

## Response from Scottish Environment LINK to 'A Consultation on the Future of Land Reform in Scotland'

We have structured this response to the Scottish Government's consultation as follows:

- **Section 1** provides our introduction, broad views and discussion as to suggested definitions;
- **Sections 2 – 5** follow the structures and questions in the Scottish Government consultation, without prejudice to our overall integrated approach to land reform; and
- **Sections 6 & 7** cover areas of public policy we consider it essential should be discussed fully in parallel with the land reform process as laid out by the Scottish Government, and our concluding aspirations for land reform in Scotland.

### 1. INTRODUCTION

Scottish Environment LINK welcomes the opportunity to contribute to the Scottish Government Consultation on the Future of Land Reform in Scotland. LINK is the forum for Scotland's voluntary environment community, with over 30 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more sustainable society which respects environmental limits.

LINK provides a forum for these organizations, enabling informed debate, assisting co-operation within the voluntary sector, and acting as a strong voice for this community in communications with decision-makers in Government and its agencies, Parliaments, the civic sector, the media and with the public.

Acting at local, national and international levels, LINK aims to ensure that the environmental community participates in the development of policy and legislation affecting Scotland. LINK works mainly through Taskforces – groups of members working together on topics of mutual interest, exploring the issues and developing advocacy to promote sustainable development, respecting environmental limits. This response was written by our Land Group.

Several LINK members own and manage significant areas of land in Scotland and submitted evidence covering the period 2012-2014 to the Land Reform Review Group (LRRG) - *'The socioeconomic benefits of the ownership and management of land by environmental non-governmental organisations (NGOs)'* <http://www.scotlink.org/files/policy/ConsultationResponses/NGOLandReformPolicyReview.pdf>

#### 1.1 Our view of land reform

Land, sea and air are the spaces where life exists on our planet. They are the fundamental spheres of our environment and together constitute the biosphere. As a species, we share these spaces with the other species and the natural, physical universe. In this shared space, whether urban, rural or wild, we depend upon the other species, as they depend upon us. The principles we offer for the land in this submission (and the suggestions as to how they might be applied) underlie our approach to the land, but to the seas and the air also.

For LINK members, land reform is about the balance and calibration of the relationship between people and the land in order to achieve sustainable human development. This applies in social areas of public policy such as housing and health; in economic areas such as economic development, agriculture and forestry; and in environmental areas such as conserving wildlife and tackling climate change. Land reform should be done

in a democratic manner and respect environmental limits. Sustainable development should replace the patterns of unsustainable development which have damaged our land and our people.

Land reform is, therefore, the system within which rights to land are defined, held and exercised. It is a system governed by law passed by Parliament on behalf of both the people, and all of the species that use the land, seas and skies. Land reform should seek to balance the public interest, rights and responsibilities in land with the legitimate rights of all owners or managers of land. It is about the system within which we all, whether owners of land or not, determine how land should be held and used. The way that land is held is a public matter and it is legitimate and proper for the public to seek to inquire, debate, reform and adapt it.

Much of the debate on land reform in Scotland has been about land ownership, almost always acknowledging that ownership affects land use, but paying so little attention to the way we use land as to amount to ignoring the issue. It is land use which most concerns LINK and its members. We are aware that a new type of owner might change the use they make of a piece of land, but we are also aware that the new owner might stick, to all intents and purposes, to exactly the same usage. From an ecological perspective it is not the ownership of the land that is important, but the way the land is used.

In LINK we start from the position that much of the way we use the land of Scotland currently is not sustainable. Huge economic, social and environmental benefits could be obtained from improving the levels of sustainability in the way we use the land – but if land reform does not lead to a major change in attitudes to land use it might be a missed opportunity, and, at worst positively harmful to our environment.

We are of the view that the way most of the land is currently used is driven by historic patterns of usage, including the development of our technological capacity, and by subsidy systems. These historically established patterns of ownership and our public institutions and policies have led to most of the problems and solutions we have identified in the section on the aspirations we set out in the Conclusion of this submission. We call for much needed legal protections for the ecosystems, public accountability of landowners, equitable taxation and balanced subsidy regimes, because so much current ownership is for single or limited land uses, with little or no reference to the public interest and the principles of sustainability.

It is time for the land debate to give equal space to land ownership and to land use. The balance between land rights and responsibilities must be recalibrated and restored.

## **1.2 Definitions**

We are of the view that a variety of definitions are used only very loosely within the text of the Scottish Government's consultation paper and within the land reform debate in Scotland. We think it would be for the best if all participants in this discussion were able to agree the definitions of the terms being used – for the sake of clarity and communication. Please find here the definitions and explanations of various terms as used in this response.

### **1.2.1 Community**

Within political and public policy discourse in Scotland the terms “community” and “communities” are regularly used, but what we mean by these terms can be widely divergent. In particular, the habit has emerged of defining communities as only those at a very local, geographically restricted level. These matters of definition cause problems when the participants in a conversation, consultation or debate apply different meanings to the terms.

Within Scottish Environment LINK we use the terms community and communities to describe complex, concentric, or overlapping groups of people, with the underlying identifiers of:

- **communities of place**, where people live together in a geographically delineated local area;
- **communities of interest**, where people join together on the basis of shared interest; and

- **the ‘democratic’ communities** that are defined by the border of Scotland itself, or local government units within it. (By extension, communities exist in this category also at United Kingdom, European Union and United Nations levels.)

The first two of these types of communities are largely self-identified, and can co-exist at several levels at the same time. We believe that this definition is in conformity with definitions in national and international law – and we believe it ought to be used within discussions of land reform in Scotland. It is also in conformity with the Scottish Government’s own Planning Advice Note 3/2010 on community engagement:

*“Defining ‘community’ is not simple. It means different things in different situations. It can be based on location – those who live, work or use an area. But it can also be based on a common interest, value or background – for example societal groups (based on race, faith, ethnicity, disability, age, gender or sexual orientation), members of sports clubs and heritage or cultural groups. Each community will have different desires and needs which have to be balanced against the desires and needs of others.”*

### **Communities of Place**

People identify the communities of place in which they live in several ways and levels. A village, housing estate, town or city might be a community. From each individual, the sense of identity at the heart of every community can spread outwards to local, regional, national, state, continental and global levels. Each and every level can be described as constituting a “community”.

