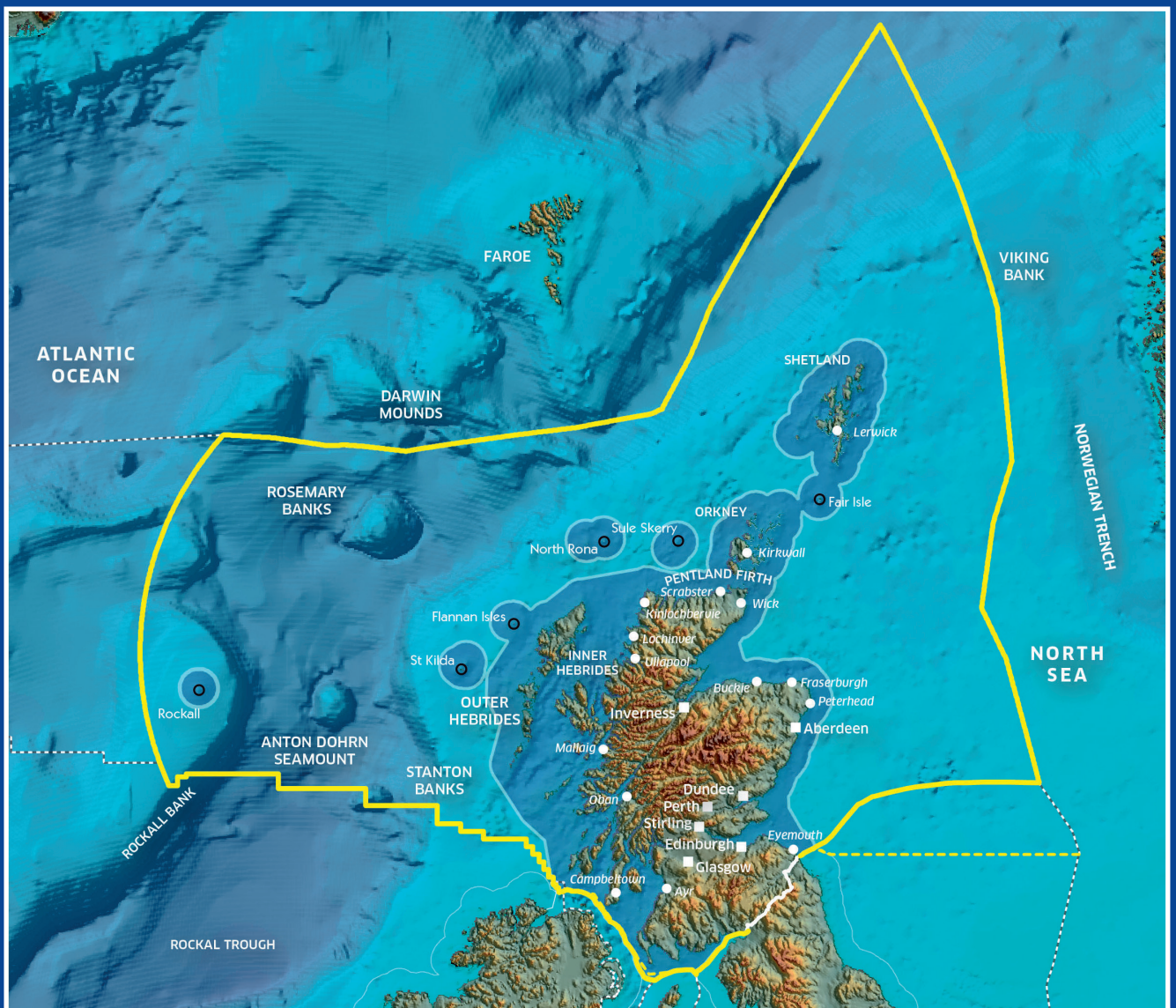









# The Land of Scotland and the Common Good

## Report of the Land Reform Review Group



## Front cover map – map of Scotland’s 12 mile boundary limit.

Key	
	200 nautical mile Scottish Seas boundaries
	Civil Jurisdiction offshore activities boundary
	12 nautical mile Scottish Territorial Seas boundaries
	Continental Shelf as defined in Continental Shelf Act 1964
	Land boundary with England
	Cities
	Towns

*Some of this map is based on Ordnance Survey material with the permission of Ordnance Survey on behalf of the Controller of Her Majesty's Stationary Office © Crown copyright and database right (2014). Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings. Scottish Government 100024655. All rights reserved Scottish Government.*

# **The Land of Scotland and the Common Good**

Report  
of the  
**Land Reform Review Group**

*Presented to Scottish Ministers  
by the Members of the Land Reform Review Group,  
Alison Elliot, John Watt, Ian Cooke and Pip Tabor.  
May 2014*

*Land Reform Review Group Secretariat  
B1 Spur, Saughton House, Broomhouse Drive  
Edinburgh EH11 3XD*

## LAND REFORM REVIEW GROUP

The Land Reform Review Group was an independent review group established by the Scottish Government in 2012 with the following remit:-

*“The relationship between the land and the people of Scotland is fundamental to the wellbeing, economic success, environmental sustainability and social justice of the country. The structure of land ownership is a defining factor in that relationship: it can facilitate and promote development, but it can also hinder it. In recent years, various approaches to land reform, not least the expansion of community ownership, have contributed positively to a more successful Scotland by assisting in the reduction of barriers to sustainable development, by strengthening communities and by giving them a greater stake in their future. The various strands of land reform that exist in Scotland provide a firm foundation for further developments. The Government has therefore established a Land Reform Review Group.*

*The Land Reform Review Group has been appointed by Scottish Ministers to identify how land reform will:*

- Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland;*
- Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development;*
- Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland”.<sup>1</sup>*

---

<sup>1</sup> Scottish Government Statement August 2012



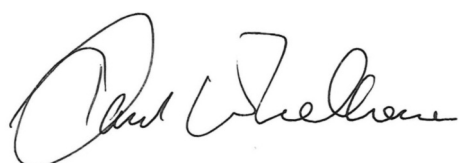
## MINISTERIAL FOREWORD

The relationship between the land and the people of Scotland is fundamental to the wellbeing, economic success, environmental sustainability and social justice of Scotland and her communities. The system and structure of land ownership is a defining factor in that relationship: it can facilitate and promote development, but it can also hinder it.

In recent years, various approaches to land reform, not least the expansion of community ownership, have contributed positively to a more successful Scotland by assisting in the reduction of barriers to sustainable development, by strengthening communities and by giving them a greater stake in their future. The various strands of land reform that exist in Scotland provide a firm foundation for further developments. I look forward to considering how the Land Reform Review Group's recommendations can further promote the public interest, in both urban and rural environments, for individuals and communities alike.

The Land Reform debate in Scotland has evolved and now is the time for everyone with an interest in Land Reform, to contribute constructively to the debate and consider the future of Land Reform in Scotland. We have the opportunity to build a better Scotland for future generations, by ensuring that we optimise the use of Scotland's wealth of natural resources, not least our land and seas, to promote the wellbeing of Scotland and her people. My vision is for a fairer and wider distribution of land in Scotland where individuals and communities have access to land that they need to fulfil their economic and social aspirations. We need to build a society with a modernised system of land ownership, and, where it is in the public interest, a greater diversity of land owners, to enable people and communities to achieve their potential. We need to support business and employment in both urban and rural areas to achieve greater distribution of land to communities, make more land available for housing, encourage sustainable development and realise increased economic vitality and employment. Scotland is on a journey delivering land reform and changes to land use. Land must be used to benefit the wellbeing of the people of Scotland; not just in terms of economic benefit, but in improved environmental and social outcomes for all.

Land Reform covers a very wide spectrum of topics and I would like to thank the Land Reform Review Group, their advisers and support team for their hard work in producing this report. I would also like to acknowledge and thank those who have provided submissions or made contributions to the Review, either at the meetings held by the Group, hosting visits of the Group, and by providing written evidence to the Review. You have all shown that Land Reform is a key area that is important to the whole country, and across a wide range of organisations, communities and individuals. I look forward to studying the Group's report and recommendations and, with support from all sectors, taking Land Reform in Scotland forward and ensuring it reflects Scotland's needs for the 21st century and beyond.



**Paul Wheelhouse MSP**

MINISTER FOR ENVIRONMENT AND CLIMATE CHANGE





## PREFACE

This Report is entitled “The Land of Scotland and the Common Good”. It reflects the importance of land as a finite resource, and explores how the arrangements governing the possession and use of land facilitate or inhibit progress towards achieving a Scotland which is economically successful, socially just and environmentally sustainable.

Land is a resource which impacts directly or indirectly on many aspects of society – from food to housing, from leisure to climate change, and from building strong communities to economic development. In addressing the remit set by the Scottish Government, the Land Reform Review Group has therefore taken a broad approach to land reform, endeavouring to reflect as far as possible the full breadth of the subject.

Historically, land reform has largely been perceived as a rural development issue. This Report seeks to challenge that perception, by illustrating the importance of land – and how it is owned, managed and used – to the everyday lives of people throughout urban and rural Scotland. It spans topics as diverse as community ownership, urban renewal, natural resources, private and public land ownership, housing supply and agricultural land holdings and it recognises the need to modernise property law and the fiscal systems which govern land ownership and management. By taking this approach, we hope to stimulate greater interest in land reform among the wider population, ensuring that land reform becomes and remains a subject at the heart of the Scottish political agenda.

As a time limited Review Group, we are acutely aware that Government approaches to land reform, when there has been a political will to engage with the issue at all, have traditionally been characterised by periodic review and piecemeal intervention. Given the importance of land reform to delivering societal aspirations, we recommend that the Scottish Government regard land as a separate, well supported area of policy, to ensure that the common good of the people of Scotland is well served by its land resources.

It has been a privilege for us to serve on this independent Review Group and we thank the Scottish Government for giving us the opportunity to do so.



**Alison Elliot**



**John Watt**



**Ian Cooke**



**Pip Tabor**

## CONTENTS

<b>Ministerial Foreword</b>	<b>07</b>
<b>Preface</b>	<b>09</b>
<b>Introduction</b>	<b>15</b>
<b>Part One - Land Reform Context</b>	<b>19</b>
1. Land of Scotland	19
2. People of Scotland	20
3. Recent Land Reform	23
<b>Part Two - Ownership of Land</b>	<b>27</b>
4. Land Registration	27
5. Owners of Land	34
6. Succession Law	36
7. Ownerless Land	40
8. Compulsory Purchase	42
<b>Part Three - Public Land Ownership</b>	<b>47</b>
9. Extent of Public Land	47
10. Publicly Owned Mineral Rights	53
11. Crown Property Rights	58
12. Historic National Properties	66
13. National Forest Estate	68
14. Common Good Lands	74
<b>Part Four - Local Community Land Ownership</b>	<b>81</b>
15. Local Communities	82
16. Land and Community Development	86
17. Local Community Land Rights	96
18. Community Acquisition Costs	103
19. Community Support Services	113

<b>Part Five - Land Development and Housing</b>	<b>119</b>
20. Urban Renewal	<b>120</b>
21. New Housing	<b>130</b>
22. Existing Housing	<b>141</b>
<b>Part Six - Land Ownership and Use</b>	<b>151</b>
23. Rural Land Use	<b>151</b>
24. Pattern of Rural Land Ownership	<b>159</b>
25. Land Taxation, Payments and Markets	<b>168</b>
<b>Part Seven - Agricultural Land Holdings</b>	<b>179</b>
26. Crofts	<b>180</b>
27. Small Landholdings	<b>191</b>
28. Tenant Farms	<b>194</b>
<b>Part Eight - Common Property Resources</b>	<b>209</b>
29. Public Access	<b>209</b>
30. Water Resources	<b>214</b>
31. Freshwater Fish	<b>216</b>
32. Wild Deer	<b>227</b>
<b>Part Nine - Way Forward</b>	<b>235</b>
33. Land Reform, Common Good and the Public Interest	<b>235</b>
34. Recommendations	<b>240</b>
Annex 1	LRRG Remit <b>250</b>
Annex 2	LRRG Members and Advisers <b>251</b>
Annex 3	List of Published Submissions <b>252</b>
Annex 4	Some Acts of the Scottish Parliament <b>262</b>

## LIST OF ILLUSTRATIONS

- Fig. 1 Satellite View of Scotland<sup>2</sup>
- Fig. 2 Population Distribution by Local Authority Areas in Scotland
- Fig. 3 Percentage of Titles recorded in the Land Register<sup>3</sup>
- Fig. 4 Areas recorded in the Land Register<sup>4</sup>
- Fig. 5 Crown and non-crown owned foreshore in Scotland
- Fig. 6 Scottish Government's Rural Estates
- Fig. 7 Public Land Ownership in Scotland
- Fig. 8 Areas where Gold and Silver Rights in Scotland are not owned by the Crown
- Fig. 9 Crown Property Rights in Scotland
- Fig. 10 The 26 Historic National Properties conveyed by the Crown to the Secretary of State for Scotland in 1998/99
- Fig. 11 Scotland's National Forest Estate
- Fig. 12 Land around Loch Katrine leased by Forestry Commission Scotland
- Fig. 13 Common Good Funds held by Local Authorities in Scotland
- Fig. 14 Community Land Ownership in the Highlands and Islands Enterprise Area
- Fig. 15 Scotland's Trust Ports
- Fig. 16 Number of Community Asset Acquisitions 1991-2011
- Fig. 17 Local Community Land Rights
- Fig. 18 Sites sold through the National Forest Land Scheme
- Fig. 19 Average annual earnings of a UK building worker and the average house price for decade
- Fig. 20 Housing Statistics for Scotland 2013: Key Trends Summary, Scottish Government

---

<sup>2</sup> Image reproduced with kind permission of NEODAAS/University of Dundee

<sup>3</sup> This material was supplied by Registers of Scotland and reproduced by permission of Ordnance Survey® on behalf of HMSO. © Crown copyright and database right [2013]. All rights reserved. Ordnance Survey Licence number 100041182

<sup>4</sup> This material was supplied by Registers of Scotland and reproduced by permission of Ordnance Survey® on behalf of HMSO. © Crown copyright and database right [2013]. All rights reserved. Ordnance Survey Licence number 100041182

- Fig. 21 Scottish Government's Urban/Rural Classification
- Fig. 22 Land Ownership Pattern in the Cairngorms National Park
- Fig. 23 Land Capability for Agriculture in Scotland<sup>5</sup>
- Fig. 24 Number of Land Owners in Scotland in the 1870s and 1970s
- Fig. 25 Private Land Ownership in Rural Scotland 1970-2013
- Fig. 26 Land Owned and Managed by Environmental NGOs in Scotland<sup>6</sup>
- Fig. 27 Prices of Different Types of Land 2003-13
- Fig. 28 Price of Land compared to other Commodities 2003-2013
- Fig. 29 Number of Crofts Owned or Rented 1960-2005
- Fig. 30 Current Areas of Scotland covered by Crofting Tenure<sup>7</sup>
- Fig. 31 Scottish Government's Crofting Estates
- Fig. 32 Number of Agricultural Holdings Owned or Rented 1912-1980
- Fig. 33 Agricultural Land Area Owned or Rented 1990-2013 and the Number of Agricultural Holdings Owned or Rented 1990-2013
- Fig. 34 Numbers of each type of Agricultural Tenancies 2005-2012
- Fig. 35 Areas of Rented Land for each type of Agricultural Tenancy 2008-2013
- Fig. 36 Tenanted Agricultural Holdings in Scotland 2013 (excluding crofts)
- Fig. 37 Scotland's District Salmon Fisheries Boards
- Fig. 38 Salmon and Freshwater Fisheries Protection Orders
- Fig. 39 Salmon Fishings held by the Crown as Ancient Possessions
- Fig. 40 Deer Management Groups in Scotland (2012)

---

<sup>5</sup> Image reproduced with permission of the James Hutton Institute. The map contains Ordnance Survey data © Crown copyright and database rights 2013

<sup>6</sup> Copyright: All rights reserved. Copyright © Centre for Mountain Studies, Perth College UHI (2013)

<sup>7</sup> Copyright: © Crown copyright and database rights 2014 Ordnance Survey. All rights reserved Crofting Commission

**Fig. 1** Satellite View of Scotland



## INTRODUCTION

### The Review Group

- 1 The Scottish Government announced the establishment of an independent Land Reform Review Group (LRRG) in July 2012 and published the Group's remit in August (Annex 1). Ministers appointed three Members as the Review Group and also a wider group of Advisers to assist the Group in its review (Annex 2).
- 2 The Review Group started its inquiry in September 2012 and undertook a public consultation as the first phase of its work. The Group issued a Call for Evidence on 4th October and by the time that closed on 18th January 2013, 484 submissions had been received (Annex 3). The Group also undertook a programme of meetings and visits to gather views from a wide range of interests.
- 3 In May 2013, at the end of this first phase of the inquiry, the Review Group published an Interim Report on the Group's work and also an analysis by ODS Consulting of the written submissions received in response to the Call for Evidence.
- 4 By the time the Interim Report was published in May, two of the three original Members of the Group had resigned for personal reasons. As a result, half way through the inquiry period, Ministers appointed two replacement Members and an additional fourth Member. An independent Special Adviser was also appointed to assist the Members of the Group with their review.
- 5 The new membership of the Review Group met for the first time at the end of June 2013, at the start of the second phase of the Group's work leading to this Report. During this phase, the Group reviewed the issues identified during the consultations that had been carried out. The Group then investigated many of the main topics involved in greater detail. This included requesting additional information and briefings on topics from a number of sources, as well as meetings with the Group's Advisers and other specialists. While many of the submissions to the Group were about similar issues, a wide range of potential land reform issues were highlighted in the submissions as reflected in the contents of this Report.

### The Review

- 6 The Review Group's remit is to examine the role of Scotland's system of land ownership in the relationship between the people and land of Scotland, and make proposals for land reform measures that would:-
  - "Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland
  - Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development

- Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland”<sup>8</sup>
- 7 This is a very wide remit, both in terms of the scale of the overall relationship between the land and people of Scotland and the broad, strategic nature of the objectives for the land reform measures to be recommended by the Review Group. However, the system that a country has in place for the ownership and management of its land is, as the Group’s remit states, “fundamental to the wellbeing, economic success, environmental sustainability and social justice of the country.”
  - 8 The land of Scotland in this context is the territorial land area of Scotland, including Scotland’s seabed out to the 12 nautical mile territorial boundary. The overall system for the ownership and management of this land can be seen as having three main components. The first is Scotland’s system of property laws governing how the land is owned.<sup>9</sup> The second is the system of regulatory laws governing how land can be used. The third component is the system of non-statutory public sector measures to influence how land is owned and used in the public interest.
  - 9 These three components together form Scotland’s overall system of land tenure. For Scotland, as for other countries, it is important that this system should work to best effect in the public interest. The system also needs to be updated and refined on an on-going basis in response to changing circumstances. This process is land reform and for this review, the Group defined land reform as measures that modify or change the arrangements governing the possession and use of land in Scotland in the public interest.
  - 10 The need for land reform in these terms has long been recognised in Scotland and it is a topic to which the Scottish Parliament has paid particular attention. In the lead up to the Parliament’s establishment in 1999, the Scottish Office set up the Land Reform Policy Group (LRPG) to develop land reform measures that could be implemented by the Parliament early in its history.<sup>10</sup> The LRPG’s final recommendations subsequently resulted in the new Parliament enacting a range of land reform measures, starting with the Abolition of Feudal Tenure etc. (Scotland) Act 2000.
  - 11 The fact that Scotland still needed at the beginning of the 21st century to abolish feudal tenure as the way that most property was owned in Scotland, symbolised more widely that the arrangements governing the ownership and management of land in Scotland required modernisation and reform. While there has been significant progress over the last 15 years, the Review Group’s consultations identified many different issues still over how Scotland’s land is owned and used. These issues involve urban and rural land and also Scotland’s seabed.
  - 12 The wide nature of the Review Group’s remit and the diversity of significant land reforms issues identified in the evidence have represented a major challenge for the Group, particularly given the constraints on its inquiry in terms of the time and resources available.

---

<sup>8</sup> Scottish Government Statement August 2012

<sup>9</sup> Land as property includes buildings and other property rights in or over land

<sup>10</sup> LRPG Final Report (1999)



## The Report

- 13 The Group's approach to its remit has been to undertake a broad review of current issues over Scotland's system of land ownership, to encompass the diversity of topics identified during the Group's inquiry.
- 14 The Report has nine Parts. In the first, the Group sets the context for the rest of the Report by clarifying the scope of the Group's review and defining its use of terms including, for example, what is meant in the Report by 'the public interest'. The Report then has seven main Parts, 2-8, dealing with the main land reform issues considered by the Group. In Part 9, the conclusions from those Parts are discussed in terms of the three broad objectives in the Group's remit, and there is a summary list of the Group's Conclusions and Recommendations from each Part of the Report.
- 15 The Group's remit has required it to review Scotland's system of land ownership against the three broad objectives for the land reform measures to be recommended by the Group. As the Group worked through the list of land reform issues raised during its inquiry, the Group became ever more convinced of the importance of considering Scotland's system of land ownership as a whole. As the Group has learnt, the laws or lack of them governing the ownership and use of land are important to many different issues in urban, rural and marine Scotland.
- 16 The Group's review might be considered, in its way, as an update on further land reform measures that are still required in Scotland, following the implementation of LRPG recommendations and other reforms over the last 15 years. Then, at the time of devolution, Scotland's system of land ownership was out of date in many respects for historical reasons, including the limited opportunities for Scottish legislation at Westminster. While there have been significant improvements since then in a range of aspects, the Group's overall view is that Scotland's system of land ownership should be seen as still in transition from that outdated position, to a system that better serves the public interest in contemporary Scotland.
- 17 In the Report, the Group makes over 60 recommendations on a wide range of topics and the Group is concerned that these recommendations should be seen in context. While we have benefited greatly in our work from the knowledge of others, the Group is not an expert committee making authoritative recommendations on all of the topics covered.
- 18 Our task has been to carry out a broad review to identify issues and potential reforms in line with our remit. The number of issues to be covered inevitably means that there have been limits to the detail in which each topic could be considered. The role of the Report is to provide an overview that brings together some of the many important issues associated with the ownership of Scotland's land, and identify ways in which land reform measures could help tackle these issues in line with the three objectives in the Group's remit. The purpose of the Report is to inform and stimulate discussion rather than provide answers, and the Group's recommendations should be seen in that light.

### Acknowledgements

- 19 We are grateful everyone who contributed to the Group's inquiry, including those who sent in submissions, hosted visits by the Group, participated in meetings or helped the Group's work in other ways. The Group is particularly grateful to its Special Adviser, Robin Callander, its wider group of Advisers (listed in Annex 2) and the Group's secretariat, Dave Thomson and Pamela Blyth, for all their assistance with the Group's work.
- 20 As the Members of the Group, we take responsibility for the contents of our Report. We are very conscious that, in tackling the Group's remit and writing this Report, we have had to consider a wide range of topics in some of which we had limited previous knowledge. We apologise for any factual errors or similar mistakes that we have made unwittingly in the Report.

## PART ONE

### LAND REFORM CONTEXT

#### SECTION 1 - LAND OF SCOTLAND

- 1 The Land of Scotland is the area covered by the boundaries of Scotland as a sovereign territorial nation. Scotland's territorial area is covered by the jurisdiction of Scots law and is the area encompassed by Scotland's system of land ownership.
- 2 Scotland's rights of sovereignty over its territory are vested in the Crown with its distinct constitutional and legal identity in Scotland under Scots law, compared to the Crown in the rest of the United Kingdom under English law. This distinct identity was not affected by the Union of Crowns in 1603 and has continued since the Treaty of Union in 1707, when Scotland ceased to be an independent state but continued to be a sovereign territorial nation.
- 3 This Report is not considering rights of sovereignty. However, the Crown's distinct constitutional identity in Scotland means that the Crown property rights in Scots law, which are an important part of Scotland's system of land ownership, are also distinct from Crown property rights in the rest of the UK and belong to Scotland as a sovereign territorial nation.
- 4 Scotland's territorial area of approximately 168,500 sq. kms is defined by Scotland's land boundary with England and the boundaries to Scotland's territorial seas, as shown on the Report's cover. The size of this territorial area increased substantially less than 30 years ago, when the boundaries to Scotland's territorial sea area were expanded out to 12 nautical miles from the previous 3 nautical miles boundary.<sup>1</sup> As also shown on the Report cover, Scotland has rights of exploration and exploitation over the Continental Shelf adjoining Scotland's territorial boundaries out to a 200 nautical mile limit.<sup>2</sup>
- 5 The expansion of Scotland's territorial seas boundaries around the mainland and Scotland's islands means that approximately 88,450 sq. kms or 52% of Scotland's total territorial land area is seabed, compared with the land area of approximately 80,000 sq. kms.<sup>3</sup> If the Scottish sea area out to the 200 nautical mile limit is added, then the ratio of Scottish sea area to Scotland's land area is nearly 6:1.<sup>4</sup>
- 6 Another important component of Scotland's marine environment is the foreshore. This is the area of shore between the high and low water marks of ordinary spring tides around Scotland's coastlines, and forms the boundary between the seabed and land halves of Scotland's territorial area. The length of Scotland's foreshore is approximately 18,000 kms and relatively long compared to its land area, given the nature of much of the mainland coast and nearly 1,000 islands.<sup>5</sup>

---

<sup>1</sup> *Territorial Seas Act 1987*

<sup>2</sup> *Continental Shelf Act 1964*

<sup>3</sup> *Scottish Government (SG) briefing*

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid*

- 7 The Review Group emphasises the scale of Scotland’s territorial seabed and associated territorial marine interests here, because of their importance as part of the land of Scotland. Scotland is also a country where the “*vast majority of its population lives within 10 kms of the sea*”.<sup>6</sup>
- 8 In this report, the Review Group is considering the system of land tenure that Scotland has over its territorial land area, both seabed and land. Scotland’s system of land tenure, like those in other countries, determines “*who can use what resources, for how long, and under what conditions*”.<sup>7</sup> Also in common with most other countries, Scotland’s system of land tenure has three main components. The first is Scotland’s system of property laws governing how the land is owned. The second is the system of regulatory laws governing how land can be used. The third component is the system of non-statutory public sector measures to influence how land is owned and used in the public interest.
- 9 Scotland’s system of land tenure is governed by the laws of the land supported by other public sector measures, and the purpose of the system is to deliver the optimum outcomes in the public interest through the interactions of the system’s three components. Changes to the components of the land tenure system to improve the outcomes in the public interest are land reform, with land reform broadly defined in this report as **measures that modify or change the arrangements governing the possession and use of land in Scotland in the public interest.**
- 10 In this Report, the main focus is on the first component in Scotland’s system of land tenure, the system of property laws governing the ownership of land. This system of land ownership is the central component, which the other two components seek to influence.

## SECTION 2 - PEOPLE OF SCOTLAND

- 1 In this Report, the people of Scotland are considered to be everyone living in Scotland at any time. This was a population of 5.2 million at the last census in 2011. This is an average population density of 64 persons per square kilometre. However, 82% of the population live in urban areas covering approximately 6% of Scotland’s land area, with 18% or nearly a million people living in the rural areas that account for 94% of Scotland’s land area, including 118 inhabited islands.<sup>1</sup> The general distribution of Scotland’s population is shown in Fig. 2.
- 2 The people of Scotland are democratically represented by elected representatives in three legislatures, the Scottish, UK and European Parliaments. The highest number of representatives is in the Scottish Parliament, which is also the most important in the context of land reform. Responsibility for Scotland’s laws of land ownership is devolved to the Scottish Parliament, while the Scottish Parliament and Scottish Government are also largely responsible for most aspects of the regulatory laws and non-statutory measures that make up the other two components of Scotland’s system of land tenure.

---

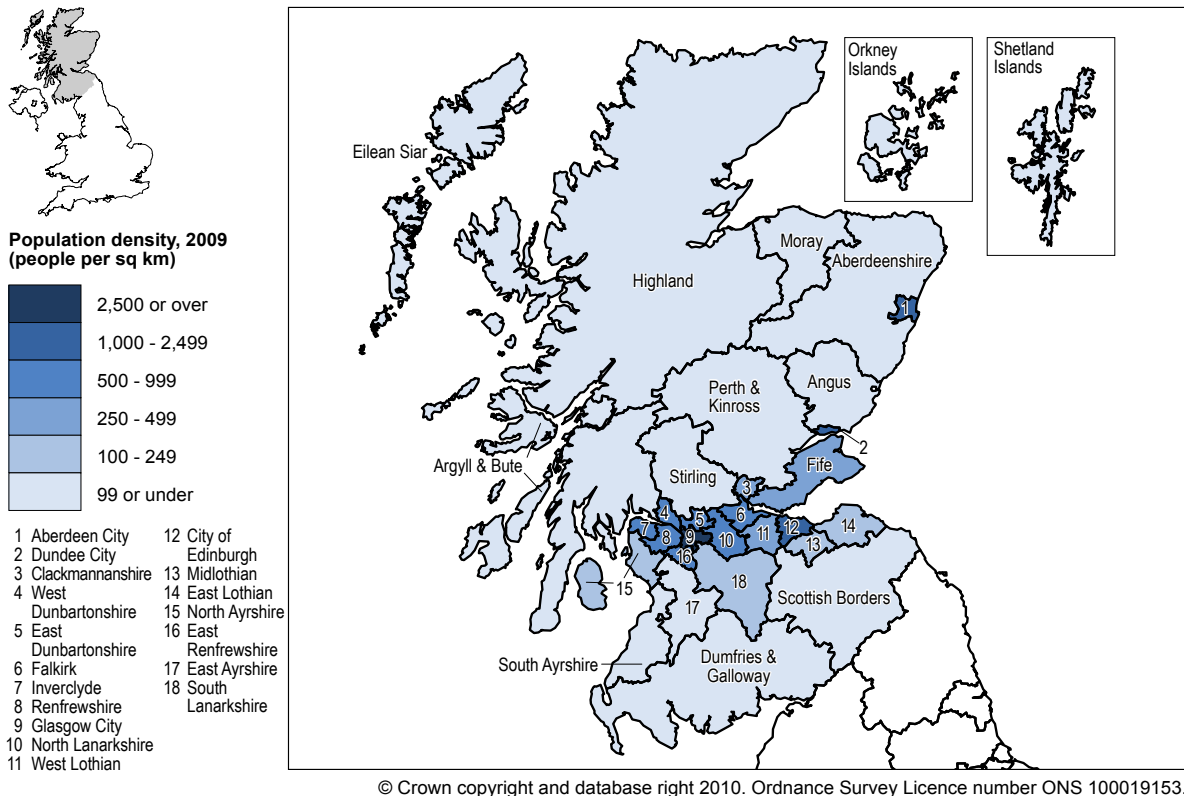
<sup>6</sup> *Sustainable Seas for All – SG consultation on Scotland’s first marine bill (2008)*

<sup>7</sup> *Food and Agriculture Organisation of the United Nations: “Responsible Governance of Tenure” 2012*

<sup>1</sup> *SG Rural Scotland Key Facts 2012*

**Fig. 2 Population Distribution by Local Authority Areas in Scotland**

Scotland population density: by council area, 2009



- 3 The Scottish Parliament, with its powers and responsibilities, is taken in this Report as representing the public interest of the people of Scotland in land and land reform. However, the significance of legislation in the other Parliaments should not be underestimated in a land reform context. The UK Parliament, for example, still has control of the management of some of Scotland's most important Crown property rights and also of taxation at a UK level related to land and property. European measures are also very important factors, although generally more concerned with the regulation and support of land use than with Scotland's system of property laws and land ownership.
- 4 The responsibility for determining the public interest of the people of Scotland rests with their elected representatives. The nature of that public interest in any situation has to be defined by the particular circumstances. The recent Court of Session case involving Pairc Estate illustrated this.<sup>2</sup> This case was brought by the Estate owner and concerned the intended purchase of the Estate by the local crofting community under Part 3 of the Land Reform (Scotland) Act 2003. As part of the findings, the Court decided that the lack of a definition of the 'public interest' in the Act was not a problem, because the public interest can only be determined in the specific circumstances of each case, and that it is the job of Scottish Ministers through their democratic position to decide what they judge to be the public interest in each instance.

<sup>2</sup> *Court of Session Pairc Crofters Ltd and Pairc Renewables v the Scottish Ministers (2013)*

- 5 In such cases, there is a balance to be struck between the public interest and the private interest. At a wider level, the public interest is determined by a balance of public and private interests. This balance of interests occurs throughout Scotland's system of land tenure, including the importance in the public interest of the private ownership of land. The balance to be struck is governed by Article 1 of the European Human Rights Convention (ECHR) First Protocol, which both provides for the protection of a land owner's enjoyment of their property and makes clear that the owner's private interest gives way to the public interest. The issue in particular situations is whether the public interest case is judged sufficient to over-ride the interests of private land owners.
- 6 The public interest of the people of Scotland, as described above, is determined by elected representatives at a particular time in a specific context. The Review Group uses the public interest in this sense in this Report, including when the Group makes specific proposals for reforms which the Group considers would be 'in the public interest'. However, decisions about the public interest in different contexts have to be based on an overall goal at which they are all aiming. In this Report, the Group uses 'the common good of the people of Scotland' to represent the goal to which the public interest aspires.
- 7 The 'common good' is an ancient concept and one with a very long tradition in Scotland. An example of its use in land tenure in Scotland is the common good lands held by Scotland's former burghs for the common good of their inhabitants and which are now managed by Scotland's local authorities. The Common Good Act 1491 remains in force in Scots law as part of the current legislation governing these common lands, which are discussed later in Section 14 of this Report.
- 8 The idea of promoting the common good of people in an area is readily understood at the overall level of promoting the wellbeing of all the people in the area. The common good is, in these terms, that which benefits society as a whole. The purpose of the Scottish Government's Land Use Strategy (LUS) for Scotland, for example, is "*to promote the wellbeing of the nation*".<sup>3</sup> The Review Group considers that, similarly, the purpose of Scotland's system of land tenure should be to promote the common good of the people of Scotland. Thus, the land reform measures proposed in this Report are measures intended to modify or change the arrangements governing the possession and use of land in Scotland in order to promote the common good of the people of Scotland.
- 9 In using the concept of the common good in this land tenure review to represent the wellbeing of all, the Group recognises that the common good encompasses a number of other important related aims. One of these is that the common good depends on democracy. This is not only democracy in terms of elected representatives, but the fuller senses of participatory democracy and active citizenship. This is also associated with the recognised constitutional principle in Scotland of the sovereignty of the people and the longstanding description of the Crown in Scotland as representing 'the community of the realm'.<sup>4</sup>
- 10 Three other aims which the Group considers to be central parts of the common good are environmental sustainability, including its intergenerational and international dimensions; economic success with its role in delivering the common good; and social justice with its principles of fairness and equality of opportunities. These aims are represented in the opening statement of the Group's remit (Annex 1) that "*the relationship between the land*

---

<sup>3</sup> Scottish Government Land Use Strategy (2011)

<sup>4</sup> R Callander 'How Scotland is Owned' (Canongate, 1998)

*and people of Scotland is fundamental to the wellbeing, economic success, environmental sustainability and social justice of the country”.*

- 11 The other aim which the Group considers a central component of the common good in this Report, is human rights. The traditional focus in discussions in Scotland about human rights and land reform has been the balance to be struck between private property rights and the public interest under Article 1 of the European Convention on Human Rights (ECHR) First Protocol, as in the example in paragraphs 4-5 above. However, as the work of the Scottish Human Rights Commission (SHRC) demonstrates, the relationship between human rights and land in Scotland is not only about the principle in that Protocol. The SHRC was established by the Scottish Parliament in 2006 and works, both in Scotland and internationally, as part of the network of national human rights commissions in other countries, under the overall auspices of the United Nations.<sup>5</sup>
- 12 During the period of the Group’s inquiry, the SHRC published Scotland’s first human rights National Action Plan and in this the SHRC identifies that issues over the ownership and use of land can be important factors in delivering some human rights commitments.<sup>6</sup> The availability of housing of an appropriate standard to provide sufficient homes for the people living in Scotland is a prominent example. The SHRC also highlights, in addition to the ECHR, the importance of the UN Covenant on Economic, Social and Cultural Rights. This recognises, under Article 11, the right of everyone to an adequate standard of living, including adequate food, clothing and housing and to the continuous improvement of living conditions.
- 13 This right to the continuous improvement of living conditions reflects that it is the duty of states to achieve a progressive realisation of the human rights of their people and to provide a framework that will oversee that progression. In this Report, the Group reviews Scotland’s system of land tenure as one part of that framework.

### SECTION 3 - RECENT LAND REFORM

- 1 Land reform programmes have taken place in many different countries in many different ways over recent centuries, with the purposes of the reforms defined to match the circumstances. A prominent 20th century example has been the agrarian changes in African, Asian and Latin American countries since the 1950s, when the United Nations (UN) made land reform a condition of development aid. The UN’s traditional definition from that time is that land reform is *“an integrated programme of measures to eliminate obstacles to economic and social development arising out of defects in agrarian structure”*.<sup>1</sup>
- 2 Another prominent example of 20th century land reform has been the restitution and privatisation of property in Eastern European countries since the collapse of the Soviet Union. These changes might be considered closer to the World Bank’s view in the 1970s that *“land reform is concerned with changing the institutional structure governing man’s relationship with the land”*.<sup>2</sup>

<sup>5</sup> *Scottish Commission for Human Rights Act 2006*

<sup>6</sup> *SHRC ‘ Scottish National Action Plan’ (2013)*

<sup>1</sup> *UN Progress in Land Reform (1962)*

<sup>2</sup> *World Bank, Land Reform Sector Policy (1975)*

- 3 Scotland has had its own history of land reform in previous centuries. However, the recent history of land reform in Scotland can be considered to have started with the work of the Scottish Office's Land Reform Policy Group (LRPG). This was set up in 1997 to develop recommendations for land reform measures that could be implemented by the new Scottish Parliament once it was established. The LRPG, which was chaired by Scottish Office Minister Lord Sewel, carried out public consultations on land reform issues and potential solutions, before publishing its final recommendations for land reform measures in January 1999.
- 4 The Government's decision to set up the LRPG reflected widespread recognition that many aspects of Scotland's system of land ownership needed to be modernised, as symbolised by the survival of feudal tenure, as the main form of land ownership. This out of date position resulted, in significant part, from the limited opportunities for legislation at Westminster for updating Scots property law, and also from the potential influence of the House of Lords on measures that might be brought forward. The new Scottish Parliament, with devolved responsibility for Scots law, was seen as offering the opportunity to achieve overdue changes and introduce new land reform measures.
- 5 At the start of its work, the LRPG stated that *"the objective of land reform is to remove the land-based barriers to the sustainable development of rural communities"*.<sup>3</sup> This statement, with its reference to 'barriers' and its 'rural' focus, echoes the UN definition of land reform ('obstacles', 'agrarian'). However, the LRPG took a much more holistic approach. The LRPG's final report proposed a wide ranging programme of land reform measures, with their recommendations grouped under seven headings:
- |  |                                      |
|--|--------------------------------------|
| A. Law reform legislation                                    | D. Agricultural holdings legislation |
| B. Land reform legislation                                   | E. Crofting legislation              |
| C. Legislation on countryside<br>and natural heritage issues | F. Action without legislation        |
|  | G. Issues for further study          |
- 6 The LRPG's final recommendations were published in January 1999 and adopted by the new Scottish Executive as its land reform programme, when it took office in July 1999. The Executive published its Land Reform Action Plan in August and, in November 1999, there was the first debate on land reform in the Scottish Parliament. Then, in 2000, the new Parliament enacted the Abolition of Feudal Tenure etc. (Scotland) Act as one of the Parliament's first pieces of legislation. The Scottish Executive also continued to produce updated Land Reform Action Plans and further LRPG recommendations were implemented through legislation during the first session of the Parliament 1999-2003, including the Land Reform (Scotland) Act 2003.
- 7 In that first session, assisted by the preparatory work of the LRPG, the Scottish Parliament made impressive progress with land reform measures to start modernising Scotland's system of land tenure. The particular focus on land reform in that session has not been equalled since. The Scottish Parliament has however continued, in its three sessions since 2003, to pass legislation that involves land reform measures.
- 8 As part of this inquiry, the Review Group carried out a quick and indicative survey of the Acts of the Scottish Parliament to obtain an impression of the number of Acts passed which have included what might be considered land reform measures to a greater or lesser degree.

---

<sup>3</sup> *Land Reform Policy Group (LRPG) (1998)*



For this, the Group defined land reform measures as provisions in an Act that reformed or modernised the rights of land ownership in Scotland, whether through property law or regulatory law. The Group did this analysis in August 2013, by which time 205 Acts of the Parliament had received Royal Assent. The Group considered that approximately 38 Acts contained some land reform provisions. These 38 Acts were also spread across the Parliament's sessions to date.<sup>4</sup> The Group considered that approximately equal numbers of these Acts had land reform provision to a greater and to a lesser degree (see Annex 4).

- 9 While the total number of Acts identified by the Group in its survey was approaching 20% of all the Acts passed by the Parliament, numbers of Acts do not convey the scale or significance of Acts. However, it is clear that legislation to modernise and reform aspects of Scotland's system of land ownership and use has continued to be a significant part of the business of the Scottish Parliament since it started. This process is also due to continue with, for example, the current Community Empowerment (Scotland) Bill and the further agricultural holdings legislation scheduled in the current session of the Parliament.
- 10 In Scotland, land reform as defined in this Report should be an ongoing process addressing many different public policy objectives. This should be part of continuously updating and improving the many different aspects of Scotland's system of land tenure, so that it better delivers the public interest.
- 11 The first session of the Scottish Parliament had a land reform programme established by the Scottish Executive. In contrast, since 2003, there has been no land reform programme. The land reform measures after 2003 have therefore tended to be specific responses to particular issues, rather than part of any wider land reform strategy or programme. Many of the measures were not generally seen as 'land reform' as such. This has resulted in a sense of loss of momentum in taking forward the type of broad, modernising land reform agenda covered by the LRPG's recommendations.<sup>5</sup> However, as Lord Sewel wrote in that Group's final report:
 

*"It is crucial that we regard land reform not as a once-for-all issue but as an ongoing process. The parliament will be able to test how this early legislation works and how it effects change. They will then have the opportunity to revisit and refine their initial achievement.....These present recommendations are therefore by no means the final word on land reform; they are a platform upon which we can build for the future".*<sup>6</sup>
- 12 Lord Sewel refers to a platform to build on, this Group's remit states that *"The various strands of land reform that exist in Scotland provide a firm foundation for further developments"* (see Annex 1). The Group also considers that the support in the Scottish Parliament on all sides for further land reform measures in the debate on land reform on 5th June 2013 reflects a wider recognition in Scotland that land reform is needed.
- 13 There was also a further clear indication that land reform measures are considered to be necessary a month after the Scottish Parliament's debate, when the House of Commons Scottish Affairs Committee launched an open consultation in July 2013 on 'A programme of comprehensive land reform in Scotland'.<sup>7</sup> We wrote to the Committee welcoming their

<sup>4</sup> 1999-2003 (12); 2003-07 (8); 2007-11 (9); 2011- Aug.2013 (9)

<sup>5</sup> Wightman, *Land Reform: The Way Ahead* (Scottish Community Alliance 2011)

<sup>6</sup> LRPG *Op cit*

<sup>7</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/scottish-affairs-committee/inquiries/parliament-2010/land-reform-in-scotland/>

inquiry for the contribution that it can make to what those reforms to the ownership and use of Scotland's land should be. The Committee has since published an Interim Report, which we refer to later in this Report.

- 14 The evidence we gathered as part of our review clearly demonstrates that there are still issues to be addressed and opportunities to be developed in reforming Scotland's system of land ownership. In this Report, we set out our review of the current position.

## PART TWO

### THE OWNERSHIP OF LAND

#### Introduction

- 1 The concept of ownership is central to how the land of Scotland is used. The ownership of land or land rights conveys the right to use the land or right as the owner chooses, subject to the legal terms of their ownership and the statutory provisions governing the use of land.
- 2 Scotland's system of land ownership is defined by Scots law and there have been major improvements in these property laws since devolution. One of the first Acts of the new Scottish Parliament was to abolish Scotland's archaic system of feudal land tenure as the main way by which land was owned in Scotland.<sup>1</sup> That change and others since have been important and long overdue modernisations of Scotland's laws of land ownership. This process of modernisation is on-going, as illustrated by recent legislation by the Scottish Parliament.<sup>2</sup>
- 3 The Review Group considers further modernisation and reform is required and in this Part of the Report, the Group examines four particular issues:
  - the slow progress in developing a comprehensive, map based register of land ownership in Scotland;
  - the limited constraints on the types of legal bodies that can own land in Scotland;
  - the continuing distinction between land and other forms of property in the law of succession in Scotland;
  - the archaic nature of the laws in Scotland governing the compulsory purchase of land by public authorities.

#### SECTION 4 - LAND REGISTRATION

- 4 The Review Group considers that an efficient and effective system for recording the ownership of land should be part of any modern system of land ownership and in this Section, the Group examines the slow progress in developing a comprehensive, map based register of land ownership in Scotland.

