



SCOTTISH LAND COMMISSION  
COIMISEAN FEARAINN NA H-ALBA

# Legislative proposals to address the impact of Scotland's concentration of land ownership

A discussion paper from the Scottish Land  
Commission

4 February 2021



## EXECUTIVE SUMMARY

Scotland's unusually concentrated pattern of land ownership is a matter of longstanding concern. Many people are deeply uncomfortable with the fact that so much of Scotland is owned or controlled by so few, in a pattern that is not necessarily shaped for today's needs.

The Scottish Land Commission has undertaken extensive research to explore these concerns and found the core issue to be the concentration of social, economic and decision-making power that often goes hand in hand with concentrated land ownership.

Concentrated land ownership can create situations in which a single individual or organisation can exercise power over who can obtain land, when, what for and at what price. The risks associated with such concentration of power run counter to the needs of a modern, dynamic economy. They can result, sometimes inadvertently, in dysfunctional rural land markets that can make it difficult for rural communities to fulfil their economic potential, limit opportunities for community development and can constrain or even damage social resilience.

The issues associated with concentrated power in localised rural land markets have close parallels in mainstream economics and can result in adverse effects similar to those associated with corporate monopolies. Unlike other markets however, there are currently no mechanisms for regulating these effects in the land market to ensure that it operates efficiently and in the public interest.

The Land Commission published its evidence on concentrated landownership in 2019 alongside a series of recommendations about how the issues identified could be addressed. In recognition of the current gap in regulatory oversight, the recommendations included three proposals for legislative change:

- A requirement for land holdings over a defined scale to prepare and publicly engage on a **management plan**, a practical mechanism to moderate the power of ownership by ensuring communities are more involved in influencing and benefitting from land use decisions
- A **statutory review mechanism** framed within the principles of Scotland's Land Rights and Responsibilities Statement to be a practical means of intervention to address adverse impacts of concentrated ownership in a specific land holding where these occur
- A **public interest test** for significant land acquisition, at the point of transfer, to test whether there is a risk arising from the creation or continuation of a situation in which excessive power acts against the public interest.

At the invitation of Scottish Ministers, the Land Commission has continued to develop these ideas since the recommendations were published. This paper explains why they are required and summarises how they could work in practice.

The measures are intended as targeted and proportionate ways of addressing the risks of excessive power associated with concentrated land ownership. They are modernising measures, designed to help the land market operate more efficiently and support a dynamic and resilient Scottish economy.

The measures are not unusual in an international context. The evidence published in 2019 shows that Scotland is currently an outlier by international standards in having no constraints on who can own land or how much they can own. The measures also have parallels in other sectors – the Competition and Markets Authority, for example, exists to promote competition in the corporate sphere and ensure that markets work well for consumers, businesses, and the economy.

Implementing these proposals would create an important opportunity for Scotland to progress the realisation of the human rights framed within the International Covenant on Economic, Social and Cultural Rights, and at the same time ensuring that obligations under the European Convention for Human Rights are met.

The measures will not, on their own, deliver the longer term systemic change in patterns of land ownership that are required to realise the full benefits of Scotland's land resource. Achieving this will require more fundamental policy reform, probably including changes to the taxation system. The need for such reform was also identified in the recommendations made by the Land Commission in 2019 and is the subject of ongoing policy work.

The proposals set out in this paper should therefore be seen as an important next step in Scotland's land reform journey that will help to modernise landownership and deliver a fairer, more dynamic and productive economy.

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*For further information on this project contact:*

James MacKessack-Leitch

Scottish Land Commission, Longman House, Longman Road, Inverness, IV1 1SF

Tel: 01463 423 300 [james.mackessack-leitch@landcommission.gov.scot](mailto:james.mackessack-leitch@landcommission.gov.scot)

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# 1 Introduction

Scotland's pattern of land ownership, particularly in rural areas where land ownership is often very highly concentrated, has been a core driver of land reform since the establishment of the Scottish Parliament. Numerous factors throughout history have combined to create a concentrated pattern of rural land ownership that continues today. Significant steps have been taken, in 2003<sup>1</sup>, 2015<sup>2</sup> and 2016<sup>3</sup>, to change this pattern of ownership with the introduction of bold new legislation that is now recognised far beyond Scotland as a watershed in the land reform movement – and the Government remains committed to maintaining the pace of change.

That is why, when the Scottish Land Commission ('the Land Commission') was established in 2017, one of the first topics the Scottish Government asked it to look at was the effects of Scotland's unusually concentrated pattern of land ownership. In 2019 the Land Commission published a significant report on the issues associated with Scotland's concentrated pattern of landownership, alongside initial recommendations for further measures that could be taken to address the adverse effects identified.

This paper sets out some of the work that has been done since 2019 to progress the non-statutory recommendations made by the Land Commission, as well as presenting initial ideas on how three modernising measures proposed for statutory change could work in practice. It is intended to inform discussion about the next steps for Scotland's land reform journey.

## 1.1 Purpose of this Paper

The recommendations published by the Land Commission in 2019 contained proposals for three new legislative mechanisms:

- The requirement for significant land holdings to engage on, and publish, a **Management Plan**
- A **Land Rights and Responsibilities Review** process, to take effect where there is evidence of adverse impacts
- A new **Public Interest Test** that would determine whether significant land transfers or acquisitions are in the public interest.

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<sup>1</sup> Land Reform (Scotland) Act 2003: <https://www.legislation.gov.uk/asp/2003/2/part/2/2003-02-25>

<sup>2</sup> Community Empowerment (Scotland) Act 2015: <https://www.legislation.gov.uk/asp/2015/6/contents/enacted>

<sup>3</sup> Land Reform (Scotland) Act 2016: <https://www.legislation.gov.uk/asp/2016/18/contents/enacted>

The primary purpose of this paper is to inform policy development and set out the Land Commission's initial views about how these proposed mechanisms could operate. The views presented are entirely those of the Land Commission rather than the Scottish Government. It will be for Scottish Ministers, and ultimately for the Scottish Parliament, to determine if and how to take such proposals forward. This would require significant engagement, consultation and consideration of the issues raised.

### **1.1.1 Scope of Paper**

Modernising Scotland's pattern of landownership will not be achieved through legislation alone. The recommendations published in 2019 explicitly recognised the need for, and importance of, non-statutory action taken in collaboration with the landowning sector alongside carefully targeted policy interventions.

The paper highlights some of the significant work that has been undertaken since 2019 to progress these non-statutory efforts. Alongside this the Commission is also working on wider policy options that could help bring about a more diverse, accountable, and productive pattern of land ownership and use. Plans for progressing this work are set out in the [Land Commission's Strategic Plan for 2020-23](#) and include ongoing work on the potential of tax reforms to support a more diverse and productive pattern of ownership and work looking at other policy and market mechanisms.

It is very important that the proposed legislative mechanisms described in this paper are understood within this broader context, as part of a comprehensive package of land reform interventions.

## **1.2 Structure of this Paper**

The remainder of this paper is structured as follows:

- [Section 2](#) provides an overview of Scotland's land reform journey to date, highlighting key legislative and policy innovations, and explaining the context within which the current proposals have been developed.
- [Section 3](#) explains why the proposals in this paper are a logical next step in Scotland's land reform journey. It summarises the potential adverse effects of concentrated landownership, why they need to be addressed and why legislative intervention is required to do this.
- [Section 4](#) sets out the fundamental principles underpinning the proposals in relation to Scotland's legal and international obligations.
- [Section 5](#) discusses the proposed requirement for a management plan.
- [Section 6](#) discusses how the proposed Land Rights and Responsibilities Review could work.
- [Section 7](#) discusses how the proposed public interest test could operate.
- [Section 8](#) highlights some important issues that will need to be considered in taking forward the proposals and the next steps.

## 2 Land Reform: The Story So Far

This section provides an overview of the emergence of Scotland's contemporary land reform movement, highlighting some of the key legislative and policy innovations that have helped to drive it forward, and explaining the context within which the current proposals have been developed.

### Key Points

- Scotland has a long history of land reform, significantly focused on community land ownership, the legal basis for which was extended in 2003, 2015 and 2016.
- The 2015 and 2016 Acts were particularly significant because of their emphasis on human rights and recognition of land reform as a vehicle for social and economic progress.
- The 2016 Act laid the groundwork for two key developments: The Land Rights and Responsibilities Statement, and the Scottish Land Commission.
- The Land Commission published a major investigation into the issues associated with Scotland's pattern of landownership in 2019 alongside recommendations about how the issues identified could be addressed.
- The Tenant Farming Commissioner (TFC) role was created by the 2016 Act and has proved highly effective in improving relations between landowners and tenant farmers. The work of the TFC is delivered through statutory codes of practice and accompanying guidance.
- A similar but non-statutory model is now being used to support the implementation of the Land Rights and Responsibilities Statement.
- The proposals in this paper would provide a statutory basis for this approach and are considered an important part of the next step in Scotland's land reform journey.

