



SCOTTISH LAND COMMISSION  
COIMISEAN FEARAINN NA H-ALBA

## Land and Human Rights Advisory Forum

### Note of Meeting – 12/07/22

#### Discussion

##### *General Discussion*

Members agreed that, given factors such as climate change and the war in Ukraine, food security is an issue that will become more of a priority, which has significant land use implications, and should be the subject of further discussion within the Advisory Forum.

##### *Draft UK Bill of Rights*

Members reflected on the publication of the draft UK Bill of Rights. Concerns were raised, in particular, about the impact on the Scotland Act 1998 which is underpinned by the Human Rights Act 1998 that the draft UK Bill of Rights is likely to replace. This has the potential to significantly reshape the operation of devolution, and while members considered the overall position would be significantly worsened, there is potential that more interventionist legislation – including on land reform – could be easier to introduce in Scotland.

Members noted the draft UK Bill of Rights differed from a traditional understanding of a bill of rights, given that it is not tied to a written constitution, and, whilst it sets out rights, it does not contain legal remedies for those rights, which may mean it creates practical limitations for the rights themselves to be upheld. This may mean that while the UK remains a member of the European Convention on Human Rights (ECHR), the “rights without remedies” aspect of the new Bill of Rights may make bringing matters to the European court more challenging, as all domestic legal options must first be exhausted. Members discussed whether the proposed bill might also sift issues that can be brought to the supreme court from a human rights point of view. Members also noted that the draft UK Bill of Rights removes the existing positive obligations on State bodies themselves to uphold human rights.

More broadly, members observed that the UK and Scottish Governments are on different trajectories in terms of human rights legislation – the Scottish Government is opting to enshrine further international obligations into law, whereas the draft UK Bill of Rights indicates an opposite direction of travel.

##### *Carbon Rights*

Members discussed whether or not it was helpful to frame carbon, in the context of carbon sequestration and carbon markets, as a question of “carbon rights”. In carbon markets, activity to sequester carbon is the key element of a contract rather than trading carbon as a commodity. Therefore, framing around “carbon agreements” or “carbon contracts” may be preferable to “carbon rights”.

Members discussed the practicality of viewing carbon rights as contractual rights as, for example, if one party failed to meet their obligations in the agreement – such as failing to plant an appropriate number of trees – it is not a violation of a property right but is a violation of contract, and should thus be dealt with under contract law.

Members discussed advantages and limitations of Scotland's woodland carbon code – one of Scotland's main voluntary carbon accreditation systems. On one hand, the need for regularly updating and changing codes was acknowledged, and other international systems of carbon and timber certification work similarly. However, members also discussed the need for transparency on these changing standards, as there may have been instances where carbon codes have changed, but the reasons given for that change are not made explicit. Members discussed to what extent this issue might be an unintended consequence of the informal nature of the codes, and the implications and further unintended consequences of such changes to existing or future carbon contracts and on the ground activities.

Members noted the range of international experience around accreditation schemes, in particular the UN REDD scheme which may provide additional insight.

Members discussed the human rights implications of a stricter system of carbon accreditation and community benefit. It was broadly agreed that there would not be a property rights impact on the introduction of such a stricter system, as it would not restrict land use – as at present a landowner would have to voluntarily adhere to the scheme to access its benefits. Conversely, a stricter scheme could be designed to fulfil broader economic, social, and cultural rights, as well as the right to a healthy environment. Members suggested that a stricter carbon accreditation system may be welcomed by the private sector and investors already involved in the carbon sector, as it may increase confidence and certainty.

More widely, members noted that greater land use planning may help provide certainty to landowners, and be an acceptable way for the state to regulate activities that require significant land use change.

Members noted that there are several more carbon codes in development – not least regarding soil carbon – and that future measures on biodiversity, and other aspects of natural capital, are likely to come forward. As such it would be wise to ensure all such provisions, codes, and measures are framed in a contractual context as well as being well linked and complementary.

