



SCOTTISH LAND COMMISSION  
COIMISEAN FEARAINN NA H-ALBA

## Land and Human Rights Advisory Forum

### Note of Meeting – 28/09/21

#### General Discussion

Members discussed a number of issues relating to land and human rights, in summary these and the points made are noted here, in no particular order.

#### *Use of “ownership” and relevance to concentration of ownership*

Members considered the use of, and focus on, “ownership” as a term, and advised that it is perhaps unhelpful and distracting. Instead, members considered that what is really being discussed is the “control of use of land”, and that although ownership is currently the simplest route to exercising control it is not the only option, and therefore using “control” as a frame provides a better context for land reform discussions.

In considering concentration and monopolies, some members noted that a well-regulated, democratically accountable, monopoly run in the public interest, such as the control of the seabed exercised by the Crown Estate Scotland, could be more beneficial than harmful.

Furthermore, members noted that inertia and indifference in control of land, as much as abuse of control or concentrated ownership, are problematic and need to be addressed through land reform measures.

#### *Articulation of the Public Interest*

Members considered the role of government and parliament in articulating the public interest, noting that public policy is flexible, and not fixed – yet may have a significant effect on judicial decision making.

Members considered whether government would always act in the public interest, noting the experience of communities and individuals where this has not been the case. As such greater clarity is needed to establish the role of government in articulating, protecting, and/or being a trustee of the public interest.

#### *Relationship to other areas of legislation and policy*

Members noted that land reform is not very well joined up with other legislation – in particular crofting, planning, and human rights – and that forthcoming Bills should seek to make much stronger links between clearly related areas.

Members noted unintended consequences of this, such as the right to buy of individual crofters coming into conflict with the duties of community landowners.

Touching on the “control of use” point noted previously, members noted crofting legislation as a long standing, but at the time radical, approach that holds lessons for modern land reform which have not been fully realised.

Members considered that future crofting law reform, as well as any agricultural holdings law reform, should be conducted in close alignment with forthcoming land reform legislation where practical. As a minimum, land reform legislation should acknowledge that it operates as part of a much wider landscape than is perhaps currently the case.

### *The potential effects of the Human Rights Bill*

The forthcoming Human Rights Bill, and its potential implications was discussed in detail. Fundamentally, members saw the inclusion of a duty to “respect, protect, and fulfil” economic, social, and cultural rights as critical to land reform.

This duty would necessarily compel government and public authorities, including SLC, to use the “maximum available resources” in taking steps to fulfil HR obligations. This multi-institutional approach would allow the judiciary and parliament to hold all public actors to account. This may in turn answer the concerns about the role of government in articulating the public interest noted previously.

Further, this duty could be extended to ensure that the private sector moves beyond a “do no harm” threshold to proactively fulfilling human rights; in-line with the UN Guiding Principles on Business and Human Rights and the current discussions underway within the UNHRC about a binding treaty for business and human rights.

In either case the significance of the LRRS, and SLC protocols derived therefrom, becomes clearer, and potentially moves towards having real legal weight.

Similarly, the HR Bill is expected to define wider HR outcomes which would add further weight to the LRRS when they are fully aligned.

Members considered whether the right to a healthy environment adequately articulated the rights of nature – this is potentially likely, but further consideration is required.

### *Reasonableness as a threshold for Courts*

Members considered the effect of the HR Bill on judicial decision making, in particular the potential to move to applying a threshold of “reasonableness” and the implications this has.

Members noted that in other jurisdictions the presence of a written, codified constitution often provides an overall framework within which to consider property rights in addition to the ECHR. In Scotland (and the UK) the lack of a written, codified constitution leaves the ECHR as a lone, preeminent, but potentially inadequate consideration in balancing private property rights with the public interest. Members considered that the HR Bill would provide a wider set of considerations in determining the public interest, reframing judicial considerations, and potentially leading to transformational judgements.

Although the ECHR would continue to apply (and the public interest argument would remain the basis for justifying interfering with private property rights), the implications of the incorporation of ICESCR into Scots law would be taken into account by the judiciary when weighing up the public interest and private property rights..

Members considered that a new threshold or test would need to be developed so as to be consistent with international human rights law, and that in all likelihood this would be a test of

“reasonableness”, significantly broader than the current *Wednesbury* principles in judicial review cases.

### *Access to Courts and remedies*

Members considered access to courts to be a key principle, although in practice litigation should be seen as a last resort. In the first instance, resolution should be sought via the appropriate regulator.

Members felt access would largely be based on need and addressing structural issues, noting that the pending Human Rights Bill is expected to provide the Scottish Human Rights Commission with the power to take test cases.

In order to address structural and systemic issues, courts would be able to grant “structural interdicts” as a remedy, thereby preventing a piecemeal, case-by-case approach.

### *Sequencing of Bills in the legislative programme*

Given the far reaching potential of the Human Rights Bill, not least on land reform, members were strongly of the belief that the HR Bill must come first to provide a clear foundation for subsequent land reform legislation. Members considered that if the sequencing were reversed, land reform legislation would risk being less ambitious than it could be and this would be seen as a huge, missed opportunity.

### *Current state of the land market*

Members considered the current state of the land market, noting that there is a significant amount of uncertainty. This is combined with a sense that developing Natural Capital markets are having a clear influence on behaviour – particularly for landowners with complex portfolios, and as a driver for new entrants. Similar patterns were noted in the booming rural housing and property markets, in response to the pandemic.

Uncertainty could lead to conflict around land use, particularly where land is being used for environmental purposes rather than economic, such as rewilding, or leaving undeveloped land to nature. Landowners responding to calls to take climate action may argue they are acting in the public interest, however, the impacts of this land use on local communities should be recognised. Members considered that conflict around such land would be different in urban and rural areas, but that in any case viewing land as a commodity to exploit climate change mitigation measures would likely be an abuse of power and run counter to fulfilling HR obligations.

Members noted getting the balance right between competing priorities is crucial, highlighting cases where high biodiversity net gain is required to redevelop old brownfield sites that have naturally regenerated to a level higher than is required for agricultural greenfield sites.

### *Communication of, and engagement with, Human Rights*

Members considered public awareness raising as important.

Good engagement with the public – especially landowners and communities – is critical to raise awareness of HR duties, as well as how they deliver co-benefits. Using SDGs (particularly SDG 11) and National Outcomes as a lens would be particularly useful.

Members noted that HR apply nationwide, but implications are different at national, regional, local, community, and individual levels – joining this up is key to furthering awareness and understanding. This in turn is hoped to foster culture change.

Members considered that public engagement, and understanding, at a policy level will be critical – particularly where public policy will be influential on judicial decision making. As such, there is a need for government and public authorities to be clearer in communication, and to move away from reliance on speaking to defined stakeholders.