

CALEDONIA BRIEFING No. 7

The Future of Land Reform in Scotland

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INTRODUCTION

This briefing paper provides an analysis of the land reform proposals announced by the Scottish Government in November and December 2014. The core of these are outlined in *A Consultation on the Future of Land Reform in Scotland* (the Consultation) published on 3 December 2014.¹ Other elements of the wider land reform programme include the Community Empowerment Bill currently being considered by the Scottish Parliament, succession law, crown estate devolution, a review of compulsory purchase legislation and the Council Tax Review to be undertaken in 2015.

The Consultation was published on 3 December 2014 and responses are to be made to the Scottish Government by 10 February 2015. Copies can be downloaded at

www.scotland.gov.uk/Publications/2014/12/9659/downloads

which contains full details of the consultation and how to respond including the option for an online response at

<https://consult.scotland.gov.uk/land-reform-and-tenancy-unit/land-reform-scotland>

This Briefing covers three broad subjects;

1. The Land Rights and Responsibilities Policy
2. The proposed contents of the Land Reform Bill
3. Other elements of the wider land reform programme.

The consultation invites responses to a wide range of questions but you should not feel constrained in your response to the way the Consultation frames the issues. This briefing should be read in conjunction with the Consultation Paper and (preferably) the final report of the Land Reform Review Group available to download here;

www.scotland.gov.uk/About/Review/land-reform/events/FinalReport23May2014

A BRIEF HISTORY OF LAND REFORM

Chapter 2 of the Consultation provides a brief history of recent land reform in Scotland. In 1997 the Scottish Office established the Land Reform Policy Group (LRPG) chaired by Lord Sewel to develop a series of recommendations that could provide the basis for legislative proposals in the Scottish Parliament.² The remit was restricted to rural Scotland with the objective of removing the barriers to the sustainable development of rural communities. Nevertheless, the proposals included important reforms to land law across urban and rural Scotland such as the abolition of feudal tenure, establishment of national parks, crofting communities right-to-buy, access legislation and reform of tenement law.

The final recommendations of the LRPG formed the basis for a series of reforms undertaken by the Scottish Parliament between 1999 and 2003. Since then, land reform

¹ See www.andywightman.com/?p=3980 for summary.

² See www.scotland.gov.uk/Topics/farmingrural/Rural/rural-land/right-to-buy/Resources/Land-Reform/2007Research

has lost momentum. In July 2012 the Scottish Government announced the establishment of the Land Reform Review Group (LRRG) with a remit to;

- *Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland;*
- *Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development;*
- *Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland.*

The Review group published its final report in May 2014 and the Scottish Government has responded by publishing the Consultation which contains the formal response by Scottish Ministers to each of the Review Group's recommendations.

This is a significant moment in the history of land reform in Scotland. There is now a recognition and an apparent willingness by legislators to see land reform as an ongoing process and to approach the topic as an integrated programme of reform across urban, rural and marine Scotland with implications that go well beyond its historic portrayal as a rural or even an exclusively Highland topic. For far too long urban and rural land issues have been tackled in isolation while the land mass and marine territory (foreshore and seabed) have rarely been seen as an integral part of land reform.

Land reform is about changing the legal, administrative and fiscal relationship between society and land in order to deliver public policy in areas such as housing, development, the environment, agriculture and forestry in a democracy. It is the system within which rights to land are defined, held and exercised. It is a system governed by law passed by Parliament on behalf of the people of Scotland. It is not about the current proprietors of land or their personal interests. It is about the system within which we all, whether owners of land or not, determine how land should be held and used. The system is a public system and it is legitimate and proper for the public to seek to inquire, debate, reform and adapt it whenever it likes.

This briefing is a contribution to this process of public engagement.

LAND RIGHTS AND RESPONSIBILITIES POLICY

Background

In order to ensure that the framework of land rights (that is to say the legal, political and fiscal rules that govern land relations) continues to meet the needs of society both now and in the future, it is useful to be clear about the principles that underpin such a framework.

In 2014 the LRRG recommended that

The Review Group supports the Scottish Government's aim of "a fairer, or wider and more equitable, distribution of land in Scotland...with greater diversity of land

ownership". The Group believes that this requires an integrated approach to developing measures which help deliver this ambition. The Group recommends that the Government should develop a National Land Policy for Scotland, taking full account of international experience and best practice.³

In response to this recommendation, the Scottish Government has drafted "Land Rights in a 21st Century Scotland" comprising a vision and seven principles (see box below).

Land Rights in a 21st Century Scotland

The relationship between the people living in Scotland and the land of Scotland is of fundamental importance. The land of Scotland is a finite resource and the land rights that govern how the land is owned and used have a crucial influence on the wellbeing, economic success, environmental sustainability and social justice of the country. This statement proposes a vision and set of principles to guide the development of public policy on the nature and character of land rights in Scotland.

Vision

For a strong relationship between the people of Scotland and the land of Scotland, where ownership and use of the land delivers greater public benefits through a democratically accountable and transparent system of land rights that promotes fairness and social justice, environmental sustainability and economic prosperity.

Principles

1. The ownership and use of land in Scotland should be in the public interest and contribute to the collective benefit of the people of Scotland.
2. There should be clear and detailed information that is publicly available on land in Scotland.
3. The framework of land rights and associated public policies governing the ownership and use of land, should contribute to building a fairer society in Scotland and promoting environmental sustainability, economic prosperity and social justice.
4. The ownership of land in Scotland should reflect a mix of different types of public and private ownership in an increasingly diverse and widely dispersed pattern, which properly reflects national and local aspirations and needs.
5. That a growing number of local communities in Scotland should be given the opportunity to own buildings and land which contribute to their community's wellbeing and future development.
6. The holders of land rights in Scotland should exercise these rights in ways that recognise their responsibilities to meet high standards of land ownership and use.
7. There should be wide public engagement in decisions relating to the development and implementation of land rights in Scotland, to ensure that wider public interest is protected.

The Scottish Government will take into account in all its policies the vision and principles set out in this document.

³ LRRG Report, para 36, page 168.

This is a welcome development but such a statement of principles is not of itself a policy and thus not a full response to the recommendation of the LRRG. In evidence to the LRRG, Robin McLaren, a global expert in land administration observed that,

There is no single source of land policy or National Land Policy - rather, the policies on land in Scotland are located in numerous sources such as national development policies, land use strategies, laws and regulations and even as the result of administrative practices. Also, there are numerous policies across the government directorates and agencies that touch on land, such as policies on housing, education, natural heritage, economic development, etc. This patchwork of land policies makes it problematic for these land policies to collectively align and effectively support the vision for Scotland and ensure that land effectively supports Scotland's future needs.

“Land Rights in a 21st Century Scotland” is thus merely the first stage in developing a National Land Policy. In the absence of such a policy, however, “Land Rights in a 21st Century Scotland” provides a valuable series of high-level principles to guide policy making in relation to land. In particular, it highlights the significance of land rights within a wider human rights framework.

Focus on Land Rights

The focus on land rights is welcome. It is consistent with international norms in land policy and in particular, with the rights-based approach to international development.⁴

A human rights approach to development is now widely entrenched within policy and practice on sustainable development but it is yet to feature much in the debate on land reform. In so far as human rights do appear, they are almost exclusively in relation to Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) which provides a qualified protection of property rights. But, as Professor Alan Miller, Chair of the Scottish Human Rights Commission noted in his evidence to the Scottish Parliament recently,

The Scotland Act 1998 calls on the Scottish ministers to observe and implement international obligations, of which one—but only one—is the International Covenant on Economic, Social and Cultural Rights, which places a duty on the Scottish ministers to use the maximum available resources to ensure progressive realisation of the right to housing, employment, food and so on— that is, it sees land as a national asset, which is to be used for the progressive realisation of what we might call sustainable development.