### 2.1 The Emergence of the Community Land Movement

Although there were a number of community acquisitions of land in the early 20<sup>th</sup> century, the community land movement really started gaining pace in the late 1990s and early 2000s with a series of high profile acquisitions and important policy innovations<sup>4</sup>. In the early days, community land acquisitions were often driven by

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<sup>4</sup> Key innovations included the establishment of the Community Land Unit within Highlands and Islands Enterprise in 1997 and the establishment of the Scottish Land Fund in 2001 to provide advice and financial support to aspiring community land owners.



insecurity and localised social and economic decline, linked to issues of neglect and disempowerment, often attributed to disengaged absentee landowners<sup>5</sup>.

These factors were important drivers behind early land reform legislation, including the Land Reform (Scotland) Act 2003, which established a new community right to buy. The new right gave rural communities that successfully registered an interest in land to be given the first option to buy it if it was offered for sale. The Community Right to Buy was extended to include urban areas under the Community Empowerment (Scotland) Act 2015, which also gave communities rights to apply to purchase land under certain circumstances even if the owner did not want to sell. These rights were further extended by the Land Reform (Scotland) Act of 2016, which created new rights for communities to acquire land in pursuit of the community's sustainable development.

Collectively, the community rights to buy have underpinned a legislative and cultural change which has seen community land ownership come into the mainstream as part of Scotland's land ownership mix. The opportunities these rights unlock can be, and have been, transformational for some communities.

## **2.2 The Land Reform (Scotland) 2016 Act**

By further extending community rights to buy, the 2016 Act marked another important step for Scotland's community land movement – but the long-term significance of the Act is much wider than this. The Act also contained important provisions that mark a distinct turning point for the land reform movement that are likely to shape the future nature and direction of Scotland's land reform journey for decades to come.

The significance of the 2016 Act lies in the emphasis it places on human rights and the idea of land reform as a vehicle not just for community empowerment, but of social and economic progress.

Of particular importance in this regard was the requirements for Scottish Ministers to prepare and publish a Land Rights and Responsibilities Statement and the creation of the Scottish Land Commission, creating a framework and intent for ongoing reform.

### **2.2.1 The Land Rights and Responsibilities Statement**

The Scottish Government fulfilled the requirement to publish a Land Rights and Responsibilities Statement (LRRS) in 2017<sup>6</sup>. The statement, which is the first of its kind anywhere in the world, sets a clear vision for a strong relationship between Scotland's land and its people. Land rights and responsibilities are about owning, managing, and using land in a fair and just way that benefits everyone in Scotland. The LRRS is about

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<sup>5</sup> MacAskill, J. (1999), *We have won the land*. Acair, Stornoway. 224 pp.

<sup>6</sup> Scottish Government (Sep 2017), [Scottish Land Rights Responsibilities Statement](#)

realising the rights of everyone in relation to land, not just property rights, and about the responsibilities that come with land rights. It consists of six principles:

- The overall framework of land rights, responsibilities and public policies should promote, fulfil, and respect relevant human rights in relation to land, contribute to public interest and wellbeing, and balance public and private interests. The framework should support sustainable economic development, protect, and enhance the environment, help achieve social justice and build a fairer society.
- There should be a more diverse pattern of land ownership and tenure, with more opportunities for citizens to own, lease and have access to land.
- More local communities should have the opportunity to own, lease or use buildings and land which can contribute to their community's wellbeing and future development.
- The holders of land rights should exercise these rights in ways that take account of their responsibilities to meet high standards of land ownership, management, and use. Acting as the stewards of Scotland's land resource for future generations they contribute to sustainable growth and a modern, successful country.
- There should be improved transparency of information about the ownership, use and management of land, and this should be publicly available, clear and contain relevant detail.
- There should be greater collaboration and community engagement in decisions about land.

### **2.2.2 The Scottish Land Commission**

The Land Commission was established in April 2017. It consists of five Land Commissioners and a Tenant Farming Commissioner (TFC). The functions of both the Land Commissioners and the TFC are clearly set out in the Act but are distinctly different: whereas the role and functions of the TFC are quite specific (see section 2.4), the remit and functions of the Land Commissioners are very broad<sup>7</sup>. This has had a significant influence on the work of the Land Commission to date and informed the proposals contained in this paper.

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<sup>7</sup> The Act defines the functions of the Land Commissioners as being to: review the impact and effectiveness of any law or policy; recommend changes to any law or policy; gather evidence; carry out research; prepare reports; and to provide information and guidance on any matter relating to land in Scotland.

## 2.3 Investigation into Scale and Concentration of Land Ownership

Within this broad remit, one of the first topics the Scottish Government asked the Land Commission to look at after it was established in 2017 was the effects of Scotland's unusually concentrated pattern of land ownership.

As a starting point for this investigation the Commission commissioned research<sup>8</sup> to find out about how other countries manage their land markets and what interventions they put in place for doing this. The findings from this research were clear: Scotland is an outlier. Although in Scotland there are no legal restrictions on who can own land or how much they can own, such restrictions are commonplace elsewhere in the world.

The next step in the Land Commission's investigation involved a public call for evidence in which people with experience of living or working in areas where landownership is particularly concentrated were invited to share their experience about how this has affected their lives. More than 400 people and organisations from across Scotland responded to the call for evidence and an analysis of the evidence they provided was published<sup>9</sup> in March 2019.

The research was significant both because of its scale (this was the most comprehensive exercise of its kind ever undertaken in Scotland) but also because of its findings, which added four important new dimensions to Scotland's land reform narrative:

- **A clear distinction between scale and concentration:** the research found that the concentration of social, economic and decision-making power associated with land ownership is the main risk factor, rather than the scale of a landholding.
- **An emphasis on land-use as well as landownership:** many of the adverse effects identified were underpinned by concerns about the ability of residents of rural communities to influence decisions about how land is used and a belief that they often derive little benefit from decisions that are made.
- **Recognition that private landownership itself is not the root of the problem:** While many people equate concern about the scale and concentration of landholdings with hostility toward private ownership, the two issues are distinct. The risks of concentrated power can apply regardless of the sector of ownership.
- **Recognition of the importance of fairness:** for the first time the social inequities long associated with Scotland's pattern of landownership were linked to international evidence on the harmful effects of inequality on economic outcomes.

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<sup>8</sup> Glass et. al (2018), [Research on Interventions to Manage Land Markets and Limit the Concentration of Landownership Elsewhere in the World](#)

<sup>9</sup> Scottish Land Commission (March 2019), [Investigation into the Issues Associated with Large scale and Concentrated Landownership in Scotland](#)

### 2.3.1 The Recommendations

Based on the evidence, the review concluded that:

- Concentration of land ownership has a direct influence on the public interest with potential adverse consequences through the exercise of market and social power and that this is amplified by large scale ownership
- There is evidence of the adverse effects of excessively concentrated market and social power being realised and causing significant detriment to the communities affected
- There is a need for a statutory framework to mitigate the risks and adverse impacts of concentrated ownership.

To address these issues the Land Commission published a set of recommendations to Scottish Ministers<sup>10</sup>, which were arranged in three broad groups:

- Recommendations for new legislative mechanisms that could help to address the key risks and negative effects of concentrated ownership. The proposals included:
  - The requirement for significant land holdings to engage on, and publish, a **Management Plan**
  - A **Land Rights and Responsibilities Review** process, to take effect where there is evidence of adverse impacts
  - A new **Public Interest Test** that would determine whether significant land transfers or acquisitions are in the public interest.
- Recommendations for further policy work to diversify the pattern of landownership and improve the accountability of land use change
- Recommendations for immediate voluntary action, to be taken forward with the landowning sector, to address the most urgent issues identified.

### 2.3.2 Response to the Recommendations

On 21 March 2019 Parliament held a debate in which consideration was given to the Land Commission's report and recommendations. Parliament agreed a motion that noted the importance of land and urged the Scottish Government *"to support the recommendations of the Scottish Land Commission on how to deliver interventions in the operation of Scotland's land markets and ownerships that will provide disincentives to the future accrual of large privately owned land holdings and help deliver a more equitable distribution in the ownership of Scotland's land assets in the public interest."*

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<sup>10</sup> Scottish Land Commission (March 2019), [Review of Scale and Concentration of Land Ownership: Report to Scottish Ministers](#)

In April 2019 Scottish Ministers invited the Land Commission to work with stakeholders and officials to develop the recommendations further. Since then, the Land Commission engaged with stakeholders on the findings of the 2019 review and has been working to develop the proposals further to inform future Parliamentary consideration.

## **2.4 The Experience of the Scottish Tenant Farming Commissioner**

When the Scottish Land Commission was established in 2017, an important feature was the creation of the Scottish Tenant Farming Commissioner (TFC) role. The experience of the TFC has been instrumental in developing the proposals contained within this paper so it is helpful to reflect on how this evolved.

The role of the TFC emerged as a result of a review undertaken in 2015<sup>11</sup>, which found that a significant number of landlord-tenant relationships were dysfunctional, often with both parties failing to take constructive action. This experience was instrumental in informing the provisions within the 2016 Act relating to the TFC.