##### 4.1 Title to Land

- 5 The owner of land or land rights in Scotland is, with two main exceptions, the person who

---

<sup>1</sup> *Abolition of Feudal Tenure etc (Scotland) Act 2000*

<sup>2</sup> *For example, Long Leases (Scotland) Act 2012, Land Registration etc (Scotland) Act 2012*

- is the registered title holder, as recorded in either the Register of Sasines or the Land Register.
- 6 The first main exception is Crown property rights such as the ancient legal presumption in Scots law of the Crown's ownership of Scotland's territorial seabed, or the Crown's statutory ownership of the right to gold and silver mining in Scotland from legislation in the 15th and 16th centuries. Crown property rights are considered further in Section 11.
  - 7 The other main exception to a written title signifying ownership, is the system of udal tenure that operates in the Northern Isles, particularly the Shetland Islands. Under this distinctive system of Norse origin, occupation is ownership without the need for a title deed. This means that the rights held over particular land can be unclear. However, given the increasing benefits of a title deed (for example, for mortgages), it appears most udal land is now held on written titles.<sup>1</sup> There is thus no practical difference in conveyancing transactions for udal properties. For registration, the Keeper of Registers can note, for these titles in the Burdens Section of the Register, that such rights as are held under udal tenure continue to be held. The main distinction of significance under udal tenure is that the ownership of the foreshore goes with the adjoining land and there is therefore no need to consider whether the Crown might be involved (see Section 11). No particular issues over the current operation of udal tenure in the Northern Isles were raised with the Review Group as a result of its call for evidence and some follow up inquiries. It is therefore not considered further in this Report.
  - 8 The Abolition of Feudal Tenure etc (Scotland) Act 2000 had the effect of making other land owners in Scotland more like udal owners, in the sense that it made them outright owners rather than vassals with a feudal superior having an interest in their land. The end of feudal tenure has radically simplified titles to land, while the associated Title Conditions (Scotland) Act 2003 has had a similar effect by modernising the types of interests and conditions or 'real burdens' that can be attached to titles to land.
  - 9 Scotland's new and more straightforward system of 'outright ownership' has been a substantial improvement since devolution. However, as discussed below, major progress is still required to Scotland's system for recording titles to land. One result of that progress should eventually be an answer to the longstanding question of 'Who owns Scotland?'.<sup>2</sup>

## 4.2 Register of Sasines

- 10 An efficient regime for recording titles to land is a key aspect of a modern effective system of land ownership. While Scotland was a pioneer when the Registration Act 1617 created the Register of Sasines to record title deeds (sasines), Scotland might now be regarded unusual in a European context in not having a comprehensive map based system recording who owns the land.<sup>3</sup>
- 11 The recording of titles in the Register of Sasines was not compulsory, but the rule was that recording was necessary to establish a real or proprietary right and that ownership passed on recording.<sup>4</sup> While recording secured ownership, the purpose of the rule was, as the 1617

<sup>1</sup> *Shetland Islands Council letter 23.12.13*

<sup>2</sup> *For example, J.McEwen 'Who Owns Scotland' (EUSPB, 1977), A.Wightman 'Who Owns Scotland' (Canongate, 1996)*

<sup>3</sup> *Real Property Law and Procedure in the European Union (2005)*

<sup>4</sup> *Real Rights Act 1693*

Act states, the protection of third parties by making transactions in or over land transparent.

- 12 The Register of Sasines still operates and the difficulties of searching it are eased to some extent by indexes that have been developed since the 19th century of people and properties. However, discussions started in Scotland in the early 1900s about moving from a system for recording deeds to a title registration system, and this eventually led to the Land Registration (Scotland) Act 1979.

### 1979 Act

- 13 The 1979 Act established a new Land Register in which properties are mapped by title boundaries and, for each title unit, there is a title sheet setting out who the owner is and what other rights there might be in the property. The other major change was the introduction of a state guarantee of title for the properties recorded. The change from the Register of Sasines to the Land Register is thus a change from a system where it was a title deed to be registered that represented ownership, to one where it is the registration that represents ownership.
- 14 The primary trigger in the 1979 Act for first registration in the new Land Register, was where there had been a transaction for value. The introduction of the Register was rolled out county by county, starting in 1981 and extending to the whole country by 2003, with property transactions in each area being recorded in the Land Register once it became operational in that area. Voluntary registrations were also allowed at the Keeper's discretion.
- 15 The 1979 Act had needed to be a relatively short piece of legislation, to enable it to conform with the limited time available for its consideration at Westminster. This resulted in significant aspects of the operation of the new land registration system having to be evolved subsequently to meet circumstances. A review of the 1979 Act by the Scottish Law Commission (SLC) resulted in discussion papers in 2004 and 2005 and the SLC's Report on Land Registration in 2010.<sup>5</sup> These led to the Land Registration etc. (Scotland) Act 2012.
- 16 One of the primary objectives of the 2012 Act, while addressing the technical issues that had arisen from the operation of the 1979 Act, was to provide for the closure of the Register of Sasines and the completion of the Land Register.<sup>6</sup>

### 2012 Act

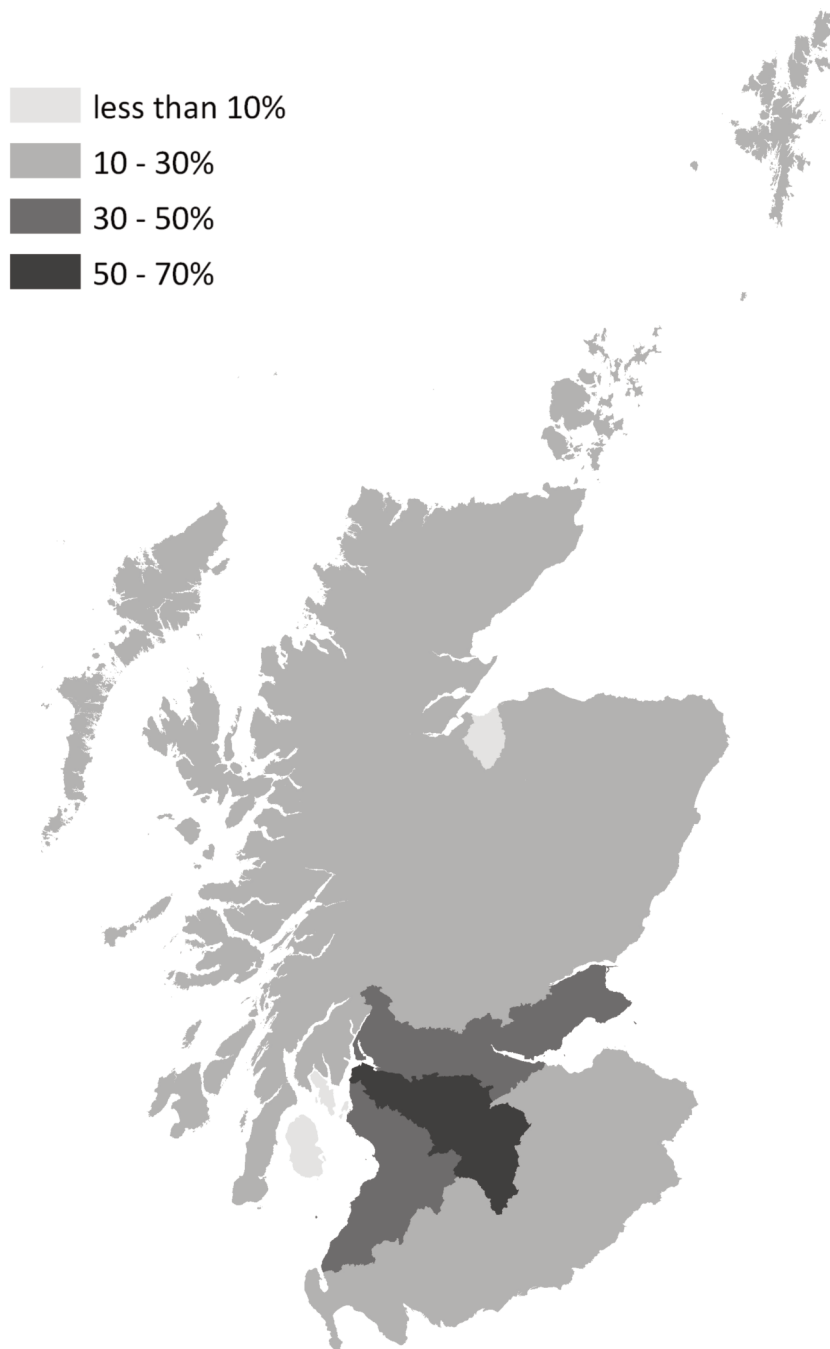
- 17 In their 2010 Report on Land Registration, the SLC wrote "*Who owns Scotland is a familiar question. The Land Register is now providing that answer*". However, progress has been very slow towards the stated aim for the Register of 100% coverage. By 2012, over 30 years since the introduction of the Land Register, 56% of Scotland's estimated 2.2 million title units were recorded in the Register (Fig. 3). This was up 1% on the year before and by May 2013, had reached 57%. Registers of Scotland estimate that at the current rate, it will be a further 40 years before 80% of titles are on the Register.<sup>7</sup>

<sup>5</sup> Scottish Law Commission (SLC) (Report 222, 2010)

<sup>6</sup> Registers of Scotland (RoS) briefing

<sup>7</sup> RoS 2012


**Fig. 3 Percentage of Titles recorded in the Land Register**

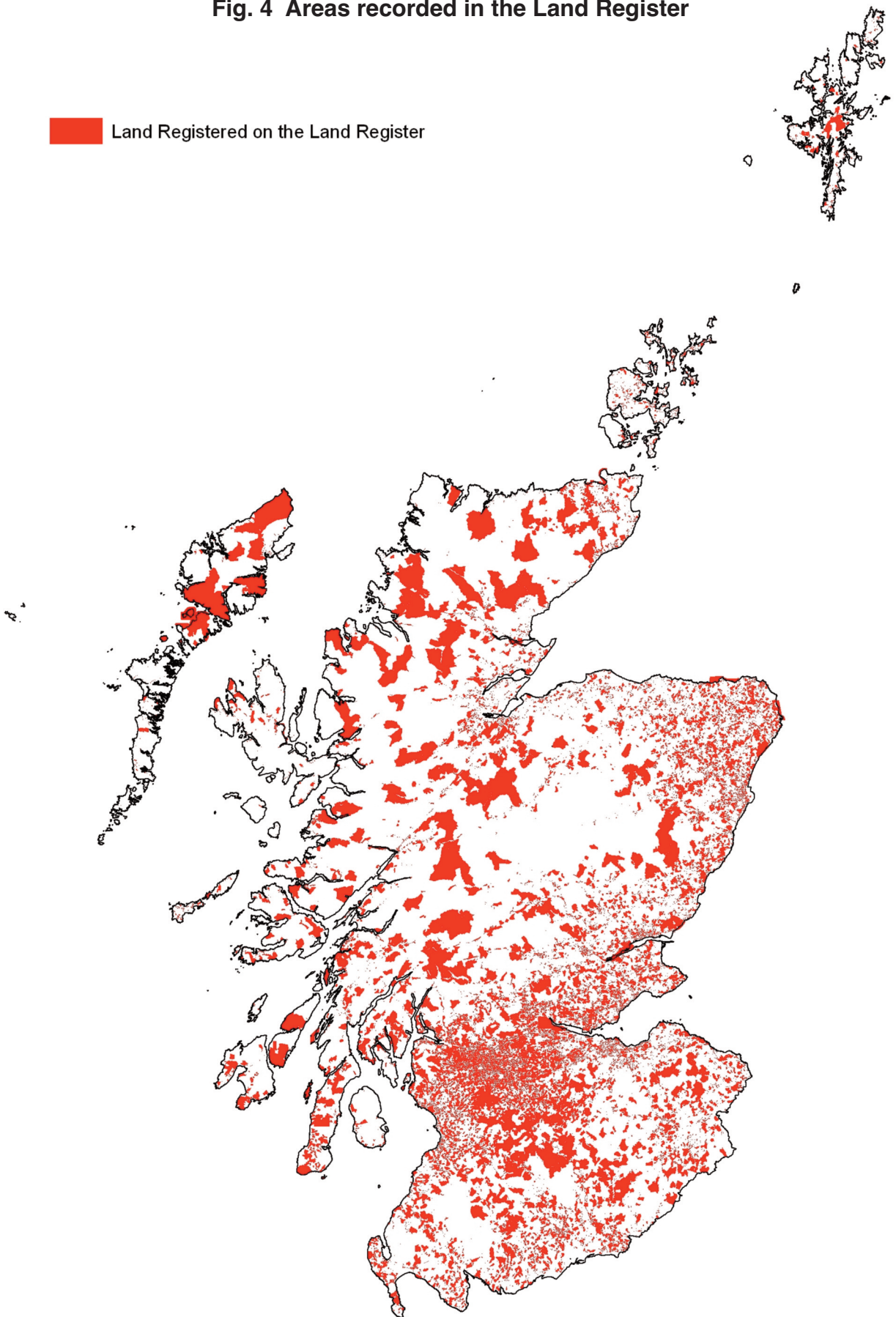


18 The Register’s percentage coverage of Scotland’s land area is substantially less than that for titles. This is essentially “because larger landward properties tend to be bought and sold less often than smaller urban ones”.<sup>8</sup> In 2012, after over 30 years, 23% of the land area was covered (Fig. 4). This was up 2% or 172,100 hectares from the year before. This was the largest increase for five years due to “a small number of registrations covering large areas of land”. By 2013, the coverage of Scotland’s land had reached 25%.<sup>9</sup>

<sup>8</sup> SLC (2010) *Op cit*  
<sup>9</sup> RoS 2012 *Op cit*

**Fig. 4 Areas recorded in the Land Register**

 Land Registered on the Land Register



## Register

- 19 The Land Registration (Scotland) Act 2012, with its objective of completing the Land Register, provides for this in four main ways: new triggers for first registration; voluntary registration; the phased closure of the Register of Sasines and Keeper-induced registration.
- 20 The new triggers include the requirement that all transfers of title (whether for value or not) will induce first registration, as will the granting of a standard security over land. In addition, any grant or assignation of a long lease (i.e. over 20 years) will induce registration of the land owner's title to the leased land. Registers of Scotland (RoS) have estimated that these triggers will increase first registrations by around 6-7,000 in the year following the 2012 legislation coming into effect. With the second measure, voluntary registration, the 2012 Act creates a presumption in favour of the Keeper accepting voluntary registrations when no transaction is involved. There were few voluntary registrations prior to the Act. In 2013-14, by December, RoS had received 238 requests for voluntary registrations.<sup>10</sup> However, the Scottish Government has made it clear it is keen to encourage these.<sup>11</sup> Registers of Scotland also sees voluntary registration "*as one of the keys to completing the Land Register*".<sup>12</sup>
- 21 The third measure in the 2012 Act to promote completion of the Land Register, is the provision to allow for a planned, phased closure of the Register of Sasines. This could be done on an area by area basis, for example, county by county similar to the original roll out of the Land Register.<sup>13</sup> The Register of Sasines could also be closed on a type of deed basis, for example, standard securities. Once the Register of Sasines is closed, a person's deed will have to be voluntarily registered in the Land Register to secure their ownership or 'real right' in land. However, at present, there appear to be no specific plans for any closures of the Register of Sasines.
- 22 The fourth measure in the 2012 Act to help complete the Land Register, is the Keeper's new power to register an unregistered plot of land without having an application from the owner or the owner's consent. This power of Keeper-induced registration will be essential in due course for the final completion of the Land Register, enabling the Keeper to register areas that have not come on to the Register through transaction based registration or voluntary registration. However, it is also a power that could be used sooner in some areas and RoS expect to carry out a public consultation on this in 2014.<sup>14</sup>
- 23 The definition of land in the 2012 Act also establishes that the scope of the Land Register includes all Scotland's land out to the 12 nautical mile territorial boundary.<sup>15</sup>

## Current Position

- 24 The Review Group notes that, in the lead up to the 2012 Act, "*one of the constant themes... from parties giving evidence during the passage of the Bill, was the need to speed up completing the Land Register*".<sup>16</sup> The Group recognises that the 2012 Act puts in place a

---

10 *Of which only 4 were refused (RoS briefing) Op cit*

11 *Fergus Ewing speech 29.10.13*

12 *RoS briefing Op cit*

13 *SLC 2010 – p.2 footnote - "Renfrewshire, having been operational for the Land Register for the longest period, has the highest degree of coverage"*

14 *RoS briefing Op cit*

15 *RoS Consultation Sept 2013 on Implementation of Land registration etc (Scotland) Act 2012*

16 *Fergus Ewing speech 29th Oct 2013*



legislative framework that will enable completion. However, the Group is concerned about how long that process might yet take.

- 25 The current relatively low extent of coverage by the Land Register and the slow projected rate of increase in the coverage, appear at odds with the widely recognised importance of an efficient and effective system of dealing with land titles as essential to the functioning of a modern economy. Without such a system, land transactions are more difficult and expensive. The value of annual land sales in Scotland is currently estimated at around £24 billion. The SLC have identified the Land Register as part of the 'national infrastructure' because it affects every square inch of the country and the whole of Scotland's economic life.<sup>17, 18</sup>
- 26 The Scottish Government has also recognised this importance and, for example, recently highlighted when referring to the 2012 Act, that an efficient, effective and indemnified land registration system is recognised by the World Bank as one of the most important factors in achieving economic development and business growth.<sup>19</sup> However, in Scotland, with the current limited coverage and the slow projected rates of increase, there is still a long way to go. The Review Group examined the position in Denmark as an example of the type of system that Scotland should have in place. In Denmark, the comprehensive map based land register is also part of a fully integrated land cadastre, which incorporates information on factors such as land use and planning status.
- 27 Given the clear and important utility of having a comprehensive mapbased system of land registration, there seems to be a conspicuous case for accelerating the rate at which properties become recorded in the Land Register. Otherwise, as the SLC has commented, the process could go on indefinitely.<sup>20</sup> The Review Group recognises that the 2012 Act is only just coming into effect, but we are not convinced that major progress towards completion of the Register is imminent. There also do not seem to be any statements by the Scottish Government or the Keeper of the Registers identifying any coverage targets to be achieved by some future date.
- 28 One feature of the current position is that a relatively large amount of public land owned by Scottish Ministers is not on the Land Register. Some land owned by Scottish Ministers is registered as a result of the normal triggers for first registration. However, the only specific initiative has been a rolling programme since 2005 of voluntary registration of Sasine titles held by Scottish Ministers and managed by Transport Scotland. In the eight years of this programme to date, approximately 900 of around 9,300 titles in the Register of Sasines have been registered by the Keeper in the Land Register.<sup>21</sup> The Review Group considers that the Scottish Government should be expanding this approach to include other land owned by Scottish Ministers, and land owned by other Scottish public bodies holding title to land in their own rights (see Section 9). This should develop into a planned programme for the registration of all government land. The Group recognises that a balance has to be struck between progress towards the goal of having all government land in the Land Register and the cost to public finances. However, the Group considers that the Scottish Government should be investing more in registering public properties in the Land Register for the benefits that will bring.

<sup>17</sup> Fergus Ewing, Minister of ET&T on 31.5.12 in debate of LR Act 2012

<sup>18</sup> SLC 2010 Op cit

<sup>19</sup> 16.9.13 Fergus Ewing, Minister for Energy, Enterprise and Tourism

<sup>20</sup> SLC 2010 Op cit

<sup>21</sup> RoS briefing Op cit

- 29 The Review Group also considers, as part of improving the coverage of the Land Register more generally, that the Keeper should take a proactive approach to Keeper-induced registration. This could include the areas of land covered by an appropriate community body registering a pre-emptive right to buy over land under the Land Reform (Scotland) Act 2003, as the information required from the community body under the Act would appear sufficient for the Keeper to register the land as in any first registration. The same approach could be adopted with agricultural tenants registering a pre-emptive right to buy under Part 2 of the Agricultural Holdings (Scotland) Act 2003. RoS already keeps separate registers to record both these types of interests.
- 30 The Review Group’s view is that further steps should also be taken to increase the rate of voluntary first registrations for other properties. The Group considers that additional triggers for first registration could also be put in place. One approach to this would be making certain types of public grants and tax concessions to land owners for the management of buildings and land, conditional on the property involved being registered in the Land Register. With different types of public subsidies, this requirement could be based on receiving funding above a certain level and would provide the public interest benefit of increased transparency over what can be substantial payments. An example for this approach is the Scottish Rural Development Programme, which distributed £4.1 billion in the six years between 2007-13 and which already has a map based payments system. This could have a major affect on improving the particularly low current level of coverage in the Land Register of land in rural Scotland.
- 31 In introducing this type of requirement, sufficient notice would need to be given, to enable those planning to apply for the funding to carry out the work necessary to apply for registration first. The Review Group recognises that there could also be a capacity issue, if registrations were to be increased too quickly beyond a certain rate, both in terms of the availability of private sector professionals to prepare titles for registration, and in terms of the research required within RoS to issue the land certificates guaranteeing titles. However, the Group considers that there is scope to build up capacity to match an increasing rate of first registrations.
- 32 **The Review Group considers the limited progress to date in the coverage of the Scotland’s Land Register is a major issue. Given the economic and wider public benefits this will produce, the Group recommends that the Scottish Government should be doing more to increase the rate of registrations to complete the Land Register, including a Government target date for completion of the Register, a planned programme to register public lands and additional triggers to induce the first registration of other lands.**

## SECTION 5 - OWNERS OF LAND

- 1 In the previous section, the Review Group considered the need for an effective and efficient system for recording who owns the land in Scotland. In this Section, the Group considers whether there should be any new limits on who should be able to register a title to own land in Scotland.
- 2 In Scotland, as in other countries, there are legal limits as to who is entitled to own land.

While owners can be either natural or legal persons, a basic requirement to hold title to land in Scotland is contractual capacity. Individuals can be excluded, for example, on the grounds of insanity, and legal persons have to have a legal identity recognised in Scots law. Thus, for example, unincorporated associations do not have sufficient legal identity and titles are therefore held in the name of their office bearers. Owners can also become disqualified from continuing to hold title (for example, a natural person who becomes insane).

- 3 A particular topic that is raised in the context of limiting who can own land in Scotland, is the lack of traceability and accountability of some legal bodies based overseas that own land here. While this issue has usually emerged in a specific case, it is also now part of wider concerns about the traceability and accountability of corporate bodies because of tax fraud and tax evasion.
- 4 The link between those wider concerns and land ownership in Scotland is illustrated by the following quote from the debate in the House of Commons in June 2013, about an EU Council resolution in May 2013 to combat “tax fraud, tax evasions and aggressive tax planning”.<sup>1</sup>
  - *Mr Ian Davidson MP: I welcome the statement from the European Council and the Government, which says that proper information on ‘who really owns and controls every company’ will be provided. Will the Government co-operate with the Scottish Affairs Committee in establishing who owns and controls the great landed estates in Scotland, in order that they can minimise both tax avoidance and subsidy milking?*
  - *The Prime Minister: That is the intention of this move. Having all countries sign up to an action plan for putting together registers of beneficial ownership by companies and the rest of it will help tax authorities to make sure that people are paying tax appropriately. That is a debate that we are leading at the G8 and in the European Union.*<sup>2</sup>
- 5 Against this background, the Review Group considered whether there might be scope in Scots law to exclude certain types of overseas bodies from owning land in Scotland, in the interests of traceability and accountability. The Group recognises that, beyond the limited existing measures in Scots law, there is a clear presumption against restricting the persons who can hold land in Scotland. This results from Scotland’s position within the European Union. In particular, Article 26 of the Treaty on the Functioning of the European Union (TFEU) states:-
  - *The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.*
  - *The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*
- 6 The requirement in (2) for the free movement of capital includes the ability to invest in ‘land’ as what is known as immovable or heritable property. Significantly, Article 63 of the TFEU also prohibits any restrictions on this movement of capital from countries outside the EU:

---

<sup>1</sup> EU Council: Conclusions 22nd May 2013

<sup>2</sup> Hansard, House of Commons, 3rd June 2013, Column 1254

Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

- 7 However, this general guarantee of free movement is qualified by Article 345 of the TFEU:
  - *The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.*
- 8 This qualification reflects that the EU recognises the wide scope of including third countries in the free movement of capital, and accepts that there can be legitimate national concerns for public policy or security for a member state taking protective measures on these grounds.<sup>3</sup> Legal cases show that such exceptions to core Treaty principles need to be narrowly construed, proportionate, transparent and subject to judicial review.
- 9 Within this context, the Review Group identified one potential measure that could improve the traceability and accountability of legal entities with their corporate seats in third party states outside the EU. It appears that a practical step that could be taken in Scots law, would be to make it incompetent to register title to land in the Land Register in any legal entity not registered in a member state of the EU.
- 10 This proposal does not appear to breach any internal EU requirements and would not bar investment by legal entities in third party countries, as they just need to set up an EU entity to own it. The change, while it would not necessarily reveal the final beneficiary owner of the EU entity, would ensure the entity is governed by EU law and that there are named Directors legally responsible and accountable for the affairs of the company. These benefits might be considered to warrant the change in the public interest.
- 11 **The Review Group recommends that the Scottish Government should make it incompetent for any legal entity not registered in a member state of the European Union to register title to land in the Land Register of Scotland, to improve traceability and accountability in the public interest.**

## SECTION 6 - SUCCESSION LAW

### 6.1 Status of Land

- 1 In Scots law, there are two types of property, immoveable and moveable. Immoveable property is 'land' (and that which is attached to it) and still commonly called heritable property in Scotland.<sup>1</sup> Everything else other than heritable property is considered moveable property.
- 2 In this Section, the Review Group examines the long standing issue over the continuing different treatment of land in comparison to other property in Scotland's laws of succession (or inheritance). This distinction does not occur in other European countries and can be traced back to the introduction of feudal tenure in Scotland over 900 years ago. Since that

---

<sup>3</sup> TFEU Art. 65(1b) and Art. 52(1) 2012

<sup>1</sup> Land includes that which is attached to land and includes separate property rights in, for example, mineral rights owned separately from the surface of the land

period, the laws of succession to land have been a key issue for those owning the land, in order that their heirs and descendants retained control over all of the land held.

- 3 The arrangements, which were put in place to ensure that continued control of landed estates, included a distinction between land and other types of property, with the succession to land being governed by the law of primogeniture<sup>2</sup> and other measures that were developed, such as entailment.<sup>3</sup> Remarkably, both these measures have only ended in the last 50 years, with primogeniture in relation to land finally abolished in 1964<sup>4</sup> and the last vestiges of entailment ended as part of the Abolition of Feudal Tenure etc (Scotland) Act 2000.
- 4 However, the feudal difference between land and other property still survives as part of Scotland's laws of succession. The remaining distinction is important in a situation where a deceased person's testament (or will) bequeaths their estate in a manner that disinherits (i.e. omits) certain close family members. Whilst a deceased person's children and spouse (or civil partner) have indefeasible rights in the moveable estate, known as legal rights, no such rights exist in relation to heritable property.
- 5 In considering why this distinction still exists, the Group reviewed the long history of recommendations to remove this distinction between heritable and moveable property in succession law. This has included several reports over recent decades by the Scottish Law Commission. A feature of this history is the influence in preventing the removal of the distinction by what is generally described in the reports as agricultural and landed interests.

## 6.2 Before Devolution

- 6 In Scotland up until 1868, land could still not be bequeathed in a will, as land continued to pass to the next generation under the law of primogeniture. The Titles to Land Consolidation (Scotland) Act 1868 then introduced the freedom to bequeath land to whomsoever one wished. However, in the event that a land owner left no will, the law of primogeniture continued to apply to the land.
- 7 In the 1920s, three legal committees recommended that Scotland's law of succession should be reformed so that, like systems of succession in other European countries, there was no law of primogeniture, no preference of males over females, a system of legal rights and no distinction between immovable and moveable property in intestate succession.<sup>5</sup> These features were then also recommended by the Committee of Inquiry into the Law of Succession in Scotland (the MacKintosh Committee) in 1951. The Committee acknowledged, however, the representations received from landed interests that the proposals would be "*detrimental to the interests of agriculture and landed interests*" and in its recommendations, the Committee made "*special proposals for the safeguarding of such interests*".<sup>6</sup>

---

<sup>2</sup> The principle in law that the eldest male descendant inherits heritable property

<sup>3</sup> Laws that enabled land owners to entail their estates and so secure the succession to their estates in the event of a land owner going bankrupt, becoming insane, et al

<sup>4</sup> Succession (Scotland) Act 1964

<sup>5</sup> Committee of Society of Writers to Signet (1924 and 1927), Faculty of Procurators Glasgow (1925)

<sup>6</sup> MacKintosh Committee Report 1951

- 8 The MacKintosh Committee recommendations formed the basis of the Succession (Scotland) Act 1964, which abolished primogeniture and made some improvements in the position of spouses and children. However, the Act did not remove the distinction between heritable and moveable property, except with regard to the marital home. This Act as amended continues to govern the legal position today and thus spouses and issue have legal rights to a share of moveable property, but still not of heritable property.
- 9 The law of succession continued to be an issue after the 1964 Act. In the 1980s, the Scottish Law Commission (SLC) therefore re-examined the topic and in 1990, published a 'Report on Succession'.<sup>7</sup> The report considered whether the legal right of children to a fixed share of their parent's estate should continue to be limited to moveable property under the 1964 Act, or whether the distinction between moveable and heritable property should be removed.
- 10 The SLC noted that strong representations were made to them on this by the Scottish Landowners Federation. However, the SLC argued that "*We do not believe, however, that the answer to their concerns is to retain the distinction between heritage and moveables for the purposes of legal shares. The results of this distinction are often arbitrary and unprincipled even in the case of farms and landed estates. If the deceased owned land as an individual it is heritable property in his estate. If he owned shares in a company which owns the land, the shares are moveable property in his estate*".<sup>8</sup> The SLC did however, include a proposal to enable executors to pay legal shares for agricultural land over a longer period. Despite this and continued calls from the SLC for progress on its Report on Succession, there had been no progress by the time of devolution.

### 6.3 Since Devolution

- 11 Succession was one of the topics included in the SLC's Seventh Programme of Law Reform in 2005, with the SLC highlighting that their 1990 Report had not been implemented and "*Yet the defects we previously identified still exist*".<sup>9</sup> They also indicated that the obstacle to progress had been opposition to the proposal to remove the immoveable/moveable distinction in the legal rights of children, and implied they would reconsider this.
- 12 The SLC produced a Discussion Paper on Succession in 2007 and then published its Report on Succession in 2009.<sup>10, 11</sup> In this report the SLC stated "*It is a fundamental tenet of our proposals that legal shares for both the deceased's surviving spouse or civil partner and the deceased's issue should be from the whole of the deceased's estate, heritable as well as moveable*". While the SLC acknowledged the continuing concerns of agricultural and landed interests over this and considered those concerns in some detail, they concluded, "*that our proposals will not, in practice, have any serious detrimental effect on the farming and landed estate sector*".<sup>12</sup> *Therefore we recommend that:*
- *Businesses, including agricultural farms and estates, should not be excluded from claims for legal share*".<sup>13</sup>

---

<sup>7</sup> SLC Report 124 (1990)

<sup>8</sup> *Ibid*

<sup>9</sup> SLC Report – seventh programme of law reform (2005)

<sup>10</sup> SLC Discussion Paper 136

<sup>11</sup> SLC Report No. 215, Report on Succession

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

- 13 Following publication of the SLC Report on Succession, the Scottish Government Minister Fergus Ewing made a statement in July 2009 welcoming it. However, he also noted that *“In considering this further, we will want to take account of the fact that farming and landowning communities have on-going concerns about legal shares for children coming out of the whole estate”*.<sup>14</sup> In December 2009, the Minister also added in relation to the SLC’s Report, *“The intention now is to engage with stakeholders, through a programme of dialogue and formal consultation”*.<sup>15</sup>
- 14 That intention remains the position five years later. At present (i.e. April 2014), the Scottish Government website states, *“The Scottish Government is giving consideration to the SLC’s report”* and the Review Group’s understanding is that there are no current plans to take matters forward.

#### 6.4 Current Position

- 15 In considering the debate about Scotland’s laws of succession over the last 50 years since the limited reforms of the 1964 Act, it appears clear that ‘agricultural and landed interests’ have successfully opposed a broad consensus across other interests in society to end the distinction between heritable and moveable property. The issue, as the SLC and others have set out, is about the continuing disinheritance of spouses (or civil partners) and issue (children) from what is considered their just entitlement, as judged by society’s contemporary values. They have argued that there is no justification for continuing to treat land differently from all other forms of property in succession law. The Review Group agrees.
- 16 The Group considers that, while this issue involves land, the driving need for removing the remaining distinction between heritable and moveable property, should be a straightforward matter of social justice based on the current disadvantaged position of spouses and children.
- 17 Some have considered that ending this special protection for landed property in succession, might also encourage a reduction in Scotland’s concentrated pattern of rural land ownership. While the potential effect is unclear, the Review Group does not consider that the change would have a significant influence on that pattern. The long running debate means that over the decades, many ‘agricultural and landed interests’ have adopted defensive positions against the possibility of the change. This is particularly the case with the larger landed estates and the ownership of much of rural Scotland is now held by companies and trusts, which are immortal land owners as far as succession law is concerned. The concern expressed in the submission to the Review Group by Scottish Land and Estates (as the main body representing the interests of rural land owners in Scotland), was not about large estates but rather that *“an extension of the protection from disinheritance to include heritable property would adversely affect the smaller family farm”*.<sup>16</sup>
- 18 The end of the special treatment of land in Scotland’s succession laws might still be considered to have some symbolic significance as a land reform issue, despite limited impact on Scotland’s concentrated pattern of large private estates. The change would finally end the longstanding link between land ownership and succession law in Scotland. The abolition of feudal tenure removed the defining character of a feudal system (superiors and

<sup>14</sup> Fergus Ewing letter to SLC 13 July 2009

<sup>15</sup> Parliamentary Question S3W-29780

<sup>16</sup> SLE submission to LRRG

vassals) and the special treatment of land in succession law, which is another distinctive relic of that feudal system, should also be abolished.

- 19 The Review Group considers that the arrangements to follow the abolition of the distinction between immovable and moveable property in succession law, should be based straightforwardly on giving children, spouses and civil partners appropriate legal rights over both forms of property.
- 20 **The Review Group recommends that the Scottish Government should, in the interests of social justice, develop proposals in consultation with the Scottish Law Commission for legislation to end the distinction between immovable and moveable property in Scotland's laws of succession.**

## SECTION 7 - OWNERLESS LAND

- 1 The Review Group considered the position of land in Scotland with no owner, as it was a subject that came up during the Group's investigations into a number of topics including: land registration; succession; Crown property rights; mineral rights and others.
- 2 Under Scots law, land that has no owner falls to the Crown. Scotland has three Crown property rights to ownerless property - *bona vacantia* (no owner), *ultimus haeres* (no heir) and treasure trove, which only involves moveable property.
- 3 These Crown property rights have always been managed in Scotland and continue to be managed in the Scottish Government's Crown Office by the Queen and Lord Treasurer's Remembrancer (QLTR). This is a position with ancient origins and had responsibility for the revenues of other Scottish Crown property rights, the administration and revenues of which were transferred to London in 1832. This was to the predecessors of the Crown Estate Commissioners (CEC), which continues to manage them.<sup>1</sup> While the responsibilities of the CEC were reserved under the Scotland Act 1998, the responsibility for the three Crown property rights managed by the QLTR was devolved by specifically excluding them from the Crown reservations in the Act.
- 4 The expression *bona vacantia* means ownerless goods and those that are managed by the QLTR involve the assets of dissolved companies and missing persons, and abandoned property. These assets can often include heritable properties and these are sold if they are not claimed. The QLTR has reported a large increase in the volume of its dissolved company work over recent years and also an increase arising from Land Registration, as this more accurate map based system leads to areas being referred by Registers of Scotland to the QLTR to resolve. In contrast, with the property with no heir that falls to the Crown under *ultimus haeres* and is sold by the QLTR, relatively little now involves heritable property as genealogists usually trace an heir to the previous owner first.<sup>2</sup>
- 5 The net funds raised by the QLTR from the sales of ownerless moveable and heritable property are paid by the QLTR into Scotland's Consolidated Fund (SCF) for public

---

<sup>1</sup> For more background, see *Crown Estate Review Working Group report (2007) (pp.111-112)*

<sup>2</sup> *QLTR briefing*



expenditure by the Scottish Government. During the first six years of devolution, these payments amounted to £11m.<sup>3</sup> Recent contributions have been £1.4m in 2011-12 and £3.4m in 2012-13.<sup>4</sup> As these figures show, the contribution to Scottish Government funds from ownerless property varies year to year. However, the Review Group notes that the average level is similar to the level of funds currently invested by the Scottish Government in the Scottish Land Fund to support land acquisitions by local communities (£9m over 4 years, see section 18).

- 6 A feature of the QLTR's role that is relevant to the pre-emptive right to buy granted to local communities under the Land Reform (Scotland) Act 2003, is that the Crown does not become owner of the property that falls to it and which may subsequently be claimed or sold. The QLTR has what is described as 'possession' of the property and has highlighted that a right to buy should not therefore be exercisable over property at the time it comes into or leaves the 'possession' of the QLTR or is in QLTR's possession.<sup>5</sup> An extension of current rights for rural communities under the 2003 Act to communities in urban areas, could possibly make the chances of a community interest in a property 'possessed' by the QLTR more likely.
- 7 The Review Group also considered the question of whether land can be abandoned and left ownerless. The Crown does not have to accept property that could fall to it. The question of what happens in that case, has arisen as part of the current issue over private coal companies going out of business and the insurance bonds placed with the local authorities for restoration of the sites being worth only a fraction of the restoration costs (see Section 10). In December 2013, in a case brought by the liquidators of Scottish Coal as one of the companies involved, the Court of Session contended in a judgement (that may yet be subject to appeal) that: *"A person cannot abandon land, in such a way as to render it ownerless, and thus avoid any obligations which run with the land"*.<sup>6</sup>
- 8 Another aspect of 'ownerless land' that the Review considered is the extent to which examples of genuine common land survive. The history of the loss of common land in Scotland, which has been described by Wightman and others, means that very little does survive.<sup>7</sup> The areas of apparently ownerless land referred to the QLTR by Registers of Scotland, as mentioned in paragraph 4 above, tend to result from discrepancies between the deeds and plans of owned land. However, the Group considers that the expansion of land registration in rural Scotland is likely to turn up relatively small, relic areas of land that are genuine common land in the sense of being owned by no-one, such as some former grazing or market stances. There is concern that such areas are continuing to be lost by encroachment into private property.<sup>8</sup> These types of areas are often of local cultural significance and potential community value. The Group considers that Registers of Scotland should ensure that the land registration process protects what might be considered genuine commons, if and when they may come to light.
- 9 A related, distinctive form of land tenure in Scots property law is commonties.<sup>9</sup> A commonty

---

<sup>3</sup> *Crown Estate Review Working Group (CERWG) Report (2007)*

<sup>4</sup> *QLTR Annual Report 2013*

<sup>5</sup> *QLTR briefing*

<sup>6</sup> *Scottish Environment News (SCENES) Dec 2013*

<sup>7</sup> *Wightman, A 'The Poor Had No Lawyers' (Birlinn, 2013); Robin Callander 'A Pattern of Landownership in Scotland' (Haughend Publications, 1987)*

<sup>8</sup> *Wightman Ibid*

<sup>9</sup> *Ibid*

is not an area of common land in that, historically, commonties became defined as undivided shared property. The Division of Commonties Act 1695 then provided the means by which they could be divided between the parties with the shared property rights in the commonty. The 1695 Act, which remains the current legislation, allows for the division of a commonty at the instigation of one of those parties.<sup>10</sup> The Group considers that it is likely that surviving commonties or very similar legal arrangements may occasionally come to light as a result of the spread of land registration.

- 10 The apparent example of a surviving commonty that came up during the Group’s work was in the context of local community land ownership, and reflected that commonties can have particular local significance.<sup>11</sup> The Group considers that the registration process should be alert to identifying any commonties that may survive, and questions the continuing appropriateness of the 1695 Act allowing the division of a commonty at the instigation of one party.
- 11 **The Review Group considers that the expansion of land registration is likely to result in surviving examples of common land and commonties coming to light. The Group recommends that these distinctive forms of land tenure should be identified and safeguarded as part of modernising Scotland’s system of land ownership.**

## SECTION 8 - COMPULSORY PURCHASE

- 1 In Scotland, as elsewhere, there is a continuing need for the Government and other public authorities to be able to buy land as part of fulfilling their responsibilities in the public interest. Common examples include land for road construction, housing developments and town centre regeneration.
- 2 Normally these acquisitions are achieved by agreement. However, compulsory purchase powers are required to acquire land when it proves impossible or impractical to buy the land by agreement. These powers enable the land to be acquired without the land owner’s permission, if there is a strong enough case for doing this in the public interest.
- 3 Compulsory purchase powers are based on the long established position that, while a basic right of land owners is the security of their ownership, that right to safeguard private property gives way to the public interest. This position is reflected in Article 1 of the European Convention on Human Rights First Protocol, 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 by law and the general principles of international law.”*
- 4 In Scotland, the current legislation allows the Scottish Government, local authorities and a number of other public bodies to buy land through Compulsory Purchase Orders (CPOs), if the Order is approved by Scottish Ministers.<sup>1</sup> The Scottish Government published updated

---

<sup>10</sup> Callander *Op cit*

<sup>11</sup> Wightman (blog re commonty at Biggar)

<sup>1</sup> SG Planning Circular No 6/2011 CPOs (potentially includes private utility companies under licence)

guidance on the use of CPOs in 2011. At the same time, the Scottish Government also published updated guidance on the application of the ‘Crichel Down Rules’.<sup>2</sup> These set out the circumstances in which land, previously acquired by compulsory purchase, will be offered to the previous owner if the land is no longer required and due to be sold.

- 5 Scottish Ministers recognise that *“without compulsory purchase many projects in the public interest would not be possible”* and that *“compulsory purchase can play a vital role. It can help deliver urban and rural regeneration, revitalised communities, creating jobs and encouraging business”*.<sup>3</sup> Ministers therefore *“encourage authorities to use compulsory purchase positively and proactively, to promote sustainable economic growth, improve quality of life and bring real benefits to Scotland’s communities”*.<sup>4</sup>
- 6 At present, considering the four years 2009-2012, an average of six CPOs a year have been confirmed for the Scottish Government. These have all been through Transport Scotland to acquire land to improve the trunk road network. Over the four year period, an average of nearly seven CPOs a year were confirmed for local authorities. During the period, just over half of Scotland’s local authorities (18 of 32) either requested or had confirmed at least one CPO.<sup>5</sup>
- 7 While some CPOs may not be implemented, no statistics are available on that, as the Government does not keep a record of the outcomes of CPOs.<sup>6</sup> It is recognised that *“there may be benefits in making a compulsory order at an early stage in parallel with negotiations to purchase by agreement”*. However, CPOs for the land involving a number of owners may still go ahead, despite agreement, for the benefit of ‘cleaning’ the title to the overall area being acquired.<sup>7</sup>
- 8 Scotland’s law of compulsory purchase should, like any such system, *“be clear, accessible, fair and up-to-date”*.<sup>8</sup> However, as the Scottish Law Commission (SLC) has commented, *“The law of compulsory purchase is generally considered to be antiquated and obscure. Much of it is still contained in the Lands Clauses (Consolidation)(Scotland) Act 1854”*.<sup>9</sup> As result, CPOs tend to be time consuming and cumbersome to draw up and implement. It also appears that those who are having their land purchased, often have a more negative experience of the process than should be the case.<sup>10</sup>
- 9 The need to update compulsory purchase law in Scotland has long been recognised. In 1999, it was identified as an issue for further research in the Land Reform Policy Group’s Recommendations.<sup>11</sup> Subsequently, following consultations, compulsory purchase was included as a medium term project in the SLC 8th Programme of Law Reform 2010-14. The Review Group’s understanding is that the SLC is currently seeking views from the Scottish Government, for proposals that the Government may have on potential improvements to the operation of CPOs from its experience.

---

2 SG Planning Circular No 5/2011 Disposal of Surplus Government Land - The Crichel Down Rules

3 SG Planning Circular No 6/2011 Op cit

4 Ibid

5 SG briefing

6 SG Op cit

7 ‘cleaning’ in the sense of removing particular conditions or burdens in the titles to any of the land

8 8th Programme Of Law Reform 2010-14 (SLC 2010)

9 SLC 2010

10 SLC Op cit

11 LRP (1999)

- 10 In its Law Reform Programme, the SLC “noted in particular a strong joint submission in support of such a review from the Royal Institution of Chartered Surveyors in Scotland and the Royal Town Planning Institute”. Those organisations’ members include the practitioners dealing directly with CPOs and their experience should be an important contribution to the review. The Review Group considers that this is essential to help ensure that the law is not only consolidated into modern legislation, but that the implementation of CPOs is also significantly improved.
- 11 The extent of that experience seems to be diminishing amongst public officials as CPOs appear to have been used less over recent decades compared to the 1960s and 1970s, when there were potentially more public sector led developments. The subsequent change in ‘political culture’ from the 1980s, may also have engendered greater reticence amongst public officials to consider the use of compulsory purchase powers as a way of achieving the public interest. The Review Group also recognises that the out of date nature of Scotland’s compulsory purchase legislation can also act as a significant disincentive to the use of CPOs.
- 12 However, as the current level of use reflects, CPOs continue to be needed. The question therefore arises over how long it will be until Scotland’s compulsory purchase laws are updated. The SLC anticipates publishing a discussion paper on the topic in 2014. However, there could then be some years before they have reported and the Scottish Parliament has passed new legislation.
- 13 A modernised and streamlined compulsory purchase regime in Scotland would make CPOs a more effective means of delivering the public interest. As discussed in Sections 20 and 21 of this report, the Review Group considers that there are important situations where there should be more public interest led developments using CPOs. A reformed system would also bring greater social justice for the individuals and businesses affected by CPOs. It might also be the case in some situations that CPOs might be needed less, as the scope to use a more workable system could more readily facilitate purchases by agreement.
- 14 **The Review Group considers there is a clear need to update Scotland’s system of compulsory purchase. The Group recommends that the Scottish Government should take forward the modernisation and reform of Scotland’s compulsory purchase legislation, with a clear timetable for introducing a Bill to achieve this into the Scottish Parliament.**
- 15 The Review Group’s view is that the capacity of the Scottish Government and local authorities to acquire land in the public interest should also be enhanced by giving them a right to register a pre-emptive right to buy land. Legislation in 2003 gave this type of statutory right of pre-emption, when land is sold, to appropriate local community bodies and to agricultural tenants with secure 1991 tenancies as discussed in Sections 17 and 28 respectively. The Group considers that the Scottish Government and local authorities should have such a right too.
- 16 The Group anticipates that such a right might be particularly valuable to local authorities. For example, there may be situations where there is a public interest in acquiring an area of land that would not warrant using a CPO, but which the local authority might not want to miss the chance to buy if the land came up for sale. In such situations, rather than applying for a CPO, a local authority would apply to register a right of pre-emption over the land.

- 17 The Group considers that giving the Scottish Government and local authorities a right to register a right of pre-emption over land where that is judged to be in the public interest, could be a helpful tool to improve the delivery of public policy in a fair and reasonable way.
- 18 **The Review Group recommends that the Scottish Government and local authorities should have a right to register a statutory right of pre-emption over land where that is in the public interest.**
- 19 Prior to the Acts in 2003 introducing statutory rights of pre-emption over land, the only right of pre-emption in Scots property law was the right of an owner of land to reserve a right of pre-emption over land when disposing of its ownership. The 2003 legislation introduced two types of statutory rights of pre-emption and we have recommended more. The Group can see merit in these types of statutory rights of pre-emption in the public interest. However, the Group questions whether there should still be scope to create new private rights of pre-emption over land at the time of disposal. The ability to create these private rights of one land owner over another might be considered no longer appropriate. However, the Group did not consider this question further within the constraints of its inquiry.



