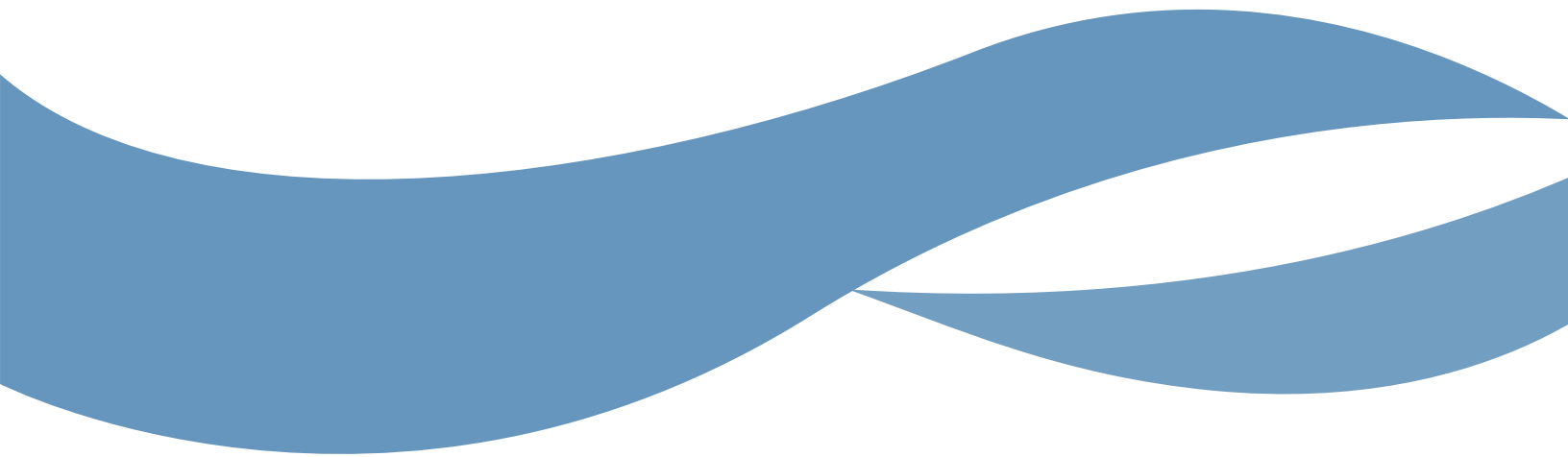


Land Reform in a Net Zero Nation Consultation response

28 October 2022

About Scottish Land & Estates

At Scottish Land & Estates (SLE) our work helps to ensure that rural Scotland thrives. We are a membership organisation for landowners, rural businesses, and rural professionals. We promote the wide range of benefits land-based businesses provide: tourist attractions, leisure facilities and landscapes enjoyed by the public, as well as housing, employment, tourism & enterprise and farming opportunities. We represent the interests of our members and wider rural Scotland to the UK and Scottish Governments to help ensure that policy and legislation reflects the unique requirements of rural Scotland and its communities.





RESPONDENT INFORMATION FORM

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To find out how we handle your personal data, please see our privacy policy:
<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

☐

Individual

☒

Organisation

Full name or organisation's name

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The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

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We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

☒ Yes

☐ No

Executive Summary

Scottish Land and Estates (SLE) welcomes the opportunity to respond to *the Land Reform in a Net Zero Nation* consultation. We do not seek to obstruct proportionate strides in the reform of how land is used and managed in Scotland, where this can appropriately be justified by evidence and demonstrably improve outcomes. We agree with the Scottish Government that land has an important role to play in reaching net zero and improving biodiversity, and we and our members wish to play a full and constructive part in delivering the best outcomes for people, jobs and nature.

The consultation proposals rely too heavily on a mixture of unchallenged assertions from a 2019 Scottish Land Commission (SLC) report on scale and concentration, and conjecture based on impressions rather than evidence. We published a detailed response the SLC's *Legislative Proposals*¹ paper in 2021 in which we demonstrated extensively how disproportionate and inappropriate many of these proposals were². Disappointingly, despite these challenges some of the proposals in this consultation appear to go several steps further than the Scottish Land Commission's recommendations, with no policy rationale provided and demonstrating a distinct lack of consideration for the recommendations made by the body set up to advise on land reform.

The Scottish Government is seeking to address the "adverse impacts of scale and concentration" through these proposals. Unfortunately, the opportunity to consider safeguards against potential issues related to concentration are hindered by seeking to apportion an arbitrary scale at which a landholding would be brought into the scope of the legislation, despite a distinct lack of evidence demonstrating that scale has negative outcomes. Taking steps to fragment ownership as set out in the consultation will be detrimental to progress on the journey to Net Zero, which is the stated aim of the bill.

There is growing evidence that management of land at scale has positive outcomes for the environment and communities. Indeed more than half of respondents from the Scottish Land Commission's own survey considered management at scale to be positive with the minority considering it as negative.

We have been supporting the SLC in shaping and rolling out the Land Rights and Responsibilities Statement (LRRS) and its associated protocols since its inception in 2017 and are pleased to see from the SLC's own figures that engagement with its Good Practice Advisory Group service

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https://www.landcommission.gov.scot/downloads/601acfc4ea58a_Legislative%20proposals%20to%20address%20the%20impact%20of%20Scotland%E2%80%99s%20concentration%20of%20land%20ownership%20-%20Discussion%20Paper%20Feb%202021.pdf

² <https://www.scottishlandandestates.co.uk/sites/default/files/inline-files/SLE%20Response%20to%20Discussion%20Paper.pdf>

(GPAG) engagement with the LRRS has increased year on year. We therefore do not consider it necessary or proportionate to enshrine compliance with the LRRS in law, when a guidance-led voluntary approach appears to be working well. Furthermore, the LRRS principles are relatively ambiguous, overarching, and sometimes repetitive and therefore not applicable in a legal context.

In principle we do not oppose land holdings producing Land Management Plans (LMPs). However, there lacks an environmental policy rationale for this requirement. Any LMP requirement must not unfairly ask for commercially sensitive information and must allow for a degree of flexibility in business, while being clear in its requirements with a clear rationale for this. Currently the proposal is too onerous and vague in terms of its objectives.

We have major concerns about the Public Interest Test (PIT) proposals in that they again focus largely on the scale of a land holding rather than any confirmed issues with a particular holding. It is unclear why there is a need for a PIT on the seller of land, which would add considerable complexity and delays to transactions without any obvious public benefit. The consequences of a PIT, we believe, would also be open to a legal challenge under ECHR due to infringements on property rights.

The final main proposal is the Land Use Tenancy (LUT), a new type of tenancy said to allow agricultural tenants to undertake more diverse projects such as carbon sequestration. We are unfortunately not able to respond as fully as we would like to this section because of the lack of clarity – the Scottish Government promised the publication of supplementary information, but this has not materialised more than a month after the original consultation closing date. We have written to the Cabinet Secretary, along with other stakeholders to highlight this concerning deficit in detail required to make an informed comment.

Overall, we feel the proposals in this consultation will not capture the true potential of Scotland's land in tackling the twin climate and nature crises, and mechanisms already exist that can be used to achieve this. Unfortunately, many of them have been set up and not seen through or properly evaluated or improved:

- Regional Land Use Partnerships (RLUPs) have been cited by the Scottish Land Commission as being an important mechanism with which to coordinate regional land use and priorities at a large scale. These are still in the early stages of development, and more resource could be concentrated on improving these.
- Improvements to the planning system must be made to support communities in producing effective Local Place Plans, which would increase community-led development and inform Local Development Plans which landowners work to in delivering for the local area.
- Community Right to Buy legislation already gives established and capable community bodies the opportunity to acquire land and assets to use in the interests of the community. No evidence has

been presented as to why these existing powers are not already sufficient. The main issue with this legislation would appear to be the complex and bureaucratic requirements on communities wishing to register. These mechanisms must be evaluated and improved in order to achieve the Scottish Government's ambitions for increased community ownership.

- From SLC data, the guidance-led, voluntary rollout of the LRRS appears to be effective in that more landowners year on year are engaging with the SLC on the LRRS principles. The first review of the LRRS has just been conducted and several projects have been completed, or are underway, in engaging landowners with the LRRS. It is too early in their implementation to deem the voluntary approach to be a failure. In our view, the voluntary approach is a growing success. We feel the time and resource being spent on these proposals would be more effective if existing legislation and mechanisms were reviewed and updated, with just a few examples of these above.

Finally, as custodians of Scotland's landscapes, landowners take their responsibilities to the environment, communities and economy very seriously. They are major contributors to the Scottish Government's Environment outcome in its Wellbeing Economy National Performance Framework, make significant economic contributions on a local and national scale, and have the expertise and means to undertake the vital biodiversity and carbon sequestration work that the country desperately needs. We would like to see landowners recognised for the positive work they do, and brought along on the Scottish Government's journey as experts in their field.

Landowners of all types and sizes are part of the solution, not the problem. Unfortunately, the proposals in this consultation seek to alienate landowners with no real prospects of improvement or delivering the Scottish Government's aims. The Scottish Land Commission's Land and Human Rights forum also questioned the relationship between the substance of the proposals and the documents framing as 'Land Reform in a Net Zero Nation'³. It must be concluded that the driving force behind so much of this is not a sincere wish to improve life in rural Scotland or take advantage of land to tackle the nature and climate crises, but rather a fundamental ideology about land ownership.

³ [6305e163a807b_Note of Meeting - LAHRAF 20220712.pdf \(landcommission.gov.scot\)](#)

Part 4: Criteria for large-scale landholdings

Q1. Do you agree or disagree with the criteria proposed for classifying landholdings as ‘large-scale’:

A) fixed threshold of 3,000 hectares

Agree / **Disagree** / Don't know

There appears to be no evidence that there is a detrimental impact on Scotland due to the scale of land holdings. The Scottish Land Commission's own evidence points to the issue being potentially one of concentrated land ownership in specific areas, rather than scale itself.⁴ Therefore any measure of scale will always be an inappropriate instrument in dealing with any adverse impacts on communities or the prosperity of Scotland in a wider context.

In 2019 the Scottish Land Commission conducted research: “The effects associated with concentrated and large-scale land ownership in Scotland: a research review”⁵, and while we have significant issues with the way this report was presented, often with anecdotal evidence put forward as “proof” of issues, if it is to be used to inform future legislation then it should be properly represented.

“The research was significant both because of its scale (this was the most comprehensive exercise of its kind ever undertaken in Scotland) but also because of its findings, which added four important new dimensions to Scotland's land reform narrative:

- 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 a landholding.**
- An emphasis on land-use as well as landownership: many of the adverse effects identified were underpinned by concerns about the ability of residents of rural communities to influence decisions about how land is used and a belief that they often derive little benefit from decisions that are made.
- Recognition that private landownership itself is not the root of the problem: While many people equate concern about the scale and concentration of landholdings with hostility toward private ownership, the two issues are distinct. The risks of concentrated power can apply regardless of the sector of ownership.”

⁵ [5dd7d807b8768_Research-Review-Concentrated-ownership-final-20190320.pdf \(landcommission.gov.scot\)](#)

This clearly states that scale in itself is not the issue they are looking to deal with, rather the concentrated ownership. While it is difficult to define concentrated land ownership characteristics, that does not mean that scale can or should be used as a proxy. This would not be proportionate or form a coherent policy rationale. Further to this, the report highlights that there are “risk factors” with concentrated ownership patterns, it does not state that concentrated ownership in itself is an issue. This is a very important distinction which should not be disregarded.

