

Scottish Environment LINK Stage 1 evidence to the Rural Affairs, Climate Change and Environment Committee of the Scottish Parliament with regard to the LAND REFORM (SCOTLAND) BILL

Scottish Environment LINK welcomes the opportunity to submit evidence on the Land Reform (Scotland) Bill. Following our participation in giving evidence to the Land Reform Review Group (LRRG), the Scottish Affairs Committee inquiry at Westminster and the Scottish Government's most recent land reform consultation, LINK members have positions on, and seek clarification about, the following sections of the Bill as it has emerged. We are confident that others within the Scottish policy community have far greater expertise and interests in the other sections of the Bill – and that they will be submitting Stage 1 evidence.

Section 1 - Land rights and responsibilities statement

LINK members are in favour of the Scottish Government having a stated land rights and responsibilities policy – and we believe that it should 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 Government consultation paper is merely a starting point and that Parliament might give consideration to adding provisions that:

- any final statement would include full definitions of community, community assets, sustainable development, land, land reform, land use, land rights and land responsibilities;
- 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 as per the Community Empowerment Act 2015;
- 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 statement make reference to clear delivery targets with regard to matters of substance and timetabling.

In particular, we think land ownership and land use are inseparable and should not be considered in isolation, and it is important that the land rights and responsibilities statement should be specifically legislatively linked to the existing, statutory Land Use Strategy, established under the Climate Change (Scotland) Act. 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 Bill might be amended to ensure that the statement and the strategy are reviewed and consulted upon side-by-side at the same time within the proposed 5 year cycle. We believe that this proposal is inherently supported by the opening sentences of the draft statement suggested in the Government's consultation paper.

“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 land rights and responsibilities. We suggest that the Scottish Biodiversity Strategy, refreshed in recent years, should have been included as a material consideration within the

statement – as might relevant parts of other Government strategies such as the new Historic Environment Strategy for Scotland.

PART 2 - THE SCOTTISH LAND COMMISSION

LINK members agree that there could be significant benefits to establishing a Scottish Land Commission (SLC) 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.

Section 3 - Status

We think that the best type of SLC would be based on the model of the Scottish Law Commission – as an authoritative, independent, advisory NDPB to the Scottish Government and Parliament. Land management functions 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.

We are of the view that an SLC 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.

Section 4 Functions of the Commission

We are of the view that it is essential that the SLC 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 – and in our view, specifically including the provision of advice on the statutory Land Use Strategy. We are concerned that, compared to the Law Commission model, the functions of the SLC are very general - whereas the administrative, strategic and reporting provisions are highly prescriptive.

LINK members noted that the Bill is very focused on rural land and believe it requires a greater emphasis in support of more urban communities gaining access to small pockets of urban land in relation to uses such as growing, allotments and recreation. The distribution of, and participation in, land matters should include the urban environment and urban communities too – even if the amounts of land concerned are relatively small.

Section 5 General powers

We think the SLC should have no executive functions, and are therefore, concerned that in this section clause 2(b) grants the power to “acquire and dispose of land”. We believe care should be taken to ensure that the SLC does not become an executive land agency if it is intended as an advisory body. If it is the Government’s intention that the SLC should become a land agency, this requires far greater detail than is currently in the Bill.

Section 6 Strategic plan and Section 7 Programme of work

LINK members note that there are no prescriptive requirements legislatively requiring strategic plans or programmes of work of the Scottish Law Commission. We are, therefore, concerned to see these impositions on the proposed SLC – and in particular those giving explicit control over the programme of work to Ministers. These powers are the equivalent of powers of direction, seriously undermine the independence of the advice the Commission will be able to offer, and we recommend that Parliament considers removing them from the Bill.

Section 8 Membership

We believe strongly that the independence and authority of an SLC will be essential to its success, but that these qualities will be dependent, also, 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 – and some expertise in urban land issues is required in addition.

Section 9 Eligibility for appointment

LINK members are of the view that the proposed list of areas where the Commission requires expertise or experience is too limited and weighted towards economic considerations and that sustainable development, social issues (both rural and urban) and land use should all be added to the list.