In our view, a person is not limited to a single community. An individual child can be brought up in more than one local community of place, and can retain identification with several communities as he or she grows up. There is no rule to say that you are only allowed to be from one place at a time. There is no rule that a person born of parents from different nations cannot be a member of both “communities” – even where there is a law saying you are only allowed a single passport.

### **Communities of Interest**

People form communities of interest in several ways, and they too can be formed and organised at different geographic levels. People of a similar cultural background or origin might form a community. People of similar innate characteristics or abilities might constitute a community. People of similar social, political, economic and environmental ideas might join together to form a community. Communities of interest can form for recreational, intellectual or social pursuits and activities.

Within even the tiniest community of place, overlapping communities of interest might be formed. In the modern world, with the aid of our many communication technologies, communities of interest can be conjoined from the local to the global levels without great difficulty. It is, also, far easier to obtain a sense of identifying with one, two or many more communities of interest than might have been the case in earlier ages – and people have never been limited to a single interest.

### **Who Represents a Community?**

Communities are largely self-identifying and their leadership and representation can be identified formally or informally. At a formal level, within a democracy, elections are the method of selection - but they are not the only way for the representatives of communities of place or interest to emerge. At an informal level, most representatives of local communities of place emerge through a wide variety of community organisations - and can achieve the informal, but very real, assent of that community. Similarly, within communities of interest, a representative function can be properly performed by people who achieve effective assent of a congregation, a club or a wide variety of organisations.

Friction between formal and informal representatives in a community is all but inevitable – but it is essential to the proper functioning of a democracy that elected representatives accept that they do not have a monopoly over the representative function. They should be prepared to work with the informal representatives of all communities. Equally, informal representatives must recognize the mandate and legal powers of elected representatives.

## **Community Assets**

Community assets include property owned by both communities of place and communities of interest – but the social and intellectual capital of any community is, perhaps, its greatest asset. LINK regrets the limitation of the term “community assets” in much of the Scottish discourse to only the physical assets of local communities of place. We believe that the property and capital of councils and both Scottish and UK Governments should be considered a “community asset” too. We deplore the idea that local and national government are corporate entities, somehow separated from the community. At the same time we welcome, warmly, ideas to bring unused physical assets into use for local communities.

## **Empowering Communities**

LINK is of the view that economic, social and environmental power in our society has been “sucked upwards” in recent decades. As a response to economic globalisation, states and supra-national entities have taken greater powers - though we suggest that this upward concentration of state or democratic power hasn’t kept pace with that of global capital and the international corporations. Scotland may have had power devolved to it in this period but it too has seen a concentration of power. If the Community Councils are ignored (as all too often they are), we note that each unit of Scottish “local” government has a larger population than any other country in Europe. Scottish councils are dependent for over 85% of their funding on higher tiers of government and are tightly constrained by several layers of legislation. Power has been centralised.

Land reform cannot, of itself, re-empower communities of place. We believe that to re-empower communities it will be necessary to return power to the social and environmental fields from the economic, but also to seriously pursue subsidiarity. Decisions should be taken, in our view, at the practical level nearest to the individual if we are to attain sustainability. In Scotland this includes returning real powers of decision to localities well below the units of our local government. This will require both the decision making powers and the control of assets of local communities to be increased. We warmly welcome the start of discussions on both these issues. We hope that community empowerment (and the current Bill before Parliament) will extend much, much further though, than to the control of greater assets alone.

Empowerment requires, essentially, full recognition of the complex nature of community, and a full recognition that communities are strongest when the elements of place and interest are taken together. Sadly, we have witnessed an increasing tendency to divide and separate these aspects of community, and, sadly, we find some evidence of this attempted division within the Scottish Government’s consultation paper on land reform.

### **1.2.2 Land rights and responsibilities**

As the debate on land reform in Scotland has often focussed on questions of ownership of land, it has been concentrated also on rights over land. At the same time, the major concern of LINK and its members has been land use - and the responsibilities and duties of owners and managers for stewardship of the land with regard to both people and the other species that we share it with.

In our view, it is time now to properly and fully combine discussion of land rights and responsibilities – and we welcome the apparent recognition of this within the consultation paper, particularly with the proposed draft Rights and Responsibilities Policy. Where there is clearly a distinction to be made between rights and responsibilities, as between land ownership and land use, the two cannot be separated. Land rights or ownership exist only in order that land responsibilities and use are governed properly.

### **1.2.3 Land ownership**

You can’t “own” a cloud, or the rain, or a river. Nobody “owns” a wild animal under Scots law – and these facts must be taken account of in the land reform process. For these reasons, you can't “own” the land, the sea or the air in the same way you can exclusively own a piece of moveable property. Nor can you own land

intimately (albeit for a limited period of time) as you can intellectual property. When land, sea and air are “owned”, it is conditional on the understanding that they are already, in fact rather than a legal construct, shared jointly by all members of all species who use that space. This joint space is the ecosystem, and for both legal and scientific purposes, we all live in one space. We all live in an ecosystem – the biosphere - and a small part of this ecosystem can be owned purely within the legal limitations, and with the very real inclusion of all others. Legal ownership of land is conditional, therefore, on the understanding that such ownership is subsidiary to land being a part of the common wealth of all people and all species.

In addition, the land reform process has to take account of the highly complex spectrum of land law in Scotland, with the many forms of ownership and tenure recognised – and the fact that an individual piece of land can be subject to several different people holding different rights over it. It is for this reason that LINK has adopted the term “land holders” in many parts of this response, in order to be clear that for policy purposes, the holders of rights over land are at the heart of the substantive matters under discussion, regardless of whether they own the land or not.