It is unclear what benefit defining large scale land holdings in this way will have on the journey to Net Zero. We would expect to see a link to Net Zero throughout the consultation if it is in the name of the title. In fact, it is well known that using land to help reach net zero is most effective at scale, with ease of management, alignment of objectives, and reduced implementation risks to deal with. It allows for sufficient area for peatland restoration and tree planting at scale, particularly when landowners have to consider additionality clauses when applying for subsidies.

The consultation goes into detail about how it has identified those landholdings above 3,000 hectares but provides no policy rationale for this being the arbitrary criteria for defining large scale.

We have concerns about the assumptions made regarding the number of landholdings which are more than 3,000 ha. We do not think that the figures from the Land Register and IACS are a truly accurate reflection of the number of landholdings which exceed 3,000 hectares and therefore give a false impression of the impact of the proposals.

As acknowledged in the consultation, many titles are not yet included in the land register, and those which are will be based on title sheets which do not necessarily correlate to a landholding. ie a landholding could be made up of a large number of title sheets.

This means that the proportionate aspect of the policy proposal is impossible to ascertain due to the inaccurate information on the number of landholdings affected.

Only 1.3% of land is registered for IACS over 3,000ha. There is no indication in this consultation as to whether those 255 businesses are landowner businesses, contract management agreements, or tenants registered for IACS, and therefore the data would seem to be flawed in its assumptions.

Proportionality

The threshold proposed seems to be arbitrary in nature. While the consultation document outlines how it was chosen, using a variety of datasets, it does not discuss why it was chosen, other than it was a figure available within the datasets. SLE strongly believes that any legislative change should be grounded in evidence and we have seen no evidence which suggests that 3,000ha, or any other defined scale, provides a rational for implementing onerous policies and legislation.

The recommendation from the 2021 Scottish Land Commission for legislative proposals⁶ discussed a much higher bar for this:

“It is suggested that the aim should be to establish a threshold that would ensure that family farms and small businesses would not fall in scope, but that modest estates that could pose risks would. It may be reasonable to expect that, for example, holdings over 10,000ha would always be in scope, while those under 1,000ha would always be exempt.”

While again this paper discussed concentration rather than scale being the issue at hand, it again does not outline why the figure was selected, merely how. The paper also outlines the nature of concentration means that the location of the landholding can have as much of an impact as the scale. Therefore this seems disproportionate to the issues discussed. Within the Scottish Land Commission’s Good Practice Advisory group, we have seen no published evidence that larger land holdings are any less likely to undertake good practice than smaller landholdings.

In terms of “family farms”, there appears to be little rationale for this dispensation. If there is a specific issue in principle with landholdings greater than 3,000ha which requires intervention, it is unclear why this would be any less so when it occurs in the context of a family farm. While reference is made to avoiding imposing “disproportionate duties” on family farms, there is no explanation of why it would be disproportionate to impose duties on family farms which exceed 3,000 hectares in size, but proportionate to impose equivalent duties on e.g. a family owned estate, or forestry business.

Further to this, there is no definition as to how a “family farm” is defined, and when asked in Parliament, the Minister was unable to provide any further clarity. Many large businesses are “family owned” and many small businesses have corporate structures in place, from a wider point of view if this is going to be used, then a clear definition will be required, backed with a rationale as to why that defined business could be deemed to be outwith the scope of

⁶ [Legislative proposals for addressing concentrated landownership \(landcommission.gov.scot\)](https://landcommission.gov.scot/legislative-proposals-for-addressing-concentrated-landownership)

legislation. This proposal therefore feels ideological in that the Scottish Government are targeting a particular type of landowner.

Under the European Convention for Human Rights, there are grounds for interference with property rights (A1P1), within clearly defined criteria. One of which is:

“The means used to pursue the public or general interest must be proportionate – this involved a consideration of whether any interference strikes a “fair balance” between the public or general interest pursued and the fundamental rights of the individual.”

Within the consultation and in previous evidence and proposals put forward, SLE believes there is no justification for this, given the evidence around the issue seeking to be dealt with state clearly that scale of land ownership does not *per se* have a detrimental impact on Scotland’s people, economy or nature.

Benefits of Scale

A Freedom of Information (FOI) request of the survey responses, to the SLCs 2019 scale and concentration work⁷, 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. On the basis of its own reporting the Scottish Government would be more accurate to say that many more people see the benefits to large scale land ownership than those who do not. Furthermore, the survey respondents were self-selecting rather than a representative sample with the SLC actively seeking to hear from people with ‘issues’. Given this approach, the majority reporting a benefit could be seen as even more significant.

Similarly further publications by the Scottish Land Commission have stated “Most of the advantages associated with Scotland’s current pattern of land ownership related to the size of landholdings and most of the disadvantages related to the concentration of social, economic and decision-making power”⁸, suggesting again that size of land holding has a beneficial rather than detrimental impact on Scotland.

In terms of a Net Zero context, scale can provide a wide range of benefits, enabling mixed and varied land use, while creating behavioral change at a scale and speed which would be harder with smaller scale land holdings. This was underlined by a 2014 national landowner survey carried out by Hindle et al⁹ which found that larger estates are more likely to be involved in

⁷ [5dd7d77021f04_Report-to-Ministers-Scale-and-Concentration-Land-Ownership-FINAL-20190320.pdf](https://landcommission.gov.scot/downloads/5dd7d77021f04_Report-to-Ministers-Scale-and-Concentration-Land-Ownership-FINAL-20190320.pdf) (landcommission.gov.scot)

⁸ https://landcommission.gov.scot/downloads/5dd7d6fd9128e_Investigation-Issues-Large-Scale-and-Concentrated-Landownership-20190320.pdf

⁹ [CNP-Landowner-Survey-FINAL-REPORT.pdf](https://www.cairngorms.co.uk/CNP-Landowner-Survey-FINAL-REPORT.pdf) (cairngorms.co.uk)

conservation management and reported participation in a wider range of activities than estates in other size bands.

Scotland's Environment Web, which is managed by non-departmental public body, Scottish Environmental Protection Agency (SEPA), clearly states the benefits that scale for conservation:

*"Landscape-scale conservation – (also known as ecosystem approach) is land management that involves working in collaboration and working at a large scale – often around a catchment, estuary or other recognisable landscape unit. This is a scale at which natural systems tend to work best and where there is often most opportunity to deliver real and lasting benefits. In this way, it is possible to deliver environmental, social, and economic benefits that are more difficult to achieve by managing small sites individually."*¹⁰

There are numerous examples where larger scale landholdings provide beneficial outcomes for both climate and nature.

Cairngorms Connect¹¹: "Cairngorms Connect partners are working together to control deer numbers to allow forests to expand; to naturalise rivers; to restore huge tracts of peatland and give common messages to visitors. Working together means bigger projects. Combining our resources makes the money go further"

The East Cairngorms Moorland Partnership¹² is a partnership of both private and public land managers, Mar Lodge, Mar, Invercauld, Balmoral, Glenavon and Glenlivet Estates working with the Cairngorms National Park Authority to deliver benefits such as "woodland & scrub expansion, peatland restoration, landscape enhancement and conservation of raptors and other priority species" through **landscape scale collaboration**.

Monadhliaths Deer Management Group¹³, which collectively manages 170,000ha, across 44 estates. The group is responsible for over 10% of Scotland's current annual peatland restoration, which is made possible by the scale at which it work, which enables it to retain and train contractors and have the confidence to invest in long term projects, including deer and wildlife management to help meet Scotland's climate and biodiversity targets.

It is hard to see how more fragmented land holdings could be brought together at this scale to create the coherent and mutually agreed approaches.

¹⁰ [Landscape-scale conservation | Scotland's environment web](#)

¹¹ [Cairngorms Connect | What We Do](#)

¹² <https://cairngorms.co.uk/wp-content/uploads/2019/07/EastCairngormsMoorlandPartnershipJuly2019.pdf>

¹³ [Monadhliaths DMG | \(deer-management.co.uk\)](#)

There are also further benefits of scale inherent in business activity and efficiency, such as ability to create employment and bring investment to rural areas, including the provision of housing.

With the benefits of scale, estates help to sustain rural populations and create “resilient communities” by making a positive contribution to housing affordability in rural Scotland. It is estimated that estates provide homes for at least 13,000 households across Scotland, approximately 4% of the total number of households living in privately rented accommodation. In the context of rural Scotland, home to some of the smallest and most remote communities, estates’ contributions to housing should be assessed as “major” (BiGGAR Economics, 2022).

Similarly with new housing development, estates add significant value. Tornagrain housing development near Inverness was made possible by Moray Estates having the scale and capacity to develop the plans fully for a new town, which will ultimately provide 5,000 homes. *“Moray Estates have designed Tornagrain to be an ensuring and sustainable town, which builds on architectural and planning traditions of Scotland and the Highlands. We wish Tornagrain to be a model town for the twenty-first century which fosters a vibrant and successful community.”*¹⁴

Stracathro Estate in Angus, has built 11 houses, which are available for rent at 40% less than the open market value. The houses are environmentally friendly using a communal biomass boiler, using locally sourced wood pellets, as well as communal ground source heating. The development also has a play area and community garden. It has helped to sustain a local school, church, and village hall, all of which had previously been threatened with closure due to a declining local population using them.¹⁵

These are just two examples, but there are many, wherein the scale of estates has enabled them to take a long term view of community need and to provide the initial capital outlay to develop the plans and ideas, often followed up with the capital to complete the projects, then provide ongoing maintenance. This can only be done by businesses which operate at scale and could be lost if scale is seen as a negative characteristic of a land holding. Across the UK the promotion of new communities which meet the government’s place making objectives are largely being done by large scale “traditional” landowners, who take a longer term view, have long term sustainable business models and can co-ordinate delivery of large scale projects.

Monopoly/ Competition

There has often been suggestions that large scale or concentrated land ownership in Scotland is a monopoly, something which was repeated recently by the SLC chair Andrew Thin: “There are

¹⁴ [Homepage | Tornagrain](#)

¹⁵ [Stracathro estates Ltd | Scottish Land & Estates \(scottishlandandestates.co.uk\)](#)

long-standing concerns about the highly concentrated pattern of land ownership in rural areas of Scotland and the monopoly of power this creates.”¹⁶

In addressing these claims, it must be pointed out that there is a statutory body in the UK, the Competition and Markets Authority (CMA), with an office in Edinburgh, which deals with monopolistic behaviour in markets and has the power to take action against businesses which are deemed to be working in an anti-competitive manner. SLE is not aware of the Scottish Government, SLC or any other body having reported any landowners in Scotland to this authority.

While it is highlighted that the CMA exists to ensure markets work fairly, they do however also work within clearly defined parameters, taking a wider view. This is not based on the scale of the business but the practices they undertake, which again highlights that it is not the scale of a business which is an issue, but its practices, i.e. something which cannot be considered using a blunt measurement of scale. Local “monopolies” are almost inevitable in rural communities by their very nature of being relatively small. However these single owning bodies still operate in competitive markets due it only being very localized and not on a national scale, the latter which would be considered a monopoly.

We do not consider monopoly and competition to be a strong basis for the land reform proposals in this consultation because regulation is usually the next appropriate step in regulating these markets, nor the intention to force businesses to downsize or sell of parts of their business to smaller potential owners.

Where there are any of these behaviours, we would encourage government and others to use the CMA which has the powers to deal with this issue if and where they are.

b) Land that accounts for more than a fixed percentage of a data zone (or adjacent data zones) or local authority ward(s) designated as an Accessible Rural Area or Remote Rural Area, through our six-fold urban/rural classification scheme

Agree / **Disagree** / Don't Know

This criteria does seem to fit more closely with the stated intention of dealing with concentration of landholdings and power. It will more clearly define where ownership is concentrated. However the consultation is silent on what the fixed percentage would be and therefore it is difficult to make a judgement as to its suitability. For that reason, we cannot support this proposal.

