

Scottish Office Land Reform Policy Group

Identifying the Solutions

September 1998

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1 INTRODUCTION

- 1.1 I welcome this second consultation paper as a useful contribution to an ongoing debate about land reform. Given the limited scope for response indicated in your questions in Ch. 11, I have kept my response brief.
- 1.2 Much of my analysis regarding the need for land reform and the measures required to implement it do not accord with your current thinking and it would be futile given the timescale to even contemplate attempting to convince you of an alternative approach. Moreover, much of what I offered by way of analysis in my response to *Identifying the Problems* has not been taken on board and I do not see much benefit in rehearsing arguments that have implicitly or explicitly been rejected. I do however offer a brief analysis of how I see land reform and how your proposals fit into that context.

2 LAND REFORM

- 2.1 As I argued in my response to *Identifying the Problems* land reform is about changing the relationship between the people of Scotland and the territory they occupy. That relationship is essentially concerned with the origins, nature, distribution and exercise of power over land. The origins and nature of power are defined by the land tenure system, the distribution of power by the way in which land is distributed, and the exercise of power by the way it is used.
- 2.2 My view is that land reform should be aiming to redistribute that power from the hands of the few to the hands of the many. There is a straightforward moral imperative for such a reform (not least of which is that the beneficiaries of Scotland's system of land tenure have over the centuries legislated for it in their own self-interest). There are also economic, social, cultural and environmental arguments for a radical redistribution of power.
- 2.3 The proposed solutions in *Identifying the Solutions* do not address this fundamental point. In particular they do not address the incredibly concentrated pattern of private landownership in Scotland. Perhaps this is a consequence of proposing as your overriding objective of land reform the removal of land-related barriers to sustainable development. Such an approach inevitably encourages a focus on particular problems which the system throws up (rather than a fundamental review of why this happens) and palliative solutions intended to address the more acute problems. Some of these will be useful but they address symptoms not causes.

3 THE VISION

- 3.1 To answer your first question, I do not agree with this vision for the following reasons.
- 3.2 I don't understand in the first part what is meant by "increased diversity in the way land is owned" ("the way it is used" is clear enough). The "way land is owned" is a term usually used to mean the system of tenure within which land is

- owned. Given that the consensus is to reduce the range of tenures (feudal, udal, leasehold etc.) it would appear odd to advocate greater diversity.
- 3.3 Does it instead refer to the nature of the ownership in the sense of public and private, companies, trusts, individuals, partnerships, community organisations, not-for-profit organisations etc? In which case there would appear to be considerable diversity already although particular kinds of ownership may be positively encouraged or discouraged.
 - 3.4 Does it then mean simply more landowners in the same sense that biological diversity refers to the numbers of individual species in existence? If it does then I agree with it. However, I can see no real evidence of a structured analysis of why there are currently so few, what measures would lead to more, or what scale of change is anticipated (from 1500 owners owning the majority of private land in Scotland to 15,000, 150,000 or 1,500,000?)
 - 3.5 The key to answering the question seems to be in the subsequent reference to monopoly ownership. I spent some time on this question in my first response and see no real evidence of any measures presented here which would do much to change the current distribution of power over land in rural Scotland.
 - 3.6 With respect to the second part of the vision I am firmly of the view that involving the community in the way land is owned is legitimate and desirable but I see no measures in *Identifying the Solutions* which address this. Indeed the whole notion of regulating the way in which land is owned is substantially rejected.
 - 3.7 The merits of involving the community in the way land is used depends on the level of decision-making being referred to. At a strategic level this is desirable and many of the proposals in Chapter 7 are welcome in this regard. However, beyond the strategic level (as embodied in planning, approvals for forestry grants etc.) the involvement of communities in the way in which individual holdings are used and managed (e.g. LO1) should not be a legitimate goal of land reform. Are members of the group who live in rural Scotland happy with the idea of involving the community in the way they use their land, be it a garden, smallholding or farm? I suspect not and assume that the principal is related to the ownership and use of large-scale holdings or estates. The land reform policy response to the fact that “local people are excluded from decisions which affect their lives and the lives of their communities” is not to involve them but to reform the system by which such an imbalance of power has developed in the first place. Why should such a system exclude people from decisions which affect their lives and communities?
 - 3.8 As a matter of principle I am opposed to the idea of involving the community in decisions affecting the use of an individual holding beyond the strategic level. Landowners should be as free as possible to determine how they use and manage their land. The legitimate locus for public intervention in such matters is in the system of land tenure (obligations of stewardship in titles), the distribution of land (no-one should own land at such a scale that decisions about its use affect local people’s lives and communities), and the statutory basis for land-use planning. Beyond that people should be free to enjoy their property.
 - 3.9 In conclusion, the vision you have presented does not address one of the most basic problems in Scottish landownership namely the remarkably concentrated

pattern of power over land. The vision is unclear in parts and particularly with respect to the 2nd part offers a flawed analysis of the problem which leads to solutions which legitimise existing power structures and which do nothing to acknowledge their role in creating many of the problems you identified in your first paper.

