carrying out of government (or public body) functions.¹⁰

In relation to land, any new test will seek to fulfil this second purpose – especially where it is considered that that the public interest is being adversely affected by the nature, scale or type of private land ownership/management.¹¹

What is a Public Interest Test?

A ‘test’ to assess these two purposes exist within Freedom of Information (FoI) legislation and Scottish Charity Law.¹² Both examples illustrate that the underlying legislation does not define the “public interest”,

⁵ See [Legislating for a public interest test in land sales, transfers, and management – Community Land Scotland](#), Annex 1, p.31 and research by the SLC - [Balancing rights and interests in Scottish land reform](#).

⁶ [Balancing rights and interests in Scottish land reform](#), p.11.

⁷ [A Review of Evidence on Land Acquisition Powers and Land Ownership Restrictions in European Countries](#) and [Balancing rights and interests in Scottish land reform](#).

⁸ [European Convention on Human Rights](#), p.33.

⁹ These remarks are taken from discussions with Prof Katie Boyle, Professor of Human Rights, University of Strathclyde, 20/08/2024

¹⁰ See [Legislating for a public interest test in land sales, transfers, and management – Community Land Scotland](#), Annex 1, p.31.

¹¹ [Legislating for a public interest test in land sales, transfers, and management – Community Land Scotland](#), p.9.

¹² *Ibid*, p.31.

but it is left to others to provide guidance and interpretation.¹³ In this Land Reform Bill the Scottish Land Commission could be enabled to provide guidance on the criteria informing a PIT on significant land transfer. Such criteria can be defined in law as matters which the Scottish Land Commission shall have regard to. This could include the following, building upon SLC recommendations and priorities for CLS members:¹⁴

- The desirability of progressively achieving a more diverse ownership of land
- Achieving relevant human rights
- Furthering sustainable development
- Contributing to the achievement of a just transition to net zero
- Advancing community wealth building
- Maintaining or restoring biodiversity
- Increasing community agency on matters seen as important to them
- The delivery of an adequate supply of affordable social housing, and of workspace for employment
- The appropriate repopulation or settlement of land
- The creation of new land and agricultural tenancies, for example crofts and farms/smallholdings
- Adherence to the terms of the LRRS

The Scottish Land Commission set out in 2021 that a PIT for significant land acquisition would assess at the point of transfer whether there is a risk arising from the creation or continuation of a situation in which excessive power acts against the public interest.¹⁵ This would **make a wider assessment of a land transfer than ‘community sustainability’ and could make a more holistic assessment of the scale and concentration of landownership**, through assessing both the landholding *and* the incoming landowner. This would be different and more robust than the proposed ‘transfer test’ on the seller.

By having a PIT which assesses whether the landholding *and* the proposed purchaser are working in the public interest, means that a forward-facing burden can potentially be placed on the transfer (such as lotting), rather than the currently proposed assessment and burden being placed on the seller. **Research by James Mure KC details that there is not a right to acquire land, but there being a right to dispose of land.**¹⁶ Therefore a forward-facing burden on the seller, rather than the buyer, is a stronger basis for interference with the A1P1.

Community sustainability vs the public interest

The Scottish Government have decided that the ‘transfer test’ and lotting decision will be determined by the impact of that specific landholding upon ‘community sustainability’ – considering objectives such as economic development, repopulation, maintenance of populations, regeneration, public health, social wellbeing and environmental well-being.¹⁷ **As such the use of the concept ‘community sustainability’ is implicitly dealing with the public interest but remains poorly defined with no legal precedent.** This raises

¹³ Ibid, p.9.

¹⁴ The SLC have produced their own criteria for assessing concentration of power: [Legislative proposals for addressing concentrated landownership](#), pp.42-3.

¹⁵ [Legislative proposals for addressing concentrated landownership](#)

¹⁶ [Balancing rights and interests in Scottish land reform](#), p.15.

¹⁷ [Policy Memorandum accessible](#), p.28

the question as to why the Government have not explicitly engaged with public interest considerations, despite SLC recommendations and the consulting on a PIT. **CLS would welcome the Committee scrutinising at Stage 1 why the decision was made to not explicitly engage with the public interest.**

The ‘community sustainability’ approach in the transfer test is too narrow and misses, for example, biodiversity and net zero public interest objectives in relation to a specific piece of land. Also, focusing on community sustainability eliminates the model being applicable to landholdings which no longer have active or viable communities living on or near them, which is not necessarily in line with the public interest and undermines the Government’s own objectives around tackling depopulation.

The use of ‘community sustainability’ indicates a wider issue within current Scottish land reform legislation which is only focused on a community-centric view on land, rather than a broader public interest approach to landownership. Twenty-one years of community-led land reform has delivered great opportunities for community-led sustainable development but has not changed the concentrated landownership pattern. Scotland needs a root and branch approach to land reform which addresses structural, public interest considerations, not just community sustainability.

The public interest is the justification for any government to interfere with property rights, as such centring this rather than ‘community sustainability’ is a far stronger legal position and is likely to establish clearer precedent to avoid future legal challenge – as research for both the Scottish Government and SLC have made clear.¹⁸

Key areas of amendment in the Land Reform Bill to create a Public Interest Test:

1. **Part 2A on Lotting of Large Land Holdings needs to be properly re-defined as a Public Interest Test** 67N could be reframed as Ministerial Public Interest Test Decision – with lotting named as a potential outcome
2. **Creation of accompanying guidance on public interest considerations** which inform PIT and lotting decisions mentioned at 67A
3. **Land Management Plans (LMP) to be informed by accompanying guidance (under 44B)** which follows the same public interest considerations as for the PIT to ensure the legislation is proportionate and predictable from a regulatory perspective.
4. **Alignment of thresholds for LMP and PIT** at 500ha, 25% of any inhabited island and sites of community significance to ensure the legislation is proportionate and predictable from a regulatory perspective – 44D and 67H.

CLS would welcome the Net Zero Committee scrutinising why the Scottish Government have not proceeded with a Public Interest Test and recommending in their Stage 1 Report that a Public Interest Test be included through amendment.

¹⁸ [A Review of Evidence on Land Acquisition Powers and Land Ownership Restrictions in European Countries and Balancing rights and interests in Scottish land reform.](#)