¹⁶ [People in Scotland can have their say on land - News - News & Events - Scottish Land Commission](#)

The Scottish Land Commission's Land and Human Rights Forum noted that its members were *"unfamiliar with data zones and therefore whether their use would be widely understood and accepted."* The members also noted *"the often significant variation in local authority wards, particularly between island and mainland authorities, as well as on geographical and population measures."*¹⁷ Once again the proposals in this consultation appear to go further than recommendations of the SLC despite clear doubts about this approach.

It is our understanding that data zones are measured by population – this is therefore fluid and will change regularly will increase or decrease in population, which could change scope of the data zone and therefore the goalposts as to where landowners fall in the 'large-scale' criteria.

This also does nothing to fix issues in urban or semi urban areas, where concentrated landholdings could be deemed to be much smaller in scale but potentially have more impact on the community due to population density/concentration, e.g. a large number of houses in a single area, or the only amenities in an area.

While the criteria for scale seems to have been calculated as to how many landholdings fit within the stated figure, there is no attempt to do such an exercise in this example. Similarly, having investigated the available information it will be extremely difficult for landowners to understand if they fall within this parameter as it is not fully publicly available, even if a percentage figure were to be provided.

We understand that these data zone boundaries can effectively move with a change in population, therefore regularly moving the goalposts for land managers and communities as to whether they may be subject to these proposals.

c) Land that accounts for more than a specified minimum proportion of a permanently inhabited island

Agree / **Disagree** / Don't Know

Please give some reasons for your answer and outline any additional criteria:

Again, this does seem to fit more with the policy rationale of placing safeguards to ensure that concentration does not create increased risk of negative outcome . However, as with the answers to Q1b there is no detail as to the "specified minimum proportion" and therefore it is

¹⁷ [6305e163a807b_Note of Meeting - LAHRAF 20220712.pdf \(landcommission.gov.scot\)](#)

impossible to assess whether this will in fact deal with any issues of concentrated land ownership.

Q2. Do you agree or disagree that family farms should be exempt from the proposals outlined in Parts 5 to 7 even if they are classified as a 'large-scale' landholding?

Agree / **Disagree** / Don't Know

Please give some reasons for your answer:

The consultation is not clear on what exactly the definition is of a 'family farm', which can take many different structures and forms within a business. Similarly, there may be 'family farms' which have a business structure which suggests a corporate entity.

Regardless of the definition, there appears to be little rationale for this dispensation. If there is a specific issue in principle with landholdings greater than 3,000ha which requires intervention, it is unclear why this would be any less so when it occurs in the context of a family farm. While reference is made to avoiding imposing "*disproportionate duties*" on family farms, there is no explanation of why it would be disproportionate to impose duties on family farms which exceed 3,000 hectares in size, but proportionate to impose equivalent duties on a family-owned estate.

This proposal indicates that the Scottish Government is less concerned with the land use and more concerned with who owns it, seeking to discriminate between individuals based on a spurious definition. We believe that this would contravene Article 14 of the European Convention of Human Rights (ECHR). For this reason we disagree with this proposal.

Q3. Do you think that the proposals considered in this consultation should be applied to the urban context?

Yes / No / Don't Know

Please give some reasons for your answer:

Given the points raised in previous questions and with the issues being specifically with concentration of ownership, then we feel that if measure were to be introduced then urban areas should come under similar scrutiny due to their much more concentrated nature than rural areas. In not doing so again there is a risk of discrimination for the purposes of Article 14 of the ECHR.

Part 5: Strengthening the Land Rights and Responsibilities Statement

Q4. We propose that there should be a duty on large scale landowners to comply with the Land Rights and Responsibilities Statement and its associated protocols. Do you agree with this proposal?

Agree / **Disagree** / Don't know

Please give some reasons for your answer:

Firstly, the Land Rights and Responsibilities Statement and its associated protocols are not an appropriate set of documents on which to place a legal obligation. A set of principles/codes/protocols, in order to be made law and compatible with ECHR, must be clear, precise and foreseeable in terms of effect. The scope of the LRRS and its associated protocols is wide and the language is legally ambiguous, containing phrases such as “should consider” and is therefore not fit for purpose in this context.

Principle 1 for example, encompasses a number of objectives from social justice, sustainable economic development to protecting the environment. These ambitions are repeated in the new Principle 5 that states land ownership “...*should deliver a wide range of social, environmental, economic and cultural benefits*”, and was already seen in Principle 4 which states that the holders of land rights (owners) “*should contribute to wider public benefit, sustainable growth and a modern, successful country.*”

Similarly, Principles 2 and 3 are virtually the same on the topic of more diverse ownership and if made law would essentially force landowners to dispose of assets and land where it may not make business sense. This may carry significant implications for A1P1 Private property rights and we would suggest that this better approached through collaboration and good practice rather than potentially overreaching legislation.

Similarly, we cannot see how the related protocols and guidance can be made mandatory. The Scottish Land Commission sets out “*where we use the word **should**, we expect everyone involved to follow the approach described, unless it conflicts with their legal duties*” and “*where we **recommend** a course of action it means good practice, but we recognise that other approaches may be equally effective.*” We support this approach to good practice on a guidance-led voluntary basis but we cannot see how this degree of flexibility and ambiguity can be put into legal practice.

As a further example, some of the protocols in the SLC's *Community Engagement in Decisions Relating to Land*¹⁸ guidance in its LRRS series are equally inexplicit in a legal context but work well as a guidance-led approach. In relation to community engagement and arranging meetings with interested parties (d) it states: *"It is recommended that this is within six weeks of a request."* Again, use of the word 'recommended' is not precise or clear enough for legal application. Statutory obligations contain imperative words like "must", not "recommend" or "should". Giving the LRRS statement a mandatory status would require not just changes to these words, but a corresponding wholesale rewriting of the LRRS to the extent that the proposal is worthless.

Although not without its issues (such as its repetitiveness), the LRRS therefore sits well within the context of a guidance-led approach, not a statutory context.

Furthermore, there has been no evidence presented to suggest that a shift from a guidance-led approach to a statutory approach is justified. In fact, there is evidence that clearly suggests the LRRS in its current form is already working effectively. The Scottish Land Commission Good Practice Advisory Service provided the wider stakeholder group with an 'Update on Good Practice Casework' in May of 2020 and 2021 (one was not provided to the group in 2022). The 2020 update showed they received a total of 41 new contacts, compared with 19 the year before. 2020/21 year saw the service receive a total of 106 new contacts. The service saw an increase in the number of enquiries from landowners, largely looking for support with implementing the protocols or looking for information about funding and bringing vacant sites back into use. The SLC also identified that in all cases where they had direct dialogue with landowners or their agents, *"positive steps [had been] taken to develop and improve engagement practices."* The information provided by the SLC clearly demonstrates an increase in awareness and use of the LRRS and its protocols amongst the landowning community. The LRRS is clearly working effectively, and claims that further powers to implement the LRRS are necessary are therefore unfounded.

The consultation papers states that a number of respondents to the LRRS Review consultation *"expressed the view that there was a need for Scottish Ministers to have more power of oversight in relation to compliance with the LRRS"*. There are a number of ways in which the intended outcomes of the LRRS can be achieved without this increased power of oversight resorting to legislation.

There is ongoing positive work between the Scottish Land Commission (SLC) and many other stakeholders (including SLE) in continuing to roll out the LRRS on a voluntary basis and facilitating a guidance-led approach to responsible management. The tone presented in this

¹⁸ https://www.landcommission.gov.scot/downloads/628e17641fd5d_Comm%20Engagement%20Protocol%202021.pdf

consultation and potential bill is setting back the constructive trust and relationship building between landowners and the SLC.

For example, SLE ran a pilot 'LRRS self-assessment' scheme with some of our members and reported the findings back to the SLC. We continue to work with them to find ways of rolling out the LRRS principles amongst our landowning membership and are currently working on putting together landowner-led training sessions on community engagement as part of the Cairngorms National Park Authority (CNPA) Heritage Horizons project. It is important to evaluate the outcomes of these projects and events to determine the best way to get landowners engaged with the LRRS. Ultimately these options should be explored before a decision is made to legislate.

Q5. If there was a legal duty on large-scale landowners to comply with the LRRS and its associated protocols, we propose that this should be enforced by having a formal procedure for raising complaints and by making provisions for independent adjudication and enforcement.

a) Do you agree with the proposal above?

Agree / **Disagree** / Don't know

Please give some reasons for your answer.

We fundamentally disagree with legislating to make the LRRS statutory based on our reasons above. It is also difficult to respond meaningfully to these proposals due to the absence of detail.

There already exists a procedure for communities to raise concerns and landowners to receive advice and suggestions: The Scottish Land Commission's website encourages people to contact them when they experience a situation which differs significantly from the expectation set out in the protocols. The SLC states *"where appropriate we will provide advice and work with you and the other parties involved, if applicable, to deal with any difficulties and help improve practice"*. Clearly there are already mechanisms in place to report on breaches of the LRRS and a mechanism for conciliation. The Scottish Government should first evaluate the effectiveness of the service, seek to improve it or raise its profile, and only consider legislation should evidence emerge that it is not effective. We do not support legislating on matters where a need has not arisen to do so.

This approach is a disproportionate response to a functioning LRRS protocols guidance-led approach that is demonstrably improving outcomes, as evidenced in our answer to question four.

b) Do you agree or disagree that only constituted organisations that have a connected to the local area or the natural environment should be able to report breaches of the Land Rights and Responsibilities Statement?

Agree / **Disagree** / Don't know

Should these organisations have a remit on:

Community

Agree / **Disagree** / Don't know

Charity

Agree / **Disagree** / Don't know

Public Service

Agree / **Disagree** / Don't know

Please provide some reasons for your answers and any additional suggestions:

None of the above. The wording of this question suggests that organisations with a national environmental remit should be able to report breaches of the LRRS in any given area. We question the appropriateness/relevance of this approach.

This is also an inconsistent approach as some areas of the country may be a hotbed for dispute/political agitation with which LRRS reporting may be a “stick” with which to beat a local landowner, while in some areas this may be a non-issue. This is not a sensible approach as - depending on the enforcement mechanisms - could lead to stifled investment in land and local communities for the sake of political agitation. It takes away from genuine efforts to seek positive outcomes for communities and the environment.

Evidence also suggests that existing approaches to community engagement (one of the LRRS protocols) are largely in line with community expectations, as no breaches of the protocols in their current form have been reported (BiGGAR, 2022). We therefore do not consider it

appropriate to legislate for the reporting of breaches given there are already mechanisms for this in place.

The Chief Executive of the SLC noted that *“most recent community buy-outs in Scotland have not been adversarial and reliant on legislation but negotiated between communities and landowners.”*¹⁹ Again, we cannot understand the need to further legislate in this area when it has been acknowledged that principles of the LRRS work relatively smoothly already. The focus should be the continued rollout of the guidance-led approach which is clearly working.

c) Do you think the responsibility for investigating and dealing with complaints should sit with

Scottish Government Agree / **Disagree** / Don't know

Scottish Land Commission Agree / **Disagree** / Don't know

Please provide some reasons for your answers and any additional suggestions:

Neither. It would not be appropriate for the Scottish Government or the SLC to be both judge and juror of land use decision making, especially as the clear objectives of both bodies is to promote land reform. This is not consistent with making a reasoned and balanced judgement.