4 THE OPTIONS

- 4.1 Despite the foregoing reservations about the approach of *Identifying the Solutions*, there are a number of useful measures which will contribute to advancing the cause of land reform although perhaps not in ways which the group intends. There follows a brief analysis of the key options presented.

Land Ownership

- 4.2 Your introductory remarks require some comment. The comment in *Identifying the Solutions* 4.1 that there are only a handful of bad landowners may or may not be true (whatever “bad” means). The essential point however is because of the concentrated pattern of power that handful have impacts over a wide area. Reform the scale of ownership and the problem of bad landowners becomes no more of an issue that people who keep untidy gardens or slightly run-down farms. These are problems of course but far more manageable and do not affect entire communities!
- 4.2 Your comments regarding “corporate, foreign and absentee ownership” are flawed. Understanding surrounding these issues is dominated by shallow analysis and vested interests. Your comment that with respect to “corporate ownership”, “there should be means of ensuring that the ownership is not a secret” is at variance with your conclusions under INF6. Your conclusions with respect to the impracticability of any ban on absentee ownership flies in the face of continuing support for tackling the issue of absentee crofters. Indeed the continuing contrast between the ways in which crofting tenure and landownership are treated when it comes to issues such as absenteeism and regulation remains stark and inconsistent.
- 4.3 With respect to foreign ownership, I know of nobody who advocates controls on the basis of racist beliefs - this is scaremongering. In any case the beneficiaries of many an offshore trust are Scottish landowners. Comments about inflows of capital are pure assertion. There is absolutely no hard evidence of the existence, scale or purpose of such inflows such is the paucity of serious research surrounding the ownership of land. Such inflows, if they exist, may well be countered by the loss of tax receipts by the UK Exchequer as a result of overseas ownership.
- 4.4 LO1
I have already indicated that this would appear to be aimed at large-scale landowners. Reform the pattern of ownership and such measures are no longer required.
- 4.5 LO2
In the absence of a regulated market in land LO2 seems a sensible option.
- 4.6 LO3
Yes, see 9.17 to 9.26 in my response to *Identifying the Problems*.

4.7 LO4

It is my view that the ownership of land should be regulated with respect to a range of criteria including scale of holding and residency obligations. *Identifying the Problems* rejects all of this so I shall not pursue it. I would point out however that I at least have never advocated a permit system and am unaware where this idea came from. I do not remember this particular mechanism being advocated by any of the respondents to *Identifying the Problems*. I would also question the view that, among the administrative implications “the volume of work would be formidable. From 1990 to 1998 there have been, on average, around 200 farms, 20 estates and 30 forest properties advertised on the open market. Allowing for sales off the open market one might double these figures. Given that around 500 sales take place a year above a threshold of around 100 acres the effort required to regulate would be not be formidable at all. Indeed, given that the annual regulatory case load of the Crofters Commission is measured in the thousands, it could be argued that any regulatory arrangements for landownership would be relatively modest by comparison.

4.8 LO5-LO7

Any changes to the way in which land is taxed (indeed any introduction of a tax on land - the abolition of sporting rates in 1995 leaves us for the first time in almost 1000 years with no taxes on land) will have to be considered in a far more detailed and structured manner than the LRPG process allows for. LO7 is the key measure to look at since it is based on sound economic principles. LO5 by contrast has lost any relationship to the purposes for which it was introduced and although a constructive relationship could be developed between sporting rates and standards of game management (in particular wild red deer and fisheries), this requires a far more thorough review. It would also require a long overdue reform of our game laws, an important area of land reform omitted from the LRPG process.

4.9 In the passing I would urge scepticism about any arguments relating to possible adverse impacts on employment arising from a re-introduction of sporting rates unless it can be demonstrated that their abolition increased employment levels. I would doubt this took place since sporting estates are not rational economic holdings and any abolition of sporting rates is far more likely to have been treated as a reduction in the cost base, unlike in agricultural holdings for example where any reductions in the cost base will in most cases be reinvested in the business.

