

Consultation Questions & Respondent Information Form

A Consultation on the Future of Land Reform in Scotland



The Scottish Government
Riaghaltas na h-Alba

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

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3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

- (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

- (d) 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?

Please tick as appropriate Yes No

CONSULTATION QUESTIONS

Draft Land Rights and Responsibilities Policy

Q 1. Do you agree that the Scottish Government should have a stated land rights and responsibilities policy?

Yes No

Q 2. Do you have any comments on the draft land rights and responsibilities policy?

The James Hutton Institute (hereafter ‘the Institute’ or ‘we’) agree that it is important for the Scottish Government to present a clear vision for land rights and responsibilities, and we welcome the statement of principles. However, there is a need for straightforward, clear definitions of key terms, such as ‘public interest’, as included in the final report of the Land Reform Review Group (LRRG, 2014). It is suggested that Principle 4 includes the following addition (in square brackets):

“4. The ownership of land in Scotland should reflect the mix of different types of public and private ownership in an increasingly diverse and widely dispersed pattern, which properly reflects [and recognises the inherent trade-offs between] national, regional and local aspirations and needs.”

However, we believe that the text of paragraph 33 in the Consultation is not, as is implied, a ‘policy’ (i.e. an intended course of action by government), whether stand-alone, or one of the ‘policies’ mentioned in the last sentence of that paragraph. Rather than ‘policy’, our response to Q 1 should therefore be understood as agreement with the idea of a ‘vision’ or ‘set of principles’, or perhaps a ‘strategy’, rather than any particular ‘policy’ (see response to Q.3 below).

The James Hutton Institute suggests that a statement of principles is developed in conjunction with the Land Use Strategy, in particular highlighting the commonalities with/distinction from the Land Use Strategy’s existing ‘Principles for Sustainable Land Use’. The statement of principles should seek to align with the key planning regulations and strategic documents, including the National Planning Framework 3 (2014) and Scottish Planning Policy (SPP-2014).

It is also imperative that the resulting ‘Land Rights and Responsibilities’ statement of principles is implemented through regulatory, legislative, legal and other procedures, to avoid it becoming viewed as solely strategic. A close alignment with SPP-2014 might help to achieve effective implementation.

Aspirations for the Future

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

Action 1:

We agree that the vision for Scotland's land use and ownership pattern with stakeholders and the wider public, before identifying the types of action required to reach these goals, provides the basis for legislative reform. Action 1 should be undertaken in conjunction with the finalisation of a register of landownership, and widening of data help in the register (e.g. including maps of land holdings, details of land capability, etc). Please see response to Proposal 3.

Action 2:

Focus efforts on community capacity building and increasing engagement in community planning (involving full citizen participation in local decision making). In addition, build partnerships between landowners (whether public/private, resident/absentee, large/small landholding) and rural communities, to ensure that communities have the skills and resilience to undertake and support opportunities arising from any legislative reform.

Action 3:

Review/evaluate the balance of incentives and regulation directing the actions of all landowner and land manager types, and consider how best this balance meets the public interest (see also responses to Proposals 4 and 6, i.e. a sustainable development text and charitable responsibilities).

Proposals for inclusion in a Land Reform Bill

Proposal 1 - A Scottish Land Reform Commission

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

Yes No

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

In principle, the Institute is supportive of the creation of a Scottish Land Reform Commission, given that the Commission would be representative of the wide range of views and interests in landownership and management (with elected Commissioners), and that it would maintain transparency and accountability in its functioning/operations. Such a Commission should remain neutral, and run on cycles which are not the same as those of Parliamentary terms. We would welcome further details regarding the proposed Commission, including, for example, how individuals could be nominated for Commissioner positions, how they would be elected (and by whom), and the potential for the Commission to have the ability/powers to commission relevant and timely research.

However, we note that the disadvantages to establishing this proposed new institution would include costs and added bureaucracy for Government, land owners, managers and rural communities. There may be delays and legal appeals regarding the proposed Commission's remit and powers. We note that a new institution would require to operate alongside other organisations of relevance given the role, remit and activities of those already in existence, including the Land Court, Scottish Land Fund and the Registers for Scotland, as well as the Land Reform Unit of the Scottish Government. Further clarity is sought regarding the anticipated relationship between the proposed Land Reform Commission and these existing and diverse organisations.

Finally, we note a concern regarding actual or perceived 'capture' of the Commission by one or other stakeholder group, e.g. large landowners, lawyers, 'single-interest' groups, or the Scottish Government of the day.

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

We recommend that the Scottish Government looks at the structure and remit of other Commissions, whether simply advisory or with some executive powers, and/or narrowly focused or wide-ranging, in order to learn lessons of best practice, for example the Sustainable Development Commission, the Expert Commission on Energy Regulation, the Fuel

Poverty Commission and the Low Pay Commission.

Further thought is merited regarding the remit of the proposed Commission. The proposed duties of 'promoting' (land reform), 'collecting' (evidence) and 'monitoring' (effects) are rather different from each other (especially the first from the other two).