## PART THREE

### PUBLIC LAND OWNERSHIP

- 1 Scotland's territorial land area is covered by a pattern of land ownership, composed of the individuals and organisations that own the surface of the land and the minerals beneath it. Knowledge of this pattern of land ownership is a key aspect in understanding the relationship between the land and people of Scotland, because the rights that ownership gives to the owner are central to how land is used.
- 2 The ownership of land by the public is an important component of this pattern of land ownership, as part of securing the public interest in Scotland's land. In Scotland, the three main types of public land owners are the Crown, the Scottish Government and Scotland's 32 local authorities.
- 3 In the first two sections of this Part of the Report, (Sections 9 and 10), the Review Group considers the extent of public land ownership in Scotland in terms of both the land surface and minerals beneath it. In the following sections of the Part, the Group considers a number of issues related to each of the three main types of public ownership.
- 4 The Review Group pays particular attention in Section 11 to Crown property rights and their management. This is because of the importance of the Crown as a part of Scotland's pattern of land ownership, the archaic nature of some Crown property rights and the prominent issues over the management of many of Scotland's Crown property rights by the Crown Estate Commissioners.
- 5 There is more limited consideration in this Part of the Report of land ownership by the Scottish Government and local authorities, as a number of aspects of each of these topics occur later in this Report. In this Part, the Review Group considers two particular types of property owned by the Scottish Government in Sections 12 and 13. Then, in Section 14, the Group considers Common Good Lands as a very distinctive form of local authority land ownership.
- 6 The two types of Scottish Government property discussed in Sections 12 and 13 might be considered in their respective ways, as amongst the most important held by the Scottish Government. The first is the Scottish Government's ownership of many of Scotland's most important and iconic national properties, such as Edinburgh and Stirling Castles, Holyrood and Linlithgow Palaces, and others. The second is Scotland's National Forest Estate, which is the Scottish Government's largest land holding.

### SECTION 9 - EXTENT OF PUBLIC LAND

#### The Crown

- 7 As described in Section 1, Scotland is a sovereign territory and the Crown has a separate and different legal and constitutional identity in Scotland under Scots law, compared to the Crown in the rest of the UK under English law. Correspondingly, the property rights vested

- in the Crown in Scots law are different from those in the rest of the UK and belong to Scotland.
- 8 This is important because Crown property rights are a major component of land ownership in Scotland. Most importantly, the ownership of Scotland's territorial seabed is vested in the Crown in Scots law. The extent of this area and of the rights associated with it, have both increased substantially in the last 50 years. These expansions have resulted from internationally agreed United Nations Conventions on the Laws of the Sea being enacted into UK law. As a result of these, Scotland's territorial boundary has expanded from 3 to 12 nautical miles from the coastline, and additional rights have also been vested in the Crown over Scotland's adjoining continental shelf area out to 200 nautical miles.<sup>1</sup>
  - 9 Approximately 52% of Scotland's total territorial area is seabed and very nearly all of this area is still owned by the Crown (See Section 1). The limited exceptions to this all consist of areas adjoining the coastline, where the Crown has granted out the ownership historically or more recently sold it. These areas include, for example, some statutory harbour authorities which own some or all the seabed within their harbours (for example, Aberdeen) or areas acquired for infra-structure developments (for example, land under the columns for the Forth Road Bridge). The largest single exception to the Crown's ownership of Scotland's seabed is a rectangular area extending into the Firth of Forth from the Port of Leith.<sup>2</sup>
  - 10 The Crown also still owns around 50% of the 18,000 km length of Scotland's foreshore (Fig.5). The foreshore is defined in Scots law as the area of shore between the high and low water marks of ordinary spring tides, and it forms the boundary between the marine and terrestrial halves of Scotland's land area. The exceptions to the Crown's ownership of the foreshore are of two main types. Firstly, there is no Crown foreshore in the Northern Isles under udal tenure, where ownership of the foreshore goes with the ownership of the adjoining land. Secondly, there are the many parts of the rest of Scotland's foreshore that have been acquired from the Crown by other land owners, much of it in the 19th century.
  - 11 The ownership of Scotland's seabed and of much of its foreshore are ancient possessions of the Crown, where the legal presumption is that an area of seabed or foreshore is owned by the Crown unless there is evidence that it has been acquired by someone else. The Crown's ownership of Scotland's seabed and much of its foreshore are both managed by the Crown Estate Commissioners (CEC).
  - 12 By contrast with the marine environment and as described further in Section 12, the Crown now holds virtually no land in the terrestrial half of Scotland as ancient possessions. The Crown is, however, still a significant land owner due to modern acquisitions of land on behalf of the Crown in the 20th century. There are four rural estates totalling 35,450 ha.<sup>3</sup> Over 75% of this area consists of the estates of Glenlivet (22,350 ha) and Fochabers (4,850 ha) in Banff and Moray. These were acquired in 1937 by the then Commissioners of Crown Lands due to concern at the time about the local socio-economic impact of the break up of the Duke of Richmond and Gordon's extensive estates in Strathspey. The other two estates, which were both acquired in the 1960s as investments, are Applegirth (6,850 ha) in Dumfries & Galloway and Whitehill (1,400 ha) in Midlothian. All these estates are managed by the CEC.

---

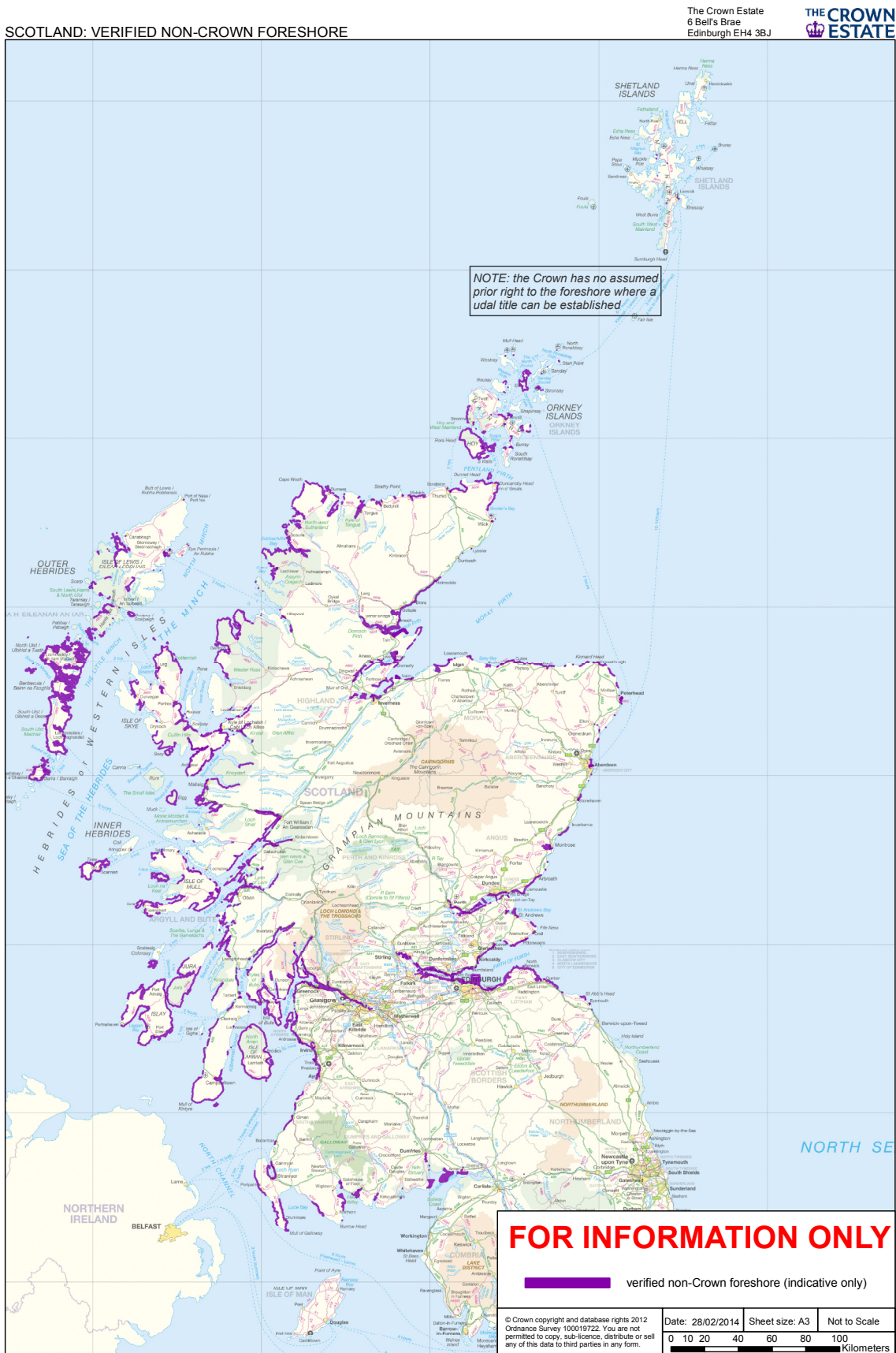
<sup>1</sup> *Territorial Seas Act 1987, Continental Shelf Act 1964*

<sup>2</sup> *Scottish Affairs Committee (SAC) 'The Crown Estate in Scotland (2012)*

<sup>3</sup> *Ibid*



**Fig. 5 Crown and non-crown owned foreshore in Scotland**



### The Scottish Government

- 13 The Scottish Government owns land for a wide range of purposes as part of delivering public policy, and also owns this land in a variety of ways. With the majority of the land, the title is vested in Scottish Ministers and may either be managed directly by the Scottish Government or through various Scottish non-departmental public bodies. Alternatively, with some land, the title is held directly by the public body managing the land. There are also other arrangements, for example, Caledonian Maritime Assets Ltd, which is an independent company wholly owned by Scottish Ministers and which owns the infra-structure for life-line ferry services in a number of harbours.
- 14 The Scottish Government carried out an asset management review of the land and property owned by the Government five years ago, including a separate review of rural land owned by the Government.<sup>4</sup> In addition, there is the on-going work by the Scottish Futures Trust (SFT), another independent company wholly owned by Scottish Ministers, on the ownership and management of Scottish Government property.<sup>5</sup> Both the Scottish Government's review and SFT's work identify the need for the Government to have improved central information on the land and buildings directly or indirectly under its management.
- 15 The Review Group, for its part, was surprised that there seems to be no readily accessible, central account of the land owned by the Scottish Government in its various guises. The information is held in various internal Scottish Government registers and by a range of other Scottish public bodies and much of it is not readily accessible. However, in this context, the Group's interest was only in the broad scale and scope of Scottish Government ownership.
- 16 The main components of the land owned by the Scottish Government in rural Scotland are shown in Fig. 6 and in Fig. 7. The two largest areas are the National Forest Estate, which is discussed in Section 13, and the Scottish Government's crofting estates, which are discussed in Section 26. The Review Group was able to find out only limited information on the extent of other land owned by Scottish Ministers and managed by various parts of the Scottish Government, such as Historic Scotland, Transport Scotland and others. The Group has estimated this to be around 10,000 ha.
- 17 The Scottish non-departmental public bodies listed in Fig. 7 all hold title to the land in their own name. The Scottish Natural Heritage land is principally National Nature Reserves, while the Scottish Water land is catchment areas to protect important water supply sources. With Highlands and Islands Enterprise, the land mainly consists of the Orbst Estate (2,230 ha) on Skye and Cairngorm Mountain Estate (1,419 ha), which includes the ski slope area.

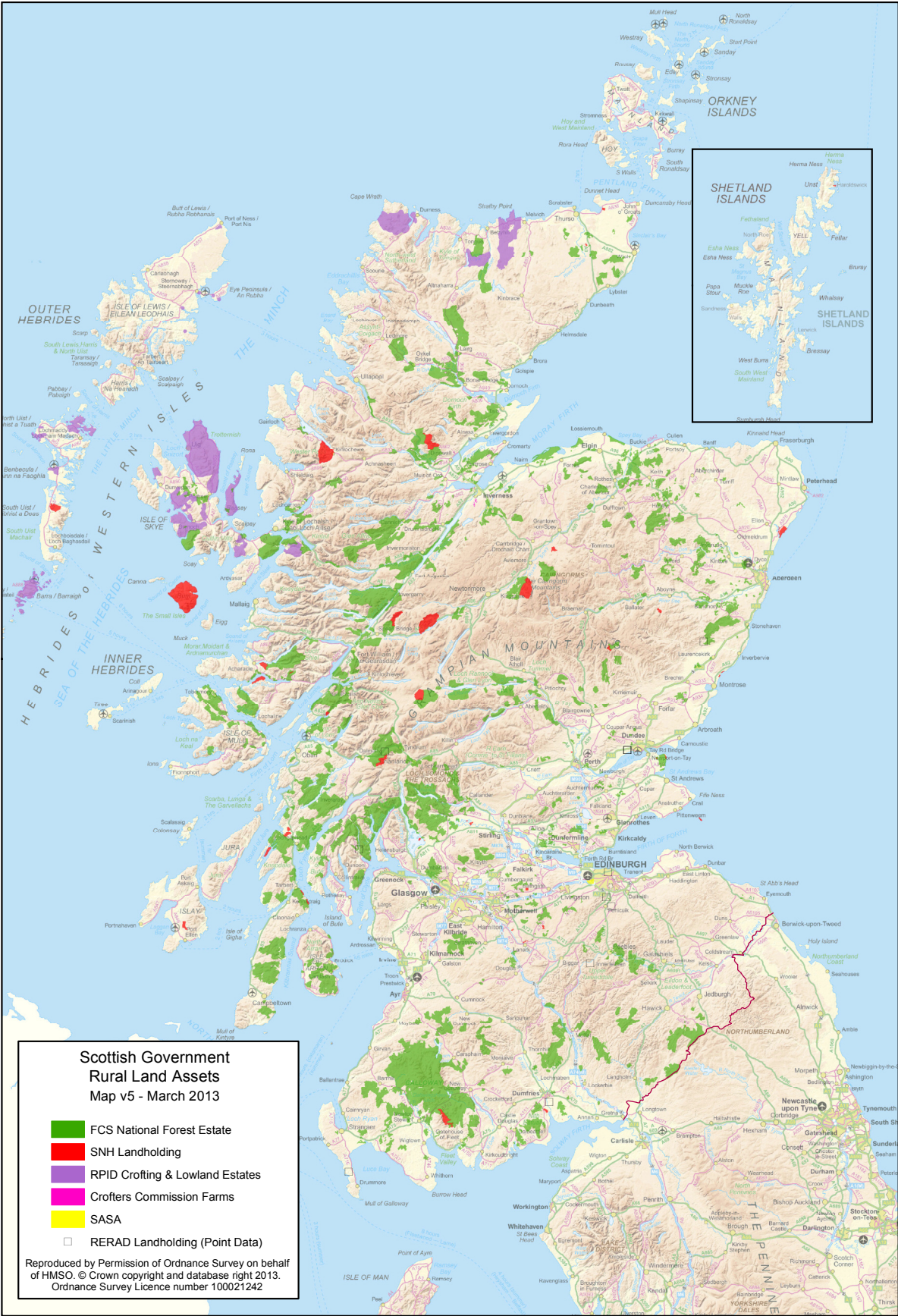
### Other Public Land

- 18 The other key component of public land ownership in Scotland is the property owned at local government level by Scotland's 32 Local Authorities. These Local Authorities need, like the Scottish Government, to own and manage land for a wide range of purposes.
- 19 There appears no readily accessible information on the extent of land held by the Local Authorities. While the Local Authorities will have their own records, no overall information on their holdings appears available on their websites. Therefore, for the limited purpose of providing an indication of the order of magnitude of the extent of land owned by local

<sup>4</sup> *Asset Management Review 2008, also Asset Management Review of Rural Land 2009*

<sup>5</sup> *Asset Management – the Scottish Government Civil Estate (Scottish Futures Trust, 2011)*

Fig. 6 Scottish Government's Rural Estates



authorities, the Group has used an existing estimate.<sup>6</sup>

- 20 The other form of public land in Fig. 7 is land owned in Scotland by the UK Government, which very largely consists of land managed by the Ministry of Defence.

Overall Amount

- 21 Over half of Scotland’s territorial land area is public land by virtue of the Crown’s ownership of Scotland’s territorial seabed, while around half the length of Scotland’s foreshore is also still public land owned by the Crown.
- 22 In considering the terrestrial half of Scotland, the totals in Fig. 7 indicate that approximately 889,000 ha. or 11% of Scotland’s land area of 8 million ha., is owned by the Scottish Government and local authorities.

**Fig. 7 Public Land Ownership in Scotland**

Owner	Property	Hectares
Crown	Crown Estate	35,500
Scottish Government	National Forest Estate	651,300
	Crofting Estates	95,200
	Scottish Natural Heritage	35,700
	Scottish Water	24,300
	Highlands & Islands Enterprise	4,000
	Estimated Other	10,000
Local Government	Estimated Total	33,000
	<i>sub-total</i>	889,000
UK Government	Ministry of Defence	25,000
	<b>Total</b>	<b>914,000</b>

- 23 The two largest components of the Scottish Government’s land and therefore the great majority of public land in rural Scotland, both result very largely from acquisitions during the first half of the 20th century. The crofting estates date from the Government land settlement programmes from the end of the 19th century until the 1950s. The build up from 1919, of the land managed by the Forestry Commission that now makes up Scotland’s National Forest Estate had largely ended by 1970s. The growth of public land ownership during the first half of the 20th century, remains one of the few major changes to have significantly affected the pattern of land ownership in rural Scotland during the last 100 years.

- 24 During the last 40 years, the overall proportion of public land ownership compared to private land ownership seems to have remained broadly similar.<sup>7</sup> The pattern of private land ownership in the remaining nearly 90% of rural Scotland is considered later in Section 24 of this Report.

6 A Wightman ‘The Poor Had No Lawyers’ (Birlinn, 2013)

7 A Wightman (2013) op cit, R Callander ‘A Pattern of Landownership in Scotland’ (Haughend, 1987)

### Public Asset Registers

- 25 The main issue in this Section is the relatively limited information available on public land ownership in Scotland. The Review Group considers there to be a lack of clear and accessible information on the land and buildings owned by the Scottish Government and local authorities, particularly in urban areas.
- 26 The practical benefits to Scotland's economy of having the information available were referred to in Section 4 on Land Registration. The wider community benefits in improving the information available were also reflected in the "overwhelming support" for the proposal in the Scottish Government's consultation in 2013 on the Community Empowerment and Renewal Bill, that all public sector authorities should be required to make their asset registers available to the public (question 27).
- 27 The Scottish Government and local authorities are already required to keep asset registers and the Group considers that the only debate should be about the level of information about properties that should be made publicly available. The Group considers that the Scottish Government should have a central, online source of public information about Government properties, through which more detailed registers can be accessed about the properties managed by different parts of Government and other Scottish public bodies. The Group also considers that each local authority should have a publicly accessible online register or schedule of the properties owned and managed by the authority.
- 28 **The Review Group considers that information on the properties in Scotland owned by the Scottish Government, local authorities and other public bodies, should be more readily available. The Group recommends that the Scottish Government, local authorities and other public bodies in Scotland should publish online property registers that are publicly accessible.**

## SECTION 10 - PUBLICLY OWNED MINERAL RIGHTS

- 1 The land under Scotland's land surface is also an important resource because of the economic value and potential of the material or 'minerals' that can be extracted from it.<sup>1</sup>
- 2 'Mineral rights' are a distinctive component of Scotland's system of land ownership. In this context, mineral rights might be summarised as a type of property right covering the authority to quarry, mine or otherwise extract sub-surface materials.
- 3 While the starting point in Scots law is that the owner of land owns everything above and below land, mineral rights can be owned separately from the surface of the land. Thus, generally, the mineral rights go with the land unless they have been sold or reserved by a previous owner, who may subsequently have sold them. Reserving the mineral rights has, for example, often been the practice of large private estates when selling land.
- 4 There are very few other examples in Scotland's system of land ownership of property rights

---

<sup>1</sup> *Town and Country Planning legislation defines 'minerals' as "all substances in or under land of a kind ordinarily worked for removal by underground or surface working, except that it does not include peat for purposes other than for sale" (BGS website)*

in or over land that can be owned separately from the land itself (as a ‘separate tenement’ in legal terms). After mineral rights, the other conspicuous example of a right capable of being held as a separate tenement is the right of salmon fishing which is discussed in Section 31. Other examples are a number of Crown property rights discussed in the following section.

- 5 The ‘mineral rights’ that might be reserved or sold is a general right and not specific to any particular mineral. However, the rights to a number of specific minerals are held in the national interest. They are the right to gold and silver, the right to petroleum (oil and gas) and the right to coal. The public ownership of the rights to these natural resources is a very important part of public land ownership in Scotland. Therefore, the nature of the ownership and management of each is described briefly below.

### Gold and Silver

- 6 The right to gold and silver in all land in Scotland was reserved by the Crown early in the country’s history and this continues to be the case. The current legislation, the Royal Mines Act 1424, is the oldest Act still in force from Scottish Parliaments before 1707.<sup>2</sup> The other current legislation related to the right is an Act of 1592 and thus also amongst the oldest Acts.
- 7 The Crown in Scotland still owns the right to gold and silver throughout Scotland, except for over a few areas where the ownership was conveyed to others in ancient grants (Fig. 8). Scotland’s Crown right to gold and silver is administered by the Crown Estate Commissioners (CEC) as part of the UK wide Crown Estate and discussed further in Section 11.

### Oil and Gas<sup>3</sup>

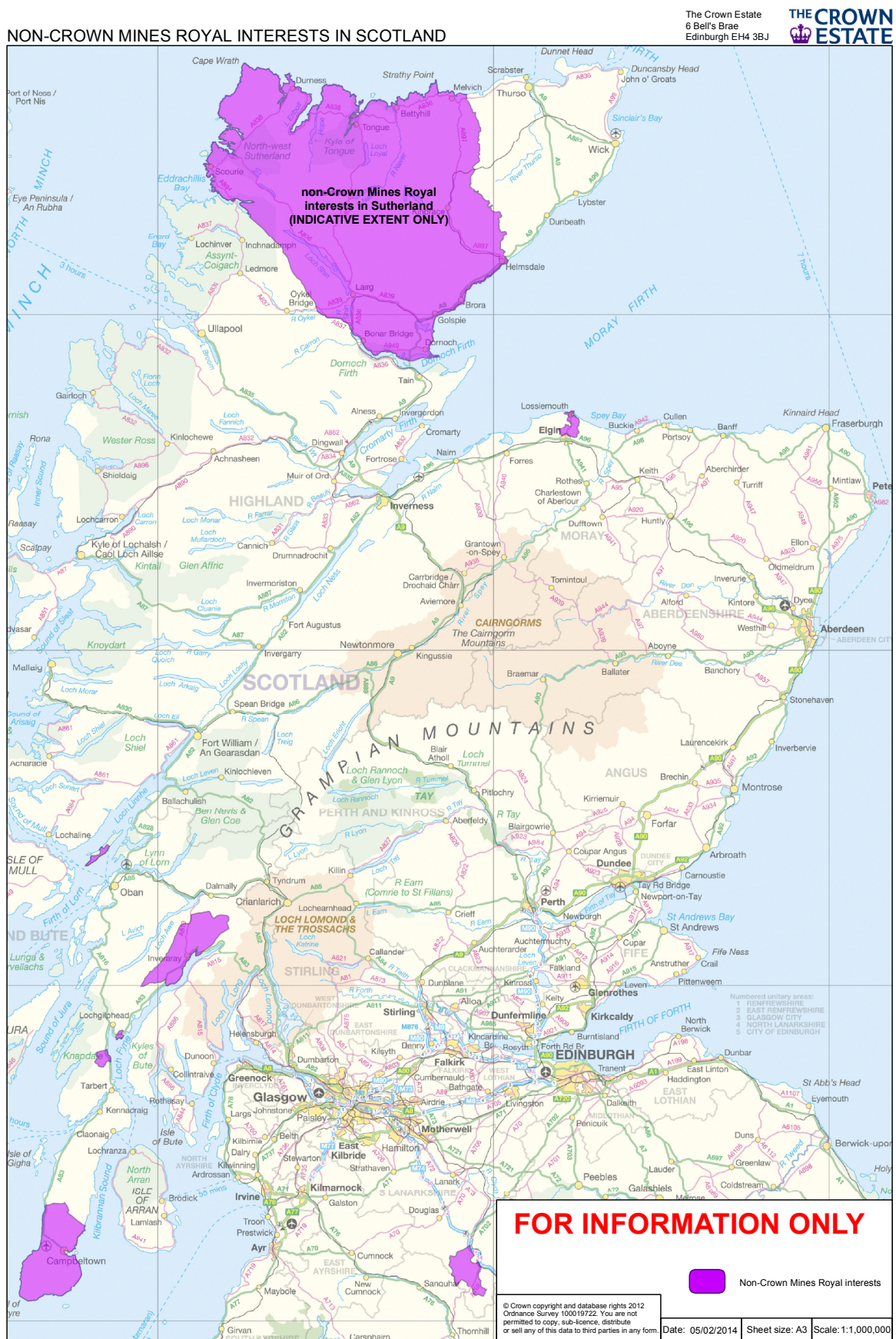
- 8 During the First World War, when the British Government wanted to encourage companies to drill onshore for oil, the Petroleum (Production) Act 1918 was passed to confer on the Crown the right to control exploration and production in Great Britain and to grant licenses for that purpose.
- 9 The Board of Trade was made responsible for managing the Crown’s right, with ‘petroleum’ defined in the Act to include *“any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata, but does not include coal or bituminous shales”*.
- 10 The Petroleum (Production) Act 1934 repealed the 1918 Act, while reaffirming that legal title to petroleum existing in its natural state in Great Britain was vested in the Crown. The Act provided for the Government to continue to license other persons to search for and get oil.
- 11 When the United Nations Conference on the Law of the Sea’s Continental Shelf Convention 1958, was enacted into UK law by the Continental Shelf Act 1964, the rights over the UK continental shelf to the 200 nautical mile limit were vested in the Crown. The Act also applied the licensing provisions of the 1934 Petroleum Act to the UK continental shelf.
- 12 The Petroleum Act 1998 consolidated a number of the earlier enactments and contains the legislation that currently determines matters such as the vesting of ownership of oil and gas

---

<sup>2</sup> Crown Estate Review Working Group (CERWG) Report

<sup>3</sup> Main source of background information is HMRC website (legal overview for taxation and oil industry)

**Fig. 8 Areas where Gold and Silver Rights are not owned by the Crown**



within Great Britain and its territorial sea in the Crown, the granting of oil licences and rules relating to submarine pipelines and the decommissioning of offshore installations.

- 13 Today, the UK Government issues licences for oil and gas through the Department of Energy and Climate Change. An annual rental is charged under each licence, but there is no longer a royalty regime on production. This was abolished on 1st January 2003. The UK Government raises the majority of its revenue from oil and gas through taxation.
- 14 Thus, while all Crown property rights in Scotland belong to Scotland as a sovereign territory, the Crown's ownership of 'petroleum' in Scotland is administered by the UK Government.

### Coal

- 15 The ownership of mineral rights in Scots law included coal until the 1942. That year, the British Government nationalised coal reserves in the UK into the ownership of the Coal Commission. Coal in the Forest of Dean was an exception to protect the ancient rights of the Free Miners of the Forest of Dean. The Coal Commission had been constituted as a statutory corporation under the Coal Act in 1938.<sup>4</sup> In 1946, the coal industry was nationalised and the Coal Commission replaced by the National Coal Board (NCB).
- 16 The coal industry was subsequently privatised through the Coal Industry Act 1994. In that year, to replace the NCB, the Coal Authority was also established as a non-departmental public body under the Department of Energy and Climate Change (DECC). *"The Coal Authority owns, on behalf of the country, the vast majority of the coal in Great Britain, as well as former coal mines"*.<sup>5</sup> Amongst other responsibilities, it grants licenses for coal exploration and extraction.
- 17 The ownership of Scotland's coal reserves in Scotland was therefore nationalised to the UK Government through the Coal Commission and its successor, the Coal Authority. This position appears to reflect the fact that the nationalisation of the coal industry in the 1940s involved the UK Government in substantial expenditure in acquiring the rights to existing mines and compensating the private owners. In that situation, claiming ownership of any unknown reserves through the legislation was an obvious step to take at the same time. However, the ownership of a separate property right across Scotland by the UK Government, as with coal reserves and the Coal Authority, appears to be unique. All other such presumptive property rights to particular assets in Scotland seem to be owned within Scotland by either the Crown or Scottish Ministers, rather than the UK Government.
- 18 The Review Group also noted this 'disconnect' in the current issues over restoring opencast coal mining sites in Scotland. The issues have arisen where a private owner mining a site has gone into administration and the insurance bonds placed with the local authority for the restoration of the site are inadequate to meet the costs. There are a number of these opencast sites in Scotland where this is currently an issue, with an estimated potential shortfall of £200 million.<sup>6</sup> In this situation, where it appears there will be a need for public funds to contribute to the restoration, the Group considers there may be role for the Coal Authority.

---

<sup>4</sup> Other statutory corporations include, for example, the Crown Estate Commissioners and Forestry Commissioners, but unlike the Coal Commission and its successors, they do not own the assets which they manage

<sup>5</sup> Coal Authority website

<sup>6</sup> Scottish Environmental Newsletter (SCENES) January 2014



- 19 The history of opencast or surface coal mining in Scotland has been relatively short. It was introduced as an emergency measure during the Second World War and grew to a peak of 21 million tonnes in 1991.<sup>7</sup> While production has declined significantly since, surface mining exceeded deep mining production for the first time in 2005. As the deep mining decline has continued, surface mining's percentage share of production has grown. However, surface mining production is itself down to less than 5 million tonnes.<sup>8</sup> As part of this decline, and contributing to issues over site restoration, the number of opencast coal mines producing coal in Scotland halved between 2000 and 2008.<sup>9</sup>
- 20 The Coal Authority is, as described above, responsible for granting licences and leases for coal mining. In doing this, the Coal Authority seeks various securities from the operators to cover liabilities. However, while these include factors such as ground subsidence as a result of the mining, they do not include provisions for site restoration after surface mining. This is because, while *"the Coal Authority owns the coal and abandoned underground coal working, once a surface mine is worked, the Coal Authority does not own any void that may be created or left above any seams"*.<sup>10</sup> Therefore, with surface mining, it is the local authority that is responsible for putting in place securities for the site restoration through insurance bonds.
- 21 This position means that, while the Coal Authority requires payment for every tonne of coal mined, none of that income from surface mining contributes towards site restoration if there is a shortfall in the securities. All the money that the Coal Authority collects from these coal payments is remitted to the Treasury, except a small percentage retained by Authority to carry out its licensing function.<sup>11</sup> It has been calculated that since privatisation in 1994, some £15.1 million has been collected for coal worked in Scotland, mostly from surface mined coal.<sup>12</sup> In early 2014, the Scottish Government wrote to the UK Government to ask that "at least some" of the levies raised from coal produced in Scotland, should contribute to the shortfall over opencast site restoration costs.<sup>13</sup>
- 22 The £15 million raised by the Coal Authority is a relatively small amount in relation to the overall costs of restoration. The real issue within the current debate is the shortcomings of the bonds. Having said this, the Review Group finds the degree of 'disconnect' between coal revenue and expenditure to be unacceptable and within the context of devolution, suggests it would be more appropriate for Scotland's coal reserves to be owned by Scottish Ministers and the licensing responsibility to be devolved to the Scottish Government.
- 23 While coal mining is a contracting industry within Scotland, it is still important in some areas. The Group considers making the proposed change would enable a substantially closer integration of the licensing and planning consents governing coal mining in Scotland, as well as a wider integration of coal mining with other aspects of public policy in Scotland.

---

7 SG Consultation on Opencast Coal Field Restoration and Effective Regulation. (2013) (sec.2)

8 Ibid

9 Ibid

10 Ibid (Q23)

11 In 2011, the payment rate was 0.17p per tonne for new leases and the administration rate 0.01p per tonne (SG Ibid Q.21)

12 SG Op cit (Q 21)

13 SCENES Op cit

## SECTION 11 - CROWN PROPERTY RIGHTS

### 11.1 Background to the Rights

- 1 The abolition of feudal tenure in Scotland by the Scottish Parliament ended the Crown's position as the Paramount Superior or ultimate owner of all land under feudal tenure. However, a diverse range of other Crown property rights continue to be part of Scotland's system of land ownership. As described earlier, in Section 1 of this report, the distinct legal and constitutional identity of the Crown in Scotland means that Crown property rights in Scots law are different from those in the rest of the UK and belong to Scotland.
- 2 Scotland's Crown property rights are of ancient origin and continued to be managed in Scotland following the Union of Crowns in 1603 and Union of Parliaments in 1707. However, in the 1830s, the administration and revenues of most of these Crown property rights were transferred from Scotland's Lord Advocate's responsibilities to a Whitehall government department, the Commissioners of Woods, Forests, Land Revenues and Public Works.
- 3 That department had evolved into the Commissioners of Crown Lands by 1924, following the creation of the Forestry Commissioners (FC) in 1919. At this time over 100,000 acres of Crown land in England was transferred to the FC, with one small area in Scotland. There were two Commissioners of Crown Lands, the Secretary of State for Scotland for Crown lands in Scotland and the Minister of Agriculture for Crown lands in the rest of the UK.
- 4 In the 1950s, the UK Government decided to replace this arrangement with a new statutory corporation with an appointed board of Commissioners modelled on the FC. The Crown Estate Act 1956 created the Crown Estate Commissioners (CEC), with the Crown property rights and interests managed by the CEC to be known as the Crown Estate. This Act was then replaced by the Crown Estate Act 1961, which continues to be the legislation governing the operations of the CEC.
- 5 While the Crown property rights and interests managed on behalf of the Crown by the Crown Estate Commissioners (CEC) are called the Crown Estate, there can often be confusion between the organisation and the property it manages as the CEC has branded itself as The Crown Estate since the 1990s.
- 6 The general duty of the CEC under the Crown Estate Act 1961 section 1(3) is, '*while maintaining the Crown Estate as an estate in land, to maintain and enhance its value and the return obtained from it, but with due regard to the requirements of good management*'.
- 7 The CEC is a statutory corporation that reports to the Treasury and transfers its net revenue surplus (profit) to the UK Government's Consolidated Fund for use in public expenditure. The CEC is formally accountable to the Chancellor of the Exchequer and the Secretary of State for Scotland, who each have powers of direction over it. The Secretary of State for Scotland has responsibility for matters relating solely to Scotland, reflecting the distinct status of the Crown property, rights and interests managed in Scotland as part of the Crown Estate.
- 8 At devolution, the Scotland Act 1998 reserved the CEC's management of the Crown Estate in Scotland to Westminster and that remains the case. Fig. 9 provides a list of the Scottish Crown property rights which currently make up the Crown Estate in Scotland. The list also includes an indication of the 'modern acquisitions' which the CEC has purchased as investments.

## Fig. 9 Crown Property Rights in Scotland

### The Crown Property, Rights and Interests in Scotland which are managed by the Crown Estate Commissioners

#### Ancient Possessions

1. Ownership of the seabed (excluding hydrocarbons) within Scotland's territorial seas out to the 12 nautical mile limit, where this has not been granted out
2. Rights over the continental shelf to minerals (excluding hydrocarbons) and sedentary species from Scotland's territorial seas to 200 nautical mile limit
3. Ownership of Scotland's foreshore where this has not been granted out and excluding areas under udal tenure.
4. The right to all naturally occurring mussels in Scotland's territorial seas where this has not been granted out.
5. The right to all naturally occurring oysters in Scotland's territorial seas where this has not been granted out.
6. (a) The right to all coastal salmon fishing within Scotland's territorial seas where this has not been granted out.  
(b) The right to all salmon fishing in rivers and lochs in Scotland where this has not been granted out and excluding areas under udal tenure.
7. The right to mine naturally occurring gold and silver in Scotland
8. Title reservations: minerals rights and other rights reserved by the Crown over former Crown lands, including Edinburgh Castle and other prominent sites.
9. Heritable revenues: any historic revenues still due to Crown over former Crown lands.
10. Other income: The right of the Crown to income if the one site in Scotland transferred to government ownership under the Forestry (Transfer of Woods ) Act 1923, is sold.

#### Modern Acquisitions

- (a) Ownership of five rural properties: -  
Glenlivet (Banff) 22350 ha (purchased by Commissioners of Crown Lands in 1937)  
Fochabers (Moray) 4850 ha (purchased by Commissioners of Crown Lands in 1937)  
Applegirth (Dumfries) 6850 ha (purchased by CEC in 1963 & subsequent years)  
Whitehill (Midlothian) 1400 ha (purchased by CEC in 1969 & subsequent years)
- (b) Ownership of one urban property in Edinburgh:-  
39/41 George Street (+Thistle St Lane) (2000+1000 sq.ms. office+retail, purchased CEC 1995)
- (c) Involvement in joint property partnerships:-  
Fort Kinnaird Retail Park (Edinburgh) (50% ownership through Gibraltar Ltd Partnership 2007)
- (d) Ownership of coastal properties (excluding harbours & related property):-  
Rhu Marina (Firth of Clyde) (purchased by CEC in 2007-08)

*Source – Table 1 in SAC 'The Crown Estate in Scotland (2012) p.17,  
updated by removal of West Princess Street Gardens, the King's Park  
and the Old Mills Farm, Stirling.*

- 9 The Crown Estate does not include all of Scotland's Crown property rights and, at devolution, the Scottish Government became responsible for the management of these other rights. The example of the Crown right to ownerless property has been described earlier in the Report (Section 7). The other Crown property rights for which the Scottish Government is responsible are described later in this section. They are not of commercial value and some are archaic, such the Crown's right in Scotland to 'larger whales'.

## 11.2 The Crown Estate in Scotland

### Response to Devolution

- 10 The reservation of the CEC's management of the Crown Estate in Scotland to Westminster in the Scotland Act 1998, means that CEC is not accountable in any formal way to either Scottish Ministers or the Scottish Parliament for its operations in Scotland.
- 11 This lack of accountability in Scotland over the management of the Scottish Crown property rights which make up the Crown Estate in Scotland, was compounded by the CEC's response to devolution in 1999. Two years later, the CEC radically downgraded its management arrangements in Scotland and centralised the control over its operations in Scotland to London.<sup>1</sup>
- 12 Historically, the CEC's predecessors since the 19th century had managed the administration of the Scottish Crown property rights and revenues for which they were responsible, through legal agents in Scotland. When the CEC was created in the 1950s, it continued and developed this Scottish based approach. At the time of devolution, the CEC's operations in Scotland's were one of the CEC's five distinct business divisions, with separate accounts and its own headquarters in Edinburgh and a senior member of staff as the Manager of the Crown Estate in Scotland.<sup>2</sup>
- 13 Then, in 2001/02, two years after devolution the CEC ended Scotland's position as a distinct business division and integrated its operations in Scotland into the CEC's other business divisions in the rest of the UK (Urban, Rural, Marine, Windsor). The post of Scottish Manager was discontinued, separate accounts were no longer kept and the CEC no longer gave a specific report on Scotland in its Annual Reports. The CEC also sold its Scottish HQ building and opened a new Edinburgh Office in rented accommodation nearby.<sup>3</sup>
- 14 This was an major change for a public body to make at that time against the flow of devolution. The CEC explains the change in terms of administrative efficiency, but the change could be seen as a tactical decision to minimise engagement with the new devolved Scottish Parliament, because of the longstanding issues in Scotland over the CEC's operations here. The Crown Estate in Scotland was, for example, one of the major land reform issues identified at the time of devolution by the Scottish Office's Land Reform Policy Group under Lord Sewel.<sup>4</sup>

---

<sup>1</sup> *Crown Estate Review Working Group (CERWG) 'The Crown Estate in Scotland' (2007)*

<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

<sup>4</sup> *LRPG issues report (1998)*

### Lack of Progress

- 15 The longstanding issues over the CEC's operations in Scotland have been considered in recent years by a sequence of parliamentary committees and other public interest inquiries. The most comprehensive and detailed of these was the authoritative Crown Estate Review Working Group (CERWG) report on 'The Crown Estate in Scotland' (2007).<sup>5</sup> This was produced by the six Highlands and Islands local authorities, the Convention of Scottish Local Authorities and Highland and Islands Enterprise after a two year inquiry. The CERWG report recommended the devolution of the CEC's responsibilities in Scotland.
- 16 In 2009, the CEC operations in Scotland were highlighted as a prominent issue in the report by the Calman Commission on Scottish devolution. The following year, an inquiry by Westminster's Treasury Select Committee into the Crown Estate recommended much more accountable management arrangements in Scotland. In 2011, the consensus recommendations in the report of Holyrood's Scotland Bill Committee included the devolution of the CEC responsibilities in Scotland. Then, in 2012, Westminster's Scottish Affairs Committee published a major report on 'The Crown Estate in Scotland' which also recommended the devolution of the CEC's responsibilities in Scotland to the Scottish Government. The Scottish Affairs Committee has also recently repeated its call for the devolution of the CEC's responsibilities in a follow up 2014 report on the Crown Estate in Scotland.
- 17 The Review Group considers that the evidence to these inquiries and the cross party agreement in Committees of both Parliaments that the CEC's responsibilities should be devolved reflects a very wide consensus in Scotland that this should happen because of the public benefits it would bring. However, despite all these inquiries and reports over nearly 10 years, there has been scarcely any improvement in the situation.
- 18 One measure relating to the public accountability of the CEC in Scotland was included in the Scotland Act 2012. However, the change only converted the CEC's tradition of having a Commissioner on the CEC's Board with knowledge of Scotland, the 'Scottish Commissioner', into a statutory appointment upon which Scottish Ministers would be consulted. As Gareth Baird, the Scottish Commissioner then and still said, this will have no significance for his role.<sup>6</sup>
- 19 There has also been slow progress with the other measure to improve the public accountability of the CEC. The UK Government's one positive initiative in response to the Scottish Affairs Committee's (SAC) report of March 2012 was to propose annual Inter-Ministerial Meetings about the CEC's operations in Scotland, with these meetings involving the Secretary of State for Scotland, a Treasury Minister, a Scottish Minister and representatives from the CEC and CoSLA.<sup>7</sup> An 'officials group' to support the Inter Ministerial Group met in February 2013 to agree terms of reference for the Inter-Ministerial Group and the first Inter-Ministerial Meeting was to have taken place in March 2014, but was cancelled. The UK Government has still to provide an alternative date for the meeting, two years after the original recommendation.

---

<sup>5</sup> CERWG *Op cit*

<sup>6</sup> *Scottish Affairs Committee (SAC) report 2012 para 31*

<sup>7</sup> *UK Gov response July 2012*

## The CEC

- 20 The Review Group considers that the key issue is not about improving the CEC's public accountability, but ending its responsibilities in Scotland. As the Committee reports calling for those to be devolved have shown, the CEC is an inappropriate type of organisation to be responsible for the management of Scotland's seabed.
- 21 The CEC is a statutory corporation with a statutory duty to manage the Crown Estate "*to maintain and enhance the value of the estate and the return obtained from it*".<sup>8</sup> This a financial remit to generate revenue for the Treasury and as the CEC's Annual Reports reflect, the CEC's core business is operating as a major commercial property investor measuring its performance against industry sector benchmarks. The nature of the way it operates in this role resulted in the Treasury Committee considering it necessary in its report on the Crown Estate, to emphasise for clarity, that the "*CEC are a public body charged with managing public resources for public benefits*".<sup>9</sup>
- 22 The CEC's operations in Scotland are a very small part of the CEC's overall business. Over 95% of both the capital value of the Crown Estate and the CEC's annual revenue are in England. Scotland accounts for only 4% of the capital value and 3% of the CEC's revenue.<sup>10</sup> The scale of this disparity reflects the very different natures and histories of the Crown and Crown property in the two countries over the centuries.<sup>11</sup> The CEC manages a very substantial portfolio of urban property in England, with particularly major holdings in London. The property value of the Crown Estate is now over £8 billion, with urban property accounting for between 75-80% of the capital value during the ten years to 2011 and 70-75% of the CEC's annual revenue.<sup>12, 13</sup>
- 23 The composition of the Crown Estate in Scotland is very different, however, with hardly any urban property and only four rural estates. In Scotland, the CEC's main business is developing marine activities involving the seabed and foreshore. Since devolution, while there has been very little change in the capital value and revenue levels of the Crown Estate in Scotland, coastal and offshore marine activities have increased from 50% to nearly 70% of the CEC's revenue from Scotland.<sup>14</sup> These marine activities include marine renewables, which although in a relatively early stage of development, are of enormous potential benefit to Scotland's coastal communities and the general betterment of Scotland.<sup>15</sup>
- 24 A fundamental problem with the CEC's responsibility for managing Scotland's seabed and much of the foreshore, is that the CEC's legislation gives it only a financial objective. Therefore, subject to meeting the standards required of any owner of land, the CEC's approach is based on maximising capital values and annual revenues. The CEC's interpretation of its financial remit in these narrow terms has been raised with the CEC in the Committee inquiries mentioned above. However, the CEC firmly maintains that its legislation requires it to pursue this approach. The CEC argues that it has no flexibility to alter its charges, for example, for the use of an area of seabed to accommodate other public

---

<sup>8</sup> *Crown Estate Act 1961, 1(3)*

<sup>9</sup> *Treasury Select Committee 'The management of the Crown Estate' (2010) para 10*

<sup>10</sup> *SAC report 2012 para 34*

<sup>11</sup> *CERWG Annex 1 Op cit*

<sup>12</sup> *CEC Annual Report 2013*

<sup>13</sup> *SAC Op cit para 35*

<sup>14</sup> *SAC Op cit para 36, CEC Scottish Report 2013*

<sup>15</sup> *Scottish Affairs Committee's report on the Crown Estate in Scotland (2012), p 18-20.*

objectives rather than only generating money for public funds. The CEC is not prepared, for example, to make any distinction in its charges between a private developer carrying out a commercial development and a public body carrying out a public project, such as the use of areas of seabed required for the columns of the new Forth road bridge.