Changing the LRRS from a voluntary set of principles that have not been evaluated to a statutory obligation with the proposed enforcement measures is wholly disproportionate. This significant jump suggests that the Government's priorities lie with who owns land rather than genuine environmental outcomes, the latter of which is more important if we are to truly tackle the nature crises. The Tenant Farming Commissioner (TFC) model was more a proportionate measure previously recommended by the Scottish Land Commission that has been completely skipped in favour of disproportionate measures.

The proposals in this consultation are not comparable with the TFC model. The TFC approach would be more beneficial in developing the relationship between landowners and communities and would be more proportionate. It is widely reported that the TFC Codes of Practice and the Commissioner's personal approach works well in encouraging good relations between landlords and tenants of agricultural holdings. The approach is largely respected amongst SLE's membership and the wider landowning and agricultural community and because of this further action is only taken infrequently.

¹⁹ <https://ww3.rics.org/uk/en/journals/land-journal/community-ownership-land-deals-in-scotland.html>

The TFC was not given enforcement powers due to concerns over the compatibility with ECHR and the proposals in this consultation paper appear to be inconsistent with this concern. We do not support these measures based on this disproportionality.

d) Should the potential outcome from an investigation of a breach be:

Recommendation for a mediation process Yes / No / Don't know

Recommendation on how the landowner or governing body could comply with the protocols Yes / No / Don't know

A direction to the landowner or governing body to implement changes and or management practices Yes / No / Don't know

Please provide some reasons for your answers and any additional suggestions:

If the Scottish Government does insist on compliance against a set of vague principles such as the LRRS then the first step in compliance would be some sort of advice given from a regulation authority (such as the TFC model). It cannot go straight to enforcement measures without an opportunity to rectify perceived mistakes or appeal.

While we maintain firm opposition to this proposal as outlined above, it is sensible to offer practical advice on how it could work in principle should it be implemented.

We are concerned that no right to appeal as been offered in the current proposals. We would consider this important as a matter of natural justice in any situation.

e) Should the enforcement powers for a breach be:

Financial penalties Yes / No / Don't know

'Cross compliance' penalties Yes / No / Don't know

Please provide some reasons for your answers and any additional suggestions:

Financial and cross compliance penalties are a disproportionate response for failing to adhere to an imprecise framework such as the LRRS with principles that are not even compatible with legal enforcement. We believe there to be ECHR implications in relation to the imposition of financial penalties leaving this open to potential legal challenge.

Q6. Do you think the proposal to make the Land Rights and Responsibilities Statement and its associated protocols a legal duty for large-sale landowners would benefit the local community?

Yes / No / **Don't Know**

Please give some reasons for your answer:

We cannot decisively comment on whether statutory implementation of the LRRS is positive for communities because there has been no impact assessment or evaluation carried out by the SLC or the Scottish Government on the rollout of the statement so far. What we can say is that the SLC's own report in 2019 did not identify issues relating to scale and did not provide evidence to support proposals such as a 3,000ha threshold.

There is evidence to suggest that a voluntary, guidance-led approach is working (Good Practice Advisory Group Casework Updates 2020 and 2021) for both landowners and communities. It is therefore disproportionate to legislate on a concept that is proven to be working in its current form before any formal evaluation/impact assessment takes place.

A positive impact for communities would be sought by viewing estates as an opportunity rather than a problem. The SLC's Good Practice Advisory Group, Scottish Enterprise (and indeed many other stakeholders) could engage with estates more extensively to facilitate a cooperative culture to get the best out of rural Scotland. The consultation proposals unfortunately do not offer this same positive direction. The Land Reform proposals instead threaten to derail these positive working relationships with its tone set to alienate landowners who are instrumental to rural Scotland's success.

The resourcing of communities to prepare Local Community Plans would do much more for community participation in decision making about land use in and around their communities. It would also encourage participation by all interests in the process as they will need to try and influence the final outcomes. Planning authorities should be better equipped to assist in this process that would in turn inform Local Development Plans which landowners would work to.

Q7. Do you have any other comments on the proposal to make the Land Rights and Responsibilities Statement and its associated protocols a legal duty for large-scale landowners?

The SLC's 2019 report into the scale and concentration of land ownership stated that improvements are required to land-use planning and decision-making processes. Regional Land Use Partnerships are supposed to be the mechanism for this process, but the schemes so far are yet to get off the ground. The South of Scotland Regional Land Use Partnership (RLUP) pilot for

example is still in the consultation stage to help establish the Regional Land Use Framework by Winter 2023. We are supportive of RLUPs but they need to be properly resourced allowed to bed in before further Land Reform legislation is brought forward as a parallel measure.

Furthermore, there is a risk that landowners would be penalised as it may be applied to a scheme which has no relevance to the purported breach. For example, preventing forestry funding due to a breach relating to community engagement about an unrelated development proposal is not proportionate. For these reasons we do not consider it appropriate to legislate the LRRS.

Part 6: Compulsory Land Management Plans

Q8. We propose that there should be a duty on large-scale landowners to publish Management plans. Do you agree or disagree with this proposal?

Agree / **Disagree** / Don't Know

Reasons:

We do not disagree with land management plans in principle but there are some issues with the blanket requirement for estates to produce these plans.

Broadly, the policy rationale for the proposal is not clear. The title of the consultation focuses on 'Net Zero' but the consultation paper proposes land management plans in the name of transparency. Both of these objectives have merit in their own right, but no link has been made as to how increased transparency will contribute to Net Zero. The lack connection between the proposal and the Net Zero policy rational could suggest a disproportionate interference with Article 8 of the ECHR and the A1P1 rights of affected landowners.

Landholdings in Scotland also take many different forms and have different interactions with local communities. For some estates in certain areas, having a publicly available plan or statement of objectives may make perfect sense for all -concerned. For other landholdings, it may not be useful at all. This is because 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. No evidence has been presented to suggest that not preparing a management plan has a detrimental impact on communities and Net Zero.

We are also concerned with the wording "*The publication of plans will provide an opportunity for landowners to set out their plans for investing in their land...*" As a business, it is more often than not inappropriate to expect landowners to demonstrate how and where they are investing their money. This language should not be continued in any further policy and instead encourage landowners to perhaps 'share their thinking' about how they manage their land for information purposes only.

We anticipate the legal requirement to produce a LMP will lead to landowners producing 'vanilla' template plans which cost time and resource to prepare but be of no benefit to anyone, because they become a compliance exercise rather than a meaning process of engagement.

If the Scottish Government can prove that LMPs are of benefit, then surely it would be appropriate for all landholdings to produce one regardless of size especially if adjacent to a defined settlement.

However, we advocate for voluntary LMPs which are intended to specify facts about the land ownership and intended use, and setting out basic objectives over a defined period. This should be achieved through continued guidance-led voluntary approach similar to the rollout of the LRRS, which as referenced elsewhere in this response, has proved to be working in terms of increasing engagement with them.

Any proposals to 'publicly engage' on a management plan would be inappropriate – no corporation (large or small) would be expected to engage customers on operational or management plans.

We could also see scenarios where proposed land use is consistently held back or delayed due to enforcement because the landowner's LMP does not meet nebulous criteria beyond the published template, or the land manager is punished by proposed enforcement measures despite having made good efforts to produce their LMP. We therefore do not support a legal duty for LMPs but do support a voluntary approach to LMPs and as an organisation have a renewed focus on good practice and how we can foster this amongst our membership, such as continuing to work with the Scottish Land Commission.

Q9. how frequently do you think LMPs should be published?

5-7 years.

Again, we oppose any proposals to legislate for mandatory plans.

However, many aspects of land management are long term and will not have moved on in short amount of time. The timeframe also must give time for land managers to undertake the protocols and processes in place that will allow them to begin any land-based activities and leniency around waiting for third party processes should be considered. Some projects are very costly and time consuming eg. Carbon audits, WCC, WES accreditation. Any less time may give local communities unrealistic expectations about how quickly they will start to see projects beginning or ending.

Q10. Should Management Plans include information on:

- **Land Right and Responsibilities Statement compliance**
No – see our response to section five.

- **Community engagement**

Yes. This could include information about what SLC protocols the landowner considers in their community engagement efforts and what potential channels for engagement could be with the community and vice versa.

- **Emission reduction plans**

No. These plans are not the place to tackle complex issues such as emissions reduction, one of the reasons being for many land based activities the science and mensuration is not fit for purpose especially for soil carbon transfers. Landowner relationships with customers and ag support system is a more structured mechanism for such issues.

- **Nature restoration**

Yes. Many traditional landowners are already undertaking significant nature restoration efforts and these should be recognised and land managers should be encouraged and supported to report on these on a voluntary basis.

Making this particular aspect of land management compulsory may be incompatible with the nature of some other landowners, such as religious organisations. The structure and remit of these organisations is not necessarily compatible with nature restoration efforts so these organisations would already be at a disadvantage if expected to report on this.

- **Revenue from carbon offsetting/carbon credits**

No. It is not clear how this is going to be beneficial to community groups. While the principle of carbon sequestration could be of interest, the revenue receive from this is commercially sensitive information and of little use to the community to know this. Further to this revenue from sales of carbon credits or offsets would only show one side of the equation, which could lead to misunderstanding of the work. Carbon credits can only be sold if they are proven to create additionality, there is it likely there is significant costs allied to contingent liability to be borne by the project.

Carbon could be construed as being similar to other land management outputs, as there is no requirement to state income from sales of other crops it would seem out of proportion to ask for this information. It could also set a worrying precedent for reporting of all land-based outputs. This would not be considered in many other markets etc eg. Supermarkets don't break down their profits by grocery department/product and only report for the sake of shareholders

A consequence of this would be landowners declining to get involved with carbon schemes for fear of community complaints about revenue, especially if they misunderstand the obligations that go with it. This would undoubtedly be contrary to the Scottish Government's Net Zero mission.

- **Plans for developments/activities that will contribute to local and inclusive economic development or community wealth building**

No. Plans for developments/activities will already be covered by Local Development Plans and other existing statutory planning mechanisms.

We understand the SLC has been working on community wealth building, but there has been no comprehensive definition or guidance around community wealth building in rural areas/for private owners so it is unclear what this means in practice for landowners. It is unrealistic to expect them to comply with a statutory obligation, for which they could potentially be penalised for getting incorrect, without them knowing exactly what the concept is. It is also difficult to comment on these proposals in this consultation while some of the aspects are still being developed.

LMPs should **not** include compliance with the LRRS. As detailed in our response to question five, the LRRS and its associated protocols are not an appropriate document on which to legislate. The principles and protocols are wide ranging and vague and the language is not concise enough that they can be interpreted easily in a legal context.

From a practical perspective, it would be an onerous and not entirely useful exercise for land managers to be asked to demonstrate compliance with these relatively open ended and vague concepts, as well as be asked for further information on top of this.

We agree that LMPs could include a broad outline of a land managers' approach to community engagement.

We do not consider it appropriate for LMPs to include information on revenue from offsetting/carbon credits as this is potentially commercially sensitive information. Ultimately carbon sequestration is an output from land use and should not be expected to be reported on publicly, just as information on other outputs from land such as wheat are not shared with communities.

Q11. Do you think the responsibility for enforcing compulsory LMPs should sit with:

- **The SG** No
- **A public body (such as the land commission)** No

Please provide some reasons for your answers and any additional suggestions:

Neither. Please see response to question five.

Q12. Do you think the proposal to make LMPs a legal duty for large-sale landowners would benefit the local community?

Yes / **No** / Don't Know

Please give some reasons for your answer:

We consider there to be little if any evidence of benefit from the proposal as most communities are unlikely to ever see a Land Management Plan and the result of creating a compliance approach is that it could lead to less meaningful engagement with the exercise. No other businesses are expected to do this even for instance if they are the dominant employer in a community.