Therefore, what human rights provides is a broader impetus for land reform, rather than an inhibition, as is suggested in the way that the issue is currently couched—that is, in questions about whether a landowner has a red card that can be used with reference to the ECHR to stifle discussion about different use of the land. That is what is missing from the policy framework.⁵

⁴ See www.ohchr.org/Documents/Publications/FAQen.pdf and, in relation to Scotland, www.scottishhumanrights.com/careaboutrights/whatisahumanrightsbasedapproach

⁵ Scottish Parliament Rural Affairs, Climate and Environment Committee, 3 December 2014, Column 45.

This wider perspective on land rights was highlighted in a discussion paper written by Professor James Hunter and delivered at the Bunchrew International Workshop on land rights that concluded with the Bunchrew Land Declaration.⁶

The focus on land rights is also consistent with international guidelines on land tenure governance. In 2012, the United Nations Food and Agricultural Organisation formally adopted the *Voluntary Guidelines on the Responsible Governance of Tenure* following a three-year process by 700 delegates from 133 countries.⁷ The Guidelines were endorsed by the 2013 G8 Summit and the UK Government has adopted them in relation to its overseas development programme. The Guidelines, however, apply to all countries. Neither the UK or Scottish Government has yet adopted them in relation to land rights within their respective jurisdictions.

Commentary

The Vision and Principles represent an important attempt to frame a high-level statement to guide policy making in the future. Some of the wording could be more elegant and being high-level, it leaves much unsaid. For example, what exactly are the responsibilities that the holders of land rights have that should be exercised responsibly? To what extent is it envisaged that some of these principles might eventually be enshrined in the land tenure system itself - a system that currently only confers rights and not responsibilities?

The Vision & Principles might even represent the first stages in a possible more radical reframing of property rights as envisaged by the academic Edward Dommen,

Firstly, property rights should be assigned to whomever is best placed to manage the property in the public interest. Secondly, it should not be assumed that it is necessary to assign all rights over a given item, i.e. managerial responsibilities for it, to a single owner; they can be divided up and allocated in whichever way best meets the first objective. Thirdly, efficiency is not the only goal: overriding priority is due to the needs of the poor. Finally, and in any event, the allocation of property rights is essentially a matter of public policy.⁸

The Vision and Principles statement is not intended to be enshrined in law. Its value will be in how it is used to guide public policy in all areas of devolved responsibilities that impinge on land rights such as housing, environmental policy and property taxation. Critical to its impact will be whether it endures beyond this session of Parliament and is adopted by future administrations. One way of helping to ensure that it does is for Parliament to have the opportunity to vote on the statement in order to build cross-party consent for its content.

The Consultation asks

Q 1. Do you agree that the Scottish Government should have a stated Land Rights and Responsibilities Policy?

⁶ Hunter's paper is here www.andywightman.com/docs/Hunter_rights_based_land_reform.pdf The Bunchrew Land Declaration is here www.andywightman.com/docs/Bunchrew_Land_Declaration.pdf

⁷ See www.fao.org/nr/tenure/voluntary-guidelines/en/

⁸ Dommen, E. (1999) Property and the Protestant Ethic, *Metanoia* 9(4), Prague.

Q 2. Do you have any comments on the draft Land Rights and Responsibilities Policy?

Q 3. Considering your long term aspirations for land reform in Scotland, what are the top three actions that you think the Scottish Government should take?

PROPOSAL 1. SCOTTISH LAND REFORM COMMISSION

In his concluding remarks in the Foreword to the final report of the Land Reform Policy Group in 1999, Lord Sewel noted that,

..it is crucial that we regard land reform not as a once-for-all issue but as an ongoing process. The Parliament will be able to test how this early legislation works and how it effects change. They will then have the opportunity to revisit and refine their initial achievement. And in addition there is a range of recommendations for further work, which will generate a longer-term agenda for further legislation.

These present recommendations are therefore by no means the final word on land reform; they are a platform upon which we can build for the future.

Many of the recommendations of the LRRG were implemented but not all. A series of Action Plans monitoring progress was terminated in 2003. The 2003-2007 Parliament saw some of the early legislation coming into force but land reform as a programme of reform then ground to a halt. The LRRG observed in its final report that,

The first session of the Scottish Parliament had a land reform programme established by the Scottish Executive. In contrast, since 2003, there has been no land reform programme. The land reform measures after 2003 have therefore tended to be specific responses to particular issues, rather than part of any wider land reform strategy or programme.⁹

The LRRG recommended the establishment of a Scottish Land and Property Commission.

The SLPC would provide a single, overall and integrated focus on the different aspects of Scotland's system of land ownership, including land information, property law, land use, fiscal measures and land markets. It should have the expertise to provide a central overview that links social, environmental and economic public policies with the legal and technical aspects of Scotland's system of land ownership.

The Review Group considers that the SPLC should operate within the framework of the proposed National Land Policy.

The Review Group considers that there is a need for a single body with responsibility for understanding and monitoring the system governing the ownership and management of Scotland's land, and recommending changes in the public interest. The Group recommends that the Scottish Government should establish a Scottish Land and Property Commission.¹⁰

⁹ LRRG Final Report para. 11, page 25.

¹⁰ LRRG Final Report para. 21, page 238.

In the Scottish Government's Programme for Government 2014-15, a Land Reform Commission was proposed that would be,

*tasked with developing the evidence base for future reform, supporting public debate and holding this and future Governments to account.*¹¹

The Consultation proposes to establish a Scottish Land Reform Commission and notes that,

*While the exact structure and remit would need to be defined, this Commission could have responsibilities such as: promoting land reform; collecting evidence and carrying out studies; and monitoring the impact and effect of law, policies and practices on landownership in Scotland.*¹²

Commentary

Brian Wilson, writing in the West Highland Free Press wrote that this proposal could well be the most important of all the recommendations of the LRRG.

*Setting up new quangos is not, of itself, a radical device. But in this case it is an absolutely essential one. What this recommendation will, if acted upon, establish is both the continuity of the land reform process and the principle of interventionism in how the land of Scotland is owned and managed. And recent history confirms that these are two underpinning essentials.*¹³

In light of the experience of land reform in the Scottish Parliament and because of the wide range of policy issues that relate to land rights (housing, the environment, infrastructure, urban development etc.) he is probably correct. It would seem very useful to establish such a body to ensure that land reform never again becomes a topic that is so easily swept into the long grass. When important matters of public policy arise that relate to land, it is important that there is an authoritative and well-informed body of opinion able to highlight relevant matters.

Key to the success of any such Commission will be its structure and remit. Clearly it needs to be autonomous and independent of Government. Membership also needs to be free of vested interests and able to respond to a clear statutory remit without compromise. It must also play a role in ensuring that land reform remains in the public eye and respond to matters of concern to the public. It should be an independent source of information dissemination, data, analysis, policy thinking and advice to Parliament.

The LRRG recommended that such a Commission "should operate within the framework of the proposed National Land Policy". Given that there are no current proposals to develop such a policy, the role and remit of the Commission might include being responsible for developing one.

¹¹ Scottish Government Programme for Government 2014-2014, page 77.

¹² Consultation Paper para. 43, page 10.

¹³ Brian Wilson, West Highland Free Press, 30 May 2014.

Finally, if this proposal is in response to the LRRG recommendation, some thought needs to be given to whether the alternative name being proposed is appropriate. The LRRG proposed a Scottish Land and Property Commission.

The Consultation asks

Q. 4. Do you agree that a Scottish Land Reform Commission would help ensure Scotland continues to make progress on land reform and has the ability to respond to emergent issues?