4.10 LO88-9

I advocate the extension of the Community Land Unit remit to Scottish Enterprise. It should be possible to achieve this by an extra clause in the Scottish Enterprise Bill announced in the Queen’s speech this month. This would rectify a major shortcoming, namely that the efforts and achievements of the HIE CLU cannot currently be enjoyed throughout the rest of the Highlands or of Scotland.

4.11 LO9

This measure appears to already have been agreed by the Labour Party as a prerequisite to land reform. It will be a useful measure in the short term but it does reflect again the inappropriate emphasis on palliative measures. The stimulus for such a proposal arises from the experience of, among others, people in Assynt, Eigg and Knoydart. These cases, however, were responses to a crisis in the existing system whereby anyone from anywhere can buy as much land as they like and then exercise such power as conferred upon them with no obligations or

- responsibilities to the wider community. Such obligations should be inherent in the tenure system as a matter of principle and should not be exercised over such large holdings.
- 4.12 Such a measure might help in certain circumstances but it is worth remembering that the events in Assynt, Eigg and Knoydart involved dealings with creditors and receivers. This was perhaps the most important reason why they succeeded. Bids on the open market were made and rejected in all three cases. Had the right to buy existed in the absence of creditors it is unlikely enough money would have been raised. This reflects the ludicrously inflated price of land. In all three cases the market price was around twice the economic value. Spending public money or anybody else's money in such a market is, I believe, inefficient.
- 4.13 Despite the benefits LO9 may bring I have doubts about these in relation to the administrative, legislative and cost involved in introducing such a right (given that these implications were flagged up as determinants of the merits of solutions I am somewhat surprised that a measure with "significant legal difficulties and potential costs" is being pursued with the priority it is). Land available for communities to buy is restricted to that on the open market.
- 4.14 The open market consists of around 250 properties of 100 acres and over per year. Given that there is no evidence of communities wishing to buy farms, the availability is restricted to around 20 estates and 30 forest properties. A casual look at most of these reveals a limited appeal to communities since they consist in the main of sporting estates and Sitka spruce plantations. Land which is likely to be of appeal will be determined by the communities themselves but the availability will be determined by landowners' willingness to sell in the first place and place on the open market in the second. Eigg demonstrates that even where the first condition is met the owner can frustrate the second.
- 4.15 The majority of private land in Scotland has never been exposed for sale (privately or openly) for over 100 years. Even in parts of Scotland where turnover is higher such as the Highlands, over 50% of private land has never been exposed since the war and 25% has not been exposed at any time in the 20th century. The claims that LO9 would "greatly empower communities" and "effect rapid change in the pattern of landownership" are highly misleading. Given that these are the only two advantages cited I cannot see the case for pursuing this option with the determination which is evident. Again it is something of a palliative. The issue on Eigg and in Knoydart were the scale of holding and the mechanics of the land market. Community ownership was developed as the only practical response in such circumstances.
- 4.16 There is a further possible complication which I presume the LRPG are aware of. How the community is defined is a problem of course but there is potentially a serious clash between LO9 and CR1. If an estate is predominantly under crofting tenure then there may be a conflict of interest between the crofting community and the wider community. Whose right will prevail in such circumstances? In Assynt only crofting tenants are members of the landowning company. In other cases anyone resident within external boundaries of an estate, crofter or not, enjoys voting rights. Enshrining the rights of respective parties in law may reduce the flexibility to respond in different ways in varying circumstances.
- 4.17 To enable such flexibility to be retained it might be better to consider ways in which the goals of LO9 could be achieved under LO2 (where the public interest

would be taken to include the benefits of community ownership with perhaps a national stakeholder incorporated). This would be administratively and legally simpler and would have the advantage of allowing an intervention to be made when land is transferred and not only when it is sold on the open market. This opens up the scope for the right to be exercised in around six times the number of cases than would be the case under LO9 (what limited research that has been done showed that of all estate transactions, around one third were sale, the others being gift or inheritance, and of these empirical evidence suggests around half are sold on the open market). The islanders of Eigg could have exercised such a right when Schellenberg sold privately to Maruma without their knowledge (although they would have had to pay more at that stage).

4.18 LO10
See 4.6 above

4.19 LO11
I doubt the benefit currently in a public sector led approach to the creation of smallholdings. There is demand however and ways of meeting it should be explored further.