As stated above, several members of LINK own land (as do many other non-Governmental organisations representing communities of place and interest in urban and rural settings). We believe such ownership is an important means to achieving environmental and cultural conservation objectives. The legal rights and responsibilities from such ownership are important in this respect, and should be protected, alongside all other rights and responsibilities. The land concerned is managed in full recognition of the limitations and duties of such ownership, including the responsibilities to other people and other species. LINK members also rent or lease land or land rights to others, and in turn, rent or lease land or land rights from others.

The consultation paper uses a variety of different descriptions of landowners – public; private; charity; third sector; and community. We are of the view that it would be helpful if these terms were properly defined and consistently used. For example, clarity is required in respect of “third sector” ownership, which probably includes many of our members – who are also charities. Much land is owned by charities who are not, however, also third sector organisations.

#### **1.2.4 Land Use**

As stated throughout this paper, we do not believe that it is possible to fully separate issues of the ownership and the use of land. In our paper ‘Living with the Land’ LINK set out, nevertheless, the views of member bodies regarding the Land Use Strategy to be prepared under Section 57 of the Climate Change (Scotland) Act 2009 (SLUS). Section 57 required Scottish Ministers to produce a land use strategy by 2011 and every five years thereafter. The second iteration is currently under discussion and consultation. This strategy must set out Ministers’ objectives in relation to climate change and sustainable land use, and their proposals and policies for meeting those objectives. The paper set out LINK’s view on the need for the SLUS, established the vision and general principles on which it should be based and proposed definitions for its key terms. The full paper is available at:

<http://www.scotlink.org/files/publication/LINKReports/LINKReportLivingwithLand.pdf>

Although it came about in relation to climate change imperatives in particular, the SLUS clearly presents a significant wider opportunity to promote the type of integrated multi-purpose land use which LINK member bodies have been advocating for many years.

In our view, an agreed aspirational long-term vision is essential to inform all aspects of the SLUS. Our vision is of sustainable land use in Scotland that:

- contributes significantly towards climate change mitigation and adaptation;
- delivers environmental objectives and justice, social justice and economic stability; and
- is based on adaptable and on resilient systems.

Achieving this vision requires a holistic approach in which all impacts of any land use decision are taken into account; for example it should not be necessary to sacrifice one environmental benefit to achieve another.

“Adaptable and resilient systems” are systems which do not necessarily stay the same, but which are capable of adapting and are resilient to change – that is ones which are operating well within environmental limits.

### 1.2.5 The public interest and the common good

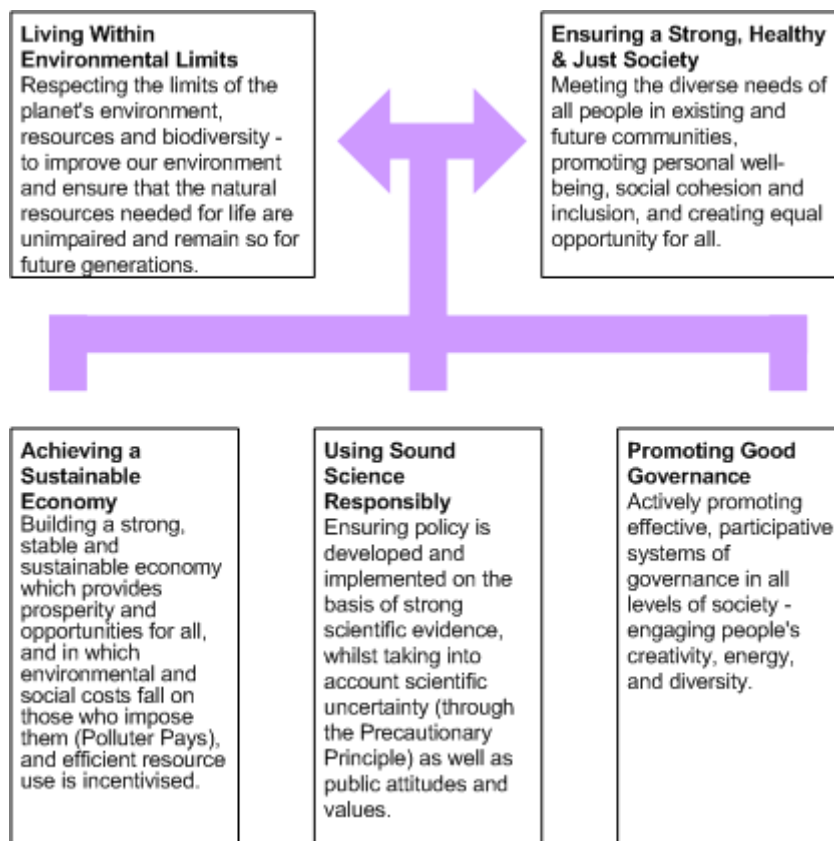
In the consultation paper, on occasion, the terms “the public interest” and “the common good” are used interchangeably (as in the title of the LRRG final report), and we think this can lead to some confusion. In order to try and avoid such confusion:

- LINK uses the term “the public interest” to describe the democratic expression of the interests of the whole of the Scottish community, or of local communities, or of communities of interest. Within the land reform debate, the public interest can comprise compounded elements of the interests of the general public, communities of place, communities of interest and private land owners or managers.
- LINK uses the term “the common good” to describe common good land only, as laid down within Scots law. We are of the view that this limited use of the term helps provide clarity.

### 1.2.6 Sustainable Development

Sustainable development is the key concept that defines LINK. As our core purpose, all of our members seek to promote sustainability. We define sustainable development within the context of international, European and domestic law, and for practical purposes, we have adopted the use of the Shared UK Principles of Sustainable development, reproduced here. This statement of the principles was agree by the Westminster Government and the three devolved administrations, and is accepted as the definition by the current Scottish Government.