Q. 5. What do you think the advantages or disadvantages of having a Scottish Land Reform Commission would be?

Q. 6. Do you have any thoughts on the structure, type or remit of any Scottish Land Reform Commission?

PROPOSAL 2. LIMITING LEGAL ENTITIES

The LRRG recommended that,

*the Scottish Government should make it incompetent for any legal entity not registered in a member state of the European Union to register title to land in the Land Register of Scotland, to improve traceability and accountability in the public interest.*¹⁴

This recommendation was made against the background of concerns over transparency and accountability of legal persons (i.e. not individual human beings or “natural persons”) that register title to land and property in offshore jurisdictions such as Grand Cayman, British Virgin Islands and Panama. Not only is it impossible to establish the beneficial owner of such companies, but they provide avenues for illegal activity.¹⁵

The EU is currently engaged in a process of agreeing a new money-laundering directive that would require member states to establish registers of beneficial ownership.¹⁶ Transparency International defines beneficial ownership as follows.

*A beneficial owner is the real person who ultimately owns, controls or benefits from a company or trust fund and the income it generates. The term is used to contrast with the legal or nominee company owners and with trustees, all of whom might be registered the legal owners of an asset without actually possessing the right to enjoy its benefits. Complex and opaque corporate structures set up across different jurisdictions, make it easy to hide the beneficial owner, especially when nominees are used in their place and when part of the structure is incorporated in a secrecy jurisdiction.*¹⁷

The UK Government has committed to setting up a register of beneficial ownership of companies and this is being taken forward as part of the Small Business, Enterprise and

¹⁴ LRRG Final Report para. 11 page 36.

¹⁵ See *The Poor Had No Lawyers*, Birlinn, 2013. Chapter 29 and a recent blog on the ownership of Kildrummy Estate in Aberdeenshire www.andywightman.com/archives/4024

¹⁶ See www.transparencyinternational.eu/focus_areas/anti-money-laundering/

¹⁷ Source: transparency International http://files.transparency.org/content/download/710/3048/file/2014_FinancialTransparencyGlossary_EN.pdf

Employment Bill currently before the UK Parliament. Section 78 of the Bill requires companies “to keep a register of people who have significant control over the company”.¹⁸

In a speech on 31 Oct 2013, the Prime Minister said that,

We need to know who really owns and controls our companies, not just who owns them legally, but who really benefits financially from their existence. For too long a small minority have hidden their business dealings behind a complicated web of shell companies, and this cloak of secrecy has fuelled all manners of questionable practice and downright illegality.

*This summer at the G8 we committed to do just that: to establish a central register of company beneficial ownership. And today I'm delighted to announce that not only is that register going to go ahead, but it's also going to be open to the public*¹⁹

Registers of beneficial ownership across the EU only apply to companies registered within the jurisdiction of member states. Hence they will not assist in revealing who is behind a company in Grand Cayman. That is where the Scottish Government's proposal comes in. By limiting legal persons to those registered within the EU it ensures that they come within the scope of any new EU regulations.

The Proposal

The proposed reform is to make it incompetent for any legal person (there are no proposed restrictions for individuals or “natural persons”) not registered in a member state of the EU (or the European Economic Area) to register a title (whether a long lease or ownership) to land in Scotland in the Land Register. Were anyone to try to do so, the Keeper of the Registers of Scotland would reject the application for registration.

The Consultation highlights some technical issues that need to be resolved in the conveyancing process and the fact that exemptions will have to be made for diplomatic missions. But the key legislative proposal is clear and straightforward.

Commentary

This proposal would be effective in preventing the future use of offshore tax havens as places to incorporate and register title to land in Scotland. It also aligns itself well with the proposed register of beneficial ownership within the Small Business, Enterprise and Employment Bill. All titles held by legal persons will be within the EU and all such corporate entities will be required to disclose their beneficial ownership in a register.

The provision will have to be compatible with EU law - most importantly the Treaty on the Functioning of the EU (TFEU), Article 26 of which provides for the internal market and free movement of goods and capital. Article 345, however makes clear that this in no way prejudices the rules in Member States governing the system of property ownership.²⁰

Furthermore there is no discrimination involved. Individuals from anywhere in the world are all free to buy land in Scotland. They simply need to register it either in their own name or

¹⁸ See <http://services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html>

¹⁹ See www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013

²⁰ See <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=en>

in an incorporated body registered in any member state of the EU. Inward investors, for example, typically set up UK subsidiary companies to hold assets and contract within the UK.

The one issue that is problematic is whether such a provision can be made retrospective. This would involve existing companies (such as the Hanky Panky Corporation registered in Bermuda) to transfer title to an EU registered company. On one reading of the situation, this is problematic and, indeed, that is the view taken by the Scottish Government in the consultation (para. 47). This view probably arises as a consequence of Article 1 Protocol 1 of the European Convention on Human Rights which provides that,

(1) 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.

(2) 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.

The Scottish Parliament is bound to comply with this and other Convention rights. The European Court of Human Rights has indicated that this Article contains three distinct rules:

(1) The general principle of peaceful enjoyment of property (first sentence of the first paragraph);

(2) The rule that any deprivation of possessions should be subject to certain conditions (second sentence, first paragraph);

(3) The principle that States are entitled to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose (second paragraph).²¹

Were this proposal to be applied retrospectively, it would require landowners who currently own land held by offshore entities to transfer ownership to a compliant entity. That could be the human beneficiary of Hanky Panky Corporation or it could be an incorporated body registered within the EU. The ECHR obliges Governments to “secure to everyone *within their jurisdiction* the rights and freedoms defined in the Convention.” Hanky Panky Corporation, it could be argued, is not within the jurisdiction of any contracting party to the ECHR and thus cannot argue any violation of convention rights.

But even if it was (because it has a registered interest in land in Scotland), such an obligation is arguably entirely consistent with the public interest provisions of the convention. Moreover, the beneficial owner would not be losing their beneficial ownership. They would still enjoy possession of their land but they would now have to make a different arrangement with regard to holding title to the land. Their convention rights would not have been violated.

It appears that there is scope to make such a provision retrospective. This could be done by requiring all existing owners registered outside the EU to transfer title to a compliant entity within, say, 5 years of a date to be set.

²¹ Harris, O’Boyle & Warbrick, Law of the European Convention on Human Rights. p.666.

The Consultation asks

Q. 7. Do you agree that restricting the type of legal entities that can, in future, take ownership or a long lease over land in Scotland would help improve the transparency and accountability of land ownership in Scotland?

Q. 8. Do you agree that in future land should only be owned (or a long lease taken over land) by individuals or by a legal entity formed in accordance with the law of a Member State of the EU?

Q. 9. What do you think the advantages or disadvantages of any restriction would be?

Q. 10. How should any restriction operate and be enforced, and what consequences might follow if the restriction is breached?

PROPOSAL 3. INFORMATION ON LAND, ITS VALUE & OWNERSHIP

Proposal 3 is designed to make information on land, its value and ownership more open and accessible. The LRRG called for information about land owned by public bodies to be made more readily available.²² The House of Commons Scottish Affairs Committee, in its Interim Report on land reform highlighted the lack of a national land information system and the fact that other countries such as Turkey and Latvia have more advanced information systems.²³ This proposal may or may not require legislation depending on what is deemed to be necessary.

There is a great deal of data held about the ownership, use and value of land in Scotland. Information is held by bodies such as Historic Scotland on ancient monuments, Registers of Scotland on landownership, Marine Scotland on the marine environment, Scottish Natural Heritage and Scottish Environmental Protection Agency on environmental data, Scottish Assessors on land and property values, local authorities on land use planning and the Scottish Government on agricultural land administration. Some of this can be accessed via websites and portals. For example,

Environmental data	www.environment.scotland.gov.uk
Forestry information	http://maps.forestry.gov.uk/imf/imf.jsp?site=fcscotland_ext&
Land values	www.saa.gov.uk
Landownership	www.ros.gov.uk/register/direct
Who Owns Scotland	www.whoownsscotland.org.uk
Community land rights	http://rcil.ros.gov.uk/RCIL/default.asp?Category=RCIL&Service=home
River basins	http://map.sepa.org.uk/rbmp
Scheduled Monuments	http://pastmap.org.uk
The Crofting Register	www.crofts.ros.gov.uk/register/search

These information sources suffers from two key problems. Firstly they are not held in one easily-accessible place but by different agencies in different formats. Secondly, key data (principally ownership records held by Registers of Scotland) is only available for a fee. Even where it is meant to be made available under EU Directives such as the INSPIRE directive on geographic information, the Registers of Scotland merely publishes a data file which one has to pay them money (£3 + VAT) to decode each record.²⁴

²² LRRG Final Report para. 28, page 53.