Sections 10 -18

LINK members note that no equivalent to these sections was required in the Law Commissions Act 1965 and suggests that Parliament may wish to inquire if all of these detailed prescriptions really need to be on the face of the legislation. We have a concern that the SLC should not be overburdened with legislative constraints on its administrative performance.

19 Application of legislation relating to public bodies

LINK members are of the view that the applicability of Freedom of Information legislation to the Commission and all its work should be specifically included in this section, or elsewhere in the Bill.

Section 20 Functions of the Land Commissioners

LINK members note the inclusion of “use of land” within the definition of any “matter relating to land in Scotland” in this section and suggests that it might be valuable to reinforce this by including also specific reference to the Land Use Strategy under the Climate Change (Scotland) Act.

CHAPTER 3 - THE TENANT FARMING COMMISSIONER

LINK members fully appreciate the many issues that have concerned tenant farmers in recent years – and the large amount of work that has been done to resolve these. We are, however, concerned that the concentration in the Land Reform Bill on this single sector, and the extent to which it has its own separate clauses, may be taken to create the impression that the importance of this sector is greater than other sectors. We hope that Parliament will take the opportunity to question the Minister on this matter, and to ensure that it is clear that all sectors are considered equal in importance within the legislation. It would be most unfortunate if the work of the SLC became skewed towards the tenant farmer sector because of the chance focus caused by recent work within Government.

Section 35 Right of access to information on persons in control of land

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.

In this connection we suggest that the Parliament explore the implication of the case *AXA versus Scottish Ministers*, where the UK Supreme Court set down rules with regard to legal standing. It is important that this judgement is taken account of in any regulations issued under 35(2).

Section 36 Power of Keeper to request information relating to proprietors of land etc.

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. 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.

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.

Section 37 Guidance on engaging communities in decisions relating to land

We express our serious concern that the definition of “sustainable development” used in the Policy Memorandum (and therefore the Bill) is “*derived from work of the Land Reform Policy Group, Sewel et al, 1998*” when a more recent and authoritative definition exists in the Shared Principles on Sustainable Development, as agreed and used by the UK Government and the three devolved administrations. We are of the view that this latter statement should be the legislative underpinning of Parts 4 and 5 of the Bill.

LINK members are of the view that, as with many other legislative proposals, it is extremely difficult to assess clauses giving Ministers the power to issue “guidance” on a matter – but where there is very little by way of indication or explanation of what the guidance will contain. This is especially the case when the “consequences where guidance is not followed” is laid out in the primary legislation. We suggest that Parliament may wish to ask for clear indications from Ministers as to what the guidance will contain, if not to request a draft of such guidance for consideration.

LINK members hope that the Parliament ascertains what is meant with regard to the complex definition of “community” in this section (and throughout the Bill). This is particularly required as several LINK members own land in the interests of communities of interest – as opposed to the communities of place referred to in the Bill. In addition to this, we note 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, and therefore, further detail and clarity is required.

Superficially it appears that this section will apply to all sectors of those who own or control land, but the Policy Memorandum and 37(3) leave it open to Ministers to limit this by exclusion of certain sectors. We think that the Parliament should question such exclusions and consider amendments to ensure that the guidance applies to all landowners and managers in all sectors. Our concern here relates strongly to the emphasis placed in the earlier consultation document on land owned by charities, and we are wary that landowning charities, who already have a regulatory burden through the Office of the Scottish Charity Regulator (OSCR) might be singled out within the legislative framework.

LINK members are quite content to receive guidance and we very much welcome the opportunity given in 37(4) to be consulted – assuming that we are considered to be “appropriate” persons. Parliament may wish to seek clarification as to who will be considered appropriate – and to consider if a more specific and determinative wording might be inserted.

