‘Legislative proposals to address the impact of Scotland’s concentration of land ownership - a discussion paper from the Scottish Land Commission’

- SLE Response

Executive Summary

The following is SLE’s response to the Scottish Land Commission (SLC) discussion paper on legislative proposals to address the impact of concentration of land ownership in Scotland[1] (hereafter “Paper”). As an organisation which represents land owners across Scotland, we welcome the opportunity to give our views on a set of legislative proposals which, if implemented, would undoubtedly have a significant impact on our members.

We do not consider the strident proposals contained in the Paper reflect the success of the current guidance-led approach epitomised by the Land Rights and Responsibilities Statement (LRRS) protocols[2], nor do we consider them commensurate to the public’s interest in the subject of land reform. This is a view underpinned by the recent Scottish Government publication into attitudes to land reform[3] which showed that most people were unaware or knew very little about the subject.

In our view the proposals are not a proportionate response to a perceived problem and they have not been adequately justified. There is no evidence to suggest that landholdings not having a management plan will be detrimental to the community. There is plenty of evidence to suggest the current voluntary, guidance-led approach through the LRRS protocols is working, and no evidence would suggest there is a need to make it statutory. And the public interest test proposal seems to be aimed at preventing an undetermined potential misuse of power rather than addressing any actual wrongdoing.

Central to our criticism of the Paper is our view that it has not demonstrated any robust evidence on which to base its proposals. A key example is the consistent reference to the scale and concentration report[4] as a basis for intervention, yet the responses used to compile that report clearly show that

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[1] Legislative proposals to address the impact of Scotland’s concentration of land ownership – a discussion paper: https://www.landcommission.gov.scot/news-events/news/legislative-proposals-to-address-impact-of-scotlands-concentration-of-land-ownership?p_slug=news

[2] Good Practice Protocols: https://www.landcommission.gov.scot/our-work/good-practice/land-rights-and-responsibilities-protocols

[3] Attitudes to Land Reform Ipsos MORI research: https://www.gov.scot/publications/attitudes-land-reform/

[4] Investigation into the Issues Associated with Large scale and Concentrated Landownership in Scotland: https://www.landcommission.gov.scot/downloads/5dd7d6fd9128e_Investigation-Issues-Large-Scale-and-Concentrated-Landownership-20190320.pdf

more people saw there being benefits to the current pattern of land ownership than did disadvantages. Our view on each of the three proposals can be summarised as follows:

1. Requirement for a Management Plan:
    a. There is no evidence to suggest the requirement for a management plan as it currently exists under the Transparency of Ownership protocol is not working.
    b. The requirement to 'publicly engage' on a management plan is distinctly separate from a requirement (or expectation) to engage with a community on decisions relating to land, however the proposal seeks to blur those distinctions.
    c. The SLC presents no evidence that not preparing a management plan has a detrimental impact on communities, it therefore cannot be justified to propose sanctions for non-compliance.
    d. This proposal seeks to address scale rather than concentration of landownership.

2. Land Rights and Responsibilities Review:
    a. SLC case study evidence clearly suggests the LRRS protocols are working effectively, and there is no need to introduce a statutory review process.
    b. This proposal is not comparable to the powers of the Tenant Farming Commissioner (TFC) as the Paper suggests. They go much further, introducing financial and cross-compliance penalties, as well as powers to recommend changes to operational/management practices, governance arrangements, or even disposal of assets.
    c. Anyone with a 'defined legitimate interest' in the landholding can initiate a review and there appears to be no protection from vexatious accusations. This is concerning since a landowner subject to a review could also be subject to a public interest test. This proposal also does not set out whether it would only be members of a local community who would initiate a review or if someone from a specific interest group could initiate the review against the views of the local community.

3. Public Interest Test
    a. The compatibility of this proposal with human rights legislation remains in doubt. Concerns regarding this matter were first raised when these proposals were mentioned two years ago, and a clear position has not yet been presented by SLC.
    b. Human rights law suggests that interfering with a qualified right in a democratic society must be considered "necessary", and in the example of compulsory purchase, such an interference should also fulfil a clear objective. These proposals do not offer any indication how it could be proved that intervention is necessary to prevent possible misuse of power or what objective might be met in interfering with people's rights.

In our view, these proposals are not a proportionate response to identified issues, rather they appear to be addressing problems which are perceived by a minority. The focus for the future should be to build on a sound evidence base, supplemented by continued work embedding the LRRS protocols into rural business practice across Scotland. Added to this there should be a serious undertaking to evaluate the land reform outcomes of policies which are not necessarily intended to deliver land reform outcomes. For example, local place plans, masterplan consent areas and Regional Land Use Partnerships.

These avenues will all deliver land reform outcomes without the need for further legislation. It is imperative that they (and others like them) are considered in the context of decisions relating to land reform legislation.

Introduction

The debate around land reform produces lots of strong feelings from those who are passionate about Scotland's land, not least SLE members. They make a hugely positive contribution to land management and are committed to continuing this through their own work and by working with others. In no small measure SLE members have been working collaboratively with the SLC on a variety of issues such as community engagement, transparency, agricultural holdings, and community rights to buy etc., all with a genuine motivation to improve practices and improve outcomes for those with an interest in decisions relating to land.

We support improvements to information on landownership, stronger community engagement and a vibrant tenanted sector. Indeed, many of these principles are embodied by our own Landowners' Commitment[5] which sets out good practice for landowners on how they can continue to operate their businesses while contributing to the public good.

SLE does not seek to obstruct proportionate interventions in land reform where they can be appropriately justified by evidence and where they can demonstrably improve outcomes. As an organisation we have shown this through encouraging and facilitating negotiated sales of private land to communities[6], collaborating on the development and promotion of the LRRS protocols, and assisting our members develop community engagement plans to match (and exceed) the growing expectations around community engagement in decisions relating to land. Individual members of SLE have continued to pioneer in areas such as community engagement on negotiated sales[7] and working with communities to put in place community development plans and effective long-term tourism strategies[8].

We believe a positive debate on land reform should focus on the best use of land to achieve the environmental, social and economic benefits it can offer the country, and that debate should be informed by sound and robust evidence and experience that stands up to scrutiny. Unfortunately, in our view, the latest discussion Paper set out by SLC relies too heavily on a mixture of unchallenged assertions from a 2019 report on scale and concentration and conjecture based on impressions rather than facts as they are on the ground. This has led to a series of proposals which have either not changed in two years since they were first made, not reflecting the positive work that already takes place and that has taken place since, or that have become more convoluted and make no real

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[5] SLE Landowners' Commitment: https://www.scottishlandandestates.co.uk/about-us/landowners-commitment

[6] Protocol for Negotiated Sales, developed by SLE and Community Land Scotland: https://www.communitylandscotland.org.uk/wp-content/uploads/2016/06/CompleteCLSProtocol.pdf

[7] Buccleuch: https://www.landcommission.gov.scot/our-work/good-practice/diversification-of-ownership-and-tenure-negotiating-transfer-of-land-to-communities/buccleuch-langholm-moor-sale-creating-opportunities-through-community-engagement

[8] Applecross Trust: https://www.pas.org.uk/news/applecross-our-fragile-or-resilient-community/ and https://www.ross-shirejournal.co.uk/news/if-nothing-changes-what-makes-us-special-will-be-destroyed-209269/

attempt to answer significant legal questions over compliance with the European Convention on Human Rights (ECHR)[9].

In this response we will set out our views on the proposals and why we consider they have not been appropriately justified. We will also set out what we consider to be a more appropriate approach to taking forward land reform in the coming years.

Tone of Discussion Paper

The Paper's executive summary talks about "Scotland's unusually concentrated pattern of land ownership" as "a matter of longstanding concern". In the introduction to the Paper, SLC make reference to a "very highly concentrated" pattern of landownership in rural areas which has been a "driver for land reform" and to "a concentrated pattern of rural land ownership that continues today". These statements belie the fact that modern estate owners are part of the communities in which they live and are themselves part of the decision-making and engagement structure within those communities. Perhaps more importantly, this language does nothing to recognise that Scotland's pattern of landownership is changing all the time. According to the latest Scottish Government statistics[10] there were 590 assets in community ownership in December 2019, consisting of 191,290 hectares (472,688 acres). And figures[11] show 914,000 hectares (2,258,543 acres) of Scotland's land is in public ownership. In our view, persisting with the use of language implies there is nothing positive about the current pattern of land ownership in Scotland and does a disservice to private owners, public owners, charitable owners and the 418 community groups looking after assets across Scotland.