²³ Scottish Affairs Committee. Land Reform in Scotland: Interim Report HC877 March 2014. www.publications.parliament.uk/pa/cm201314/cmselect/cmsscota/877/877.pdf

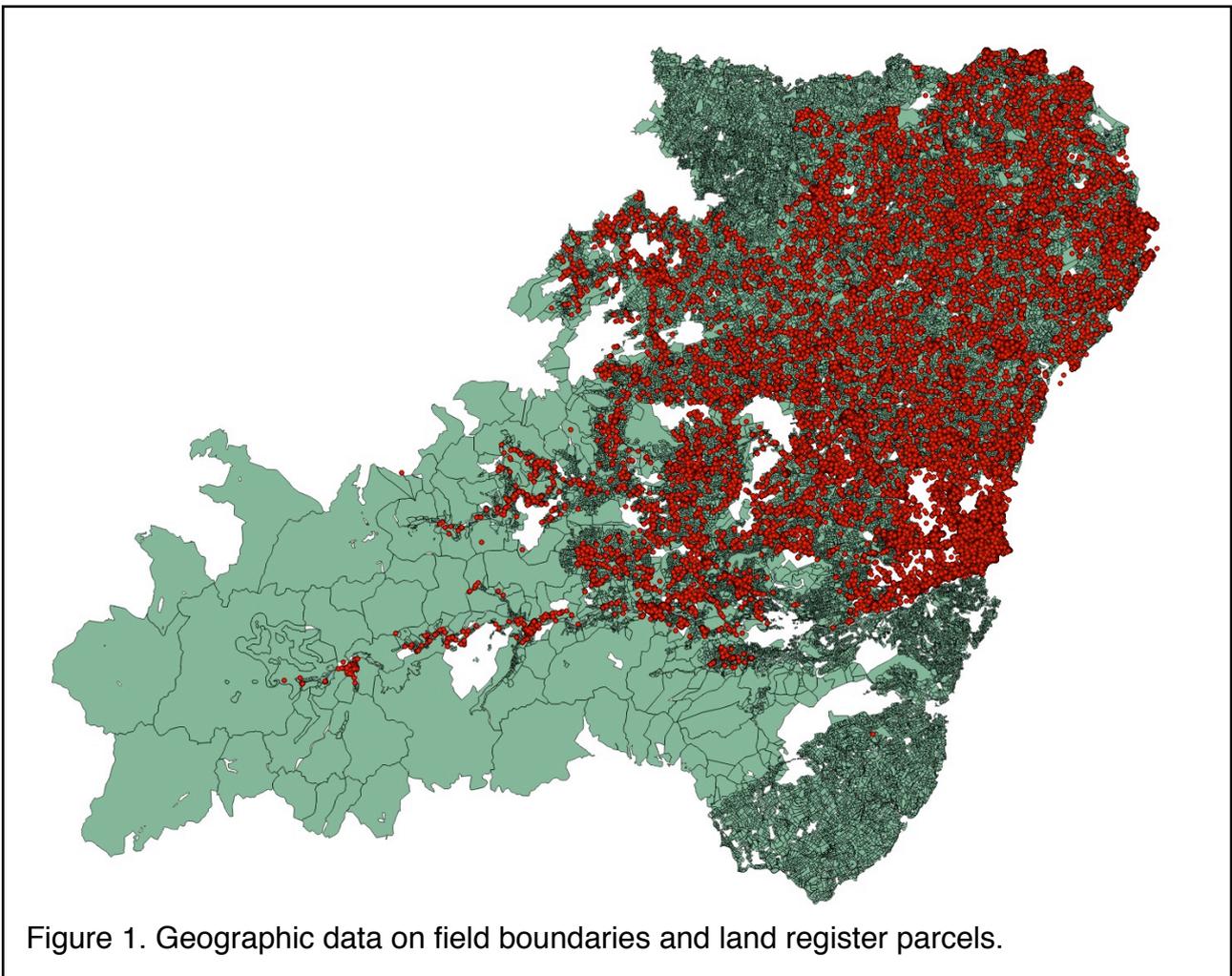
²⁴ See <https://ros.locationcentre.co.uk/inspire/> In England and Wales the full polygons are available for free.

Commentary

There is a long history of efforts to bring together disparate sources of information and data. The current industry-led initiative is UnifiScotland who are holding a conference on 10 March to discuss a land and property database for Scotland.²⁵ Historically there has been a reluctance to invest the time and effort required to build a modern landownership system and a sensitivity, (in particular about ownership information) leading in one case to a Government agency redacting ownership information from documents that could be obtained from another source unredacted.²⁶

The map in Figure 1 shows the potential for a modern land information system. It consists of field boundaries for the current Aberdeenshire Council area held by the Scottish Government and points showing the location of registered land held by Registers of Scotland. The data associated with these locations is not publicly available in the case of the Field Boundaries and to decode the points involves a payment (see above).

The public availability of free-to-use open data about Scotland's land is one of the most important keys to unlocking informed debate and new ideas about land reform.



²⁵ See <http://unifiscotland.com/>

²⁶ Historic now routinely redact ownership information from Scheduling documents made available through its <http://pastmap.org.uk> service that are in the public domain at Registers of Scotland.

One example of an integrated, publicly-available online land information system is that designed for the State of Montana in the USA (see Figure 2 below).

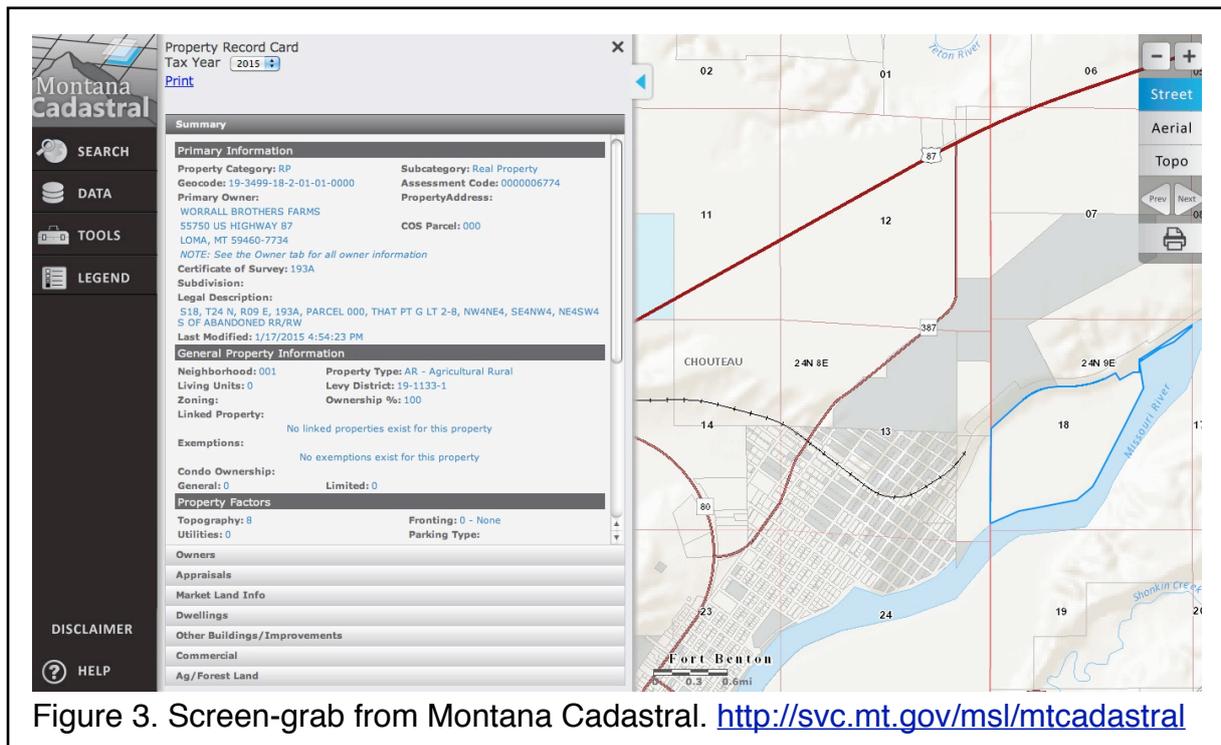


Figure 3. Screen-grab from Montana Cadastral. <http://svc.mt.gov/msl/mtcadastral>

