



# FACULTY OF ADVOCATES

## RESPONSE

by the Faculty of Advocates

to

**A Consultation on the Future of Land Reform in Scotland**

by the Scottish Government

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The Faculty of Advocates is Scotland's referral bar. It has served the people of Scotland since the sixteenth century. The Faculty comprises advocates with a wide range of experience and expertise in many different areas of law. The Faculty is pleased to respond to the Scottish Government's consultation on the Future of Land Reform in Scotland. We answer the questions put as follows:

### **Draft Land Rights and Responsibilities Policy**

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

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

### *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?

We consider that questions 1 to 3 are questions on policy on which it would not be

appropriate for the Faculty to comment.

### **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?

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

We consider that questions 4 and 5 are questions of policy on which it would not be appropriate for the Faculty to comment.

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

In general terms the Faculty also considers this to be a question of policy. However, the Faculty considers that careful consideration ought to be given to the inter-relation between the powers of any Scottish Land Reform Commission and the responsibilities of the Scottish Law Commission. The Scottish Law Commission has an excellent track record in promoting reform of Scots property law. Of those Acts of the Scottish Parliament listed in paragraph 17, four of them stem from reports and draft legislation produced by the Scottish Law Commission. The Faculty considers that the Scottish Law Commission should continue to have primary responsibility for promoting law reform in relation to property law.

#### *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?

No. The Faculty does not consider that restricting the type of legal entities that can take ownership or a long lease over land in Scotland would help improve the transparency and

accountability of land ownership in Scotland. The proposal appears to be an entirely general one, relating to any land or buildings in Scotland.

The Faculty considers that if the aim is to improve accountability and transparency, one approach which the Government might consider would be to require any owner of land in Scotland to have an address in Scotland where he, she or it could be contacted and served with documents. At present, in certain cases it can be difficult to serve a landowner with court papers if that person has no residence or place of business in the UK. It might involve notices or court papers being translated, and the process may involve additional expense and delay. The landowner should be free to nominate the address of their choice, and it could, for example, be a land agent's, accountant's or solicitor's office. This could have the benefit of general applicability to all landowners: individuals, companies and other non-natural persons. Whether such a requirement, applied to all land and buildings in Scotland, would be proportionate, is for others to assess.

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?

No.

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

As noted in paragraph 48 of the Consultation Document, it is straightforward to set up a company registered in the EU, including in the UK. The measure would therefore be relatively easy to circumvent. An entity registered in a country outwith the EU could simply set up a new subsidiary company in the EU to purchase a plot of land. Anyone seeking to establish the beneficial ownership of that company would still be unable to trace the individuals lying behind the corporate entity which owned the land. In any event, within the UK and EU more generally, it is currently possible to have complicated ownership structures which makes tracing the beneficial owner difficult. For that reason, we do not consider that the proposal would further the objective in any meaningful way. The proposal is simply likely to add an

administrative cost to those businesses seeking to trade in the UK from outwith the EU.

The Faculty notes that one suggested advantage of the proposal is that if companies had to be set up in the EU, the directors would be legally accountable within the EU for the company's actions. It is not clear to us what benefits that would have for land reform. In the UK, a director's duty is to promote the interests of the company for the benefit of the members of the company as a whole (section 172(1) of the Companies Act 2006). Whilst this includes, amongst other things, a requirement to have regard to the impact of the company's operations on the community and the environment, the duty is one which is owed to the company, not to the community more generally. What a director must do to satisfy the requirement is unclear. Nicholas Grier of Napier University Law School described these problems in more detail in his article in the 2014 edition of *Juridical Review: Enlightened shareholder value: did directors deliver?* There are no equivalent duties for other legal entities, such as partnerships. In any event, it is possible to have complicated corporate structures within the EU, including the UK, at present which makes it difficult to trace the beneficial owner.

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

We have nothing to add to our previous answers.

*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?

The Faculty acknowledges that the ready availability of material information which is reliable and up-to-date is, in principle, likely to be beneficial to decision making.