Another line of the executive summary asserts that "many people are deeply uncomfortable with the fact that so much of Scotland is owned or controlled by so few...". We do not consider this to be the case and it is not clear what evidence the SLC has based this emotive assumption on. As far as SLE is concerned, this type of language does nothing to move the land reform debate forward in a responsible fashion. Rather than being deeply uncomfortable with the current pattern of land ownership, recent evidence[12] suggests that some 73 percent of people new 'not very much' or 'nothing at all about' the land reform agenda. And as we will set out later, there are many people who see there being benefits to the pattern of landownership.

The Paper states at section 2.5, "… community right to buy while core to Scotland's land reform programme, are no longer sufficient. They are one part in what must be a wider ongoing programme of reform…". This paragraph reads as if no reform other than community right to buy has ever been taken forward and is particularly disheartening coming from the SLC which has, along with the sector, done so much work to advance improvement and modernisation. Furthermore, since its establishment in 2017 SLC has spent around £4million in tax-payers money[13] to take forward land reform, add to that the more than £36million awarded to communities by the Land Fund since

[9] Official texts of ECHR: https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c
[10] Community ownership in Scotland 2019: https://www.gov.scot/publications/community-ownership-scotland-2019/pages/1/
[11] Public Ownership in Scotland: https://www.gov.scot/publications/land-reform-review-group-final-report-land-scotland-common-good/pages/26/#fig7
[12] Attitudes to Land Reform Ipsos MORI research: https://www.gov.scot/publications/attitudes-land-reform/
[13] SLC annual reports: https://www.landcommission.gov.scot/openness

2016[14], it therefore seems quite astonishing that the Commission would suggest that this level of work and investment is not having an impact.

Another phrase used by the SLC in this Paper is that the need for intervention is based on more than "a simple desire for natural justice." This intimates that the current pattern of land ownership is, along with the land use decision-making process, somehow unjust. This is a charge which once again does not recognise the high standards which SLE members have long prided themselves on, nor does it recognise the progress of not only changes that have taken place in ownership, but also the progress that has been seen in improving transparency of landownership and decision-making practices.

In section 3 of the Paper, the SLC talk of "possible misuse of power", "risks" and "systemic risks". This would suggest the Commission are content to develop these proposals on the basis of *potential* problems rather than build them on foundations of robust evidence of widespread issues. In our view, it is not appropriate to impose such strident legislative proposals on a whole sector based on approximated possible future problems. Our position is supported by the Scottish Government's Better Regulation agenda[15] which includes a principle of targeting regulation only where it is needed.

In reference to existing legislation within section 3.2.2 of the Paper, SLC notes that the current rights to buy are "mechanisms that sit at the more extreme end of the spectrum of potential interventions". While we consider this to be the case, we can therefore assume that the SLC do not consider that their proposal to make a change of trustee subject to a public interest test an extreme intervention, despite the implications this may have on existing Trust law.

Under the same section the Paper says, "at present there is no effective mechanism for bringing about such intermediate solutions, leaving community acquisition as the only recourse to action." This is not strictly correct. If a community wishes to affect change but does not wish to pursue ownership through the various rights to buy, it can begin by communicating with the landowner directly using the LRRS Protocols as a basis for that interaction. This is a process which allows for positive interaction and intervention and is working. Beyond that, a community can engage relevant authorities on a variety of issues tackling problems ranging from contaminated land[16] to access[17], and the authorities have a range of powers to intervene, for example, through planning enforcement[18] or compulsory purchase orders (CPO) to tackle abandoned or neglected land[19].

In addressing the community land movement at section 2.5, the Paper notes, "This evolution has occurred in tandem with the emergence of powerful demands across the UK for more democratic community control of property and other assets, demands that have grown in strength and influence during the Covid-19 pandemic." However, no evidence is provided to suggest that this is the case and yet the Paper goes on to suggest that this is part of the reason that existing rights to buy are no longer sufficient. By contrast, the recent Attitudes to Land Reform research found that 73 percent of respondents were not aware of the land reform agenda and only 17 percent (in a questionnaire

[14] Land Fund Awards: https://www.tnlcommunityfund.org.uk/media/documents/scottish-land-fund/Scottish-Land-Fund-awards.pdf?mtime=20201130144545&focal=none
[15] Better Regulation agenda: https://www.gov.scot/policies/supporting-business/business-regulation/
[16] SEPA contaminated land: https://www.sepa.org.uk/regulations/land/contaminated-land/
[17] Outdoor Access Officers: https://www.outdooraccess-scotland.scot/access-management-guidance/contacts
[18] Planning Enforcement: https://www.gov.scot/publications/planning-enforcement-charter-guide-enforcing-planning-controls/
[19] CPO case studies: https://www.gov.scot/publications/compulsory-purchase-order-case-studies/

about land reform), saw inequality in land ownership as a challenge. This does not demonstrate the ground-swell of public opinion that the Commission's Paper would suggest.

Scope of the SLC's Paper

The SLC notes that proposals for three new legislative mechanisms were initially contained in the 2019 report on scale and concentration. In a land reform debate[20] in the Scottish Parliament on 21 March 2019, the Cabinet Secretary for Land Reform Roseanna Cunningham said of the Public Interest Test proposals contained in the SLC's scale and concentration report:

> "… a great deal of work would be required to ensure that any such proposal was compliant with the European convention on human rights.
>
> "My officials will work with the Land Commission, stakeholders and other Scottish Government policy areas to consider how the report's recommendations can be turned into workable policy."

Despite this, at section 1.1 the Paper sets out that these proposals are, "the Land Commission's initial views about how these proposed mechanisms could operate", and that taking them forward "would require significant engagement, consultation and consideration of the issues raised". This effectively repeats the Cabinet Secretary's calls of March 2019 and demonstrates that a resolution has not been reached on these concerns and that these proposals have not moved with the times in the last two years.

All three proposals appear to have potential significant detrimental impacts on land management, ownership and governance. They are all also based on a common theme of satisfying an undefined "public interest". There appears to be no consideration in the Paper of where a local public interest (as defined by a local interest group) might conflict with a landowner's desire to use the land to meet government policy objectives considered to be in the national public interest.

As noted in the Paper at section 2.3, the scale and concentration report found that the concentration of social, economic and decision-making power associated with land ownership is the main risk factor, rather than the scale of a landholding. In other words, there is a clear distinction between scale and concentration. In addition, during an evidence session[21] at the Scottish Parliament's Environment, Climate Change and Land Reform Committee on 19 March 2019, SLC Chair Andrew Thin said the following in response to a question about an absolute limit on the scale of ownership:

> *"I am quite happy to deal with the main issue, which is whether the issue is scale or something else. In broad terms, we are clear that it is not about whether people have 5,000 or 10,000 acres but about power and monopoly and about the constraints on power, which are quite normal – if we think about other aspects of the economy, we do not allow oligopoly or a monopoly to develop; we have constraints. It is unlikely that a blunt tool – such as saying that the limit is 5,000 acres or whatever – would deal with the issue, because it is not about the number of acres but about the power. Therefore, we need to think about the issue in a*

[20] Land reform debate transcript: https://www.theyworkforyou.com/sp/?id=2019-03-21.41.0
[21] Scottish Parliament evidence session: *https://www.parliament.scot/parliamentarybusiness/report.as . . .*

more intelligent way – that perhaps sounds a bit unkind, so in a more thoughtful or subtle way. Just setting arbitrary limits is unlikely to deal with the issue."

Despite this, two of the SLC's proposals look to set arbitrary limits in relation to the scale of a landholding that will be subject to a public interest test and a requirement for a management plan.

Land Reform to Date and SLC's Justification for Further Change

In setting out the land reform story to date and looking at the need for change, the SLC touch on a number of important aspects of the current progress being made without going into appropriate detail.

In reference to the community land movement at 2.1, the Paper states that, "the community rights to buy have underpinned a legislative and cultural change which has seen community land ownership come into the mainstream as part of Scotland's land ownership mix.". SLE is in agreement that land reform legislation to date has achieved this, as is demonstrated by the Scottish Government's own community ownership statistics. We welcome this and we continue to maintain that community ownership can be an effective means of unlocking opportunities, and should be encouraged on a willing buyer, willing seller basis.

