



FACULTY OF ADVOCATES

RESPONSE FROM

THE FACULTY OF ADVOCATES

IN RESPECT OF THE CONSULTATION: “LAND REFORM IN A NET ZERO SCOTLAND”

Foreword: The Faculty of Advocates (“**the Faculty**”) notes the Scottish Government’s statement of intent in Part 2 of the consultation paper, which sets out that “*The next Land Reform Bill will build on the Land Reform Acts of 2003 and 2016 to help us reach the goals we have set in a number of policy areas.*”

On the information available it is not clear what the policy drivers are for various proposals set out in the consultation paper, and whether or to what extent the proposals will assist in achieving net zero. Furthermore, there is currently insufficient detail to enable us to comment fully on the relevant proposals. We also note that a number of proposals will have implications for existing legislation, including in relation to land ownership and planning.

It is not for the Faculty to take a position on matters of policy. However, the Faculty is pleased to submit for consideration our response to this consultation, which focuses on the legal consequences and challenges inherent in any programme of land reform.

Our response deals with the set questions where these are appropriate. Where a question relates to a matter of policy that raises no legal issue of which we are aware, we answer “**Don’t know**” in keeping with the requested language of the consultation paper. We do however make comment in the Reasons section of the response where we consider that some comment on practical and legal aspects of the proposals is relevant.

PART FOUR: Criteria for large-scale landholdings

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

a) A fixed threshold of 3,000 hectares

Don’t know

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 **Don't know**

c) Land that accounts for more than a specified minimum proportion of a permanently inhabited island **Don't know**

Reasons: These are matters of policy. We foresee that it could be possible for a beneficial owner to avoid falling under the definition of a land-scale landholding by purchasing land in smaller parcels, with different legal persons registered as owner of each parcel under 3,000 hectares.

Further, we note that establishing a fixed threshold of 3,000 hectares as part of the definition of a Large Scale Landholding (“**LSL**”) deals with the extent, rather than the concentration of land ownership. It therefore seems unlikely to address the issue of concentration which we understand to be the key issue identified by the Scottish Land Commission.

We consider that the LSL scheme is likely to deliver a degree of transparency, however until the detail is known we cannot say how effective this would be.

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? **Don't know**

Reasons: We consider that there is scope for a wide variation in efficacy, depending on what precisely is proposed. We are unclear which classes of entity would be included in the definition of “*family farm*”. For example, would farming land that is owned by a limited company, the directors of which are all related by blood or marriage, be a “*family farm*”?

In addition, we are unclear why a “*family farm*” is to be treated differently from other types of farms or partnerships, or why, for reasons of consistency, this proposal would not be extended to, for example, family forests, or family estates.

Q3. Do you think that the proposals considered in this consultation should be applied to the urban context? **No**

Reasons: We do not understand how these proposals could be applied in an urban context, given that considerations such as scale, content etc. would be different in that context.

PART FIVE: 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 Responsibility Statement and its associated protocols. Do you agree or disagree with this proposal? **Don't know**

Reasons: This is a matter of policy. We comment in respect of the questions which follow in relation to the legal aspects of the proposal.

Q5. If there was a legal duty on large-scale landowners to comply with the Land Rights and Responsibility Statement 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 or disagree with the proposal above? **Don't know**

Reasons: We do not see a difficulty *per se* with establishing a formal procedure which would allow complaints of this nature to be adjudicated independently. However, it would be necessary for these proposals to be set out in more detail before we could comment in full. At this early stage, we note that the forum of adjudication is not set out in the consultation paper. Much important detail is therefore missing. Careful consideration is required in respect of a number of matters. For example, would complaints be heard by a tribunal which is already established, or by a new body? In this regard we note that the unified and expanded Land Court (to be formed by the merger of the existing Scottish Land Court and the Lands Tribunal for Scotland) will already have considerable expertise in dealing with land-related matters. If, however, a new body is to be established, has consideration been given to matters including the recruitment of suitably qualified members; the expenses regime, particularly where a complaint has been raised which has found to be without merit; the rights of audience before such a tribunal; the powers that such a tribunal would have; the availability of Legal Aid funding; and how this tribunal would interact with the existing judicial structure in respect of appeals, case law, and administration?

b) Do you agree or disagree that only constituted organisations that have a connection to the local area or the natural environment should be able to report breaches of the Land Rights and Responsibility Statement? **Don't know**

Reasons: We note the importance of making any "*connection test*" clear and certain, for example, by reference to the domicile/registration address of an organisation with a

be difficult to overcome the perception of possible bias. The Scottish Government might also be the subject of a complaint in relation to land for which it is responsible.