**Figure 1 – The Shared UK Principles of Sustainable Development**



Many people do not readily accept the notion of human dominion over the biosphere held within several traditional philosophies, but we all recognise the simple fact of human history and presence. People have an enormous impact on the biosphere and a duty to manage our activities responsibly, particularly where our human use of space threatens the very existence of other species. We believe that our history demonstrates the need for an acceptance of the idea that our species has a duty of “stewardship” of the environment, however that might be defined. Since the last ice age, human society has used and changed the vast bulk of Scottish land directly – through agriculture, deforestation, reforestation, urbanisation, mineral extraction and other uses. Indirectly, all of the land of Scotland is farther affected by human activity through global processes such as climate change or damage to the ozone layer.

LINK has no preference between the many types of limited legal ownership or dominion of land by people. All such forms can provide either benign or malign stewardship within the principles of sustainability we believe in. We have, however, set out our wish to see “real subsidiarity, where decisions are taken at the nearest appropriate and practical level, and where communities of place and interest can assess the long-term economic, social and environmental consequences for their lives and the lives of future generations before decisions are made.” This view and other details of our broader manifesto can be seen at: <http://www.scotlink.org/files/publication/other/LINKReferendumChallenge2012.pdf>

Environmentalists and conservationists do not seek, generally or widely, to “re-establish wilderness” or “reclaim all land from human use”, as has been sometimes claimed - but we do seek to ensure that human land use respects the ecosystem and biodiversity, together with our landscape, cultural and historic legacy, and that the land is sustained for future generations. The “re-wilding” many argue for relates to species re-introductions - having considered and tested the impacts of the re-introduction, and with the aim of enhancing existing ecosystems. Together, these aims include our mainly limited, or sometimes zero, intervention in areas of land we own as a community of interest. Scotland has obligations in international law to achieve sustainability – and in this we believe Scotland must follow the precepts and definitions laid out in the 1987 report of the Brundtland Commission, ‘Our Common Future’.

## **2. DRAFT LAND RIGHTS AND RESPONSIBILITIES POLICY**

Having set out definitions and principles with regard to the debate, we now turn to the specific questions set out in the Scottish Government’s consultation paper. We welcome the comment in the Ministerial Foreword to the consultation that land reform is a “continuous process”. We understand this to mean that the set of proposals contained in the consultation cover a selection of the priorities, but not all of the issues involved in land reform.

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

We are in favour of the Scottish Government having a stated land rights and responsibilities policy – and we believe that it should, most certainly, contain a vision and principles. It must contain much more than this however if it is to be a comprehensive and coherent statement of policy which will guide action.

We hope that the indicative draft given in the consultation paper is merely a starting point and that:

- any final statement would include reference to the type of definitions suggested in Section 1 above;
- any such policy would be subject to a full, separate public consultation as to its content;
- the policy statement be specifically fitted into the structure of the National Performance Framework and the hierarchy of the strategic policy aims of the Scottish Government;
- it either include, or specifically refer to, all policy statements with regard to the full area of land policy (such as the Government’s full response to the LRRG) and any other related policy statements; and
- the policy statement make reference to clear delivery targets with regard to substance and timetable.

In particular, in the light of the comments above with regard to the inseparability of questions of land ownership and land use, we think it is important that the land rights and responsibilities policy should be contained within, or strongly tied to, the existing, statutory Land Use Strategy, established under the Climate Change (Scotland) Act and currently under review. We believe that this proposal is inherently supported by the opening sentences of the draft policy – which we support. *“33. The relationship between the people living in Scotland and the land of Scotland is of fundamental importance. The land of Scotland is a finite resource and the land rights that govern how the land is owned and used have a crucial influence on the wellbeing, economic success, environmental sustainability and social justice of the country.”*

We believe, in addition that as Scotland’s biodiversity is so inseparably entwined with our shared land sea and air that all of the other species of life must, too, be properly recognised within any statement of policy for land rights and responsibilities.

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

In accordance with the definition of sustainable development given above, we believe that in the Vision within the draft Policy Statement, “sustainability” should apply to the social, environmental and economic aspects of land rights and responsibilities – and not exclusively to the environmental considerations. We suggest, therefore, that the Vision should read:

*“For a strong relationship between the people of Scotland and the land of Scotland, where ownership and use of the land delivers greater public benefits through a democratically accountable and transparent system of land rights and responsibilities that promotes fairness and social justice, respects environmental limits and fosters economic prosperity.”*

We hope that this wording can also be adapted in the third Principle, which might read:

*“The framework of land rights and responsibilities and associated public policies governing the ownership and use of land, should contribute to building a fair and socially just Scotland, which respects environmental limits and promotes economic prosperity.”*

## **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?**

LINK’s ten priority aspirations are set out in the Conclusion to this response.

### **3. PROPOSALS FOR INCLUSION IN A LAND REFORM BILL**

As noted above, we understand that the proposals in the Government’s consultation are priorities identified by the Government and not designed to cover the entire spectrum of land reform issues.

#### **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?**

LINK agrees that there could be significant benefits to establishing a Scottish Land Reform Commission (SLRC) if it is given the right role – that of pursuing the proper calibration of rights and responsibilities over land ownership and management and land use.

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



We think that the best type of SLRC would be based on the model of the Scottish Law Commission – as an authoritative, independent advisory body to the Scottish Government and Parliament, but with no executive functions. These should remain with land holders (including Government). Land policy functions should continue to be carried out by the Scottish Government. We believe it is important that the advisory function is not compromised by becoming entangled in any area where political or ministerial direction overshadows the advice given.

As per the views expressed in our paper ‘Governance Matters’ (in particular at Section 2(d) and elsewhere), we believe strongly, that the independence and authority of such a body would be essential to its success, but that these qualities would be dependent on a properly representative, expert membership, carefully appointed in a manner which meets the best public standards and achieves the acceptance of all of the major stakeholders in land matters within Scotland. A full suite of relevant knowledge, including legal, scientific, social, environmental and economic expertise would be required amongst members. The full text of Governance Matters can be found at:

<http://www.scotlink.org/files/publication/LINKReports/LINKGovernanceMatters.pdf>

We are of the view that it is essential that any SLRC be given an advisory remit covering the whole field of land rights and responsibilities. This would include all matters of land holding and land use – including the provision of advice on the statutory Scottish Land Use Strategy.