Instead of choosing to place emphasis on the progress being made on community ownership and in other areas through the LRRS protocols, the Paper focuses on the scale and concentration report of 2 years ago and sets out that these proposals "have emerged from and been informed by" it.

The Paper then leans heavily on the experience of the TFC, drawing comparisons with the non-statutory LRRS protocols. It then asserts the need for intervention is based on "protecting fragile rural communities" and "realising Scotland's full potential" and it sets out a further three reasons why legislative intervention is required.

We will look at each of these subjects in turn.

Scale and concentration report 2019

"In 1980 my wife and I newly married at 21 years old and fresh out of our education wanted to start up a business growing plants. With no experience, no financial backing and no potential to buy our own premises we approached Dupplin Estate by Perth about the possibility or renting their old kitchen garden. despite our young age and lack of experience they gave us a chance with an initial 5 year lease on a peppercorn rent of the walled garden and adjoining house. This gave us the start we needed and our business is now still expanding, in a way sadly, since we miss Dupplin, now on a site of our own ownership. The point of this is that without Dupplin Estate being intact as part of a large estate in family ownership we would never been given such a good start in our business life. it is only because the estate existed in single ownership that the owning family had the resources to be able to give us a hand up."

"I supply affordable rural housing which has contributed over the years to keeping people in the community and sustaining the local primary school. In collaboration with neighbours we have achieved landscape scale environmental impacts for example for black grouse and upland waders. My farm supports 5 FTJEs which otherwise would not exist. The modest shoot provides good seasonal income at a time of year when few other opportunites are available."

"Land for a network of formal foot paths have been made available over a reasonably large area between two towns. This would have been more difficult if the land was in multiple ownerships."

"In the 1990s, ALCAN, a multi-national company, was the largest corporate landowner in Scotland. They worked with Highland Council, HIE, SNH and the local community around Kinlochleven to reorganise the economy of the village and its surrounds in anticipation of the closure of an aluminium smelter. This included a substantial land transfer allowing the development of new housing, schools, community facilities and new business/job opportunities. Had the land around the village been owned by multiple owners, this programme would not have been possible."

"I was a professional deer management adviser. It is nearly impossible to make any sort of sensible deer management plan where the land ownership is fractured and the decision-making ability diverse and the many owners are in competition and disagreement with each other over policy. As part of my responsibilities I was made aware of the detailed economics of running Highland and Lowland estates and forests. I also became aware of the difficulties and often very negative results where land ownership became fractured."

"I manage a number of SSSI's, SAC's and other important national and international sites. These have been improved recently because we have finally managed to agree and implement a flexible and common herbivore management plan across a very wide area."

"… 2. The Estate helped in establishing the first rural sheltered housing scheme in the North East of Scotland with the primary objective to give local retired people the opportunity to live in secure alternative surroundings when they were less able to look after themselves. … 5. Houses were built on land which was sold by the Estate at affordable prices originally to those young people born and brought up in the Community who were unable to buy a site on Deeside after the North Sea oil boom. This policy started in a modest way but still continues so that over 30 houses have now been built or are about to be built. Over 80% of the Estate houses let out are at an affordable rent (as per comparable rents of Aberdeenshire Council) and long standing employees remain in their house on a rent free basis. … This list may not be exhaustive but it perhaps gives the general picture of what is happening on a privately owned family estate, operated by hard working partners and managers who are fully committed and employed running a labour intensive livestock farm, and precious forestry investments, which give this beautiful valley so much character. The new Farm Shop which has won many awards gives additional employment to many local people, and this enterprise selling meat, game and local produce is contributing to the Tourist Industry of Royal Deeside, and the reputation of the North East of Scotland. Many small woodlands and shelterbelts have been created to add to the diversity, providing shelter to some of the 130 different species of birds, which have been recorded in the valley. It perhaps illustrates the benefits of how a family Estate of this kind can contribute to the wellbeing of the local Community and general public."

"… Large scale land ownership allows a rural business to take advantage of economies of scale and run efficiently. An efficient business will be robust and sustainable and deliver a range of benefits both economically and socially… Concentrated ownership facilitates the delivery of government policy (and significantly land use policy) consistently over large single areas. This could be policy in relation to farming, forestry, tourism, wildlife management etc…"

"… Examples on this estate of businesses operated by others on a leasehold business include agricultural storage, gravel extraction, an equestrian business, paintball and public allotments. We also support a community business, the …. Trust, with administrative support, free of charge, and an annual donation (10k) derived from our hydro schemes."

"…They have made land available for housing development in Bowmore. They have supported the development of community village halls. They own and run a successful hotel which provides year round employment. They underwrite the cost of and provision of the Islay Lifeboat and have done so continuously for at least 60 years. There has been unrestricted access to the land for hillwalking and beach holidaymakers for my whole lifetime 70 years, and probably long before that. … The largest landowner has made retail and workshop space available to joiners, brewers, craftspeople, launderers, flooring suppliers, fencing suppliers to name some businesses known to me. The history of single large landownership in Islay gave rise to the development of the significant settlements of Bowmore, Port Chatlotte Portnahaven etc. In an effort to improve the lot of the residents at a time of great poverty. …"

"… estate is large by most standards, though in the main it is poor-quality land. The size and therefore value of the land-holding has allowed the owners to borrow substantial amounts of money which have been invested successfully in the business. This in turn has resulted in total investment, funded by both borrowing and the returns on investment funded by borrowing, of an eight-figure sum over the last five years in one of the remotest areas of Scotland. This would not have been possible without the collateral of the 14,000-ha estate."

These are just a handful of examples of the benefits of large scale and/or concentrated ownership highlighted in the scale and concentration report. However, reading the report and its recommendations you will recognise a tone which suggests evidence to support the advantages was "not clear cut" and that there is a critical need to intervene in systemic risks associated with large scale and concentrated ownership. However, a Freedom of Information (FOI) request of the survey responses to the scale and concentration report (ANNEX 1) obtained by SLE shows that 51.4% of all those surveyed felt that there were benefits to land being owned by a "very small" number of people. In contrast, 39% of respondents felt there were disadvantages. As we have noted already, where the Commission states in its latest Paper, "many people are deeply uncomfortable with the fact that so much of Scotland is owned or controlled by so few…", on the basis of their own report it would be more accurate to say that many more people see the benefits to large scale land ownership.

To further understand why SLE do not see the SLC report on scale and concentration carried out in 2019 as a sound evidence base on which to build a case for introducing more legislation, the following can also be said of that report:

1. Rather than highlight the proportion of respondents who saw positives to the current pattern of land ownership, the Commission appears to have drilled into each response and broken it down into 'macro themes'. This has resulted in the 209 respondents who reported benefits accruing a total of 720 advantages, while the 160 respondents who reported disadvantages accumulated 741 shortcomings. However, we are not aware that any site visits to verify evidence were carried out and of the 29 follow-up telephone conversations that took place there is no indication whether these conversations were to corroborate any of the evidence, positive or negative. Rather than concentrated land ownership being the issue, it appears the SLC concentrated all its efforts in emphasising a minority view. In our

opinion, this is not a sound foundation on which to build a case for further legislation.

2. Figures from the report tell us that proportionately, private landowners were viewed both more positively and less negatively than either charitable owners, public owners or community owners. And while the Commission accepts this, stating, "*At face value this suggests that experience of private landowners tends to be somewhat more positive than experience of other landowners*", this is quickly qualified by adding, "but this result must be interpreted with caution because the survey sample may not be statistically robust." Ordinarily, this is a reasonable statement to make, but when it is cast against a report which seems to accept without question the thoughts, feelings and perceptions of respondents that criticize concentrated private ownership, it seems a somewhat inconsistent statement to make. Some examples of this type of language include (but are not limited to):

    a) *Most of these responses were very general in nature but the overall perception was that…"*[22]

    b) *"A common perception for example was . . ."* [23]

    c) *"In other cases it was alleged that the anti-development stance of some landowners was motivated by a desire to preserve land as a "playground . . ."* [24]

    d) *". . .it is therefore helpful to consider specific examples how landownership is believed to hinder economic opportunities."* [25]

    e) *"In both these cases (and others like them) it was claimed that . . ."* [26]

    f) *"Some respondents were of the view that . . ."* [27]

    g) *". . . a resident of one Highland estate claiming that . . ."* [28]

    h) *". . . with some respondents suggesting that some landowners have a tendency to 'hide behind' their agents."*[29]

3. *"Recent research suggests has shown that private estates have a number of local economic impacts, including job creation, direct spend in the local economy and indirect economic impacts (Hindle et al., 2014). There is also some benefit in the diversity of activity, in land management at a landscape scale, with scale and size leading to greater total outputs and impacts (although lower per hectare impacts are prevalent on large estates due to the large areas of unproductive land) (Hindle et al., 2014). Nonetheless, negative impacts related to the control exerted by landowners continue to be documented by researchers."*[30] To dismiss

[22] SLC Scale & Concentration Report: p14, 4.1 para 1
[23] SLC Scale & Concentration Report: p14, 4.1 para 2
[24] SLC Scale & Concentration Report: p14, 4.1 para 4
[25] SLC Scale & Concentration Report: p15, para 2
[26] SLC Scale & Concentration Report: p16, para 2
[27] SLC Scale & Concentration Report: p 20, para 1
[28] SLC Scale & Concentration Report: p20, para 1
[29] SLC Scale & Concentration Report: P23, para 2
[30] SLC Scale & Concentration Report: p6, Section 2.4 para 1

the input of private estates in Scotland as 'a number of local economic impacts' is disingenuous considering the vast impact they have and there is no attempt to weigh up the benefits against the negatives. This gives weight to the impression that the report was just looking to justify a preconceived view.