As a result, the functions of the TFC as set out in the Act are quite specific and include the preparation and promotion of Codes of Practice on agricultural holdings and the right to inquire into alleged breaches of those Codes. Importantly, the TFC also has some limited powers to enforce these functions, including the ability to impose a financial penalty in the event of non-compliance with a legitimate request for information, and an obligation to publish a report on the findings of inquiries into alleged breaches.

Experience to date suggests that this model has been extremely successful in helping to bring stakeholders together and improve practice within the sector. A statutory review of the functions of the TFC was carried out in early 2020<sup>12</sup>, which found that the Codes of Practice issued were easy to understand, useful, fair, and robust, and that they had helped to improve relations between tenants and landlords. The findings were clear that the current powers of the TFC should be retained and recognised a strong trend towards increasing the powers available to the TFC.

However, perhaps the strongest evidence of the success of the approach is that, despite a steadily increasing case load, in three years of operation the TFC has not yet had to formally investigate a breach.

This has been attributed to the manner in which the functions of the TFC are exercised: with a strong focus on resolving disputes through constructive dialogue and mediation, underpinned by a clear decision-making framework.

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<sup>11</sup> The Scottish Government (2015), [Review of Agricultural Holdings Legislation: final report](#)

<sup>12</sup> The Scottish Government (April 2020), [Tenant Farming Commissioner Functions: review](#)

### **2.4.1 Building on Experience: Land Rights and Responsibilities Protocols**

An important component of the recommendations that the Land Commission made to the Scottish Government in 2019 was for the need for voluntary action, led by the land ownership sector, to embed a more inclusive approach to landownership that better supports the public interest in land. In 2020 the Land Commission introduced a new framework to support the culture change necessary to achieve this.

This framework draws heavily on the experience of the TFC and the effective role of the Tenant Farming Codes of Practice. It consists of a suite of Protocols and associated guidance, which are designed to provide clarity on what is expected as normal, reasonable practice in implementing the principles of the LRRS. The overarching aim of the Protocols is to support a programme of good practice in land rights and responsibilities that establishes a common understanding of what is expected and supports people in addressing issues on the ground.

To date, eight [Protocols](#) have been published covering:

- Community engagement in decisions relating to land
- Transparency of ownership and land use decision making
- Land ownership by charities
- Land ownership by private trusts
- Diversification of ownership and tenure
- Negotiating transfer of land to communities
- Good stewardship of land
- Common Good land.

As well as providing clarity of expectations, the protocols provide a feedback mechanism by which examples of good or bad practice can be raised directly to the Land Commission. Early experience in the first year of operation shows a strong appetite for the clarity that the protocols provide, within all land ownership sectors, and indications that they are being used positively by communities, landowners and managers, and other interested parties.

## **2.5 Lessons Learned: Implications for the Next Steps**

In 1999, Lord Sewel remarked that *“it is crucial that we regard land reform not as a once-for-all issue but as an ongoing process”*<sup>13</sup>. Developments since then have shown how prescient this remark was and demonstrated the need for ongoing reform.

The community land movement has evolved into a powerful force for social and economic progress. This evolution has occurred in tandem with the emergence of

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<sup>13</sup> Final report of the Land Reform Policy Group (1999), Scottish Executive

powerful demands across the UK for more democratic community control of property and other assets, demands that have grown in strength and influence during the Covid-19 pandemic.

This means that community rights to buy, while core to Scotland's land reform programme, are no longer sufficient. They are one part in what must be a wider, ongoing programme of reform of land rights and land markets to deliver a more diverse and productive pattern of land ownership that enables Scotland to better fulfil its full potential.

The experience of the TFC role has also demonstrated that a collaborative and inclusive approach, underpinned by an appropriate legal framework, can produce a well-functioning system characterised by healthy relationships in which disputes can be resolved fairly, and usually without recourse to legal action.

The LRRS Protocols provide an initial approach to providing similar clarity, but currently without statutory underpinning. As a voluntary approach, there is no requirement for landowners to use the LRRS Protocols and no mechanisms encourage their use or address incidents of poor practice.

This contrasts with the statutory framework for the TFC Codes of Practice, backed by investigatory powers, which ensure all relevant parties adhere to basic good practice – a mechanism that has been widely welcomed.

Learning from, and contrasting these approaches, the proposals in this paper aim to better support the implementation of the LRRS by outlining underpinning legislative mechanisms that go beyond reliance on individual voluntary behaviour change.

### 3 The Case for Change: The Next Steps in the Journey

This section explains why the Commission has proposed legislative measures to address the impacts of concentrated land ownership and what such a package of measures is intended to achieve.

#### Key Points

- Research by the Land Commission has shown that concentrated landownership can have serious adverse consequences for communities.
- Action is required to protect fragile communities from possible misuse of power associated with concentrated landownership and help ensure that rural communities can fulfil their full potential.
- While voluntary action can address some of the risks of concentrated land ownership, it will not be sufficient to tackle the wider systemic problem.
- Existing land reform legislation is not sufficient for tackling these wider systemic risks or for enabling the full realisation of human rights in relation to land.
- The proposals described in this paper would help correct important failures in Scotland's land market and support a more productive economic model.

#### 3.1 The Need for Intervention

There are two main reasons why action is required to address the adverse effects of concentrated land ownership: to protect fragile communities from potential misuse of power, and to help ensure that rural communities can achieve their full potential.

##### 3.1.1 *Protecting Fragile Rural Communities*

In 2018 the Scottish Land Commission issued a public call for evidence in which people with experience of living and working in communities where most of the land is owned by a very small number of individuals or organisations were invited to share their experience. More than 400 people responded from all over Scotland including landowners, land managers, community representatives and residents.

An [analysis of the responses](#) was published in March 2019. A key finding from the analysis was that most of the disadvantages associated with Scotland's current pattern of landownership relate to the concentration of social, economic, and decision-making power that it often entails. The research concluded that, in some parts of Scotland, this concentration of power is an impediment to economic development that is causing significant and long-term harm to affected communities. The research identified examples of several different types of adverse effects associated with concentrated landownership within some rural communities, including:



- Inadequate provision of affordable housing due (in some cases in part) to either:
  - restrictions in the supply of private rental accommodation; and/or
  - restrictions in the supply of land suitable for new housing development
- Limited business expansion due to difficulties in securing suitable land/premises on reasonable terms because of a lack of alternative options within the locality
- Inability to secure work or contracts due to an individual or business being ‘blacklisted’ by a dominant landowner with a high degree of control over demand for local services (monopsony)
- Community development limited by landowner resistance to projects that would deliver social, environmental, and/or economic benefits for the community.

In identifying these adverse effects, the research drew parallels between concentrations of power in rural land markets, and excess market power – or ‘monopoly power’ – in other areas of the economy. In other sectors, when the supply of a good or service is controlled by a single entity, mechanisms are in place to protect consumers from excessive market power. In contrast, the concentration of power in land markets is largely unregulated, and the state currently has no mechanism to intervene to ensure that the land market functions effectively.

The primary purpose of these proposals is to rectify this and make land markets work more effectively in the public interest.

### **3.1.2 Realising Scotland’s Full Potential**

The need for intervention is based on more than a simple desire for natural justice. During the Covid-19 pandemic the urgent need to refocus our economic model on human wellbeing and the vital role that communities can play in helping to achieve this became ever more apparent. As we begin to emerge from the pandemic, the full potential of models like ‘community wealth building’ and ‘community powered regeneration’ as key drivers of social and economic progress are becoming clear. Reforms to ensure Scotland’s land markets operate effectively in the public interest will be fundamental to realising this potential.

Scotland’s current pattern of landownership is, in places, a barrier to achieving this because it reinforces a power structure that inhibits progress. When a single individual or organisation has the ability to decide who can make use of land in a given community, when, for what purpose, and at what price, this gives that individual or organisation a huge amount of power over local development outcomes. Evidence gathered by the Land Commission shows quite clearly that in some parts of rural Scotland power is not being exercised as well as it could be, with the result that some communities are unable to make the best use of available land resources.

This should not be taken to imply that landowners in such communities are necessarily or always abusing their power, but rather that in some cases landowners do not act to maximise the potential of the available land resource. It is a systemic risk, as much as

an issue of individual behaviour. In a country where so much land is owned by relatively few people this can have a serious detrimental impact on long term rural development outcomes. Ensuring that provisions are in place to enable communities to realise the full potential of their natural assets must therefore be an important component of any comprehensive rural development and economic policy and is the other main reason why intervention is required.

### **3.2 The Rationale for Legislative Intervention**

In principle there are a variety of mechanisms that could be used to address the adverse effects of concentrated landownership. This section explains the three main reasons why the Land Commission has proposed legislative measures.

- While voluntary action can address some of the risks of concentrated land ownership identified, the evidence points to this being a systemic, structural risk in the current pattern of land ownership, which will require structural change to address
- There are important issues that existing legislation does not address that mean further legislative reform is required
- The proposed measures would provide a means of correcting important failures in the land market and help Scotland to move toward a more productive model of economic development.