Proposal 2 - Limiting the legal entities that can own land in Scotland

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

Yes No

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

Yes No

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

The Institute does not have expertise or research evidence regarding the legal aspects of landownership in Scotland. However, we note that greater restrictions are enforced in some other European countries regarding residency requirements for ownership or long-term occupancy. We would in principle (and practice) support measures that contribute to greater transparency and accountability in landownership mechanisms which influence the sustainable development of rural and urban areas in Scotland. However, the proposed limitations may not necessarily improve transparency significantly, given the possibilities of non-residency and anonymity offered, for example, by overseas-based companies, or trusts serviced by law firms based in the UK. Nonetheless, it is likely that such restrictions would contribute procedural advantages, i.e. in terms of controlling regulations, and allowing greater understanding of landowner motivations and economic influences.

For these same reasons, and due to the fact that some land in Scotland seldom changes hands (sometimes only every few hundred years), it would also likely be in the public interest to require all current owners to become registered (please refer to our response to Proposal 3).

It is a weakness of this proposal that only new future owners would be affected, and thus many problems of unclear and unaccountable current ownership would remain.

Further research may be required to identify ways to maintain compliance with the European Convention on Human Rights (ECHR).

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

See response to Q. 9.

Proposal 3 - Information on land, its value and ownership

Q. 11. Do you agree that better co-ordination of information on land, its value and ownership would lead to better decision making for both the private and public sectors?

Yes No

Q. 12. Do you hold data you could share or is there any data you would wish to access?

We note that Proposal 3 links closely to Proposal 13 of the Land Use Strategy, namely to “provide on its website a Land Use Information Hub”, which has subsequently led to the creation of the Scotland’s Environment website (see below).

The James Hutton Institute has produced, and is the legal holder, of several spatial datasets which could facilitate the objective of enhancing the coordination of information, and ultimately improve evidence-based decision making. Examples of these include the Land Capability for Agriculture and Forestry maps (www.hutton.ac.uk/research/themes/delivering-sustainable-production-systems/soils/land-capability), a wide range of data on soils (please see the Scotland's Soils website: Scotland's Soils website www.soils-scotland.gov.uk/ and www.soils-scotland.gov.uk/data/lca250k) and other indicators (e.g. compliance data for SRDP measures, based on IACS data). Potentially, these data could influence the productivity and value of land (although development rights can also confer considerable increases in value regardless of underlying biophysical quality). Despite the adherence of the UK (and Scotland) to the EU INSPIRE Directive in 2009 (www.itspubliknowledge.info/Law/INSPIRE.aspx), it should be noted that access to these data may be bound by legal constraints to their public use.

However, and in compliance with the aforementioned EU Directive, some of this information is already publicly available through online repositories such as Scotland's Environment (www.environment.scotland.gov.uk/) and the Scottish Government Spatial Data Infrastructure (<http://data.gov.uk/publisher/scottish-government-spatial-data-infrastructure>).

The research at the James Hutton Institute shows that understanding and realising multiple benefits from land use requires an associated understanding of patterns of land tenure, and therefore how benefits accrue to different people in rural areas based upon their rights (and security) of access to the land. Therefore, the distinction made by the current Land Use Strategy, that it addresses land use issues and not land tenure, means that there can only be an incomplete policy response and partially explains the limited progress on the LUS to-date, despite its holistic objectives. A key requirement here is to develop a standardised database of land tenure in Scotland linked to registration of individual land parcels which can be used to further develop research on this issue and make relevant policy recommendations.

Q. 13. What do you think the advantages or disadvantages of wider and more flexible sharing of land information would be and do you have any recommendations about how this can best be achieved?

The main advantages of sharing land information include:

- Increasing transparency and accountability (especially through links to individual land-holdings); contributing minimum data availability to all and the democratisation of information; supporting the empowerment of different groups.
- Allowing for better monitoring of policy efficacy/bench-marking and overseeing land manager actions (e.g. based on regulation/incentives).
- Increasing the potential to increase accessibility to data for research, as suggested currently for the next phase of the Scotland's Environment website.

- Overcoming issues arising from diverse data sources and 'messiness' through dataset centralisation/compatibility.
- Improving market efficiencies through greater knowledge about land holdings.

However, there may be disadvantages if the sharing of land information is 'too open', for example, and there was some conflict with property rights.

Including land 'values' raises the question of the definition of 'value', assuming it is not just a transaction price. The inclusion of 'value' raises many challenging questions, including the relative importance of different groups' values and their enumeration, which in the case of public good values, are contentious and in many situations of questionable accuracy. In an open society, values are contested (as well as valuation methods) and to assume that the public good can be ascertained without contention may be deeply unrealistic.

Finally, it would be interesting to look further into how this Proposal might bring the Land Registry of Scotland closer to a cadastre as found in other EU countries. For example, see further details of the virtual cadastral office in Spain at www.sedecatastro.gob.es/, where both spatial and legal information on land property and valuation is made fully open and public to any Spanish citizen formally registered under their passport number. A similar service is available in France: www.cadastre.gouv.fr/.