The Consultation asks

- Q. 11. Do you agree that better co-ordination of information on land, its value and ownership would lead to better decision making for both the private and public sectors?
- Q. 12. Do you hold data you could share or is there any data you would wish to access?
- Q. 13. What do you think the advantages or disadvantages of wider and more flexible sharing of land information would be and do you have any recommendations about how this can best be achieved?

PROPOSAL 4. SUSTAINABLE DEVELOPMENT TEST

Landowners in the private and public sector across urban and rural Scotland play a key role in acting as gatekeepers to the use and availability of land. Various policy instruments are available to ensure that land is used in the public interest and to promote sustainable development. These range from fiscal incentives, planning controls and regulations to powers of compulsory purchase and community rights to buy. But in some areas of Scotland the scale of landownership, the motivations of the owner and the decisions they take act as a barrier to local environmental, social and economic development

Proposal

The proposal is to create a new power of Ministerial direction to overcome barriers such as the scale of ownership or decisions of landowners. Where there is evidence of such

barriers, then landowners could be directed by Scottish Ministers or other public bodies to take steps to remove them. This could involve a direction to take specific action or to sell or release land.

Commentary

The Consultation does not expand a great deal on the proposal and it is clear that the Government is either open-minded or perhaps uncertain about what such a power might entail. Over the years there have been many instances where landowners have, for whatever reason, chosen not to co-operate with local development efforts which rely on the release of land. They are perfectly within their rights not to do so. However, where the scale of ownership (which will vary according to the circumstances) is such that one or a very few people exercise power in such a way it can stifle progress leading to decline and dereliction.

For a long time, communities have been losing power over their immediate environment and the decision-making that is involved. Local government has been centralised over the past 40 years and little has changed in the way in which land is owned to empower communities. Measures like the Land Reform (Scotland) Act 2003 (the community right-to-buy) are blunt and complex instruments. Likewise local authorities powers of compulsory purchase represent another blunt response to the need to release land for the public interest.

In the past there have been high-profile instances of this such as the infamous “Dr. No” on the Isle of Raasay whose opposition in 1972 to selling a fifth of an acre of land for a ferry terminal led to it being built in a far less suitable location.²⁷ Writing at the time, Professor Tony Carty and John Ferguson highlighted the problem in the following terms.

The sheer size of many estates makes individual purchases significant in themselves because of the vast acreages which change hands. The political, social and economic consequences of such purchases have major implications both at local and national level and yet they depend upon the personal choice of a very small number of individuals who are very often ill informed even as to their own best economic interest let alone that of local communities.

Their paper, *A Comparative Study of Land Purchase Standards in Scotland and Western Europe*, remains a useful if dated analysis of how Scotland compares with other European countries in the mechanisms available to intervene in land markets.²⁸

Less high-profile examples than Dr. No have continued to arise over the years although there has been no systematic study of the phenomenon beyond reports in the newspapers. Very often initiatives and ideas do not even get as far as the early stages of development because of the known anticipated views of the owner of key land assets. A location such as the Cabrach in Banffshire is a good example of an area where local development has been stifled.

²⁷ See www.heraldscotland.com/rigging-for-victory-work-begins-on-raasay-s-ferry-terminal-1.876091

²⁸ Available at www.caledonia.org.uk/land/documents/Land_Purchase_Patterns_&_State_Control.pdf

The LRRG proposed a menu of new community rights as well as a Compulsory Sale Order to be exercised by local authorities.²⁹ The Scottish Government's response to these recommendations is that they are under consideration.³⁰ This proposal for a power of direction appears to be an attempt to bridge the gap between inaction and the kinds of statutory powers proposed by the LRRG. It could even be framed as a general enabling power with the specific mechanisms to be outlined in secondary legislation at a later date.

A public interest power available to Scottish Ministers or other public bodies to intervene, probably as a last resort, in cases where the scale of ownership of decisions of landowners is a barrier to a community's aspirations would be a very useful sanction that would give confidence to communities and stimulus to landowners to work together for a mutually beneficial outcome. Crucially it would help balance the power disparity between local people and landowners and provide greater leverage.

The circumstances in which such a power could be invoked and the evidence needed to trigger it require careful thought. A possible way forward could involve the introduction of compulsory leasing of underused land linked to the implementation of the Local District Plan. Similar types of approach are used in Europe in Italy, Germany and Switzerland. There may be alternative means (including the proposals of the LRRG referred to above and fiscal powers) of achieving the same ends.

Clearly this is one proposal where quite a bit of further thought is needed. Any statutory direction needs to be precisely worded, focussed, targeted and straightforward to understand and to use.

The Consultation asks

Q. 14. Do you agree that there should be powers given to Scottish Ministers or another public body to direct private landowners to take action to overcome barriers to sustainable development in an area?

Q. 15. What do you think the benefits would be and do you have any recommendations about how these can best be achieved?

Q. 16. Do you have any concerns or alternative ways to achieve the same aim?

PROPOSAL 5. PROACTIVE ROLE FOR PUBLIC SECTOR MANAGEMENT

Public bodies in Scotland such as local authorities, Scottish Ministers, Scottish Natural Heritage and Health Boards own around 12% of the land area of Scotland.³¹ All of this land is owned and managed under specific statutory arrangements which often include the purposes for which any public body can hold land. It has become evident in the past decade or so that these arrangements can be restrictive. Social housing, for example, might be a suitable use for land currently held by a Health Board or managed by the Forestry Commission but, as the Consultation notes,

²⁹ LRRG Final Report Section 17 and, in particular, pages 101-103.

³⁰ See Scottish Government Response to Recommendations 18 and 19 on page 29 of Consultation.

³¹ 12% is derived from the author's own research. See Tables 1c and 4 in Chapter 12 of *The Poor Had No Lawyers*. The LRRG has a figure of 11% (Fig 7 page 52). The Consultation has a figure of 16.5% (para 66) - I think this may be an error.

*It is clear public land should be managed for the greatest overall benefit, balancing a number of differing and sometimes conflicting public needs.....however, the legal framework for some public bodies can be a significant constraint on the range of operations that they can undertake.*³²

The Proposal

The proposal suggests legislative reform to “improve the ability of public sector organisations, such as Forestry Commission Scotland, to manage public land to promote social, economic and environmental outcomes in the public interest.”³³ The Consultation seeks views on how best to achieve this.

Commentary

Public bodies such as Scottish Natural Heritage, Scottish Enterprise and Health Boards exist for a purpose. This purpose is stated in the legislation that established the bodies concerned. It is normal for such bodies to have the power to acquire and own land to advance these purposes. So, for example, Health Boards need to acquire land on which to build hospitals and clinics and local authorities need land on which to build schools and leisure facilities.