The Faculty considers that the Land Register of Scotland is the most reliable and appropriate source of information on the ownership of land which is registered. The Faculty, therefore, considers that present proposals to extend the process of registration towards the end of having as nearly as possible all land in Scotland registered should be given priority.

The Faculty understands from the Consultation paper that the proposal is to collate in one repository only such data as is already held by public authorities and agencies. Insofar as the data is already publicly available, that may not be objectionable. However if the intention is to collate in a single database information which is not publicly available and which has been provided to or collected by particular agencies for particular purposes, there may be data protection issues which will require to be addressed.

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

No.

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?

Information which is inaccurate or out-of-date may be unreliable or even misleading, and its value is likely to be greatly diminished. The Faculty has concerns that the creation and maintenance of a central repository of information on land values which is both accurate and up-to-date may be difficult, and therefore expensive, having regard to any benefits offered.

*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?

The creation of such a power may have implications in terms of Article 1 of Protocol 1 of the European Convention on Human Rights and, possibly, of other Articles of the Convention. In the absence of a clear articulation of what is meant by “sustainable development” and a clear statement of standards to be achieved, the power could be exercised arbitrarily. The proposal does not appear to envisage procedural safeguards. We note that the Report of the Land

Reform Review Group makes reference to the utilization of brown sites and associated registers. There is a danger of incompatibility with the Convention if the powers were not default powers in the style used, for example, in the Deer (Scotland) Act 1996.

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

The benefits can only properly be identified when sustainable development has been defined. Any power of the sort suggested would require to be associated with robust procedural protections against arbitrary use, and the overall package would require to be assessed for its compliance with fundamental rights.

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

The alternatives that are currently available include compulsory purchase and repair orders. Financial restraints can affect the exercise of compulsory purchase by local authorities and the proposed compulsory sale orders (CSO) do not encounter such difficulties. However, as the local authority may not become the owner of the land, the essential problem may merely be transferred rather than resolved. Consideration might be given to incentives being offered rather than penalties for non-compliance.

*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?

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

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

We consider that questions 17 to 19 are questions of policy on which it would not be appropriate for the Faculty to comment.

*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?

No.

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

This proposal would impose an inappropriate and undue burden on charity trustees. Charities come in many different sizes. Some are very small indeed and many charity trustees are not paid for the work they do. The time and resources spent engaging with the local community would be time and resources which could otherwise be spent pursuing the charitable purposes of the charity. It is not clear whether this proposal relates to trustees when investing in properties as well as managing them for the purposes of their charitable purposes, but it appears from the proposal that it would apply to both.

At present, the trustees' role is to act in the interests of the charity. It is not clear what requiring the charity to engage with the community would require of trustees, but it ought not to interfere with their primary function. This tension is noted in paragraph 74. What would happen if the community was against a proposal that was in the charity's interest? To the extent that what is proposed is to require something similar to what is required of company directors in terms of section 172(1) of the Companies Act 2006 to have regard to the impact of the company's operations on the community and environment, the Faculty refers to its answer above to questions 7 – 10. In that answer, we note that commentators have been critical of that requirement, in particular because it is vague, difficult to enforce and difficult to reconcile with a director's primary duty to the members of the company itself. It is not clear what difference the requirement has made. Similar criticisms may be made of any such duty on charitable trustees.

We are also concerned by the extent of the obligation that is proposed. The Companies Act

2006 requires directors to 'have regard' to certain factors, but we note that what would be required of charity trustees is community engagement. That is potentially an onerous requirement, particularly for small charities. The proposal also appears to require this engagement for any decisions taken in the management of the land. Decisions could be taken in the management of land on a daily basis. Whilst the extent of the engagement required could no doubt be proportionate to the significance of the decision taken, this still appears to be an onerous requirement. It is not at all clear why, alone of landowners, charities should have this particular burden imposed upon them.

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

This question is a further illustration of the difficulties inherent in the proposal.