#### **3.2.1 The Limits of Voluntary Action**

The issues associated with Scotland's concentrated pattern of landownership are not new. Debates about the use and misuse of power within fragile rural communities have been ongoing for generations. Yet despite this long history, the adverse effects of concentrated landownership in some rural areas persist.

The need to address these issues was an important driver behind the Land Reform (Scotland) Act 2016, and reaffirmed by the Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, in her response to the recommendations of the Land Commission in April 2019.

Sectoral leadership has been unable to fully mitigate the issues identified in the research, even with the publication in 1999 of the "Code of Practice for Responsible Land Management" by the Scottish Landowners Federation,<sup>14</sup> followed by the "Landowners' Commitment" in 2014 by its successor, Scottish Land and Estates.<sup>15</sup>

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<sup>14</sup> <https://www.heraldscotland.com/news/12009241.landowners-fight-back-with-legal-action-threat-slf-launches-code-of-practice-to-counter-radical-land-reform-proposals/>

<sup>15</sup> <https://www.scottishlandandestates.co.uk/about-us/landowners-commitment>

The Land Commission has more recently initiated a programme of activity, underpinned by the Land Rights and Responsibilities Protocols described in section 2.2.1, designed to encourage and support good practice within the landowning sector. While there has been a commendable level of engagement with this programme from some parts of the sector, this is of course neither universal nor mandatory.

Voluntary action – regardless of who is behind it or how it is promoted – will always be limited in its impact while a minority can act as they see fit, regardless of wider interests and circumstances. The risks identified are a systemic result of the pattern of landownership and relying always on individuals' behaviour to mitigate these risks is insufficient given the actual and potential impacts.

### **3.2.2 Existing Legislation**

Communities and local authorities already have at their disposal various instruments that could be used to help address the adverse consequences of concentrated land ownership. Compulsory Purchase Orders (CPOs), for example, can be used by local authorities and some other public agencies in certain circumstances to purchase land without the agreement of the owner if there is a strong enough public interest case for doing so. Similarly, under Community Right to Buy powers, communities have a mix of pre-emptive and absolute rights to buy.

However, by their very nature, these mechanisms sit at the more extreme end of the spectrum of potential interventions and are not appropriate for all scenarios.

While a wholesale change in landownership is sometimes necessary to affect change within a community, this is not always the case, and in such circumstances the powers available under Community Rights to Buy are therefore of little assistance. In some cases, the community may not have the capacity, resources, or inclination to take on outright responsibility for the land themselves and may simply wish to see the property managed more effectively in the public interest. At present there is no effective mechanism for bringing about such intermediate solutions, leaving community acquisition as the only recourse to action.

This lack of intermediate options for communities is particularly important because the communities where action is most needed are often those least able to take advantage of existing legislative options. The capacity for action by such communities has often been fatally undermined by the long-term systematic effect of concentrated power.

Another important gap within the existing legislative framework is that it offers no support to proactive individuals, families, and businesses within the local community, who may wish to acquire access to land for their own purposes. While the primary motivation of such individuals may well be private gain, the spinoff benefits for the wider community – in terms of services, amenities, additional spending, environmental improvement, population growth, and general vibrancy – should not be

underestimated. At present there is no effective mechanism for supporting such individuals or enabling such activity.

### **3.2.3 Making Land Markets Work**

It is now widely accepted that the UK's current economic model is not working well enough. It has given us increasing inequality, deep social divisions, and a depleted natural environment. Change will require us to reinvent our economic model so it prioritises wellbeing. Changing how we think about land and making sure it is properly reflected in decision-making will help us to do this.

Achieving this will require long-term systemic changes to how we own, use, and manage land. This will not be achieved through a single legislative instrument, but through incremental steps such as those set out in this proposal.

Within our current economic model a number of criteria need to be in place for the market to function effectively. These criteria include:

- All parties to a transaction must be able to access relevant market information
- The market should be diverse, with a large number of suppliers
- No barriers to prevent people from entering (or leaving) the market
- Any negative spill over effects on the community from private economic activity should be borne directly by the entity responsible.

It is evident that in Scotland's rural land market these criteria often do not apply. In some communities the supply of land is dominated by a single provider; information about who owns land is often difficult to obtain; it can be difficult for businesses to acquire the land they need to operate; land can be transferred privately without market transparency; and the way land is managed frequently has unintended negative effects for the surrounding community and environment that are not borne by the landowner. Addressing these sources of market failures would help improve the operation of the land market, resulting in a more efficient allocation of resources and a more competitive economy.

There are many parallels between the criteria for a well-functioning market and the principles contained within the Land Rights and Responsibilities Statement (e.g. diversity, transparency, and good stewardship). Applying these principles, consistently and widely, could therefore be an effective way of improving the function of Scotland's land markets. However, there are currently no legislative provisions that enable these principles to be enforced. The proposals set out in this paper have been constructed around these principles so could help to address this.

The need to embed land in our economic model was recognised in September 2020 when the Government invited the Land Commission to advise on how it could factor land into its economic thinking<sup>16</sup>. This paper is part of our response to this invitation.

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<sup>16</sup> Scottish Government (2020), Protecting Scotland, Renewing Scotland: The Government's Programme for Scotland 2020-21.

## 4 Underlying Principles

The proposals for a statutory review and a public interest test would be a significant change from Scotland's traditional approach to regulating the land market and will require careful development to ensure that they are both effective and legally sound. To support this process, this section highlights some of the key principles underpinning the proposals with reference to the international human rights framework and established practice elsewhere in the world and in other sectors of the economy.

### **The Underlying Principles highlighted in this chapter are that:**

- The Scottish Government must meet its legal obligations under the European Convention on Human Rights, including property rights as set out in Article 1, Protocol 1 of the Convention.
- The Scottish Government also has an international obligation to support the progressive realisation of human rights, as framed by the International Covenant on Economic, Social and Cultural Rights.
- It is legitimate for the state to interfere with individual property rights if it is in the public interest to do so.
- It is neither necessary nor desirable for the public interest to be defined in legislation.
- Scotland is unusual in having no limitations on the amount of land any individual can own. Legal mechanisms that enable states to regulate land markets are commonplace elsewhere in Europe.
- Public intervention to address market failure, including monopoly power, is a well-established principle of public policy within the UK.
- Excessive market power is a recognised barrier to market efficiency and regulation to protect consumers from abuse of such power is commonplace across the developed world.
- A high burden of proof is required to demonstrate that the public interest outweighs individual rights in any given case.

### 4.1 Human Rights

All human beings are entitled to basic rights and freedoms that are enshrined and protected by international law. The Scottish Government is committed to creating an inclusive Scotland that protects, respects, and promotes these rights so any proposals for legislative reform must be set within this context. Of particular importance are:

- The UN International Covenant on Economic, Social and Cultural Rights
- The European Convention on Human Rights (ECHR).

The relevance of each of these to the proposals in this paper is considered below.

#### **4.1.1 The UN International Covenant on Economic, Social and Cultural Rights**

This Covenant stipulates that individuals have a variety of economic, social, and cultural rights including rights to food, housing, work, and an adequate standard of living.<sup>17</sup> Furthermore, article two of the Covenant imposes a duty on all parties to take steps to achieve the progressive realisation of the rights recognised by the Covenant “by all appropriate means, including particularly the adoption of legislative measures”.

The concentration of power associated with concentrated landownership presents a risk to the full realisation of human rights such as the right to housing and the right to work, and evidence from previous research (see section 3.1) suggests that this risk is already a reality in parts of Scotland. By providing tools that could help achieve the progressive realisation of such rights, the proposals set out in this paper provide an opportunity for Scotland to better fulfil its international obligations.

#### **4.1.2 The European Convention on Human Rights**

Scottish Ministers have a legal obligation to act in a way that is compatible with the ECHR. This includes Article 1, Protocol 1 (A1P1) which states that:

*“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”*

This provision of the right to peaceful enjoyment of possessions is one of the fundamental rights underpinning modern democracies and integral to a stable economy. However, the individual property rights enshrined in the ECHR are not absolute.

The ECHR expressly states that the right to property may be legitimately interfered with *in pursuit of the public interest*. Any mechanism that is a challenge to the A1P1 right must rightly meet a high bar in demonstrating the public interest.

In the context of regulating land ownership, it is worth noting in relation to A1P1 that although the right to peaceful enjoyment includes rights of disposal, there is no corresponding right to acquire, inherit, or be appointed trustee over, property. Nor does A1P1 prevent the imposition of pre-emptive rights of acquisition or transfer.

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<sup>17</sup> <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

### 4.1.3 Defining the Public Interest

The legitimate basis for interference with property rights naturally leads to questions about how the public interest can be determined and whether it is necessary or desirable for it to be strictly defined.

Although reference to the 'public interest' is found throughout public policy and legal frameworks, there is no conclusive definition of what it encompasses or how it is to be interpreted. By way of example the 'public interest' is invoked as part of:

- The prosecutor's discretion whether to prosecute
- Ministers' intervention in corporate mergers and acquisitions
- Decisions by the Information Commissioner about what information to release under freedom of information law
- Disclosures made in the context of employment contracts.