As time has passed, however, some of this land has become surplus to requirements or new uses have emerged that might be better suited to particular sites. If such bodies had greater flexibility in what they could do with their land or it was easier to transfer the ownership or management to another public body then it might be possible to make more efficient use of the public estate. In this sense, the public sector is as much part of delivering the land reform agenda as the private sector. After many decades, it is worth asking whether the areas of land that are currently in public ownership need still to be held this way. Might they be better owned by community bodies or indeed sold to the private sector?

Some of these changes are already underway. The Forestry Commission has been undertaking a “re-positioning” programme, selling land that does not deliver much by way of public benefits and acquiring other land that does. Asset transfer by local authorities is now well-established as a means of moving land and property out of council ownership into the hands of community organisations where they can best make use of it.

However, there are still restrictions and limitations on how flexible public bodies can be as a result of the legislative framework in which they are operating. This proposal is designed to create this flexibility although it is worth noting that local authorities already have very flexible powers to acquire land and that it is accounting policies, best value duties and or EU State Aid rules that sometimes inhibit their freedom to dispose of it.

A possible means by which greater flexibility can be achieved would be by a straightforward power provided to a defined list of public bodies to the effect that their competence to acquire and manage land is not restricted to their own purposes but can be extended to any of the functions of any of the other bodies.

³² Consultation, para. 67.

³³ Consultation, para.69.

The Consultation asks

Q. 17. Do you agree that public sector bodies, such as Forestry Commission Scotland, should be able to engage in a wider range of management activities in order to promote a more integrated range of social, economic and environmental outcomes?

Q. 18. What do you think the benefits would be and do you have any recommendations about how this can best be achieved?

Q. 19. Do you have any concerns or alternative ways to achieve the same aim?

PROPOSAL 6. DUTY OF COMMUNITY ENGAGEMENT ON CHARITIES

Organisations with charitable status own sizeable areas of land in Scotland. They fall into four main types.

1. Environmental and cultural non-government organisations such as the National Trust for Scotland (NTS), Royal Society for the Protection of Birds (RSPB), John Muir Trust (JMT) and Scottish Wildlife Trust (SWT). Between them they own over 480,000 acres of land across Scotland.³⁴

2. Educational and other similar bodies such as universities, colleges, churches and private schools. They mainly own and manage urban estates and facilities although some, such as SRUC (which manages a large hill farm in Perthshire) own some large rural properties. The Church of Scotland owns glebes around Scotland and the Church of England Commissioners are the owners of the largest private forestry estate in Scotland.

3. Community bodies own land and community facilities such as village halls and public toilets. These include the large community landowners (Eigg, Assynt, Gigha, North Harries etc.) as well as a host of other community bodies and development trusts that own smaller areas of land and property in urban and rural Scotland.³⁵

4. Landed estates or historic buildings that were formerly owned privately but were subsequently transferred to charitable ownership often to avoid tax liabilities. Such charities today are typically governed by a small and restricted network of family members with some exclusive powers of nomination given to the former owner. Examples include Applecross Estate, Clan Donald Estate, and substantial parts of the Isle of Bute, Drummond Estate and Atholl Estate.

Proposal

The proposal is to include in the Bill “a specific stand alone duty on trustees of a charity that when considering the management, use or transfer of any land under the charity’s control, the trustees must engage with the local community and consider the potential impact on the local community before taking any decision.”³⁶

³⁴ See *The Poor Had No Lawyers* (2013 edition), Chapter 16.

³⁵ See www.communitylandscotland.org.uk

³⁶ Consultation, para 73, page 15.

Commentary

The proposed duty is not especially onerous and, for a number of charities who own large areas of land, is something that they already do as a matter of good practice. By definition, for example, community organisations (type 3) are accountable to the communities within which they are located and local consultation forms part of the rationale. Large environmental charities such as the RSPB, JMT and SWT (type 1) have a more mixed record but most have developed various levels and degrees of community engagement and consultation.³⁷ Educational and church bodies (type 2) are not typically the owners of large areas of land although the Church of England's estate was acquired in 2014.

The charitable bodies that have most often been the focus of concern have been the growing number of estates that are often popularly regarded as privately-owned but are in fact owned by charities that are often wholly and exclusively under the control of the private family that once owned them (type 4).³⁸ Large estates such as Clan Donald Estate (19,500 acres), Bute Estate (28,300 acres) and Applecross Estate (61,600 acres) are owned and managed by charitable companies or trusts comprising a limited number of individuals who are almost exclusively based at some distance away from the estate with non-existent or very limited accountability to the local community.

In such circumstances, governance arrangements could be improved by, for example, allowing local residents to become full members of the charity, providing for a number of local people to take up a position on the Board of the company (or Trustee of the Trust) and for enhanced local management of the affairs of the charity. This could take the form of something similar to that used by both the Eigg Trust and the Knoydart Foundation who have a set number of elected community representatives on their governing bodies.

Given the range of different types of charitable bodies that own land, this proposal needs further consideration in order to make clear what its intended purpose is. Improved governance and accountability of the type 4 charities, many of which were established to avoid tax liabilities, is one key area where this could be achieved.

The Consultation asks

Q. 20. Do you think a trustee of a charity should be required to engage with the local community before taking a decision on the management, use or transfer of land under the charity's control?

Q. 21. What do you think the advantages or disadvantages would be?

Q. 22. How should "community" be defined?

Q. 23. What remedies should be available should a trustee of a charity fail to engage appropriately with the local community?

PROPOSAL 7. SPORTING RATES

Historically, virtually all public revenues (whether for the Crown or Parliament) were raised from land and associated wealth. Taxes on income are a relatively recent phenomenon and were first introduced in 1798 to help pay for the Napoleonic war. They were the subject of much political argument in the 19th century and only intended to be temporary.

³⁷ See for example Scotlink evidence to the LRRG. www.scotland.gov.uk/Resource/0043/00432938.pdf

³⁸ See, for example, www.landaction.org.uk

The main land tax over the past few centuries was the land tax. Introduced in 1667 by the Scots Parliament, it was levied on all owners of land.³⁹ Modern land tax dates from the Lands Valuation (Scotland) Act 1854 which established a uniform system of land valuation across Scotland with separate valuation rolls compiled for each burgh and county. Valuation rolls recorded individual properties, the names and addresses of owners and tenants and the annual rental value of the property. A rate (or poundage) was paid by the owners of the land.

Section 42 of the 1854 Act stipulated that deer forests and shootings would be subject to rates where they were actually let out. In 1886, the Sporting Lands Rating (Scotland) Act provided that a separate valuation would be made of all shootings and deer forests and that they would all be subject to rating whether let out or not.

Section 7 of the Valuation and Rating (Scotland) Act 1956 provided 100% exemption for all "agricultural lands and heritages" which included the rates payable over land that was "kept or preserved mainly or exclusively for sporting purposes". The shootings and deer forests, however, continued to be liable for the rates established under the 1886 Act until 1994 when they too were abolished.⁴⁰ These exemptions meant, that for the first time in the recorded history of Scotland, the owners of the vast majority of the land area in Scotland ceased to be liable for any local land taxes and the burden fell, instead on houses, factories, offices and other types of non-domestic land.

The abolition of the rates on shootings and deer-forests in 1994 attracted considerable criticism from opposition parties and by the then Chairs of Scotland's Rating Valuation Tribunals who, in a memorandum to the Secretary of State for Scotland, wrote,

"Sporting estates like to describe themselves, when it suits them as being part of a sporting industry. In fact they are part of an inefficient trade which pays inadequate attention to marketing their product, largely because profit is not the prime objective.

These sporting estates change hands for capital sums which far exceed their letting value and which are of no benefit to the area, and are often bought because there are tax advantages to the purchaser, not necessarily in the UK."