- 25 The CEC's commercial approach has long been recognised in Scotland as completely inappropriate in Scotland's marine environment. The great majority of that environment, whether measured by length of coastline, number of coastal communities, harbours, inhabited islands or other features, is in the Highlands and Islands. The levels of the CEC's charges have been heavily criticised over many years in this region as a constant drain against the socio-economic objectives of public policy, with the CEC's charges resulting in economic leakage out of many marginal local economies.<sup>16</sup>
- 26 The CEC's approach means that, for example, while public funds in Scotland are used to subsidise lifeline ferry services to island communities, the CEC is maximising the revenue which it can extract from the use of piers and slipways by these services. The Review Group did note that the CEC confirmed that it had varied its standard terms to allow the laying of inter-island broadband cables to go-ahead on the west coast. However, the CEC clarified for the Group that the variation did not mean that they had foregone any potential income, but rather re-structured the contract so that some of the charge would be deferred until after the cables were laid.<sup>17</sup>
- 27 The CEC also give a high profile to money they invest in coastal and marine developments in Scotland, including their new Local Management Agreements. However, the CEC has clarified that they are all commercial investments based on the rate of return that the CEC will receive from them.<sup>18</sup> Also, as the CEC cannot make loans, cannot invest in companies and has to maintain the Crown Estate as an estate in land under its legislation, these and other investments are all in property with the rents charged by the CEC providing a commercial rate of return. While the CEC has highlighted its capital investment in Scotland as one of the benefits of its role, the Scottish Affairs Committee report in 2012 showed that the CEC had taken around £10 million more capital out of Scotland through sales since devolution, than the CEC had invested in Scotland.<sup>19</sup>
- 28 This narrow focus of the CEC on charging the "*best consideration in money or money's worth which in their opinion can be reasonably obtained,*" has long been criticised as an inappropriate remit for delivering the optimum public interest outcomes in the use of Scotland's seabed and foreshore.<sup>20</sup> In the face of all this criticism within successive reports, the Review Group is concerned at the lack of progress being made in ending the CEC's responsibilities in Scotland. This is all the more surprising given the small amounts of money involved and the fact that the continued operation of the CEC in Scotland does not even seem good business for the Treasury.
- 29 The Scottish Affairs Committee established in its inquiry that, for 2010-11 when the CEC's gross surplus revenue in Scotland was £9.9m, only about £5.7m of that was net surplus or 'profit' after costs.<sup>21</sup> The gross surpluses were at similar levels to this in 2011-12 and 2012-

---

16 CERWG Op cit

17 LRRG session

18 SAC Inverness Dec 2013

19 SAC (2012) Op cit

20 1961 Act Section 3(1)

21 SAC (2012) Op cit

13, indicating a similar general level of profits.<sup>22</sup> This modest annual net surplus to the Treasury from the CEC's operations Scotland, was then substantially reduced by the Coastal Communities Fund (CCF) set up by the UK Government. Under this scheme, the Treasury gives an amount equivalent to 50% of the CEC's marine revenues calculated on a regional basis, to the Big Lottery to distribute as grants in those regions. Scotland is divided into two regions and, because nearly 70% of the CEC's revenue in Scotland is from marine activities, Scotland received back an amount equivalent to a high proportion of the CEC's total net income from Scotland. Thus, in 2010-11, when the net surplus was about £5.7m, the amount Scotland received back through the CCF was £3.9m (i.e. equivalent to nearly 70% of the £5.7m). In the two subsequent years, the CCF amount has been £4.1m and £4.8m.

- 30 These figures illustrate that the Treasury is deriving virtually no net income from the CEC's operations in Scotland. The question of whether the CEC's continued operation in Scotland might actually result in an annual net deficit to the treasury has also arisen within Committee hearings.<sup>23</sup> This position was arrived at on the basis that, because Scotland's percentage contribution to the net income that the CEC transfers to the Treasury each year is less than Scotland's population share, Scotland receives more back under the Barnett Formula than it contributes.
- 31 **The Review Group considers that ending the Crown Estate Commissioners' involvement in Scotland would deliver wide ranging and important benefits in Scotland. The Group recommends that the Crown Estate Commissioners' statutory responsibilities in Scotland, under the Crown Estate Act 1961, should be devolved to the Scottish Parliament.**

### 11.3 Future of Crown Property Rights

- 32 There seems a broad agreement between the Scottish Affairs Committee report recommendations and the positions of the Scottish Government and Scotland's local authorities, that ending the CEC's responsibilities in Scotland should be a two stage process. After the devolution of the responsibilities to the Scottish Parliament, there should then be further changes to decentralise the management of some Crown property rights where appropriate and to abolish other archaic rights.
- 33 Ending the CEC's involvement with Scotland's seabed opens up opportunities for huge improvements. No other maritime country in Europe has an equivalent to the CEC operating its marine environment. The CEC would no longer be running its own system of approvals determining who can use Scotland's seabed, based solely on its narrow financial objective and unaccountable to public policy in Scotland. Scotland would, like elsewhere, be able to have an integrated multi-objective system of permissions operated through the Scottish Government directorate, Marine Scotland, to cover both the activity involved (license) and the use of the seabed (lease). As the Scottish Affairs Committee report sets out, while the overall plans for Scotland's marine environment would flow from the centre out, the distribution of any financial benefits from the uses of the seabed should flow the other way,

---

<sup>22</sup> *CEC Scotland Reports*

<sup>23</sup> *SAC (2011)*



with the local areas most closely associated with developments benefiting first.<sup>24</sup>

- 34 The Review Group considers that the agreement between the Scottish Government and the Western Isles, Orkney Islands and Shetland Islands Councils announced by the First Minister in the ‘Lerwick Declaration’, appears to demonstrate a commitment to the decentralisation of CEC responsibilities if they are devolved.<sup>25</sup> The Group considers however, that whatever arrangements might be reached to decentralise the control and use of the seabed, the overall integrity of Scotland’s ownership of its own territorial seabed should be maintained and safeguarded in the long term national interest. The Group considers that, as at present, the only areas of seabed which are not to be retained in national ownership, should be of limited extent and adjoining the shore.
- 35 There also seems wide agreement that, following the end of the CEC’s responsibilities, the ownership of the lengths of foreshore still held by the Crown should be conveyed to the local authorities for the areas in which the lengths occur. The Review Group considers that the scale and diversity of the benefits that could flow quickly and straightforwardly from the ending the CEC’s involvement with Scotland’s seabed and foreshore, mean that ending that involvement is of profound importance as a land reform measure.
- 36 The most appropriate reform for each of the ancient Crown property rights in Scotland managed by the CEC, have been described in other reports.<sup>26</sup> The ancient Scottish legislation vesting the right to gold and silver mining in Scotland in the Crown as described in Section 10, for example, should be abolished and replaced with a new statute vesting the right in Scottish Ministers on behalf of the people of Scotland.
- 37 Some of the rights managed by the CEC should simply be abolished, for example, as the Scottish Law Committee has recommended for the Crown’s archaic rights to naturally occurring mussels and oysters.<sup>27</sup> These species should, like all the other species of naturally occurring shellfish in Scotland, be managed under Scotland’s wildlife legislation. The Review Group was surprised to learn, however, that the CEC are proposing to convey these two Crown property rights which have no commercial value to the CEC, to Scottish Ministers as property transactions.<sup>28</sup> This transaction would not involve conveying a property, but an entire Crown property right subject to any grants made to others under that right. The Group questions whether this approach is competent in Scots property law, which defines Crown property rights as part of Scotland’s regalia.<sup>29</sup> If the transaction was accepted as legal, CEC would be able to start selling Scotland’s other Crown property rights if it chose to do so.
- 38 The Review Group discusses the reform of the Crown property right to salmon fishing in Scotland, which is currently managed by the CEC, in Section 31. The only other Crown property right to an animal in Scotland is managed by the Scottish Government and illustrates the archaic nature of some Crown property rights. This is the Crown right to larger whales. This ancient right is obscure and, for example, a rule was made up by government in the 1920s that a larger whale was one which measured 25 feet or more. The right also serves no function. While the right to a large whale might have been good news in medieval times, it is no longer the case and the Scottish Government does not accept any liability for

24 *Scottish Affairs Committee (SAC) (2012) Op cit*

25 *First Minister’s speech in Lerwick 25.7.13*

26 *CERWG 2007 and SAC 2012*

27 *Scottish Law Commission (SLC) report on Law of Foreshore and Seabed*

28 *LRRG session with CEC*

29 *For example, A. Duncan ‘Scottish Legal Terms’ (W.Green & Son, 1992)*

a larger whale that washes up. The removal of a 50 ton whale from a beach to land fill for health and safety reasons can cost many thousands of pounds.<sup>30</sup> The clean-up responsibility therefore falls to the local Council. The Council can however apply to Marine Scotland in the Scottish Government for a grant towards the costs, if the whale measures 25 feet or more. Whale strandings on Scotland's coast continue to increase and this arbitrary length for grant support makes no sense, because the length has no necessary bearing on the cost of dealing with strandings. A mass stranding of 'smaller whales' less than 25 feet, can cost more than a single whale over that length.

- 39 While the right to larger whales should simply be abolished, the Review Group recommends in Section 29 that the various public rights which the Crown holds inalienably in trust for the public over the foreshore and sea should be replaced by modern statutory provisions. These types of reforms to abolish or reform Crown property rights which do not form part of the Crown Estate, could be taken forward now by legislation in the Scottish Parliament as the rights are not covered by the reservation of the CEC's management in the Scotland Act 1998. These property rights are part of Scots law and responsibility for that is devolved to the Scottish Parliament, as illustrated by the abolition of Crown property rights involved in ending feudal tenure in Scotland. The requirement in that reform, as with any now, is to obtain the Crown consent required by the Parliament's Standing Order 9.11. That process is apparently carried out by the Bill Team contacting Buckingham Palace.
- 40 **The Review Group considers that, following the abolition of feudal tenure, there should be further significant reductions in types of Crown property rights in Scotland. The Group recommends that the Scottish Government reviews the current Crown property rights in Scots law and brings forward proposals for the abolition of these rights or their replacement statutory provisions, as appropriate in the public interest.**

## SECTION 12 - HISTORIC NATIONAL PROPERTIES

- 1 Historically, the ownership of properties of particular national importance to Scotland as a sovereign country was retained by the Crown on behalf of the nation. Conspicuous examples include Edinburgh and Stirling Castles and the Royal Palaces at Holyrood, Linlithgow, Stirling and Falkland.
- 2 By the 19th century, the government in London was responsible for managing these Castles, Palaces and other iconic national properties held as ancient possessions by the Crown in Scotland. In some instances, the ownership was also conveyed to the government. This was the case with Holyrood Palace and as a result, the ownership of the Palace transferred from the Secretary of State for Scotland to Scottish Ministers at devolution under the Scotland Act 1998.
- 3 There was, in addition, a much larger transfer of historic national properties from the Crown to Scottish Ministers at devolution. In 1999, 26 properties held as ancient possessions by the Crown in Scotland were conveyed on behalf of the Crown by the Crown Estate Commissioners (CEC) to the Secretary of State for Scotland. As a result, the ownership of these properties, listed in Fig. 10, transferred to Scottish Ministers under the 1998 Act.

<sup>30</sup> For example, a 45ft sperm whale on Whalsay in the Shetland Islands in September 2013 cost the Council £9,110 to clear (SG 14.1.14)

**Fig. 10 The 26 Historic National Properties conveyed by the Crown to the Secretary of State for Scotland in 1998/99**

Edinburgh Castle	Dunblane Cathedral
Stirling Castle	Fortrose Cathedral and Precincts
Blackness Castle	St.Machars Cathedral, Aberdeen
Dumbarton Castle	Brechin Cathedral Round Tower
St. Andrews Castle	Arbroath Abbey and Precincts
Broughty Castle	Dundrennan Abbey
Fort Charlotte	Beaulieu Priory
Linlithgow Palace and Loch	St.Mary's Kirk, St.Andrews
Dunfermline Palace, Chapel and Grounds	Blackfriars Chapel, St. Andrews
Glasgow Cathedral	Brechin Maison Dieu Chapel
Elgin Cathedral and Burial Ground	Holyrood Park
Dunkeld Cathedral and Grounds	Kings Knott, Stirling
St Andrews Cathedral and Precincts	Argyll Lodging Stirling

Source: CERWG (2007)

- 4 The story of this transfer was first reported in the Crown Estate Review Working Group (CERWG) Report in 2007, including the strange involvement of the CEC which had no prior involvement or responsibilities for the properties.<sup>1</sup> The report also highlighted that two reservations were inserted by mistake by the CEC's lawyers into the titles now held by Scottish Ministers. The reservations are expressed in each title in the following terms:-

*“under exception of and reserving to Her Majesty and her Successors the whole mines, minerals and fossils insofar as belonging to Her and Them within or under the subjects hereby disposed and free right to exercise all rights to which She or They may be presently entitled and all privileges which She or They may presently enjoy over the subjects hereby disposed”.*<sup>2</sup>

- 5 These reservations remain in the titles held by Scottish Ministers to these historic national properties. The Review Group considers this entirely inappropriate. The reservation of the mineral rights has created a situation where the CEC has ended up acquiring responsibility for these rights under 26 of Scotland's most iconic properties through the conveyancing, despite the fact that the CEC had no responsibility for these properties in the first place. The Group also understands that the second reservation appears to be incompetent as a reservation in Scots property law.
- 6 **The Review Group recommends that the Scottish Government should ensure that the two reservations inserted by the Crown Estate Commissioners into the titles to Edinburgh Castle and other former Crown properties now owned by Scottish Ministers are removed.**

<sup>1</sup> CERWG Report (2007) Annex 6

<sup>2</sup> Ibid

- 7 While the CEC had had no responsibility for the Crown properties transferred in 1999, the CEC was responsible at the time of devolution for the management of two closely associated ancient possessions of the Crown in Scotland. One of these was 5 ha. in West Princes Street Gardens, including much of the slopes around Edinburgh Castle. The ownership of this area was conveyed in 2013 by the CEC to Edinburgh City Council, who already managed the area as part of Princes Street Gardens.
- 8 The other ancient Crown property managed by the CEC at the time of devolution was the King's Park at Stirling Castle and therefore an area of considerable national significance to Scotland. For over 900 years, this 140 ha. Park had been an ancient possession of the Crown and Scotland's foremost Royal Park as part of Stirling Castle.<sup>3</sup> In 2006, a dispute arose over the ownership and management of the Park, when the local community discovered that the CEC was negotiating to sell most of the ancient Park to a private company. In the end, the ownership of the King's Park was eventually conveyed to Scottish Ministers on behalf of the Crown by the CEC in 2013.
- 9 The Review Group considers that iconic national properties such as Edinburgh and Stirling Castles and other historic properties of equivalent national significance to Scotland, should be held inalienably on behalf of the people of Scotland by Scottish Ministers. The Group also considers that there should be greater clarity over the historic properties owned by Scottish Ministers. It might be useful to produce a list of those considered to be held inalienably on behalf of the nation. The list in Fig.10 might be considered to include examples of such properties, while Holyrood Palace is an example not in that list. The Group recognises that, while some properties could be obvious candidates for a national list, the 'bottom end' of the list would be more difficult to define. However, the Group considers that should not preclude drawing up a core list of Scotland's most significant historic national properties that should be held inalienably on behalf of the nation.
- 10 The Review Group's view is that the Scottish Ministers should establish this national list and that the recent introduction of the Historic Environment Bill into the Scottish Parliament, makes this an appropriate time to consider such a list.<sup>4</sup> This Bill involves the merger of the two bodies most involved in the management of Scotland's iconic historic properties, Historic Scotland and the Royal Commission for Ancient and Historic Monuments in Scotland.

### SECTION 13 - NATIONAL FOREST ESTATE

- 1 As described in Section 9, Scottish Ministers own a substantial amount of property which is managed by different parts of the Scottish Government for a wide range of purposes. There is further Scottish Government property held and managed by other Scottish Non-Departmental Public Bodies.
- 2 The most extensive holding owned by Scottish Ministers is Scotland's National Forest Estate (Fig. 11) which covers around 650,000 ha and is managed on behalf of Ministers by the Forestry Commission. The National Forest Estate includes over a third of Scotland's woodland area and is one of the people of Scotland's major assets.

---

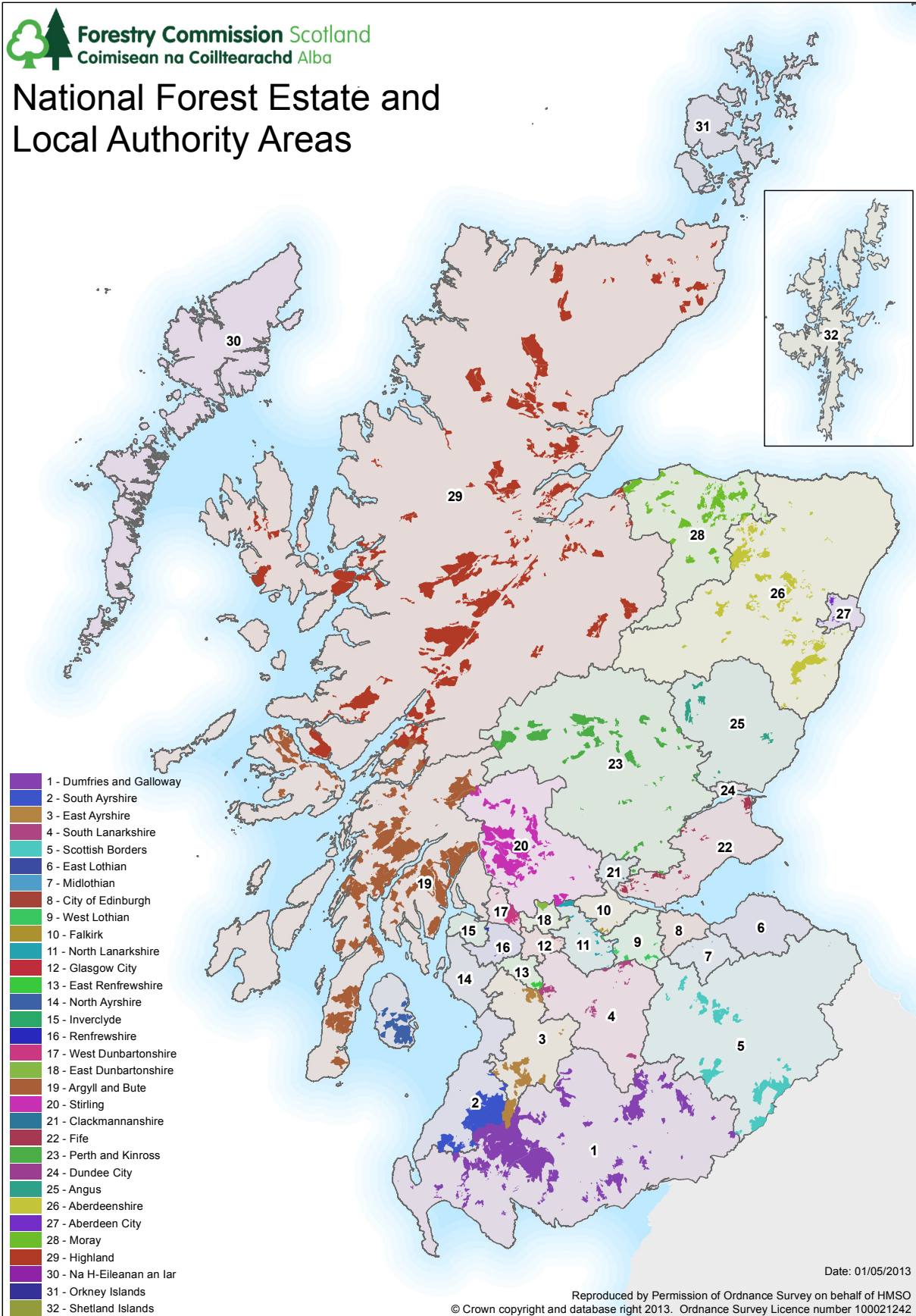
<sup>3</sup> Statement issued by the King's Park History Group, Sept.2012

<sup>4</sup> Introduced March 2014

Fig. 11 Scotland's National Forest Estate



# National Forest Estate and Local Authority Areas



### Ownership and Management

- 3 The development of the land holding now recognised as Scotland's National Forest Estate, started with the creation of the Forestry Commission (FC) by the Forestry Act 1919. The FC was constituted as a statutory corporation managed by a Board of appointed Commissioners, and this remains the case, with the FC now operating under the Forestry Act 1967 as amended. The title to the ownership of land acquired by the Government for planting by the FC from 1919 onwards was vested in Ministers, with the title to any land acquired in Scotland being held by the Secretary of State for Scotland. The ownership of this land then transferred from the Secretary of State to Scottish Ministers at devolution under the Scotland Act 1998.
- 4 Since devolution, the identity of the land managed by the FC in Scotland, through Forestry Commission Scotland (FCS), has been promoted as Scotland's National Forest Estate. Forest Enterprise Scotland (FES), an agency of the Forestry Commission, is responsible for management of the Estate to implement Scottish Government policies, including the Land Use Strategy, the Scottish Forestry Strategy and the Scottish Biodiversity Strategy. The perception might be that FCS and FES are part of the Scottish Government, but this is not the case. While responsibility for forestry was devolved in 1999, the responsibilities of the Forestry Commissioners in Scotland were not, and these remain reserved to Westminster. Thus, FCS only describes itself in publications as 'serving' as part of the Scottish Government, because FCS and FES are both parts of the FC with its reserved responsibilities.
- 5 The creation of FCS in 2003 followed the UK Forestry Devolution Review in 2002 and was part of a wider re-structuring of the FC's UK wide operations, so that they were in line with the devolution of responsibilities for forestry to Scotland, Wales and England in 1999. This UK wide arrangement over the FC now appears to be coming to an end, as the FC's responsibilities in Wales were transferred to Natural Resources Wales in 2013 and on-going discussions at Westminster also seem likely to replace the FC and its responsibilities in England at some stage. The devolution of the FC's responsibilities in Scotland to the Scottish Parliament and Government therefore seems likely, whether by choice or default.
- 6 The Group regards FCS and FES as positive outcomes of devolution in 1999 and recognises the high degree of devolved arrangements currently in place. This means that, if the remaining responsibilities of the FC in Scotland under the current legislation were devolved, there would be very little immediate effect on the operations of FCS in Scotland. Arrangements would need to be put in place for continued co-operation on forestry at a UK level over aspects such as pests, diseases and international agreements. However, the creation of the Joint Nature Conservation Committee that resulted from the devolution of the Nature Conservancy Council's responsibilities to Scottish Natural Heritage and English Nature, is an example of how such matters can be addressed.
- 7 The Review Group considers, however, that the current arrangements have become an anomaly and that devolution of the FC's responsibilities would be a positive development. The change would end the current ambiguity arising from FCS's position 'serving' the Scottish Government and enable Scotland's national forest services to be fully integrated into the Government. The Group considers that there would also be benefits from FCS no longer being bound by some of the terms of the Forestry Act 1967. The roles of trees, woodlands and forests as part of the delivery of public policy have expanded greatly since

the time of the 1967 Act as reflected now, for example, in the importance of climate change and the emphasis in the Scottish Government's policies on the ecosystem services provided by Scotland's land and environment.<sup>1</sup>

- 8 The Group considers that the FC's responsibilities should be devolved and that FCS, with its responsibilities for managing Scotland's National Forest Estate, should be fully integrated into the Scottish Government. One of the changes in the context of this Report would be that, compared to the terms of the 1967 Act, FCS would become fully able to acquire and manage land for whatever range of public policy purposes that the Scottish Government might decide as part of delivering those purposes.

### Extent and Purposes

- 9 The current extent and composition of Scotland's National Forest Estate has developed over time and continues to evolve. During the period from 1961-1980, the size of the FC's holding in Scotland continued to increase as very few sales took place.<sup>2</sup> In 1980, the then Conservative UK Government decided following a review of forestry policy, that the FC should sell a proportion of its estate. This was to meet Government objectives of expanding the private sector and reducing the FC's annual call on Government funding. The Forestry Act 1981 provided Ministers with the powers to dispose for any purposes, land acquired for purposes connected to forestry.
- 10 That policy continued in force between 1980 and 1997, and during that time 73,000 ha. of land and forests were sold in Scotland.<sup>3</sup> The policy was rescinded by the incoming Labour UK Government in 1997 and replaced with a new policy. This limited the FC to selling certain restricted types of land that were surplus to requirements and did not contribute to its objectives, as well as areas for development where that was in the public interest. Following devolution, the Scottish Government continued this policy until 2005. During the six year period 1999/2000 to 2004/05, 13,166 ha. were sold by the FC and 3,201 acquired. This net reduction of nearly 10,000 ha. resulted in a net capital income of over £10 million.<sup>4</sup>
- 11 The new policy from 2005 arose from discussions about the static nature of the Forest Estate and the growing recognition of the wider range of public interest purposes that woods and forests can serve. Following a public consultation in 2003 on the Future Role of Scotland's National Forests, the Scottish Ministers agreed that *"FCS should proceed with a re-positioning approach, selling areas with low potential to deliver public benefits to invest in programmes (including the land / woodland acquisition) which would make a significant contribution to delivery of the Scottish Forestry Strategy"*.<sup>5</sup>
- 12 FCS introduced a re-positioning programme in 2005/06. This was aimed at selling off more mature forests in remote locations which were not deemed to be delivering significant public benefits, and using the income raised to buy generally bare land, closer to the majority of the Scottish population. This new land was then developed as multi-purpose woodland delivering public benefits in line with the aims of the Scottish Forestry Strategy. The programme was to be at no additional public cost and to be cost neutral within FCS, with

---

1 J.Glass et al 'Lands, Lairds and Sustainability' (EUP, 2013)

2 FCS Re-positioning Programme

3 Ibid

4 FCS website Acq & Disposals Summary 1999-2013

5 FCS Re-positioning Programme. Op cit

£10 million as an annual sales target which would subsequently be re-invested in land purchase, tree planting on the land and any associated infrastructure developments.

- 13 In the first eight years of the programme until the end of 2012/13, 29,943 ha were sold for £79.75 million and 24,604 ha acquired for £59.38 million, with the total expenditure on the new land including planting and related costs being £81.45 million.<sup>6</sup> Income and expenditure therefore essentially balanced out at the intended target of £10 million a year. The net loss of just over 5,000 ha from the National Forest Estate means that the overall reduction in its size between 1999-2013 has been just over 16,000 ha. or approximately a 2.5 % reduction.<sup>7</sup>
- 14 The Review Group's understanding is that FCS's re-positioning programme is now considered largely complete but that it will continue at a reduced annual level of £5m and there will be a review of the programme in 2015/16.
- 15 The scale of the re-positioning programme to date in terms of land sold and land bought, has been small compared to the overall size of the National Forest Estate. However, there is a substantial core of the National Forest Estate where disposing of sites might not be considered in the public interest. These sites range from what FCS describes as 'national treasures' through to sites which help maintain a critical mass of commercial forests. The commercial aspect is important as timber production from the National Forest Estate plays an important role in sustaining a timber processing sector which benefits forestry generally in Scotland.
- 16 The Review Group also recognises that the existing history of disposals of FC woodlands over many years, means that FCS is increasingly constrained in the sites that can be sold without giving rise to local community concerns. The Group considers FCS's National Forest Land Scheme, introduced in the same year as FCS's re-positioning programme, to be a positive mechanism for providing an opportunity for local communities to buy or lease National Forest Land. As discussed later in the Report, the Group recognises that other factors have been limiting community acquisitions including issues over the current Scottish Government interpretations of State Aid and the Scottish Public Finance Manual (Section 18).
- 17 The Group also appreciates that FCS faces challenges in acquiring land due to high land values and its limited budget for acquisitions. Land prices can be particularly high in acquiring land for woodlands in and around towns. High land values are also a major constraint against FCS acquiring heather moorlands that would be highly suitable for woodlands or forests, but which are currently managed as part of private estates for grouse shooting or deer stalking. As discussed later in the Report, the high value placed on these activities by some people means that the land prices for these areas are beyond what would normally be considered a realistic price to pay for land for tree planting (Section 23).

### Future Opportunities

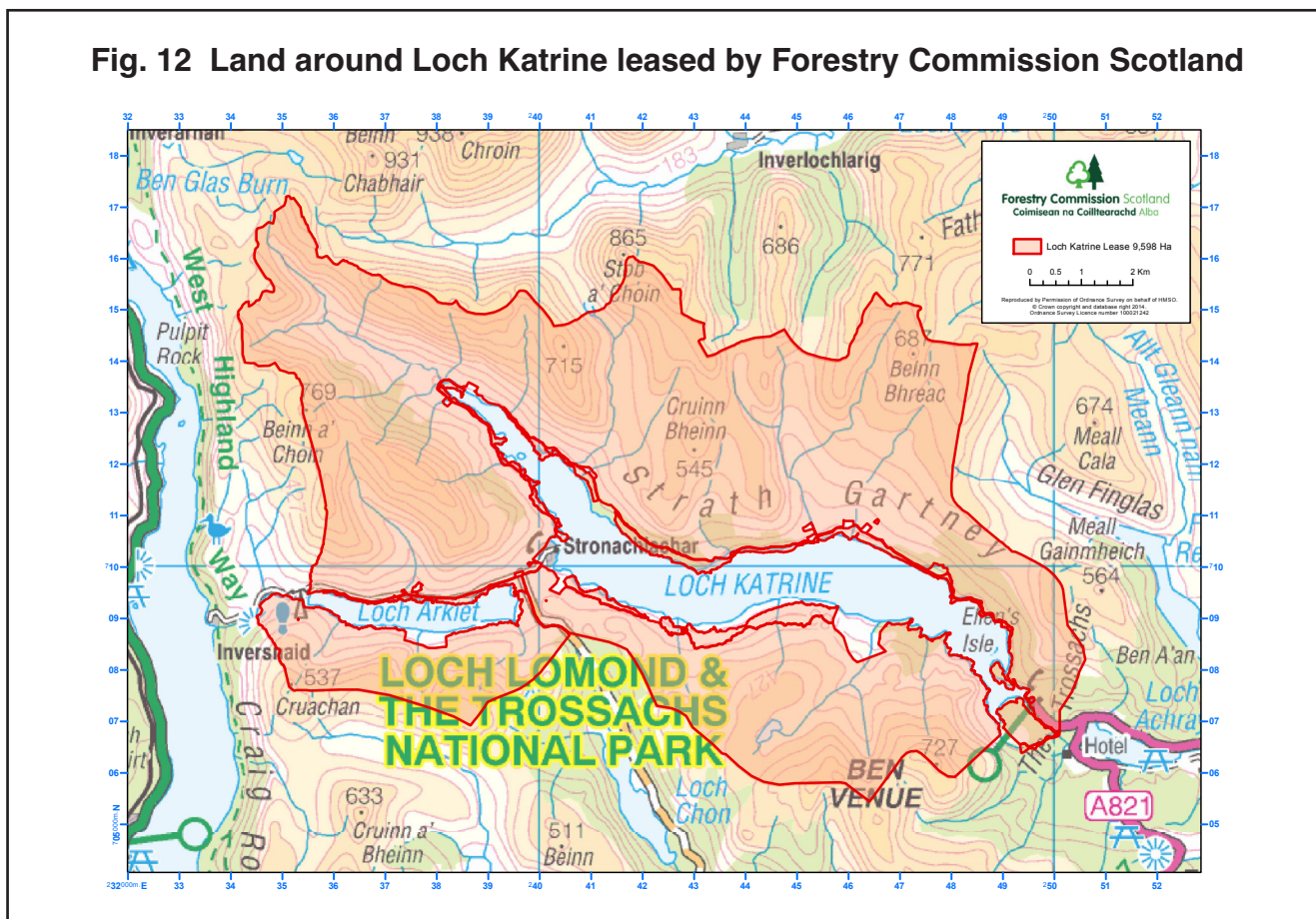
- 18 The Scottish Government's policies aim to expand the importance of woodlands and forests as a land use in Scotland, with the Government's target being to create 100,000 Ha of new woodland by 2022. As the Scottish Forestry Strategy reflects, trees, woodlands and forests can deliver many different economic, social and environmental public benefits that contribute

---

<sup>6</sup> *Ibid*

<sup>7</sup> *FCS website summary Op. cit*



**Fig. 12 Land around Loch Katrine leased by Forestry Commission Scotland**

towards achieving a wide range of public policy objectives.

- 19 The National Forest Estate is an important part of delivering the Scottish Forestry Strategy and the wider public interest agenda which it represents. As part of that role, the Review Group considers that the forthcoming review of FCS's re-positioning programme should not be restricted to considering future acquisitions that are only funded by income from selling parts of the Estate. The size of the National Forest Estate has been reduced by over 85,000 ha over the last 35 years, with around 16,000 ha of that since devolution, and planting on the Estate currently only accounts for around 500 ha or 5% of the Scottish Government's target of 10,000 ha. of new planting a year. The Group considers that the Government should be investing in an acquisition programme by FCS, based on the value this could contribute to the delivery of the wider policy objectives in the public interest.
- 20 FCS is already involved in delivering these types of multiple objectives. Examples include creating new woodlands in and around towns and providing opportunities for new entrants to agriculture (FCS established 7 starter farms on National Forest Estate land in 2012/13).<sup>8</sup> FCS's 9,600 ha project around Loch Katrine since 2005, is an example of creating a major new public forest in an existing water catchment area (Fig. 12). While that project is on existing public land leased from Scottish Water, the Group considers that there could be more opportunities where public investment by FCS in large scale acquisitions is warranted as part of catchment management and flood control, as well as for the many other public interest benefits new forests could bring.

- 21 The Group considers that ongoing acquisitions and disposals by FCS should also contribute directly to the Scottish Government’s objectives of increasing the number of land owners in rural Scotland. While acquisitions of National Forest Estate land by local communities are part of this, the opportunities for increasing the number of land owners should be a consideration in any disposal. Larger scale acquisitions of private estate land could also create opportunities for parts of the lands purchased and not required by FCS, to be re-sold into smaller scale ownership.
- 22 The Review Group considers that the National Forest Estate and the capabilities of FCS should be seen as being at the centre of a more integrated public policy framework for the acquisition and disposal of rural land to help deliver multiple public interest objectives. The Group recognised that public finances are restricted and subject to many calls. However, the Group considers that relatively small amounts of funding in government terms could enable a significantly stronger and more integrated land acquisition programme.
- 23 The Review Group considers that the size and composition of the National Forest Estate should continue to evolve to meet changing circumstances. The Group recommends that the Scottish Government and Forestry Commission Scotland should develop a more integrated and ambitious programme of land acquisitions in rural Scotland, as part of delivering multiple public interest policy objectives.**

## SECTION 14 - COMMON GOOD LANDS

- 1 A special type of property owned by local authorities in Scotland, which is legally distinct from all the other property which they own, is Common Good Funds. These Funds are of ancient origin and consist of property that previously belonged to one of Scotland’s burghs. They include both moveable property (for example, cash, securities, civic regalia) and heritable property (land and buildings). By far the largest component of Common Good Funds is heritable property and while this mainly consists of public buildings and public spaces, such as parks, it also includes in some cases farm land and other heritable property, such as salmon fishings.<sup>1</sup>
- 2 The ownership of these Common Good Funds has undergone a series of changes as a result of local government reforms in Scotland since the Second World War. Common Good Funds were owned by 196 burghs at the time of the Local Government (Scotland) Act 1947, when the burghs became managed by Town Councils.<sup>2</sup> Subsequently, when the Local Government (Scotland) Act 1973 abolished Scotland’s Town Councils, legal title to Common Good Funds was transferred to the new District Councils and then, in 1996, to Scotland’s current local authorities under the Local Government (Scotland) Act 1993. As shown in Fig.13, the combined value of the Common Good Funds was considered to be over £300 million in 2012.

---

<sup>1</sup> Andrew Ferguson *Common Good Law* (Avizandum Publishing, 2006)

<sup>2</sup> *Local Government (Scotland) Act 1941 (list of burghs in First Schedule)*

**Fig. 13 Common Good Funds held by Local Authorities in Scotland**

	No. of Funds	No. of burghs	Value 2005	Value 2009	Value 2012
Aberdeen	1	1	£31,231,000	£58,905,000	£73,853,000
Aberdeenshire	17	18	£1,461,000	£2,229,000	£9,723,000
Angus	5	7	£5,597,000	£8,453,000	£8,748,000
Argyll & Bute	7	9	£1,728,000	£1,508,000	£2,165,000
City of Edinburgh	1	2	£3,453,000	£19,031,000	£20,593,000
Clackmannan	4	4	£29,000	£8,000	£3,875,000
Comhairlie nan Eilean Siar	0	1	£0	£0	£0
Dumfries & Galloway	11	16	£4,749,000	£5,624,000	£7,215,000
Dundee	1	1	£3,117,000	£3,237,000	£3,316,000
East Ayrshire	6	6	£190,000	£230,216	£7,165,000
East Dunbartonshire	1	2	£382,000	£452,000	£485,000
East Lothian	4	8	£8,737,000	£6,243,000	£7,910,000
East Renfrewshire	0	1	£0	£0	£0
Falkirk	4	4	£675,000	£1,056,000	£1,076,000
Fife	17	25	£4,352,000	£5,704,000	£6,522,000
Glasgow	1	1	£8,877,000	£13,454,000	£15,607,000
Highland	8	13	£8,582,000	£44,694,000	£43,620,000
Inverclyde	3	3	£1,433,000	£2,150,000	£1,711,000
Midlothian	2	4	£110,000	£72,000	£19,000
Moray	7	12	£4,528,000	£9,408,000	£10,735,000
North Ayrshire	6	7	£3,166,000	£4,265,467	£5,196,651
North Lanarkshire	0	4	£0	£0	£0
Orkney	2	2	£654,000	£588,000	£656,000
Perth & Kinross	10	10	£1,730,000	£5,697,000	£7,527,000
Renfrew	3	3	£17,420,000	£22,034,000	£26,349,000
Scottish Borders	8	12	£5,264,000	£5,982,000	£9,849,000
Shetland Islands	0	1	£0	£0	£0
South Ayrshire	5	5	£16,438,000	£16,549,000	£16,008,000
South Lanarkshire	4	4	£4,752,000	£7,828,000	£6,041,000
Stirling	3	5	£600,000	£1,509,000	£1,371,000
West Dunbartonshire	1	2	£2,667,000	£2,715,000	£2,725,000
West Lothian	1	4	£16,000	£19,000	£21,000
	143	197	£141,938,000	£249,644,683	£300,081,651

- 3 This combined value is less than 1% of the value of the property assets owned by Scotland's Councils, which was reported to be £35 billion in 2011.<sup>3</sup> However, the long history of Common Good lands, the locations and character of the properties and their local importance make them, as the Scottish Government has commented, "*an important part of the community landscape in many places*".<sup>4</sup> However, as is also very clear, the legal framework governing Common Good Funds as a very distinctive component of Scotland's system of land ownership, is archaic and not fit for purpose.
- 4 The origins of these Common Good Funds go back to the establishment of Scotland's Royal Burghs in the 11th century. Royal charters by the Crown granted these burghs special rights and privileges, as well as tracts of land which typically extended for some distance around the medieval town. Then, in the 15th century in response to maladministration, the Scottish Parliament passed the Common Good Act 1491. This Act which remains in force today, stipulated that the common good of the Royal Burghs "*be observed and kept for the common good of the town*".<sup>5</sup>
- 5 Despite that legislation, much Common Good land was lost by Scotland's burghs between then and the 1830s. Reforms at that time meant the burghs began to expand and some of the land owners who sold land to the growing towns, gifted land to the Common Good for parks and other public purposes. While there has been little research on the fate of Common Good lands between then and local government reform in the 1970s, "*what is clear from even a cursory examination of the evidence is that the depredations did continue*".<sup>6</sup> The major re-structuring of local government in 1975, poor record keeping and the further re-organisation in 1996, have all added to the uncertainty over the full extent of the properties that are part of the Common Good, and the loss of some because they were not recognised as such.
- 6 In recent years, a number of factors have focused more attention on the need to improve the position over Common Good Funds, including a report on "*The Common Good Lands of Scotland*" in 2005 and a book on Common Good Law in 2006.<sup>7, 8</sup> However, while there has been some improvement in the administration of these, "*many Councils are still to complete audits of assets*".<sup>9</sup> The increase in value of Common Good Funds between 2005 and 2012 shown in Fig.13 is considered to be "*due principally to better and more comprehensive asset registers. However, out of the 197 Town Councils wound up in 1975, there are still 54 burghs for which no assets are reported*".<sup>10</sup>

### Common Good Registers and Accounts

- 7 The need to improve the records of Common Good Fund property held by local authorities is reflected in proposals in the current Community Empowerment Bill to improve transparency over Common Good Funds by placing two statutory duties on local authorities.<sup>11</sup> The first would require them to establish and maintain Common Good property

<sup>3</sup> *Audit Scotland: An Overview of Local Government in Scotland (2012)*

<sup>4</sup> *Community Empowerment Bill (CEB) Part 3*

<sup>5</sup> *Common Good Act 1491*

<sup>6</sup> *Wightman and Perman Common Good Land in Scotland (2005)*

<sup>7</sup> *Ibid*

<sup>8</sup> *Ferguson Op cit*

<sup>9</sup> *Wightman Briefing*

<sup>10</sup> *Ibid*

<sup>11</sup> *Draft CEB Nov 2013*

registers, and the second would require them to consult Community Councils and others over any planned disposals.

- 8 The Review Group considers that creating a duty to have a Common Good Fund Register would be a positive development. However, this does not lessen the challenges that can be involved in identifying properties that should be on the registers. The conventional legal description of these properties is that *“all property of a royal burgh or a burgh barony not acquired under statutory powers or held under special trusts forms part of the common good”*.<sup>12</sup> However, this does not directly help determine the properties involved when there are inadequate records. The identification of these properties can only be done definitively with reference to case law by a court, except where land has clearly been acquired with money from the Common Good Fund.
- 9 There is no statutory definition of Common Good property and the Scottish Government considers that it may be unhelpful to try to create one at this stage. The risk is that such a definition could inadvertently result in the loss of some Common Good lands. However, there could also be merit in basing a definition on the extensive existing case law as part of clarifying the position. The Group envisages that, in time, the definition of Common Good property will become those properties on the proposed Common Good registers. The Group considers that these registers should be kept open once they are established, until it can be safely judged at some future stage that no further Common Good properties are likely to be identified through due process. The process of establishing these registers should not become the latest episode in the loss of Common Good property, by setting a pre-mature cut off for recording historic Common Good property. The contents of the Registers will, in any event, evolve with any disposals and acquisitions, and ‘recovered’ properties should be part of that.
- 10 While the Community Empowerment Bill proposals give little detail about the registers, the Review Group would expect each local authority’s register to be structured to list the properties under the burghs from which they derived, while also recording any properties that may have come from other sources. The Group also considers that the establishment of the registers should be linked to a programme requiring the progressive recording of Common Good properties in the Land Register. This could be rolled out through a schedule that started with the local authorities with least Common Good property, to allow most time for the local authorities with most to carry out the necessary work to enable registration.
- 11 The Review Group also considers that, in addition to registers, some further attention should be given to local authority accounts for their Common Good Funds. It has been accepted since local government re-organisation in 1975 that financial accounting for Common Good Funds should be carried out separately from the Councils’ main accounts. Improvements have also followed the guidance issued in 2007 by the Local Authority Scotland Accounts Advisory Committee.<sup>13</sup> However, the Group considers that, while some Councils still account for all the Common Good Funds in their area under one accounting head, each of their Common Good Funds should be recorded separately. The Group understands that there are also variations in the accounting conventions applied by the Councils to Common Good Funds, that make comparisons difficult. The Group also notes that two Councils have also registered the Funds under their control as a charity with the Office of the Scottish

---

<sup>12</sup> *Lord Wark in 1944 ref in Wightman Briefing Annex 1*

<sup>13</sup> *LASAAC (2007) in Wightman Briefing p.3*

Charity Regulator.<sup>14</sup> The Group questions whether this is an appropriate approach.

### Disposals and Appropriation

- 12 Measures to establish the identity of Common Good property more clearly are only part of the reforms required, as the legal framework governing the management of Common Good property is complex and unclear. This is particularly the case with the rules governing the terms under which Councils are allowed to sell, lease or change the use of Common Good land. Disputes about these are the most common source of litigation involving Common Good Funds, as illustrated by the current issues over the future use of Portobello Park in Edinburgh.<sup>15</sup>
- 13 Common Good property, which is recognised as being held inalienably, is described as deriving from three sources. These are the original grant, a decision of the Town Council itself or that the land had been used and enjoyed by the public since time immemorial.<sup>16</sup> The ability of a local authority to dispose of any Common Good properties in whole or part is unclear, though the Local Government (Scotland) Act 1973 enables this to be done for certain types of common good in certain circumstances by reference to the courts. However, that Act is silent on whether or how a Council could change or ‘appropriate’ the use of Common Good land to serve a different public purpose. As the Law Society of Scotland observed in relation to the Portobello case, *“the determination that there is currently no mechanism whatsoever for the appropriation by an authority of inalienable property for a necessary public purpose, is one which should certainly benefit from national debate”*.<sup>17</sup> As a result of the difficulties, Edinburgh City Council has introduced a Private Bill into the Scottish Parliament seeking to be allowed to change the use of Portobello Park as Common Good land from a park to the site of a new school. This is not the first Private Bill involving Common Good land that the Parliament has had to consider since 1999.<sup>18</sup>
- 14 While the restrictive conditions on the disposal or change of use of Common Good Fund property were intended to protect them for corrupt management in previous centuries, they are now considered no longer fit for purpose. Even in situations where everyone is agreed, the law or lack of it can still place obstacles in the way of making progress. Most respondents to the Scottish Government consultation on proposals for its Community Empowerment and Renewal Bill agreed that the current rules act as a barrier to the effective use of Common Good assets by both local authorities and communities.<sup>19</sup> Despite this, the Scottish Government has not brought forward measures to address this in the current draft Bill.
- 15 The Review Group considers that the Scottish Government’s proposed Common Good Fund registers should be only one of a series of measures to bring about more major reforms as part of improving Scotland’s system of Common Good Funds. The Group consider that a new statutory framework should be developed to modernise Common Good law, which currently relies on the interpretation of a long history of case law. The Group considers that a modernised statutory framework could be enacted through a new Common Good Act to replace the current Act from 1419.