Proposal 4 - Sustainable development test for land governance

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

Yes No

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

Given the Institute's third suggested action by the Scottish Government (see Q 3.), we believe that there is scope to better evaluate the mechanisms for directing landowners to undertake certain land management activities in the public interest or to promote sustainable development.

The critical points in this proposal are: (i) the definition of 'sustainable development' (which is so far undefined in Scottish law), and (ii) the likely types of 'actions' to be taken by private landowners in response to directions from Scottish Ministers. In practice, many such actions are likely to involve others, such as tenants or public access-takers. The responsibilities of landowners for the actions or inactions – and indeed benefits or losses – on the part of these other parties need to be considered, e.g. the principle of 'vicarious liability' recently invoked in cases of illegal interference with wild birds. Without further detail and clarity of definitions, and of the procedures, including appeals, involved in a Ministerial direction being given, this proposal is unlikely to be achieved successfully.

Firstly, we question whether sustainable development in this context equates to the definition of the 'public interest' as stated in the draft principles at the beginning of this document. We recommend that a definition of sustainable development is included in the new legislation, given its omission in the Land Reform (Scotland) Act 2003 (cf. Pillai, 2005). We also suggest that to maximise policy cohesion, the final definition reflects the principles and objectives outlined in the Land Use Strategy and in other relevant strategic and legislative documents and programmes (e.g. Scottish Planning Policy (2014) (SPP), Climate Change Act (2009), National Planning Framework 3 (2014) (NPP3), Scottish Rural Development Programme (2014-2020), and clarifies the relationship between the revised legislation and the 2005 sustainable development strategy, 'Choosing Our Future'. Consideration should be given to the compatibility of 'sustainable development' in this legislative reform and the Government's predominant goal of 'sustainable economic growth'.

Whilst defining 'sustainable development' remains an ongoing, rhetorical (rather than practical) and at times, ambiguous discussion (Elliott, 1999; Leist and Holland, 2000; Robinson, 2004), recent research on sustainability in the context of estate management has been carried out at the Centre for Mountain Studies and the James Hutton Institute. In particular, we suggest that the Scottish Government reviews the findings of the 'Sustainable Estates for the 21st Century' project, which gathered views from a wide

range of rural interests, including private, community and NGO landowners, land managers, rural community members, agency staff and other key stakeholders, regarding 'sustainable estates' and sustainable rural development, arriving at the creation of a 'sustainability toolkit', designed to assess the sustainability progress of landholdings under any type of ownership (cf. Glass *et al.*, 2013a; Glass *et al.*, 2013b; www.sustainable-estates.co.uk/).

In addition to clarification on the interpretation of 'sustainable development', it is worth exploring the possibility of incorporating notions of 'responsibility', within the framing of 'desired' landownership types. We welcome the inclusion of 'responsibilities' within the Draft 'Land Rights and Responsibilities' Policy Statement. We note the valuable precedent for responsibility in Part 1 of the Land Reform (Scotland) Act 2003 (LRSA), in that all rights have commensurate responsibilities, upon which the ability to enjoy those rights are contingent.

As an innovative development to this proposal, we suggest that the Scottish Government explores the potential for all landowners to be required to provide management plans (reviewed and updated regularly), including a positive statement and vision of how their land and its use benefits the public interest. Community engagement should be embedded in the management plan development process, and indeed the process should be developed to foster partnership working between landowners and communities (cf. Glass *et al.*, 2012). Simultaneously, research should focus on developing valuable maps to show where there is a divergence between management/land use and aggregate public and private good.

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

With reference to the Institute's response to Q. 15, concerns arise regarding the definition of 'taking action'.

In particular, the suggestion that the compulsory sale of private land may be necessary to remove barriers to sustainable development raises the question of why existing compulsory purchase legislation is not used at present for this purpose? Furthermore, there is a lack of detail regarding valuation of land under compulsory sale, and how conflicts would be resolved (and who would act as arbitrator).

Again we suggest a re-evaluation of incentives/regulations influencing the actions of private landowners. The measures suggested in this proposal may be considered a major step-change, and it should be noted that severe sanctions/demands could jeopardise goodwill. To make any tests meaningful, and in line with established multi-stakeholder governance principles (e.g. Ostrom, 1990) there should be a step-wise gradation of incentives and sanctions, with increasing yet proportionate gradations of severity. An appropriately estimated and designed set of incentives and disincentives are required to nudge the resulting outcome in the intended direction. For example, the argument may be made that if a land-based business becomes unviable due to additional responsibilities for public good

delivery, compensation may be due, according to the principle of opportunity cost.

Nonetheless, the suggestion that removing barriers to sustainable development through working with other public sector bodies and local communities is to be welcomed, and complies with the recommendations outlined in the booklet 'Working Together for Sustainable Estate Communities' (Glass *et al.*, 2012).