Dismissing the argument that sporting estates provide employment and should therefore be freed of the rates burden, the chairmen's report points out that,

*"..local staff are poorly paid, their wages bearing no relation to the capital invested in the purchase price, and it is not unusual to find a man responsible for an investment in millions being paid a basic agricultural wage. Many of the estates use short-term labour during the sporting season, leaving the taxpayer to pay their staff from the dole for the rest of the year. Estates can in many cases be deliberately run at a loss, thereby reducing their owner's tax liability to central funds elsewhere in the UK."*⁴¹

³⁹ The Act of Convention established the Commissioners of Supply (a committee of landowners) whose responsibility was to collect the land tax or cess in every shire. The Commissioners continued with responsibility for county government until 1890 when elected county councils were established.

⁴⁰ Local Government (Scotland) Act 1994 Section 151(1).

⁴¹ See The Poor Had No Lawyers (2013 edition) page 227 and The Herald, 9 June 1994 available here www.andywrightman.com/docs/herald_19940609.pdf

DESCRIPTION AND SITUATION OF SUBJECT		PROPRIETOR	TENANT AND OCCUPIER OR INHABITANT OCCUPIER	NET ANNUAL VALUE £	RATE-ABLE VALUE £
DESCRIPTION	SITUATION				
340 R14A					
00-9 DEER FOREST & SHOOTINGS (PT)	WYVIS	JOHN LLOYD CO MESSRS PANNELL KERR FORSTER 38 ALBYN PLACE ABERDEEN	PROPRIETORS	2600	2600
00-8 SHOOTINGS (PART OF)	NOVAR & KINLOCH	R R L MUNRO FERGUSON PER FACTOR NOVAR ESTATES OFFICE EVANTON IV16 9XL	PROPRIETOR	1940	1940
00-7 FISHINGS (PART OF)	RIVER GLASS	A B L MUNRO FERGUSON PER FACTOR NOVAR ESTATES OFFICE EVANTON IV16 9	PROPRIETOR	60	60
00-6 FISHINGS	ALNESS RIVER (UPPER & MID)	"	PROPRIETOR	1425	1425
10-9 FISHINGS	MID ALNESS RIVER	THE MILTON TRUST PER FACTOR ESTATE OFFICE NOVAR IV16 9	PROPRIETOR	1010	1010
20-2 FISHINGS	MID ALNESS RIVER	RONALD MUNRO FERGUSON PER FACTOR ESTATE OFFICE NOVAR EVANTON IV16 9XL	PROPRIETOR	370	370
50-1 RIVER GAUGING STATION	RIVER ALNESS	HIGHLAND RIVER PURIF BOARD STRATHPEPPER ROAD DINGWALL	PROPRIETORS	550	550
00-4 SHOOTINGS	CONTULLICH	PAT MUNRO (CONTRACTORS) LTD CAPLICH ALNESS IV17 0XX	PROPRIETOR	150	150
00-3 SHOOTINGS	BALLACHRAGGAN	"	PROPRIETOR	100	100
00-2 FISHINGS (PART OF)	RIVER ALNESS	ALNESS LTD ARDROSS CASTLE ALNESS	ALNESS ANGLING CLUB PER MR A R DENT 33 ORSDALE PARK ALNESS ROSS-SHIRE	550	550
00-1 SALMON FISHINGS	EX ADVERSO TEANINICH	ALNESS DIST FISHERY BOARD PER MR J H STEWART (CLERK) MUNRO & NOBLE 26 CHURCH STREET INVERNESS IV1 1HX	PROPRIETOR	215	215
00-7 SHOOTINGS	KILDERMORIE	MR & MRS DUNCAN KILDERMORIE LODGE KILDERMORIE ALNESS IV17 0YH	PROPRIETORS	500	500
10-0 SHOOTINGS	SOUTH KILDERMORIE	GEOFFREY C WILLIAMS 31 UPPER MONTAGU STREET LONDON W1H 1RG	PROPRIETOR	445	445
00-6 DEER FOREST	KILDERMORIE	MR & MRS DUNCAN KILDERMORIE LODGE KILDERMORIE ALNESS IV17 0YH	PROPRIETORS	1700	1700
10-9 DEER FOREST	SOUTH KILDERMORIE	GEOFFREY C WILLIAMS 31 UPPER MONTAGU STREET LONDON W1H 1RG	PROPRIETOR	1500	1500
00-5 SALMON FISHINGS	KILDERMORIE	MR & MRS DUNCAN KILDERMORIE LODGE KILDERMORIE ALNESS IV17 0YH	PROPRIETORS	20	20
10-8 SALMON FISHINGS	KILDERMORIE	GEOFFREY C WILLIAMS 31 UPPER MONTAGU STREET LONDON W1H 1RG	PROPRIETOR	30	30
20-1 SALMON FISHINGS	KILDERMORIE	SEC OF STATE FOR SCOTLAND PER FORESTRY COMMISSION 21 CHURCH STREET INVERNESS IV1 1E	PROPRIETOR	20	20
00-4 DEER FOREST (PART OF)	KILDERMORIE	"	MR & MRS DUNCAN KILDERMORIE LODGE KILDERMORIE ALNESS IV17 0YH	100	100

Figure 3. Extract from Highland Region Valuation Roll Volume 2. 1 April 1994.

Notwithstanding this criticism (which may or may not be valid today), the rates were abolished and local authorities had to rely on a reduced tax base despite the ongoing costs of providing roads, schools and other local services to farmers and estates across Scotland.

Proposal

The Scottish Government proposes to end the exemption introduced in 1994 and to enter shootings and deer forests on the valuation roll to be rated at the same rate as other non-domestic property.

Commentary

This proposal ends the anomaly that the occupiers of shootings and deer forests pay no rates to help finance local government expenditure while pubs, shops, workshops, distilleries, warehouses, offices and other non-domestic properties contribute the full non-domestic rate (though agricultural land and various other categories of land such as vacant urban land will remain exempt).

The re-introduction of rates for shootings and deer forests is estimated to raise around £4 million per annum. However, the Small Business Bonus Scheme provides rates relief for all land valued at less than £25,000 rateable value. For rateable values of less than £10,000 the relief is 100%. Many of the valuations for shootings in 1994 were for rather small sums of £100 or so (see Figure 3). Although these valuations will now be higher after 20 years, many properties may well qualify for rates relief. Quantifying the extent of this is difficult until a full valuation is undertaken.

A question also arises over how such a valuation should be conducted. The statutory basis for these rates prior to 1994 was the 1886 Act modified by a century of case law, some of which was complex. It may be that a simpler system of valuation should be introduced that values land used mainly or exclusively for shooting according to a more conventional rental value of the land. Recent capital and rental valuations are readily available today.

The LRRG also recommended that the re-introduction of these rates be designed as an instrument of public policy in wildlife management. Commercial grouse moors may pay a conventional non-domestic rate whilst reliefs might be designed for managers of deer forests where deer management was conducted according to an agreed management plan designed to safeguard the public interest in the environment.

In order for this reform to be effective in raising public revenue, it needs to be designed so as to be straightforward to administer. That may take further thought than is evident in the Consultation. In particular, it is worth considering whether it would be more transparent to adopt a system where all non-domestic land and property (including agricultural land) is valued on (preferably) an annual basis. If Parliament decides to provide relief for any particular categories of land then it can apply a lower rate or even a zero-rate. But at least the revenue foregone as a result will be evident to the taxpayer and justifications will have to be given as to the basis for any such reliefs.⁴²

⁴² The question of exemptions and reliefs is explored in the Scottish Affairs Committee's Interim Land Reform Inquiry report paras. 47-56. www.publications.parliament.uk/pa/cm201314/cmselect/cmsscota/877/877

The Consultation asks

- Q. 24. Should the current business rate exemptions for shootings and deer forests be ended?
- Q. 25. What do you think the advantages would be?
- Q. 26. What do you think the disadvantages would be?