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

We are of the view that an SLRC which did not meet the independence and authority outlined here, and did not achieve the acceptance of all of the major stakeholders in land matters within Scotland, could become a serious impediment to the progress of land reform.

#### **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?**

In recent months, LINK members concerned with the enforcement of wildlife crime law have come across the huge difficulties that can be met in finding who, exactly, is the owner of land in Scotland in respect of the direction of proceedings for vicarious liability where crimes have been committed. We are committed to achieving transparency in ownership in order to ensure that land rights and responsibilities are properly performed. We believe that this is an essential condition if the public interest is to be meaningful in relation to land use in Scotland.

Some LINK members are sceptical, in addition, about what effect this proposal might have by itself, suspecting that the use of complex legal vehicles to own property might be enough to get around the limitations - without improving transparency.

**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?**

We think that the Scottish Government should study models of transparent land ownership and registration in other European countries carefully, and adapt a model which allows for the proper application of the public interest to all Scottish land. The most important aspect of this for LINK is the matter of transparency.

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

No answer proposed - see Q8.

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

No answer proposed - see Q8.

**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?**

We believe that information on land, its value and ownership is essential to decision making in both the private and public sectors. We believe that, as rights and responsibilities in land are inseparable, this extends to land use also – and we note with concern the Scottish Government’s response to Recommendation 39 from the LRRG in this respect.

For the full and proper expression of the public interest in land, we believe that not only should transparency in land ownership be established, but that the information must be registered and held in a manner which allows members of the public easy access to that information.

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

Individual LINK members hold data on land ownership and use which we are content should be public – subject only to considerations around the established protocols for publication and sharing of scientific evidence, and legal requirements covering matters such as personal data protection.

**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?**

No answer proposed – see Q11

**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?**

If sustainable development is defined within the ‘*Shared UK Principles of Sustainable Development*’ (above) and is in conformity with domestic, European and international law and principles we believe that it is in the public interest – and that unsustainable development is against the public interest. How this might be translated into a power for Ministers or a legal duty for land holders is not a matter where we have expertise or comment, other than to suggest that it might prove seriously difficult if it were created outside existing legal frameworks. We note, however, that similar “powers of last resort” over land such as Nature Conservation Orders, the use of existing powers of compulsory purchase, and prosecutions for damage to protected areas, have rarely, if ever, been used. The credibility of such powers must be considered if they are to have any serious impact.

This matter is discussed in Section 1(i) (and elsewhere) of the LINK Paper ‘Governance Matters’. Duties of sustainability on public bodies and others have, thus far, never been tested in a Scottish court and it is exceptionally difficult to assess the impact of such legal duties. We believe that this analysis might well be extended to the proposed duty on private owners. Governance Matters can be found at:

<http://www.scotlink.org/files/publication/LINKReports/LINKGovernanceMatters.pdf>

We believe, however, that the same principles of sustainable development must be applied to all land, including that held by the public or communities – and that legal mechanisms for ensuring sustainable development must be applied equally to all land holders.

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

We are of the view that the benefits of sustainability being achieved are fundamental to the success of Scotland.

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

Alternative methods of removing barriers to sustainable development are discussed at various points in the LINK Paper ‘Governance Matters’, referenced at Q14. In addition, LINK has been discussing, internally, the possibilities inherent in a voluntary Code of Responsible Stewardship for land holders and all stakeholders - akin to the Scottish Outdoor Access Code. Such a code might provide standards for sustainable development of land, and might provide an invaluable link between land reform and the LUS. A land holder who wanted to know what the public interest required of him/her in the management of his/her land could refer (and be referred) to it for guidance. This would of course require the development of a countrywide regime of indicative land use plans (as per the current Regional Land Use Framework pilots), to supplement the general principles set out in the LUS itself. It would be a defence against accusations of irresponsibility to be able to point to conformity with these documents.

**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?**

As per the response to Questions 14-16 above, public sector bodies have significant, statutory duties to promote sustainable development, access and biodiversity already. We would be interested in a discussion of which appropriate “management activities” cannot already be carried out by them – and in removing any barriers to their performance if they were genuinely in pursuit of sustainable development. We commend the work which Forestry Commission Scotland has recently been able to carry out in terms of educational engagement and community outreach. If an extended remit, or further powers, were to allow an expansion and continuation of these existing activities then they would be warmly welcomed.

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

We are of the view that the benefits of sustainability being achieved are fundamental to the success of Scotland, but without a clearer explanation of the changes proposed here, it is difficult to add anything more.

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

See the answer to Q16.

**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?**

LINK is concerned as to the origin of this proposal and the problem it seeks to address, which does not appear in any recognisable form in the report of the LRRG. We note that a similar proposal was discussed, and a statutory solution dismissed, in the earlier Land Reform Policy Group, chaired by Lord Sewel.

Several LINK members are both charities and landowners in Scotland, with small or large land holdings, and, after considerable experience of working with local communities over many years, every effort is made to ensure that such engagement is carried out at both formal and informal levels. We consider it vitally important that communities of interest work closely with local communities to deliver sustainable development, and we make every effort to do so.

As charities we are regulated by the relevant Scottish legislation and the Office of the Scottish Charity Regulator (OSCR). We are content to observe all such regulations and believe that all charities should do so in order to obtain the fiscal and other benefits of charitable status. We believe that this is in the public interest.

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

As stated, we see great importance in communities of interest working with local communities. We believe this is reciprocal, and that consideration should, perhaps, be given to creating a parallel duty for local communities in receipt of public support for the purchase of land to consult with appropriate communities of interest “before taking a decision on the management, use or transfer of land”.

We are of the view that charities, as recipients of public support in the form of tax relief, should not be singled out, other than in respect of their charitable status and the regulations they must follow. There are several areas of public policy where non-charity land holders are the recipients of far more extensive support from the public purse and we find it strange that they too are not to be given a similar statutory duty. If such a duty were to be introduced, surely it should apply to all land holders equally?