- A public body (such as the Scottish Land Commission) **Don't know**

Reasons: We refer to our answer to **5(a)** above. We do not yet know what such a body would be tasked with adjudicating, nor its powers. On the supposition that the adjudication will determine civil rights or obligations, any such body would require to be compliant with the right to a fair trial under Article 6 of the European Convention on Human Rights. At this early stage we are unable to say whether such a body would require to be composed, at least partly, of legally trained members in order to properly fulfil its functions as an independent adjudicator. We cannot therefore indicate what sort of public body would be appropriate until we have been able to understand fully the proposed type of adjudication.

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

- Recommendation for a mediation process **Don't Know**
- Recommendation on how the landowner or governing body could comply with the Codes of Practice/protocols **Don't know**
- A direction to the landowner or governing body to implement changes to operational and/or management practices **Don't know**

Reasons: We note that there is no potential outcome listed which would accord with a finding that the complaint was without merit. We proceed on the assumption that this question deals only with outcomes arising from a finding that the complaint was upheld.

In respect of the recommendation for a mediation process, we do not see how mediation would be appropriate in the context of a complaint about, and an investigation of, an alleged breach of a statutory duty.

In relation to both the recommendation of mediation and the recommendation as to compliance with the Codes of Practice/protocols, we are unable to comment on the suitability of such recommendations without understanding what the legal consequences for failing to follow them would be. This has a direct bearing on the effectiveness of such a process.

We note the delicate balance here between the public interest and legally protected rights of land ownership inherent in giving a direction to a landowner to implement changes in respect of how they manage their own land. We refer to our comments in response to **5(a)** relating to

the constitution and legal training of any independent adjudicator who may issue such an order. Issuing directions, which would presumably have legal consequences in the event that they are not complied with, is a sensitive matter. Judges, sheriffs, and legally-qualified tribunal members in Scotland have many years of litigation experience and are provided with dedicated training to support their decision making in respect of specific orders of a kind similar to this. The consequences for failing to obtemper such an order of a court or tribunal are serious. We note this area as a further reason to give careful consideration to *inter alia* the membership and training of any independent adjudication tribunal in this area. We note also that establishing a new tribunal is a significant undertaking which would inevitably require the advice of the senior judiciary in Scotland.

e) Should the enforcement powers for a breach be:

Financial penalties **Don't know**

'Cross-compliance' penalties **Don't know**

Reasons: We refer to our answer to (a) and (d) above and urge that careful consideration be given to proposals around any new independent adjudicator, its membership, powers, and rules.

Q6. Do you think the proposal to make the Land Rights and Responsibility Statement and its associated protocols a legal duty for large-scale landowners would benefit the local community? **Don't know**

Reasons: This is a matter of policy, but as a generality the benefit or otherwise to the local community would be dependent on the content of such a statement, rather than flowing purely from its existence. We are also not sure how the "local community" might be identified or defined. In many areas this may not be a problem, but the less sparsely populated an area is, the more difficult it may be to determine.

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

No

PART SIX: 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? **Don't know**

Reasons: We would require to understand the consequences for breaching this duty, and what the proposals are for enforcement. There is also a likelihood that such Management Plans will interact with the planning system and permitted use in various ways, and we urge that careful consideration be given to how conflicting uses under the land management and planning systems can be avoided.

Further, it is not clear how the responsibilities surrounding Management Plans will interact with parties who hold an interest in the land, for example agricultural tenants, crofting tenants or sporting lease tenants. Where those parties have an exclusive right to use the land, a plan prepared by the owner of the land would be of no effect.

Related to this, we wonder what practical benefit might result from the exercise. We therefore anticipate that this is only the first step in a longer term goal of being more directive as to the use to which land is put, which would be fraught with difficulty.

Q9. How frequently do you think Management Plans should be published? **Don't know**

Reasons: We consider that this is likely to vary for different kinds of land use, and that a one-size-fits all approach may be unduly burdensome on some classes of land use.

Q10. Should Management Plans include information on:

Don't know in respect of all topics

Reasons: This is a matter of policy.

Q11. Do you think the responsibility for enforcing compulsory land management plans should sit with:

The Scottish Government: **Don't know**

A public body (such as the Scottish Land Commission): **Don't know**

Reasons: We would require to understand the consequences of breach, and what is meant by enforcement. It may be that a legally trained independent tribunal would require to

consider the enforcement and consequences of breach. We also note that there is potential for Management Plans to conflict with the planning system. For example, would a Management Plan preclude an owner from applying for planning permission for development of land that conflicted with the proposed management of that land as set out in the relevant Management Plan, and what would the status be of development plans that conflicted with existing Management Plans?

Q12. Do you think the proposal to make Management Plans a legal duty for large-scale landowners would benefit the local community? **Don't know**

Reasons: This would depend on their individual content, rather than their existence *per se*. We would anticipate as a generality that some plans will be of greater value than others.

Q13. Do you have any other comments on the proposal to make Management Plans a legal duty for large-scale landowners? **No**

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

(i) Provision of a Public Interest Test

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? **Don't know**

Reasons: We would require to understand further detail of this before providing a definitive answer.

