



Land Ownership by Trusts

Trusts are bodies set up by a deed of trust with the aim of providing benefit to a particular individual, group of individuals, or the general public. Trusts hold assets, including land and buildings, and manage them in accordance with the instructions in the Trust Deed. Trusts are commonly used for financial planning and succession purposes.

The Scottish Government asked the Land Commission to look at ownership of land by charities and trusts and consider potential impacts on the public interest. This Land Focus paper aims to set out information about trust status in land ownership and some of the associated issues to consider.

What are Trusts?

A trust, in simple terms, is a legal arrangement in which the legal title to property is transferred to a trustee who holds title on a limited basis and subject to an obligation to deal with that property (i) in accordance with the directions given by the person who created the trust and (ii) for the benefit of those persons identified as beneficiaries.

The main legislation governing trusts is the Trusts (Scotland) Act 1921 and the Trusts (Scotland) Act 1961, along with common law.

A trust is created among three parties:

- The 'truster' – the person who owns property or assets and who wishes to create the trust arrangement
- The 'trustee' – the person or people to whom the truster transfers ownership of and legal title to the property or assets, on condition that the property or assets be held by the trustees for certain defined purposes and/or for the benefit of certain persons or classes of person or for the general public
- The 'beneficiary' – the person or people who will benefit from the trust arrangement.

Types of Trusts

Public Trusts

Public trusts are created to benefit all or a section of the public, rather than specific beneficiaries. With a public trust, no private individual or group of individuals gains any benefit from the trust purposes and the trust assets. Instead, the intention is that the trust assets should be used for purposes which will benefit the public, a section of it, or a particular community, more generally. It may be that individual members of the public benefit from the trust, but the focus is on benefit to a group of some kind or the public at large.

Charitable Trusts

Many public trusts in Scotland are also charities, registered with the Office of the Scottish Charity Regulator (OSCR) and subject to the legislation set out in the Charities and Trustee Investment (Scotland) Act 2005 (the '2005 Act').

The 2005 Act sets out the 'charity test' which a body must meet before it will be recognised as a charity. There are 16 recognised charitable purposes set out in the Act, many of which could be relevant to a trust which holds property or land, and these purposes are coupled with an overriding requirement that the organisation must demonstrate that it provides public benefit in Scotland or elsewhere.

Private Trusts

Private trusts are arrangements which are set up for the benefit of a defined group of individuals who are typically named or designated in the trust deed – for example, family members of the truster, or the truster's creditors. Private trusts are often used because they allow the truster via the trustees to control property on behalf of the beneficiaries, especially when they are under age or thought to be vulnerable.

In a few cases there may be financial and tax benefits which can accrue from a trust, where the land is held for family members or for future generations, but by and large, private trusts are taxed very much as though they were private individuals and the reason for their use is primarily control over the assets held in them. A private trust is not set up with a specific purpose to deliver wider benefit or to make the land or property, or any benefit which flows from it, available to the wider public or to any part of the community at large. Trustees of a private trust owe a duty to their beneficiaries to do their best for those beneficiaries and can be held to account if they fail to do so.

There are various types of private trusts which operate in different ways:

- The conventional type of trust holds assets for beneficiaries with a clear view to one or more of them taking ownership of the assets personally in the future, e.g. trusts after a death when children may be under age – trustees can appoint the assets and transfer them to the beneficiaries when they reach a certain age or in particular circumstances.
- In a 'discretionary management' type trust, assets are held and the income from them, or the right to use them, is passed to the beneficiaries from time to time. Assets can also be passed to the beneficiaries outright at trustees' discretion. The lifetime of such trusts can often be in excess of 70 years but there are legal limitations which mean that most such trusts do eventually draw to an end.
- A further kind of trust is the commercial partnership. The assets are held in trust for the partners of a firm, and there can be changes within the partnership over the years.

What are the issues?

The Commission has identified four key public interest issues to consider in relation to the current operation of land ownership by trusts:

- What are the impacts on the potential for community land acquisition either by statutory Rights to Buy or by negotiated purchase?
- Does trust status create barriers to effective community engagement?
- How does trust status affect land use decision making and the ability to respond to changing contexts?
- What are the public benefit implications of tax reliefs?