We suggest that the Scottish Government considers (and publishes) the steps that would be taken before the compulsory sale of private land to achieve sustainable development, linking them with the aims and contents of this legislative reform. A transparent framework of measures would reduce potential conflicts and ensure consistency, removing the potential for failure in compliance with the European Convention on Human Rights (ECHR). For example, we suggest that community engagement and partnership working between private landowners and the communities who live and work on their land should be encouraged and feature in the 'sustainable development test' (as it appears in the 'Sustainable Estates' toolkit and 'Working Together' booklet). Transfer of management power, rather than property rights, might also be an appropriate alternative, and alleviate perceived barriers to sustainable development as a result of landowner action/inaction.

The final issue which the Institute would like to see clarified regards which public body would be given the power to "direct private landowners to take action to overcome barriers to sustainable development in an area". The phrasing of Q. 14 leaves this open but suggests that Scottish Ministers should be given this power. However, sustainable development priorities differ from the national to the local scales (Baker, 2006; Barker, 2005). We suggest that, in developing this proposal, due consideration is given as to which public body will administer these powers and what will be done in the inevitable case of conflict between local, regional and national visions of sustainable development.

Proposal 5 - A more proactive role for public sector land management

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

Yes No

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

The Institute commends the positive progress of Forestry Commission Scotland, and highlights evidence that the goals described in the consultation document are already being achieved. There is scientific knowledge (Nijnik and Mather, 2008; Munoz-Rojas *et al.*, in press) and on-the-ground evidence (observed in detailed soil surveys throughout the 10

Forest Districts during 2010-2014) that the Commission is clearly engaging in an increasingly wide range of management activities to promote a more integrated range of social, economic and environmental outcomes. Thus, there is evidence that these goals are already being achieved, e.g. the increasing number of people using woodlands for recreation, and the several carbon mitigation programmes and tools, including, for example, the forestry renewables initiatives.

As mentioned, many of these outcomes relate to greater availability of publicity material on access (e.g. Barcaldine Forest, West Argyll FD), the development of a more comprehensive network of way-marked access tracks, investment in infrastructure and recreation-specific facilities related to mountain biking (e.g. Balblair Forest, North Highland FD), and many aspects of nature conservation protection and environmental improvement. Also, these developments relate to the provision of holiday accommodation within forests, for example 'Forest Holidays', founded by the Forestry Commission in the 1960s to meet the growing demand for such resources. Although Forest Holidays is an independent company, it is still part-owned by the Forestry Commission and retains strong links to FCS. All the holiday locations are on Forestry Commission land, and there is a commitment to preserve and protect forests for future generations of visitors (e.g. Forest Holidays, Strathyre Forest, Cowal & Trossachs FD). Our perception is that Forest Enterprise has taken their social obligations very seriously.

If the Scottish Government wishes to move towards its goals more effectively/efficiently, we agree that the Forestry Commission Scotland (FCS) may require to obtain greater powers from the Scottish Government to become rural entrepreneurs and run non-forest enterprises. The FCS' approach to renewable energy developments are considered to be a very positive step, and effective in reconciling public and local interests. However, further consideration should be given to avoid the 'crowding out' of local enterprise, if public bodies behave entrepreneurially and in local partnerships. In relation to development throughout Scotland (even rural Scotland) as a whole, local authorities are likely to be more important for 'public sector land management' (in addition to other public or semi-public bodies, such as transport authorities, Scottish Water, and the Ministry of Defence), and their (further) involvement in "sustainable development" will involve difficult questions of planning (including compulsory purchase) powers, finance, risk-bearing, etc.

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

Forestry Commission Scotland should be able to engage in a wider range of management activities and promote community engagement (rather than solely property rights transfer). However, the assumption of enhanced forest management to promote a more integrated range of social, economic and environmental outcomes through increased community engagement requires further scrutiny (Nijnik *et al.*, 2015). Such scrutiny is needed in the light of Brugger's (1986) observation that 'too endogenous', self-reliant community-level development, which ignores external effects and global economic processes, can be highly damaging for the regional economy and society (i.e. at higher than local levels of governance). The development of new ways of exploring community management of forests through the institutionalism of Ostrom (2011; 2007) indicates that, in the UK, forests are unlikely to have the salience on livelihoods that they have in developing countries and that their acquisition and management by local communities may represent a form of local rent capture at taxpayers' expense (Nijnik *et al.*, 2015). Currently, in many Central and Eastern Europe countries, state-controlled forestry has often been replaced under restitution and other policies by small-scale private ownership, leading to problems of over- and under-exploitation, and in delivering multipurpose/multifunctional forestry (Nijnik *et al.*, 2009). In the light of this experience, further research is needed which involves science and practice communities in Scotland.

Proposal 6 - Duty of community engagement on land management decisions to be placed on charitable trustees

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

Yes No

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

The proposal supports the promotion of transparency and accountability in Scottish land management. This could be extended to all landowner types, thereby ensuring that community engagement is a requirement not just limited to charitable trustees.

Further detail is required regarding the scale of decision necessary for community engagement. McKee (2013a and b) found that community members did not expect to be involved in the day-to-day decision-making of estate management, but felt strongly about the necessity of engagement around issues that affected their home, livelihood, community cohesion, service provision and local landscape, amongst other concerns. Glass *et al.* (2012) recommend community engagement to be embedded as a 'norm' in estate management planning (see response to Q. 15), undertaken by both landowner and estate staff. Consideration should be given to the nuances of

estate decision-making that might impact on the rural communities who live and work there, and consider how best to generate positive estate-community engagement practices.