We note that the consultation paper does not contain any detail on what types of dealing would be within scope of the public interest test. Therefore the “*trigger*” of such a test being applied is not certain. We consider that any such test requires to be defined so that it can be applied consistently across different cases and situations, and that landowners are aware in advance of what circumstances might give rise to the statutory provisions relying on that definition being invoked. We further note that the 2021 Scottish Land Commission Discussion Paper recommended that it cover sales (private and public), changes in trustees, executry transfers and creation of options. This is a very wide approach, which would likely have a substantial impact on family estates meeting the criteria for a LSL. We foresee that events outside control of the family (such as unexpected death or a change in trustee) could potentially result in the break up of land in family ownership.

We caution that any such mechanism would require to be compliant with Article 1, Protocol 1 of the European Convention on Human Rights. Where a wide range of events, including death in the family, could lead to the break up of a landholding, there would be reasonable doubt that such a proposal is compliant. We also note that it is not clear why there should be a public interest test in relation to the ownership of land, as opposed to the use of land.

Q15. What do you think would be the advantages and/or disadvantages of applying a public interest test to transactions of large-scale landholdings? **Don't Know**

Reasons: This is a matter of policy.

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

The seller only **Don't know**

The buyer only **Don't know**

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

Reasons: We refer to our comments in answer to **Q14**. The matter of “*public interest*” is inherently subjective, and we would be concerned if the detailed requirements of such a test were not explicitly stated in any proposed legislation. Again, we note the legal difficulty in making such determinations and encourage that significant consideration is given to the training, recruitment and qualifications of any decision-maker under this test.

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? **Don't know**

Reasons: We are concerned that solicitors engaged for the buyer or seller would require to be on notice as to when such a test was engaged and to be in a position to advise on whether or not the test was met. It is not clear to us that this would be so.

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? **Don't know**

Reasons: This is a matter of policy. However, we emphasise our comments above in respect of the importance that any such measure is compliant with Article 1, Protocol 1 to the European Convention on Human Rights.

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 **Don't know**

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 **Don't know**

Reasons: These are matters of policy, but we note the potential difficulty in defining a “constituted community body”. We further note that not all community bodies are likely to be prepared for land ownership on any scale. Issues to consider would be the management of funds realised from managing or dealing with the land, as well as the risk to the body (and indeed its members) from any litigation arising from use of, or access taken over, the land in their ownership.

It is important that any landowner who requires to offer land for sale to any specified group(s) should only be required to sell that land for value. This may require significant funding to be made available to community groups. We also note the difficulty in assessing land values. The new Land Court will already have considerable expertise in dealing with compensation. If, however, jurisdiction is not to be given to the Land Court, then we would again urge that significant consideration be given to the training, recruitment and qualifications of any tribunal that will adjudicate fair value. We refer to our response to **Q5(a)** and **(d)** above.

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? **Don't know**

Reasons: This is a matter of policy.

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

Diversify ownership **Don't know**

Use their Management Plan to engage with community bodies over opportunities to lease or acquire land **Don't know**

What time period do you think this should cover? **Don't know**

Reasons: These are matters of policy.

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

The Scottish Government **No**

A public body (such as the Scottish Land Commission) **No**

Reasons: Such a determination will – whatever criteria are set – require a determination of a judicial character. We do not consider that the above bodies are likely to be equipped to provide this. A practical consequence of assigning such a determination to a non-judicial body would be to increase the likelihood of frequent judicial review petitions being raised by disappointed parties on the basis of an error of law. There is also a risk that allocating decision making to a body other than an independent, qualified tribunal might be in breach of Article 6 of, and Article 1, Protocol 1 to, the European Convention on Human Rights.

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?

Reasons: This is a matter of policy.

Q24. Do you have any other comments on the proposal that a public interest test should be applied to transactions of large-scale landholdings? **No**

(ii) **Requirement to notify an intention 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? **Don't know**

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 landowner whether they are interested in purchasing the land?

Agree

Reasons: Part **(a)** of this question is a matter of policy. We agree that, in the event that part **(a)** is implemented, then a reasonable period of time should be allowed for expressions of interest. This would provide legal certainty and allow transactions to proceed as normal in the event of no interest.

c) If the community body or bodies notifies the landowner that they wish to purchase the land during the notice period, then the community body or bodies should have 6 months to negotiate the terms of the purchase and secure funding. Do you agree or disagree with this proposal? **Don't Know**

Reasons: This is a matter of policy. However, we consider it likely that some community groups could express an interest in purchasing land, but that it may be apparent from the outset that the funding is very unlikely to be in place. A period of 6 months in these circumstances would be onerous on the seller, and so we suggest a mechanism whereby unrealistic expressions of interest may be declined.