### *Land Reform Bill Consultation*

Members discussed the proposed definition of large-scale landholding – in particular, greater clarity is needed as to whether the 3,000ha definition of large-scale landholdings is on an aggregated basis or per individual holding. The latter may unintentionally incentivise landowners to restructure their holdings to avoid being classed as “large-scale”. Members were unfamiliar with “data zones” and therefore whether their use would be widely understood and accepted. Similarly, members noted the often significant variation in local authority wards, particularly between island and mainland authorities, as well as on geographical and population measures.

Members raised concerns about the de facto exclusion of uninhabited islands from the definition, and queried how this aligns with the re-peopling agenda. Similarly, members

considered that this exclusion may discourage landowners to redevelop and repopulate islands, and in extremis could lead to landowners being incentivised to depopulate islands.

Members discussed the differences between the proposals the consultation makes (the public interest test and presale notifications) and the Land Commission recommendations on which they were based.

Members considered that the Public Interest Test proposal seems to have become more about the behaviour of an individual landowner, rather than the risk of localised monopoly, and queried how this would be clearly defined. Members noted the shift in emphasis for the Public Interest Test onto the seller (away from the SLC's original buyer focussed proposal) and raised concerns this would potentially make the mechanism more difficult to enact (in terms of ECHR) and operate in practice. Similarly, members queried how relevant the sellers' record would be in assessing the buyers' potential motivations, behaviour, and risk to creating or perpetuating a localised monopoly.

Members welcomed the inclusion of transfers of shares, and trusts being brought into scope for the Public Interest Test. Members further suggested that all transfers should be included for consideration – including inheritance – even if only to ensure completeness of discussion.

Members noted that the consultation proposal on presale notifications is less broad than the SLC proposal, but is more directly focused on community bodies, and references the commitment made in the Bute House agreement of presumption in favour of community buyout. Members compared this to the SLC presale notification process, which would be a simple notification to the through public means, like newspapers adverts, and would encompass all potentially interested parties.

Members discussed the proposal to register community bodies, with one potential advantage noted that it could help to be a part of consolidating policy, making it easier for community groups to take advantage of land sales. Some members suggested that the creation of a national register of community bodies could be a useful resource in itself, as well as a guide for directing support for capacity building.

The consultation proposes large scale landowners must be tax resident in the EU or UK. Members acknowledged this may help transparency, but queried the extent to which it would ensure appropriate tax is paid, and that wealth is retained, in Scotland, or the effect in addressing absenteeism.

Members discussed the relationship between the substance of the proposals and the document's framing as "Land Reform in a Net Zero Nation". SLC recommendations have generally been based on evidence of community/social/economic impact; rather than environmental impact; however, the latter is addressed through the stewardship provisions of the LRRS.

Members discussed the unclear distinctions between farm and estate in law; especially family farms and family estates, and suggested that this may impact some of the proposals if a definition of "family farm" is used as a basis for exemptions.

Members agreed that none of the Land Reform Bill's proposals risk contravening human rights in principle.

Members suggested the introduction of a new land use tenancy could engage property rights where existing tenancies are converted. However, much greater detail on both the provisions and mechanisms are needed to facilitate a well informed discussion.

Outwith the specific proposals in the consultation, members recommended a stronger focus on land use planning. Members considered that a robust national plan bringing together local, regional, and national planning would be helpful, and that Regional Land Use Partnerships could be empowered to lead this work.

Similarly, members noted that the Scottish Government has previously proposed merging the Scottish Land Court with the Scottish Lands Tribunal, however there is no reference to this in the consultation document and the implications on how the merger and the proposals will interact remains to be seen, if Government is still minded to pursue the merger.

## **Links**

Members provided links to further reading regarding the proposed UK Bill of Rights:

- <https://www.strath.ac.uk/humanities/lawschool/blog/thebritishbillofrightswatarewealltodoaboutit/>
- <https://www.lawscot.org.uk/members/journal/issues/vol-67-issue-07/rights-without-remedies/>