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

Please see Section 1.2.1 above for details of our views on the complex definition of “community”. We note, in addition, that the Scottish Government itself rejected a duty for Historic Environment Scotland to consult with local communities, during recent Stage 2 discussions of the Historic Environment (Scotland) Bill, on the basis that the local communities could not be easily defined in law. This suggests there is a serious difficulty here.

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

If the proposed duty to consult were to be introduced and was set within the charity law framework, the remedies should be those already available to OSCR.

**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?**

We have long argued for rigorous regulation of shooting and stalking activities on estates, and in respect of wild deer matters we comment extensively below under Questions 35-37. With regard to business rates, we have heard, for many years, the claims of such estates to be essential to local economies, but distinct from agricultural enterprises. We find it hard to understand how they can be such essential local businesses but claim an exemption from the rates paid as their contribution to local services by the ordinary businesses that are the estates neighbours, customers and suppliers.

If the rate exemptions were to be ended, we suggest that careful consideration be given to matter of rates relief being applied on a discretionary basis in circumstances where the land holder's management practices were especially beneficial to the environment. An alternative to this might be to make continuing rates relief conditional on compliance with a set of conditions designed to ensure environmental sustainability. Such a regime might be analogous to the cross-compliance and greening conditions now attached to CAP payments.

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

See answer to Q24.

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

See answer to Q24

**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?**

LINK and its members have very little experience or expertise in matters of Common Good land. Other than the suggestion in the Introduction with regard to exclusive use of the term "common good" for this category of land holding, we have no comment to make on this proposal.

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

See answer to Q27 above.

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

See answer to Q27 above.

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

See answer to Q27 above.

**Q. 31. Do you have any other comments?**

See answer to Q27 above.

**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?**

We cannot answer this question before carefully studying the recommendations of the Group which have only very recently been published. Several LINK members have agricultural tenants on their land holdings, or are tenants themselves on pieces of land. Based on this experience we have, in several Government consultations over the years, proposed special conservation tenancies, designed to provide stability to tenants working with conservation NGOs to deliver long term gains for nature. These proposals have, latterly, been supported by the Cabinet Secretary, and we would appreciate legislation to introduce them at the earliest opportunity.

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

See answer to q32 above.

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

See answer to q32 above.

**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?**

The Rural Affairs and Environment Committee of the Scottish Parliament carried out a review of the impacts of wild deer populations and on the natural heritage in 2014. The LINK Deer Task Force (comprising RSPB Scotland, Scottish Wildlife Trust, John Muir Trust, Woodland Trust Scotland, Ramblers Scotland and Cairngorms Campaign) submitted detailed evidence. There is now a substantial body of evidence, which demonstrates that deer populations in many parts of Scotland are having significant impacts on the natural heritage, by both excessive browsing of vegetation and trampling. This chronic and long standing problem is one of the main factors preventing the Scottish Government from meeting a range of its public policy objectives, including the delivery of the Scottish Biodiversity Strategy; the favourable condition targets for protected areas (a legal requirement); woodland expansion targets; and climate change adaptation commitments. The Native Woodland Survey of Scotland, published in 2014 by Forestry Commission Scotland is the latest commissioned evidence to highlight that an important habitat is in poor condition, to a large extent due to the impacts of deer damage.

We accept that the RACCE Committee of the Scottish Parliament and the Minister agreed in 2014 to continue with the voluntary approach to deer management in Scotland until 2016, following which it will be re-evaluated. We also welcome the increased investment by Scottish Natural Heritage in the deer management process in order to effect the required changes in deer management practice, and we will play a constructive role in trying to make these arrangements effective. However, we have long felt that increased regulation of deer management in Scotland will be required to deliver sustainable management. RACCE also noted that improvements to the voluntary system of deer management had been too slow over several decades and we agree with this analysis.

In Scotland we should be learning from deer management structures that are already in place in other European countries, and North America. Characteristics of these systems that we believe could be helpful include Government setting required cull targets and deer densities; preparation and implementation of effective deer management plans; and obligatory cull returns by landholders to inform sustainable management of wild deer populations. The LINK Deer Task Force has taken independent legal advice on this issue and we understand that a similar deer management system could be constructed for Scotland by the public authorities, which protects private property rights, and is therefore compliant with the European Convention on Human Rights.

On this basis, we consider it likely that in 2016 further deer management regulation will be required, and that SNH should be given increased powers to intervene in the public interest. We also suggest that SNH should make greater use of the powers that already exist under sections 7 and 8 of the Deer (Scotland) Act 1996. At present, compulsory powers for SNH to intervene and reduce deer populations in the public interest under section 8 of the Deer Act have not been used. We believe that this is due to the complexity of the burden of proof that SNH would be required to produce in support of the case for compulsory intervention, as well as the fear of legal challenge by landowners. Any simplification of these procedures to allow effective implementation without delay would be helpful and we recommend that this is considered now as part of the legislative reforms to enhance the powers of SNH to protect the public interest.

In exercising its power in relation to deer and the environment it is important that SNH focus on protecting natural heritage, which is a legal requirement for protected areas in particular, and not use their 'balancing duty' to take decisions that will further degrade designated sites and the natural heritage. We trust that the

2016 review will include a benchmark of landowner compliance with the voluntary Code of Practice on Deer Management 2011, including the results of any quantitative and qualitative monitoring programme being carried out by SNH.

In paragraph 93 of the consultation document it is suggested that SNH powers may be increased to require landowners to put in place sustainable Deer Management Plans that protect the public interest and to ensure that the plans are fully carried out. Whilst the details of how this might work in practice are not fully explained, we support the principle of this improvement. Many Deer Management Groups in Scotland still do not have any Deer Management Plan in place, let alone a plan which is effectively implemented. The voluntary approach to putting effective deer management plans in place has been given until 2016 in which to deliver. If this fails it is likely that after 2016 SNH will need to have greater powers to intervene in the public interest.