A disadvantage of Proposal 6 is that it is likely to be challenging to ensure consistent and genuine community engagement, building on trusting, personal relationships, especially where the Trustees are not local residents, and/or have objectives such as wildlife conservation which are not widely shared. There may be added costs, and Trustees, landowners and estate staff may lack capacity/confidence in undertaking community engagement (cf. Glass *et al.*, 2012). In conjunction with this proposal, consideration should be given to support mechanisms, and training to overcome these challenges.

Consideration should be given to the provision of public development or management plans every 5 or 10 years (see response to Q. 15). Such a management plan can provide the basis for regular community-landowner engagement and dialogue, outwith the context of specific, and perhaps contentious, development proposals.

Q. 22. How should “community” be defined?

The definition of ‘community’ is central to the successful implementation of this key legislation, and multiple perspectives exist about what is understood about the term ‘community’. The following extract from McKee (2013b) discusses the diversity and shifting meanings of ‘community’, confirming the challenge of defining such a concept in legislation.

“‘Community’ has typically fallen into two sets of definitions regarding the geographical and territorial notion of the neighbourhood or village (‘communities of place’), and the ‘relational’, that of the strength of human relationships without the need for location (‘communities of interest’) (Gusfield 1975 in McMillan and Chavis George, 1986). Indeed, ‘community’ may be interpreted as “both a discursive and material phenomenon of social connection and diversity” (Liepins, 2000: 325). Earlier academic discourses regarded community as a relatively stable, homogeneous and detached concept, whilst more recent studies have approached it as a post-structural, more complex and often ‘fluid notion’ (Liepins, 2000), incorporating symbolic constructions, the influence of memory and concepts of ‘belonging’ (Cohen, 1985; Withers, 1996; Skogen and Krange, 2003; MacKenzie, 2004; McIntosh, 2008). The rural ‘community’ is considered uncertain because of increased mobility and outmigration, because people are no longer required to define themselves locally and the ‘politics of difference’ is increasingly providing ‘community’ (Bryden, 1994: 8). Consequently, much academic discourse on community and ‘rural communities’ has investigated the concept of ‘otherness’ and social exclusion, as well as social class systems and power relations (e.g., Bell, 1994 in Skogen and Krange, 2003; Pratt, 1996; Seymour et al., 1997; Phillips, 2009; Heley, 2010). ...

Disparities within communities can disrupt aspirations of local-level sustainability. Often, populations of different social structures, economic links, and income bands are demarcated together within settlement

boundaries: Shucksmith et al. report the phenomenon of 'communities within the community' (1996; Derounian, 1998). Such boundaries cannot categorize a community, hence the academic shift in definition to 'post-structural' communities that are unlikely to result in representative community participation, with diverse and sometimes conflicting values and resource priorities (Midgley et al., 2005; Leach et al., 1997). As Brown explains, "struggles over resources are simultaneously struggles over the meanings attached to key categories, such as 'community'" (2007: 635) and community 'boundaries' are sites of contestation (Alperson, 2002 in Brown, 2007; Liepins, 2000). Different interpretations of sustainable development are likely within such heterogenic communities, impeding the creation of shared objectives and action plans for sustainability (Shucksmith, 2010)."

It is important that legislation adopts a clear, yet flexible definition of 'community', to allow diverse communities to engage with the legislation. We suggest that a common definition of community is adopted in both the revised Land Reform Act and Community Empowerment Bill, and other related legislation (which may involve retrospective amendments), to ensure better coordination and policy cohesion (please refer to response to Q. 23). With reference to the extract above, and the context of the current consultation, one possible and tentative 'community' definition may be: 'a group [scale to be defined] of residents [residency status to be defined] who reflect the demographic and viewpoint diversity of a defined local area [reflecting scale of community], yet share a connection to place and a common goal in the local and national public interest [according to definition]'.

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

We question the use of the term 'remedies' in Q. 23; would simply 'actions' be more appropriate? Whilst we suggest that Proposal 6 should be extended to all landowner types, we also suggest that referral to the Office of the Scottish Charity Regulator (OSCR) for re-examination of the charity's objectives, and actions would be an appropriate action in case of breach of legislative responsibility on the part of charitable Trustees.

Whilst greater community engagement is welcomed in principle, the proposal lacks clarity on the intended outcome of any engagement process. To what extent would concerns raised by community members be binding upon trustees? Who would mediate potential conflict between the constitutional aims of the charity and the desires of the local community? A process of engagement with no demonstrable results over time and/or space could be a negative potential outcome of this proposal, due to unachieved expectations on the part of communities and a breakdown of trust between charity and community.

To assess whether 'appropriate' community engagement is undertaken by a charity, the Institute seeks further clarification of the definition of community engagement adopted by the Scottish Government. We refer to the definition stated by COSLA (Communities Scotland, 2009:4):

“Developing and sustaining a working relationship between one or more public body and one or more community group, to help them both to understand and act on the needs or issues that the community experience.”

