



SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

Land and Human Rights Advisory Forum

Note of Meeting – Wednesday 28th September, 2022

Discussion

Legal News Update and Reflections on Previous Meeting

The Trusts and Succession Bill in the Programme for Government was flagged as a point of future discussion for the forum as more detail emerges, noting that the Land Commission has previously looked at issues around land owning trusts.

The forum discussed potential implications of the Retained EU Law Bill being brought before the UK Parliament, which sets out, broadly, that December 2023 is the expiration date for many EU-derived laws; including land-related regulation which would have very significant implications for land use planning.

Members identified that the UK Government is moving in the direction of deregulation in England, and that in such a policy environment, public interest may be reinterpreted as simply human interest, rather than taking into account environmental and other factors. Members reaffirmed that taking a holistic approach to the public interest, that includes environmental factors such as biodiversity, would continue to be the best way to support a just transition towards net zero.

The introduction of ‘investment zones’ following the UK governments fiscal event raised concerns, but without further detail members were unable to assess potential consequences.

The revised Land Rights and Responsibilities Statement (LRRS) was published on the 22nd of September, and forum members discussed some of the changes made. Particular attention was given to the new Principle 5, which encourages land to be used, owned, and managed in a way that delivers wider social, environmental, and other benefits. This is seen as an additional responsibility for landowners and managers to contribute to wider society beyond doing no harm. Members suggested this new principle could be perceived negatively by some as overreach, currently a minor risk given adherence to the LRRS is voluntary. This may change for some landowners if proposals in the Land Reform Bill are taken forward. Members also noted that the new principle was ambitious and the most substantive change to the LRRS.

The forum observed that the revised LRRS includes more language around the Scottish Government’s policy of a ‘Just Transition’ to net zero carbon emissions, as well as an emphasis on natural capital, demonstrating that the LRRS can be adapted to address emerging concerns. Some members questioned whether the term ‘natural capital’ implied a preference for market-based approaches to sustainable land management.

Members discussed forthcoming emergency legislation on residential tenancies that would put in place a short-term rent cap on most private lets and a moratorium on evictions. These

pieces of legislation, members agreed, would engage A1P1 rights, and this may be used by private landlords to challenge the Scottish Government's measures.

Land Reform Bill Consultation

Members observed that the definition of large-scale landholdings appears to be one of the most widely discussed aspects of the bill. The advantages and disadvantages of the proposed 3000-hectare definition were discussed, including the implications of lowering the threshold to cover more landowners. The forum agreed that any 'large-scale' definition should consider aggregate or discontinuous landholdings, not just contiguous landholdings.

Members noted the necessity of other criteria to inform the definition of 'large scale' – including a proportion of a data zone and whether a landholding is a part of an inhabited island – providing a balanced approach to defining 'large-scale'.

Members again raised the point that land value should be considered when defining whether a landholding meets the requirements to be subject to a public interest test, as, for example, the transfer of a 3000-hectare landholding of prime agricultural land may risk much greater impacts on the local community, economy, and environment, than 3000 hectares of uninhabited bog, rock, and heather.

Though members acknowledged that bringing uninhabited islands into the definition of land subject to a public interest test may raise complex questions on the definitions of islands, it should still be considered, as transfers of such islands could affect the public interest in environmental, or indeed future repopulation, terms.

The exemption of family farms was also discussed. Members weighed the implications of several options, including removing the exemption altogether, as a family farm over 3000 hectares would be unusually large and therefore very few family farms would benefit from this exemption. However, family farms can receive special treatment in other areas, notably around succession and related tax exemptions. Members noted that family farms already have to comply to many high standards, further expectations arising from the land reform bill might appear burdensome and/or create another barrier to new entrants in agriculture. A nuanced approach was also considered by members – for instance, the possibility of a caveat to the exemption that takes into account how a family farm is being transferred to a new landowner. Such a caveat could mean that where a family farm is transferred and will continue to operate as a family farm it may be exempt from a public interest test, but where the farm is transferred with the intent to convert agricultural land to another purpose, for example afforestation to generate carbon credits, the transfer would not be exempt from the test. Members therefore suggested that a presumptive exemption rather than a blanket exemption might be appropriate.