Community Land Acquisition

The Land Reform (Scotland) Act 2003 (the '2003 Act') introduced rights for community bodies to buy land through registering an interest in the land. Since then land reform legislation has continued to develop and promote community ownership in Scotland, through the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2016. At present, the statutory community rights to acquire land are:

- Community Right to Buy (Part 2) – which gives communities the first option to buy should a landowner wish to sell
- Crofting Community Right to Buy (Part 3) – which gives crofting communities an absolute right to buy (without a willing seller)
- Asset transfer request – which applies exclusively to land, property or assets owned by public authorities

- Community Right to Buy (Abandoned, Neglected and Detrimental Land) (Part 3A) – which does not require a willing seller and gives communities the opportunity to buy land that is causing harm.

In addition, a Community Right to Buy Land for Sustainable Development (Part 5), will be brought into force in 2020. It will give communities the opportunity to make a case for acquisition based on their plans for sustainable development of land.

The community rights to buy apply equally to all land owners. However, in the case of a Community Right to Buy (Part 2), for a community to acquire land, the owner must take steps to dispose of the land. This may be less likely where the landowner is a trust for a variety of reasons.

In terms of Community Right to Buy (Part 2) legislation, a transfer can only take place when a landowner triggers a disposal by taking steps to sell the asset. Moving an asset in or out of a trust does not constitute taking steps to dispose of an asset as under the provisions of the act a transfer otherwise than for value can be made, even when there is a registered community interest in the land. This could be considered an issue when a community has a Part 2 registration in place but there are still options available to communities through Part 3A, and soon Part 5.

In general, unless stated otherwise in the deed of trust, the Trusts (Scotland) Act 1921 incorporates wide-ranging statutory powers into all trusts, including the power to sell or lease the trust estate, to acquire property, to appoint factors and lawyers, to borrow money, and to grant security over the trust property. This means that trusts should commonly be able to consider selling assets to communities if the proposal fits with the trust's purposes.

Community Engagement

In terms of trust legislation, there is little that prevents trusts from engaging effectively with communities. In practice, some trusts could behave in a way that is not conducive to good community relations, possibly due to the way the trust deed is written, or due to a lack of understanding of community needs and priorities, or simply operating without sufficient engagement. However, there is no inherent reason that prevents good practice in engagement.

There are no formal requirements for registering a trust unless it is a charitable trust and there are no requirements to notify changes of trustees in any public register. While this can simplify administration and operation for the trust, it may lead to feelings that there is a lack of transparency around trust ownership and management, which can have an impact on community engagement.

The Land Reform (Scotland) Act 2016 placed a duty on Scottish Ministers to issue guidance on engaging communities in decision relating to land. This guidance applies to land owning trusts of all types in the same way that it applies to other land owners.

Decision Making and Publicity

The foundation trust document will set out the trust purposes, which may be specific and/or prescriptive, and is likely to go into some detail as to what is expected of the trustees in terms of implementing and furthering those trust purposes. This can include specific provision for how decisions are taken by the trustees.

Where trustees are remote from the land that is owned and there are inflexible decision-making processes in place, it could take some time for decisions to be reached. All trustees have a right to take part in decision-making processes and must have the opportunity to have their say in relation to trust business. This could delay timescales for decision making.

Ultimately, it should be borne in mind that trustees of private trusts are obliged to act in the best interests of the trust and its beneficiaries. However, that does not prevent them from adopting good practice processes that allow for flexibility and timely decision-making. Expectations of good practice in land rights and responsibilities apply to all types of land owner, including trusts.

Taxation and Reliefs

Although in the past, it was sometimes the case that tax benefits could be obtained by using a trust, this is much less so now. Trusts pay tax on their income (with fewer allowances than individuals) and pay Capital Gains and Inheritance Tax on their assets. HMRC's general policy is understood to be that money and assets in a trust should pay roughly the same tax, and have substantially the same tax reliefs and allowances, as if the property were held by private individuals.

Updating Trust Legislation

The Scottish Law Commission has carried out research and written discussion papers on modernising Trust law in Scotland which have led to extensive recommendations and the drafting of a new Trusts (Scotland) Bill.

The new bill, drafted in 2018, is aimed at modernising the provisions of trust legislation and making it clearer and more fit for modern day use. The new bill covers administration of trusts and the powers and duties of trustees, and the court's powers to vary trusts, and also seeks to introduce new provisions. It is not known when the Scottish Government will seek to enact these changes.

Next Steps

The Scottish Land Commission commissioned a discussion paper exploring the application of trust and charity law on landholding trusts and their dealings with communities which informs this Land Focus paper. The core issues identified in relation to land ownership by trusts relate more to culture, governance, and operations than legislative constraints. Therefore, the Land Commission will focus on supporting good practice in land rights and responsibilities through our Good Practice Programme. We will be developing and promoting protocols and guidance to support good governance, openness and accountability, and genuine engagement in relation to land use, management, and ownership.



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