However, there remains a wide variety of interpretations within the concept of ‘developing and sustaining a working relationship’, ranging from engagement in the form of simple consultations to co-management of assets. With reference to Arnstein’s ladder of participation (Arnstein, 1969), not all forms of community engagement may be ‘appropriate’ or ‘equal’ in a given situation, and some may disadvantage some community members if used inappropriately (Blackstock *et al.*, 2007; OECD 2004). This proposal requires further clarity regarding community engagement definitions, standards and models of best practice/benchmarking, by which to assess ‘failure’ to engage.

Community members may have much to contribute to a consultation process but may not then have the time and resources to contribute to management activities. However, a broad and shallow approach to engagement may fail to tap the available capacity of active community members. We suggest that future revisions of this proposal recognise and seek to overcome trade-offs between inclusivity and the potential depth of engagement/collaboration.

One possible mechanism to encourage effective community engagement may be to include a measure that requires charitable Trusts or other landownership types to include local community members as Trustees or as company Directors. Furthermore, case studies documented by Glass *et al.* (2012) describe ‘estate liaison groups’, which include members of the local community, landowners of neighbouring estates, and estate representatives. This model could be expanded to include third-party stakeholders, such as local authority representatives. Landowners should consider opportunities for the co-management of assets with community members, in order to meet the needs and aspirations, as well as spread the benefit of outcomes of landownership and management (McKee, 2013a).

Proposal 7 - Removal of the exemption from business rates for shooting and deerstalking

Q. 24. Should the current business rate exemptions for shootings and deer forests be ended?

Yes No

Q. 25. What do you think the advantages would be?

Further details would be desirable regarding motivations for removing this exemption, especially as there are no similar proposals for other land-based businesses, such as forestry and farming.

The James Hutton Institute often conducts research with stakeholders from the 'deer sector'. From this, we understand that, if deer are to be managed at least in part for the public good, it is likely to be necessary that this is undertaken largely by the private sector. However, the removal of this exemption could be considered a tax on private-sector deer management, whilst carrying out a public service and reducing costs to the taxpayer. If the argument is to be made that deer management deserves tax relief in return for public good provision, the issue should be framed from this perspective, rather than the current argument of deer management as an obligation to prevent the 'public bad' of overgrazing, with associated losses of biodiversity and landscape diversity. The removal of this exemption will potentially act as a disincentive to own land for the purposes of deer stalking, with implications for deer-related employment and associated community interests. In some cases, it could lead to under-culling with negative implications for environment protection. One option is to provide exemptions for owners who actively participate in Deer Management Groups with an effective and Deer Management Plan, implemented by the membership, which addresses public as well as private interests.

There is an acceptance that deer management is necessary on most, if not all, landholdings (as implied by the Code of Practice for deer management). In practice, the 'sporting use of deer' is difficult to separate from management culling. In any case, the revenue generated from deer stalking for sport and from the sale of venison contributes to, but does not generally cover, the costs of deer management. Overall, therefore, many unprofitable enterprises may be liable to pay business rates.

There is a difficulty in determining a sporting rate when the actual sporting part of an estate business may be a small item amongst the various enterprises on a land holding. Sporting rights have a theoretical value based on the net rental value to a landlord with a tenant bearing all the costs (although other approaches to valuation were used by Regional Assessors prior to exemption in 1995). Will the costs incurred in carrying out initial valuations, subsequent reviews and collection of sporting rates be covered by the amount of revenue raised by local authorities? Will the Scottish Government maintain present reliefs under the Small Business Bonus Scheme? Many sporting subjects are likely to fall below the present threshold RV of £35,000, and thus be fully or partly relieved of the requirement to pay business rates. This needs to be taken into account as

part of deciding whether what public benefit will be achieved from re-introducing sporting rates.

The removal of the exemption from business rates would require assessments to be carried out in respect of all land where deer are present as a basis for an appraisal as to whether their management is 'sporting' or not. Therefore questions arise regarding whether it is intended that public bodies, such as Forest Enterprise Scotland or NGO owners, which let a proportion of their annual cull for sport, will be liable to pay Business Rates on that proportion of their cull. Similarly, further detail is required whether farmers who shoot or let roe deer stalking for sport will also be liable to pay this rate.

In addition, the James Hutton Institute recognises that deer (and other game) management is also in the private interest, for example, providing income from sport shooting, venison sales, and the connection between stag cull and estate capital values (cf. Thomson *et al.*, 2013). From this perspective, there is merit in the removal of the exemption from sporting rates.

The proposal, if implemented, may indirectly contribute to the Scottish Government's woodland expansion targets, through land being removed from sporting use and planted with forestry, as well as contributing to more successful natural regeneration. Furthermore, with removal of the exemption, advantages would include increased tax revenue, which could be reinvested in rural service provision and job creation.

As with almost any tax, removal of the exemption would be expected to lower the value of the affected land, with implications for market sales, and for inheritance and transfer tax revenue.

Q. 26. What do you think the disadvantages would be?

Please refer to our response to Q. 25.