Finally, we note that it is recommended in the LRRG Report that any reintroduced sporting rates are used as a tool “tailored to help deliver the Scottish Government’s Land Use Strategy and other rural objectives”. It is also noted in the Report that charges of this type may result in working against encouraging higher deer culls in the public interest. It is further suggested in the Report that “a revised rate on deer shooting could, for example, be based on the level of deer cull required to protect public interests, and then only be charged when an owner or occupier was not achieving adequate culls”. We support this type of approach and any new system of sporting rates must lead towards helping to deliver sustainable management practice. In this context, it is also highlighted that LINK landowning bodies are primarily culling deer, not in effect for recreational purposes, rather to promote woodland regeneration and the improvement of habitats in the public interest.

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

There would be more effective delivery of sustainable deer management to protect the public interest. Reform of SNH powers in relation to deer management are urgently required if we are to meet Scottish Government policies and targets for improved conservation of the natural heritage, as well as combating climate change. Once again we emphasise, that in exercising its power in relation to deer and the environment SNH must focus on protecting natural heritage and not use their ‘balancing duty’ to take decisions which will further degrade designated sites and the natural heritage.

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

None that we are aware of, except the requirement for SNH to have sufficient resources and capacity to implement effectively. We are aware that current resources within SNH for implementing sustainable deer management are stretched.

**Proposal 11 - Public Access: clarifying core paths planning process**

The consultation paper refers to “a number of small potential changes to Part 1 (*of the Land Reform (Scotland) Act (2003)*) which have been identified as requiring some legislative change, and it is our intention to make these changes through the Land Reform Bill”. LINK takes this opportunity to raise the following relatively minor issues which could improve the implementation of the 2003 Act.

**Guidance:** The Scottish Government has committed to updating the statutory local authority Guidance and on this point LINK supports an update of the guidance since there is now 10 years of practice to take into account, and the many case studies could be used to illustrate good practice.

**Level crossings: Level crossings:** LINK supports proposals for amending the Land Reform (Scotland) Act 2003 to specify that access rights apply across all so-called “private” level crossings, bringing these in line with the purposes of Part 1 of the Act. LINK believes there is a strong public interest in securing rights of access across level crossings where rights also apply to land on either side of the railway line. There are approximately 450 of such crossings in Scotland, and their importance for non-motorised users and for recreation interests is very high, especially when the nearest public crossing is often a matter of several miles distant. Future legislation

on level crossings will be passing through Parliament in due course, but this is a very specific point of principle. In addition, the Statutory Guidance would need to be amended to state that the creation of core paths across level crossings can properly be achieved, and their core path status is in itself conclusive proof of the public right of access across the line. Following level crossings legislation passing through the Scottish Parliament, we would anticipate that Network Rail would be able to apply to Ministers to close specific crossings where they can demonstrate unjustified risks to public health and safety, or to the safe operations of the railway. Nevertheless, there would still remain a majority of crossings where access rights would apply.

**Clarifying the “main purpose” in s.14:** There is an issue across Scotland which affects the implementation of the LR(S)A, in that the Access Authority must prove that an obstruction is for the “main purpose of preventing or deterring” access – which has proved to be an extremely contentious test in law, since alternative reasons, for example, locked gates, can be given. This has resulted in many access issues being unresolved, or taking many years to be resolved, where particular landowners are determined to obstruct access. To solve this problem, an option would be to amend the legislation to state that the obstruction is “for the main purpose, or which has the effect, of preventing or deterring” access. The statutory guidance would then be updated to clarify the processes access authorities should undertake to give landowners opportunities to prove a satisfactory alternative purpose for the obstruction, and examples of how the obstruction might be removed through case studies. Or, rather than “main purpose” the legislation could be amended to cover obstructions where they “did not give due regard to the public’s right of access”.

**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?**

We agree that this proposal would be helpful.

**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?**

We agree that such a clarification would be helpful.

**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?**

We agree, but suggest that it is important that some consultation takes place, on a basis similar to a planning application, including both opportunities for the public to object, and a clear procedure for the determination of unresolved objections by an impartial body. Such consultation processes should apply to any deletion, addition or alteration to the plan.

#### **4. 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.**

This is not an area of LINK expertise and we have, accordingly, no comment.



**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?**

This is not an area of LINK expertise and we have, accordingly, no comment.

#### **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.**

An increase in regulatory burdens might arise from either (a) additional requirements in respect of land registration or (b) more complex requirements for landholding charities consulting local communities. An increase in costs would occur under the proposal with regard to any landholding caught by the introduction of business rates for shooting or stalking estates.

#### **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.**

This is not an area of LINK expertise and we have, accordingly, no comment.

#### **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 are of the view that, as stated above, while a distinction can be made between land rights and responsibilities, it is impossible to separate them, as land rights are held for the use of land and land use has inevitable environmental consequences, particularly if it is changed (and we respond under the presumption that land reform must, in itself, be about affecting change).

We deem it essential, therefore, that a Strategic Environmental Assessment (SEA) is carried out on the whole land reform programme, and disagree strongly with any suggestion in paragraph 6 of the consultation paper's Executive Summary that an SEA might not be required.

### **5. OTHER ASPECTS OF LAND REFORM (highlighted in the consultation paper)**

#### **A. Completion of the Land Register**

We support the completion of the Land Register, and we are of the view that improved transparency and accountability are vital to the expression of the public interest in land.

#### **B. New and improved community rights to buy**

We accept that the community here is as defined in the Land Reform (Scotland) Act (2003). We support improving and refining the rights of local communities to buy land.

#### **C. Extending the Scottish Land Fund until 2020**

We support the extension of the Scottish Land Fund.

#### **D. A strategy to achieve 1 million acres in community ownership by 2020**

With regard to our definition of community in the introductory section of this response, we assume that this refers to land held by local communities or communities of place. We consider, however, that the millions of acres of land held by the state and its agencies already belongs the democratic community of Scotland as defined above. In addition, we consider that land held by LINK members is owned by communities of interest. We suggest that greater specificity is required here. In particular, we would wish to avoid the confusion of measuring the extent of community ownership by Government merely affecting transfers of areas from one category of community land holding to another. We think that it might be helpful also, to explain why the specific 1 million acre target has been arrived at, and if it is intended as an initial target, or if it is to be added to after 2020.