The Land Use Strategy 2021-26 lists over 45 documents relating to land use in Scotland. Even taking a handful of the major documents (such as the upcoming NPF4, Regional Land Use Frameworks, Local Development Plans, Local Place Plans, Community Action Plans, and the myriad of LRRS protocols), there could be a substantial, verging on unrealistic, amount of reading and understanding expected of both land managers and communities.

Of the myriad of national and local plans, there is also a danger that where they inevitably contradict each other this could cause confusion and it simply will not be possible to meet all of their needs within a single business. Similarly there will be inevitable conflicts where national and local policy differs e.g. renewable energy where it is a national priority but not included in local priorities.

Furthermore, more >3,000Ha landholdings will be in heavily populated areas so most communities would be unlikely to even see the plans; most plans will be devoid of detail and compliance based affairs rather than meaningful; and evidence from Forestry LTPs shows very low levels of interest unless change is proposed. Under current guidance, landowners are already expected to consult on land use change or have to via the planning system. Communities will therefore not benefit from these proposals.

Again, there are many mechanisms already in place which should be improved upon to achieve the same outcomes, rather than additional layers of legislation.

Q13. Do you have any further comments on the proposal to make LMPs a legal duty for large-scale landowners?

We would suggest that there could be a discriminatory aspect to this proposal, in that there are no known negative outcomes of land ownership at large scale (specifically the 3,000ha+ threshold suggested in this consultation). It is understood that there are 'risk factors' in relation to concentration, so these mechanisms should be focused in this area and not unfairly target owners based purely on size and not concentration, as there is no evidence to suggest that land ownership over 3,000ha (unconcentrated) is negative.

It is unclear how this will apply to landowners with many discontinuous holdings across the country, such as religious or nature organisations. For example, a religious organisation may have several thousand hectares of land across Scotland in the form of various parishes, but these parishes are managed by locals. We would not like to think that each individual parish must complete a LMP, but equally it may be difficult for a head office of such an organisation to complete an LMP given the variety of its landholdings and differing communities. In this case, provisions should be made that the organisation can simply supply more of a vision statement of what it hopes its land can achieve in the context of the organisation. As above, it is unrealistic to expect an organisation with a specific focus (such as religion and by default community) to take up specific work on carbon or nature restoration and a degree of flexibility should be allowed around this.

The exclusion of 'family farms' from these proposals again is problematic because it tells us that the Scottish Government is more concerned about who owns land rather than the outcomes, and this is before considering the legal definition of a 'family farm' (which has not been provided here). The Scottish Government must give a reasonable justification as to why a 'family farm' is exempt from producing a land management plan and another landowner around the same size but with a slightly different corporate structure is not. What evidence has been produced to demonstrate the difference between the outcomes of family farm ownership vs other landownership.

Part 7: Regulating the market in large-scale land transfers: a new Public Interest Test, and a requirement to notify an intention to sell

Q14. We propose that a public interest test should be applied to transactions of large-scale landholdings. Do you agree or disagree with this proposal?

Agree / **Disagree** / Don't know

Please give some reasons for your answer:

A public interest test could take many forms when applied to transactions of large-scale landholdings, however we disagree with the proposals as they stand from what detail we have seen.

We disagree with this proposal because to interfere in the legitimate property rights and expectation of parties to be able to transfer or sell/buy land should require a high bar of necessity, a clear policy rationale and the absence of any alternatives. These proposals make none of these cases and as a result risk breaches of ECHR rights and the possibility of legislation being defeated following legal challenge with all the uncertainty and disruption that causes.

The consultation paper states that this proposal is intended to fulfil the commitment to further diversification of land ownership in Scotland. It also states that in doing this, we must also bring about every opportunity to achieve a just transition to Net Zero. There is a missing link between the latter policy rationale of a just transition and this specific proposal, as it offers no insight into how it will help achieve Net Zero.

The consultation does not make it clear whether the Scottish Government intends to take forward both the public interest test and the prior notification to sell proposals, or just one of these mechanisms. We are not clear how these work in practice together and unfortunately focusing on both proposals appears to be a case of throwing several ideas to the wall and hoping some stick, which makes it more difficult for stakeholders to respond constructively to the proposals.

As highlighted in our 2021 response to the SLC's *Legislative Proposals*, there are already a number of comprehensive powers and mechanisms in place that can influence and make determinations on land use in the public interest. For example planning permission; NatureScot; SPA; FLS all add layers of control and influence over land use decision making and help in balancing public policy interests. There also exists laws which allow communities, or the state, to acquire land for the objectives in the public interest but which are more clearly defined and have a generally accepted legal framework and case law to support them. The PiT as envisaged here is more of a "catch all" approach that may not hold up in practice.

In our 2021 response to 'Legislative proposals to address the impact...', we highlighted a lack of consideration in the Paper of where a public interest (as defined by a local interest group)

might conflict with a landowners' desire to use the land to meet government policy objectives considered to be in the national public interest.

The PIT proposals in this consultation are a response to the SLC's recommendation that the forthcoming Bill should include *"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"*. However, our 2021 response to *Legislative Proposals* highlighted that the Good Practice Group identified through its LRRS work that there was only one single case study relating to public interest in over a two year period. This also related to development plans on common good land and did not relate to private ownership.

A theme in our response to these proposals is that the Scottish Government should look at what existing powers they have to address any problems. We re-emphasise this in relation to the PIT.

Q15. What do you think would be the advantages and/or disadvantages of applying a public interest test to transactions of large-scale landholdings?

1. The decision to discriminate on the grounds of 'large-scale' (especially purely scale) we believe is counter productive to many of the Scottish Government's own aims and objectives, especially the just transition to Net Zero and positive environmental outcomes, given the major contribution estates make to this area of the Scottish Government's own 'Environment' National Outcome (BiGGAR, 2022).
2. A disadvantage of applying a PIT would be a real risk of creating increased legal complexity.
3. Application of the PIT will represent an interference with the A1P1 rights of any landowners whose land was made subject to it. It may also represent an interference with the A1P1 rights of those with a legitimate expectation of *obtaining* land, such as beneficiaries or those benefiting from an option agreement or those set to inherit land or assets.
4. Application of PIT could impinge on succession rights of family members, which fall under Article 8 of the ECHR, especially where they relate to the succession rights to a "home".
5. The fluid nature of the 'public interest' (in that the public interest is essentially deemed whatever the government decide in any given situation) will create uncertainty in the land market. This uncertainty will not be conducive to the Scottish Government's own aims of using land to tackle Net Zero because it could lead to less land being brought to market and hesitancy from potential buyers and investors in Scotland's land. We understand that the Scottish Government wants to interfere in the land market so these concerns may not cause it the same level of alarm as it does other stakeholders, but we urge that these proposals are reconsidered so this uncertainty and hesitancy are mitigated as it may well

negatively impact on the delivery of the transition to Net Zero.

6. The recent land market insights report, another driver of these proposals, was a one year snapshot of the rural land market at an unprecedented time in history. We do not consider appropriate or sensible to address findings from a report that is potentially not a true reflection of long term market trends. The implications of these proposals cannot therefore be fully understood
7. On the topic of uncertainty, we anticipate land transactions that do go ahead to become significantly more onerous and complex as a result of the public interest test process. While it is ultimately the employer's responsibility to mitigate uncertainty and anxiety amongst its workforce during these transactional processes, the outcome of a public interest test is largely out of the employer's hands. If the public interest is deemed to be served by land owners being forced to reduce their holdings, this will have negative consequences for employment when the transaction is finalised.
8. The length and complexity of the process will halt any new investment in land use and projects that could improve national climate contributions or local economic growth (beyond those that already have contractual agreements in place). Again, this is not conducive to the wellbeing of rural communities and targets of the Scottish Government. As an alternative, we would like to see existing mechanisms for community acquisition of land to be improved and communities and landowners better supported in this, before further ill thought through legislation comes in to place that will have negative outcomes.
9. There could be negative effects on investments for long term, often multi-generational projects that originally would have been conducive to contributing to achieving a just transition to Net Zero, which is one of the Scottish Government's main aims. This could include forestry plans, capital investment in affordable housing, peatland restoration, energy and other projects that could not be undertaken with fragmented ownership.
10. It should not be forgotten that the Scottish Government (and its agencies) is the largest landowner in Scotland and an active player in the land market. This impacts on supply, demand and value and more work should be undertaken to explore the direct and indirect impact of the Scottish Government and Government agencies on the land market.

Q16. Do you think the public interest test should be applied to:

The seller only / **The buyer only** / The seller and buyer / Don't know

Please give some reasons for your answer:

We do not support the introduction of a PIT, but seek to make constructive comments on the questions being asked.

We do not understand the rationale behind applying the public interest test to a seller of land, especially in the context of the seller potentially having had to comply with the LRRS and LMPs for a period of time before sale. This is almost counterintuitive in that if a seller is found to be in breach of these nebulous mechanisms then surely it is in the public interest that a sale does go ahead, with potential requirements on the buyer to demonstrate that their use of the land will be more conducive to positive outcomes. Similarly if a seller has been subject to a LRR review and has been cleared of any wrongdoing then it is inappropriate to expect them to then be subject to a PIT with all the associated implications.

Members of the Scottish Land Commission's *Land and Human Rights Advisory Forum* also noted the "shift in emphasis for the Public Interest Test onto the seller (Away from the SLC's original buyer focused proposal) and raised concerns this would potentially make the mechanism more difficult to enact in terms of ECHR".²⁰ SLE asserts there is a legitimate risk of violating the affected owners' A1P1 rights in the event of a forced sell without adequate compensation.

We also note the very recent **off-market** sale of Glenprosen Estate in Angus, which a Scottish Government agency itself benefited from. The Scottish Government is one of the largest landowners in Scotland and has benefited further from the acquisition of this estate. Had its own proposals been applied in this case would the sale (which was in the interests of the Scottish Government or it would not have gone ahead) have been conducted in the same way and had the same outcome?

The only version of a public interest test that we would accept or understand is that of a test on the buyer that would demonstrate how they intend to manage the land in the public interest. However, the Scottish Government said of its land reform programme that it wants to balance public and private interests. Any public interest test should therefore consider the interests of the business in question and remember that business viability of ownership is vital for wider outcomes to be improved and benefits shared with local communities.

We do not support applying the PIT to a seller based purely on their 'scale' because there is no evidence to suggest that large scale land ownership has negative outcomes. We refer to our response to Part 4 of this consultation paper in which we provide evidence demonstrating the benefits of land ownership at scale and outline our concerns about the arbitrary, ideological criteria use to define 'large-scale'.

Q17. If the public interest test was applied to the seller, do you think the test should be considered as part of the conveyancing process?

Yes / No / Don't know

Please give some reasons for your answer:

²⁰ https://www.landcommission.gov.scot/downloads/6305e163a807b_Note%20of%20Meeting%20-%20LAHRAF%2020220712.pdf

The PIT should not be applied to the seller but if it were it would make sense to include this in the conveyancing process. However given the complexity of the legal argument and lack of existing case law this could be significantly lengthy process. This could ultimately lead to the sale falling through, in which case it could be argued that the seller should receive compensation for costs and time incurred.

A seller in the middle of a transaction of their land will be unlikely to start or further invest in ongoing projects on the land due to the impending sale (unless there are existing contractual agreements to be fulfilled). This could stifle investment in local communities and the environment and ultimately be detrimental to these areas.

Q18. Do you think that all types of large-scale landholding transactions (including transfers of shares and transfers within or between trusts) should be in scope for a public interest test?