Proposal 8 - Common Good

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

No response

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

No response

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

Yes No

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

No response

Q. 31. Do you have any other comments?

No response

Proposal 9 - Agricultural Holdings

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

Yes No

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

We note that the Agricultural Holdings Legislation Review Group is yet to publish its final report and complete recommendations. Given the complexity of the Agricultural Holdings legislation, it is not appropriate to include recommendations in this review of the Land Reform Bill, especially if the added complexity would delay progress of this legislative reform. We view these two legislative reforms as distinct; however, we recommend that policies are designed carefully so as to be complementary and not contradictory.

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

Please refer to our response to Q 33.

Proposal 10 – Wild Deer

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

Yes No

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

Question 35:

We observe that to answer ‘yes’, there is a presumption is that even a small failing to deliver the public interest should result in further regulation, and to answer ‘no’, there is a presumption that, even if there is a failure, further regulation will not help.

To provide an informed response to Q35 we suggest that:

- a) there is a need for a baseline for assessing how well the public interest is being protected,
- b) systems need to be in place to ensure the public interest is being protected,
- c) consideration is required as to how progress is being monitored?
- d) there is a need for an assessment of whether the current regulatory backstops are sufficient and useable in specific cases where the public interest is threatened.

Question 36:

Public agencies have not articulated precisely what management is in the public interest and when ‘good’ management is achieved; as such the ‘goal posts’ for deer managers are not clearly visible and could change, leading to deer managers to be judged to have ‘failed’. Until recently, deer managers were not well prepared in generating an evidence base for what the sector is doing to protect the public interest.

The governance framework in Scotland currently confers significant rights on landowners, but there needs to be a shift towards wider acceptance of the obligations associated with responsible land and environmental management. Whilst many owners believe that they are following best practice guidance, often they are not aware of the public interest in their land (e.g. how land provides cultural and regulating services). Therefore, there remains a key task to understand and communicate actions that are in the public interest and to consider how to achieve this alongside private owner objectives.

Simultaneously, there is a need for the private land management sector to accept that the public interest exists and to demonstrate how it is managing for this in a sustainable way. Demonstration requires data, which is starting to be generated. Examples include the efforts of the Association of Deer Management Groups (ADMG) to develop the ‘DMG Benchmark’ system, as

well as a self-assessment system for DMGs to measure their progress against the benchmark. These systems have been developed alongside SNH, who are working on a data management system for use by DMGs. The DMGs are carrying out their own monitoring of habitat condition (Atholl Estates, and Fealar Estate, 2010) and, for example, recently completed a re-assessment of grazing and trampling impacts and comparison with baseline measurements, 2004-2014 by East Loch Ericht DMG.

A missing element is a process for conflict resolution, where differences arise. At one extreme, a designated site (protected area) means that there are nature (e.g. habitat, abiotic or landscape) considerations that take precedence over other objectives. At the other extreme, there may be little public interest on a land holding, and intensive production can occur without any compromise to public interest. Between these extremes there will be examples where opinions on options will differ. The extent to which private objectives should be compromised for public interest and *vice versa* needs to be decided on a case-by-case basis, supported by evidence and adaptive management, which should include all relevant stakeholders (on local and national scales). Landowners should demonstrate that there is an appropriate process to deliver in the public interest and government agencies need to support this process.

There are some potential but perhaps unintended consequences of increased bureaucracy associated with demonstrating management that is in the public interest. Potentially, many private land owners could stop managing land for deer because of the associated bureaucracy. Whilst this may open the land to other activities, it may also lead to completely different enterprises that are not subject to management for the public interest to the same extent as the deer sector. For example, if an owner switches from deer to grouse moor management, this may include the removal or fencing out of deer, reductions in mountain hares, more intensive predator control, and muirburn. Whilst there are some biodiversity benefits from grouse moor management, there are also potential losses at the landscape scale from what would be increasingly diverse deer management objectives between neighbouring holdings.

The statutory agencies have considerable regulatory powers to enforce management action (specifically, in the Deer (Scotland) Act 1996, notably, Section 7. Voluntary control agreements; Section 8. Statutory control schemes; and Section 10: Emergency measures to prevent damage to the natural heritage). The existing legislative framework requires evidence-based application and enforcement, if there are deemed to be threats to the wider public interest. This would be a significant contribution to achieving objectives, rather than creating any new, and potentially unnecessary, additional powers.

Finally, in relation to the voluntary principle, a wider and more comprehensive attendance of landowners at, for instance, Deer Management Group meetings could be encouraged. We recommend that more efforts are made to encourage members of the wider community to attend DMG meetings, which is not often the case, to enable aspirations to be met of wider public engagement in deer management.

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

Please refer to the response to Q. 36.

Proposal 11 - Public Access: clarifying core paths planning process

Q. 38. At present, section 18 of the Land Reform (Scotland) 2003 Act is silent on the issue of resolving objections to a core path plan consultation. Do you agree that access authorities should be required, in the interests of transparency, to conduct a further limited consultation about proposed changes arising from objections?