At present, the bill proposals are only for property owners to consult with communities on decisions that may affect those communities. We note that successive reports into planning in the United Kingdom have pointed to the absence of a community level of engagement in shaping their physical environment. In particular, there is no equal right of appeal for communities on planning decisions, to balance that of development interests. If the Scottish Parliament considers there is merit in giving communities a say in how land and property owners make ongoing use of their assets, is there not greater value in giving community interests a voice in the planning system whose decisions will have a much more profound effect on people and places? We urge the Committee to consider how the community interest can be strengthened by creating an equal right of appeal within the planning system.

Section 40 Eligible land: salmon fishings and mineral rights

We hope that Parliament will investigate the reason why shooting rights are not included in this section of the Bill. It appears to be inconsistent that shooting rights should be divorced from fishing rights, as they are so similar in relation to land values and use.

PART 5 - RIGHT TO BUY LAND TO FURTHER SUSTAINABLE DEVELOPMENT

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. 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.

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. 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. We hope that Parliament will pursue the exclusions intended for this part of the Bill under **Section 39 and 40**.

Section 44 Register of Land for Sustainable Development

Duties for sustainable development are already embedded in Scottish planning policy and in large numbers of other strategies and pieces of legislation. We think, therefore, that this section should make plain that the Register is of land covered by the Bill, as the inference that unregistered land has no connection to duties of sustainable development is likely to prove misleading.

Section 45 & 46 – Right to buy

We noted in paragraph 181 of the Policy Memorandum that it states:

“There are a number of crucial distinctions between the existing rights to buy and that proposed in this Bill. Firstly, the community can nominate a third party purchase partner, who could be, for example, a housing association or local business partner etc. to help deliver the benefits to the community. The benefit of this arrangement is that third parties may have access to resources unavailable to communities.”

We suggest that Parliament might wish to query exactly where this policy proposal is stated within the Bill itself. In addition, we hope that clarification might be sought as to whether an Environmental

NGO might be nominated as a “third party purchase partner” or “local business partner”, particularly as NGOs, as communities of interest might have access to “resources unavailable to communities”.

Section 66 Repeal of exclusion of shootings and deer forests from valuation roll

We have long argued for rigorous regulation of shooting and stalking activities on land holdings with shooting stalking activities, and in respect of wild deer matters we comment under Part 8 below. With regard to business rates, we have heard, for many years, claims that such exclusion of such land holdings is essential to local economies, but distinct from agricultural enterprises and local businesses. We have frequently questioned this position, and ask the Scottish Government and the Parliament to consider it fully.

If the rate exemptions were to be ended, we suggest that careful consideration be given to the 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.

PART 8 - DEER MANAGEMENT

We welcome the continuing interest of RACCE in deer management. We encourage this scrutiny to continue, as in our experience it is helping to deliver improvements to current deer management systems in practice. We support the Scottish Government proposals for new legislation and enhanced powers for SNH to deliver more effective deer management planning and for the wider use of deer panels for public engagement. Where public funding for deer management planning is in place, either through SNH or SRDP, we think that it is appropriate that deer management plans undergo thorough and transparent public consultation, and final endorsement by SNH, to ensure that the public interest is supported. We note that the Land Reform Review Group Report proposed additional measures for improving deer management and we look forward to these suggestions being considered by Scottish Government for implementation in due course

PART 9 - ACCESS RIGHTS - Section 72 Core paths plans

Scottish Environment LINK members support the inclusion of the clauses which clarify the process for reviewing and amending core paths plans. We are particularly pleased to see that procedures for public consultation on changes to the plan, and for determining unresolved objections, are set out. We also welcome the requirement for public consultation on any paths that are being removed from the plan or diverted.

This evidence is submitted on behalf of the LINK Land Group and (where relevant) by our Deer Management Task Force, which include the following LINK members:

Archaeology Scotland;
The Association for the Protection of Rural Scotland;
The Cairngorms Campaign;
The National Trust for Scotland;
Ramblers Scotland;
RSPB Scotland;
The Scottish Wild Land Group;
Sustrans Scotland;
The Scottish Wildlife Trust; and
Woodland Trust Scotland