Yes / **No** / Don't know

Please give some reasons for your answer:

The Scottish Government cannot, within the current devolved settlement, make legislative changes that would require modifications to companies law. The consultation proposals states that the Scottish Government “*will seek to engage with the UK Government to ensure that all transactions involving large-scale land transfers – including those involving company shares – fall within the scope of the public interest test.*” We are concerned that key aspects of these proposals will be dealt with retrospectively if the UK Government are inclined to cooperate with the Scottish Government on the matter. While we do not support this proposal, we do not consider it sensible to approach legislation in this way without having first secured the competencies to deliver promises.

In our response to *Legislative Proposals* we previously disagreed with the Scottish Land Commission’s consideration that it was appropriate to apply its suggested sanctions when a “significant risk is identified”²¹, rather than in the event of there being an actual problem. This was because it could set a dangerous precedent for interference in other markets and was not compatible with the Scottish Government’s own Better Regulation agenda. The proposals in this consultation to apply the PIT as a blanket measure to all types of transactions (including change of company structure) without hard evidence of a problem again goes much further than the Scottish Land Commission’s recommendations.

This may interfere with the A1P1 rights of those who expected to receive relevant land transactions.

²¹ [Legislative proposals for addressing concentrated landownership \(landcommission.gov.scot\)](https://landcommission.gov.scot/legislative-proposals-for-addressing-concentrated-landownership)

Q19. We have proposed that if a public interest test applied to the seller concluded there was a strong public interest in reducing scale/concentration, then the conditions placed on the sale of the land could include:

- i. The land in question should be split into lots and could not be sold to (or acquired by) one party as a whole unit**
- ii. The land, in whole, or in part, should be offered to constituted community bodies in the area, and the sale can only proceed if the bodies consulted, after a period of time, indicate that they do not wish to proceed with the sale**

Do you agree or disagree with these conditions?

- Condition i. Agree / **Disagree** / Don't know
- Condition ii. Agree / **Disagree** / Don't know

Please give some reasons for your answer and suggest any additional conditions:

- i) Placing a condition on the sale of the land to be split into lots has potential to impact on the market value of the lots and thus the entire area of land. Sellers could lose out on value. This is especially inappropriate if the PIT is based solely on scale given the absence of evidence suggesting ownership of land over 3,000ha has negative outcomes. We do not believe it is proportionate that sellers of land be disadvantaged at the point of sale simply for owning x number of hectares. We fundamentally disagree that landowners should be forced into a detrimental sale because the Scottish Government perceives the scale of their landholding to be a 'potential problem'.

While the Government/SLC do want greater market interference in the rural property market, the greater the loss of value in these situations then the more likely it would be a likely violation of A1P1. We do not believe this condition would be compatible with the affected landowner's A1P1 rights, in the absence of the adequate compensation. To this end the Scottish Government should be liable to pay the seller the required compensation for the forced loss on their returns.

We would suggest instead encouraging landowners, through existing voluntary guidance-led protocols etc. to voluntarily review their landholdings in the interest of the local community and incentivise them to do so. Lotting already takes place in many cases – with lotting based on knowledge of the land and property rather than arbitrary intervention from an external agency.

- ii) There are already mechanisms in place that allow constituted community bodies to register an interest and acquire land.

The Scottish Land Commission has acknowledged (referenced above) that in almost all cases the transfer of land from private landowner to communities almost always happens without reference

to the law. This demonstrates that when an interest from communities is present they usually end up becoming the purchaser. While there may be necessary improvements to this process, no evidence is provided to support any additional legislative measures.

What framework has been established for gathering evidence to demonstrate negative effects of scale? We would expect one to have been established already and tested, perhaps by informing these proposals. The framework in this case would be an afterthought to the legislation and not properly tested.

It is not clear who decides on the lotting basis in these scenarios, and we would expect this to have been considered before consulting on such a significant proposal.

Q20. Do you think that a breach of the Lands Right and Responsibilities Statement should be taken into account when determining the outcome of a public interest test?

Yes / **No** / Don't know

Please give some reasons for your answer:

Firstly, it is not clear whether this breach of the LRRS would apply to the seller or potential buyer who may have holdings elsewhere.

As above, we firmly disagree with the proposal that the LRRS in its current form should be made compulsory in the first place. The LRRS is so ambiguous in a legal context that it is likely potential 'breaches' could always be up for challenge causing major delays to any process involving the public interest test.

Q21. Do you think that a public interest test should take into account steps taken in the past by a seller to:

a) Diversify ownership

Yes / **No** / Don't know

b) Use their Management Plan to engage with community bodies over opportunities to lease or acquire land

Yes / **No** / Don't know

Please give some reasons for your answers:

We cannot understand why the past actions of a seller should have a bearing on the sale of land. The priority should be opportunities for positive outcomes moving forward. The SLC's Land and Human Rights Forum also questioned *"how relevant the sellers' record would be in*

*assessing the buyers' potential motivations, behaviour, and risk to creating or perpetuating a localised monopoly."*²²

c) What time period do you think this should cover?

Q22. Do you think the responsibility for administering the public interest test should sit with:

- **the Scottish Government**

Yes / **No** / Don't know

- **a public body (such as the Scottish Land Commission)**

Yes / **No** / Don't know

Please provide some reasons for your answers and any additional suggestions:

We do not consider it appropriate for either the SLC or the SG to be both judge and juror of this process. Both bodies have a clear pro-land reform bias which is not conducive to balancing both public and private interests in the Public Interest Test process.

An alternative could be the Local Authority, which is a more impartial body with a better understanding of the characteristics of the community and local area. This would be a more objective approach.

If RLUPs were up and running and resourced effectively then there could also be an opportunity here for this mechanism to encompass a version of the public interest test through a collaborative approach. Again, introducing this legislation parallel to the early stages of RLUPs will result in several layers of similar mechanisms that should be streamlined into one effective system.

Q23. Do you think the proposal that a public interest test should be applied to transactions of large-scale landholdings would benefit the local community?

Yes / **No** / Don't know

Please give some reasons for your answer:

This question is very generic and open ended and it is not possible to give a definitive answer given the unique situation of every community and locality.

As our response above, there is no evidence to suggest that large-scale land ownership is linked to negative outcomes for communities or the environment.

²² [6305e163a807b_Note of Meeting - LAHRAF 20220712.pdf \(landcommission.gov.scot\)](#)

The Scottish Government must provide a policy rationale for this by presenting evidence that would demonstrate why current rights held by communities are not sufficient. We would like to see the current mechanisms that are in place be improved and communities and landowners further educated and supported in these measures before the implementation of further potentially unnecessary legislation.

Q24. Do you have any other comments on the proposal that a public interest test should be applied to transactions of large-scale landholdings?

If a form of this is introduced, the seller must have the ability to withdraw from the process without penalty.

(2) Prior Notification to Sell

Q25. We propose that landowners selling large-scale landholdings should give notice to community bodies (and others listed on a register compiled for the purpose) that they intend to sell.

a) Do you agree or disagree with the proposal above?

Agree / Disagree / Don't Know

Please give some reasons for your answer:

There are already a significant number of measures to this effect in place such as the right to buy to further sustainable development, community right to buy (CRTB), CRTB abandoned, neglected or detrimental land (ANDL) and crofting right to buy. The tenant farmer pre-emptive right to buy also gives tenant farmers with 1991 Act tenancies to buy their holding if it becomes available for sale.

The CRTB already gives communities the first option to buy when the registered land is offered for sale and communities can register their interest in any piece of land or asset they wish, as well as registering an interest in rights such as minerals or fishing.

Communities can already register their interest in purchasing land by application to the Register of Community Interests in Land (RCIL). The website states that this register is currently not available for public inspection, but we would suggest making efforts to make this public so landowners can see if there is indeed a local community body interested in land and negotiations can commence. (This would be a good example of improving existing mechanisms before bringing in parallel ones that may cause confusion).

For example, the *Right to buy land to further sustainable development* states that “a community organisation may force the sale of land even where the owner of the land is not contemplating a sale.”

These existing processes should be appropriately evaluated and improved on before considering further legislation and parallel processes. However, we would consider it good practice for landowners in undertaking a sale to have conversations with their local community about a potentially mutually beneficial transaction.

- b) Do you agree or disagree that there should be a notice period of 30 days for the community body or bodies to inform the landowners whether they are interested in purchasing the land?**

Agree / Disagree / Don't know

Please give some reasons for your answer:

We support a notice period to ensure that the process is streamlined as much as possible. However our membership has lots of experience of being pressured to extend its timescales to suit community bodies. Restraint needs to be shown on both sides in that there must be a reasonable limit as to how many times these deadlines can be extended.

- c) If the community body or bodies notifies the landowners that they wish to purchase the land during the notice period, then the community bodies or bodies should have 6 months to negotiate the terms of the purchase and secure funding. Do you agree or disagree with this proposal?**

Agree / Disagree / Don't know

Please give some reasons for your answer:

As far as we are the Scottish Land Fund meets every three months so it is not clear how this is compatible with the above timeline.

Furthermore, many of our members have experienced pressure to extend timescales for community sales. They are often willing to work to the extension requests with a genuine desire for the sale to complete and do well, but a line must be drawn and ultimately new buyers must be held to a realistic timescale in the majority of cases.

This proposal sounds much like the existing pre-emptive right to buy mechanisms. It is also unclear whether the six months begins automatically if the community registers an interest in the land, or whether the seller can choose to sell to a preferred bidder.

Q26. Do you have any other comments on the proposal that landowners selling large-scale landholdings should give notice to community bodies that they intend to sell?

These proposals “respond to concerns... of rapidly rising land values...”, which were identified in the *Rural Land Market Insights Report*²³ commissioned by the Scottish Land Commission. This report only gives a one year’s snapshot of activity and does not show long-term trends. The research is also based on years 2020-21 – the height of the pandemic and an unprecedented event for all markets and sectors. We therefore do not consider the research to be representative of long-term market trends and do not consider it appropriate on which to base new policies.

However, a very recent study shows only a very small proportion of estates income (0.6%) was attributable to carbon trading and suggesting that the demand for carbon credits is unlikely to be a significant influence on landowner behaviour (and thus land values) (BiGGAR Economics, pg 19, 2022).

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https://www.landcommission.gov.scot/downloads/62543b9498bb1_Rural%20Land%20Market%20Insights%20Report%20April%202022.pdf

Part 8: New conditions on those in receipt of public funding for land based activity

Q27. We propose the following eligibility requirements for landowners to receive public funding from the Scottish Government for land based activity:

- i. All land, regardless of size, must be registered in the Land Register of Scotland.**
- ii. Large-scale landowners must demonstrate they comply with the Land Rights and Responsibilities Statement and have an up-to-date Land Management Plan.**

Do you agree or disagree with these requirements?

- a) Requirement i. Agree / Disagree / Don't Know**
- b) Requirement ii. Agree / Disagree / Don't know**

Please give some reasons for your answers:

We fully support the concept of transparent ownership and encourage our members to register their landholdings in the Land Register. However, we do not support this as a condition for the receipt of public funding for a number of reasons.

Practically, this proposal could inadvertently lead to a reduction in the undertaking of land management activities that often require public funding such as peatland restoration or tree planting, which would hinder landowners' contributions to the Net Zero journey.

The cost and length of time it takes to complete the registration process is a major factor in landowners' motivation and abilities to complete registration. This barrier must be removed before the proposal can be considered reasonable. The Land Register service is extremely stretched and under resourced: we have been contacted by some members who have been trying to complete the process for up to seven years but cannot get a response from RoS despite numerous attempts.