In these and other examples the 'public interest' is not defined in any fixed or overarching sense, as there is no absolute definition suitable for any and all cases. Rather the public interest is determined on a case-by-case basis depending on the particular circumstances of the question at hand.

This approach is also reflected in the various community rights to buy under the Land Reform (Scotland) Acts 2003 and 2016, which compel ministers to decline any application under the Right to Buy process *unless they are satisfied it is in the public interest*. While the public interest is referenced in these acts, it is not defined and the approach has now been tested in the courts (notably in the *Pairc Crofters v. Scottish Ministers* case) and found satisfactory.

## 4.2 Precedents for Intervention

In the context of the land market in Scotland the proposals outlined in this paper may appear to be quite radical, but the type of mechanisms proposed are actually quite normal in other parts of the world and in other sectors of the economy. This section examines some of these precedents.

### 4.2.1 International Experience

In 2018 the Land Commission published research<sup>18</sup> into land market controls in place in comparable developed economies. The key finding from this research was that,

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<sup>18</sup> Glass et. al (2018) Research on interventions to manage land markets and limit the concentration of land ownership elsewhere in the world, Scottish Land Commission [https://landcommission.gov.scot/downloads/5dd6c67b34c9e\\_Land-ownership-restrictions-FINAL-March-2018.pdf](https://landcommission.gov.scot/downloads/5dd6c67b34c9e_Land-ownership-restrictions-FINAL-March-2018.pdf)



while controls are targeted towards addressing each nation's specific needs and circumstances, legal mechanisms for regulating land markets are commonplace elsewhere in the world. Scotland, and indeed the UK, are outliers amongst developed economies in having very few restrictions in relation to who can own land or how much they can own.

Across the international experience controls are generally framed around three main objectives:

- Limiting foreign ownership
- Regulating land use
- Maintaining viable units.

In the majority of cases, formal approval, whether by a specific public agency or national or local government, is required before transfers of land are permitted. Aspiring landowners often have to make binding commitments on intended land use and management approaches when seeking approval, and in some cases land can be repossessed where conditions are breached.

In many nations, public authorities also possess extensive pre-emptive rights to buy, and regularly make use of them to safeguard the public interest in land.

In France, for example, the *Société d'aménagement foncier et d'établissement rural* (SAFER) possesses the pre-emptive right to buy over most rural property. The particular public interest justification is to preserve agricultural land and businesses, with SAFER offering property acquired through pre-emption to local farmers in the first instance. As a well-established mechanism operating over a number of decades, it is now common for outgoing landowners to negotiate with SAFER and avoid a potential triggering of pre-emptive rights, rather than going straight to the open market.

Of particular interest in the Scottish context are the many and varied European examples of interventions – many are long-standing, demonstrating the longevity of their aims – all of which are necessarily compliant with the provisions of the European Convention of Human Rights.

Further information on these and other examples is available in research published by the Land Commission in 2019<sup>19</sup>.

#### **4.2.2 Parallels in Other Sectors**

According to prevailing economic theory there are a number of pre-conditions that need to be met to secure the efficient operation of a competitive market economy. One of these is that in any given market there must be a diversity of suppliers to ensure that

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<sup>19</sup> *ibid.*

no single supplier is able to exert excessive control over the market. Where there are too few suppliers, or in the case of a monopoly situation only one, this can result in higher prices and/or under provision of the good or service in question, both of which are detrimental to consumers and society as a whole.

It is standard practice throughout the developed world for governments to intervene to correct this kind of market failure.

In the UK the basis for such intervention is provided in guidance produced by HM Treasury – the ‘Green Book’<sup>20</sup> – which sets out how projects, policies and programmes should be evaluated and appraised across the public sector. This guidance, which has been in place since the 1970s, is used by public officials across Scotland and the rest of the UK to inform decisions about which policies and interventions should be supported.

The Green Book identifies three reasons why it may be acceptable for the state to intervene in the market, the first of which is to ensure that markets work efficiently<sup>21</sup>. In defining the circumstances under which such intervention might be appropriate the guidance goes on to make explicit reference to the concept of market failure and highlights excessive market power (or monopoly power) as an example of how such failure can occur.

The ‘market failure’ approach to public intervention is a very well-established principle of public policy across the UK, grounded in conventional economic theory and supported by decades of experience. The fact that this approach has thus far failed to penetrate the operation of the land market is therefore something of an anomaly.

### **4.2.3 Regulatory Support**

The rationale for intervention set out above is significantly about addressing the economic and social impacts of excessive market power. It is therefore appropriate to look at how excess market power is managed in other parts of the economy as a starting point for developing these proposals. The importance of limiting excessive market power in other sectors of the UK economy is widely recognised and the subject of established regulatory approaches. Of particular relevance is the work of the Competition and Markets Authority (CMA) which exists to “*promote competition for the benefit of consumers*” and focuses explicitly on making markets work well for consumers, businesses, and the economy.

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<sup>20</sup> HM Treasury (2020), the Green Book: <https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-government/the-green-book-2020>

<sup>21</sup> For completeness, the other two justifications can be to achieve distributional objectives or to provide a good or service that would not otherwise be provided by the market.

The rationale underpinning the operation of the CMA is grounded firmly in theories of economic efficiency and the need to ensure that excessive market power does not result in market failure. To do this the CMA has jurisdiction to examine corporate mergers (including acquisitions and joint ventures) to make sure they do not harm competition.

While it is not required, voluntary notification in advance of merger is recommended to allow the CMA to conduct an initial assessment of any potential risks. Where notification is not given but the CMA decides to investigate, due to statutory time limits this may not leave sufficient time to resolve any issues promptly, escalating – perhaps unnecessarily – to a detailed investigation.

Where mergers are deemed problematic the CMA also has the power to institute remedies<sup>22</sup>, which can be:

- Structural – requiring the sale of assets (accounts for the majority of remedies) or
- Behavioural – changing operational practices to improve competition in the market.

The CMA does have the power to pause ongoing mergers, and if necessary, force them to be unwound. Similarly, completed mergers can be effectively unwound through the use of structural remedies – i.e. forced sale assets which de facto recreates the previous separate companies.

Beyond the CMA, many sectors of the economy and society also have dedicated regulators with a variety of powers to issue codes of practice and guidance, often backed by enforcement powers to ensure operations meet expected behaviours. The legislative reforms proposed by the Land Commission are designed to enable principles that are normal in other sectors to be extended to the regulation of market power in land ownership.

The land market is of course in many ways quite different to other markets. Unlike other markets, the supply of land is finite and cannot be readily increased to meet demand and every parcel of land is, at least to some extent, unique. These characteristics mean that the land market is, if anything, even more vulnerable to excessive market power than other markets and therefore at least as much in need of regulation.

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<sup>22</sup> <https://www.youtube.com/watch?v=QQr-ZlhC0BM>

### **4.3 Balancing Individual Rights and the Public Interest**

Where the public interest case for intervention in property rights is being made, the subsequent, and more challenging, question is on how to balance the existing individual rights of the landowner against the wider public interest.

The decision-maker does not have free reign to act as they see fit, but must satisfy four key points aimed at establishing fair balance and proportionality:

- Whether there is a legitimate aim sufficiently important to justify a restriction of rights
- Whether the measure adopted is rationally connected to that aim
- Whether the aim could have been achieved by less intrusive means
- Whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

Inevitably these questions must be satisfied on a case by case basis, although in broad terms the case for legitimacy, the rational link between the measures and their stated aim, and the case against a less intrusive approach, are all set out above.

### **4.4 Lawfulness**

A broader consideration is the overall lawfulness of the mechanisms. The lawfulness of any statutory mechanism relies on three key features, that the mechanism is:

- Accessible, in that the language used to describe the mechanism is clear and readily understood
- Precise, in that the purpose and aims of the mechanism are well defined and unambiguous
- Foreseeable, in that the effects and outcomes of operation of the mechanism are predictable and do not lead to unintended consequences.

These are key considerations to be addressed in careful design and drafting of provisions, but there is in principle no reason why the options outlined in this paper could not fulfil these requirements.

### **4.5 Sound Foundations**

While the proposals presented in this paper will require substantial further work prior to implementation, the preceding discussion provides some assurance that the underlying principles upon which they are based provide a foundation for mechanisms that are legitimate, lawful, and proportionate.

The proposals in this paper do not create any novel powers or principles. By drawing on existing legal mechanisms from other sectors, and principles already established in

land reform legislation, these proposals merely seek to bring the land market and land ownership into line with the wider economy in serving the public interest.

## 5 Requirement for Management Plans

The Land Commission's report to Ministers of March 2019<sup>23</sup> recommended that landholdings above a defined scale threshold should be required to prepare and engage on a management plan incorporating community engagement. This section discusses this proposal further.