Members noted that any such potential challenges to the family farm exemption might invoke Article 8 of the European Convention of Human Rights, around the right to respect for family and private life.

Forum members discussed potential challenges around the operation of the public interest test as proposed in the bill. If the previous behaviour of an acquirer of land was to be taken into consideration, then new buyers coming into the market would not be affected and arguably at an advantage. The forum discussed potential ways to address this, such as whether land purchases should be conditional on future behaviour and adherence to conditions, rather than previous behaviour. Members suggested that these issues indicate

that there are limitations to taking an almost ‘fit and proper person’ approach to land ownership, and a model similar to that used by the Competition and Markets Authority in dealing with mergers, which balances risks and benefits rather than assess the behaviour of each party to a merger, or, in the land reform bill context, a land transfer. Members suggested that such an approach would be broadly aligned with previous recommendations of the Land Commission.

Land, Rights, and Food Systems

The forum discussed how a rights-based approach to food production and land use might help to encourage sustainable farming practices, agroecology, and agroforestry; as these might often be in the best interest of the landowner and the wider community. Examples were provided to the forum where this is already the case.

Members discussed the relationship between supply and demand in food systems. If sustainable produce such as locally grown fruit and vegetables was to be successful, demand needs to exist; and forum members suggested that policy change could help in shifting such a demand.

The historical context of land tenure in Scotland was also raised. Scotland has lost a lot of small landholdings and the early 20th century tradition of crofting and smallholding in Scotland in which families had relatively diverse farms, growing vegetables alongside rearing cattle or sheep for both subsistence and sale. This tradition gave way to trends of larger scale livestock farming, and cheaper supermarket food means demand for food produced on a small, local scale has generally declined. This led to the forum discussing the relevance of the crofting system within the context of food rights and food security. Some forum members argued that crofting has presented the answer to food production issues in the past and there is scope for the crofting system today to better facilitate the productivity of smaller crofts – a form of small-scale agriculture with the potential to be diverse and sustainable.

The forum discussed the issue of ‘best and most versatile land’ (BMV) in Wales, and a recent decision by the Welsh Government to reject solar farm developments on agricultural land on the basis that the benefits of food production outweighed the benefits of solar energy in those particular instances. The forum discussed how to strike a balance between the two very important factors of food production and sustainable energy, and discussed to what extent comparisons between the Welsh BMV and Scotland’s roughly equivalent ‘prime agricultural land’ policies could be made, as the Welsh and Scottish Government’s policy implementation increasingly differs.

Members discussed the benefits of a hypothetical overarching land use plan for the whole of Scotland that very clearly sets out how land is used, the balance between different uses such as housing, energy production, forestry, and agriculture, and where such land uses might roughly be located. Such a plan would have to be flexible due to constantly changing concerns and priorities.

Members discussed data gaps around the agricultural sector, in particular identifying a need for a soil census to bring knowledge of soil quality throughout Scotland up to date. The suggestion was made that a census of land for agriculture should be carried out, that would scope out what land can be used for agricultural use, to avoid land being ‘written off’ and challenging the stereotype that great swathes of highland land can only be used for grazing.

Some members suggested that the right to food should be viewed within the context of other human rights, for instance, there should not only be the right to access food, but government should also facilitate the right for communities to grow food. As the Scottish Government continues to codify human rights in Scots Law, issues of food rights like this should continue to be considered and discussed.

Links

Members provided links for further reading related to the discussion:

- Updated Land Rights and Responsibilities Statement:
<https://www.gov.scot/publications/scottish-land-rights-responsibilities-statement-2022/>
- Review of the Land Rights and Responsibilities Statement:
<https://www.gov.scot/publications/review-scottish-land-rights-responsibilities-statement-report-scottish-parliament/pages/1/>
- Blog on Land Reform Bill Consultation:
<https://basedrones.wordpress.com/2022/08/24/land-reform-in-a-net-zero-nation/>