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? **No**

PART EIGHT: New conditions on those in receipt of public funding for land based activity

Q27. Do you agree or disagree with these requirements?

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

- All land, regardless of size, must be registered in the Land Register of Scotland.

Disagree

Reasons: It is not clear whether this proposal is intended to apply only to landowners, or also to commercial tenants. If it is intended to apply to both, then we consider that this would

be unworkable in the short term. Agricultural subsidies represent a large proportion of public funding. Much agricultural land is tenanted. We consider that it would result in injustice for an agricultural tenant to be denied public funding because the owner of the land has not applied for voluntary registration. We also note that the current delays in land registration, and the complexities associated with first registration, need to be taken into account.

- Large-scale landowners must demonstrate they comply with the Land Rights and Responsibility Statement and have an up to date Land Management Plan.

Don't know

Reasons: This would depend upon the prescribed content of same.

Q28. Do you have any other comments on the proposals outlined above? **No**

PART NINE: Land Use Tenancy

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? **Don't know**

Reasons: This would represent a further innovation in the area of agricultural tenancies, which have been subject to repeated statutory intervention over recent years. It would add to the existing forms of agricultural tenancy, which include those under the Agricultural Holdings (Scotland) Act 1991, the Modern Limited Duration Tenancy, and the Repairing Tenancy (once this is brought into force). We are aware of no proposal for the process or procedures for converting one type of tenancy to another. Conversion could affect the security of tenure under existing tenancies. We would require to understand this detail before providing a more comprehensive view.

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

Reasons: This is a matter of policy.

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? **Don't know**

Reasons: This is a matter of 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? **Don't know**

Reasons: In general we agree that parties should be free to convert tenancies by agreement, but we would require to understand the details of what a Land Use Tenancy would entail, including the effect these might have on security of tenure for existing tenancies, and whether they might discourage landowners from giving any form of agricultural tenancy.

Q33. Do you agree or disagree that when a tenant farmer or small landholder's 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? **Don't know**

Reasons: See response to **Q32**.

Q34. How do you think the rent for a Land Use Tenancy should be calculated? **Don't know**

Reasons: We emphasise that consideration must be given to the tribunal or adjudicator who will confirm the level of rent in the event of a dispute. We refer to the matters narrated in our response to **Q5(a)** and **(d)**.

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? **Not applicable**

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**

Reasons: Such matters have the potential to be legally complex and to have significant consequences for both parties, therefore guidance would be of benefit. Without being aware of the terms of a Land Use Tenancy we are unable to comment further at this stage.

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

Reasons: This may be required in the event of a dispute. Should a new tribunal or adjudicator be established we emphasise the points raised in our response to **Q5(a)** and **(d)** above.

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? **Don't know**

Reasons: We are not aware of the terms of a Land Use Tenancy so cannot say what matters are likely to arise in a dispute and what the appropriate forum might be.

Q39. Do you have any other comments on our proposal for a Land Use Tenancy? **No**

PART TEN: Small landholdings

Q40. Would you like to be kept informed via email about the Small Landholding Consultation for the Land Reform Bill? We would use the email you provide in the 'About you' section to contact you. **Yes**

PART ELEVEN: 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 **Don't know**

Reasons: This is a matter of policy.

- The possibility of introducing a requirement that those seeking to acquire large-scale landholdings in Scotland need to be registered in an EU member state or in the UK for tax purposes. **No**

Reasons: We are concerned by the reference to EU member states in this proposal, and query the basis for this. We are unclear what basis there could be for extending any rights to EU registered tax-payers, while excluding tax-payers in various other nations. We do note that a number of nations worldwide have limited transparency in respect of tax registration. We follow the logic in excluding tax-payers registered in such nations from the right to acquire a LSL. Indeed, some of these nations might be EU members. We are unclear which aims of this consultation would be met by extending the right to acquire LSL to an entity registered in the EU but not, for example, Canada. We consider that arbitrary choices such as this could undermine public confidence in the rationale behind these proposals.

PART TWELVE: Other land related reforms

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

No. This is a matter of policy. Taxation ought to be considered independently of land reform and/or holistically.

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

a) Community benefit

b) National benefit

Don't know. This is a matter of policy.

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

Yes. The Faculty will express these by continuing to engage with proposals relating to Land Reform in Scotland.

PART THIRTEEN: Assessing impact

Q45-51

We are not aware of any particular proposals which would negatively impact the groups mentioned, other than in relation to Q48. In this regard we note that there are a number of environmental organisations with landholdings in excess of 3,000 hectares in Scotland, that are working to protect biodiversity and/or address the climate emergency, and are likely to require land of that scale in order to meet those aims. Some of the proposals in this consultation have the potential to undermine the aims and work of those organisations to the detriment of the environment. As the proposals become clearer and more detailed the Faculty may have further comments.