4. *"This argument is therefore one about the model of ownership (public vs private) rather than scale or concentration. This was a point of confusion that emerged repeatedly in the responses provided to the call for evidence with many respondents equating concern about the scale and concentration of landownership in Scotland with hostility toward private ownership. The two issues are of course logically distinct."*[31] This implies that some respondents were responding because of a 'hostility towards private ownership'. If so, then a proportion of the responses are probably based on that hostility rather than any specific problems with concentrated ownership.

5. In response to a few examples where people have 'claimed' an opinion or two based on evidence which has not been further investigated, the writers of the report conclude, *"This would seem to suggest that the economic benefits said to derive from scale of landownership may not be realised as often as they could be and where they are tend to benefit landowners more than communities."* [32] It is surprising that the writers did not look further into the actual economic benefits rather than relying on the opinions of a few potentially disenchanted respondents.

It is clear that combined with the overarching number of positive responses compared to negative ones and these examples, the scale and concentration report is not the robust evidence base on which to build a case for further legislation. The subjective and anecdotal views of 160 respondents out of 407 have, in our view, been amplified to justify the recommendations set out in both the original scale and concentration report and in this most recent set of legislative proposals.

The Tenant Farming Commissioner

The experience of the Scottish Tenant Farming Commissioner (TFC) is also cited as a good example of how similar powers could be applied to the proposed LRR Review. While we recognise the TFC has been successful in improving tenant – landlord relations, this has been in spite of the fact that the TFC Codes of Practice does not have the powers to sanction or impose financial penalties for non-compliance in the manner that is proposed for the LRR Review.

Indeed, the SLC state in their Paper:

> *"Experience to date suggests that this model has been extremely successful in helping to bring stakeholders together and improve practice within the sector. A statutory review of the functions of the TFC was carried out in early 2020*[33]*, which found that the Codes of Practice issued were easy to understand, useful, fair, and robust, and that they had helped to improve relations between tenants and landlords. The findings were clear that the current powers of the TFC should be retained…".*

[31] SLC Scale & Concentration Report: p19
[32] SLC Report: p20 para 1
[33] Tenant Farming Commissioner functions: review: https://www.gov.scot/publications/review-functions-tenant-farming-commissioner/pages/1/

> *"However, perhaps the strongest evidence of the success of the approach is that, despite a steadily increasing case load, in three years of operation the TFC has not yet had to formally investigate a breach."*

This is a ringing endorsement of the current functions of the TFC which, importantly, do not extend to sanctions and financial penalties for non-compliance. It therefore strikes as odd that the Commission should then make a leap to suggest that the LRRS protocol framework should be underpinned by a legislative framework which enforces sanctions such as cross-compliance penalties and financial penalties. This is in addition to allowing recommendations to be made on changing operational/management practices, changing governance arrangements and ultimately recommending the disposal of assets following a review.

These proposals far exceed the current powers of the TFC and it therefore cannot be justified to use the TFC's experience to call for greater powers in this area.

Land Rights & Responsibilities Good Practice Protocols

At 2.4.1, the Commission says of the LRRS protocols:

> *"As well as providing clarity of expectations, the protocols provide a feedback mechanism by which examples of good or bad practice can be raised directly to the Land Commission. Early experience in the first year of operation shows a strong appetite for the clarity that the protocols provide, within all land ownership sectors, and indications that they are being used positively by communities, landowners and managers, and other interested parties.*

Despite this positive endorsement of the LRRS protocols, the Commission quickly move to undermine that affirmation by stating at 2.5:

> *"As a voluntary approach, there is no requirement for landowners to use the LRRS Protocols and no mechanisms encourage their use or address incidents of poor practice."*

It continues:

> *"…the proposals in this paper aim to better support the implementation of the LRRS by outlining underpinning legislative mechanisms that go beyond reliance on individual voluntary behaviour change."*

However, the Commission's own work through the Good Practice Advisory Group demonstrates that the LRRS protocols are, as they suggest, being used positively by all parties and the desired voluntary behaviour change is taking place. At a Good Practice Advisory Group meeting in May 2020, SLE, along with the other members of the group, were given an update on casework (ANNEX 2 – Good Practice Casework) which outlined there were a total of 60 enquiries relating to LRR between 2018/19 -2019/20. Out of that number, SLC only identified one case where 'lack of powers' to intervene on apparent poor practice was highlighted. And it was not the sole reason for not intervening as there was also a request to not "take the matter further". The same paper also shows us that in all cases where SLC have had direct dialogue with landowners or their agents, "positive steps have been taken to develop and improve engagement practices." The claim that further powers to address incidents of poor practice are required is completely unfounded.

The Need for Intervention

The latest Paper states that the two main reasons for action to address the adverse effects of concentrated land ownership are; to protect fragile communities from potential misuse of power, and to help ensure that rural communities can achieve their full potential. However, as we have already established, the 2019 report highlighted many examples of where communities and estates are working together to deliver resilient and thriving rural communities. These benefits have been achieved through large scale ownership, yet there are no proposals in this Paper to ensure these outcomes are maintained or enhanced through large scale ownership.

From an SLE perspective we have long promoted examples of where landowners work collaboratively with communities to help serve community interests and to deliver thriving, resilient communities. The Commission sets out four examples of adverse effects associated with concentrated landownership in its Paper at 3.1.1. These relate to affordable housing, business expansion, work contracts and community development. We will look at each in turn.

1. "inadequate provision of housing due (in some cases in part) to either:
    a. restrictions in the supply of private rental accommodation; and/or
    b. restrictions in the supply of land suitable for new housing development"

While we appreciate such challenges may occasionally occur, in our view this is not an accurate characterisation of the norm. In fact, recent research[34] carried out by Savills on behalf of the Commission noted that the following "key themes" were more significant barriers to housing than any shortage of land supply due to concentration of ownership:

- land price and best value;
- the rural housing funds;
- the cost of development in rural Scotland;
- resource, capacity, skills and awareness;
- the Scottish Land Fund;
- rigorous planning policy and regulations; and
- the green agenda.

SLE members are actively involved in the provision of housing and often end up being the major provider of affordable housing in rural areas[35][36].

2. "Limited business expansion due to difficulties in securing suitable land/premises on reasonable terms because of lack of alternative options within the locality."

As far as we are aware this issue has not been raised with the Good Practice Team at the SLC in the context of the LRRS protocols, so it is therefore premature to say that any such issue could not be solved through the guidance led process, combined with a more flexible approach to planning and building regulations which would more readily allow empty spaces to be utilised. It is also important to understand the context of this issue, which has presumably been raised through the scale and concentration report, where such complaints may not have been verified by the landowner or a

[34] The Role of Land in Enabling New Housing Supply in Rural Scotland: https://www.landcommission.gov.scot/downloads/5f0d95f1aa966_Savills%20Final%20Report%20(inc.%20case%20studies)%20-%20SLC%20July%2020.pdf

[35] Kincardine Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/kincardine-estate-affordable-housing

[36] Islay Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/affordable-housing-islay

third party. We cannot therefore assume that terms offered in such circumstances were unreasonable, and that it is in fact community expectations which need to be managed.

SLE members are very proactive in providing opportunities for business set up as well as expansion. In many cases businesses are attracted to estates precisely because they can offer more than traditional business parks[3738].