This proposal will have negative unintended consequences which are twofold: less land being used for an environmental advantage and a surge in Land Register applications which the RoS cannot cope with.

We do not support demonstrating compliance with the LRRS because of our concerns outlined in Part 5 of our consultation response. To recap in short, the Land Rights and Responsibilities Statement is proving to be working on a guidance-led voluntary basis. The concepts are repetitive and subjective and there is no clear framework as to how landowners can possibly

demonstrate compliance with these. The subjective nature of the LRRS also means it will be fraught with legal complexity.

Q28. Do you have any other comments on the proposals outlined above?

No

Part 9: Land Use Tenancy

Despite assurances from Government officials for some months that detailed information on the land use tenancy would be shared with members of the Tenant Farming Advisory Forum (of which SLE is a member), the information has not been forthcoming. We are therefore limited in terms of the feedback we can provide. We and others have raised these concerns with Scottish Government officials, the Tenant Farming Commissioner and the Minister. We feel that we have been placed in an unreasonable position but will seek to be as constructive as possible in our response. Our comments are based on the scant information we have.

Q29. Do you agree or disagree with our proposal that there should be a Land Use Tenancy to allow people to undertake a range of land management activities?

Agree / Disagree / **Don't Know**

Please give some reasons for your answers:

Due to the lack of detail it is difficult to agree or disagree with the Land Use Tenancy (LUT) proposal. We support the concept of flexible arrangements for leasing land to undertake a range of land management activities, but struggle to see what the LUT can add to what is currently available.

The Consultation sets out that the legal framework should be adapted to allow tenant farmer and others to undertake a combination of agricultural activities and non-agricultural activities. The 2003 Act allows for an agricultural tenant under a secure tenancy, LDT and MLDT (the longer term tenancies) to diversify into non-agricultural activity within the agricultural lease. The process was recently reformed by the Land Reform (Scotland) Act 2016. We suggest that any detailed proposal to be brought forward should explain in detail why the current diversification provisions do not meet the stated policy aims of allowing a combination of agricultural and non-agricultural activities.

It is open to agricultural landlords and tenants to remove land from an agricultural tenancy by agreement and enter into an alternative lease. Commercial leases or business contracts which allow for the types of activities referred to in the consultation already exist so we want to explore what additional benefits the LUT would bring. It is not currently possible for landlords and tenants to agree a lease which allows for agricultural use of land without bringing the lease within the confines of the agricultural legislation. If the LUT allowed for the hybrid use of land outwith agricultural holdings legislation (meaning that using some of the land for agriculture does not mean that the parties ability to contract freely is removed), we would support that.

However, our members are not currently seeing much demand from agricultural tenants seeking to explore non-agricultural uses (either within the confines of the agricultural lease of outwith it). Perhaps instead of creating new tenancy vehicles we use existing legal vehicles and focus on raising awareness of what tenants can actually do, as there is still a lack of understanding. This to be done alongside consideration of the proposed changes to provisions such as the definition of agriculture contained within the current Ag Bill consultation. Tenants can already undertake measures to help restore and preserve nature, so again we believe that the Scottish Government needs to be clear on what cannot be done under current arrangements that would be covered by the new LUT.

We support opportunities for new entrants and for new vehicles where they meet specific policy aims which cannot be met by existing structure. In order to meet the policy aims, we consider that the LUT would need to be based on the principle of freedom of contract. It is not clear from the consultation to what extent that is proposed, and we therefore require further detail before we can extend this support to an LUT model.

We note that there is provision for an agricultural tenancy to be “converted” to an LUT. If this is to be brought in then it must be clear that conversion of exiting tenancies or partial holdings can only happen with agreement of the landlord.

With regard to the content of LUTs, as above, we are strongly of the view that limited regulation would be appropriate. We are aware however that it is common practice for any non-agricultural lease to restrict the use of land to a specified use. This is to ensure that both parties are clear as to their responsibilities for what is permitted (and therefore what the rent should be) and their obligations relating to management of the land (and this is the case whether or not it is a retail park, a windfarm, or an acre of ground for growing wild flowers). We consider that one of the criteria of an LUT is that the parties need to clearly state what type of non-agricultural activity is permitted. Any variation to that specific purpose would require the agreement of both parties (as would any other change to an agreed lease).

The taxation implications needed to be fully understood by all parties before being introduced - clearly there would be substantial implications for both parties if the land is no longer being used for an agricultural purpose.

If it is the case that the LUT would be a move to a progressive freedom of contract arrangement between 2 parties, then we consider that it could bring benefits to the sector. If the LUT is subject to the level of regulation which applies to fixed term agricultural tenancies then we do not consider that they will be capable of meeting the aims – and we do not consider that they would be used, given how complex they are likely to be.

Q30. Are there any land management activities you think should not be included within a Land Use Tenancy?

The Scottish Government needs to be clear if the LUT is targeted at activities which further our journey to Net Zero or cover any form of diversification, including those which may have a negative impact on emissions.

Provided that the landlord and the tenant are free to agree their own terms – duration, responsibilities for maintenance, obligations at termination regarding reinstatement – we do not consider that it would be appropriate to carve out specific land management activities.

As per answer to Q29, the stated LUT purpose should be agreed between both parties at the start, any variation must be in agreement with landlord.

Q31. Do you think that wider land use opportunities relating to diversification, such as renewable energy and agri-tourism, should be part of a Land Use Tenancy?

Yes / No / Don't Know

Please give some reasons for your answers:

As above, we consider that a Land Use Tenancy should allow for different types of non-agricultural activity to be undertaken i.e. it would be a hybrid type of lease, and that the parties would be free to reach agreement on their own terms. However, we understand that the policy driver for an LUT is natural capital and had understood that an LUT would therefore be limited to land use which fits in with that policy.

Q32. Do you agree or disagree that a tenant farmer or a small landholder should, with the agreement of their landlord, have the ability to move their agricultural tenancy into a new Land Use Tenancy without having to bring their current lease to an end?

Agree / Disagree / Don't know

Please give some reasons for your answers:

There is mixed opinion on this from our members and further detail is required on a number of issues.

However, we note that there is provision in legislation for agricultural tenants to convert their existing tenancies to a different type of tenancy, without terminating the original tenancy.

Provided that the agreement of both parties is required, we do not have a concern with conversion in the context of LUTs.

A number of questions need to be answered: Is this conversion rather than renunciation? Does the Scottish Government see it as a variation of use class in 91 act tenancy? Is the Scottish Government suggesting that the LUT could create a Farm shop lease with security of tenancy? Is the Scottish Government suggesting a widening of the use class?

We presume that the Scottish Government cannot be assuming that all 91 provisions would be maintained given the significant departure from the original purpose of the tenancy?

Ultimately, having the ability to move an existing tenancy to this new tenancy without changes to the current lease will lead to overcomplicating. If an existing agreement suddenly has a new agreement on top, it could become unclear which takes precedence on any number of issues. Length of lease and similar issues could be renegotiated through the new tenancy to start fresh without overcomplicating.

Q33. Do you agree or disagree that when a tenant farmer or small landholders' tenancy is due to come to an end that the tenant and their landlord should be able to change the tenancy into a Land Use Tenancy without going through the process of waygo, with parties retaining their rights?

Agree / Disagree / **Don't know**

Please give some reasons for your answers:

We are not clear as to what is being asked. If the tenancy is converted, it is not coming to an end and therefore waygo compensation is irrelevant.

Again until we have further detail we are unable to take a firm position. It may be cleaner to bring the tenancy to an end and deal with all waygo and landlord dilapidations etc – provided that if the landlord has to pay compensation to an agricultural tenant based on value to the incoming tenant then the landlord is able to retain that asset that they had purchased. However if there is no incoming tenant to an agricultural tenancy then how will this be dealt with? Would it be the same as converting any other tenancy and rolling waygo into new tenancy, e.g ltd partnerships into LUTs?

If carried forward then would the value be to an incoming LUT tenant?

Q34. How do you think the rent for a Land Use Tenancy should be calculated?

The initial rent and the basis for any rent review (if any such process for rent review is to be agreed) should be a matter for agreement between the parties.

Given that LUTs will potentially involve a commercial element, the rent agreed may be fixed or relate to turnover. This is common in commercial land leases where there is significant investment to have start up provisions to make things fair for both parties.

Q35. Would you use a Land Use Tenancy if you had access to a similar range of future Scottish Government payments which other kinds of land managers may receive?

Yes / No / **Don't know**

Please give some reasons for your answers:

We believe that this is a very leading question and suggests that tenants of agricultural holdings will be excluded from future Scottish payments, the details of which are unknown.

In the interest of fairness, the Scottish Government should also be asking the question to a landlord, would you grant one? There is a need to ensure that both parties in the contractual agreement are in favour of a new vehicle.

The consultation document states that tenants may end tenancies early as they are prevented from delivering range of env benefits – we would ask the Scottish Government to share the evidence of this happening so that we can proceed discussions on the LUT on a much more informed basis than we are currently doing.

Q36. Do you think that there should be guidance to help a tenant and their landlord to agree and manage a Land Use Tenancy?

Yes / No/ Don't Know

Please give some reasons for your answers and outline who you think should be responsible for writing and managing the guidance:

A lack of awareness of the legislation or misinterpretation was often at the root of any agricultural holdings dispute when dealing with historic and often cumbersome legislation

which is in need of consolidation. These issues have been alleviated greatly by the TFC publishing guidance. In this case, we would expect that there should be less room for dispute, where the legislation will follow on from detailed policy development and parliamentary scrutiny. However, we would support the use of guidance for area which are not appropriate for legislation i.e. processes and behaviours.

SLE welcomes any opportunity to work with the relevant bodies to create the guidance so it is appropriately informed for both landlord and tenant.

Again, this should remain guidance-led and not legislation.

Q37. Do you think there should be a process to manage disputes between a tenant of a Land Use Tenancy and their landlord?

Yes / No / Don't know

Please give some reasons for your answers and outline how this process could be managed:

This would be governed by the terms of the lease to be agreed between the parties.

We support mediation and ADR but want to make sure that the flexibility and freedom of contract required to make any new arrangement work best for both parties is not impacted by overly prescriptive dispute resolution.

Q38. Do you agree or disagree that tenants of a Land Use Tenancy and their landlords should be able to resolve their legal disputes in relation to the tenancy through the Scottish Land Court?

Agree / Disagree / **Don't know**

Please give some reasons for your answers and outline additional ways in which disputes could be resolved:

We had understood that the driver behind the LUT proposal is to allow parties the flexibility to undertake a range of land management activities. There may only be a small portion of the land used for agricultural use – the bulk of the land may not be agricultural. We consider that the parties should be free to decide on their own forum for dispute (courts, or alternative dispute mechanisms), similar to the way in which sporting leases or commercial leases are. They would

be free to nominate the Scottish Land Court, but of course there is a separate question as to whether or not the Scottish Land Court would welcome such a nomination, given the range of expertise which might be required to hear such a dispute.

Q39. Do you have any other comments on our proposal for a Land Use Tenancy?

Yes / No / Don't know

Please give some reasons for your answers:

The key issue is the extent to which the legal framework will regulate what terms the parties can agree. Whilst the framework would be required to allow for the creation of the vehicle, and it would be helpful to set out what types of activities can be undertaken and the process for termination (with a view to minimising disputes), we remain of the view that the policy reasons behind regulation of agricultural tenancies would not apply to LUTs.

Whilst the consultation does not provide any detail on what the legal framework would involve, we would not for example support regulation on how benefits are to be shared. It is a commercial term, and the parties should be free to reach their own agreement, depending on the level of risk which is being carried by each party.