PROPOSAL 8. COMMON GOOD

Common Good is a category of property in the historic ownership of Scotland's burghs. It consists of moveable property (paintings, furniture, cash etc.) and heritable property (land and buildings) and was administered by Scotland's 196 Town Councils until local government was abolished in May 1975 to be replaced by District and Regional government (and then in 1996 by Unitary Authorities).⁴³

Over the past ten years or so, increasing concerns have been expressed over the administration of common good funds (the managed funds that include all common good property).⁴⁴ Across many towns in Scotland, residents have been campaigning for more transparency and accountability in how Scotland's 32 local authorities manage the assets that belong to places such as Forres, Pittenweem, Selkirk and Ayr.

The complex legal framework for disposing of common good land that was laid out in the Local Government (Scotland) Act 1973 means that local authorities and communities are often in conflict over whether it is legal to lease or sell common good land and for what purpose. More fundamentally, there is often dispute over whether in fact a piece of land is common good in the first place since this relies on interpretation of case law going back to the 19th century.

The Community Empowerment (Scotland) Bill currently before the Scottish Parliament contains provisions in Part 6 to introduce statutory registers of common good assets and a duty on local authorities to consult over the disposal of common good property. It does not provide any statutory definition of common good nor any modernised arrangements for how common good funds should be managed and, in particular, how communities could or should be involved.

The Proposal

The Consultation proposes no specific measures to improve the framework of common good law but the questions do suggest reforms to the need for court approval for disposal of Common Good assets and a new legal definition of the term.

⁴³ Note that although Town Councils were abolished 15 May 1975, those burghs with charters (mostly Royal Burghs) continue to exist as legal entities and their charters remain live legal documents. The 196 burgh total is based on Schedule 1 of the [Local Government \(Scotland\) Act 1947](#) which established Town Councils for the 196. Between 1947 and 1975 it is understood that a further two or three towns obtained Town Councils.

⁴⁴ See, for example, Wightman & Perman, Common Good Land in Scotland at www.andywightman.com/common-good and LRRG Final Report Section 14.

Commentary

The LRRG recommended that “a new statutory framework should be developed to modernise the arrangements governing Common Good property.”⁴⁵ This conclusion reflects a widespread dissatisfaction with the existing legal framework which is based on an act of 1491, an ambiguous few sections of the 1973 Local Government Act and a century and more of case law.

Common Good law is not fit for purpose.

Common Good does, however, represent a rich and valuable legacy and heritage of common property that has been and could in the future be enjoyed more fully by the vast majority of Scotland’s residents who live in the towns and cities that have common good property. With a modern framework of law in which definitions were clear, registers were complete and local communities were actively involved in governance, common good funds could provide a valuable source of local pride, autonomy and wealth.

Given the current state of the law and the anxieties and complexities that surround the topic, it is probably time for a thorough review of the legal framework. This might be carried out by an independent review body in collaboration with the Scottish Law Commission. Such an exercise, however, is not going to deliver reform very quickly. Neither should it be expected to. Given that the basic law remains a statute of 1491, it would be justified to take two years or so to conduct a thorough examination of the options available and the preferences of communities across Scotland.

Meanwhile, the proposed Land Reform Bill does provide an opportunity to make some immediate improvements. What might most usefully be done? One option would be to improve the governance of Common Good Funds. Currently there are a range of different ways in which they are managed. Some local authorities have a Common Good Fund Committee for each fund, some combine them and some have none. In no cases known to the author do the beneficiaries of the Fund - that is to say the residents of places like Forres, Pittenweem, Selkirk and Ayr - have any statutory role in managing the Funds, preparing strategic plans for the assets or deciding on the allocation of surpluses to local good causes. This Bill could provide such a role.

The Consultation asks

Q. 27. Do you agree that the need for court approval for disposals or changes of use of common good property, where this currently exists, should be removed?

Q. 28. If removed, what should take the place of court approval?

Q. 29. Should there be a new legal definition of common good?

Q. 30. What might any new legal definition of common good look like?

Q. 31. Do you have any other comments?

PROPOSAL 9. AGRICULTURAL HOLDINGS

The Scottish Government established a separate review of the law on tenanted agricultural holdings - the Agricultural Holdings Legislation Review (AHLR).⁴⁶ It is due to publish its

⁴⁵ LRRG Final Report para. 21, page 80.

⁴⁶ See www.scotland.gov.uk/Topics/farmingrural/Agriculture/agricultural-holdings/review-of-legislation

final report in January 2015. The Consultation thus contains no legislative proposals at this stage but merely asks if some of the recommendations of the AHLR should be taken forward in the Land Reform Bill.

There is thus no substantive proposals to comment on.

The Consultation asks

Q. 32. Do you agree that the Scottish Government should take forward some of the recommendations of the Agricultural Holdings Legislation Review Group within the proposed Land Reform Bill?

Q. 33. What do you think the advantages would be?

Q. 34. What do you think the disadvantages would be?

PROPOSAL 10. WILD DEER

The Consultation notes that,

88. Wild deer are a key part of Scotland's natural heritage, bringing benefits in terms of tourism, sport and food. However, their distribution and numbers have the potential to have an adverse impact on the regeneration of woodlands, on fragile habitats, on agricultural crops and on road traffic safety. Wild deer therefore need to be managed to control their impacts on the environment and on land use objectives.

89. Wild deer in Scotland are not owned, but the right to take or kill deer rests with the owner or occupier of the land. There is no legal obligation on landowners or occupiers to manage deer. However the Deer (Scotland) Act 1996 contains powers for Scottish Natural Heritage (SNH) to intervene and impose management measures where SNH considers that deer management is detrimental to the public interest, and there is also a Code of Practice on Deer Management that sets out the responsibilities of landowners.

90. This voluntary approach to deer management in Scotland has been criticised for failing to address over-population of deer in some areas of Scotland, in particular where there are conflicts in land use objectives between those who wish to manage deer to maintain sporting interests and those who are seeking to restore or protect designated sites.

It goes on to propose a power to make the existing system of voluntary deer management planning mandatory but only to introduce such a power if, at the end of 2016, the existing voluntary system was not delivering the public interest.⁴⁷

Commentary

The politics of deer management appears to be such that the existing system of voluntary arrangements has to be allowed time to see if it is effective. By contrast, other countries have modern wildlife management systems in place rather than a succession of modest reforms that leaves the basis framework of private rights over a public resource intact. As the LRRG noted,

⁴⁷ See Scottish Environment Link's position paper for an insight into the issue www.scotlink.org/files/policy/PositionPapers/LINKDeerTFPolicyAug13FINAL.pdf and Section 32 of the LRRG.

The Review Group has been struck during its own investigations by the limited progress in addressing some of the issues over the management of wild deer in Scotland, particularly red deer, despite many years of debate over these issues.

The Group recommended a new statutory framework where the monopoly right to hunt deer on land could be withdrawn where sustainable deer management was not being achieved, where consents should be required for culling targets, and where sporting rates could be used as an incentive to encourage appropriate management to protect public interests.⁴⁸

None of these measures are being contemplated by the Scottish Government at the moment. Nevertheless the Consultation is a good opportunity to argue why they might be a good idea with a view to informing future legislation.

The Consultation asks

Q. 35. Do you agree that further deer management regulation measures should be introduced to be available in the event that the present arrangements are assessed as not protecting the public interest?

Q. 36. What do you think the advantages would be?

Q. 37. What do you think the disadvantages would be?

PROPOSAL 11 PUBLIC ACCESS - CORE PATHS

Proposal 11 represents a minor amendment to the law governing the right of responsible access as it affects Core Paths. This briefing does not address this proposal.

WIDER LAND REFORM MEASURES

The proposed Land Reform Bill is one part of a broader programme of land reform proposed by the Scottish Government. This includes the Community Empowerment (Scotland) Bill, proposals to reform the law of succession, a review of Wild Fisheries, a harbours bill, a review of the council tax, proposals in the Smith Commission to devolve responsibility for the administration and management of the Crown Estate and for the regulation of onshore oil and gas, and a Scottish Law Commission review of the law of compulsory purchase.

These topics will be the subject of future briefings.

⁴⁸ LRRG Final Report Section 32.