3. "Inability to secure work or contracts due to an individual or business being 'blacklisted' by a dominant landowner with a high degree of control over demand for local services (monopsony)."

Firstly, it is not clear what scale of problem there exists with businesses being 'blacklisted' by landowners. And it is also not clear to what extent any reported 'blacklistings' are in fact disgruntled businesses reporting a 'blacklisting' because they have not won a contract for legitimate reasons. If this evidence is based on the scale and concentration report, we refer back to our earlier comments relating to an apparent lack of corroboration. In addition, we are not aware of any complaints of 'blacklisting' or 'monopsony' relating to estates in Scotland being made to the Small Business Commissioner[39]. What we can be sure of however, is that there are many practical examples of estates helping small local businesses throughout the country[4041].

4. "Community development limited by landowner resistance to projects that would deliver social, environmental, and/or economic benefits for the community."

Where this does happen, there is a growing understanding of the importance of community engagement in decisions relating to land which is borne out through the work of the Good Practice Group and the LRRS protocols. We also consider that in the vast majority of cases landowners do not resist sensible, appropriate projects which benefit the community[4243].

In our view, the examples we highlight clearly demonstrate that estates can and do play a crucial role in both protecting fragile rural communities and in helping them reach their potential. There are more examples which can be found on SLEs Helping It Happen website[44].

However, it is not just SLE that recognises the benefits that private land ownership can bring to communities. Even as far back as 2016, the SRUC[45] commenting on socio-economic and environmental outcome from different land ownership models in rural Scotland noted, that private estate owners often emphasise long term estate viability and deliver significant local economic

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[37] Cambusmore Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/mcqueen-gin and https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/mcqueen-gin-finds-home
[38] Cassillis & Culzean Estates: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/kirklands-farm-redevelopment
[39] Small Business Commissioner: https://www.smallbusinesscommissioner.gov.uk/
[40] Leys Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/leys-estate-encouraging-partnership-working-between-estate-and
[41] Balcaskie Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/fifes-quiet-revolution
[42] Learney Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/supporting-local-community
[43] Drummuir Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/rural-community-development
[44] Helping It Happen Case Studies: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies
[45] Rural Scotland in Focus 2016: https://www.sruc.ac.uk/info/120428/rural_scotland_in_focus/1735/2016_rural_scotland_in_focus_report

impacts, contributing an estimated £127/ha to the economy and over 8,000 jobs. And the SRUC research also recognised that landowners were using diversification opportunities to address challenges including renewable energy, adding value to products, nature-tourism in conjunction with conservation and development of new markets and incentives for key ecosystem services (e.g. carbon).

Further evidence of the benefits of private estates were highlighted in a 2014 report[46] which estimated 3,175 FTE jobs were reliant directly on the 277 businesses surveyed. Of course, Scotland's estates don't just deliver economic benefits, they also produce food[47], provide diverse habitats for wildlife[48], fight climate change[49], support health and communities[50], and create some of our most beautiful landscapes[51].

In our view these benefits are being realised in the vast majority of estates, working in collaboration with communities. We therefore do not believe further legislation is needed to protect Scotland's communities from the so-called risks posed by large scale and concentrated land ownership.

Rationale for Legislative Intervention

In an attempt to reiterate their rationale for legislative intervention the SLC Paper sets out three main reasons for proposing these measures. Those are:

- Voluntary action is not adequate;
- Existing legislation is not adequate; and
- There are failures in the land market.

In terms of the voluntary action, the allegation that "the evidence points to this being a systematic, structural risk in the current pattern of land ownership, which will require structural change to address", is completely unfounded. As we have already seen, the issues identified in the scale and concentration report were amplified while the benefits downplayed. In the period since that report, the voluntary action being taken through the LRRS protocols has, in looking at the SLCs own casework, been an overwhelming success. It is disappointing that the SLC has not let this process settle before passing judgment on its effectiveness.

At section 3.2.2 the Commission begins by stating "Communities and local authorities already have at their disposal various instruments that could be used to help address the adverse consequences of concentrated land ownership.". It then goes on to suggest that wholesale change in landownership is not always needed. We agree with both of these sentiments, but consensus ends there. SLE believes that the risk of compulsory purchase at one end, combined with the guidance led

[46] Economic Contribution of Estates in Scotland: https://www.scottishlandandestates.co.uk/sites/default/files/library/Economic%20Contribution%20of%20Estates%20in%20Scotland.pdf
[47] Midlothian Estates Group: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/food-farming-midlothian
[48] Caerlaverock Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/wildlife-haven-publicly-used-privately-owned
[49] Lochrosque and Kinlochewe Estates: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/creating-energy-and-supporting-nature
[50] Altyre Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/breath-fresh-air
[51] Drimnin Estate: https://www.scottishlandandestates.co.uk/helping-it-happen/case-studies/drimnin-estate-conserving-natural-beauty

approach of the LRRS protocols at the other has so far been very effective at assisting behaviour change and improving practice.

The outgoing Cabinet Secretary, Roseanna Cunningham MSP said, land reform is being "… driven by culture change as well as legislation,", recognising that "…it is a necessarily gradual journey,". In that context she notes "There are now 590 assets across Scotland, owned by 418 community groups, a figure which is increasing all of the time. There are also more negotiated sales between major landowners and community groups. The various options for a legislative community right to buy are still there – but they are not always needed. I am, however, confident that their existence is driving the culture change."[52]

In trying to justify its position that the land market does not work, the Paper has honed in on several points it considers sources of market failures in rural Scotland. These are:

1. "In some communities the supply of land is dominated by a single provider." This may be true, but the Paper offers no concrete evidence to suggest that where this is the case no land is coming forward or that it is coming forward at disproportionately high prices.
2. "Information about who owns land is often difficult to obtain." The Registers of Scotland continues to progress with a voluntary registration of all land in Scotland and there is also new legislation which will improve transparency in relation to those holders of controlling interest in land[53].
3. "It can be difficult for businesses to acquire the land they need to operate." As our examples and those expressed in the scale and concentration report demonstrate, it can also be due to the scale of an estate business that enables a local business to acquire land for below market rates or even for free.
4. "Land can be transferred privately without market transparency." While this may not aid accuracy in determining land values, creating artificially high values based on estimations, it is also possible for there to be artificially low valuations, thereby unintentionally lowering market values.
5. "The way land is managed frequently has unintended negative effects for the surrounding community and environment that are not borne by the landowner." This statement lacks any objective justification and reveals a lack of understanding of land management issues and the extensive regulation already associated with it. In addition, the statement does not appear to have any tangible relation to the land market.

This part of the Paper goes on to suggest that there are many parallels to be drawn between the criteria for a well-functioning market and the principles for the LRRS. In our view, it therefore makes sense to continue working to improve practice via the current LRRS protocols, which is working, rather than propose new legislation.

Underlying Principles

Part four of the Paper relating to the underlying principles begins by revealing that "proposals for a statutory review and a public interest test would be a significant change from Scotland's traditional

[52] Land Reform Reflections: https://blogs.gov.scot/rural-environment/2021/03/24/land-reform-reflections/

[53] Register of Controlling Interests: https://www.gov.scot/policies/land-reform/register-of-controlling-interests/

approach to regulating the land market…". We concur with this statement and consider that there is no evidence to justify either a need or desire for such a significant change in approach. It then sets out to ensure that its proposals would be "both effective and legally sound" by giving brief overviews of relevant human rights law, and the public interest etc.

Rather than deal with the implications of European Convention on Human Rights (ECHR)[54] in any detail, the Paper gives primacy to the UN International Covenant on Economic, Social and Cultural Rights[55]. We are not aware of any circumstances where this Covenant has been used in relation to concentrated land ownership. Furthermore, the Covenant is quite clear that the duty on all parties to take steps to achieve the realisation of rights "by all appropriate means, including particularly the adoption of legislative measures", would equally apply to landowners who "freely pursue their economic, social and cultural development" (part 1, article 1), for example.

When addressing the ECHR issue, the Commission does highlight the right to "peaceful enjoyment of possessions", but the Paper notes that this right is "not absolute". In this context it correctly highlights that those rights can be interfered with in pursuit of the public interest. It then goes on to suggest that while the "right to peaceful enjoyment includes rights of disposal, there is no corresponding right to acquire, inherit, or be appointed trustee over, property. Nor does A1P1 prevent the imposition of pre-emptive rights of acquisition or transfer". Given that this proposal has such wide implications, SLC need to make certain that this assumption is correct. On face value there are questions over where a clear distinction can necessarily be drawn between the right to dispose and the right to acquire, for example.