<sup>14</sup> [www.oscr.org.uk](http://www.oscr.org.uk) for Stirling Council Common Good Funds (SC019363) and Scottish Borders Council Common Good Funds (SC031538)

<sup>15</sup> City of Edinburgh Council (Portobello Park) Bill

<sup>16</sup> Ferguson p.55

<sup>17</sup> Response to first CEB Consultation

<sup>18</sup> National Galleries of Scotland Act 2003

<sup>19</sup> CEB, Analysis of Response, 2012, para 4.43

## Beneficiaries

- 16 Central to the modernisation of Common Good Funds is re-establishing a more direct link between Common Good land and the local communities where that land occurs.
- 17 Common Good case law makes reference to the fact that local government Councillors have a fiduciary duty to burgh inhabitants and that in holding title to Common Good land as part of that, they have similar responsibilities to that of Trustees. As Lord Drummond Young observed in a Court of Session appeal case in 2003, *“It (common good property) was thus the ordinary property of a burgh, held for the general purposes of the community. It is owned by the community, and the town council or other local authority is regarded in law as simply the manager of the property, as representing the community”*. However, under the current legislation, local authorities only have a legal duty to *“have regard to the interests of the inhabitants to which the common good related”* prior to the 1975 local government re-organisation.<sup>20</sup>
- 18 This duty does require Councils to consider the interests of the inhabitants in each area from which the Common Good property they manage originated. However, the duty gives Councils considerable discretion as to how they fulfil this duty and the standards of direct engagement with the local communities involved is typically very limited. The proposals in the current Community Empowerment Bill would require Councils *“to have regard to guidance issued by Scottish Ministers in relation to the management and use of property that forms part of the common good”*.<sup>21</sup> This provision, if enacted, could be used to help improve the standard and consistency of engagement with the local communities within the existing legal framework. This could include such matters as the provision of adequate accounts, involvement in management decisions and direct benefit from any net income generated by the Common Good land in their area.
- 19 The Review Group considers that such measures should be the first steps in re-establishing the direct link between the Common Good lands and these local communities. There is scope for legislation to be developed that could give these communities rights to take over the management of the Common Good land in their area and indeed, to re-gain local ownership of it. However, an early requirement in improving the position over Common Good land is to identify who those ‘local communities’ are. This may not be straightforward in many situations. It might be noted that, while the administrative functions of the Town Councils responsible for the burghs were abolished in 1975, Scotland’s Royal Burghs still exist as legal entities and the boundaries of all burghs can be clearly mapped. However, in many situations, the ‘inhabitants’ living within those boundaries might no longer be considered to be the community due to the urban renewal and expansion since the boundaries were last defined historically.
- 20 The Review Group considers that Common Good land should be recognised more clearly as one of Scotland’s oldest and most enduring forms of community land ownership, and something which plays an important part in the historic, cultural and economic heritage of Scotland’s towns and cities. A reformed system of Common Good Funds would safeguard that heritage, while enabling Common Good lands to play a more progressive role in the public interest in urban areas and as part of that, become a valuable part of revitalising

---

<sup>20</sup> *Local Government (Scotland) Act 1994 S.15(4)*

<sup>21</sup> *CEB Draft Bill 25(2)*

community land ownership in urban Scotland. A modern statutory framework would clarify the status of Common Good land as a distinct form of land tenure. This could open up the scope for it to become used by local communities outwith the 197 former burghs, where communities hold particular types of property as Common Good lands to protect them from disposal.

- 21 **The Review Group considers that the position over Common Good lands should be improved to ensure they are adequately safeguarded and appropriately managed. The Group recommends that a new statutory framework should be developed to modernise the arrangements governing Common Good property.**



## PART FOUR

### LOCAL COMMUNITY LAND OWNERSHIP

#### Introduction

- 1 The Review Group's remit is to identify land reform measures which will contribute to three strategic objectives. The most specific of these is to *“Assist with the acquisition and management of land (and also land assets) by communities to make stronger, more resilient, and independent communities which have an even greater stake in their development”* (Annex 1).
- 2 This objective reflects a broad consensus that public policy should seek to further empower Scotland's local communities.<sup>1</sup> The rationale for this includes a response to the aspirations of the people in communities to improve their individual and collective well-being, and also the pragmatic recognition by national and local government of the increasing need for strong local communities to participate in a reformed system of public services.
- 3 There has been substantial growth in community activity in Scotland's local communities over the last thirty years or so, though this has not been even across the country. A key change has been a shift from mere participation and engagement in community affairs, to community-led development and regeneration. As part of this, community ownership of land, buildings (including housing), and other property assets is a major component. This is a Scottish success story, and the Group acknowledges that there is a body of evidence now available about the public benefits that community ownership can generate.<sup>2</sup> This spans from the local communities in urban neighbourhoods to those in scattered settlements in remote rural areas, and this activity is continuing to expand and develop.
- 4 The Group notes the considerable progress in community-led, asset-based regeneration and development that has occurred despite the fact that Scotland's local communities have few political powers, particularly in comparison with those in most countries in Western Europe. Many submissions to the Review Group suggested that there was a need for progress to improve this position. The Group considers that there should be a much clearer, more coherent public policy framework to promote and support the development of Scotland's local communities.
- 5 In this Part of the Report, the Review Group starts by examining what is meant by 'local communities', before considering the role that land ownership can play in the development of these communities and the types of support needed to promote that.

---

<sup>1</sup> As illustrated by the *Community Empowerment (Scotland) Bill* currently being considered in the Scottish Parliament

<sup>2</sup> J. Hunter, *From The Low Tide of the Sea to the Highest Mountain Tops: Community Ownership of Land in the Highlands and Islands of Scotland* (The Islands Book Trust, 2012). The BIG Lottery, *Growing Community Assets (GCA) Evaluation, Community Land Scotland (CLS) : Economic Indicator Data (2014) and Scottish Land & Estates: Economic Contribution of Estates in Scotland (2014)*.

## SECTION 15 - LOCAL COMMUNITIES

- 6 Any discussion on the development of community land ownership usually faces the inevitable question of ‘What do you mean by community?’ The term ‘community’ is widely used in many ways in different contexts and there is a diverse range of types not only of communities but also of ‘community organisations’ in Scotland.
- 7 Scotland’s landscape, both urban and rural, can be considered to be covered by local communities or neighbourhoods. More or less every one of us lives in one of them and most residents in a local community or neighbourhood also tend to know its identity, as the local area in which they live, and with which they identify. While the scale and complexity of local communities in urban and rural areas can vary very greatly, the same basic principles apply to the nature of local communities and local community development.
- 8 In this section, the Review Group examines the nature of communities, and identifies two key issues which the Group considers should be addressed to help promote “*stronger, more resilient, and independent communities*”. (See Annex 1)

### 15.1 The Nature of Communities

- 9 There are many definitions of ‘community’ and a significant body of theory examining the nature of community.<sup>1</sup> Because land is the core of the Review Group’s work, the concept of place is central, and therefore the focus here is on communities which are defined by geography, which can be applied to both rural and urban areas. These communities of place are often referred to as neighbourhoods in urban areas.
- 10 But communities are more than simply a group of people living in a particular place. ‘Community’ involves a complex set of relationships between individuals and groups, involving networks and other linkages, such as family and kinship ties, collective voluntary action, informal reciprocity and trust. In addition, there are more intangible aspects such as sense of place and belonging, shared history and cultural identity, and, important to this report, attachment to land.
- 11 There are also ‘communities of interest’ which are social groups or networks with a particular shared focus. In looking at land issues this is important inasmuch as local, regional or national organisations based on communities of interest can become involved in land ownership and management, such as crofting trusts, the John Muir Trust (JMT), the Royal Society for the Protection of Birds (RSPB), and the National Trust for Scotland (NTS).
- 12 The complex relationships in geographical communities described above are often referred to as ‘social capital’ and this is an important element in the resilience of local communities and economies.<sup>2</sup> Strengthening social capital and building capacity in communities are critical processes in the growth of local community land ownership and management, and these processes of community development are often assisted by external, often public,

---

<sup>1</sup> For example, see C. Bell and H Newby *Community Studies*, (Unwin, 1971); A. Cohen, *The Symbolic Construction of Community* (Tavistock, 1985); G Crow and G Allan, *Community Life. An Introduction to Local Social Relations* (Harvester Wheatsheaf, 1994)

<sup>2</sup> R. Putman, *Bowling Alone. The Collapse and revival of American Community* (Simon and Schuster, 2004)

agencies. This type of support is discussed in Section 19.

- 13 Scotland has been at the forefront of using the ownership and management of land as a means of empowering and strengthening local communities. 'Asset-based community development', is now commonly accepted as an important part of an organic, bottom-up, people-centred process, responding to threats and opportunities and forging an alternative approach to large scale top down solutions which have characterised regeneration in many parts of Scotland for decades.<sup>3</sup> To further facilitate this process, the Group believes that there needs to be an effective level of local democracy in Scotland through which communities can represent their views, and also support for community bodies that participate in land and other asset owning for local community benefit.

## 15.2 Local Community Democracy

- 14 Unlike many countries, Scotland has no equivalent of democratic public administration at the local community level. Scotland traditionally had three levels of public administration or 'government' viz. national government, counties and local burgh, town and parish councils. However, during the 20th century, successive local government re-organisations have progressively removed the lower levels of local government. At the start of the 20th century, Scotland had 37 counties and 1109 parish councils and town councils,<sup>3</sup> but following major re-organisations in 1929, 1975, and 1996, Scotland now has 32 unitary local authority Councils with a total of just over 1,200 elected Councillors.<sup>4, 5, 6, 7</sup>
- 15 Community Councils (CCs) were introduced in the 1975 re-organisation, and these continue today. However, CCs were given few powers or specific responsibilities, other than a requirement on local authorities to consult each CC on planning applications in its area. CCs were also given no resources, other than any grant that a local authority might give towards administration expenses.
- 16 At present, there are 1514 CC areas in the 32 Council areas and the most recent survey indicates that there are active CCs in 1215 or 80% of the CC areas.<sup>8</sup> While it might be noted that 60% of the inactive CC areas were in three local authority areas, the shortcomings of many CCs, in terms of local representation and engagement, are well recognised. As a reflection of the difficulties facing CCs, and reduced funding, the Association of Scottish Community Councils wound itself up in 2012.
- 17 The Group is aware that there are some examples of CCs being involved in land reform issues, through being active in the early stages of identifying potential community acquisition opportunities, and in mobilising support. But as outlined above, the network of CCs is patchy and even where they exist, and are active, CCs generally do not own land or other assets.
- 18 The Group recognises that a number of publications have recently contrasted Scotland's position with the much more local forms of local government in other European countries,

---

<sup>3</sup> T. O'Leary et al., *Appreciating Assets* (Carnegie UK Trust, 2011); M. Shucksmith, *Future Directions in Rural Development* (Carnegie UK Trust, 2012)

<sup>4</sup> A Wightman *Renewing Local Democracy* (Scottish Green Party, 2014).

<sup>5</sup> *Local Government (Scotland) Act 1929*

<sup>6</sup> *Local Government (Scotland) Act 1973*

<sup>7</sup> *Local Government (Scotland) Act 1994*

<sup>8</sup> *SG Short Term Working Group (Final Report Sept.2012, Paper 4.1)*

as part of calls for the restructuring of local government to create a level below the current unitary local authorities.<sup>9</sup> But the Group also notes that proposals for a reform of CCs were not included in the Scottish Government's current Community Empowerment (Scotland) Act. While the Group considers that the lack of a representative democratic structure at the local level can act as an obstacle to developing stronger local communities, and that the powers of CCs could be reformed, the reorganisation of local government is not a central focus of this review.

### 15.3 Local Community Ownership

- 19 An increasing number of communities have developed other types of bodies to channel, proactively, their energy and dynamism to tackle local needs and opportunities directly themselves often articulated in the form of a community plan. These are democratically run organisations, often asset owning, known by various names, including 'anchor organisations', and are active in community development and regeneration across Scotland. The ownership of buildings and land has been an important part of their work.
- 20 The defining feature of these community bodies is that they are owned and managed by the local community as a whole, for the benefit of the communities. There are four widely recognised essential criteria for these local community bodies. These are:-
- *Common Good*: The community body must have a clearly stated social purpose that benefits the local community
  - *Open Membership*: Membership of the community body must be open to everyone on the electoral register within the local community's area
  - *Local Control*: The body must be democratically controlled by the local community at both membership and board levels. A majority of the community body's voting members must be members on the electoral register within the local community's area and, at least a majority of those on the board and eligible to vote must be members of the local community elected by the local membership
  - *Non-Profit Distributing*: Surplus funds or assets must be re-invested into the work of the community body to further its objectives and if it is wound up, its assets must be passed to another non-profit distributing body with similar objectives
- 21 These well established criteria mean that there is limited choice in the types of legal constitutions suitable for these local community bodies. For example, while a local Community Association could meet the criteria, the liability for its actions falls on its members because it is an unincorporated association. This can be a particularly important liability with the ownership of buildings and land. Some types of insurance are available to address aspects of this, for example, with a community association owning a village hall or district angling associations owning fishing rights. However, an unincorporated association is generally not recommended for a local community body owning property or undertaking other significant economic activities.

---

<sup>9</sup> Jimmy Reid Foundation 'The Silent Crisis' (2012), Lesley Riddoch 'Blossom' (Luath Press, 2013), Andy Wightman 'Renewing Local Democracy' (Scottish Green Party 2014)

- 22 The most widely used type of constitution for these local community bodies is a company limited by guarantee, and usually also with charitable status. In the Land Reform (Scotland) Act 2003 Part 2, which vests the right in local communities to register a pre-emptive right to buy over land, the ‘appropriate community body’ to do so on behalf of the local community, is defined as a company limited by guarantee that conforms to the four essential criteria above. It should be noted that liability of members of such companies is limited to the value of their membership, but that directors have the same responsibilities as any ‘normal’ company; for example they are liable if the company trades while knowingly insolvent.
- 23 Nearly all the existing community bodies to date that conform to these criteria have been established as companies limited by guarantee. The Group notes that whilst it is important to adhere to the criteria, there can be flexibility with this particular legal structure. For example, the company structure of the Isle of Eigg Heritage Trust is a partnership comprising the Highland Council, The Scottish Wildlife trust and the Eigg community, and the Knoydart Foundation originated as a consortium, involving a range of bodies including the Highland Council, HIE, the John Muir Trust, and the local Community Association and other private Trusts. Having partners working formally with community bodies is important, in terms of bringing expertise and external finance into community land acquisition and management.
- 24 However, the Group notes that other legal forms are being evolved which can be appropriate for community land ownership. For example, the Scottish Charitable Incorporated Organisation (SCIO), introduced in April 2011, can also provide scope for a constitution that meets the essential requirements of a community body owned and managed by the community as a whole. SCIOs reduce the administrative burdens for charitable companies of reporting both to Companies House and the Office of Scottish Charity Regulator (OSCR). They are also able to set up their own wholly owned subsidiaries, such as a trading company to carry out commercial activities. The Group concludes that a SCIO should therefore be included as an eligible constitution for an ‘appropriate community body’ in Part 2 of the Land Reform (Scotland) Act.<sup>10</sup>
- 25 Many communities have named their ‘appropriate community body’ a Trust, notwithstanding the fact that they are legally constituted as companies rather than trusts. A significant number of these bodies are also not called Trusts. However, for consistency and clarity, the Review Group refers here to these ‘appropriate community bodies’ that are owned and controlled by local communities on their own behalves, as Local Community Trusts or LCTs.
- 26 The Group notes that LCTs exist to implement projects in a community, rather than to represent its views. This should be the role of CCs but in many cases LCTs fill a vacuum if CCs are moribund or ineffective. Within LCTs, the voting membership which elects the Directors of the LCT are those members of the community who have signified their agreement to being a member, as this is a requirement of company law.<sup>11</sup> Their primary role is to take forward the acquisition and management of land and property for community benefit.
- 27 CCs and LCTs are part of a much wider and diverse community sector. Within an active community, there can be many other different locally based community groups including associations, clubs and societies. There can also be other community based land owners

---

<sup>10</sup> Section 34 of LR(S)A 2003

<sup>11</sup> Companies Act Section 8 (112)

and other forms of community businesses or social enterprises. These can involve a range of different legal constitutions including other companies and SCIOs, Community Interest Companies, Community Benefit Societies and others.

- 28 **The Group considers that while there should be an agreed set of criteria which define an ‘appropriate community body’, the Government should be flexible in terms of which legal structures are eligible. The Review Group recommends that there should be a clear focus in public policy on supporting appropriate local community bodies that are owned and managed by local communities acting on their own behalves.**

## SECTION 16 - LAND AND COMMUNITY DEVELOPMENT

- 1 There has been increasing awareness in Scotland over recent decades that the ownership of land and buildings by local communities is an important part of community development to create stronger and more resilient local communities.
- 2 The Review Group considers that policies to promote further community land ownership, should be informed by knowledge of the extent of existing community land ownership and an understanding of the main reasons why communities become involved in land ownership. The Group considers both these topics in this Section, before considering in the following Sections a range of measures that would directly support local communities to acquire land.

### 16.1 Extent of Community Land Ownership

#### Number of Communities

- 3 The ownership of property can be an important part of local community development. Most commonly this is the ownership of buildings, and the starting point for many communities is a meeting place. A recent Scottish Government study found, for example, that there are close to 3,000 village halls and other community facilities in rural Scotland, and that around 80% (2,400) of these are community owned.<sup>1</sup> Another survey found in contrast, that *“the vast majority of community centres in urban locations tend to be owned by the local authority rather than the community organisations that may manage or use them”*.<sup>2</sup>
- 4 The distribution of village halls in rural Scotland remains a good indicator of the pattern of local communities. There is no map of these local communities at a more accurate level below the scale of the pattern of Scotland’s Community Councils. This mapping might be anticipated to be relatively straightforward in most of rural Scotland, where there are usually clearer traditional boundaries than in areas affected by modern urban development. The Group considers that a clearer awareness of the pattern and number of local communities in rural areas would help inform public policies intended to support these communities.
- 5 The range of assets which communities now own has grown. Community controlled housing associations have extensive property portfolios. Communities now own land, often extensive tracts mainly in rural areas, but also woodland, parks and open spaces, heritage assets,

<sup>1</sup> S Skerratt *Community Facilities in Rural Scotland: A Study of Their Use, Provision and Condition (2008)*

<sup>2</sup> DTAS baseline survey 2012

and a range of buildings, for broad community use, including business workspaces. This growth in community owned assets is an indicator that Scotland's communities are becoming more empowered and therefore stronger, and this is discussed further below. The Review Group considers that it is important to know the 'extent' of community land ownership, in terms of numbers of buildings and hectares owned, but also how many local communities do or do not own property.

### Amount of Property

- 6 The fullest assessment, to date, of the amount of property owned by local communities is Development Trusts Association Scotland's (DTAS) Baseline Survey from 2012.<sup>3</sup> It covered both urban and rural areas, and estimated that there are 75,891 property assets owned by a total of 2,718 community controlled organisations. The overwhelming majority of these assets (73,151) were housing units owned by 84 community controlled housing associations. The Survey estimated the total amount of land owned by community controlled organisations as 463,006 acres (187,372 hectares), noting that *"the vast majority of this area (95%) comprises 17 large rural estates under community ownership."*
- 7 The DTAS study gives the lower overall total of 446,587 acres (180,800 ha) for the amount of rural land owned by community controlled organisations. This is similar to the total of 439,895 acres (178,095 ha) in the database maintained by Highlands and Islands Enterprise and which DTAS used as part of its study. HIE's map of community owned land based on its database is shown in Fig.14. Wightman gives a total of 419,874 acres (169,989 ha) for 19 community land owners with over 1,000 acres (405 hectares).<sup>4</sup> Community Land Scotland estimate the amount of land owned by its membership, which only includes some community land owners, as 406,476 acres (164,565 ha).
- 8 These figures all give a similar order of magnitude for the amount of community owned land. There is also a high degree of similarity in the three lists, DTAS, HIE and Wightman, for the 15 -20 largest community land owners with over 1,000 acres (405 hectares). However, in reviewing the lists, the Group found each list contained significant errors and that there were some differences between them in what counted as community ownership. This is not a criticism of those putting the lists together, but a reflection of the limitations to the quality of information available.
- 9 The Review Group considers that much better data on community land ownership is needed to inform public policies intended to support and develop this sector. This is particularly the case at the level of small scale ownership, when the acquisition of very small areas of land can be so important to many communities.
- 10 The fact that the existing totals for what is broadly described as community land ownership are approaching 450,000 acres, has led to the current figure being rounded up to 500,000 or half a million acres (202,429 ha).<sup>5</sup> The announcement by the First Minister in June 2013 that the Scottish Government's target for community land ownership is 1 million acres by 2020, provides a clear policy context to addressing the need for better information.

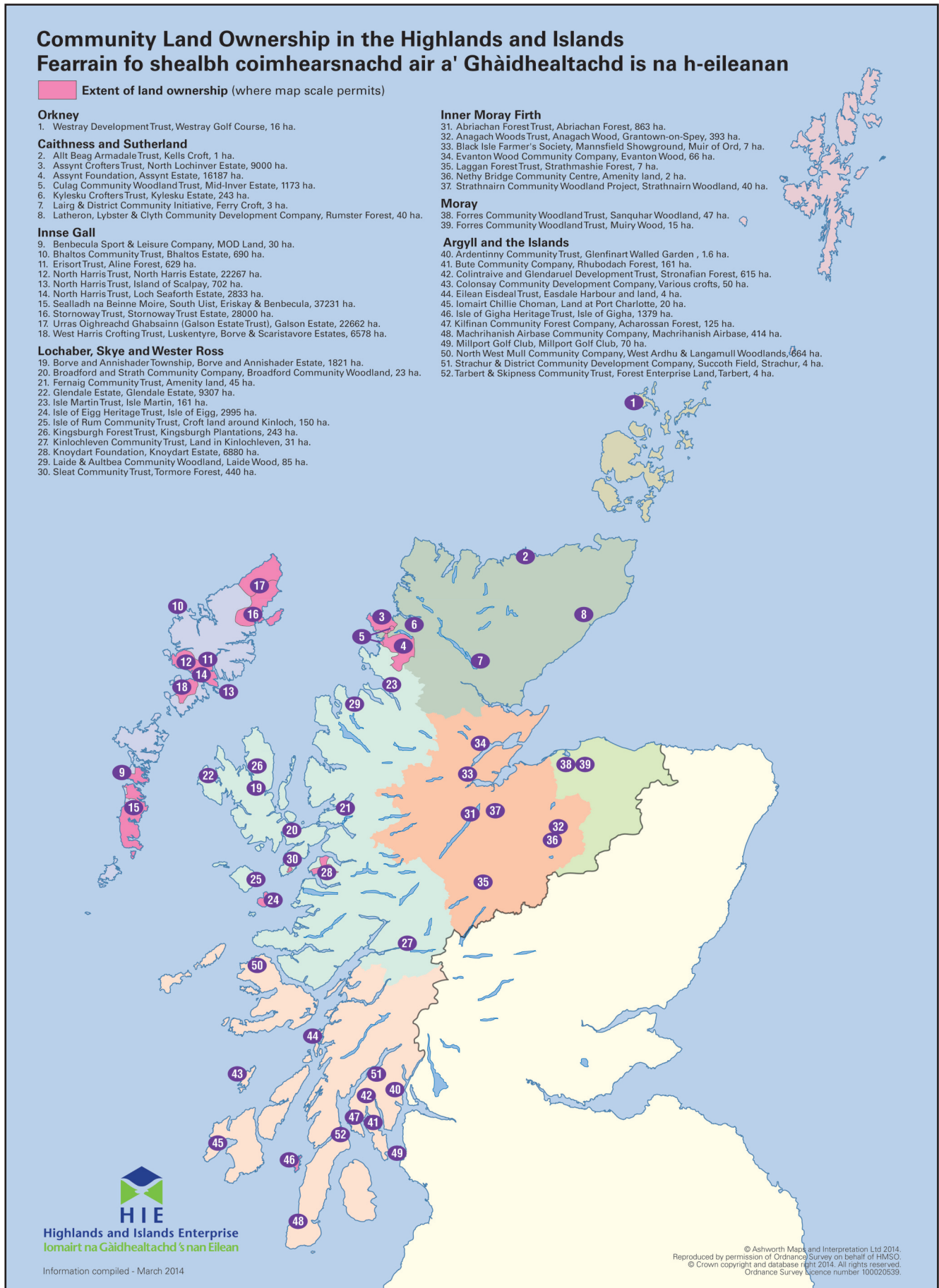
---

<sup>3</sup> *Ibid*

<sup>4</sup> A. Wightman, *The Poor Had No Lawyers* (2010)

<sup>5</sup> J. Hunter 'From Low Tide of the Sea to the Highest Mountain Tops' (Island Book Trust 2012)

Fig. 14 Community Land Ownership in the Highlands and Islands Enterprise Area





## Types of Owners

- 11 An important part of improved information on community land ownership should be recognition that not only is there a wide range of types of community owned property, but there are a number of different types of community land owners. The Review Group has highlighted the core status of an ‘appropriate community body,’ or as it is labelled here, Local Community Trust (LCT). This is the ‘fullest’ or most genuine form of local community land ownership. However, the Group considers that other forms of local ownership should be included, as was done in the DTAS study of Community Ownership in Scotland.<sup>6</sup>
- 12 The DTAS study defined community land ownership as property where the title is held by a community controlled organisation. The study’s definition of these organisations, which is quoted below, is the same as the definition of an appropriate community body or LCT, except for the last half dozen words (emphasis added):

**“Community controlled organisation:** *an organisation that is not-for-private-profit, has a defined geographical area of operation (typically at the level of village, neighbourhood, town or similar), is accountable to those who live within that area, and is democratically run. The majority of people who serve on its management committee or Board must live within the organisation’s area of operation and be elected or appointed through a transparent process open to all who live within that area. Such organisations may exist to serve the interests of the whole community of place or specific communities of interest within this”.*<sup>7</sup>

- 13 Examples of property ownership by ‘specific communities of interest’ within local communities are, in the urban context, Scotland’s locally controlled Housing Associations, and in the rural areas, crofting trusts.<sup>8</sup> As described in Section 15 some ‘appropriate community bodies’ can have legal structures which combine broad community benefit with communities of interest and this flexibility is important. Different types of community ownership can be dictated by the different legislation which governs those sectors, and this can lead to a range of legal entities including limited companies, SCIOs, Industrial and Provident Societies, Community Interest Companies, Community Benefit Societies and others.
- 14 Clear information on community land ownership should be based on a breakdown by category, starting with LCTs and their trading companies and including local community associations, housing associations, community energy companies and others that conform to the DTAS definition above. Improved information should help inform public policies to support the continuing development of ‘specific interest community land ownership’, as part of promoting more robust resilient communities.<sup>9</sup>

---

<sup>6</sup> DTAS Op cit

<sup>7</sup> Ibid

<sup>8</sup> For example, Assynt Crofters Trust, Borve and Annishader Township, Melness Crofters Estate

<sup>9</sup> The need for better information at this wider scale is identified in “The Highlands and Islands Social Enterprise Sector” Final Report by ekosgen for HIE, March 2012

- 15 **The Review Group recognises that there is now a wide range of types of property owned by communities and also types of community owners. Given the target of one million acres in community ownership by 2020, set by the First Minister, the Group recommends that the Scottish Government sets up a short life working group whose task would be to improve existing information on the numbers and types of community land owners and the land that they own, and to develop a strategy for achieving this target.**

### Trust Ports

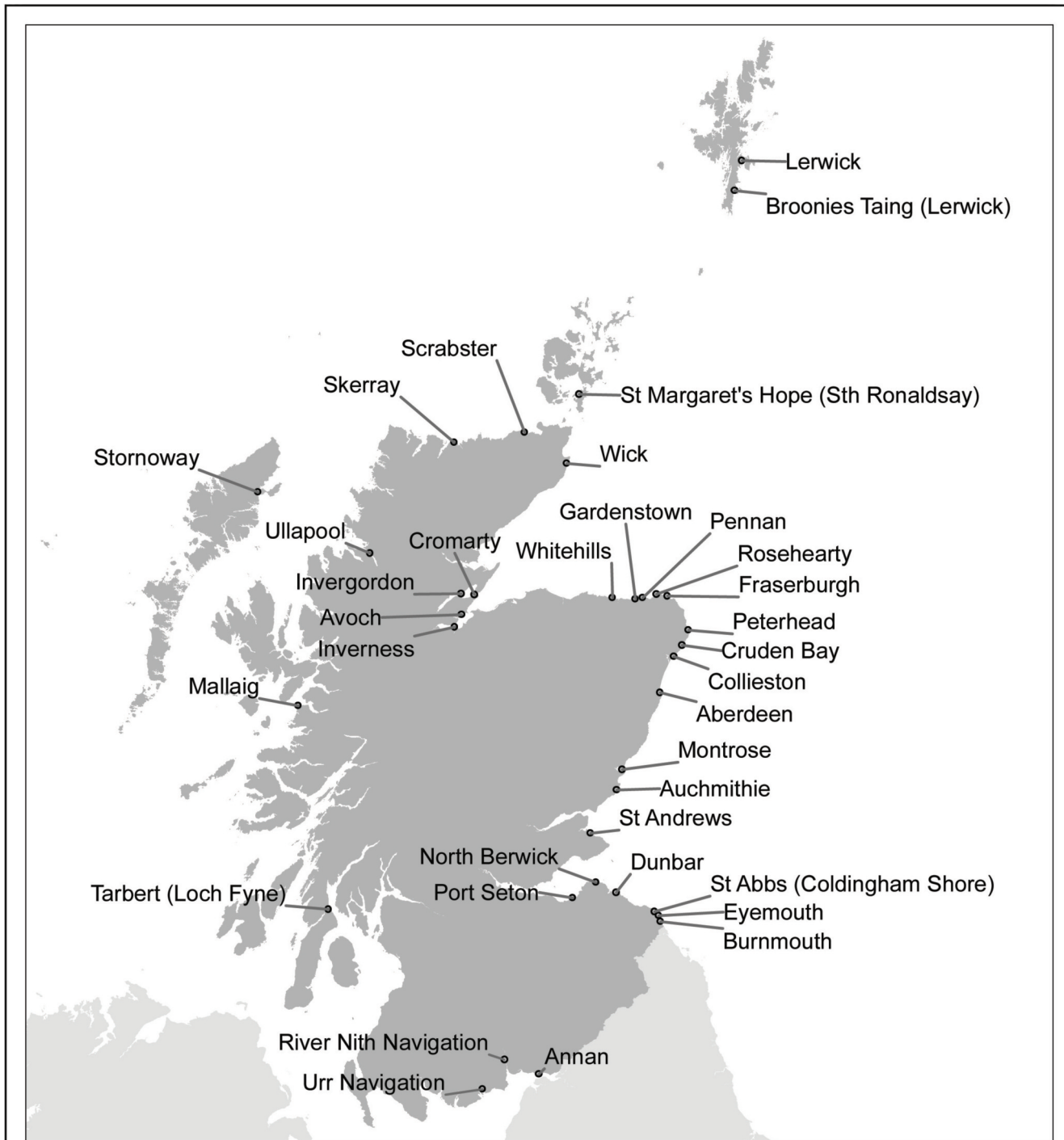
- 16 Another particular case of ‘community ownership’ considered by the Review Group was Trust Ports. Scotland currently has 35 Trust Ports as shown in Fig.15. Each is an independent statutory harbour authority, governed by its own local legislation and run by independent local boards who manage the assets of the Trust for the benefit of stakeholders.
- 17 A key point here is that Trust Ports are both locally controlled and have to re-invest any profits in the port. The Scottish Government’s ‘Modernising Trust Ports – A Guide to Good Governance’ describes a trust port as *“a valuable asset presently safeguarded by the existing board, whose duty it is to hand it on in the same or better condition to succeeding generations. This remains the ultimate responsibility of the board, and future generations remain the ultimate stakeholder”*.<sup>10</sup>
- 18 Scotland has around 375 harbours. Most are local authority or other public sector harbours (over 70%), with the rest either Trust Ports (9%) or private sector (20%).<sup>11</sup> The vast majority of all traffic in or out of Scotland’s harbours (95% or more), whether goods or people, is handled by around a dozen main harbours. These include several of the largest Trust Ports with multi-million pound turn-overs – Aberdeen, Peterhead, Cromarty Firth and Lerwick. More than half a dozen other Trust Ports have turn-overs of £1m or more, while around half of all Trust Ports are what might be considered significant local businesses and many others are also important locally.<sup>12</sup>
- 19 Most Trust Ports have long histories dating back to Crown grants, before these were replaced by statutory harbour regulation in the 19th century. In 2000, following devolution, the Scottish Government published guidance for modernising the governance of Trust Ports to include the composition of their Boards, including a mix of local elected members and representatives of user groups. All the larger Trust Ports have been through this modernisation process, with the changes implemented through individual Harbour Empowerment Orders under the Harbours Act 1964. The process is continuing to spread down the list of smaller scale Trust Ports.
- 20 The Review Group considers that Trust Ports are an important and distinctive form of locally based social land ownership in Scotland. Trust Ports can be found in larger population centres such as Aberdeen, but many are part of very small communities. After a long history of decline in the number of Trust Ports in Scotland, the trend is starting to reverse due to local community initiatives. In the 20th century, many harbours were taken over by the local

<sup>10</sup> Scottish Government - *Modern Trust Ports for Scotland: Guidance for Good Governance (2012)*

<sup>11</sup> *Crown Estate Review Working Group (CERWG) Rpt (2007) Annex 16*

<sup>12</sup> *CERWG Annex 16*

Fig. 15 Scotland's Trust Ports



<p><b>Key</b></p> <ul style="list-style-type: none"> <li>• Maritime Transport - Trust Ports</li> </ul> <p><b>NOT FOR NAVIGATION</b>                  Reproduction in whole or part is not permitted without prior consent of Marine Scotland. © British Crown and SeaZone Solutions Limited. All rights reserved Product Licence No. 042013.022. © Crown copyright and database rights (2013) Ordnance Survey 100024655.</p>		<p>0 30 60 120 Kilometers</p>	<p><b>FOR ILLUSTRATIVE PURPOSES</b></p>
		<p>1:3,400,000 Size : A4 Datum: OSGB36</p>	

authority. Now revived or new Trust Ports may be formed to take over this management, as is happening in for example, Dunbar, North Berwick and Tobermory in Mull.<sup>13, 14</sup>

- 21 Scotland has many coastal communities and local harbours, piers, slip ways and moorings can be of key importance to those communities. Local community control of these types of assets is an important form of community land ownership that should be encouraged and supported, especially when opportunities are arising in new and existing economic sectors, such as marine renewable energy, marine tourism, inshore fishing and developments in marine transport. While becoming a Trust Port is one type of organisational structure, there are others. For example, the Review Group understands that Storas Uibhist is planning to become the harbour authority at Lochboisdale in its current form as a company limited by guarantee, as is the case with private sector harbours.
- 22 In considering Trust Ports as an important form of local ownership and control, the Review Group also noted the comment from 2006 that Trust Ports had been neglected “*in comparison to the (Scottish) Executive’s positive policies to support other social enterprises and more community control in different contexts, including the Community Right to Buy (CRtB) and National Forest Land Scheme (NFLS)*”.<sup>15</sup> While the Group did not explore this further, there would seem to be scope for initiatives of this type to support Trust Ports, for example, over the acquisition of foreshore that is not in their ownership but within their immediate harbour areas.
- 23 **The Review Group considers that Trust Ports and other forms of local community control over harbours, piers, slipways and similar coastal assets should be encouraged as a form of community land ownership. The Group recommends that the Scottish Government should develop specific initiatives to assist this process.**

## 16.2 Communities and Land Ownership

- 24 There are many ways that local communities can be involved in managing buildings and land, which do not amount to ownership. These types of arrangements can be at different levels of legal formality, for example, from simple permission to use a property, to some form of management agreement or to a registered lease. While such arrangements might be the community acting by itself, they can also involve the community being in some form of partnership with another party, for example, the owner of the land.
- 25 One of these arrangements, other than ownership, might be the only opportunity available to a community in some situations. There can also be many circumstances where a community might consider one of these arrangements, best suited to its purposes (see Section 17). This can include local communities that already own buildings and land, deciding to lease other property as the most appropriate arrangement in that instance. These types of arrangement can therefore be a significant part of local community involvement with land (see Annex 1). However, whereas several submissions received in response to our Call for Evidence offered this as a potential alternative way forward, others indicated the importance of the ownership of property because of the benefits to local

<sup>13</sup> SG briefing 10.12.13

<sup>14</sup> Tobermory Harbour Association (THA) website: consultation doc

<sup>15</sup> CERWG 2007, Annex 16 para 26

communities from the greater security and control that ownership gives. Our focus is therefore on community ownership.

- 26 The history of local communities in Scotland democratically owning property on their own behalves has been relatively short, with the examples that exist having largely developed in the last 30 years. As reported above, the most common property owned by local communities is village halls or community facilities. Most village halls in rural areas were traditionally owned by a local estate. These have progressively become owned by the communities themselves, and, given the importance of village halls as a key basic component of local community development, this has been a very significant change in some areas.
- 27 The Group acknowledges that in terms of ‘property’, as opposed to land, community controlled housing associations, predominantly located in urban locations, are significant community owners. It is acknowledged also, that while these may be defined as communities of interest, these organisations in more recent years have taken on wider roles as anchor organisations involved in local community regeneration. The emphasis in this section, however, is more specifically on land per se.
- 28 The conspicuous growth in local community ownership of land has been, however, the ‘estate buyouts’ in the North and West Highlands and Islands in 1990s and since. These account for the overwhelming majority of all land in local community ownership in Scotland. The very positive record of these new community land owners, and the transformative effect of the buyouts on the fortunes of the communities involved, has been well documented.<sup>16</sup> The Outer Hebrides, with its longstanding example of the Stornoway Trust, also demonstrates a historic change at a wider scale. There are now 120,961 ha of community owned land in the Western Isles, representing 42% of the total land area, and, in large part due to the influence of Stornoway, two thirds of the population now live on community owned land.<sup>17</sup> There is also the prospect of further sales of significant estates by private owners to the local community.<sup>18</sup> The Scottish Government also owns over 15,000 ha in crofting estates in the Outer Hebrides.
- 29 It can be argued that community acquisition and management of land in the North and West of Scotland can be linked to generally lower land values there, the influence of the settlement patterns under crofting tenure, and the nature of social capital found in remoter and island locations. One of the many wider benefits of these estate buyouts has been the demonstration of the capacity of local communities to manage large scale areas of land. The Review Group considers, however, that whole estate buyouts by local communities in the south and east of Scotland are less likely. It is more probable that local communities in these areas will acquire buildings and land through a number of different purchases over time, for a range of purposes and at different locations spread across the area covered by the community.
- 30 The reasons why individual local communities might decide to become involved with owning land are many and varied. There are three main triggers:
- Response to a threat or a crisis. This may result from a landowner suddenly getting into

---

<sup>16</sup> J. Hunter *Op.Cit. and Community Land Scotland (CLS) Op. cit 2014*

<sup>17</sup> HIE briefing to LRRG

<sup>18</sup> For example, Carloway, where the community has voted to buy and the owner has agreed to sell

financial difficulties or going bankrupt. Some of the early Highlands and Islands buyouts were from companies that were in administration or receivership e.g. Assynt, Eigg, Knoydart. Similarly the closure of a local school or shop can trigger a community into seeking to acquire buildings in order to sustain local services

- Identification of opportunity. The availability of land and buildings for sale can encourage communities to consider what new opportunities could be exploited for local community or wider public benefit, in terms of income generation, service provision, diversified land use, employment creation or enhancement of amenities. The ability to exploit such opportunities can come from using the current rights offered by the Land Reform (Scotland) Act 2003, or from amicable purchases of land from willing sellers
- Proactive transfers of land. This can be both public land, owned by the Scottish Government, its agencies or local authorities, and occasionally private land, where owners offer land to communities<sup>19</sup>

31 As a result of these triggers, a rural community with a well developed pattern of community ownership might own the following:

- The village hall or some other community facility as the hub of the community and possibly other types of facilities that are key to the operation of the community as a community which might create or preserve a valuable local service
- Buildings and particular areas of land that the local community considers important to its identity because of their local significance
- Buildings and land that make a particular contribution to the well-being and amenity of the community
- Buildings and land, sometimes of an extensive area, with economic potential that enable the community to generate an income

32 The above typology can apply in both urban and rural contexts. Experience to date indicates that there can be a cumulative effect in community ownership, inasmuch as the acquisition of one asset can lead to growth in organisational capacity to identify further opportunities and the means of capitalising on them. Fundamental to this is ownership of property with economic potential, crucial to the financial viability and future development of local communities acting on their own behalf.

33 Local communities need to develop an asset base to generate income as part of their land ownership. This is to cover the costs of operating overheads and managing properties that are important to the community for other reasons; to finance the more general expenses involved as a community body in promoting and maintaining community engagement; and to invest in new social and economic activity. The Review Group sees developing financial resilience as essential in promoting stronger and more robust communities. This is reflected in one of the five key principles of community empowerment identified by the Scottish Community Alliance. The principle states that *“Ownership of land and control over land use, and the capacity to generate income streams which are independent of the state, are critical in determining the degree to which a community becomes empowered”*.<sup>20</sup>

<sup>19</sup> As was the recent case of the transfer of the island of Scalpay.

<sup>20</sup> Scottish Community Alliance '5 Key Principles of Community Empowerment' August 2012

- 34 The development of renewable energy, in the form of wind turbines, biomass boilers or hydropower schemes owned by local communities themselves or in a partnership, has become a prominent source of revenue for some communities. At least five of the major community buyouts already operate renewable schemes and a further two are in the advanced stages of feasibility work.<sup>21</sup> There has also been a growth in commercial forestry as an income source, as woods and forests are particularly suitable for community ownership. They are a renewable commercial resource that can be developed in most parts of rural Scotland, in comparison to the more limited scope for commercial renewable energy schemes. The multipurpose character of woods and forests and the nature of their management are also suited to local management by communities. In addition, while a forest of adequate size can generate a sustainable income, it can also act as a bank because there is some flexibility to adjust harvesting if a particular financial need arises in a community.
- 35 However, at present, most local communities do not own land beyond, possibly, a village hall or similar community facility, and few local communities own a commercial renewable energy scheme or significant area of commercial forestry. Existing local community land ownership is also very unevenly distributed in Scotland. Two thirds of the instances of community land ownership are in 'remote rural areas' with around 6.5% of Scotland's population.<sup>22</sup> In comparison, only 5% of local community owned land is in large urban areas where nearly 40% of the population lives. Most local community property is also in the least deprived areas as measured by the Scottish Index of Multiple Deprivation, with 3% of community owned assets in the 5% most deprived areas.<sup>23</sup>
- 36 The Review Group recognises that there has been a very significant growth of community land ownership over the last 25 years and that its uneven distribution can be explained by many factors, including land values and community capacity. There is also now widespread support for the principle of encouraging more local community land ownership, including statements of support for this principle from Scottish Ministers. Despite this, many submissions to the Group voiced concern about an apparent loss of momentum over the last few years in the rate of growth of local community land ownership. This is reflected in Fig.16, showing the number of local community asset acquisitions between 1991 and 2011 (though it is acknowledged that the data in the graph are incomplete and community acquisitions are continuing).
- 37 The Review Group recognises that, while there is some legislation in place, a funding programme established, and now a Government target for further community land ownership in Scotland, a range of unnecessary difficulties that local communities face in trying to acquire property have to be addressed. In addition to the removal of obstacles, a coherent and effective support structure needs to be provided.

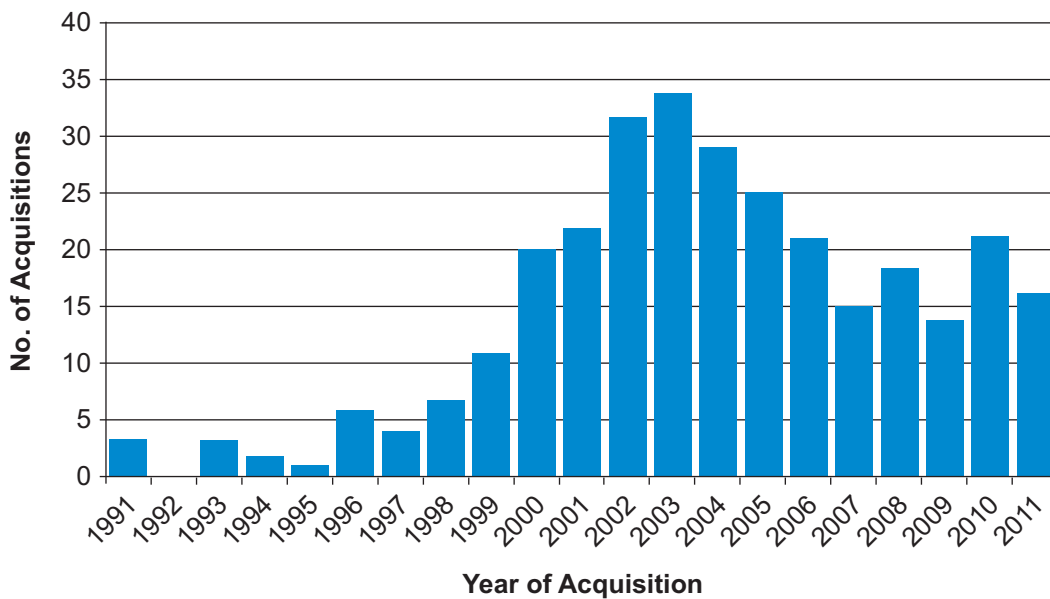
---

21 *Community Energy Scotland lists almost 300 community renewable schemes , varying from small wind turbines to heat village halls to the larger commercial schemes listed in the text. See [www.communityenergyscotland.org.uk/projects.asp](http://www.communityenergyscotland.org.uk/projects.asp) Local Energy Scotland maps many of these. See [www.localenergyscotland.org/about/cares-funded-projects/](http://www.localenergyscotland.org/about/cares-funded-projects/)*

22 *DTAS 'Community Ownership in Scotland' (2012)*

23 *Ibid*

**Fig.16 Number of Community Asset Acquisitions 1991-2011**



38 **The Review Group recognises that significant progress has been made in the growth of community owned land. The Group recommends that the Scottish Government, using the evidence and recommendations for change presented in this report, should develop a policy statement, with clear direction to all parts of Government and its agencies, on the objective of diversified land ownership in Scotland, and a strategic framework to promote the continued growth of local community land ownership.**

**SECTION 17 - LOCAL COMMUNITY LAND RIGHTS**

- 1 The Land Reform (Scotland) Act 2003 was a major milestone in the promotion of community land ownership in Scotland. Part 2 of the Act introduced a right for local communities in rural areas to register a statutory right of pre-emption to acquire a property if it comes up for sale, while Part 3 of the Act gave crofting communities a statutory right to acquire their land whether or not it is for sale.
- 2 The Review Group considers the influence and effectiveness of both these rights in this Report. Part 3 of the Act is considered in Section 26 on Crofting while the focus here is on Part 2. There have long been calls for improvements to the operation of Part 2 of the Act, included in many submissions to the Group, and the Government is currently considering proposals for changes in the Community Empowerment (Scotland) Bill. The Group also considers in this Section, the issue of whether local communities should have other additional statutory rights over land in their community area.