#### **E. Housing and Planning response to recommendations**

We shall await the developments outlined in the consultation paper and the likely further round of consultation before making any comment.

#### **F. Wild fisheries**

We shall await the developments outlined in the consultation paper and the likely further round of consultation before making any comment.

#### **G. Succession**

This is not an area of LINK expertise and we have, accordingly, no comment.

### **6. OTHER ASPECTS OF LAND REFORM (not specifically highlighted in the consultation paper)**

#### **H. Scottish Land Use Strategy**

As stated previously in this response, it is our view that land rights and responsibilities can be distinguished but not separated. We referred, also, to the statutory provisions requiring the preparation of a land use strategy under Section 57 of the Climate Change (Scotland) Act 2009 (SLUS). Section 57 required Scottish Ministers to produce a land use strategy by 2011 and every five years thereafter. The second iteration is currently under discussion and consultation. This strategy must set out Ministers' objectives in relation to climate change and sustainable land use, and their proposals and policies for meeting those objectives.

LINK believes that the Strategy and its review should have been included as a material consideration in, at very least, Annexe A of the consultation paper. We regret the omission and suggest that matters of land use should be fully integrated in the land reform programme as proposed in several sections of this response.

#### **I. Scottish Biodiversity Strategy**

As stated above, we believe, that as Scotland's biodiversity is so inseparably entwined with our shared land sea and air that all of the other species of life must, too, be properly recognised within any statement of policy for land rights and responsibilities. We suggest that the Scottish Biodiversity Strategy, refreshed in recent years, should have been included as a material consideration in, at very least, Annexe A of the consultation paper.

#### **J. European Legal Considerations**

The UK and Scottish Governments are signatories to the European Landscape Convention, although little action has followed from the signing. Its aspirations, which apply to both urban and rural landscapes, should be reflected within the land reform debate. Again, it could be an Annex A material consideration. This might also apply to other European legal considerations, such as the Birds and Habitats Directives.

## 7. Conclusion

This section comprises LINK's aspirations for land reform – as set out in our submissions of evidence to the LRRG and the Scottish Affairs committee at Westminster.

### We want a Scotland where.....

**..... all land owners and managers understand and observe defined environmental rights and responsibilities.** We recognise and understand that the Scottish community has the right and shall decide upon the system for the economic and social division of the land between people. This division, however constituted, must be balanced by a full understanding of the shared aspects of our dominion over land - the ecosystem cycles and services and the biodiversity that are an inseparable function of the space. Legal protections must be put in place to ensure the integrity of these cycles, services and biodiversity.

**..... the ownership or dominion over land is open and transparent.** We need public registers of land that allow us to know exactly who bears the legal duties and responsibilities for ecosystem cycles and services within any defined space – in order that these duties and responsibilities can be enforced and the ecosystem services protected. This transparency must cover all land, and ownership and management by communities, individuals and corporate entities. It should allow for the identification of 'absentee' owners who do not live on the land owned.

**..... all public policy for land is set out in a democratically established Land Use Strategy.** The strategy should be developed from that established in the Climate Change (Scotland) Act (2009) and should continue to be based upon the principles of environmental, social and economic sustainability. It should ensure that both communities and the ecosystem are sustained for future generations. It should include efficient processes to ensure the accountability of land managers for their performance in delivering the strategy and refer to effective regulatory systems. We set out our view of these principles in the paper 'Living with the Land' which can be found at:

<http://www.scotlink.org/files/publication/LINKReports/LINKReportLivingwithLand.pdf>

**..... the planning and regulatory systems for land use take account of global, national and local terrestrial, freshwater and marine ecosystem impacts.** We need protections for ecosystem cycles, services and biodiversity which are based on the best available science - including the clear designation of spaces and appropriate management responsibilities where threatened species are located, in order that biodiversity is maintained.

**..... any land taxation is designed to be economically, socially and environmentally sustainable.** It should be equitable, and underpinned by an awareness of the effect of the fiscal regime on the ecosystem and biodiversity. Alongside the promotion of economic and social development, one of the core purposes of any land taxation should be the protection of the ecosystem and biodiversity.

**..... any public policy subsidy for land use fully balances economic, social and environmental concerns.** Public policy should recognise that unbalanced subsidy regimes can cause severely dangerous impacts to communities, the ecosystem and biodiversity. Such public policy should also be consistent and coherent in all its many strands, and should include consideration of landscape, cultural heritage and recreational interests.

..... **openness and public participation are central features of our governance for land use.** We want the methods and processes of government at local and national levels to be open and properly transparent and, as a matter of course, to include genuine representatives of our communities of place and interest in all political decision-making

..... **recognition that the term 'community' applies to both communities of place and communities of interest.** We want to see a balance between the views of local communities and communities that seek to apply principles relating to national and global issues of concern such as the fight against climate change or the protection of ecosystems and biodiversity. We believe that the community interest is best represented when communities of place and interest co-operate.

..... **the traditional right to roam of Scots is maintained.** The Land Reform (Scotland) Act (2003) set out in legislation for the first time the right of public access to land in Scotland, with the attendant responsibilities of the public and land managers. We want to see this right jealously guarded and full and continuing recognition of the underlying principle that land 'ownership' is conditional and limited in Scotland – and subject to public rights and interest.

..... **the establishment of adequate procedures for the resolution of conflicts concerning land and environmental protection.** This should include provision for the required legal and scientific expertise in Scotland's courts and tribunals, and for specialist courts or tribunals if necessary.

This submission is specifically supported by the following LINK members.

Archaeology Scotland  
Ramblers Scotland  
RSPB Scotland  
Scottish Allotments and Gardens Society  
The National Trust for Scotland  
Sustrans Scotland  
Scottish Wildlife Trust  
Woodland Trust Scotland  
Scottish Wild Land Group  
Scottish Badgers

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