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

If it were to be considered – notwithstanding the observations above - appropriate to impose these additional duties on trustees, OSCR might be given the power to investigate and, where appropriate, impose sanctions on charity trustees who fail to fulfil their obligations. Particularly serious or persistent breaches of duty could result in removal of the charity from the Scottish Charity Register.

*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?

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

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

Subject to our response to proposal 10, we consider that the issue of whether the current rate exemptions for shootings and deer forests should be ended is one of policy on which it would not be appropriate for the Faculty to comment.



*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?

The Faculty considers that the exercise by the Court of control over doubtful alienations of common good property is a powerful safeguard for the benefited community. The Faculty believes that protection against the erosion of public rights should not depend on the alertness of members of the public, or even of community organisations, to appreciate what is happening before it is achieved, nor on their ability or willingness to initiate court proceedings. The Faculty considers that there is a strong argument for extending the control of the Court to all alienations or appropriations to another use, where the power of alienation or appropriation has not been given clearly and expressly to the authority administering the fund.

If, however, it is considered appropriate to remove this control by the Court, the Faculty considers that the need for court approval of disposals or changes of use of common good property should not be removed unless and until a clear regime regulating such disposals or changes of use is in place. The Faculty acknowledges that the proposals in Part 6 of the Community Empowerment (Scotland) Bill go some way towards establishing such a regime. The Faculty does, however, note with some concern that the effect of these proposals will be to put the onus of bringing any contested disposal or change of use before the court on the person or body objecting to it, rather than on the local authority.

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

If a regime is to be adopted whereby the onus of bringing a contested decision under review is left with the objecting party, the Faculty considers that it may be appropriate to make express provision for this to be done by a summary procedure, and for the availability of a protective expenses order.

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

The Faculty considers that, in the interests of clarity, a statutory definition of common good in the context of modern local authorities should be included in any proposed statutory regime regulating the use and management of common good property, including disposal or change of use. The Faculty notes that no such definition is included in Part 6 of the Community Empowerment (Scotland) Bill. The Faculty would not favour any statutory definition of common good which could be construed as excluding any property which would currently form part of the common good of a community.

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

Policy considerations may arise as to where the boundary of common good property should be drawn. At a general level, common good might cover all property, whether heritable or moveable, and however acquired, held by a local authority for the common benefit and welfare of the inhabitants of its administrative area, or any defined part thereof, but excluding property held for the purpose of fulfilling the authority's statutory functions, or held on a special trust. However, it might be considered that property acquired or held for the purpose of a statutory function, such as providing leisure and recreational facilities for the inhabitants of the area, should be expressly included in the common good. Many public parks are held by local authorities on titles which expressly dedicate them to use for the leisure and recreation of the inhabitants of a particular locality.

The Faculty considers that it may be desirable to make provision, although not necessarily in the definition of common good, regulating the joint holding and administering by more than one authority of property held or acquired for the benefit of the inhabitants of a locality which falls within more than one local government area.

Q. 31. Do you have any other comments?

The Faculty considers that the complexities and anomalies in the present law of common good extend beyond the remit of the present consultation. The Faculty considers that a

comprehensive review of the law of common good would be desirable, and that this would most appropriately be undertaken by the Scottish Law Commission.

*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?

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

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

The Final Report of the Review Group, as published on 27 January 2015, consists of 49 separate recommendations. At paragraph 90 of the Final Report, the Review Group's recommendations are said to "comprise an integrated package rather than a pick and mix selection", which "collectively seek to address the key issues that need to be resolved", and at paragraph 290, having noted that the 2003 Act substantially amended the 1991 Act, and that subsequently there have further amendments to both Acts, the comment is made that in consequence, it is "difficult for landlords and tenants to get access to an accurate and up to date version of both Acts. Any amending Act following on this Review will make further difficulties in this respect. Once any amending legislation is passed, the Acts should be consolidated into one Agricultural Holdings (Scotland) Act."