Yes No

Q. 39. Do you agree that section 20 of the 2003 Act should be clarified so that Ministerial direction is not required when an access authority initiates a core path plan review?

Yes No

Q. 40. Do you think that the process for a minor amendment to core path plan (as set out in section 20 of the 2003 Act) should be simplified to make it less onerous than that for a full review of a core path plan?

Yes No

Assessing impact

Equality Impact Assessment

Q. 41. Please tell us about any potential impacts, either positive or negative, you feel the draft Land Rights and Responsibilities Policy or any of the proposals for the Bill may have on particular groups of people, with reference to the “protected characteristics” listed above. Please be as specific as possible.

There should be no negative impacts on those with mobility issues whilst revising proposals for public access.

Q. 42. What differences might there be in the impact of the Bill on individuals and communities with different levels of advantage or deprivation? How can we make sure that all individuals and communities can access the benefits of these proposals?

Communities and individuals differ in their capacity to influence decisions being made about the surrounding landscape. Amongst others, levels of education, the fragility of employment and attitudes to authority will strongly influence whether people actually benefit from new opportunities to engage with land management proposed in this consultation.

At several places in the Consultation there is emphasis of the need for community engagement, particularly Proposal 6 in which charity landowners will be required to engage with the local community before taking (apparently significant) management decisions. As researchers, we appreciate that communities differ in their capacity to engage in such processes. Disadvantaged communities may not be able to afford the time to take part in consultation processes, and consequently would struggle with the resource costs associated with co-management arrangements. There is a tendency for participants in such consultation processes to be retired or otherwise not requiring employment, and well educated. Whilst we welcome efforts to give communities a voice in land management, we would like to see revisions of the proposals to embed the principles of good practice in community engagement, seeking to ensure inclusivity and equality.

However, certain parts of the Consultation appear to bypass community engagement, particularly Proposal 4 which suggests that public bodies should be able to direct landowners to take action for sustainable development. We have concerns that this proposal will create resentment and distrust in cases where the national or local government is seen to exercise power over landowners without consulting with local residents. Again, the inclusion of definitions of ‘sustainable development’, ‘community’ and the ‘public interest’ will aid the quality of discussion.

Business and Regulatory Impact Assessment

Q. 43. Please tell us about any potential costs or savings that may occur as a result of the proposals for the Bill, and any increase or reduction in the burden of regulation for any sector. Please be as specific as possible.

There may be costs associated with information sourcing and provision associated with Proposals 2 and 3.

Potential costs and increasing regulatory burden are anticipated for land holdings with sporting enterprises, with regard to proposals for the reintroduction of sporting rates (Proposal 7) and further deer management regulatory measures (Proposal 10).

Private landowners, charitable and public land managers will have costs and potential increased regulatory burden as a result of proposals to undertake community engagement and management in the public interest (Proposal 5 and 6), without barriers to sustainable development (Proposal 4).

Privacy Impact Assessment

Q. 44. Please tell us about any potential impacts upon the privacy of individuals that may arise as a result of any of the proposals contained in this consultation. Please be as specific as possible.

We anticipate potential impacts upon the privacy of individuals arising from proposals which require the provision of information regarding ownership and other attributes of land holdings (Proposals 2 and 3).

Strategic Environmental Assessment

Q. 45. Please tell us about any potential impacts, either positive or negative, you feel any of the proposals contained in this consultation may have on the environment. Please be as specific as possible.

With regard to Strategic Environmental Assessment, we anticipate the following potential impacts as a result of the proposals in this consultation:

- Overall, the possibility of diversified landownership raises the prospect of an increase in diversity of land uses and landscape mosaics with a potential associated increase in biodiversity.
- The impact of a sustainable development test for land governance (Proposal 4) would strongly depend on whether a 'strong' or 'weak' definition of sustainable development (Costanza and Daly, 1992) is adopted. If 'strong sustainability' is adopted, then we could assume that the environmental impact of actions carried out under this legislation would be positive and would result in increases in natural capital. If 'weak sustainability' is adopted, then we would expect a

trade-off to occur where negative environmental impacts are balanced with social or economic benefits such as affordable housing, renewable energy developments or increased access to nature. We would like to emphasise that only strong sustainability can guarantee the long-term development of living natural capital, the foundation of all future wealth (Costanza and Daly, 1992; Serafy and Goodland, 2008).

- Proposals 7 and 10 have more specific implications on deer and other game and vermin species; thus, we consider the environmental implications of these proposals in our responses. In particular, we note the negative effects of an unmanaged deer population.
- Proposal 6 will have environmental implications in the case of conservation charities. In the cases where community priorities conflict with conservation goals, it may not always be possible to carry out best practice/ideal environmental management. On the other hand, greater engagement of local people in managing natural resources can result in greater buy-in and better conservation results. The overall environmental impact of this proposal would need to be determined in future research.
- Similarly, Proposal 5 grants more powers to public sector land managers such as Forestry Commission Scotland and risks encouraging 'weakly sustainable' development. However, this does not necessarily have to be the case, and future research can assess whether the impacts of these proposals are/have been environmentally harmful, benign or beneficial.

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