## 17.1 Right of Pre-emption

- 3 Part 2 of the 2003 Act was pioneering legislation as it gave local geographic communities acting through an ‘appropriate community body’, the opportunity to register a right of pre-emption over land. As discussed in Section 15, these appropriate community bodies are defined in the Act so that their constitution ensures that they represent the local community acting on its own behalf in owning property and undertaking other activities. In Section 15, the Review Group used the label Local Community Trusts (LCTs) to describe community bodies that met the same essential criteria as appropriate community bodies in the Act (See Section 15).
- 4 Part 2 of the Act came into effect ten years ago. Since then, there have been 167 applications by community bodies to register a right of pre-emption.<sup>1</sup> The number of community bodies involved has been less than that total, as some have made applications for more than one area of land and 15 community bodies have also applied twice for the same land, when their original five year period covered by registration has ended. Of the applications, 111 or two thirds were successfully registered and in 41 cases, the pre-emptive right to buy has been triggered by the sale of the land. Scottish Ministers approved the exercising of the right in 38 of the cases (while rejecting 3) and 18 of these resulted in a successful purchase. Amongst the applications where the right has not been triggered, some have lapsed after five years, so that there are currently 33 applications that could be triggered.<sup>2</sup>
- 5 There is limited information available on what happened in 21 cases where Ministers approved the exercising of the pre-emptive right to buy, yet no successful purchases were made. It appears that this has mainly been due to the community body not being able to raise the necessary funds, while in a small number of cases it resulted from the land owner deciding to withdraw from selling the land.<sup>3</sup>
- 6 The 18 successful land purchases that have been completed through Part 2 of the Act, have amounted to just over 21,000 ha.<sup>4</sup> However, 19,812 ha of this total was for the Assynt Estate. Two other purchases of 707 ha and 409 ha account for most of the rest of the area acquired through Part 2. The remaining 15 successful purchases were mainly for small plots of land or single buildings, reflecting the importance to local communities of these types of acquisitions.
- 7 The number of applications to register a pre-emptive right to buy has also followed what can be seen as the wider loss of momentum over recent years in the growth of local community land ownership due a range of difficulties faced by communities. Two thirds of the applications under Part 2 were in the first four years after the Act came into force and the number of applications a year declined to 8 in 2009/10, but has since risen to 18 in 2012/13. There are currently 6 applications to date in 2013-14.<sup>5</sup>
- 8 The Review Group considers that the success or otherwise of Part 2 of the Act should not be judged simply on the number of purchases through it or the total amount of land acquired.

---

<sup>1</sup> For statistics to May 2012 see ‘Overview of Evidence on Land reform in Scotland’ (Scottish Government 2012) Updated statistics here as at February 2014 provided by Scottish Government to LRRG

<sup>2</sup> Scottish Government Op cit

<sup>3</sup> Ibid

<sup>4</sup> SG briefing Feb.2014

<sup>5</sup> Ibid

The Group understands that the existence of the community right of pre-emption has had a wider influence in facilitating negotiated purchases by local communities. However, as has become well recognised, Part 2 of the Act needs to be improved and the Scottish Government is developing proposals for inclusion in its Community Empowerment (Scotland) Bill. The Bill will not be published until after this report is published.

- 9 The important improvements the Review Group considers should be made can be summarised as follows:
- The right of pre-emption should be extended to urban communities, by the removing of the population threshold that restricts the right to communities in rural areas
  - ‘Appropriate community bodies’ should be able to be constituted as a Scottish Incorporated Charitable Organisation (SCIO) rather than just a company limited by guarantee (as discussed in Section 15)
  - Local communities should be able to define their community area by a boundary line on a map rather than the current postcode based requirements
  - Applying to register an interest should be less complex and onerous for local communities, both in terms of the legislation and the Scottish Government’s application process
  - The period for which registration lasts should be lengthened from five to ten years
  - The process of re-registration should be much less demanding, if there have been no significant changes in circumstances
- 10 As the submissions to the Scottish Government’s consultations and to this Group argue, there are also many useful refinements that should be made to improve the detail of Part 2 to help open up the potential use of the right of pre-emption to more communities. We have, separately, passed the Group’s suggestions to the Government to assist in its consideration of proposals for changes through its planned Community Empowerment (Scotland) Bill. The Group considers that removing unnecessarily complex and onerous requirements for applicants will make the right a more effective tool for local community development and also by virtue of that, help facilitate more negotiated purchases by communities without recourse to the Act.
- 11 **The Review Group considers that the Scottish Government’s planned Community Empowerment (Scotland) Bill provides a crucial opportunity to improve Part 2 of the Land Reform (Scotland) Act 2003. The Group recommends that improvements to Part 2 of the Act should include widening its scope to cover urban areas; enabling appropriate community bodies to be constituted as SCIOs; allowing communities to define their area by a boundary on a map; increasing the period of registration to ten years and decreasing the requirements of re-registration; and more generally to make the legislation more straightforward and less onerous for local communities to use.**

## 17.2 Menu of Land Rights

- 12 Part 2 of the Land Reform Act established the principle of giving local communities, acting through an appropriate community body and subject to appropriate conditions, a statutory

property right. While enabling communities to register a right of pre-emption over land provides them with a valuable option, it is an option more suited to some circumstances than others.

- 13 The Review Group considers that local community land ownership should also be encouraged by giving local communities other statutory options. As with existing rights, these additional rights would be available to community bodies operating within a defined geographic boundary. The basic eligibility requirements for community bodies would be the 4 essential criteria described above (Section 15). Then, for each option or right, there would be different requirements and processes appropriate to the nature of that particular right. As with Part 2 of the 2003 Act, such rights would apply to both public and private land.

#### Right to Register an Interest in Land

- 14 The Review Group considers there would be significant benefits if local communities had a statutory right to register a community interest in land, which simply resulted in the community being notified of sales and changes in owner. The requirements for an appropriate community body to register such an interest would be correspondingly lower than in Part 2 of the 2003 Act, because of the limited consequences of the registration. Registering a community interest as part of Registers of Scotland's Register of Community Interests in Land, would inform the present and future owners of the community's interest in an area of land and the reasons that warrant that interest being registered.
- 15 The opportunity for a community to register a significant interest in buildings and areas of land would be expected, by making land owners and planning authorities aware of the interest, to reduce the chances of the interests being damaged by a land owner or developer. Awareness of a community's interest in a particular building or area might also encourage more cooperation between land owners and communities over the management of such areas or in some cases, a lease or purchase by a community.
- 16 The Review Group considers that another particular benefit of a low threshold opportunity to register an interest in land would be that this would encourage more local communities to consider which buildings and areas of land locally are important to the identity and wellbeing of their community. This might result in the identification of one or more particular properties that the community might want to acquire if the property came up for sale and over which the community might therefore want to register a right of pre-emption. This would help communities be better prepared to make use of Part 2 of the Land Reform Act and contribute further to reducing the number of late or missed applications.

#### A Right to Request Public Land

- 17 While an appropriate community body can register a right of pre-emption over both public and private land, the right is only triggered by the sale of the land. However, in the case of public land, the Review Group considers that an appropriate community body should also have the opportunity of a statutory right to request either a lease or the purchase of buildings and land from the public body involved.
- 18 Appropriate community bodies already have the opportunity, on a non-statutory basis, to request to lease or buy land from the National Forest Estate through the National Forest Land Scheme. The Scottish Government consulted on introducing this type of right more generally on a statutory basis over public land through the Community Empowerment

(Scotland) Bill.<sup>6</sup> The Review Group's concern is that the formal processes are adequately straightforward, while still robust enough to ensure the outcome of a request, whether successful or not, best serves the public interest.

### A Right to Buy Land

- 19 While Part 2 of the Land Reform Act gives local communities a pre-emptive right to buy, the Review Group considers that local communities should also have an actual right to buy land through an appropriate community body, in situations where that is judged in the best public interest by Scottish Ministers.
- 20 The terms of an actual right to buy for local communities, and the arrangements for exercising it, would need to be rigorously defined to protect the legitimate rights and interests of any land owner affected, including the rights of property owners under the European Convention on Human Rights (ECHR). However, Part 3 of the Land Reform Act already gives crofting communities a right to buy and its provisions have withstood legal challenge under the ECHR.<sup>7</sup>
- 21 The crofting community right to buy, which is discussed in Section 26 of this Report, provides a starting basis for arrangements that could underpin a similar right for local communities. However, a significant difference in the situation is that crofting communities have a direct statutory connection to the land involved through crofting tenure. With local communities, there would be an additional onus to demonstrate why the land was sufficiently important to the community, to justify that exercising a right to buy in that particular situation is in the wider public interest.
- 22 The nature of a right to buy, in terms of necessary procedures and requirements, would mean that there was a high threshold before a community would be likely to consider applying to exercise it. Part 3 for crofting communities has only been used once in over ten years and in that case, the LRRG understands, the community and owner, at the time of writing, are discussing a negotiated settlement.<sup>8</sup> However, the Review Group can envisage particular situations where the opportunity for a local community to exercise a right to buy could be justified in the public interest, because of the special importance of a building or area of land to the community. Instances might be where there are issues over the ownership of, for example, a community's village hall or equivalent building that is central to the life of a community or else a site of other special significance to a community, such as areas of land for housing, or local amenity and recreation.
- 23 The Review Group considers that providing local communities with the opportunity to exercise a right to buy in situations where it could be justified, would provide communities with a 'backstop option' in key situations when all other approaches fail. In those very particular situations, exercising the right would be a crucial contribution to building stronger communities. However, the Group considers that providing local communities with a right to buy land would further encourage negotiated purchases between communities and land owners in situations outwith the restricted circumstances in which the right might apply.

---

<sup>6</sup> *Consultation on the Community Empowerment (Scotland) Bill, November 2013 to January 2014*

<sup>7</sup> *Scottish Land Court 2012 CSIH 96*

<sup>8</sup> *Ibid*

### A Right to Request a CPO

- 24 In the paragraphs above, the Review Group has described a hierarchical set of statutory local community land rights, from the right to register an interest with a low threshold through to a right to buy with rigorous conditions. The Group also considers there could be situations where, as an approach of last resort, an appropriate community body should also be able to request Scottish Ministers to implement a Compulsory Purchase Order (CPO) over land.
- 25 The Review Group notes that Ministers can compulsorily purchase land under Part 2 of the Land Reform Act.<sup>9</sup> However, this right involves land acquired by a community body through Part 2, if it transpires the community body was not eligible to acquire the land under the terms of the Act. However, the Group can envisage that circumstances might arise where an owner of land uses what might be regarded as inappropriate avoidance measures to prevent a local community exercising a legitimate right of pre-emption or right to buy, where exercising the right has already been approved by Ministers as in the public interest. The Group considers that the community should have the opportunity to request Ministers to implement a CPO over the land involved for resale to the community. The Group's view is that the existence of such a right would itself reduce the chance of circumstances where it might be necessary.
- 26 The menu of rights is summarised in Fig. 17 over.
- 27 **The Review Group concludes that local communities acting through appropriate community bodies, should have the opportunity to use a range of statutory land rights which are defined to suit different needs and circumstances. The Group recommends that the statutory land rights of local communities should include a right to register an interest in land, the existing right of pre-emption over land and a right to buy land, as well as rights to request the purchase of public land and to request Scottish Ministers to implement a Compulsory Purchase Order.**

### Other Related Community Rights

- 28 The purpose of the set of statutory community land rights described above is to promote local community land ownership as part of creating stronger and more resilient local communities. Issues also arise where local communities should have an entitlement to payments or other direct benefits, from certain types of land developments within their local community area. The payments made by developers in some situations to local authorities as 'planning gain' under the planning legislation, reflects this broad principle.
- 29 A conspicuous issue over payments by developers to local communities has been and continues to be in relation to renewable energy projects, usually windfarms. Whether a 'community benefit' payment is made, is not part of the statutory planning process and outside planning gain. Developers each decide whether they will offer payments, the nature and amount of the payments, to whom they are made and under what conditions. As a consequence, since payments started in the 1990s, *"community benefit payments have evolved in a piecemeal manner resulting in a diverse range of models being implemented by different developers, local authorities and community groups"*.<sup>10</sup>

<sup>9</sup> Land Reform (Scotland) Act 2003 s.136

<sup>10</sup> Scottish Parliament Information Centre (SPICe) Briefing 12/71 Renewable Energy: Community Benefit and Ownership

### Fig. 17 Local Community Land Rights

At present, local communities have the option of one statutory land right. This is the right of local communities acting through an 'appropriate community body' to exercise a right of pre-emption over land under Part 2 of the Land Reform (Scotland) Act 2003.

The Land Reform Review Group considers that local communities should have other statutory options to fit different circumstances and issues. The Group recommends in this Report that local communities should have four additional land rights. These are described in the text of the Report and summarised below.

With each right, the criteria for the appropriate local community body remain the same and based on those in Part 2 of the 2003 Act. The thresholds of requirements to be met for each right would progressively increase from numbers 1 to 5, with the increasingly significant nature of the rights involved.

#### 1. Right to Register an Interest over Land

Process that enables an appropriate local community body in defined circumstances to register an interest over land where that is judged to be in the public interest, and then to be notified of the sale and any change of ownership of the land.

#### 2. Right of Pre-emption to Buy Land

Process that enables an appropriate local community body in defined circumstances to register a right of pre-emption over land and to exercise that right if the land is to be sold, where that is judged by Scottish Ministers to be in the public interest.

#### 3. Right to Request to Buy Public Land

Process that enables an appropriate local community body in defined circumstances to buy public land, whether or not it is for sale, where that is judged to be in the public interest by the public body responsible for the land or by Scottish Ministers.

#### 4. Right to Buy Land

Process that enables an appropriate local community body in defined circumstances to buy land which is not for sale, where that is judged by Scottish Ministers to be in the public interest.

#### 5. Right to Request a Compulsory Purchase Order over Land

Process that enables an appropriate local community body in defined circumstances to request Scottish Ministers to exercise a CPO over land for re-sale to the community body, where that is judged by Ministers to be in the public interest.

<sup>30</sup> Given the widespread issues for local communities as a result of this approach, the Scottish Government and others have sought to promote best practice, facilitate negotiation and enhance community benefit payments from renewable energy developments. As part of this, the Scottish Government established a voluntary Community Benefit Register in 2012 to

encourage transparency and consistency in the community benefit process and to help communities to negotiate with developers. In addition, when FCS is working with energy developers on the land they manage for Scottish Ministers, there is a standard community benefit of £5,000 per megawatt capacity installed and an option which enables local communities to take a stake in developments.<sup>11</sup>

- 31 The scale of some of the on-going community benefit payments from renewable energy developments has the potential to be transformative for some local communities. However, the Review Group considers there is a clear need to continue to improve the present system for community benefit payments from these developments, as the current arrangements or lack of them can be unnecessarily divisive within and between local communities. While these payments by developers might be regarded as a goodwill gesture to the community or some form of compensation for the development, they are not an entitlement and the question arises whether they should be for these types of developments or other particular types of developments in a community's area. The Group could envisage, for example, some form of 'planning gain' through the planning system explicitly for local communities rather than the local authority. However, the Group, with its focus on land ownership and property rights, has not considered such matters further.
- 32 A different aspect of development in a local community's area which the Review Group did consider, is land that has been left derelict and vacant by its owner for a long period. Derelict and vacant land is an important issue in urban Scotland and the Scottish Government monitors its extent annually. The Group recommends in Section 20 of the Report on urban renewal, that local authorities should have the power under new Compulsory Sale Orders (CSOs), to put such areas up for public auction in specified circumstances. Such areas can be particularly important for the urban communities where they occur. The Group considers that local communities should have a statutory right to request a local authority to exercise a CSO over an area of vacant or derelict land, if the Council has not initiated that itself.
- 33 **The Review Group recommends that Local Authorities should have the right to exercise a Compulsory Sale Order over an area of vacant or derelict land, and also that Community Councils, or appropriate community bodies, should have the right to request that a local authority exercises a Compulsory Purchase Order.**

## SECTION 18 - COMMUNITY ACQUISITION COSTS

- 1 The Review Group considers that there is widespread agreement across many different interests in Scotland that increasing the amount of local community land ownership is in the public interest, as part of creating stronger and more resilient local communities.
- 2 Public sector support, in terms of funding and other forms of practical assistance, has played a key part in enabling the growth of local community land ownership over the last 15-20 years that was described in Section 16. While the types of statutory land rights proposed in Section 17 would improve opportunities for local communities to acquire properties, further growth of community land ownership will continue to depend, in very large part, on practical

<sup>11</sup> *Ibid*

support from the public sector through various non-statutory means.

- 3 Funding to finance buying buildings and land is crucial to expanding local community land ownership. As community aspirations grow, there is an increasing diversification of funding sources including not only a range of public programmes, but also commercial, social and philanthropic investment, discussed below.
- 4 This section starts by examining the level of public funding invested in supporting local community purchases since 1997. It should be emphasised at this stage that while the Group recognises the importance of community controlled housing associations, and the scale of assets they own, particularly in urban areas, this Section does not include the public assistance, much of it from regeneration funding, which has been invested in this sector. This Section does consider the public funding currently available for acquisitions, and the types of arrangements that exist, to facilitate local communities being able to acquire public land. The wider public sector support services needed to encourage the expansion of local community land ownership, are considered in Section 19.

### 18.1 Public Sector Investment to Date

- 5 A wide range of sources have been used by local communities over the last 15-20 years to raise the money necessary to buy property. There is no estimate of the total amount raised, but by far the largest contribution has come from public sector grants. This includes grants from the National Lottery which, although it is not part of Government and is funded by people buying lottery tickets, is conventionally viewed as part of public funding.
- 6 There appears to be no recognised overall total for the amount of public funds invested in helping fund local community acquisitions. However, an estimate can be made for the period 1997/8-2012/13. During that period, the great majority of the public funding for acquisitions came from four sources and together they invested around £27.5m in local community purchases over those 16 years. This consisted of approximately £7.5m from Highlands and Islands Enterprise (HIE), £12m from the first Scottish Land Fund (SLF) (2001-06), £6.5m from the Lottery's first Growing Community Assets (GCA) Scheme and £1.5m from the second SLF (2010 onwards).<sup>1</sup>
- 7 Over and above these capital grants, these main funders have also given grants for revenue funding to help some new community land owners become established, for example, by supporting a development officer for a limited period post-acquisition. These grants were not recorded separately from the acquisition payments until 2006, but there has been a further £1.5m since.<sup>2</sup> There has also been an estimated £5m of funding over the 15 years on technical assistance for local communities on matters such as valuations, feasibility plans and legal costs, while it estimated that a further £1m has been provided by grants from other public bodies, including the EU, Scottish Government departments and agencies and local authorities.
- 8 On the basis of the figures in the two previous paragraphs, there has been around £35m of public funding spent directly on supporting community land ownership acquisitions. There

---

<sup>1</sup> HIE briefing (03.02.2014)

<sup>2</sup> *Ibid*



have been no other types of post-acquisition public funding specifically for local community land owners. They may apply like other land owners for public grants, such as EU and Scottish Government funding to deliver particular rural land use outcomes. Community owners which are charities can also apply for a wider range of funds for support with specific projects.

- 9 The £35m invested in supporting local community land ownership in 1997-2013, is an average of just over £2m a year. During this period, a number of independent evaluations have concluded that the main grant programmes involved in providing this support had been good value for money in terms of the level of achievement in creating stronger and more resilient local communities.<sup>3</sup>
- 10 Over the last 15 years, the Big Lottery has funded just over 50% of the £35m of grant support for community acquisitions. However, the average amount of all support of just over £2m a year can be seen in context compared to the Big Lottery's annual budget, which is £133m in 2012-13.<sup>4</sup> Another comparison for context is the £533m a year (or an average of around £1.5m a day) of agricultural subsidies paid to Scottish farmers during 2007-13 through the Common Agricultural Policy.<sup>5</sup>

## 18.2 Funding Acquisition Costs

### Main Sources

- 11 The main current sources of public funding to support local community purchases continue to be the second programme of the SLF, with a budget of £9m for 2012-16, and the GCA Scheme, with a budget of £42.25m for 2010-14, and, in the Highlands and Islands only, HIE.
- 12 The SLF is, however, only available to community acquisitions in rural areas. While the GCA Scheme covers both urban and rural issues, the programme is primarily focused on developing and managing land and buildings rather than acquiring them. The first GCA Scheme spent 2-3% of its grant budget of around £50m on supporting acquisitions and the Review Group considers the evidence available indicates that the percentage of the current GCA budget on acquisitions is very unlikely to be higher than this.<sup>6</sup> The Big Lottery has also made clear that, with the GCA programme, its policy is *“to invest less of our funding on the purchase of publicly owned assets and more on their future development once they are under community ownership”*.<sup>7</sup>
- 13 In the last two years attempts have been made to rationalise funding for community acquisitions and management. Any community seeking such funding, channels its initial enquiry to BIG who, as well as managing its own GCA scheme, delivers the SLF in partnership with HIE. BIG staff will advise community organisations on the most appropriate route for their applications. At present, the SLF is restricted to rural areas and focuses on land and property acquisition and some time-limited revenue funding. GCA is primarily for

<sup>3</sup> *Scottish Land Fund (2001-06) Evaluation (Big Lottery Fund 2007); Evaluation of the Community Land Unit (HIE 2009); Growing Community Assets (2006-10) Evaluation Report (Big Lottery Fund, 2013)*

<sup>4</sup> *Big Lottery Fund Annual Report and Accounts 2013.*

<sup>5</sup> *Scottish Government statistics*

<sup>6</sup> *Big Lottery Evaluating Growing Community Assets 2013*

<sup>7</sup> *Big Lottery - Investing in Communities – GCA website*

investment in project development, in both urban and rural communities, though it does consider assistance with acquisition if it is integral to a well-developed business plan. In terms of acquisition of public sector properties, the Lottery's particular preference, only to support if at a discounted price, can be an obstacle in some urban areas, when local authority properties including community facilities and others are possibly the most common types of property local communities in urban areas want to acquire.<sup>8</sup> HIE can assist with acquisition, revenue and development funding where required, but only in its own area.

- 14 A major implication of this pattern is the potential need to expand the SLF's remit to include urban areas. While this raises issues over the size of its budget, the case for this change would seem to be reinforced by the Scottish Government's apparent intention to expand the scope of the community right of pre-emption in Part 2 of the Land Reform Act to cover urban areas.<sup>9</sup>
- 15 If the growth of local community land ownership in urban and rural Scotland is to continue, and community rights are extended both in type and in geographical coverage, the Review Group considers that there should be a clear, integrated framework of funding to support this process. This requires the following:
- Funding must be flexible, as opportunities for a local community to purchase an important building or area of land can arise at short notice with a tight timeline
  - The requirements placed on applicants must remain proportionate to the scale of the proposed purchase, with most communities usually seeking to acquire individual buildings or small plots of land
  - While there must be appropriate scrutiny of applications as they are seeking public funds, it is also important to allow for an appropriate amount of risk in supporting purchases
- 16 The Group acknowledges that community groups do not rely entirely on public funding, especially from a single source, for achieving their asset acquisition aspirations, and subsequent project development investments. All existing public funding programmes require some community contributions, albeit at modest levels in many cases. But as communities' ambitions grow, along with their capacity to manage larger and more complex initiatives, more sophisticated funding packages are being designed. These can involve philanthropic contributions from national as well as local sources (and indeed 'crowdsourcing') but also, increasingly, commercial borrowing from mainstream banks and other social investment.<sup>10, 11</sup> In addition, the concept of community shares, rather than simple donations, is growing in importance, as public funding continues to be constrained. A clear example of such funding is where community land owners are investing in significant renewable energy projects. The Group concludes that this trend will continue and that legislation and public funding programmes have to be flexible enough to allow legal structures which can use such financing models.
- 17 The Group understands that there is currently a healthy pipeline of enquiries and applications

---

<sup>8</sup> DTAS *Community Ownership (2012)*

<sup>9</sup> *Draft Community Empowerment Bill*

<sup>10</sup> *The Coop Bank has been particularly prominent in investing in community renewable projects*

<sup>11</sup> *For example, Social Investment Scotland, [www.socialinvestmentscotland.com/](http://www.socialinvestmentscotland.com/), and Triodos Bank, [www.triodos.co.uk/en/personal/](http://www.triodos.co.uk/en/personal/)*

for SLF funding, but recognises that one successful large scale application would exhaust existing budgets. However, there are two other important funding issues, discussed below, that are currently having a major impact in limiting the number of community projects able to proceed. These are the interpretation of State Aid Rules and the Scottish Public Finance Manual. Demand for capital funding is likely to increase if these obstacles are removed. In addition, a range of factors are likely to stimulate more interest amongst communities in owning buildings and land, for example, measures through the planned Community Empowerment (Scotland) Bill and others associated with the Scottish Government's policy ambition of doubling the area of community owned land to 1 million acres (405,000 ha) by 2020. The amount of public funding available to support local community acquisitions will need to be monitored and potentially supplemented, if policies to increase local community land ownership in the public interest are to be successful.

- 18 **The Review Group concludes that while funding packages for community land acquisitions and development are becoming more diversified, public funding remains critical. The Group recommends that the Scottish Government should ensure that there is an integrated legislative and financial support structure to help local communities in urban and rural Scotland buy and develop land and buildings. The Group further recommends that an adequate level of funding should be available to meet an expected increase in demand for local community land ownership.**

#### State Aid

- 19 The European Commission (EC) use the term State Aid to refer to forms of public assistance given to organisations on a discretionary basis which has the potential to distort competition and affect trade between Member States of the European Union. Under this system, the EC sets State Aid Rules covering what aid can be given and under what circumstances.
- 20 The way that State Aid Rules have become interpreted and applied in Scotland is now proving a major obstacle to expanding local community land ownership, because the Rules are limiting the amount of public funding that can be given to support local community acquisitions.
- 21 There are five tests to determine whether public assistance would count as State Aid and therefore not be allowed under the EC rules. The first is whether the assistance comes from the State's resources. This covers all public bodies including, for example, local Government and lottery funding as that is under State direction. The second test is whether the assistance is selective, as state-wide fiscal measures and most forms of taxation are not considered State Aid.
- 22 The other three tests are whether the public assistance would confer an advantage on the recipient organisation or 'undertaking'; whether the assistance would distort or have the potential to distort competition and whether the activity involved is tradable between Member States. If the answer to all five tests is 'yes' the public assistance would therefore count as State Aid. However, there are still two ways assistance can be given. These are, firstly, where there is an agreed EC scheme for a block exemption from the restrictions or secondly, where the amount of assistance to an undertaking does not exceed a set limit, including all forms of assistance, over a three year period. The level of this 'de minimis' funding is 200,000 Euros.<sup>12</sup>
- 23 As submissions to the Review Group's inquiry and much other evidence demonstrates, the

12 Scottish Gov webpage State Aid – 'De Minimis Aid' page

way these tests are currently being applied by the Scottish Government and its agencies means that local community bodies are finding it increasingly difficult to obtain public funding to support land acquisitions.<sup>13</sup> The conundrum for local communities is that they need to develop plans for economic activities on a commercial basis to be able to manage an acquisition viably, and are generally required to do so as part of applying for public grant support with the acquisition, yet these same activities can prevent them from receiving a grant because of the State Aid rules.

- 24 The Review Group considers that there is a pressing need for the Scottish Government to address this situation. The current application of State Aid Rules is now a major obstacle to an expansion of local community land ownership, beyond the very restricted scope of ‘de minimis’ aid. The ways in which this anomaly is frustrating the Government’s policies, are illustrated by the difficulty now for local communities trying to acquire areas of woodland through the Government’s own National Forest Land Scheme.<sup>14</sup>
- 25 The Scottish Government has acknowledged the need to address this situation and has been considering ways of doing this. However, at the time of drafting this Report, there has yet to be any progress from the point of view of local communities. The Review Group considers the first key task is to establish the extent to which the Scottish Government and its agencies’ interpretation and application of State Aid rules in this context is being unduly restrictive, so that the full scope to support local communities buy land and buildings on their own behalf is being utilised.
- 26 The Review Group recognises that within the Government there are two main concerns about the risk of a challenge by the EC over any breach of State Aid rules. Firstly, with a successful challenge, the recipient might need to refund the support received; and secondly, that the whole funding programme might come under scrutiny. However, communities are currently concluding that officials in public bodies are taking an over-cautious and risk-averse approach to interpreting the rules. The Group considers that the Government needs to provide new guidance to public bodies and their officials dealing with State Aid appraisals, to ensure a full understanding of the scope under the regulations for assistance to be recorded as non-State Aid and to have a risk-aware view of the likelihood of a challenge. The Group agrees with the Big Lottery’s conclusion that State Aid regulations “*were not put in place to stifle the small scale community ‘enterprises’ that many community asset ownership projects so badly need to help them become empowered and to renew themselves and their local areas*”.<sup>15</sup>
- 27 Appropriate Government guidance could potentially immediately ease the current situation. However, the Review Group suggests that the Government should enter into discussion with the EC to create flexibility for assisting non-profit distributing appropriate local community bodies which have clear social and environment objectives as well as economic ones. This should encourage these community controlled ‘undertakings’, as they are contributing to local community well-being and the wider public good. Such flexibility is part of the normal support infrastructure for the majority of business sectors and without this in the community context, local community land ownership will be heavily constrained from developing to any significant scale.<sup>16</sup>

---

<sup>13</sup> Eg. LRRG Call for Evidence ref numbers 107, 136, 222, 331

<sup>14</sup> Aigas submission to LRRG, ref number 136

<sup>15</sup> Big Lottery submission reference 331

<sup>16</sup> Scottish Community Alliance briefing (2013) ‘State Aid and how it impacts on the community sector’

- 28 **The Review Group considers that current interpretation of State Aid regulations in Scotland is inhibiting the further growth and development of community land ownership. The Group recommends that the Scottish Government should publish new Guidance on State Aid to ensure public bodies take a more solution-focused and less risk-averse approach to their interpretation of the Rules. The Group further recommends that the Government enter into a dialogue with the European Commission to improve the scope for public assistance for non-profit distributing appropriate local community bodies.**

### 18.3 Public Asset Transfer

- 29 The great majority of the expansion of local community land ownership over the last 15-20 years has resulted from communities acquiring properties from private land owners. In HIE's database of 232 community acquisitions, around 20% involved public sector property with these divided nearly equally between land (11%) and buildings (9%).<sup>17</sup>
- 30 With the current overall total area of community owned land of around 180,000 ha (450,000 acres), approximately 11,247 ha (27,780 acres) or 6% has come from public bodies. Nearly 60% of this results from the West Harris Trust's purchase of the Scottish Government's West Harris crofting estates (6,580 ha), under the terms of the Transfer of Crofting Estates Act 1997. Most of the rest of the area of community owned land has come from communities purchasing land from Scottish Ministers through Forestry Commission Scotland's non-statutory National Forest Land Scheme (NFLS).
- 31 The public sector can also support the expansion of local community land ownership, in the public interest, through other non-statutory arrangements. These can both create opportunities for communities to acquire properties that are important to their development and to do so at a negotiated price on the basis of an independent valuation, rather than through open market competitive bidding. In some cases, local communities may also be able to acquire these properties for below what might be considered their open market value or indeed, where the public interest outcomes are substantial, at no cost.

#### Scottish Government Land

- 32 The Review Group's view is that when the Scottish Government and associated public bodies plan to dispose of property, consideration should be given to how the disposal could best be done to optimise its contribution to the delivery of public policy. The interests and wellbeing of the local community should be an important factor in that.
- 33 The Group considers that the Scottish Government should also ensure that there is a clear framework in place to ensure that public bodies notify local communities, over what might be described as significant disposals, in terms of their possible relevance to the community. The Group recognises that the pattern of local community representation remains variable, in terms of a functioning Community Council or other local 'appropriate community body', as defined in the 2003 Land Reform Act and discussed in Section 15 of this report. However, there should be consistent arrangements in place across government and associated public

<sup>17</sup> HIE briefing ( March 2014)

bodies, including the processes to be followed if a local community expresses an interest in acquiring the property.

- 34 The Government's most developed property disposal scheme is the National Forest Land Scheme (NFLS). This provides a mechanism by which local communities, non-governmental bodies and social housing bodies can apply to buy or lease land managed by Forestry Commission Scotland (FCS), even where the land has not been declared surplus or for sale. The Scheme was introduced in 2005 and by the time of the most recent FCS Progress Report in 2012, there had been 12 community purchases involving 1,735 ha, as shown in Fig. 18. The overall total of 22 land sales under the Scheme also included land for 81 affordable houses.
- 35 The Review Group regards the NFLS as a good mechanism for local communities that want to acquire FCS managed land. The Group considers that FCS should continue to monitor and refine the NFLS where appropriate, for example, to ensure that the application process has suitable flexibility to be proportionate to different scales of community acquisitions. At present, the issue over State Aid rules described in Section 18.2 above is the main obstacle to further sales to local communities through the NFLS.
- 36 State Aid rules apply whether the public assistance is by direct financial assistance towards a purchase or, in the case of public land, by discounting the price. However, resolving the position satisfactorily over State Aid will still leave wider issues over determining the price to be paid by local communities to buy property from the Scottish Government and associated government bodies. The rules governing this are set out in the Scottish Government's Scottish Public Finance Manual (SPFM) in the chapter on Disposal of Property, Plant and Equipment.<sup>18</sup>

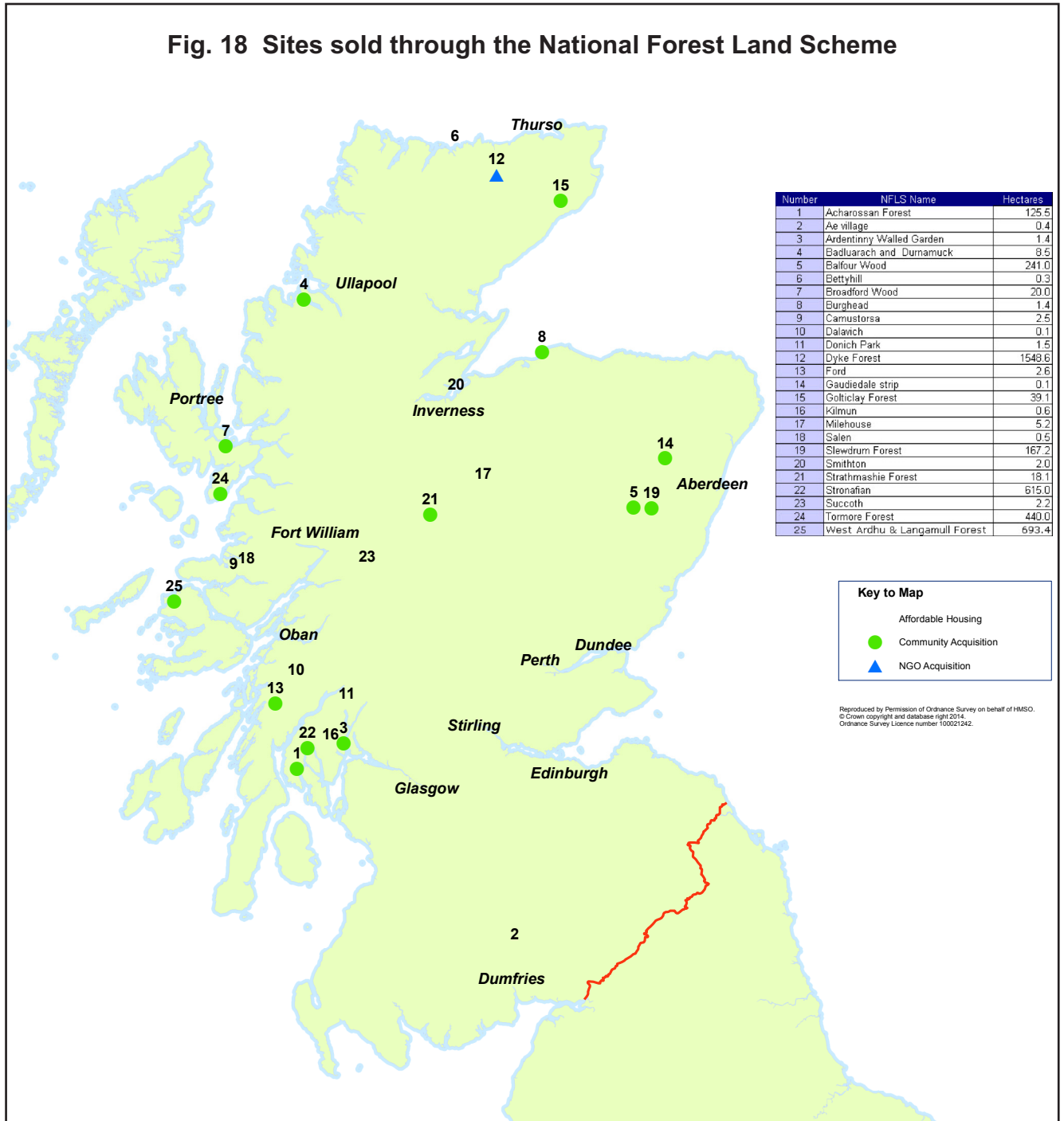
#### Scottish Public Finance Manual

- 37 The SPFM stipulates that the disposal of property assets by the Scottish Government and associated public bodies should normally be at the open market value as defined in the Royal Institute of Chartered Surveyors Appraisal and Valuation Standards. The Group understands that there is some flexibility to allow for disposals at less than market value, but each requires Ministerial approval.<sup>19</sup> Any reduction counts as a gift and in addition to the State Aid implications of this, it can give rise to VAT charges to the recipient. The amount of any reduction also has to be accounted for in the budget of the public body involved, potentially reducing its future spending power.
- 38 At present the impression given to community bodies is that there is no flexibility over the open market value as assessed by an independent valuer, allegedly constrained by 'Treasury Rules'. The Review Group recognises the clear importance of appropriate systems to ensure that the public receives value for money if they dispose of an asset. However, the Group considers the current lack of flexibility over the price in disposals to local communities can work against the public interest, especially when the public 'asset' could actually be incurring recurrent losses. This position is also in contrast with the flexibility given to local authorities over disposals for less than market value.

<sup>18</sup> SG website (current version last update June 2011)

<sup>19</sup> Community Land Scotland, Submission to SG consultation on Community empowerment and Renewal Bill, March 2012; HIE, Disposal of Public Sector Land and Property to Communities, January 2012

Fig. 18 Sites sold through the National Forest Land Scheme



- 39 One aspect to the current situation over local communities trying to acquire public land is simply the circularity of the funding, given the dominant role of public funds in financing local community acquisitions. A local community wanting to acquire, for example, part of the National Forest Estate from Scottish Ministers has firstly to go through the demands of the NFLS application process to obtain approval on behalf of Ministers that the disposal is in the public interest. The local community will then have to go through the requirements of the application process to the Scottish Land Fund (SLF), as set up by Scottish Ministers with public funds, as the SLF is the only public sector funding body likely to grant aid for the purchase of public land. The community might receive a grant of up to 95% of the price of the land and essentially, the community collects this money from Scottish Ministers to give

- to Scottish Ministers. Thus, with this example, Ministers would have actually sold the property to the community for 5% of its open market value from the point of view of Government funds.
- 40 The Review Group considers that there is scope for the Government to have clearer internal integration between disposals of Government land to local communities that are judged in the public interest and Government funding to support such acquisitions. This should reduce the onus on local communities and make it a more straightforward process to acquire public land where that is judged to be in the public interest. One potential arrangement is for the Government to have its own internal ‘community land fund’ to which a Government body could apply for a disposal, at less than market value, to a local community that it has judged in the public interest. This could mean that any reduction from the market value did not result in that Government body’s budget being affected by the amount of the reduction, as required by the SPFM.
- 41 There are other issues for local communities over the open market basis used for the valuation of government land which they are trying to acquire. The local community bodies involved are often registered charities and disposals of public land to them are approved as being in the public interest because of the wider public benefits they deliver, including improved local economic and community development and more resilient local communities. These wider benefits are not reflected in open market valuations and the community bodies also do not enjoy the tax concessions that are factored into land prices, as discussed in Section 25. There is thus a disparity between the value of the land in the public interest and the basis upon which the public body is valuing it. This position is also illustrated when land is leased to local communities. While a community’s plan for managing the land could be approved as being in the public interest because of the public benefits it will deliver, the open market basis of the rent to be charged can mean the community would not be able to afford to manage the site for its approved public interest purposes.
- 42 The Review Group considers that assets should be transferred to local communities at a reduced cost or no cost where that is judged in the public interest because of the wider public benefits it will deliver. To achieve this, the Government should establish a more integrated and flexible approach which will involve it examining the SPFM and providing clear guidance on the scope to use the flexibility in it for below market value disposals. The Review Group understands that the Cabinet Secretary for Finance has instructed the Scottish Government’s Director General of Finance to examine the SPFM to enable a greater transfer of assets from the public sector to the community sector, including looking at the scope for disposals at less than market value by taking more account of the wider public benefits of transfer to a local community. However, the Group is not aware of any outcome of that review by the time of writing this report.
- 43 **The Review Group concludes that the Scottish Public Finance Manual need not prohibit the transfer of public land at less than market value. The Group recommends that the Scottish Government should have a clear policy framework for the disposal of public property to appropriate local community bodies by the Government and associated public bodies, including a more integrated and focused approach to disposals for less than open market value where that is in the public interest.**

#### Local Authority Land

- 44 There is a clearer framework for local authorities to sell property to local communities at less than market value, than is the case with the Scottish Government and associated public



bodies. In addition the Scottish Government funds DTAS to provide the Community Ownership Support Service to assist this process.<sup>20</sup>

- 45 The starting point is the same in that, under the Local Government in Scotland Act 2003, it is a legal requirement for local authorities in disposing of land to secure “*the best consideration that can be reasonably obtained*”. However, Section 11 of the 2003 Act also amended Section 74 of the Local Government (Scotland) Act 1973, to set out that Scottish Ministers may, by regulations, provide circumstances in which local authorities may dispose of property for a consideration less than “*the best consideration that can be reasonably obtained*”.
- 46 Subsequently, the Disposal of Land by Local Authorities (Scotland) Regulations gave local authorities discretionary powers to dispose of property at below market value where (a) the local authority is satisfied that a disposal for such a consideration is reasonable; and (b) the disposal is likely to contribute to the promotion or improvement of economic development or regeneration, health, social well-being or environmental well-being.
- 47 As a result of this new flexibility, an increasing number of local authorities have also established procedures to set out the basis on which they may transfer properties to local community bodies, including transfers below market value. The Review Group recognises that there is a need for these types of arrangements, usually known as Community Asset Transfer Schemes, to establish and follow best practice standards.<sup>21</sup> However, they are a very positive development to encourage greater local community ownership. Taking over the ownership of a local authority building is most often important for communities in urban areas, where Councils usually own local community centres and other community facilities.
- 48 **The Review Group considers that there is significant potential community benefit in the transfer of selected local authorities’ assets to communities. The Group recommends that all local authorities should have a ‘Community Assets Transfer Scheme’ to encourage greater local community land ownership, and that the arrangements in these Schemes should all follow the same consistently high standard of best practice.**

## SECTION 19 - COMMUNITY SUPPORT SERVICES

### 19.1 Social Development

- 1 The growth over the last 20 years in the extent of local community land ownership has been concentrated in the Highlands and Islands for many reasons. However, there is also wide acknowledgement of the role played by Highlands and Islands Enterprise’s (HIE’s) Community Land Unit, in helping this growth take place by providing a range of types of support to the local communities involved.
- 2 HIE set up the Community Land Unit in 1997 and renamed it the ‘Community Assets Team’ in 2010. While that Team continues to provide the same types of support to local

<sup>20</sup> [www.dtascommunityownership.org.uk](http://www.dtascommunityownership.org.uk)

<sup>21</sup> Community Ownership Support Service ‘Asset Transfer from Policy to Practice’ (DTAS, 2013)

communities in the geographic area covered by HIE, there is no, and never has been, equivalent support for local communities in the rest of Scotland covered by Scottish Enterprise (SE). The Review Group recognises that the partnership between HIE and BIG to deliver the Scottish Land Fund (SLF) provides a support service to aspiring community land owners across the whole of rural Scotland. However, the disparity in broader community economic development support continues to be a significant factor in the limited growth in community land ownership in rural Scotland outwith HIE's area (in areas such the Eastern and Central Highlands, Borders and South West Scotland).

- 3 The origins of this different approach in the delivery of public support in these two parts of Scotland goes back to the legislation in 1965 that established HIE's predecessor, the Highlands and Islands Development Board (HIDB).<sup>1</sup> The HIDB was charged with furthering both economic and social development, rather than just economic development. When the HIDB was replaced in 1990 by the legislation establishing HIE and SE, promoting social development as well as economic development was only included in the functions of HIE.<sup>2</sup>
- 4 The Review Group considers the fact that local communities outside the HIE area are not also able to benefit from the types of support provided by HIE's Community Assets Team, to be an issue that should be addressed. The Group considers this different treatment of local communities in the two areas appears all the more anomalous, when HIE has been involved on a Scotland-wide basis in implementing the BIG Lottery's Growing Communities Assets grant scheme and the Government's current Scottish Land Fund. The Government also now uses HIE to implement some other community programmes on a national basis, for example, as the lead delivery partner in Community Broadband Scotland.
- 5 The Review Group considers how this disparity in support for community land ownership might best be addressed later in this Section. However, there are wider issues over the position where furthering social development is not part of SE's functions. The fact that SE has economic and environmental objectives, yet no social objective, would seem at odds with the essence of public policy. The Group's view is that, as a matter of principle, there is no justification for social development not being an objective in the rest of Scotland outside the HIE area. The Group considers that its omission works against creating stronger and more resilient communities, and is therefore at odds with the Group's remit in that respect. The current position also works against the implementation of that remit, including appropriate support across Scotland for community land ownership and for community land owners as social enterprises.
- 6 The functions of SE and HIE are set out in Section 1(a) and (b) respectively of the Enterprise and New Towns (Scotland) Act 1990. The terms of their functions are very similar except for the omission of 'social development' from SE's functions. It would appear that 'social development' might be readily inserted into SE's functions, for example, in 1(a)(iv) so it would read "*furthering social development and improvement of the environment of Scotland*".
- 7 The Review Group considers that the wider social remit of Highlands and Islands Enterprise has proved valuable in strengthening local communities and could be extended across the whole of Scotland, through amending section 1(a) of the Enterprise and New Towns (Scotland) Act 1990 to incorporate furthering social development into the functions of Scottish Enterprise.