We agree with the Review Group as to the desirability of consolidation of the Agricultural Holdings legislation, and standing the Review Group's characterisation of its recommendations as "an integrated package rather than a pick and mix selection", we are sceptical as to the benefits of taking forward some only of the recommendations of the Review Group within the proposed Land Reform Bill.

Whilst we acknowledge that the proposed Land Reform Bill conveniently might be used as a vehicle for making uncontroversial minor amendments to the existing 1991 and 2003 Acts

where those amendments address well recognised ambiguities or inconsistencies in the existing legislation, into which category may fall some of the proposed changes identified in Chapter 12 of and in Appendices F and G to the Final Report, we consider that if the recommendations which the Scottish Parliament is minded to implement go further than that, then in what is a notoriously complex area of law, it would be preferable for significant new legislative provisions to be set out in a dedicated Agricultural Holdings bill, rather than as an add-on to a bill dealing with wider issues of Land Reform.

The Final Report of the Review Group states that since 1982 there has been a 42% decrease in the area of let agricultural land in Scotland. Previous reforms intended to revitalise the tenanted sector in Scotland have not succeeded in reversing that decline, and difficulties identified with the contents and drafting of the 2003 Act generated much litigation, to the considerable cost of both landowners and agricultural tenants. We are aware that many within the farming community consider reform of the Agricultural Holdings legislation to be a matter of great urgency if the tenanted sector in Scotland is to be successfully revived, but it is vital that when any new legislation comes into force, it proves to be workable in practice.

We do not consider that effecting significant reforms of the Agricultural Holdings legislation piecemeal is in the long term interests of the Scottish agricultural community. We are of the view that a stand-alone Agricultural Holdings Bill should be accorded an enhanced Parliamentary scrutiny with the consequence that the farming industry and its advisers are better placed to absorb the ensuing changes.

#### *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?

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

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

This proposal is to increase the powers of SNH to manage deer contained in the Deer (Scotland) Act 1996. These powers are contained in control agreements under section 7 backed by control orders where section 7 fails.

It seems to us that there are in fact two proposals:

The first proceeds on the basis that the voluntary system of management currently in place (section 7) may fail. The consultation document does not indicate that the mandatory part of the scheme (section 8) has been invoked, still less that it has been found wanting or how it is anticipated it may be found wanting. In the absence of such indications, we have to observe that the case for a change in the law has not been made out.

It occurs to us that this issue may be raised in anticipation of a change in deer management arrangements consequent on the ending of the current rate exemptions for shootings and deer forests canvassed as proposal 7. If there were a reasonable concern of that kind, it would seem to be sensible to put in place arrangements to meet that eventuality.

No doubt the cost of putting such arrangements in place and the potential cost of implementing such arrangements would be taken into account in considering whether to implement proposal 7.

The second proposal seems to be an extension to the involvement of the state in deer management rather than an increase only in the mandatory element of such management. The only content of the proposed extension to the statutory powers currently enjoyed by SNH is, at paragraph 93, to require that landowners have in place detailed sustainable deer management plans that protect the public interest. As sections 7 and 8 have the same substantive content as each other, we assume that the proposal proceeds on the basis that this does not fall within either and that both are to be changed. We have no comment to make on the policy involved in this proposal although it may be that, insofar as it increases the involvement of the state in land ownership, the proposal may fall within the scope of article P1-1 ECHR and the details of any proposed regime would, accordingly require to be assessed for compatibility with fundamental rights.

*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?

There should be no further duty to consult except with new consultees arising from the revised plan. Only persons who were not previously consulted but who would have been consulted had the original proposal been in the form of the revised one should be consulted at this stage.

What form any consultation should take requires to be specified.

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.

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.

**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.

We do not foresee an impact of the kind anticipated in this question.

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?

We have no useful contribution to make in this regard.

*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.

We have nothing to add to the answers we have already given.

*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 do not foresee a significant impact of the kind anticipated in this question.

*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.

We have nothing to add to the answers we have already given.