That the Paper does not see a need to define the public interest is not strictly problematic per se, particularly when this is the norm when we consider compulsory purchase etc. The issue arises when we consider the public interest in the context of private property transactions and private business governance. We consider this would be particularly difficult to determine on a case-by-case basis, and in the context of land, may throw up many conflicts, for example, between national and local public interest. The Paper notes the need to balance individual rights and the public interest at 4.3, but it fails to address issues where a local community or individuals' 'public interest' is pitted against the national interest of delivering more trees, for example. Indeed, there already exists frustration that the Land Reform 2016 Act fails to adequately explain the difference between community benefit and the public interest (ANNEX 3 - ECHR MAXWELL PDF).

In underscoring precedents for intervention, the Paper highlights international experience citing its research[56] of 2018 which looked to compare interventions into concentrated land ownership around the world. The first conclusion that the Commission infers from its research is that Scotland (and the UK) are 'outliers amongst developed economies in having very few restrictions in relation to who can own land or how much they can own.". However, this is an imprecise narrative considering that out of the 36 developed economies categorised by the UN in 2020[57], only 18 countries were identified as

[54] ECHR Official Documents: https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c
[55] UN International Covenant on Economic, Social and Cultural Rights: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
[56] Research on interventions to manage land markets and limit concentration of land ownership elsewhere in the world: https://landcommission.gov.scot/downloads/5dd6c67b34c9e_Land-ownership-restrictions-FINAL-March-2018.pdf
[57] World Economic Situation and Prospects 2020 (UN): https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf

having some form of land regulation in the SLCs research. Interestingly, the same report also points to 7 countries where measures are being taken to reduce land fragmentation. It states:

> "A prominent concern in these countries is land fragmentation, rather than concentration. Fragmentation has negative impacts on the land market by increasing negotiation and information costs, in turn reducing farm performance (Loughrey et al., 2018)."

The latest Paper then looks to stress the existing parallels in other sectors by commenting that governments will intervene in market failure created by a monopoly situation, for example. In this section the SLC reference the Green Book[58] and its reasons for intervention. The Green Book sets out "the need to understand competition and market efficiency, arising when we consider either:

- whether a public policy objective can be met by improving the social welfare efficiency of an existing market, or establishing a new market, or
- whether a proposed market intervention may also result in distorting an existing market and so significantly damage welfare efficiency. "

In our view, we do not see public policy objectives being met through intervention, but we do consider that intervention would result in the distortion of the existing market to the detriment of welfare efficiency. For example, intervention would not improve efforts to meet climate change targets, as the scale and concentration report made clear, landscape scale interventions are easier over larger landholdings. And legislating to effectively discourage sales and or put-off investors will undoubtedly impact on the market. In addition, if this is an attempt to interfere in competition law, there are doubts about legislative competencies which have not been addressed in the Paper.

The Commission then moves on to talk about the need for regulatory support to underpin its proposals. It does this by referring to the role of the Competition and Markets Authority (CMA), which exists to "promote competition for the benefits of consumers" and focuses explicitly on making markets work well for consumers, businesses, and the economy. Much of the businesses that landowners operate as part of their day-to-day operations will already be covered under the remit of the CMA.

The Proposals

Requirement for Management Plans

"A requirement for land holdings over a defined scale to prepare and publicly engage on a management plan, a practical mechanism to moderate the power of ownership by ensuring communities are more involved in influencing and benefitting from land use decisions."

The requirement for an estate to develop and publish a management plan is not problematic in and of itself, SLE considers it good practice to produce one as do many of our members. SLE was instrumental in developing a 'Management Plan Template' which was subsequently adopted by the SLC as a template tool for the Transparency of Ownership protocol[59]. The difficulties with this proposal are two-fold. Firstly, the requirement to 'publicly engage' on a management plan is distinctly separate from a requirement (or expectation) to engage with your community on decisions relating to land. It can be accepted that a management plan is there to specify facts about the land ownership and use etc. and set out basic objectives over a defined period. This is an exercise in being

[58] Green Book: The Green Book (2020) - GOV.UK (www.gov.uk)
[59] Transparency of Ownership protocol: https://www.landcommission.gov.scot/our-work/good-practice/transparency-of-ownership-and-land-use

open and transparent rather than an opportunity for the community to influence governance decisions. To draw on the examples the SLC used in relation to interventions in market monopoly, no corporation (large or small) would be expected to engage customers on operational or management plans.

Secondly, the introduction of sanctions to this proposal is not justified. As we have already noted, there exists a template management plan in the Transparency of Ownership protocol and we are not aware that any issues have been raised through the SLC's Good Practice Group or any other avenue relating to an absence of management plans. The SLC presents no evidence to suggest that not preparing a plan, and/or not publicly engaging on a management plan has any detrimental effects on communities.

As the Paper notes, the scale and concentration report found a clear distinction between scale and concentration: "the research found that the concentration of social, economic and decision-making power associated with land ownership is the main risk factor, rather than the scale of the landholding." Yet this Paper proposes to legislate for compulsory management plans for landholdings over a certain scale. This would appear to be addressing a non-existent issue with scale rather than the main "risk factor" associated with concentration. For example, the ownership of one property in a village may impact the viability of a school, but this owner would presumably not be expected to complete a management plan because the land holding does not meet the required scale.

The Paper asserts that the most practical way to enforce compliance with this requirement would be through cross-compliance. For example, compliance could be a pre-requisite for access to specified fiscal support and/or regulatory consents. There does not appear to be any clear precedents for this. Again, drawing on the corporate monopoly example used by the Commission – we are not aware of Tesco ever having been fined for not having publicly engaged on a public facing management plan despite it operating a 27.4 percent share[60] of the UK market.

Land Rights and Responsibility Reviews

"A statutory review mechanism framed within the principles of Scotland's Land Rights and Responsibilities Statement to be a practical means of intervention to address adverse impact of concentrated ownership in a specific land holding where these occur."

There is no evidence to suggest such a shift is required. SLE is proactively co-operating and collaborating to deliver positive change through the LRRS protocols via a guidance and voluntary-led approach. That approach is working and should continue to be the focus of everyone's collective effort.

As a general comment, it is worth mentioning that the full suite of LRRS protocols has not long been introduced, the review of the LRRS is not due until later this year and early indications (as noted in this Paper) suggest that the protocols are being used positively by interested parties. It would therefore be both premature and unnecessary to recommend statutory reviews based on the LRRS before a review of their effectiveness has been conducted. Indeed, this LRR Review mechanism was

[60] Tesco market share: https://www.proactiveinvestors.co.uk/companies/news/942686/tesco-increases-grocery-market-share-for-first-time-in-four-years-942686.html

originally proposed in the scale and concentration report **before** the LRRS protocol series was complete.

The first point to make on the specifics of the proposal is in relation to the first key issue raised in the Paper, "The parallel of the TFC model as the basis for statutory Reviews." There is no "parallel". The proposed LRR Review goes much further than the TFC model in suggesting powers such as, recommending changing operational/management practices, changing governance arrangements, or even disposal of assets as well as financial and cross-compliance penalties.

This Paper notes: "The statutory review mechanism is proposed as a means of addressing the adverse effects of concentrated landownership where normal, responsible management approaches are not sufficient." It is not clear whether the Paper is referring to where management practices do not meet normal, responsible standards, rather than suggesting people need to go above and beyond normal and responsible. If it is the latter, this undermines the Good Stewardship Protocol[61] which defines good stewardship as: "…the careful and responsible management of something entrusted to one's care." and it goes on to give examples of what this means in the context of land management.

Fundamental to the SLC's attempt to justify its proposals for a review mechanism, this Paper states: "The LRRS Protocols provide an initial approach to providing similar clarity, but currently without statutory underpinning. As a voluntary approach, there is no requirement for landowners to use the LRRS Protocols and no mechanisms encourage their use or address incidents of poor practice." We have already proved the SLC's own casework clearly demonstrates that this approach is effective and there is no basis on which to build a case for more legislation – backstop or otherwise.

We note that at section 6.2 of the Paper, the Commission, in establishing clear expectations, highlights that the LRRS protocols "have been developed in collaboration with sector interests, enjoy widespread support, and are widely considered reasonable and proportionate." This is accurate, however, their scope is quite wide and legally ambiguous and therefore they sit well within the context of a guidance-led voluntary approach. The same cannot be said in a statutory context. This will be inequitable if different owners are having to comply with different cross compliance requirements particularly given the arbitrary nature of the criteria.