### Key Points

- The Land Commission's recommendations to the Scottish Government included the proposal that landholdings above a certain scale should be required to produce an estate management plan.
- This is a practical means to address the findings that communities should have greater ability to influence and benefit from decision making, and further embed the principles of the Land Rights and Responsibilities Statement.
- This mechanism could be delivered as part of a statutory based set of Codes of Practice as described in section 6, or as a stand-alone legislative requirement. The Land Commission sees advantages in the former.

### 5.1 Overview

This recommendation arises from the reasonable expectation that any landholding operating at scale should prepare and engage on a management plan that demonstrates delivery against the LRRS and connects with local priorities, opportunities, and public policy. The requirement to prepare and, importantly, engage on a management plan would address some of the risks of concentrated ownership, by moderating the power of decision-making through wider involvement and influence. It could provide the necessary basis for transparency of objectives, collaboration, and widening the influence on, and benefits from, decision-making.

While a management plan might reasonably be considered good practice for all landholdings, the caveat that this recommendation should only apply to landholdings above a certain size is intended to ensure that the proposal would not create disproportionate administrative burdens on smaller landholdings. It is not, for example, envisaged that the proposal would apply to most family farms.

It is anticipated that the plans would be required to set out how the management of the landholding supports the principles of the LRRS and contributes to relevant land use, economic and community development priorities, and opportunities as expressed in community plans, regional and national policy. It is envisaged that the plans would be

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<sup>23</sup> Scottish Land Commission (March 2019), [Review of Scale and Concentration of Landownership: Report to Ministers](#)

required to include a community engagement plan setting out how community engagement is embedded.

It is envisaged that enforcement could be based on a range of cross compliance mechanisms, such as being a pre-requisite for access to regulatory consents and fiscal support.

## **5.2 Key Issues**

Key issues to be considered in developing the proposal include the question of proportionality and the risk that the proposed mechanism could become something of a box-ticking exercise. Many landowners will already have business plans and management plans for specific enterprises. The purpose of this proposal is not that commercial business plans should necessarily be shared, rather that there should be a transparent and accessible process to share and engage communities and other interests in the management objectives, priorities, and opportunities.

Management plans should be expected to connect to wider economic, community and spatial planning at a local and regional level. For example, through community action plans, local development plans, and regional land use frameworks as these are developed.

Therefore, detailed consideration of a proportionate format and scope will be required, as well as clear criteria determining which land holdings are required to prepare a plan.

Consideration will also need to be given to enforcement, for which a cross-compliance approach is considered likely to be most practical. For example, compliance could be a pre-requisite for access to specified fiscal support and/or regulatory consents.

Implementation of a requirement to prepare and engage on management plans could be a standalone legislative requirement, or it could also be implemented as an integral part of a statutory set of Codes of Practice, as proposed in section 6. The Land Commission sees advantages to using a Code of Practice approach that could combine clarity of expectations with sufficient flexibility to be implemented in a proportionate way.

## 6 Land Rights and Responsibilities Reviews

In its 2019 report to Ministers, the Land Commission also recommended the introduction of a statutory review mechanism as a means of intervention to address the adverse effects of concentrated ownership where they arise. This section describes how the Land Commission believes such a mechanism could operate in practice.

### **Key issues for further consideration in relation to this proposal include:**

- The parallel of the TFC model as the basis for statutory Reviews.
- The potential role of the LRRS in establishing clear expectations for Reviews.
- What the process for triggering a Review should be and which groups and individuals might reasonably be expected to input to this decision.
- What the outcomes from a Review could be.
- The need for and nature of any enforcement measure needed to ensure compliance with the findings of a Review.

### 6.1 Overview

The statutory review mechanism is proposed as a means of addressing the adverse effects of concentrated landownership where normal, responsible management approaches are not sufficient. It is intended to provide a means of review in specific cases where there is evidence of adverse effects from concentrated power.

It is intended to address situations in which there is a need for intervention to review and address adverse impacts, without having to either wait for a change in ownership or to expect use of rights to buy, where these may not be the appropriate or desired solution. A review process should incorporate the ability to investigate a specified issue to determine the facts based on evidence and identify potential resolution options capable of stimulating action to address the issue.

The Land Commission considers that a review process should be framed in terms of the principles of the LRRS and underpinned by statutory Codes of Practice. Specified parties should be empowered to allege breaches of the Codes and a relevant body should be empowered to investigate such breaches, report publicly on the findings, and propose appropriate remedial actions.

The principal purpose of the Codes would be to ensure a proactive management approach that identifies and mitigates the risks of concentrated power and delivers against the Land Rights and Responsibilities principles.

This would build directly on the successful experience of the Tenant Farming Commissioner functions and the Land Commission's ongoing work to embed the principles of the LRRS through the use of LRR Protocols and guidance.



## **6.2 Establishing Clear Expectations**

To facilitate the LRR review process a baseline would be required against which performance could be reviewed. The principles of the LRRS are an obvious starting point for this, but in and of themselves provide limited clarity on how the principles work in practice.

Experience from the TFC suggests that it would be necessary to put in place a set of practical codes of practice that articulate how the principles of the LRRS can be delivered, to provide landowners with clear guidance as to what is expected, and the criteria against which their actions might be reviewed.

The Land Commission's recent experience of developing LRR Protocols (see section 2.4.1) could provide a basis for this. The Protocols have been developed in collaboration with sector interests, enjoy widespread support, and are widely considered reasonable and proportionate.

The Land Commission is also developing a prototype review template based on the LRR Protocols and has begun working with a range of ownership sector bodies to test this. The results from this work will be available in 2021 and could be used to inform the development of any future legislation.

Additional guidance could be used to set out the context and implications of the Codes and provide supporting information on how to meet the Codes' expectations. TFC experience shows that guidance for key intermediaries such as agents and solicitors will be important, as will case studies and appropriate templates to provide and share information.

## **6.3 Triggering a Review**

To ensure that the mechanism would be proportionate to the issue it is designed to address, and would not create an unreasonable burden for landowners, it would be important that the process for triggering a review is clearly defined and unambiguous.

It is proposed that an application to conduct a review could be lodged by anyone with a defined legitimate interest in the landholding in question and that such parties should be clearly identified within the relevant code of practice.

It should only be possible to instigate a review if a credible allegation that one of the LRR codes of practice has been breached is made and, in the opinion of the administering authority, investigating the alleged breach would be in the public interest.

This process closely mirrors the existing process for investigating alleged breaches of Tenant Farming Codes of Practice by the TFC.

## 6.4 Undertaking a Review

Where a review is instigated it is proposed that its primary purpose should be to determine the facts and make appropriate recommendations to ensure the public interest is protected.

It is proposed that the scope of reviews should be as broad as necessary to fully assess the issue(s) and would need to be able to explore all relevant aspects of the ownership, governance, and management of the landholding, with reference to the LRRS and relevant Codes of Practice.

Based on the evidence and any further necessary information, it is proposed that reviews should determine whether the public interest is being harmed, and how best to address the issue(s).

## 6.5 Potential Outcomes of a Review

Where issues are identified, it is proposed that the outcome of the review could conclude with options for further action, which could include one or more of the following:

- A recommendation on how to comply with the Codes of Practice
- A recommendation to change operational and/or management practices
- A recommendation to change governance arrangements
- A recommendation to dispose of assets (either voluntarily or via an existing compulsory mechanism, as necessary).

To ensure that the new mechanism is fair it would be important to stipulate clear timescales for the completion of reviews to ensure that the process would happen in a timely fashion. The process would also need to allow sufficient time for evidence to be collected, assessed, and conclusions drawn, while not taking longer than necessary or becoming convoluted. It would also be necessary to require that the final report outlining the findings of the review, and the reasons behind any further action, would be published as soon as practically possible.

## 6.6 Compliance and Enforcement

Another important consideration in taking forward this proposal is what measures, if any, may be required to ensure compliance with any new review mechanism. In developing these proposals the Land Commission has identified three main options:

- No enforcement powers
- Financial penalties

- Cross-compliance penalties (withholding of public funding, regulatory consents, etc).

The Land Commission is of the strong view that some form of enforcement mechanism would be required to ensure compliance with reviews; however, in principle it would be possible to implement reviews without any enforcement mechanism. This option has therefore been included for completeness to inform future discussions.

What form such a power should take would be a matter for further consideration. A financial penalty would have the benefit of being transparent and easy to understand but, unless it was set very high, would be unlikely to be a significant financial deterrent.

The Land Reform (Scotland) Act 2016, which legislated for the TFC role, establishes a precedent for financial penalties. Under the terms of the Act the TFC is empowered to levy a penalty for non-compliance with an inquiry of up to £1,000. At the time of writing these powers had never been used but it is the view of the Land Commission that their existence is nonetheless important in helping to reinforce the authority of the TFC role. For this reason, the Land Commission would support the inclusion of some form of financial enforcement powers as part of any new Review mechanism.

Cross-compliance measures may be an even more effective approach to ensuring compliance with the outcomes of a review. For example, specific fiscal support or regulatory consents could be contingent on implementation of agreed measures.