Within the idea of a freedom of contract, the purpose of the contract should be very clearly laid out and be binding, for example specific planting of trees and should not be an opportunity for tenants to go ahead with whatever diversification they see fit without this being agreed in contract.

Furthermore, a tenant farmer/smallholder being able to enter into a LUT without bringing their current lease to an end would mean there are two leases running on one piece of land and this could be very messy for both parties. Entering into a LUT should bring an end to an existing tenancy and the landowner and tenant should be negotiating the terms of the LUT, which may well include carrying over costs for improvements etc.

Tenants should also be encouraged to engage professional advice as it is naïve to expect this process to be a simple, easy form without understanding and negotiating specific terms of contract.

Finally, we believe that the LUT should be considered alongside the proposed changes to agricultural tenancies as part of the next Agriculture Bill. It is imperative that we take a wholistic approach to ensure effective changes to the sector.

We believe that the policy rationale for this proposal is not entirely clear and appears to be partly driven by a lack of awareness and understanding as to what can be carried out under current tenancies and other vehicles and agreements.

We wrote to Scottish Government ministers to highlight the above concerns and along with STFA and NFUS requested that the deadline for submissions relating to the Land Use Tenancy section of this consultation is extended to ensure the industry has sufficient time and information to respond.

Part 10: Small Landholdings

Q40. Would you like to be kept informed about the Small Landholding Consultation for the Land Reform Bill?

Yes / No

If yes, please provide your email details here:

We note that this consultation has already been published.

Part 11: Transparency: Who owns, controls and benefits from Scotland's land

Q41. Do you agree or disagree with our proposal to explore:

- **Who should be able to acquire large-scale landholdings in Scotland**

Agree / **Disagree** / Don't Know

- **The possibility of introducing a requirement that those seeking to acquire large-scale landholdings in Scotland need to be registered in an EU member states or in the UK for tax purposes**

Agree / Disagree / Don't Know

Please give some reasons for your answers:

The policy rationale behind these proposals appears to be transparency, which is something we fully support and agree with. However, transparency over who owns land and what they do with it is not the same as restricting who should be able to acquire land.

It is important that foreign investors (and all owners) in Scottish land understand what is expected of them in terms of forward thinking, responsible land management, and we have been supportive of the SLC and SG in producing protocols and guidance as part of the LRRS programme. However, it is equally important that investment in land remains a relatively attractive prospect if the Scottish Government hope to achieve its Net Zero targets through tree planting and peatland restoration, as well as conservation and biodiversity targets. Ultimately we believe the outcomes of land management should be paramount over who owns the land and how much they own.

This proposals also appears to aim to tackle absenteeism, but we do not feel placing a restriction on who could acquire landholdings would achieve these aims since a landlord can still practice absenteeism even if they live and work in Scotland or the wider UK.

Full assessment of all measures to increase transparency of landowner, including the Register of Controlling Interests, should be undertaken before any further measures are introduced. Broadly speaking we trust that the Register of Controlled Interests and the Register of Overseas entities will address any transparency concerns.

Part 12: Other land related reforms

Fiscal and taxation

Q42. Do you have any views on what the future role of taxation could be to support land reform?

Taxation in relation of land in Scotland is a complex and layered issue. With businesses deriving income from land already paying tax across a number of mechanisms. Land and property taxes (LPT) can be classified as recurrent (usually annual) or event-based taxes. In terms of event-based LPTs, Scotland has Land and Buildings Transfer Tax, capital gains tax, inheritance tax, and 'section 75 agreements' (i.e. planning obligations). Scotland also has a recurrent LPT that both tax improved land (i.e. the value of land as well as the value of any improvements to that land such as structures). These are council tax, levied on domestic properties, and non-domestic rates (business rates), levied on non-domestic property. The taxable entity for both of these taxes is the occupier in the first instance, although landowners become liable if the land and property is unoccupied.

The consultation document and indeed the advice from the Scottish Land Commission to ministers does not set out any clear proposals or assess any impact of any future land taxation. SLE is strongly of the opinion that any future changes to taxation must be viewed holistically in terms of both reserved and devolved taxation levers and must not disadvantage land managers in Scotland.

Given the role of land management and the accepted need for private finance in the delivery of Net Zero targets it would seem perverse to burden land managers with greater taxation, while at the same time using public support to meet these targets. Similarly, food security has also been threatened in recent months by the war in Ukraine. With margins often wafer thin for agriculture, greater taxation on land would put an unbearable strain on Scotland's ability to provide food of the highest quality and to the highest standards.

Rural communities can also be extremely fragile, and the role landowners and managers play in providing employment and economic activity in these communities must not be jeopardised. There is a recognised local multiplier effect in rural and remote communities which is greater than urban settings and it is vital that this is not reduced or lost. Any proposals must be carefully considered, including any unintended consequences for those living and working in rural Scotland. Similarly the cost:benefit from designing and delivering future taxation must be considered to ensure that it is a worthwhile exercise and not just symbolic and placing cost on individuals with tangible benefit to wider society.

Community benefits and natural capital

Q43. How do you think the Scottish Government could use investment from natural capital to maximise:

- a) Community benefit**
- b) National benefit**

Community benefit

Community benefit from natural capital projects will look different for every single project and community. It is unrealistic to expect a similar model to windfarms, in which communities receive cash within a very short timescale, to be extended to other projects such as tree planting or peatland restoration. These projects are completely different in financing structure and risk involved and this should be considered in any further community benefit policy development.

A form of community benefit from tree planting could be the installation of paths or trails so that communities can benefit from the use of the woodland while it sequesters carbon.

Financially peatland restoration and forestry planting are long term investments. Often the true cost of the projects are not known for years or decades. The need to maintain the peatland and trees means there are ongoing management costs which can be difficult to quantify due to climatic and environmental changes, therefore it is not a simple task to measure the quantum of benefit for each individual project and an attempt to make a broad brush assessment would make some projects unviable and increase the risk for those investing the natural environment.

National benefit

Investment in natural capital has inherent national benefits in that it will contribute to a just transition to Net Zero and conservation efforts. The current pattern of landownership is already very well placed to maximise the national benefits from natural capital and it does so by responding to Scottish Government policy priorities like the current favourable tree planting initiatives. Investment in natural capital helps to deliver national and local benefits including long-term flood risk reduction, boosts to wildlife, improvements to water and air quality and opportunities for biodiversity net gain. Pursuing more fragmented ownership and thus less opportunity for natural capital investment at the required scale will make it more difficult to achieve these benefits.

It has been established that estates have a major impact in their contribution to Biodiversity and Natural Capital, around 17% of the country's Natural Capital stocks. BiGGAR Economics (2022) has also identified that rural estates "make a substantial contribution to the national

outcome relating to the environment” through “active efforts to protect and enhance the natural environment and by supporting the roll out of renewable energy infrastructure”. Estates will play a key role in supporting Scotland’s transition to Net Zero and are therefore already making significant contributions to the national benefit. With these benefits already being provided in Scotland at both a local and national level, any proposed changes to the current system must be sure to be able to provide greater benefit, based on sound and secure evidence rather than reductionist arguments and assumptions.

The Public Interest Test proposals pose a serious threat to the continuity of some vital natural capital projects. For example, the development of the Peatland Carbon Code has potential to help land managers deliver environmental benefits, but receiving the credits comes with a requirement to maintain the peatland for up to 100 years. Continuity here would usually be achieved through the inheritance of the estate and projects being carried on by the next generation, or a new buyer having a contractual agreement to continue the work under the Peatland Carbon Code. Due to a significant lack of detail in the PIT proposals we are unclear whether these types of projects will be safe from ‘lotting’ or the land being used for something else in the ‘public interest’.

Prior to any decisions or policies being developed on the availability of investment to local communities, there is a need for clarification on the taxation of carbon credits. It is currently not clear how they should be treated, whether as an asset, or as trading income. The final view on this could substantially change the potential for community benefit. Similarly, any aims to share financial benefits from natural capital must be considered carefully so as to not choke off investment and harm potential for projects which will enhance biodiversity or help to reach Net Zero.

Q44. Do you have any additional ideas or proposals for Land Reform in Scotland?

We strongly recommend that the Scottish Government reviews the existing legislation, mechanisms and structures that can help deliver on their policy aims before introducing further layers of ill thought through legislation that will only increase legal complexity and threaten efforts to achieve Net Zero and biodiversity net gain.

Part 13: Assessing impact

Q45. Are you aware of any examples of how the proposals in this consultation might impact, positively or negatively, on island communities in a way that is different from the impact on mainland areas?

There is some potential for negative impact on island communities, where there is a small area and economies of scale are present. This can enable greater employment opportunities as well as landscape scale benefits for nature.

Rural and island living, and employment is fragile and care should be taken to ensure there are no unintended consequences to legislation.

Q46. Are you aware of any examples of particular current or future impacts, positive or negative, on young people (children, pupils and young adults up to the age of 26) of any aspect of the proposals in this consultation?

As per our answer to Q45, care must be taken to ensure no unintended consequences both for current and future generations living in rural areas.

Q47. Are you aware of any examples of how the proposals in this consultation may impact, either positively or negatively, on those with protected characteristics (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

Nothing to add.

Q48. Are you aware of any examples of potential impacts, either positive or negative, that you consider any of the proposals in this consultation may have on the environment?

As we have stated previously there are strong concerns around the impact on biodiversity and nature, which strongly benefit from scale of management.

As we have stated in Part 4, there needs to be better understanding of how this may impact on wildlife and habitat management.

The Langholm Initiative neatly lays out the benefits of scale for a range of reasons, but in particular around biodiversity.

“As wildlife thrives best in a large, interconnect mosaic of habitats, having a larger reserve would allow us to support a wider range of wildlife and maximise biodiversity.”²⁴

Therefore we would suggest evidence is gathered and published from NatureScot to fully understand the impact a reduction in scale of ownership could have on nature initiatives, both current and future.

Q49. Are you aware of any examples of how the proposals in this consultation might impact, positively or negatively, on groups or areas at socioeconomic disadvantage (such as income, low wealth or area deprivation)?

The proposals would have no impact on some of the most disadvantaged areas of Scotland as it purely looks at rural issues.

Q50. Are you aware of any potential costs and burdens that you think may arise as a result of the proposals within this consultation?

There is potential for significant costs to be brought about by these proposals.

Landowners will incur significant costs through the need to implement management plans as well as reporting against Land Rights and Responsibilities.

There will also be significant costs in implementation of assessment of these plans and criteria, it is unknown how much this will cost. During a pilot of a voluntary LRRS process which SLE work with the Land Commission on it highlighted how much time this took, with participants taking up to 4 days to complete the process by the estates in the pilot, along with a similar amount of time provided by SLE to work with them through the process. Partly due to the difficult nature of measuring practical outcomes with what are subjective, high level principles. Therefore, the costs may be significant for those who are required to undertake them.

However the greatest cost incurred could be for those looking to sell land if the sale of the land falls through, either due to delays in carrying out a public interest test, or if there is forced

²⁴ [Tarras Valley Nature Reserve | langholminitiative](#)

lotting of land which could greatly reduce the overall value of the landholding. Any of these impacts which reduce the value of the land could be in breach of Human Rights.

We would expect these impacts to be fully explored in the Business Regulatory Impact Assessment, which will require to understand the way land is valued, the needs and wants of buyers as well as the impact of delays on the feasibility of sales. The assessment should also seek to place a value on the time spent by landowners potentially caught by new legislation in abiding by it and understanding it.

Q51. Are you aware of any impacts, positive or negative, of the proposals in this consultation on data protection or privacy?

Nothing to add

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