We note with interest the comment, "The Land Commission is also developing a prototype review template based on the LRR Protocols and has begun working with a range of ownership sector bodies to test this. The results from this work will be available in 2021 and could be used to inform the development of any future legislation.". It is unclear whether this is a reference to the LRRS self-assessment pilots that SLE and other organisations are helping their members to compile in good faith. Whilst we have always been aware the results could be used to inform future legislation, we were never led to believe that the LRRS self-assessment pilots were in any way "prototype review templates".

At section 6.3 of the Paper the Commission proposes "that an application to conduct a review could be lodged by anyone with a defined legitimate interest in the landholding in question…". This is a wide scope that leaves landowners open to vexatious claims, it is not clear whether this relates to interest based parties or local people and has potential implications down the line as the

[61] Good Stewardship Protocol: https://www.landcommission.gov.scot/our-work/good-practice/good-stewardship-of-land

Commission also proposes that any landholding which has been subject to a LRR Review can also be subject to a Public Interest Test.

In undertaking the review, the proposal recommends that its "primary purpose should be to determine the facts and make appropriate recommendations to ensure the public interest is protected.". This immediately raises the question of which public interest is given primacy, national, local or interest group? and if the landowner is found to be delivering the greater public interest, what recourse is there for the land to be excluded from a public interest test in future?

The review process also proposes to fully assess issues relating to ownership, governance and management of the landholding, and bearing in mind the authority should "report publicly on the findings", there could be implications for financial confidentiality and GDPR.

This proposal includes potential action such as changing operational/management practices, changing governance arrangements, or disposal of assets following a review. It also proposes financial penalties and cross-compliance penalties (such as withholding public funds, regulatory consents etc.) for non-compliance. As we have noted before, this goes beyond the powers of the TFC which is held by the Commission as an appropriate comparison. We also consider these suggestions to be a wholly inappropriate response to a functioning LRRS protocols guidance-led approach that is demonstrably improving outcomes.

Public Interest Test

"A public interest test for significant land acquisition, at the point of transfer, to test whether there is a risk arising from the creation or continuation of a situation in which excessive power acts against the public interest."

The primary objective of this proposal is stated as being able to "test whether a specific significant acquisition of land is likely to create or perpetuate a situation in which excessively concentrated power could act against the public interest.". However, the LRRS work through the Good Practice Group identified only one single case study relating to public interest in over a two-year period. And, in the SLC's own words, "The public interest issue related to development plans on common good land", rather than private ownership. Once more, according to the SLC's most up-to-date practical evidence shared with us, it would appear there is very little in the way of justification for introducing a public interest test.

Another important consideration in the context of these proposals is that the public interest is only one of several considerations which must be satisfied before ministers will consent to a community right to buy. For example, for the right to buy land to further sustainable development Scottish Ministers must be satisfied that:

- the transfer of land is likely to further the achievement of sustainable development in relation to the land
- the transfer of land is in the public interest
- the transfer of land is expected to result in significant benefit to the relevant community
- is the only practicable, or most practicable, way of achieving that significant benefit and
- is not anticipated to result in harm to that community.

This demonstrates that, to date, Scottish Government has thought it appropriate to consider a range of issues when deciding whether or not to purchase land for a community. If, as the proposal

suggests, a sale could be prevented or full/partial compulsory purchase by a public body could be required, it is only equitable that in such circumstances other conditions besides the public interest test should be met. For example, if a recommendation is made to stop a sale, it should be demonstrable that the sale; is not in the public interest; would prevent the community from achieving its stated aims; and would cause harm to the community, etc.

The viability of this proposal in terms of human rights remains in doubt. Instead of using the last 2 years to get a clear legal position on the original proposals, the SLC have widened the scope and come up with conjecture about the UN International Covenant on Economic, Social and Cultural Rights which has not been tested in this context.

In transposing the ECHR into UK law, the Human Rights Act 1998[62] says that interference with a qualified right must be deemed 'necessary' in a democratic society. Is it necessary to implement a public interest test when we already have a series of protocols which are helping to deliver change in the way land is used and managed – in the public interest? Even without the change that is taking place, for a particular action to be deemed necessary in a democratic society, that action must surely have a defined purpose. If we take the case of a CPO, not only is the acquiring authority required to justify why it is in the public interest to interfere with the legal rights of those it will affect, but it should also satisfy that in doing so it will fulfil a clear objective[63]. It is not apparent what 'clear objective' could be met through refusing an acquisition to proceed, or indeed, what clear objective could be met by refusing to allow inheritance or a change of shareholder.

Given the UK Government's recent legal challenge of two Holyrood Bills[64] for reasons connected to the fact that they incorporate outside standards into Scots law (i.e., the UN Convention on the Rights of the Child and the European Charter of Local Self-Government), it is reasonable to expect that a similar challenge may be raised if attempts are made to incorporate the UN International Covenant on Economic, Social and Cultural Rights as the Paper suggests.

Similarly, in justifying their position on monopolies SLC have cited "parallels in other sectors". The parallels cited in other sectors do not go beyond preventing monopolies through mergers and acquisitions, they do not interfere with inheritance, share holder control, trusteeship or the equivalent of option agreements, which is central to these proposals.

On the one hand the proposal is described as "a targeted mechanism, applied only where necessary to prevent adverse effects", yet on the other it explicitly states, "To be effective it is important that all forms of transfer of control could be covered, including but not limited to:

- Sale on the open market
- Private sale
- Inheritance
- Sale of shares in the controlling company resulting in a change of controlling interest or majority shareholder
- Appointment to, or change in, trusteeship
- Creation of an option agreement over land."

[62] Human Rights Act 1998: https://www.legislation.gov.uk/ukpga/1998/42/contents
[63] CPO Guidance for Acquiring Authorities: https://www.gov.scot/publications/guidance-acquiring-authorities-prepare-compulsory-purchase-order/pages/3/
[64] UK Government legal challenges: https://www.heraldscotland.com/news/19227565.uk-government-refers-two-holyrood-bills-supreme-court/

This is not a targeted approach but a blanket one clearly intended to interfere in every transfer of land. The need for such an approach has not been justified.

It is interesting to note that the Commission considers that it would be appropriate to apply its suggested sanctions only when a "significant risk is identified" rather than in the event of there being an actual problem. In our view, this sets a dangerous precedent and does not comply with the Scottish Government's own Better Regulation agenda.

The Commission has chosen this Paper to introduce a new concept of "transparency of operation" as opposed to transparency of ownership and decision-making, both of which are covered by various protocols covered in the LRRS series. If the Commission has evidence to suggest a lack of transparency in business operation is in some way problematic, it should bring that evidence forward and suggest a proportionate solution such as incorporating it in the LRRS protocols series.

In choosing to exclude certain properties the Paper suggests that "exclusions should broadly be in line with the exclusions to existing rights to buy contained within the land reform legislation, such as those covering owner-occupied homes.". We reiterate our previous point that it would therefore be appropriate to include similar conditions that apply to ministerial consent for a community right to buy in any public interest test which may ultimately result in an inability to sell land or for land to be compulsorily purchased.

As a starting point the Paper proposes that the scoping criteria to determine which transactions could be subject to a test could include landholdings:

- Above a certain specified threshold
- That account for more than a specified minimum proportion of the total land area of either a Remote Rural Area (per Scottish Government Urban Rural Classification) or an island; or
- That have previously been subject of a statutory Land Rights and Responsibilities Review

Like the proposal for a requirement for management plans, this proposal focuses on land over and above a certain threshold. We do not understand how targeting large-scale ownership will help address potential risks associated with concentrated ownership, which was the main challenge identified by the scale and concentration report. The specific proposals characterise all land over 10,000 hectares as being subject to a public interest while all land under 1,000 hectares as not being subject. As an example, this would mean that the CPO for the Glasgow Commonwealth Village development of 38 hectares would not qualify for a public interest test despite its significant impact on the surrounding communities.

It is also concerning that any landholding which has been subject to a LRR Review (regardless of the outcome) would also be subject to a public interest test. It is inappropriate to expect those who have been cleared of any wrongdoing in a review to then be subject to a public interest test with all the associated implications. The Commission notes that the intention is that the test should only ever need to be activated in a small number of targeted circumstances, however, this is not backed up by the scope of the proposal nor by the fact that anyone subject to a vexatious accusation could be subject to an LRR Review and by default, subject to a public interest test.