## 7 Public Interest Test on Land Acquisition

The third of the legislative recommendations that the Land Commission made to the Scottish Government in 2019 was for a new statutory power to apply a public interest test at the point of significant land acquisition. This section sets out more about the purpose of such a test, how the Land Commission believes such a power could work in practice, and some of the practical considerations that would need to be addressed prior to implementation.

### **Key issues for further consideration in relation to this proposal include:**

- The type of acquisitions to which the new power might reasonably be applied.
- What the appropriate scoping criteria should be for determining when a public interest test might apply.
- The process for triggering a test, including whether there should be a statutory requirement for agents to notify the authorities of a relevant transfer.
- The factors that might be considered when applying the test and the type of evidence that might be needed to support this.
- Potential outcomes from the test and mechanisms for enforcement.
- Ensuring compliance with the European Convention on Human Rights.

### 7.1 Overview

The primary objective of this proposal is to be able to test whether a specific significant acquisition of land is likely to create or perpetuate a situation in which excessively concentrated power could act against the public interest.

It is envisaged that this power would have strong parallels with those of the Competition and Markets Authority when assessing the risk to the public interest of mergers and acquisitions (see section 4.2.3).

It is envisaged that the test would be focused specifically on the risks associated with the concentrated power of ownership. It is intended to be a targeted mechanism, applied only where necessary to prevent adverse effects. It is not intended as a general test of whether the management of land holdings is delivering public interest outcomes.

The core question such a test should be able to address is whether a proposed acquisition would create or perpetuate excessive market power that could harm the social, economic, or environmental wellbeing of an area's communities.

Where a significant risk is identified, the outcome of the test should be capable of applying measures to safeguard the public interest, either through preventing an acquisition or applying conditions to it.

The key stages such a test would require, and relevant considerations are discussed in the following sections.

## 7.2 What Kind of Land Acquisition Might the Test Apply To?

This kind of public interest test is intended to apply at the point when control of a landholding transfers from one party to another. This creates a natural point at which a test and intervention to safeguard the public interest could be applied. This is similar to mechanisms in place in many countries which require certain criteria to be met before acquisition of land can proceed. To be effective it is important that all forms of transfer of control could be covered, including but not limited to:

- Sale on the open market
- Private sale
- Inheritance
- Sale of shares in the controlling company resulting in a change of controlling interest or majority shareholder<sup>24</sup>
- Appointment to, or change in, trusteeship
- Creation of an option agreement over land.

The objective of covering all kinds of transfers raises important considerations about what precisely constitutes a change in control and how such changes could be identified. For some transactions – notably sales on the open market or inheritance – this is obvious, but for others – notably a change in controlling interest when land is owned by a company – it is less straightforward.

To ensure transparency of operation it would be important for the circumstances under which a test might be applied to be clearly defined at the outset.

One option would be to adopt a definition of ‘controlling interest’ that parallels that of the Register of Controlling Interests in Land (RCI). This would negate the need to develop an additional, but largely identical, methodology for identifying controlling interest and point of transfer.

There should be no need to apply such a test to the majority of land acquisitions, so the Land Commission considers that a) certain categories of transfer should be automatically excluded and b) a scoping stage should identify those transfers that pose a potential risk, and which should therefore be subject to the test.

Excluding categories of land and property from the test would help ensure proportionality and predictability. The Land Commission considers that such

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<sup>24</sup> Regulation of the transfer of shares is a reserved matter.

exclusions should be broadly in line with the exclusions to existing rights to buy contained within land reform legislation, such as those covering owner-occupied homes.

### **7.3 Scoping Phase**

A set of scoping criteria would make it possible to quickly and easily determine whether or not a given acquisition should be the subject of a test. This would make it possible for transfers that are unlikely to raise concerns to be ruled out of scope at an early stage to minimise unnecessary disruption to property markets.

It is suggested that a scoping phase should involve an initial assessment of the proposed acquisition that would determine whether there are reasonable grounds to consider that it could create or perpetuate a concentration of power that could adversely affect the public interest. It is anticipated that this would be a simple process that could be carried by landowners or their agents well in advance of any transfer and could tie in with the duty of notification outlined in section 7.4.1.

The prospect of triggering a test could represent a significant risk for purchasers, so to avoid the unintended consequence of discouraging investment it will be important that the types of landholdings to which the test could be applied are clearly defined within the relevant legislation. As a starting point it is proposed that the scoping criteria to determine which transactions could be the subject of a test could include landholdings:

- Above a certain specified scale threshold
- That account for more than a specified minimum proportion of the total land area of either a Remote Rural Area (per Scottish Government Urban Rural Classification) or an island; or
- That have previously been the subject of a statutory Land Rights and Responsibilities Review (see section 6).

The rationale for these criteria and related issues are explored further below.

#### **7.3.1 The Scale and Extent of a Landholding**

While not a direct risk factor in and of itself, the scale of a landholding is often a good indicator of where risks of harm to the public interest may arise. This risk was explicitly recognised by the final report of the Land Reform Review Group<sup>25</sup>, which recommended that there should be an upper limit on the total amount of land in Scotland that can be held by a single private landowner.

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<sup>25</sup> Land Reform Review Group (May 2014), *the Land of Scotland and the Common Good*, final report of the LRRG.

There are however significant challenges in determining a scale threshold, as this is particularly dependent on the location of the landholding, and potential land uses.

It is suggested that the aim should be to establish a threshold that would ensure that family farms and small businesses would not fall in scope, but that modest estates that could pose risks would. It may be reasonable to expect that, for example, holdings over 10,000ha would always be in scope, while those under 1,000ha would always be exempt. The Land Commission does not have a firm view as to exactly where a threshold might fall within this range and proposes that this should be the subject of further consultation and discussion.

### **7.3.2 *The Rurality of the Landholding***

The evidence gathered by the Land Commission to support the development of this proposal (see section 2.3) is drawn almost exclusively from rural Scotland. The rurality of a landholding is therefore considered a significant risk factor. These criteria are therefore critical to identifying transfers that pose the greatest risk. By using existing definitions of rurality – notably the Scottish Government’s Urban Rural Classification – should make identification of holdings potentially within scope relatively simple.

A specified minimum proportion of land area is suggested as a criterion to help overcome the challenge of areas, such as islands, where geography means the absolute size of a landholding is not particularly significant but experience suggests the concentration of power may be an issue. The Land Commission does not have a fixed view as to what this proportion should be but considers that a threshold of between 30% and 50% may be appropriate.

### **7.3.3 *Previous Land Rights and Responsibilities Review***

Where a landholding has previously been subject to a statutory Land Rights and Responsibilities Review, this is an indication that there have been concerns in the past about the extent to which the landholding is operating in the public interest. While it is intended that the Review would be sufficient to address any deficiencies found, this cannot be guaranteed.

Including a previous statutory review as part of the scoping criteria for a public interest test would help to address this by providing an opportunity to check that the same issue is not likely to arise again in the future. This should not, however, be taken to imply that the result of the test would necessarily impose conditions on the proposed acquisition. It would be entirely consistent with the principle of the mechanism for a test to be undertaken and for it to conclude that the acquisition should proceed as intended.

However the scoping criteria are eventually defined, it is intended that the test should only ever need to be activated in a small number of targeted circumstances with the vast majority of land transfers and acquisitions remaining unaffected.

## **7.4 Initiating a Test**

Determining which acquisitions should fall within the scope of the test raises a further question about how relevant transactions should be identified.

As noted above, the prospect of triggering a test could represent a significant risk for purchasers, so to avoid the unintended consequence of discouraging investment the Land Commission believes that it would be preferable to identify relevant transfers with the support of the landowning community, through voluntary notification by, or on behalf of, the acquiring party well in advance. However, we recognise that not all landowners will welcome this approach and may be tempted to avoid triggering a test by simply not notifying relevant transactions.

To overcome this challenge it would also be necessary to consider provision for the test to be triggered shortly after a change in controlling interest if the acquiring party has not notified the relevant authority in advance. This would parallel the French experience of SAFER, (see 4.2.1) where after decades of operation a substantial majority of rural landowners now approach the public authority at the outset, rather than risk triggering pre-emptive rights.

It is anticipated that this scenario would only apply to a minority of situations where the required notification was not provided in advance and that the vast majority of tests would be triggered prior to acquisition as a result of voluntary notification. As the legislation becomes established it is anticipated that the requirement to complete tests post-acquisition would become increasingly rare as landowners and their agents become accustomed to the new requirements for notification.

### ***7.4.1 Duty of Notification***

For many transfers it should be possible to introduce a formal notification process prior to transfer as part of standard legal process. For example, a duty could be created that would require solicitors to notify the relevant authority of relevant transfers as part of the conveyancing process.

However, not all acquisitions require the involvement of a solicitor or other professional advisor, which means that a professional duty of notification on agents would not cover all circumstances. This is a key challenge that will require to be addressed as the proposals are developed and reinforces the need for a provision that would enable transfers that have taken place without due transparency to be investigated.