4.20 LO12
Irrelevant in the broader context.

4.21 LO13
This is a vital area of reform particularly with respect to the Forestry Commission who have historically conspired against and frustrated attempts at community empowerment. This is a subject for a whole review and consultation in its own right.

4.22 LO14
Again the whole question of the Crown's interest in land is a subject for a separate and urgent review especially in light of the imminent abolition after 900 years of the valuable principle of conditionality in the feudal tenure reform exercise.

4.23 LO15
There is no reason why NGOs who operate in the social economy and are supported by upwards of 500,000 citizens in Scotland should be singled out for special attention when they are on the whole democratic and open bodies in which anybody can participate which is a lot more than can be said for the unaccountable companies based in Grand Cayman, Liechtenstein and other places.

Law Reform

4.24 The heart of land reform is in Chapters 4 and 5. It is an sorry reflection of the land reform policy process therefore to see no options presented in Chapter 5 and this important area of policy relegated once again to lawyers in the Scottish Law Commission. I reiterate the points I made in 7.1 - 7.7 of my response to *Identifying the Problems*.

4.25 I would also point out the unfortunate way in which the term "conditionality" has been used in Chapter 5. The concerns a great number of respondents to *Identifying the Problems* have with the current feudal reform exercise is that it is in danger of

losing sight of the important principle of public conditionality, not private conditionality (which is what real burdens are about).

- 4.26 It is a fact of Scottish land tenure that land is held conditional on the wider public interest. The challenge for feudal reform is to reinterpret this for the 21st century to incorporate broad ranging obligations of stewardship and the public good as well as rights. A move to “absolute” ownership is a retrograde one. Retention and relevant application of the principle will be of great benefit however and will, for example, make it easier for the Scottish courts to uphold the public interest inherent in Article 1 of the First Protocol to the European Convention on Human Rights, now incorporated into UK law.

Information about Land

- 4.27 INF1-3
The scope and purpose of varying the current way in which the Land Register operates should be the subject of a separate consultation. Moves in this direction will not address the principal concerns about information in the short term.
- 4.28 INF4-5
I support INF4 and would leave INF5 to develop at its own pace. With regard to a comprehensive spatial database of landownership I would suggest that, based upon experience with the Highland Council Landownership Database, that there needs to be statutory measures to back up such a survey since existing sources of information are inadequate on their own. Indeed I would go further and suggest that there should be a full census of landownership in all non built- up areas every five years to capture a great deal of information about patterns of occupation, land use, landowner motivation and financial performance of holdings. The experience of the Highland Council Landownership Database suggests this would be relatively straightforward to implement given the computerisation of the Register of Sasines (enabling efficient updating) although costs need to be examined more closely in relation to thresholds, particularly within the external boundaries of large holdings.
- 4.29 INF6
The difficulties you present regarding a duty to disclose are unconvincing. The scope for avoidance is extremely limited since the classes of impersonal entities to be covered can be known from the results of INF4. In general the difficulty of introducing water-tight legislation, of enforcement, and in identifying cases of breach pale into insignificance when compared to duties of disclosure under Inland Revenue or Data Protection. All duties to disclose depend on people being good citizens. In the case of the limited classes of persons which would be covered by an obligation to disclose, they can be identified in advance and their obligation monitored for compliance. Future compliance can be linked to the conveyancing process and title registration as suggested for LO4. The disclosure of beneficial interests is vital and need not cost anything. The power to investigate by contrast will cost and will be difficult.
- 4.30 INF7-8
I support INF7 and INF8 therefore effectively becomes redundant.

Land Use

- 4.31 I broadly agree with almost all of these proposals and would be happy to see the groups existing preferences proceed. Land use is the end product but one (final being land management) of a consequential series of arrangements starting with land tenure and landownership. It is my belief that by tackling these two areas the scope for inappropriate land use is dramatically curtailed and, with the adoption of some of the preferred measures under Chapter 7 hopefully almost eliminated. Thus I believe that the emphasis put on regulating land use through, for example, land use councils (LU7) is irrelevant and a waste of time if measures are taken to redistribute power within the system of land tenure and the pattern of landownership. As I argued in my response to *Identifying the Problems*, (para. 4.22):

As a matter of political philosophy therefore it is far better to ensure that as far as possible the underlying framework of land tenure and ownership is conducive to the “sustainable development of rural communities” so that by the time land use decisions are made they do not become a power struggle between the community (relatively powerless) and the landowner (relatively powerful).