The Paper considers it might be appropriate for landowners to voluntarily notify the relevant authority of the need for a public interest test. We do not see how such an approach would prevent the discouragement of investment as is suggested. A test could be initiated shortly after an acquisition has been made if the acquiring party has not notified the relevant authority in advance.

However, there is a suggestion that some types of transfers could require a duty to notify beforehand. These approaches will certainly discourage investment as this will represent a "significant risk to purchasers", something which the SLC has recognised in its Paper. In our view, this is problematic on two levels. Firstly, it raises the spectre of a reduction in capital investment in the rural economy just when the impact of Brexit and the coronavirus takes hold. Now is a crucial time to encourage private investment in our rural communities to help build and maintain resilience through these challenging times. Secondly, by effectively discouraging the sale of land (and even change in governance) over a certain scale, this proposal will unintentionally perpetuate the current pattern of land ownership. SLE does not see this as problematic, however, diversification of ownership is a clear policy objective for Scottish Government, and in our view this proposal is ultimately counterintuitive to that objective.

In setting out the requirements for the test phase, the Paper suggests that this phase would allow for the detailed assessment of the relevant economic, social, and environmental factors pertinent to safeguarding the public interest. It goes on to justify not defining the public interest and suggest that guidance would need to be developed to assist decision-makers with key questions for consideration, including:

- would a proposed acquisition create or perpetuate a monopoly situation?
- if so, is there reason to believe that such a situation could harm the public interest?

These questions raise valid issues in relation to the national versus local interest. For example, there may be a situation where large-scale forestry or agriculture is proposed as part of a purchase. Each will either meet a Scottish Government objective in relation to planting trees for carbon sequestration or food production/security. Both land uses are potentially concentrated in nature and could conflict with a community's interest in developing housing units, for example. The Paper does not offer any insight into such potential conflicts between local and national public interests, which we perceive as being a key issue which may ultimately end up being tested in court.

What the Paper also fails to mention are the already comprehensive powers and structures in place to make determinations on land use in the public interest. For example, planning permission; NatureScot; SEPA; FLS all add layers of control and influence over land use decision-making processes to balance public policy interests. The Planning (Scotland) Act 2019[65] explicitly states that, *"the purpose of planning is to manage the development and use of land in the long term public interest".*

The Paper sets out characteristics of concentrated land ownership which it considers might justify a public interest test. These are as follows:

- the majority of the stock of privately rented residential properties
- strategic local infrastructure -e.g. slipways, petrol stations or sites for telecommunications infrastructure
- important community or cultural facilities such as hotels or shops (particularly where there is only one in the locality)
- the majority of the effective local housing land supply
- a significant proportion of local employment; and/or
- a significant proportion of local demand for goods and services

[65] Planning (Scotland) Act 2019: https://www.legislation.gov.uk/asp/2019/13/section/1/enacted

It is clear that much of the characteristics identified have just as much potential to have a positive impact on communities. This view is borne out by the evidence as expressed by the majority of respondents to the scale and concentration report in 2019, as well as by the case studies we have already highlighted. The Paper is almost suggesting that if you don't want to be subject to a public interest test, don't provide any of these things that might be considered a characteristic of concentrated ownership.

At *Table 1*, the Paper then looks at examples of conditions, setting out potential negative manifestations they might have on the land market. No such consideration of the potential positive impacts is undertaken and no attempt is made to consider the implications on the land market if fragmentation of landholdings was to take place. And as we have already set out, there are countries who have identified fragmentation as a problem and have developed policies to prevent it.

The proposals to impose conditions on an acquisition or prohibit an acquisition are not justified, particularly when it is not clear whether land owners should be aiming to meet the local or national public interest. As we have already outlined, such conditions would likely result in less sales taking place, disrupting vital investment in our rural communities and perpetuating the current pattern of land ownership.

On safeguarding new ownership, the Commission suggests including "binding commitments on governance and management, or voluntary disposal of land and property assets either from within the desired landholding, or other landholdings within their portfolio.". This proposal demonstrates a lack of understanding of land management and business practices and the need for flexibility to meet ongoing challenges. Imposing these types of restrictions would have a significantly detrimental impact on investment.

In the end, these proposals seek to impose a public interest test on potential private sales, but it could be argued that the priority should be to establish whether purchases which rely on public funds (for initial capital and ongoing support) are in the public interest. As the ECHR Maxwell paper puts it:

"A number of very central concerns remained unanswered in relation to whether the 2016 Act and the wider land reform movement in Scotland are really in the public interest. It has to be asked whether government spending, which one study by the Chartered Surveyors Smith Gore suggested could be more than £600 million, in order to give a handful of communities the ability to make community purchases, is a justifiable use of public funds. It also remains to be seen if community ownership in most instances can even be economically successful. Notably the Isle of Gigha Heritage Trust, which undertook one of the first community buy-outs in Scotland, has been reported to be over £2.7 million in debt."

A way forward for land reform

SLE is not of the view that we should be standing still as far as land reform is concerned. At 2.5 the SLC Paper talks of Lord Sewel's remarks in 1999, "it is crucial that we regard land reform not as a once-for-all issue but as an ongoing process", in our view this process is continuing. This progress is taking many forms:

- the LRRS protocols;
- the work of the TFC;
- financial support through the Scottish Land Fund;

- Crofting Community Right to Buy;
- Community Right to Buy;
- Community Right to Buy Abandoned, Neglected and Detrimental Land;
- Community Right to Buy Land to Further Sustainable Development;
- development of regulations for a register of persons holding a controlling interest in land;
- Agricultural holdings reform;
- Asset Transfers;
- Community Planning; and
- Participatory Budgeting.

SLE has been active in every aspect of this work where it is relevant to our members. And as we have outlined in this paper there have been considerable success stories and progress being made over the course of the last few years.

A review of the Scottish Government's Guidance on Engaging Communities in Decisions Relating to Land[66] recently revealed that 65% of landowners or land managers had read or used the guidance, while more than half of the same group had read or were aware of the SLC's Community Engagement protocol. This represented a higher level of awareness than all the other groups that took part and demonstrates there already exists a good foundation on which to build.

In our view the main focus of work for the immediate future should therefore be to build on this foundation by fully embedding the LRRS protocols into rural business practice across the country. Time must be permitted for behaviour change to take shape and to allow for that change to influence outcomes on the ground, just as expectations around health and safety have become firmly embedded into business practices over a prolonged period of behaviour change. The protocol series is effective in improving understanding of expectations for landowners and managers and ultimately it is successful in improving practices. The current eight protocols should be actively implemented and their impact evaluated before any legislation is proposed. We consider that, given their effectiveness, there is further scope to develop new protocols, for example:

a. **Protocol for Responsible Access** – Rising instances of irresponsible access from dirty camping to sheep worrying have been a symptom of increasing numbers of people taking access in the countryside. Now is the time for a high-profile public facing Protocol to be launched by SLC to support the responsible access rights enshrined in the 2003 Act.

Another part of the land reform agenda is that which is not directly labelled land reform, but which may directly impact land reform outcomes. Examples include the Local Place Plans being brought forward through the Planning (Scotland) Act which could better enable communities to have their say about the development that takes place in their area and which the Scottish Government notes in their consultation[67] can "deliver on the community empowerment agenda". Similarly, Masterplan Consent Areas being implemented by the same legislation present an opportunity for public interest led development. And we also see the development of the Regional Land Use Partnerships as a potential opportunity to have a more collaborative approach to land use decision making. In

[66] Review into the Guidance on Engaging Communities in Decisions Relating to Land: https://www.gov.scot/publications/review-guidance-engaging-communities-decisions-relating-land/

[67] Local Place Plans consultation: https://consult.gov.scot/local-government-and-communities/local-place-plan-regulations/

referring to the Regional Land Use Partnerships, the SLC[68] said they, "could bring opportunities to ensure people are more engaged in decisions about land use change, helping unlock the economic, social and environmental opportunities for communities and land managers, and supporting local action."

These avenues will all deliver land reform outcomes without the need for further legislation. It is imperative that they (and others like them) are considered in the context of decisions relating to land reform legislation.

[68] SLC press release on Regional Land Use Partnerships: https://www.landcommission.gov.scot/news-events/blog/regional-land-use-partnerships