## **7.5 The Test Phase**

Where a proposed acquisition is found to be in scope, the test phase would be triggered. This phase would allow for a detailed assessment of the relevant economic, social, and environmental factors pertinent to safeguarding the public interest.



As discussed in section 4.1.3, it is common practice for other areas of regulation not to provide a fixed definition of the public interest, rather the public interest is determined on a case by case basis depending on the particular circumstances of the question at hand. It would though be desirable to assist decision-makers by developing comprehensive guidance – if appropriate on a statutory footing. Such guidance would need to consider two key questions:

- Would a proposed acquisition create or perpetuate a monopoly situation?
- If so, is there reason to believe that such a situation could harm the public interest?

To answer the first of these questions the Land Commission believes it would be helpful to identify characteristics of concentrated landownership that could create a structural risk of excessive power. Examples of the type of structural characteristics that may be relevant include situations where the landowner would own or control:

- The majority of the stock of privately rented residential properties
- Strategic local infrastructure – e.g. slipways, petrol stations or sites for telecommunications infrastructure
- Important community or cultural facilities such as hotels or shops (particularly where there is only one in the locality)
- The majority of the effective local housing land supply
- A significant proportion of local employment; and/or
- A significant proportion of local demand for goods and services.

To help answer the second question – what evidence should be considered to help determine whether the concentration of power within a given landholding could be harmful – we believe it may be helpful to consider the adverse consequences often associated with monopolies in other sectors. These factors are presented in Table 1.

**Table 1 – Characteristics of Excessive Market Power Applied to the Land Market**

<b>Effect</b>	<b>Description</b>	<b>Potential manifestation</b>
<i>High prices</i>	In a competitive market the price of a good should reflect its marginal cost of production. In a monopoly situation prices can be set regardless of production costs because the producer faces no competition and consumers have no choice.	Concentrated landownership could contribute to high prices for: <ul style="list-style-type: none"> <li>- Sites for housing development</li> <li>- Privately rented residential property</li> <li>- Business premises.</li> </ul>
<i>Low output</i>	The output of a market in which supply is dominated by a single provider will be lower than it would in a competitive market because the monopolist is able to charge higher prices, so consumers demand less.	Concentrated landownership could result in an under provision of sites for housing or other development than would be socially optimal. This could involve either suitable sites being withheld from the market despite evidence of effective demand or sites being brought to market more slowly than required to meet local demand.
<i>Monopsony</i>	A market structure in which a dominant actor can control demand for a product (rather than supply) and is able to exert power or control over would be suppliers.	In areas where landownership is concentrated the dominant landowner may be responsible for generating a significant proportion of demand for local businesses. If this power is misused, then the effect on those businesses can be much more serious than they would be in a market with more actors.
<i>Inferior quality</i>	Monopolists may use their position as sole supplier of a good or service to supply inferior products.	In the housing land market – inferior sites may be brought to market where more suitable sites may be available.  In the residential lettings market – provision of lower quality units than would be acceptable in a competitive market.
<i>Lack of innovation</i>	If there is no competition in a market, incentives to innovate or provide ‘new and improved’ products is absent.	Refusal or inactive approach of a dominant landowner to provide reasonable support for local efforts to develop the local economy.  Failure to take advantage of new market opportunities – e.g. activity-based tourism or renewable energy

		development – that could bring wider spin-off benefits to the local area.
<i>Collateral damage</i>	The tactics used to establish or maintain monopoly power can cause considerable harm to those affected.	Tenants being unable to continue their business or losing their home as a result of a decision to use land or property for other purposes, with no other options available.
<i>Political influence</i>	Large companies often have significant political power, which they can use to influence political and regulatory processes.	Powerful landowners are often able to employ experienced and articulate professional agents to represent their interests. This can make it difficult for communities (which rarely have access to such expertise) to make their voices heard and can mean that community views are given less weight than those of the landowner.  Local residents feeling unable to contribute to or challenge decisions due to fear of possible repercussions.

Source: Scottish Land Commission

The test phase would require the assessing body to consider available evidence and make a judgment on any measures necessary to safeguard the public interest. This will require access to as much relevant information as possible in order to illustrate a full and accurate picture, and therefore appropriate powers would be required to enable the assessing body to collect such information in a timely manner.

An important consideration for the next steps in developing the proposal would be the powers that would be required by the assessing body to access or acquire information relevant to the test.

There would have to be an opportunity for the incoming landowner to submit proposals to demonstrate how the public interest would be safeguarded under new ownership. This could, for example, include binding commitments on governance and management, or voluntary disposal of land and property assets either from within the desired landholding, or other landholdings within their portfolio.

## 7.6 Outcomes

It is envisaged that there could be several possible outcomes of a test:

- The acquisition proceeds as originally proposed
- The acquisition proceeds with conditions/modifications

- The acquisition is prohibited.

It is proposed that conditions/modifications to protect the public interest could include, but should not be limited to:

- A requirement to sell on part of the newly acquired landholding, or existing holding(s), in a predetermined manner (e.g. through lotting with restrictions on number of lots per bidder)
- Requirements for the governance structure, for example to ensure accountability or to enter shared governance arrangements
- Requirements for specific management/operational practices
- Full/partial compulsory purchase by a public body; and/or
- A combination of the above.

It is envisaged that on all occasions there should be a requirement for a report of the test and outcomes to be published.

## **8 Wider Considerations and Next Steps**

This chapter highlights some important issues that will need to be considered in taking forward the proposals contained in this paper.

### **8.1 Administration**

A final important area for consideration that will apply to each of the proposals described in this paper is the issue of where administrative and decision-making authority should lie. This should take into consideration appropriate accountability as well as effective and efficient administration. Powers could sit with Scottish Ministers directly, local authorities, or another public body.

The Land Commission considers that the proposed statutory review mechanism could be delivered in a proportionate way through amendments to the functions of Land Commissioners, on the model of the existing Tenant Farming Commissioner.

In relation to the public interest test, the judgement required in relation to human rights, the balance of individual rights and the public interest, suggests that the decision-making role in applying such a test would most appropriately sit with Scottish Ministers.

The potential role of local authorities should also be considered. Running through all three proposed mechanisms is the underlying intention to better connect landownership and decision-making with local democratic accountability. In most northern European countries that have regulatory mechanisms for land ownership, decision-making is generally embedded at a municipality level. Sufficient connection to local authorities, as a means of connecting decisions with local and regional circumstances, should be built into consideration of these measures.

### **8.2 Relationship to Other Mechanisms and Policy Priorities**

It is important that the mechanisms described in this report are not considered in isolation but as part of a wider package of reforms designed to further Scotland's land reform programme. These measures will not in themselves transform the pattern of landownership, other policy interventions will be required to do that.

The measures have been conceived to complement each other as well as existing legislative mechanisms already in place, and to support existing government policy priorities. They would work with, rather than replace other existing policy interventions.

The requirement for a management plan further embeds the expectations set out in the LRRS and the Guidance on Engaging Communities in Decisions About Land. As Regional Land Use Partnerships become established, the management plans should help to deliver their aspirations, by providing a mechanism for individual landholdings to demonstrate delivery of public interest outcomes and facilitate collaboration and

engagement with local communities. This could be particularly important for helping deliver an enhanced focus on the Place Principle in rural areas.

The statutory review and public interest test mechanisms provide a means of intervention to address the adverse effects of concentrated ownership in specific places.

The results of a statutory review, or public interest test could, for example, be used to inform an application by a community body to acquire all or part of a land holding where appropriate. Similarly, the processes may inform and/or prompt the use of compulsory purchase action by a public body.

### **8.3 Implications for Urban Scotland**

The fact that the proposals outlined in this paper have been developed in response to the Land Commission's research and findings predominately relating to rural Scotland should not be taken to imply that they have no relevance beyond rural Scotland. There is a growing body of evidence to suggest that issues of concentrated power, control, and a lack of transparency and accountability in urban landownership can be every bit as damaging to urban communities and economic productivity as they are in rural Scotland.

In due course these issues will need to be investigated, assessed, and addressed, and it may be that mechanisms similar to those outlined in this paper could provide an appropriate approach to protect the public interest in urban Scotland.

### **8.4 Next Steps**

The proposals set out in this paper have been developed by the Land Commission in response to an invitation from the Cabinet Secretary for Environment, Climate Change and Land Reform. They emerged from, and have been informed by, the findings of what was perhaps the most extensive investigation ever undertaken into the impacts associated with scale and concentration in Scotland's pattern of landownership. Each of the three proposed measures would help modernise Scotland's rural land market, enhance accountability and support a dynamic economy.

The Land Commission recognises that significant work remains to be done to develop the proposals into fully functional legislation and anticipates that extensive consultation with stakeholders would be required to achieve this. The aim of this paper is to help inform these discussions by identifying some of the important issues that will need to be considered if the proposals are taken forward and to help inform public debate on the issues involved.

Progressing the proposals beyond this stage will ultimately be a matter for the Scottish Government and Parliament and the Land Commission will continue to support and inform this work as required.