Landlord and Tenant

- 4.32 I reiterate my comments in response to *Identifying the Problems* in paras. 7.8 - 7.15, in particular para. 7.15 which I reproduce here:

I suggest that tenant farmers be given the right to buy (perhaps limited to those who have been tenants for a set period of time) and that current arrangements for landlord tenant be made more flexible and that existing rights and opportunities for tenants are strengthened and extended and that current security of tenure is protected. These reforms are indivisible from one another and could perhaps resolve the long-standing stalemate between the SLF and NFUS on the matter although I should add that reform in this area must be driven by the larger picture and the wider public interest in the long term. Tenancy law is not something which should be left to two private interest groups to resolve.

Crofting

- 4.33 I leave comment on crofting matters to others in light of the fact that extensive consultations have just been completed by the Crofters Commission. I would just reiterate comments I made in my response to *Identifying the Problems* in paras. 9.1 - 9.4:

- 9.1 *The land market in Scotland is virtually unregulated. This lack of regulation has led to conditions where communities are completely powerless to influence the nature, character or motivation of those who own land in and around settlements. This lack of regulation is of less importance in the kind of situation which exists in much of Western Europe where there's a healthy balance of public ownership, community ownership and small-scale private ownership. It is of major concern however where a handful of owners control the use of land over large areas. And it matters less if such owners exercise their responsibilities responsibly. As a catalogue of cases has shown it is the very existence of such an unregulated market and concentrated pattern of ownership which inevitably leads sooner or later to problems which can last for many years and affect many people.*
- 9.2 *The situation reaches its most unacceptable in places such as Eigg which illustrates the vulnerability of communities to the vagaries of the land market. It*

needs reformed. One element of reform is to consider how the market in land might be regulated to a greater or lesser degree.

9.3 *At this stage it is worth stressing that the debate is about the extent of regulation and the kinds of functions this should fulfil. The principle is already established in crofting for example that assignments of tenancy, de-crofting, amalgamations and even the competence of an occupier is subject to regulation. The anomaly that exists is that such regulation is deemed to be appropriate for a few acres of bog and rock above Newtonmore when at the same time the transfer of 40,000 acres of internationally important land in Glen Feshie can be traded in the VIP lounge of Heathrow airport with no scrutiny whatsoever.*

9.4 *Whilst there is much scope for simplifying and rationalising the regulation of crofting tenancies no-one is suggesting abolishing them completely. There is therefore a strong case to embed the principle of regulation in the landownership system. Such regulation should be simple, clear and unambiguous in promoting the public interest at the point of land transfer. Such regulation could cover many things but in the context of the current consultation I would suggest it covers the following:*

Residency

Amalgamations and monopolies

Public right of pre-emption & compulsory purchase

Succession reform

5 CONCLUSIONS

5.1 I have not devoted the same time and effort to responding to *Identifying the Solutions* as I did to *Identifying the Problems*. This is due to the lesser influence able to be exerted at this stage in the process, personal circumstances, the recognition that much of my analysis has been implicitly or explicitly rejected by the LRPG, and the consequent recognition that there will be a process beyond the life of the LRPG within which to pursue matters further.

5.2 I would however make a final appeal for the recognition implicit in the LRPG's work (that the concentration of power in the hands of a few members of society is wrong) to be more explicitly presented in the final report. It could still be argued in your final paper that there is a more fundamental and radical agenda to be pursued which seeks to systematically redistribute power at all levels within the system of land tenure, landownership and land use.

5.3 One measure which would demonstrate that recognition would be to recommend to the Scottish Parliament that they reform the Succession (Scotland) Act 1964 to provide legal rights for the spouses and children of a deceased to enjoy legal rights to heritable property in addition to the rights they currently enjoy to moveables. Scotland is one of the few countries which recognises such a division and the burden of proof must rest with those who would argue for the status quo to defend a measure which seeks to distinguish between the two forms of property.

5.4 It was after all only landowning interests who sought to make such a distinction in the first place - interests whose will prevailed when faced with the inevitable problems that would arise in the House of Lords. The distinction was only made in order to salvage at least some of the over-riding benefits of the 1964 Act.

5.5 This reform would signal more powerfully than any other the intent to do something radical about the distribution of landowning power. Such a reform could adopt a range of options for the division of heritable property ranging from equal and mandatory division, to optional equal division, to succession by the eldest child allied with compensation for other children. It is the principle which matters, however since arguably nothing symbolises more strongly the institutionalisation of landed power in few hands than do the arrangements for its inheritance.