---

<sup>1</sup> Highlands and Islands Scotland Development Act 1965

<sup>2</sup> Enterprise and New Towns (Scotland) Act 1990

## 19.2 Types of Community Support

- 8 The ownership of buildings and land is recognised as an important component of local community development and there is an increasing number of successful examples of the benefits local community land ownership can deliver. However, the growth of community land ownership is a relatively new development in Scotland and there are very few examples in most parts of the country.
- 9 Against this background, the Review Group considers that progress in delivering the Government's policy to increase local community land ownership will be very much influenced by the nature of the support given to local communities that might want to acquire buildings and land. Property ownership is a new venture for most local communities. Over the last 15 years much of this generic support has been delivered by the public sector, most notably HIE's Community Land Unit, (now the Community Assets Team), but also by other public agencies such as the Scottish Government's own Community Right to Buy Team, the BIG Lottery and some local authorities.<sup>3</sup>
- 10 More recently, third sector organisations have emerged to complement this support. Among these is the Development Trust Association which administers the Community Ownership Support Service, aimed primarily at assisting community organisations with the acquisition of assets being transferred from public bodies, particularly local authorities. Specialist advice and support services are provided by, for example, Community Land Scotland, Scottish Council for Voluntary Organisations, Community Energy Scotland, the Energy Savings Trust, the Community Woodland Association, Community Recycling Network for Scotland, Scottish Federation of City Farms and Community Gardens, Plunkett / Community Retail Network and other community-led networks (such as Scottish Community Alliance, the Single Interface Network).
- 11 An important aspect of that support has been assistance with community development especially during the early stages, for example, with community engagement, capacity building and training. Linked to that is assistance by helping provide access to professional advice on a wide range of potential topics. These might include legal advice on setting up an appropriate local community body to own property and on the conveyancing and other aspects involved in acquiring a property. Financial advice might include assistance with business planning, accounting systems and funding sources. Communities can also require advice over negotiations or technical assistance on their planned use of the land to be acquired, for example, building redevelopment, renewable energy projects, forestry and many others.
- 12 The work of the Community Assets Team also demonstrates important lessons about the most effective approach to adopt in providing support services to local communities. The approach includes, for example, experience of engaging with communities, user friendliness, access to expert support staff giving objective advice, flexibility, prompt responses and decision making, delegated decision making over small funding packages to help finance the development process and promotion of other grants or support programmes which might assist a community.

---

<sup>3</sup> *Evaluation of the Community Land Unit (HIE, 2009)*

- 13 The Review Group considers that the types of support services provided by HIE for local community land ownership in its area, should be available to local communities throughout urban and rural Scotland. This support should be accessible and there is a need for a more proactive approach to raise awareness of local community ownership in the rest of Scotland. This is also emphasised by the development of new opportunities for communities including, for example, Community Asset Transfer Schemes and measures currently proposed in the Community Empowerment (Scotland) Bill. In addition, the Group considers that the greater emphasis in public policy on the importance of encouraging and supporting community ownership requires a more integrated and focused approach within Government.
- 14 **The Review Group concludes that communities embarking on land and property ownership and management require considerable support. The Group recommends that the types of support services provided in the Highlands and Islands should be made available to local communities in the rest of Scotland and that the Scottish Government should take a more integrated and focused approach to encouraging and supporting the growth of local community land ownership.**

### 19.3 Community Land Agency

- 15 Increasing the extent to which local communities own buildings and land that are important to their community, is recognised as a core component of creating stronger and more resilient local communities in Scotland. However, current Government support for increasing local community land ownership is relatively limited, and somewhat fragmented with major differences in the support available to communities between those in the Highlands and Islands or the rest of Scotland, as well as between rural and urban communities.
- 16 The Group considers that Government policies to achieve a significant increase in community land ownership across urban and rural Scotland, should be supported by establishing a specific agency within Government to lead on this. This agency is referred to here as a Community Land Agency (CLA). A number of the submissions to the Group and most particularly from Community Land Scotland have recommended setting up a CLA and while proposals have varied over their details, there is agreement that such an agency is a key requirement to encourage and support increased local community land ownership.<sup>4</sup>
- 17 The Review Group sees the CLA as having the following structural characteristics:
- The CLA should be a distinct unit within Government, because of the cross cutting and targeted nature of its purpose. The Group therefore uses the term agency in the sense of a body *“created to enable executive functions within Government to be carried out by a well-defined business unit with a clear focus on delivering specific outputs within a framework of accountability to Ministers”*<sup>5</sup>
  - While focused on increasing community land ownership, the CLA would ensure improved delivery of a range of Government policies and measures aimed at promoting stronger and more resilient local communities

<sup>4</sup> CLS submission, ref no 317

<sup>5</sup> *Executive Agencies: A Guide for Department (Cabinet Office, 2006)*

- While the CLA would have specialist staff it would also have access to expertise within Government. The degree of ‘distance’ created by its distinct position should be recognised as helpful for its role in working with communities

### Primary functions

- 18 The CLA would have three primary roles:
- a. Facilitating negotiated settlements. The Group acknowledges that most local community property acquisitions to date, have not been through exercising statutory rights or from the public sector. There have been many negotiated settlements with private land owners and encouraging and supporting this process should be a priority focus for the CLA. The Review Group considers that, as a key part of this, the CLA’s role should include providing advice to land owners who would like to sell or gift land to a local community. The Group considers that the CLA should develop best practice in negotiating successful community acquisitions, including the use of specific approaches such as mediation in difficult cases. The Group acknowledges that there may be a series of outcomes from such negotiations, including community ownership, leasing and other partnership arrangements.
  - b. Advising Ministers on the use of ‘backstop’ powers. An important element in the core activity of facilitating negotiated settlements, is the existence of a ‘backstop’ power if negotiations fail to achieve an outcome in the public interest. This power can be seen as part of the menu of community rights over land, in addition to the current right of pre-emption, as described in Section 17. The Group’s view is that local communities should hold statutory rights over land, rather than the CLA and that the CLA’s responsibility would be to advise Ministers on the implementation of backstop powers. The Group’s view, on the basis of the experience since the Land Reform Act in 2003, is that the existence of such rights will further encourage negotiated acquisitions. The Group considers that the proposed low threshold right of a community to register an interest in land, could provide a major opportunity for the CLA to promote greater awareness of the potential of local community land ownership amongst both communities and land owners.
  - c. Providing support services. The CLA should provide a clear and integrated national system of support services for community land ownership as described in Section 17.2 above. Rather than employing staff directly, the CLA could contract out such services to appropriate existing organisations, under clear guidance to ensure consistent standards of delivery. This process could involve existing agencies and community sector bodies where appropriate, both benefiting from their direct experience and strengthening the sector.

### Other core tasks

- 19 These would include:
- Provision of small scale grants to community bodies as part of enabling an acquisition. The CLA should not, however, be given responsibility for administering other funds such as the Scottish Land Fund

- Help to local communities to deal with applications to funding bodies, while providing advice within Government on the merits and weaknesses of different funding schemes and the co-ordination between them
  - Assistance to communities with applications to acquire public land through non-statutory disposal schemes, such as the National Forest Land Scheme and local authority Community Asset Transfer Schemes
  - Assistance to communities to apply to register a pre-emptive right to buy over land under Part 2 of the Land Reform (Scotland) Act 2003 and help them exercise it if the opportunity arose. The CLA should not be involved in administering this right, with applications assessed for Ministerial approval and recorded in the Register of Community Interests in Land as at present
  - Help to communities through processes, associated with other statutory community land rights, including the existing right to buy of crofting communities under the 2003 Act or new rights for local communities that might result from the Government's current Community Empowerment (Scotland) Bill
  - Advice to Government on the merits and shortcomings of measures from its knowledge and experience of them
  - Maintenance of a database of local community acquisitions, as well as post acquisition monitoring over time to inform policy and practice
  - Acting as a hub of expertise on community land ownership within Government and involved in developing improved knowledge, analysis and understanding of it in a Scottish context.
- 20 **The Review Group concludes that communities require a wide range of support and advice in seeking to acquire and manage land. The Group recommends that the Scottish Government should establish a Community Land Agency, within Government, with a range of powers, particularly in facilitating negotiation between land owners and communities, to promote, support and deliver a significant increase in local community land ownership in Scotland.**

## PART FIVE

### LAND DEVELOPMENT AND HOUSING

#### Introduction

- 1 The Scottish Government seeks to promote sustainable economic growth, in part through the regeneration of our towns and cities, greater community development and community empowerment. Achieving economic prosperity is likely to depend significantly on the extent to which land and buildings, including those left vacant by economic change, can be taken and transformed into sites of future opportunity. As such, any land reform measures should provide an effective means to successfully address the barriers which militate against the delivery of sustainable economic, social and environmental development in Scotland.
- 2 To a large extent, land reform has been popularly conceived as falling within the context of rural development. Yet the largest group of landowners in Scotland are those who own the 1.5 million owner-occupied houses (a figure which accounts for 60% of all Scottish houses). While less headline grabbing, in terms of land reform, this aspect of the pattern of land ownership has huge social and economic implications for society. Land reform has, arguably, even greater significance for those people who are unable to access appropriate housing, or are inadequately housed. International human rights legislation obliges all governments to *“take steps to ensure and sustain the progressive realisation of the right to adequate housing, making use of the maximum of its available resources”*.<sup>1</sup> Land reform can therefore play a potentially crucial role in enabling the Scottish Government to meet its legal human rights obligations.
- 3 This part of the Report highlights areas which urgently need to be addressed within this context, but particularly the need to facilitate and support more and better urban renewal, and the need to provide sufficient housing to meet the needs of a changing Scottish population. Land - and more precisely the interaction between how land becomes available, the price of land and the planning process - is central to both of these issues, and urban renewal and delivering housing are, therefore, essential components of the current land reform agenda. At the heart of both these issues, lies the question of who captures the benefit from rising land values, and how this is used.
- 4 The first part of Part 5 considers the need for land reform within the context of urban renewal and regeneration. It recognises the importance of our towns and cities as a key driver of an economically prosperous Scotland. Land is an essential raw material for the urban development process, and one which is often in short supply or beyond the reach of many potential end users. Land reform measures should therefore encourage and enable the transfer of land (especially unused, underused and neglected land) to those who can best make use of it in the public interest, irrespective of whether they are in the public, private or community sectors.
- 5 The second part of Part 5 focusses on housing. The issue of housing is both complex and multi-faceted, but the land dimension is a crucial determinant in the number of new houses

---

<sup>1</sup> *International Covenant on Economic, Social and Cultural Rights, Articles 2 and 11 (1976)*

which can be built in Scotland over the coming years, the quality of the houses we build and the kind of places we develop. Further, land prices and house prices are very closely linked. As such, this report explores the land reform aspects of housing, both in terms of how Scotland meets its new-build housing targets and by exploring other relevant land reform issues around existing housing provision.

- 6 Central to both these issues is the way in which urban development processes and the new-build housing market have evolved throughout the post-war period. As the UK increasingly embraced the free market, the role of the state (in the form of planners and proactive development agencies and corporations) receded. This has resulted in a fundamental shift in power relations towards increasingly larger developers and land owners, and the development of business models which are increasingly reliant on the practices of land banking and land speculation.
- 7 In recent years we have also seen the housing market, to a large extent, becoming more closely entwined with the financial sector, to the extent that the fortunes of the wider economy are now inextricably linked to the fortunes of the housing market. Creating a better functioning land market will therefore deliver wider economic benefit. This part of the report explores whether current land development and new-build housing processes are likely to address Scotland's future urban renewal and housing needs, and how best to serve the public interest.

## SECTION 20 - URBAN RENEWAL

- 8 The urban environment is characterised by continuous change as old industries decline and new ones develop; as existing buildings are adapted for new uses; and as buildings are demolished and new ones built on the resultant cleared sites. Successful urban areas therefore depend on this process of 'land recycling', and the effectiveness and efficiency of land recycling is thus crucial to the long term prosperity of Scotland's towns and cities.
- 9 Commentators such as Adams however point out that left to their own devices, urban land markets do not work particularly well, and are replete with imperfections and failure.<sup>1</sup> Indeed Balchin et al argue that the widespread nature of the imperfections in such markets, make urban land and property markets among the least efficient of all.<sup>2</sup>
- 10 Linked to the imperfections of the urban land and property markets, are a number of specific ownership failures or constraints. These include ownership being unknown or unclear; ownership rights being divided (land held in trust or subject to leases or licences, etc); and the existence of ransom strips which can act as a barrier to land assembly for urban development. Other problematic contexts include situations where either the owner is willing to sell, but not on terms acceptable to any likely purchaser, or where, for any one of a number of reasons the owner is unwilling to sell.
- 11 This combination of market imperfection and ownership failures or constraints, manifests itself in two ways. The first of these concerns the gap that often opens up between the

---

<sup>1</sup> D. Adams, *The Potential for Urban Land Reform in Scotland*, paper at AESOP-ACSP Joint Congress, Dublin, July, 2013

<sup>2</sup> Balchin, P. N., Bull, G. H. and Kieve, J. L. 1988, *Urban land Economics and Public Policy*. London:Macmillan.



allocation and availability of land for development. Specifically, planners may allocate or set land aside for housing or urban uses, but this does not necessarily make it available to those who wish to develop such uses. The second aspect concerns the hangover of vacant and derelict land, which often has a significantly detrimental effect on local communities. Creating opportunities for local communities and others to take over and regenerate vacant urban land in Scotland could potentially make a hugely important contribution to kick-starting regeneration where it is most needed.

- 12 As with most examples of inefficient markets, the case for intervention in urban land and property markets seems compelling. However, any reform of these markets requires us to consider how far we can go, without impinging on human rights. Allen offers a useful analysis of how Article 1 of the First Protocol of the ECHR has evolved in a way which a number of the original signatories to the Treaty never intended, and highlights the competing liberal and social democratic interpretations.<sup>3</sup> Reform of urban land and property markets require us to rethink our understanding of what we mean by ‘public interest’ within this context. Rather than simply considering the ‘micro’ public interest in relation to any one particular site, we need to instead regard the ‘macro’ public interest in relation to sustainable development and sustainable economic growth across Scotland as a whole. In other words, reform is needed to help Scotland flourish more generally, rather than simply to release particular sites for development.

## 20.1 Derelict and Vacant Land

- 13 A key test of effective land reform in Scotland will be whether it helps reduce the long-term urban land vacancy and dereliction which blights many of Scotland’s older urban areas. In addition to the undoubted economic benefits, simply bringing former vacant and derelict land back into productive use can immediately boost local confidence. It is difficult to conceive of circumstances in which it is in the public interest for urban land, whether it is public or private land, to lie vacant or neglected by its owners for any length of time, other than for strategic transport or infra-structure requirements. It follows that bringing such land back into productive use should not be frustrated by recourse to the discussion of private property rights.

### Extent

- 14 The term ‘vacant land’ refers to land that is unused for the purposes for which it is held, and is viewed as an appropriate site for development. This land must either have had prior development on it, or preparatory work has taken place in anticipation of future development. ‘Derelict land’ (and buildings) on the other hand, refers to land that is so damaged by development that it is incapable of development for beneficial use without rehabilitation. Planners also refer to this as “brownfield land” and a body of planning policy has emerged which specifically deals with this concept.
- 15 The Scottish Vacant and Derelict Land Survey (SVDLS) is an annual survey undertaken by the Scottish Government, using information provided by local authorities. It was initiated in 1988 and has been undertaken on an annual basis since 1993. The survey aims to establish

---

<sup>3</sup> Allen, Tom (2010), *Liberalism, Social Democracy and the Value of Property under the European Convention of Human Rights*, *International and Comparative Law Quarterly*, 59 (4)

- the extent and state of vacant and derelict land in Scotland, and highlights recent trends in levels and patterns of vacant and derelict land.
- 16 The 2013 report established that there are 11,114 ha. of urban vacant or derelict land in Scotland. This figure breaks down into 2,355 ha. (21%) classified as urban vacant, and 8,759 ha. (79%) classified as derelict. Interestingly, over 40 per cent of urban vacant or derelict land has been unused for at least 21 years. At moderate development densities this could site more than half a million new homes.
  - 17 The SVCLS identifies that the most common previous use for urban vacant land, where previous use is known, was agriculture (414 ha. or 21%), closely followed by residential development (399 ha. or 20%). It is also interesting to note that 56% of people living in the most deprived decile in Scotland live within 500 metres of derelict land, compared to 13% of people in the least deprived decile. This would suggest that an approach which successfully addressed urban and vacant land is likely to have a positive impact on disadvantage.
  - 18 Despite the best efforts of local authorities, supported in some instances by the Scottish Government's Vacant and Derelict Land Fund, there has only been a decrease of 265 ha. (2.3%) in the total amount of derelict and urban vacant land recorded in the survey since 2007. While, on average, in excess of almost 400 ha. of derelict and urban vacant land has been brought back into use each year, this figure is continually offset by further urban land falling into decline and being newly classified.
  - 19 While the SVCLS now provides much better information on the extent of vacant and derelict land, the statistical nature of the exercise offers few clues as to why this remains such a serious problem. Cameron et al and Couch and Fowler distinguish between frictional, demand-deficient and structural vacancy.<sup>4, 5</sup> Land that is either frictionally vacant or suffers from demand-deficiency will be involved in the development pipeline. The former tends to be blocked by constraints at the feasibility stage, while the latter is awaiting the next upturn in the market. Structural vacancy, however, is defined as land rendered permanently surplus to requirements by changes in technology or in the nature of demand. It is especially characteristic of de-industrialised locations left behind by structural economic change. In this form, the problem is 'hardcore', often seeming to be intractable, and the land is unlikely to reach the development stage without market intervention.
  - 20 It is also important to consider who actually owns vacant and derelict land. A study by Adams et al which focused on the cities of Aberdeen, Dundee, Nottingham and Stoke identified almost three times as many private sector owned brownfield sites as public sector ones.<sup>6</sup> The report stresses that crucial to understanding the relationship between ownership and development is whether the owners (private or public) are passive or active, and concludes that one objective of any market intervention should be to get derelict and vacant land into the hands of active owners.

### Compulsory Sale Order

- 21 Keeping urban land and property vacant when someone else could put it to beneficial use

---

<sup>4</sup> Cameron, GC, Monk, S and Pearce, BJ (1988), *Vacant Urban Land, A Literature Review*, London Department of the Environment

<sup>5</sup> Couch, C and Fowler, S (1992), *Vacancy and Recent Structural Change in the Demand for Land in Liverpool*

<sup>6</sup> Adams, D, Disberry, A, Hutchison, N and Munjoma, T (2001), *Ownership Constraints to Brownfield Redevelopment*, *Environment and Planning, A* 33

impedes the chances of achieving sustainable and resilient settlements. Compulsory Purchase Orders (CPOs) are one measure currently available to local authorities and other public bodies to address this situation, and these are discussed in Section 8. However, even within an improved CPO regime, this mechanism alone is unlikely to suffice, and the development of other mechanisms is clearly required to address the challenge of vacant and derelict land.

- 22 The Group considers that one new measure worthy of consideration is a Compulsory Sale Order (CSO). This mechanism is based on the recognition that there comes a point when it is no longer in the public interest for an owner to retain land and property indefinitely, without use or sale. When this point is reached, a CSO would be triggered, effectively requiring the land to be sold by public auction.
- 23 Public auctions arguably provide the most effective means to ascertain a fair price for vacant land and property, especially at a time of economic restructuring. They cut through the inherent difficulties involved in the valuation of such assets, which arise because actual transactions in vacant urban land are relatively few in number. The price paid per hectare can vary substantially and the lack of comparable evidence makes it hard to make a realistic valuation. A key feature of this uncertainty is that sellers are often reluctant to go to auction because the price achieved may well be lower than that which they believe to be achievable by waiting indefinitely for a purchaser. But, from a public interest perspective, this is precisely the point.
- 24 Indeed, it may well be necessary to write-down land prices across much of urban Scotland to enable regeneration to flourish, and if auctions are an effective means to achieve this, then this supports the case for the introduction of a CSO. The mechanism would provide a powerful means to convert 'exchange value' back into expected future 'use value', thus acting as an important stimulant to bring those future uses about. By introducing greater realism into land and property pricing, the CSO would have a significant knock-on effect on regeneration across the whole of Scotland.
- 25 Legislation would need to define when a CSO could be exercised, who might have the power to do so, and to which categories of land and property it might and might not apply. In principle, the CSO would apply to any 'abandoned' land that has remained in a vacant or derelict condition for an unacceptable period of time. This will require that local authorities, who already collect and supply information on vacant and derelict land to the Scottish Government, use this information as the basis of a new, publically available, statutory register.
- 26 Because of the increasing importance of the register, it is likely that a formal procedure would have to be included for circumstances in which an owner wished to object to the inclusion of land within the register, or where other bodies, such as community groups, considered that land had been omitted. In responding to such challenges, local authorities would make decisions on a purely factual basis of whether, in view of all the information presented, the land did or did not meet the required definition. There would also need to be some limited right of appeal against the decision.
- 27 The use of CSO's could be linked to the current validity of planning permissions (generally 3 years), reflecting the already well-established principle of public policy that it is reasonable to expect development to commence within 3 years of permission having been granted. Applying this principle would suggest that a CSO could be served at any point after land

had been registered as vacant and derelict for more than 3 years. The CSO would be initiated by new powers granted to local authorities, although extending this to other public agencies with CPO powers could also be considered.

- 28 Once triggered, the CSO would involve the local authority serving a notice on the Owner, requiring arrangements to be made for the land to be offered for sale by public auction within a period of six to eight months. The local authority would have reserve powers to organise the auction itself if the owner failed to act, or if the proposed arrangements for holding the auction were deemed unsatisfactory. The notice served on the owner would be accompanied by a planning statement prepared by the local authority. This would detail any existing planning permissions and relevant development plan allocations and policies. The statement would be intended to clarify what types of development would and would not be likely to be permitted on the land. The statement would be published on the local authority website and would be expected to be referenced in any sale particulars.
- 29 Although there would be no restriction on who might participate in the auction, measures would need to be introduced to avoid speculative purchases by parties who continued to keep the land vacant. This could involve attaching a condition to the sale which gave the local authority the right to purchase the land three years after the sale, at a valuation set at that date by the District Valuer, if no development on the site had commenced. Alongside the planning statement, this condition would help ensure that bids made at the auction were based on realistic proposals, and not speculative ones.
- 30 If no bids were made at the auction, the land would remain unsold, and there would be a period of time, possibly 3 years, before a further CSO could be initiated. While possible, this scenario is highly unlikely as, in most circumstances one would expect a community organisation or local authority to make at least a nominal bid for the land, especially as no reserve price would be allowed. Indeed, interest and action would be stimulated by the intended auction notice period of 6 to 8 months.
- 31 Since it is often the local community which suffers most directly from vacant and derelict land, it would seem reasonable to give communities a right to trigger a CSO, particularly in circumstances where they have an alternative use for the site. This is discussed within Section 17 of the Report. While there would of course be no guarantee that the community bid would prevail at the resultant auction, the CSO would ensure that the land is sold for a realistic 'market' value, and that the derelict or vacant site is brought back into productive use. It is important to note that any proposed community use might not necessarily be a built development: communities may well use this power to provide more open space, allotments or community growing sites. However, even in these circumstances, these uses would contribute much more in the broad sense to urban renewal than keeping the land vacant.
- 32 **The Review Group considers that further mechanisms are required to address the persistent challenge of vacant and derelict land in urban areas. The Group recommends giving local authorities a new power of Compulsory Sale Order.**

## 20.2 Land Assembly Mechanisms

- 33 In addition to those situations which the CSO would address, there are also other contexts in which ownership failures and constraints act as a barrier to derelict and vacant land being bought back into productive use. At the most basic level, effective urban land and property markets require access to quality information: the ability to discover quickly and precisely who owns the various patchwork of interests that make up a potential development site. Crucial to this is the updating of the Land Registry, which is addressed within Section 4 of the Report.
- 34 There are other existing measures which can help facilitate the re-development of derelict or vacant land in an urban context. Many people regard the planning system as the prime means to do this, but while the planning system has significant power in preventing unwanted development, as Adams argues, its ability to generate desirable development, at least on its own, is really quite limited.<sup>7</sup> The use, or threat of use, of CPOs to help assemble sites for development is the other tool currently available, and Section 8 discusses the need to modernise and reform these.
- 35 In order to deliver significant urban regeneration however, there is a need to complement the planning system and more effective use of CPOs with additional policy tools. Traditionally this has involved developer subsidies, but these tend to be expensive and symptom-focused, rather than being tools which get to the root of the problem. As such, some new policy tools and approaches are required to support existing mechanisms. Within a land reform context, new measures which specifically seek to address the problem of multiple and fragmented land ownership could be achieved by redefining property rights.

### Majority Land Assembly

- 36 In land law, a developer must either acquire or respect all the existing property rights in the site before development can proceed, making it extremely difficult in practice to assemble such sites by negotiation. This is often because, by owning what is referred to as 'hold-out parcels of land' (often in the middle of the development), the last owner to settle is left in a powerful position to drive a hard bargain with the developer.
- 37 Adams however, contrasts this situation with company takeovers in corporate law, where once the bidder has acquired a certain proportion of the company shares (which in most jurisdictions is around 85% to 90%), the remaining shares held by those who did not accept the bidder's offer, can be compulsorily acquired by the bidder.<sup>8</sup> This, therefore, raises the question of whether the principles of corporate law offer Scotland an effective way to solve the problem of land assembly, without the need for compulsory land purchase by the state.
- 38 Such a measure would require the intended redevelopment area to be clearly defined, along with all the ownership interests potentially affected. Within this area, the developer would be expected to acquire the vast majority of ownership interests, say 90%, through negotiation and voluntary agreement. At this point, the dynamics of the remaining negotiations change fundamentally. The crucial negotiation is no longer with the last seller, but with a much earlier seller, beyond which the stronger negotiating position switches from

<sup>7</sup> *D. Adams (2013) Op cit*

<sup>8</sup> *Ibid*

the outstanding seller(s), to the buyer (a transfer of power from the remaining landowners to the developer).

- 39 In 1999, the Hong Kong Government introduced precisely this measure in the form of the Land (Compulsory Sale for Redevelopment) Ordinance, which enables private developers who had acquired 90% of the property rights in any redevelopment project to apply to the Lands Tribunal to, effectively, force the sale of the remaining 10 per cent of property rights.<sup>9</sup> The ordinance removes the advantage of holding out to the very end, and so encourages all owners to settle by negotiation. While this example is a privatised form of compulsory purchase, it does provide a useful illustration of how markets can be re-shaped to achieve desired policy ends (in this case, speeding up urban redevelopment) by making relatively minor adjustments to property rights.
- 40 **The Review Group considers that additional policy tools are required to more effectively enable land assembly for urban renewal purposes. The Group recommends that the Scottish Government explores the feasibility of introducing a Majority Land Assembly measure.**

#### Urban Partnership Zone

- 41 An effective alternative mechanism to compulsory purchasing land for redevelopment is that of 'owner participation'. Again this applies to fragmented or multiple ownership and involves reforming property rights to enable land assembly. Many countries throughout the world already do this effectively through statutory arrangements known as land readjustment or land pooling, the strength of which is creating opportunities for land owners to share in the financial benefits of redevelopment in return for sharing some of the risk. This approach originated in Germany in the early 20th century.<sup>10</sup> It has since been applied and adopted in many other countries.<sup>11</sup>
- 42 The system enables fragmented and irregularly shaped plots of land to be consolidated to create serviced and usable parcels. Land is then redistributed to the original landowners, with public infrastructure costs being borne collectively by the increase in development value. As a development stimulus, land readjustment thus connects land assembly, disposal and infrastructure provision with a method to distribute the financial benefits of development between landowners and public agencies.
- 43 If this approach was introduced in Scotland, it would speed up urban regeneration by providing a statutory framework to encourage voluntary co-operation between owners. Indeed, Scotland could actually do much better by integrating the development process as a whole under local leadership, through a form of 'land readjustment plus' which Adams calls an 'Urban Partnership Zone' (UPZ).<sup>12</sup> The UPZ offers an innovative approach to land assembly by combining a statutory framework with greater planning certainty and, possibly, with taxation and other financial benefits. This would enable local authorities to drive forward redevelopment projects with minimum compulsory purchase.

<sup>9</sup> [http://www.devb.gov.hk/en/publications\\_and\\_press\\_releases/gallery/av/index\\_id\\_35.html](http://www.devb.gov.hk/en/publications_and_press_releases/gallery/av/index_id_35.html)

<sup>10</sup> Doebele, WA (1982), *Land Readjustment: A Different Approach to Financing Urbanization*, Lexington Books

<sup>11</sup> Archer, RW (1989), *Transferring the Urban Pooling Readjustment Technique to the Developing Countries of Asia*, *Third World Planning Review*, 73 and Archer, RW (1992), *Introducing the Urban Pooling Readjustment Technique into Thailand*, *Public Administration*, 12

<sup>12</sup> D. Adams *Op cit*

- 44 In practical terms, a UPZ would be an area specially designated for redevelopment by the local planning authority, and would involve a development partner being selected by the authority through open competition. At that stage, neither the local authority nor its development partner need own any land within the proposed UPZ. A joint-venture development company would be formed between them, in which the local authority would be entitled to at least a minimum share, irrespective of any land owned, in order both to reflect its own commitment and to ensure local democratic accountability. In some circumstances, partners who already hold an ownership stake in a suitable UPZ might invite the local planning authority to enter into partnership rather than vice-versa. It would be for the local authority to decide how best to respond to such an approach.
- 45 Once a UPZ is declared, existing landowners would acquire the statutory right either to join the development partnership or to sell out to it. Crucially then, in contrast to compulsory purchase, the process of land assembly would be designed to promote co-operation not confrontation between the joint-venture development company and existing landowners. This would provide a welcome means by which those already owning land and property within the UPZ could benefit from the proposed redevelopment, either financially or by taking reserved space in the new scheme.
- 46 To prevent further fragmentation of ownership within a declared UPZ, declarations would be entered as land charges and would entitle the local planning authority to pre-emption rights to any land and property in the area. To provide vision, direction and planning certainty, UPZ declarations would be accompanied by an overall master plan or development brief to ensure quality design and development. This would grant outline permission for the uses specified, so creating early planning certainty and enabling valuation disputes to be resolved more quickly.
- 47 By linking strategic development intentions at an early stage to a planning approval in principle, development risk would be reduced and valuation disputes between owners minimised. The majority land assembly measure proposed above, would help address those owners who neither wished to sell their land, nor enter the development partnership. If owner participation proved popular, it would be necessary to invoke compulsory purchase only against a minority of the original owners, making such action easier to accomplish and politically more acceptable. A UPZ would mean that on confirmation of any compulsory purchase order, title would transfer directly to the joint-venture partnership, rather than the local authority, and the partnership would be directly responsible for compensation payments.
- 48 Although some aspects of UPZs draw on successful regeneration practices, others would be quite new in a UK context. These include the status of outline planning permission accorded to master plans and development briefs, the grant of pre-emption rights to the local authority, the vesting of compulsorily acquired land directly in a joint-venture development company and, especially, the proposed statutory rights and processes to encourage owner participation. Importantly, the blunt instrument of compulsory purchase would be supplemented with a process which encourages interested owners to participate while challenging those owners whose actions discourage redevelopment.

- 49 **The Review Group considers that the well-established international practice of property land readjustment or land-pooling provides another effective means of addressing fragmented or multiple ownership of land. The Group recommends that the Scottish Government investigates the potential of introducing an Urban Partnership Zone mechanism in Scotland.**

#### Financial Disincentives

- 50 Within this context of vacant and derelict land, the final point to be noted is that there are currently no holding costs or taxes which discourage passive land owners from retaining vacant or derelict land. The introduction of one or more of a range of fiscal disincentives, including Land Value Tax, Stamp Duty Land Tax, land holding charges, or empty business rates could be considered as a means of complementing or reinforcing those other tools and mechanisms which seek to address vacant and derelict land in urban areas. These are discussed within Section 25 of the Report.

### **20.3 Public Interest Led Development**

#### Prime Developers

- 51 Future Scottish prosperity depends to a significant degree on the ability of cities and towns to reinvent themselves, and transform vacant and derelict land into productive use. This needs to be done in a way which simultaneously delivers better urban 'places' (in terms of design and quality) and maximises the local development impact (through local production and sourcing local materials).
- 52 For a large part of the post-war period, the predominant development model was characterised by the proactive intervention of well-focussed public organisations such as development authorities and / or proactive public housing authorities.<sup>13</sup> These bodies made land available for housing and other development and, through their interventions were able to capture most of the rising land value. Crucially, they influenced the quality of development taking place. More recently, however, urban development has increasingly become private sector-led, involving fewer and larger companies. Within this model, it is the private developer who will assemble and acquire the land for development, carry nearly all of the risk and, along with the land owner, capture gain from rising land values.
- 53 Various commentators suggest that if we are to develop a more efficient approach to urban development we need to draw on historic experience, and shift towards 'public interest led development. This will involve local authorities and other public agencies increasingly taking on the role of prime developer, with the responsibility of producing local development plans and of proactively acquiring and assembling the land necessary for the implementation of these plans.
- 54 Gulliver and Tolson point out that, at different points in time, urban development has always been driven by either the search for market value or by public sector intervention.<sup>14</sup> They go on to argue that, particularly in the current economic context, where markets, private credit

<sup>13</sup> Such as the new town development corporations and the Scottish Development Agency

<sup>14</sup> Gulliver, S and Tolson, S, *Delivering Great Places to Live, 10 Propositions aimed at Transforming Placemaking in Scotland* (2013)



and public and private investment have all but ‘dried up’, the public sector will be the only driver of any substance and “*now needs to play the role of ‘Prime Mover’ in Placemaking*”.

- 55 In addition to the historical evidence, it is also instructive to look at examples from Europe which continue to deliver urban development of the required scale, design and quality. In Germany, local authorities continue to adopt an approach which was widely practised in the UK for much of the 1930’s and 1940’s. Once land is identified by Councils as being necessary for development, the farmer or landowner gets a small premium for losing it, and the Council then makes it available (usually as serviced sites) in a way which supports their urban development objectives. Similarly, the much heralded urban development of Ljburg in the Netherlands over the last couple of decades has been planned and driven by the Municipality of Amsterdam, which bought the seabed on which the island is built from a national government agency at the outset of the development process.
- 56 This model of public interest led development effectively redefines the relationship between the various public and private actors. It involves the local authority or other public agency taking a proactive role in zoning the land for specific development purposes and then assembling the land, with land owners being fairly compensated. However as prime developer, the local authority or public body does not necessarily have to take on the role of master planner, a role which could equally be undertaken by a private sector body or through a partnership arrangement. It is also worth noting that local authorities tend to have a ‘triple A’ credit rating and therefore have the potential to raise development finance of their own. In addition, local authorities have land, property and planning powers at their disposal, all of which suggests that they are ideally placed for public interest led development.
- 57 Adams argues that the scale and challenge of much urban renewal requires, what he describes as, ‘strategic market transformation’.<sup>15</sup> This involves the integration of masterplanning, land ownership consolidation (and division), regulatory approval and financial planning in a way which facilitates the emergence of new markets whose potential would otherwise be constrained.
- 58 While this model would incur greater initial costs, Gulliver and Tolson suggest that these could be funded through different types of public-private relationships.<sup>16</sup> However, any initial investment to unlock land constraints at an early stage, would undoubtedly deliver significant financial and non-financial rewards for both public and private sectors later on. This approach would also increase the ability of local authorities to co-ordinate the provision of physical and social infrastructure. Moving towards increasing public interest led development would require clear leadership from the Scottish Government, who could provide further support through the provision of an underwriting facility.
- 59 **The Review Group notes the greater public interest outcomes from public interest led development processes and considers this to be a necessary requirement for most effectively addressing urban renewal challenges in Scotland. The Group recommends that the Scottish Government should encourage and support a greater emphasis on public interest led development.**

15 Adams, D and Tiesdell, S (2013), *Shaping Places: Urban Planning, Design and Development*, Routledge

16 Gulliver, S and Tolson, S, *Op cit*

## SECTION 21 - NEW HOUSING

- 1 The foreword to the Scottish Government's housing strategy states "*Scotland needs many more new houses and to significantly enhance the quality and sustainability of our existing housing stock and neighbourhoods ... we need to find ways to achieve this, despite the additional major challenges stemming from the credit crunch and the UK Government's cuts to public spending. That is why we are setting out a radical agenda with profound implications about the way we think about housing ....*"<sup>1</sup>
- 2 This Strategy and Action Plan for Housing is a bold and ambitious policy document which straddles the full range of housing issues and challenges, including the need to significantly increase the supply of new houses being built. In addressing this particular objective, it refers to "*following through our recent reforms to the planning system to ensure a generous supply of land for housing*", as one of a number of measures which will deliver the required number of houses. The Group questions whether this policy document sufficiently recognises the centrality of land supply to meeting new house building targets, and whether the planning system on its own has the necessary wherewithal to make sufficient land available for housing.
- 3 Within those responses to the LRRG's Call for Evidence which touched on housing, there was a significant degree of consensus around the nature of the land aspect of housing development. It was generally seen as a three dimensional problem: accessing land (how land is made or becomes available for housing); the price of land for housing development; and the operation of the planning system (which tends to work in a reactive manner, rather than perform a more proactive, enabling role). It was pointed out that it is how these three aspects of land supply interact together which creates the land supply problem for new housebuilding.
- 4 There is much literature on the extent to which the supply of land for housing is constrained or otherwise by restrictive planning policies and this is an area which has generated considerable debate among housing economists. A very good review of the evidence around land constraint issues is found within the recent article by Glen Bramley.<sup>2</sup> Whatever conclusion one arrives at however, it seems important that the public sector should not merely restrict housing development where it is considered inappropriate, but take pro-active steps to ensure the actual development of land where it is required.
- 5 To fully understand the relationship between land supply and housing supply, it is instructive to reflect on how this has developed historically. Wiles is one of a number of UK commentators who has pointed out how the value of land, as a percentage of house prices, has rocketed.<sup>3</sup> Back in the thirties, land could cost as little as 2% of the sale price of a house - today the land component of a new house can be as high as 70%. This leads Wiles to conclude that land, or the lack of it, is the single most important issue in housing today, and a major contributor to the fact that the UK is building some of the smallest houses in Europe.
- 6 Green points out that in constructing analyses of this nature you can only ever get crude pointers to trends.<sup>4</sup> In doing so he supports Wiles' observation that the price of land can

---

<sup>1</sup> "*Homes Fit for the 21st Century*", (2011), Scottish Government

<sup>2</sup> Bramley, G (2013), *Housing Market Models and Planning*

<sup>3</sup> Wiles, C (2013), *It's Land Stupid, Inside Out*

<sup>4</sup> Green, B (2013), *Is it Time for Housing Policy to Pay More Heed to the Costs and the Benefits of Location?*

now account for up to 70% of new house prices. Green also looks at house prices as a percentage of income. As an illustration, Fig. 19 shows how in the 1930's, an average builder could buy a house for between 3 and 4 times their annual salary. By 2010 it would take a builder 7.5 times their salary (and in reality the house being bought would probably be smaller with less of a garden).

**Fig. 19 Average annual earnings of a UK building worker and the average house price for decade**

Year	House Prices	Annual Earnings	HPE Ratio
1930	590	170	3.5
1938	545	175	3.1
1950	1,940	380	5.1
1960	2,530	730	3.5
1970	4,975	1,500	3.3
1980	23,596	5,900	4.0
1990	59,785	9,400	6.4
2000	109,446	20,000	5.5
2010	208,628	28,000	7.5

- 7 The observations of Wiles and Green chime with a new report from Shelter which argues that addressing the land issue is the only way to properly close the current housing supply gap.<sup>5</sup> This report concludes that the land market is at the heart of the housing development industry: therefore improving its ability to provide land for development at reasonable volumes and prices is the greatest challenge facing housing supply policy today. They go on to point out that public policy levers in this area have largely fallen into disuse, leaving land supply at the mercy of an opaque market and an unresponsive planning system.
- 8 A recent major international review of land supply and planning systems, conducted by the Cambridge Centre for Housing and Planning Research, found that those countries which have demonstrated greatest success in housing delivery are much more proactive in the land and development market than the UK.<sup>6</sup> The authors conclude that a new approach to acquiring and releasing land is required, as are new development vehicles, able to deliver housing at scale. The study also stresses the need to allow new, smaller actors the opportunity to build.
- 9 While much of this research and commentary refers to the operation of the general housing market, Gibb and O'Sullivan conducted a study of social housing development costs in Scotland.<sup>7</sup> They found that the evidence supports the conclusion that the single most important factor in escalating social housing development costs in Scotland has been land price increases, particularly since 2002. Gibb and O'Sullivan found that residential land prices in Scotland rose from £200,000 per hectare in 1998 to £1,830,000 per hectare in 2006 – an increase of approximately 900%.

<sup>5</sup> Griffith, M and Jefferys, P (2013), *Solutions for the Housing Shortage*, Shelter UK

<sup>6</sup> Monk, S, Whitehead, C, Burgess, G and Tang, C (2013), *International Review of Land Supply and Planning Systems*, Joseph Rowntree Foundation

<sup>7</sup> Gibb, H and O'Sullivan, T (2008), *The Cost of Social Housing Development*, SFHA / Glasgow University

## 21.1 Scale of Need and Nature of the Problem

- 10 Housing supply in Scotland is facing significant challenges over the coming years from population growth and demographic changes. Scotland's already growing population is projected to increase by a further 10% (760,000) by 2035. In addition, steadily improving life expectancy will lead to a 75% increase in people aged 75 and over by 2035, and there is a projected 44% increase in the number of single person households within the same timeframe. The cumulative impact of these trends is that Scotland will have an additional 500,000 households (an increase of 21%) by 2035, leading Audit Scotland to conclude that around 500,000 new houses will need to be built between now and 2035.<sup>8</sup>
- 11 It should be borne in mind that the precise level of housebuilding required will also be influenced by the life and performance of the existing housing stock. Of the homes we will inhabit in 2050, around 80% of them are already standing today. In a nutshell, investing in regular maintenance and house improvements reduces the demand for new houses. There are currently 2.5 million homes in Scotland's existing housing stock. Of these, around 600,000 are the responsibility of local authorities and social landlords, while the overwhelming majority, 1.9 million, are privately owned.<sup>9</sup> In 2012, a physical survey of dwellings as part of the Scottish House Conditions Survey was undertaken on 2,787 houses of which: 1,754 were owner-occupied and 292 were privately rented. This sample of 2,046 privately owned houses does provide a reasonably accurate picture of the condition of privately owned housing. The Group considers that without a strategy to address particularly the poorest housing, this situation is likely to have an adverse impact on future housebuilding targets.
- 12 In their response to the Audit Scotland report, the Scottish Government "broadly agree with the scale of future need and demand".<sup>10</sup> To achieve this target over the next 20 years will require the building of 25,000 houses a year, a figure which is considerably more than the 14,000 houses built in Scotland during the course of last year. A particular concern in discussing housebuilding targets, is the collapse in the number of new homes being built by the private sector, which have fallen from 21,656 in 2007/8 to 10,039 in 2011/12.
- 13 This housebuilding target is referred to within the Scottish Planning Policy, currently under review.<sup>11</sup> This highlights the important contribution which the planning system can make towards delivering the required number of houses, by "identifying and allocating a generous supply of land". The statement does however acknowledge that "delivery of housing does not rely solely on the allocation of appropriate land in the development plan", citing "the capacity of the construction industry and the functioning of the housing market" as other important factors.
- 14 The following graph of new house building trends in Scotland (Fig. 20) shows that the required target level of 25,000 new houses per year was barely reached at the height of the pre-financial crisis housing boom, and as such, is extremely unlikely to be reached in the foreseeable future by the current housing market. Meeting housebuilding targets will require an **acceleration** of housebuilding in Scotland, whereas the supply of new houses is currently largely in the hands of an industry whose "*business model is predicated on the slow release of new houses onto the market*".<sup>12</sup>

<sup>8</sup> *Housing in Scotland*, (2013), Audit Scotland

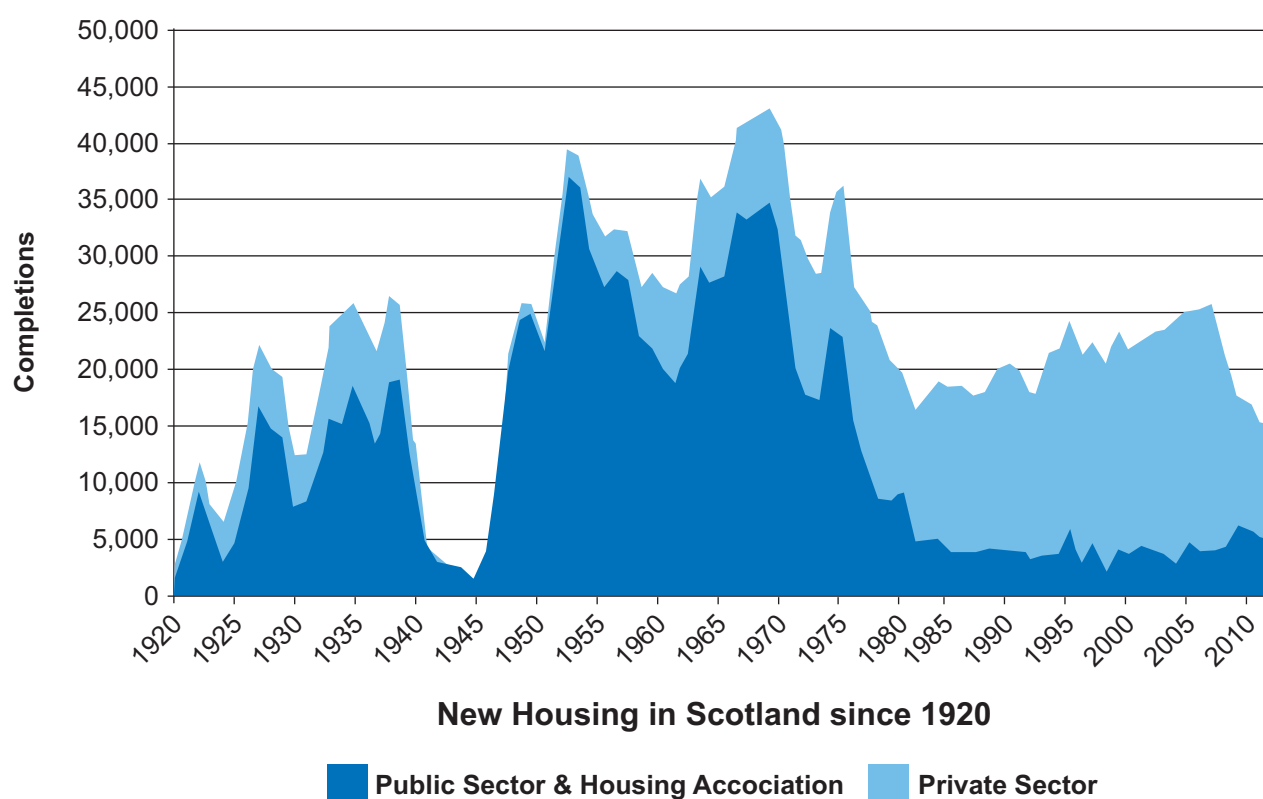
<sup>9</sup> *Housing in Scotland*, (2013), Audit Scotland

<sup>10</sup> *Public Audit Committee Paper (2013) SG Response to Audit Scotland's Housing in Scotland Report*

<sup>11</sup> *A statement of the Scottish Government's policy on nationally important land use planning matters (2010)*

<sup>12</sup> *Barker, K (2004), Review of Housing Supply – Delivering Stability: Steering Our Future Housing Needs, Office of the Deputy Prime Minister*

**Fig. 20 Housing Statistics for Scotland 2013: Key Trends Summary, Scottish Government.**



- 15 It is interesting to note that the period of greatest new house building in the early fifties and late sixties was characterised by a much higher level of public housing and a more proactive role being played by public agencies. When one considers both the historical data, and the experience of other European countries, it is difficult to see how the housebuilding targets required can be delivered without a greater level of market intervention involving a redefined role for the public sector. It is important to stress that market intervention today does not necessarily need to mean public sector construction. Making land available through the active management of the land supply would actually encourage new private sector players to come forward, achieving the diversity of producers essential to increasing production.
- 16 The Scottish Government's current Planning Policy also goes on to say that "the planning system should enable the development of well-designed, energy efficient, good quality housing in sustainable locations".<sup>13</sup> High standards and good quality placemaking are laudable ambitions, but the reality is that within the UK housing market, the private sector is building some of the smallest, least energy efficient and, arguably, poorest designed houses in Europe. The Scottish Government has been committed to placemaking at a policy level for a number of years now, but this progressive policy is unlikely to be fully realised through the operation of the current planning system alone. It is therefore essential, that any market intervention in the housing market is equally designed to improve standards and placemaking.

<sup>13</sup> A statement of the Scottish Government's policy on nationally important land use planning matters (2010)

- 17 In their first annual report in 2008, the Scottish Government’s Council of Economic Advisers concluded that *“too much development in Scotland is a missed opportunity, and of mediocre and indifferent quality”*.<sup>14</sup> This is what Gulliver and Tolson describe as *“placeless, single-use housing development, characterised by poor estate layout, over-engineered roads, dominant parking, poor amenity space, lack of connectivity, and bereft of facilities and planting”*.<sup>15</sup>
- 18 As the levels of private housing output have increased over the past 30 years, the housebuilding sector has become increasingly dominated by a smaller number of larger firms. To give some sense of scale, one of the UK’s top three house-builders sold almost 9,500 new houses alone in 2010.<sup>16</sup> The business model of volume house-builders is essentially speculative and involves the need to continually land bank. In addition, the volume house building model does not suit much of rural, and particularly remote rural, Scotland, and this is reflected in the limited involvement of these companies in many rural areas. In general, fewer and larger sites, controlled by fewer and larger companies is unhealthy in terms of competition, local placemaking, design and quality standards, housing choice, house prices and local production and supply chains – all of which are essential elements for creating sustainable communities.
- 19 Unlike the UK, many European countries have a much more diverse house building industry with significant levels of ‘self-build’ being commonplace. The term ‘self-build’ refers to small scale housing development, where houses are built or procured by the people (acting individually or collectively) who will actually live in them. This includes the kind of community-led, co-operative or mutual home ownership initiatives which have been so successful in mainland Europe. Crucially, the self-build model removes the speculative element which characterizes the dominant volume housebuilding model. Because people are building homes to live in, rather than houses to sell, self-build also leads to more energy efficient houses, which tend to be designed to a higher standard.
- 20 In the UK, self-build currently accounts for between 10% and 15% of the market. In many EU countries that figure is nearer 50%.<sup>17</sup> In terms of land supply, the Office of Fair Trading, in their 2008 Report on Housebuilding, point out that *“in terms of ensuring that land which is already available for housing is used efficiently and output maximised, it is important to maintain a vibrant self-build sector”*.<sup>18</sup> However, in terms of land reform, a strong self-build sector is also essential if we want to diversify home ownership and encourage the development of community-led initiatives and alternative housing models such as mutual home ownership and different forms of co-operative housing.
- 21 The Review Group considers that a strong self-build sector is a key factor in the efficient use of land and in encouraging different forms of home ownership. The Group recommends that encouraging and supporting the development of a vibrant self-build sector should be an explicit aim of housing strategy in Scotland.**

---

<sup>14</sup> Scottish Government’s Council of Economic Advisers, (2008), *First Annual Report*

<sup>15</sup> Gulliver, S and Tolson, S, *Delivering Great Places to Live, 10 Propositions aimed at Transforming Placemaking in Scotland*

<sup>16</sup> Source: Adams, D (2013), *Why Not Build Faster (and Better)?, Presentation to LRRG*

<sup>17</sup> Parvin, A, Saxby, D, Cerulli, C and Schneider, T, (2011), *The Right To Build: The Next Mass-Housebuilding Industry*, University of Sheffield School of Architecture

<sup>18</sup> *Housebuilding Market Study*, (2008), Office of Fair Trading

## 21.2 Housing and the Economy

- 22 As has been all too well demonstrated in recent years, the fortunes of the housing market and the wider economy have become inextricably linked, and therefore efforts to intervene in the housing market require to take cognisance of any implications for the wider economy. Most commentators recognise that the UK has become too dependent on the banking system to support our housing system, and we are arguably too dependent on our housing system to support economic growth. An economic growth policy built largely on rocketing house prices and consumer debt (UK mortgage debt stood at £1.237 trillion in 2010) led to unsustainable levels of borrowing and ultimately the financial crash in 2008, triggered by imprudent lending and the weakening of, in particular, the US economy.<sup>19</sup> The Barker Review draws attention to the problem of property inflation unhelpfully being counted as “economic growth”, and points out that this is also a major contributor to social inequality.<sup>20</sup> High housing costs, Barker goes on to argue, impact negatively on wider economic performance by reducing labour market mobility and making the UK an increasingly expensive place to do business.
- 23 Central to UK housing policy for the last 30 years has been the support and popular demand for home ownership. However during her recent visit to the UK, Raquel Rolnik, the UN Special Rapporteur on Adequate Housing, while accepting that “*home ownership has provided housing for more than one generation and it is deemed a common aspiration for many*” went on to warn that “*the takeover of the housing sector by the finance sector has exposed many households to a highly volatile market, with skyrocketing prices during the boom years and, since 2008, a credit crunch which has essentially paralysed access to credit... various stakeholders have warned of potential risks once the interest rate on mortgages starts to rise.*”<sup>21</sup>
- 24 UK house price inflation is currently around two and a half times the rate experienced in the rest of Europe. While there is no clear consensus, an increasing number of economists now believe that house prices in the UK are much too high. This has significant macroeconomic consequences, not least of which is the fact that the finance and banking system is based on current land values, and any devaluation of land would therefore significantly undermine both its sustainability, and the role it plays in underpinning the economy. Any devaluation of land would also have serious consequences for many households, for whom the house is invariably the family’s major financial asset.
- 25 While the case for market intervention to deliver Scottish housebuilding targets is compelling, any new policy would have to be implemented sensitively, in a way which minimised disruption and dislocation, and avoided pushing thousands of Scottish households into a negative equity situation.

---

<sup>19</sup> LRRG Briefing

<sup>20</sup> Barker, K (2004), *Review of Housing Supply – Delivering Stability: Steering Our Future Housing Needs*, Office of the Deputy Prime Minister

<sup>21</sup> *Interim Report of Official Visit to the UK of Raquel Rolnik, UN Special Rapporteur on Adequate Housing*, (2013)

### 21.3 Housing Land Corporation

- 26 “Without a step change in our attitude towards fixing the housing crisis we’ll stay locked into a boom and bust housing market which increasingly crowds out young, poor and vulnerable people”. – Joseph Rowntree Foundation.<sup>22</sup> The solution to achieving Scottish Government housebuilding targets, in a way which delivers quality placemaking and improved housing standards is likely to be characterised by:
- Managing the land supply in the public interest
  - Capturing a greater percentage of rising land values to support the public interest
  - Lowering land and house prices
  - Encouraging a greater diversity of housing providers
- 27 The Group believes that central to any solution is the establishment of a new national body with a clear public interest remit. The new body will be referred to as the Housing Land Corporation (HLC), but whether it would require to be established as a statutory corporation is less important than the proposed function of the agency, which is central to our proposition. Working alongside local authority planners the HLC would achieve its public interest objective by taking land into public ownership at a low but fair price, investing in the necessary infrastructure, and then selling the land to house builders as serviced sites or plots. In addition to facilitating more house building (better designed and more energy efficient) more quickly and more cheaply, land ownership would provide increased control and ability to influence the quality of placemaking.
- 28 The HLC would acquire short-term as well as strategic land and would bank enough land to fully address the number and quality of houses needed. It would introduce variety into the market by selling to different kinds of housebuilders and not operate exclusively in the interests of the volume house builders. In addition to delivering sufficient land to meet housing supply needs, the HLC would be charged with contributing to the stabilisation of the price of land by bringing land price inflation in line with the European average. Over time this in turn would begin to readjust the mortgage to earnings ratio.
- 29 Investing the HLC with the necessary back-stop powers (a minimum of the compulsory purchase powers discussed in Section 8) will be critical to its success, as will the necessary confidence and ability to utilise these powers effectively. The HLC could decide to subcontract some activity to some of the larger local authorities (possibly providing training and capacity building if required).
- 30 The HLC would operate within planning guidelines and this should ensure a meaningful partnership with the relevant local authority. Where required, the HLC would be able to establish joint venture companies to develop land in a particular area. This approach would bring the new public body together with developers, land owners, local authority and community interests. The model allows for those communities whose interest was greater than simply commenting on proposals, to have a far more direct role in development. In this situation it may be possible for communities, through their representative bodies, to be involved in any joint venture company being established, thus furthering opportunities for community ownership.

---

22 Monk, S, Whitehead, C, Burgess, G and Tang, C (2013), *International Review of Land Supply and Planning Systems*, Joseph Rowntree Foundation



- 31 The HLC would clearly require borrowing powers, and it is likely that banks would be more inclined to lend to the agency, than to existing developers. The cost of acquisition of land could be minimised or controlled in one of two ways, dependent on how many land owners were potentially involved. If a single owner was involved, the land would transfer to the HLC at the point at which it was allocated for housing, and the owner would be compensated to the tune of the residual value of the land, once public contributions had been deducted. This would still be greater than its agricultural value. In the case of several owners, a number of approaches could be taken. There may be some merit in exploring an approach being developed by the London School of Economics, which involves owners engaging in a silent auction. If adopted, this would enable the agency to balance cost and location in deciding which land to acquire.
- 32 There is no reason why the HLC could not be cost neutral, or thereabouts, for the taxpayer over the medium term. The operation of buying, servicing and selling the land should only require additional PSBR (Public Sector Borrowing Requirement) borrowing at the outset, since the resale of land to housebuilders would claw back much, if not all, of this initial cost. A rolling fund could thus be created to enable this approach to be sustained over time. Moreover the creation of new homes will increase Council Tax revenues to the relevant local authorities.
- 33 The intervention of the HLC in the housing market is also likely to make it (and the macro economy) much less susceptible to the kind of booms and slumps which have characterised economic performance for years. The example of Germany is instructive, where over a lengthy period of time their interventionist approach has resulted in a freer, more diverse and much better functioning market which has largely avoided the boom and bust of the UK housing market.<sup>23</sup> This therefore presents an opportunity for Scotland to take a different path from the rest of the UK, which is likely to remain locked into the model of speculative house building for the foreseeable future.
- 34 This proposal would require to be explored further with those currently involved in the housing sector, and if implemented would require some form of readjustment for current house builders. However, in addition to boosting the self-build sector, the Group understands that the provision of serviced sites would be attractive to current housebuilders.
- 35 It should be recognised that a considerable amount of land zoned for housing development is currently in the hands of existing housebuilding developers, and it is likely that transition arrangements (over a five to ten year period) would be necessary to minimise disruption to ongoing housebuilding programmes. To address the possibility of medium and long term land banking, any interim arrangements could also include the introduction of a new ‘use it or lose it’ power for use when planning consent is being reapplied for.
- 36 **The Review Group considers that existing mechanisms are unlikely to deliver national housebuilding targets, in a manner compatible with Scottish Government place-making aspirations. The Group recommends the establishment of a Housing Land Corporation, a new national body charged with the acquisition and development of sufficient land to fully achieve these objectives.**

---

<sup>23</sup> Mark Brinkley podcast HPH019, entitled “How Does Self Build in the UK Compare to Germany?” March 2013

## 21.4 The Rural Housing Context

- 37 Whilst the creation of a Housing Land Corporation to markedly increase the supply of houses being built would benefit both urban and rural communities alike, housing policy has to be sufficiently nuanced to reflect the distinctive characteristics of urban and rural communities.
- 38 The urban environment has provided the context for much of this section, and the vast majority of the new houses will have to be built in our cities and towns. Responses to our Call for Evidence suggest that the urban housing problem is often characterised by insufficient social housing to meet housing need, the effective creation of housing ghettos, and the creation of commuting settlements. It was also felt that the location of new housing development on the green belt often undermined the viability of city and town centres, which require a certain level of population density to be sustained - often achieved through brownfield site housing development. Control over the assembly and ownership of land by the HLC, coupled with sympathetic local planning by local authorities, should ensure that many of these problems, including the need for better placemaking, could be more effectively addressed within the proposed new model outlined above.
- 39 In rural parts of Scotland, the unavailability of appropriate and affordable housing is frequently a major obstacle to achieving sustainable communities. Many rural communities face the challenge of arresting depopulation and, in particular, retaining young people within, what are often, fragile local settlements. Yet despite the importance of housing as a critical rural development issue, many organisations and commentators refer to the current situation as a 'rural housing crisis'. Levels of homelessness are markedly higher in rural areas of Scotland. There are higher levels of dampness and disrepair. The cost of housing relative to disposable income is also much higher in rural areas, due to a combination of higher building costs and lower than average incomes. Crucially, there is a far greater reliance on the private rental sector, which throws into sharp focus the patterns of land ownership in Scotland and the systems which govern land, and how these impact on the ability to fully address rural housing need.
- 40 In terms of addressing rural housing need, there are three issues which need to be considered: patterns of tenure and ownership, providing sufficient land for housing development (at the right price) and the most effective use of existing property. The concentration of land ownership in rural Scotland means that all three of these areas are still dependent to a large extent, on the attitudes and decisions of a relatively small number of people and the asset policies of a relatively few public sector agencies.
- 41 A 2012 survey of members of Scottish Land and Estates estimates that private estates currently let in excess of 9,000 houses, making them an important provider of rented housing in rural, and particularly smaller rural, communities.<sup>24</sup> There are clearly some examples of landed estates who have made a significant contribution to local housing provision, although this is by no means universal across all estates. The private rented sector in general makes an important contribution to overall housing provision within rural communities and it has been well argued that this could be further encouraged through changes to the UK taxation system which would encourage and incentivise rural land owners to further develop private rented housing provision.<sup>25</sup>

24 *Affordable Rented Housing, (2013), Extract from Scottish Land & Estates' Response to the Land Reform Review Group's Call for Evidence*

25 *Andrew Bradford in presentation to 2014 Rural Housing Conference in Birnham*

Fig. 21 Scottish Government's Urban/Rural Classification

## Scottish Government Urban/Rural Classification, 2011-2012

### 6 Fold Classification

- Large Urban Areas (with a population of over 125,000)
- Other Urban Areas (with a population of 10,000 to 125,000)
- Accessible Small Towns (with a population of 3,000 to 10,000)
- Remote Small Towns (with a population of 3,000 to 10,000)
- Accessible Rural (with a population of less than 3,000)
- Remote Rural (with a population of less than 3,000)

#### Note:

Accessible Areas are defined as those areas that are within a 30 minute drive time from the centre of a Settlement with a population of 10,000 or more, while Remote Areas have a drive time which is greater than 30 minutes.

© Crown copyright 2012. All rights reserved Scottish Government. Ordnance Survey Licence number 100024655.

Scottish Government GI Science & Analysis Team, August 2012, Job 5274 - KT



- 42 Tied housing accounts for around 40% of the rural private rented sector. Information on tied housing is patchy and the role of tied housing in a modern private rented sector and rural economy, and the condition and operation of tied housing, are issues that merit further investigation. Of concern within a land reform context is the potential number of tied housing tenants who do not have a proper tenancy agreement, and therefore lack the security which that affords.
- 43 About 97% of land in Scotland is designated as rural and this land mass hosts 976,000 people, less than 19% of the Scottish population.<sup>26, 27</sup> Fig. 21 the map of Scottish Government's urban/rural classification shows this. Given this situation, it is difficult to understand why accessing land for new housing development (both individual plots and small housing sites), continues to prove so problematic. There is a clear social imperative to develop the supply of housing, and particularly social housing, in many parts of rural Scotland, and it is envisaged that the HLC will accelerate the supply of land for this purpose.
- 44 The danger in chasing the kind of national housebuilding targets required is that the development of new housing in rural parts of Scotland is likely to gravitate towards larger rural settlements, as confirmed in the Planning Policy Review. While there are often good reasons for this, it is important that new housing is also built in villages and small rural communities to meet specific local housing need. We therefore need to ensure that increasing housing supply includes many more of the 'small scale interventions' which will tap into the kind of organic, imaginative, bottom-up solutions capable of renewing our villages and small communities. The Group recommends that the HLC should have explicit performance targets that recognise the needs of rural, as well as urban, communities.
- 45 It is important that attention to rural housing (particularly in the smaller settlements) is given sufficient weighting within housing and planning policy and that more effort is made to identify and address very localised, specific housing need. An essential element of this approach is the encouragement of, and support for, community profiling or local housing needs analysis. Based on this information, the prioritisation and zoning of land around small vulnerable settlements for housing / affordable housing should be incorporated within Local Development Plans.
- 46 One of the easier ways to reflect the public interest in land, is at the point at which land is being sold or transferred. Introducing a public right of pre-emption, administered by the local authority, at the point of sale or transfer would provide another mechanism to make more land available for acute housing need in fragile rural communities (see Section 17). This would enable a local housing body or community self-build group to register an interest in a possible housing site, and have a specified period (say, 6 months) to match the best price offered if the land comes on to the market. In administering the public right of pre-emption, the local authority would have to be satisfied that the social need case for acquiring the land was in the public interest.
- 47 In many rural areas, the housing problem is exacerbated by second homes and holiday homes, which can impact negatively on both housing supply and house prices. In response to this situation, various measures have been introduced, both within the UK and in other countries, in an attempt to address local housing need by restricting second or holiday

---

26 *Land Reform Policy Group – Identifying The Problems (1998), The Scottish Office*

27 *National Statistics – Rural Scotland Key Facts (2011) Scottish Government*

homes. These have included planning measures, financial incentives and disincentives, occupancy control, rural exception policies, marketing campaigns and local taxation. In a study commissioned by the Scottish Government in 2009, Satsangi and Crawford concluded that these measures tended to have a limited impact and often had negative consequences.<sup>28</sup> In some cases the measures introduced proved difficult to administer.

- 48 Despite those limitations it is worth noting that local authorities currently have discretionary powers to reduce or remove second and empty home council tax discounts, and this has enabled some local authorities to build up useful pots of money for new, affordable housing.<sup>29</sup>
- 49 The Satsangi and Crawford study reinforces the conclusion that the land supply issue remains at the heart of the rural housing problem. As such, the Review Group believes that the proposed Housing Land Corporation with the necessary powers, combined with greater recognition of specific rural housing need in the planning process offers the best prospect of delivering the right kind of rural housing, in the right place and at the right price. This role should involve close liaison with key housing development agencies.<sup>30</sup>
- 50 **The Review Group considers that specific attention requires to be focused on the housing needs of rural communities. The Group recommends that in these areas, the Housing Land Corporation should have explicit performance targets that recognise the specific needs of small rural communities and an extended operational role to enable these to be addressed.**

## SECTION 22 - EXISTING HOUSING

- 1 As has been referred to above, the housing challenge facing Scotland is both complex and multi-dimensional. Our ability to effectively address issues such as homelessness, access to the housing market (particularly for young people and working people on low incomes), dampness and disrepair, housing investment and finance, negative equity for owners and house price to earnings ratios will have a profound impact on the sustainability of communities, economic development and social stability. Clearly, a fairer and more stable housing market is at the heart of a successful Scotland. It is beyond the scope of this report to comprehensively address all these issues in depth, but in addition to the issue of housing supply, land reform can provide some useful insights, and possibly offer some potential remedies, to other aspects of housing in Scotland.

### 22.1 Common Property

- 2 Land reform is not just about vast tracts of rural land. Around 37% of households in Scotland live in flats, and therefore share with other households common elements such as entrances, stairwells, structural walls, roof and communal gardens. Flats are physically and financially

---

28 *Satsangi, M and Crawford, J, (2009), An Investigation of Occupancy Conditions in Rural Housing, Scottish Government*

29 *LRRG Briefing*

30 *Rural Housing Service, Small Housing Trusts, Housing Associations and the Co-operative movement*

inter-dependent. As a consequence, the actions, or inaction, of one or more owners can impinge directly on the safety and security of a neighbour's property. To ensure the proper functioning of this type of housing, there is the need to have a robust legal framework in place.

- 3 Tenure arrangements (rights, obligations and responsibilities) of flat ownership are markedly different from those associated with house ownership, and in the interests of all flat owners, there is a need to have a system of rights and responsibilities which covers both the individual ownership and collective governance of such property.
- 4 In legislative terms, the Abolition of Feudal Tenure (Scotland) Act 2000 was the core element of a three part reform of Scotland's property laws. Abolishing feudal title demanded reform of title conditions, or 'real burdens'. This was addressed in the Title Conditions (Scotland) Act 2003, following which common law was then reformed under the Tenement (Scotland) Act 2004. With these 3 Acts in place, feudal tenure was finally abolished on the 28 November 2004.
- 5 While these reforms have gone some way to improving the ability of flat owners to better control governance matters within the common elements of the building, the main change has been that they now allow for more appropriate title revisions to be made. However, these reforms did not seek to challenge the fact that an infinite variety of title deed provisions would continue. While the basic provisions in the Tenement Act could be incorporated into title deed provisions, this seldom happens in practice, with solicitors continuing to draft title deeds which are specific to a development, often on the instructions of the developer.
- 6 In comparative terms, the current arrangements in Scotland for managing, maintaining and improving common property are relatively weak in relation to other European countries. Bailey and Robertson point out that the approach taken in Scotland to accommodating individual ownership and collective governance is in stark contrast to that adopted by other countries.<sup>1</sup> Rather than persist with pre-existing property ownership arrangements, other countries have set down new legal arrangements that acknowledge both the individual and collective aspects of ownership within flats, and other types of multi-owned housing. Under such arrangements, individual ownership of a flat carries with it an obligation to be a member of an owners' association which either owns, or has the responsibility for, the governance of the building's common elements. Legal statutes and associated regulations set down the associated rights and responsibilities of the owners, and provide for a standardised organisational structure.
- 7 There appears to be a generally held view in Scotland that the 3 Acts have effectively addressed many of the anomalies for flat owners. However the fact that the Scottish Parliament has seen fit to introduce further provisions in the Housing (Scotland) Act 2006 and in the current Housing (Scotland) Bill suggests that we do not, as yet, have a sufficiently comprehensive and robust legal framework in place. While all the additional measures are welcome, they are by nature incremental and piecemeal, and common property owners now require this process to be completed.

---

<sup>1</sup> Bailey, N. & Robertson, D. (1997) *Management of Flats in Multiple Ownership: Learning from other Countries*

- 8 **The Review Group recognises that it is now 10 years since the Abolition of Feudal Tenure etc (Scotland) Act, 2000, the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004 were introduced. The Group recommends that the Scottish Government introduces a more comprehensive legal framework for common property, which clarifies and modernises the rights and responsibilities of both the individual ownership and the collective governance of such property.**

## 22.2 Empty Homes

- 9 It is estimated that there are around 23,000 long-term empty private homes in Scotland.<sup>2</sup> This represents a considerable potential source of 'new' housing, along with the prospect of increased council tax revenue for local authorities. In response to this situation, the Scottish Government-funded Scottish Empty Homes Partnership, co-ordinated by Shelter Scotland, help local authorities work with empty home owners to bring their properties back into use. To date this has mainly involved the use of persuasion, providing information and signposting, practical help with refurbishment and renovation, and the use of various incentives.
- 10 Whilst at a relatively early stage in its development, the Scottish Empty Homes Partnership has brought around 200 properties back into the housing market. Shelter expect that the number of empty house being returned to the market will begin to accelerate as various projects increase and mature, and as further local authorities come on board. It is however recognised that there are limits to what can be achieved through voluntary engagement alone, and this has led Shelter to propose a new 'Housing Re-Use Power' (HRP).
- 11 The HRP draws on experience from England which demonstrates that providing information, advice and incentives works best when accompanied by a backstop power. The HRP is, however, a measure which has been specifically tailored to the Scottish context. The process would involve a number of stages. If attempts to engage with the owner fail, the local authority could declare the property 'long term empty' and apply for an order to secure the property for re-use (for either rent or sale). At this point a final notice would be sent to the owner. The local authority would then bring the property up to specified standards, and use the subsequent sale price or rent to recover the costs of this work. The owner would be entitled to any financial balance. The process would include an opportunity for the owner to appeal.
- 12 It is important to recognise that the introduction of this kind of statutory power would not, directly, deliver a huge number of empty homes back into the market – its main strength is that it would encourage many more owners to engage with the Scottish Empty Homes Partnership on a voluntary basis, and give some much needed 'teeth' to the subsequent negotiations. Having said this, the potential usefulness of having a specific mechanism which would enable local authorities to bring particular and problematic long term empty homes back into use, should not be under-estimated.
- 13 Given the identified need for new housing the Review Group believe that there is significant merit in giving local authorities a HRP, and that in defined circumstances for particular properties, to address local blight and / or to meet specific local housing need – there is

---

<sup>2</sup> *Housing in Scotland*, (2013), Audit Scotland

also a case to be made for local communities, or appropriate community body, having a right to trigger the HRP.

### 22.3 Private Rented Sector

- 14 The private rented sector (PRS) is a housing tenure with properties owned and let by private landlords on the open market. There were an estimated 267,000 households in the PRS in Scotland in 2011, accounting for 11% of households.<sup>3</sup> Despite being numerically less significant, the highest percentages of PRS are to be found in rural Scotland, which is one of a number of fairly distinct market segments within the PRS. These also include executive housing, student accommodation, social / quasi-social housing and urban market rent. In commenting on the private rented sector, some consideration needs to be given to specific and local market conditions.
- 15 The current tenancy regime in Scotland originates from the Housing (Scotland) Act 1988. Most tenancies in the PRS are 'assured' tenancies with the vast majority of lets being 'short assured' tenancies (tenancies which run for a minimum of 6 months).
- 16 Until recently, the PRS in urban Scotland was in general viewed as a tenure most suitable for those seeking flexibility in their living arrangements. In this sense, it was regarded as a 'transitional' housing option - on the way to owner occupation or social housing. However, a major consequence of the credit crunch is that the PRS is increasingly being considered as a longer-term housing option. Younger people in particular are finding it increasingly difficult to enter the housing market and research by the Joseph Rowntree Foundation predicts that by 2020, the private rented sector will house 37% of all young people in the UK.<sup>4</sup>
- 17 In 2013, the Scottish Government embarked on the development of a new strategy for the PRS, which constitutes the first review of the PRS tenancy regime since devolution.<sup>5</sup> The document recognises that the tenancy regime is central to the efficient functioning of the sector, and states that "*a key component of a quality private rented sector is a tenancy regime that is fit for purpose*". The Scottish Government's PRS Strategy Group identified two key issues: security of tenure (a tenant's right to remain in a property and the circumstances in which the landlord may seek to regain possession of their property), and length of tenancy. The Strategy Group recognise that a balance will have to be struck between those people who will continue to look for flexibility from the PRS and the increasing number of people who are now looking to settle in the sector for the medium or longer term.
- 18 No consensus was reached on these crucial issues within the PRS Strategy Group, nor within the consultation responses received. The Scottish Government subsequently established a stakeholder-led PRS Tenancy Review Group to examine the suitability and effectiveness of the current tenancy regime and make recommendations to Scottish Government Ministers.

---

<sup>3</sup> *A Place to Stay, A Place to Call Home: A Strategy for the Private rented Sector in Scotland*, (2013), Scottish Government

<sup>4</sup> *Clapham, D, Mackie, P, Orford, S, Buckley, K and Thomas, I, (2013), Young People and Housing, Joseph Rowntree Foundation*

<sup>5</sup> *A Place to Stay, A Place to Call Home: A Strategy for the Private rented Sector in Scotland* (2013), Scottish Government



- 19 Sprigings points out there are significant changes taking place within the housing market, and observes that as long as policy makers and politicians fail to recognise the long-term expansion and changing nature of the PRS, the less discussion we will have as a society about the kind of PRS we want and need.<sup>6</sup> Prior to the economic crisis in 2008, the PRS experienced steady growth across the UK – from 9.7% of private housing stock in 2001 to 14.7% in 2008.<sup>7</sup> However since the onset of the crisis, the growth of the PRS has increased sharply, with recent research showing a 98% increase in the number of households renting privately over the last 5 years.<sup>8</sup>
- 20 As with the rest of the UK, Scotland is currently experiencing a significant change in the demand side of the PRS market. For many people looking to access housing, the shortage of houses and the unavailability of suitable mortgages mean that the PRS is increasingly their only realistic option. A large proportion of them are young couples, looking to set up home for the first time. They require long term housing security in an effort to integrate employment, transport, childcare and schooling arrangements. A number of years ago the vast majority of this cohort would most likely have become new home owners. The character of this new demand contrasts sharply with the minority of problematic tenants who get into rent arrears, damage properties and give rise to the nervousness which PRS landlords display when discussing tenure change.
- 21 These trends would suggest that we are at a critical juncture in the development of the PRS in Scotland, which has the potential to play a far greater role in meeting housing need. Shelter point out that currently 272,653 Scottish households live in the PRS – but by 2020, one in five UK households is expected to rent privately.<sup>9</sup>
- 22 We are witnessing a significant and growing number of people seeking a longer term housing option within a market previously characterised by transition. This demands that we create a private rented sector equipped to address current and future housing need. As Shelter point out “we want to see a form of private renting that can offer a home, with all that implies – dignity, security and stability.”
- 23 The Director of Shelter Scotland believes we can learn from the German housing model. *“In Germany”, he points out, “more people rent than own their own homes. Renting is seen as a normal and long term choice, with landlords equally seeing investment in rented property as a long term investment. Tenancies are usually for unlimited periods of time”.* The Joseph Rowntree Foundation (JRF) recently proposed a Four Point Housing Plan which included a demand to create a better alternative to home ownership.<sup>10</sup> The JRF acknowledges that there is no one answer to this challenge, but claims that *“a rental sector with sensible rents and decent-length tenancies is a good start”.*
- 24 **The Review Group considers that, to address housing need and the changing nature of the private rented sector, a change is required in the nature of tenancy arrangements within the sector. The Group recommends that the Scottish Government introduces longer and more secure tenancies in the private rented sector.**

---

6 Sprigings, N, (2013), *The End of Majority Home Ownership: The Logic of Continuing Decline in a Post-Crash Economy, People, Place and Policy Online*

7 Wilcox and Pawson, *UK Housing Review, 2011/12*

8 Citylets letting portal, *Quarterly Report (July, 2013)*

9 Shelter Scotland (July, 2012), *Charity calls for Scottish Government to be ambitious and bold – rebuild private rented sector fit for families*

10 Kelly, K (2013), *A Four Point Plan to Fix the UK Housing Market, Joseph Rowntree Foundation*

## 22.4 Social Housing Tenants Right to Buy

- 25 Following a statutory consultation, the Scottish Government introduced the Housing (Scotland) Bill to the Scottish Parliament in November, 2013. Within the Bill, the Scottish Government is intending to end the Right to Buy (RTB) entitlement which exists for social housing tenants. If passed, the RTB will end 3 years from the date on which the Bill becomes law.
- 26 During the last 40 years, Britain has witnessed a dramatic change in the nature of property ownership, and this has been mirrored, to a large extent, in Scotland. In particular, the significant shift from council renting to owner occupation is perhaps the most fundamental and best known change. The 1979 Conservative Government's flagship RTB policy has transformed housing tenure throughout the UK and significantly influenced public attitudes towards home ownership.
- 27 The legislative basis for the RTB is the Housing (Scotland) Act 1987, with subsequent reforms introduced in the Housing (Scotland) Act 2001 and Housing (Scotland) Act 2010. These reforms covered discounts, qualifying periods and exemptions, and in general, introduced a range of measures which, in direct response to pressure on both the social housing stock and budgets, limited the scope and operation of RTB.
- 28 Despite these restrictions to RTB policy in recent years, and whilst sales have fallen to historically low levels, the Scottish Government point out that since its introduction, over 450,000 houses have been sold through the scheme. This represents a huge loss of capacity in the social housing stock in Scotland, and has placed increasing pressures on housing providers. RTB has also had a profound and detrimental effect on many communities, with the policy contributing to the even greater degree of marginalisation which many of our disadvantaged areas are now experiencing.
- 29 It has pointed out while all these public sector homes have been sold off through RTB, around 157,000 individuals and families are on council lists, waiting for a home to call their own. Scottish Government figures show that between April and June 2012 alone there were almost 11,000 applications for homelessness assistance, often from some of the most vulnerable people in society. Whilst current RTB sales are at a relatively low level, the longer term impact of abolition on supply nationally is still significant. The Scottish Government estimate that over the next decade up to 15,500 social houses will be protected from sale with the phasing out of RTB.
- 30 The Review Group considers RTB to be an obstacle to developing a coherent housing policy in Scotland, and a mechanism which acts as a barrier to providing sufficient social housing to meet the housing needs of some of the most disadvantaged people in society. At the start of this part of the report, attention was drawn to international human rights legislation which obliges all governments to *"take steps to ensure and sustain the progressive realisation of the right to adequate housing, making use of the maximum of its available resources"*<sup>11</sup> The continued funding of RTB would clearly be an inefficient use of public resources and there seems little doubt that RTB discounts benefit individual households at the expense of the wider public interest.

---

11 *International Covenant on Economic, Social and Cultural Rights, Articles 2 and 11 (1976)*

- 31 The Review Group supports the proposal within the Housing (Scotland) Bill to abolish the RTB.

## 22.5 Mobile Homes

- 32 Mobile homes, often known as ‘park homes’, are used by their owners all year round as their permanent home, and are situated on a residential ‘park’. For various reasons, not least the lack of a clear definition, it is difficult to be precise about how many households in Scotland live in mobile homes. A 2007 Scottish Government report conducted a local authority survey which identified 4,121 residential mobile homes.<sup>12</sup> A more recent investigation by Consumer Focus Scotland identified 92 park home sites in Scotland, housing an estimated 3,314 mobile homes.<sup>13</sup> While there are no figures available with which to accurately project the trend in mobile home ownership, it is generally thought that the underlying trend is upwards.
- 33 The rights and protections of mobile home owners are covered by specific legislation for mobile homes; residents are not covered by general housing law. This is because mobile home residents own their home, while a site operator owns the land it stands upon, and residents pays ground rent or a ‘pitch fee’ to the operator. This tenure arrangement means that mobile home residents, while owner-occupiers, are generally dependent on their site operator for their electricity, gas and water supplies and all park maintenance and improvements.
- 34 Scotland has a separate legal framework governing mobile homes to that of the rest of the UK. In response to a perceived lack of security of tenure for mobile home owners, the Scottish Government established a Residential Mobile Homes Stakeholder Working Group, and in September 2013, introduced a revised Scottish Statutory Instrument (SSI).<sup>14</sup> This gave mobile home owners who live permanently in their homes a number of new rights and responsibilities, including security of tenure (reflecting the site owner’s own tenure position) and the right to sell without approval of the site agent. The SSI also gives mobile home owners the right to pass on their home to a member of their family without paying commission to the site owner.

## 22.6 Hutting

- 35 A hut in a Scottish context can be defined as a small and simple building providing informal accommodation in a rural location. Its function is to enable individuals, families and groups to relax and enjoy the countryside away from the stresses of modern living and work. In a general sense, hutting involves a mode of living which, by contrast to conventional urban living, is simpler, closer to nature, smaller in scale and which utilises less energy, space and materials.
- 36 The largely working class tradition of hutting developed in a fairly organic and fragmented way in the early 20th century when small holiday huts began to be built on land close to the

<sup>12</sup> *Residential Mobile Homes in Scotland (2007)*, Mark Bevan, Scottish Government Social Research

<sup>13</sup> *Stories To Be Told (2013)*, Consumer Focus Scotland

<sup>14</sup> *The Mobile Homes Act 1983 (Amendment of Schedule 1) (Scotland) Order 2013*

main industrial cities. Hutting sites evolved in different ways, in different parts of the country, influenced in part by the motivation and attitudes of the landowners who provided land for hutting sites. As far as can be determined, no new sites were developed after the 1930's, possibly reflecting the increasing planning control of land use.

- 37 In the late 1990's, a well-publicised conflict between the owner and occupiers on the hutting site at Carbeth brought the issue of hutting to the attention of Government and the Scottish Executive commissioned a study of hutting in Scotland.<sup>15</sup> This identified 37 hutting sites, containing around 630 huts. These sites were located largely in a band from the Angus coast to the Clyde coast, with extensions into East Lothian, the northern Borders and the Solway Coast. While there were 3 large sites which contained upwards of 50 huts, the overwhelming majority of the sites identified (74% of the total) contained less than 20 huts, and in many cases less than 9 huts. The study also found that huts were rented on 27 of the 37 sites identified, and owned on the remaining 10 sites.
- 38 More recently there has been a renewed interest in hutting, influenced in part by the perceived benefits of similar traditions in Norway, Germany, Sweden and Finland for example.<sup>16</sup> Scottish Government Ministers have recently commented positively on hutting in the media, and a couple of motions in support of hutting have also been passed within the Scottish Parliament.<sup>17, 18</sup>
- 39 In response to increasing demand for new hutting sites, the Scottish Government recently initiated a pilot project on a Forestry Commission site, and, if successful, this could potentially open the door for other hutting sites to be made available on suitable public sector land. If the hutting movement is to gain any kind of significant momentum however, there is a need for sites to be made available by private, as well as public, landlords. As farmers and rural land owners continue to diversify their businesses, the prospect of a rental income, for corners of land that in many cases will be largely unproductive, could well prove to be attractive. It is not therefore inconceivable that within the right kind of enabling framework, privately owned land for hutting sites could be made available.
- 40 Such an enabling framework requires the support of planning policy at both a local and national level, and this was recently picked up within the Scottish Planning Policy (SPP) consultation. Paragraph 69 of the SPP consultation document states that Development Plans should set out a special strategy which "*makes provision for housing and other residential accommodation in the countryside, taking account of the development needs of communities and the demand for leisure accommodation, including huts for temporary recreational occupation*". The Review Group supports the retention of this statement in the final policy document.
- 41 Consideration also needs to be given to the impact of building regulations and building standards on the construction of huts. Current building standards are uniform, and because huts have sleeping accommodation, etc, they fall within the category of 'a dwelling'. As such, huts have to conform to all building regulations and standards which apply to new houses and other residential forms of development. While appreciating the need for building

---

15 *Huts and Hutterers* (2000), the Scottish Executive Central Research Unit

16 [www.thousandhuts.org](http://www.thousandhuts.org)

17 Richard Lochhead (19.08.13) *newsnetScotland* and Paul Wheelhouse (15.07.14) *BBC News*

18 Motion S4M-00380 moved by Alison Johnstone, MSP and motion S4M-07327 moved by Jenny Marra, MSP

regulations and standards to be maintained, there is clearly a need to recognise the unique intention and recreational nature underpinning the form and construction of huts, and the Review Group would urge that this issue is also addressed.

- 42 The third issue is the nature of the tenure relationship between site owners and hutters. Legal opinion sought to date lays importance on the fact that huts are not occupied as principal homes, and rights of security of tenure within housing legislation are therefore inapplicable. This legal distinction needs to be recognised within the future development of hutting as a recreational activity. This will require a framework which, while better governing the relationship between the hutter and the site owner, does so in a way which does not discourage owners of rural property making new sites available. This could take the form of the kind of framework, defining rights and responsibilities, which has recently been developed by the Scottish Government for mobile home owners.

### **Final Remarks on Part 5**

- 43 In this part of the report, the Group has sought to address a number of fundamental issues which lie at the heart of achieving a successful and prosperous Scotland. Our review of the evidence suggests a general, underlying lack of understanding among many policy makers and decision makers about how key markets work in practice, in particular the housing market, the land market and the construction market. It is important to stress that markets are socially constructed, and that the ability to restructure or reconstruct markets lies within the gift of Government.
- 44 The Scottish Government has a clear vision of what it wants to achieve within the spheres of urban renewal, housebuilding and placemaking. However, the evidence suggests that existing mechanisms will not sufficiently address the challenges, nor deliver the Scottish Government's vision and targets. Within this part of the report we have offered an analysis and framework for change. We propose market interventions and the introduction of new rights which will empower the public sector and communities, diversify the construction and development sector and in so doing contribute to a more economically successful and socially just Scotland.



## PART SIX

### LAND OWNERSHIP AND USE

#### Introduction

- 1 In this Part of the Report, the Review Group considers a series of issues which were prominent in the submissions to the Group and which have long been the main focus of the land reform debate in Scotland.
- 2 In Section 23, the Group considers the flexibility that ownership gives rural land owners over their land use decisions and then, in Section 24, the Group considers the concentrated pattern of large scale private land ownership in rural Scotland.
- 3 In the final section in this Part of the Report, Section 25, the Group considers the role of tax concessions for land and incentive payments for land use, in the operation of the rural land market and the current pattern of rural land ownership in Scotland.

#### SECTION 23 - RURAL LAND USE

- 4 The relationship between land ownership and land use is straightforward at a basic level. As stated earlier in the Report, the ownership of land or land rights in Scotland conveys the right to use the land or rights as the owner chooses, subject to the legal terms of their title and the laws and regulations governing the use of land (see Part 2). Land use can therefore be said to flow from land ownership.
- 5 The choices of land owners over developments and changes of land use on their land which are covered by the statutory planning system are restricted by that system. There are also statutory controls over a wide range of aspects of rural land use including, for example, those relating to freshwater use and nature conservation. However, rural land owners can still be described as having considerable flexibility in how they choose to use their land. As the Scottish Government's Land Use Strategy comments *"It is true that land owners and managers make most direct decisions about land use"*, before adding *"but public influence strongly affects their decisions"*.<sup>1</sup> The examples given of how that public influence might be expressed are *"through the market, the policies of elected representatives or wider community opinion."*
- 6 An example of the flexibility of land owners' choices which was discussed by the Review Group is the many thousands of hectares of heather moorland in the Eastern and Central Highlands which are managed principally for grouse shooting and which could alternatively grow forests. It is an owner's choice whether they manage such areas, for example, for grouse shooting, commercial forestry, native woodland restoration, wild land to be left to develop naturally or a combination of these or other land use options. There is also generally considerable flexibility in how an owner might undertake one of these land uses,

---

<sup>1</sup> *'Getting the best from our land – A land use strategy for Scotland' (SG, 2011)*

unless they are applying for a public sector grant and therefore need to conform to its standards and conditions.

### Land Use Strategy

- 7 The Scottish Government's Land Use Strategy (LUS) is a major development in the context of the current flexibility, as it provides a new public policy framework for decisions by land owners and managers about land use. The LUS, which was published in 2011, has the title 'Getting the best from our land' and starts from the point that *"there is a wide consensus that we are not getting the best from our land"*.<sup>2</sup>
- 8 The LUS recognises Scotland's land as a finite resource and a fundamental asset which is subject to increasing demands and expectations, and that *"the ways in which we use Scotland's land resources in the future will be critical to our economic performance, to our environment, to our sense of place and community, and to our quality of life"*. The Strategy *"represents the Government's statement of policy on land use"*.<sup>3</sup>
- 9 The aim of the LUS is to promote land use decisions by owners and occupiers that are in accordance with the public interest, and this ambition is reflected in the Strategy's vision statement of *"A Scotland where we fully recognise, understand and value the importance of our land resources, and where our plans and decisions about land use deliver improved and enduring benefits, enhancing the wellbeing of our nation"*.<sup>4</sup>
- 10 The LUS also has three objectives (economic, environmental and community) and ten Principles for Sustainable Land Use, which conform to the principles of sustainable development, and *"also reflect the Government's policies on the priorities which should inform land use choices across Scotland"*.<sup>5</sup> The LUS brings a new integrated, public interest approach across different land use interests and reflects the increased importance in public policy of ecosystem services. This includes, for example, the new emphasis on public interest purposes such as flood control, water catchment management and carbon storage as primary land uses.
- 11 While the LUS is a policy statement, its development and implementation is an ongoing process involving many different 'stakeholders'. At present, the Scottish Government is carrying out pilot projects with two local authorities (Scottish Borders and Aberdeenshire) *"to give spatial expression to the high level principles and objectives in the Land Use Strategy and to explore the issues associated with the preparation of land use mapping / guidance in regional level frameworks"*.<sup>6</sup> This focusing down from national to regional levels is then expected to continue, in order to *"provide guidance on what particular land uses might be most suitable in particular locations"*.<sup>7</sup>
- 12 **The Review Group recognises that the Scottish Government's Land Use Strategy is an important development to encourage the use of Scotland's rural land in ways which contribute more to the public interest. The Group recommends that the Government should make rapid progress in implementing the Strategy across the rest of Scotland beyond the two pilot areas.**

<sup>2</sup> LUS (2011) Op cit p.8

<sup>3</sup> Ibid p.1

<sup>4</sup> Ibid p.3

<sup>5</sup> Ibid p.4

<sup>6</sup> SG briefing

<sup>7</sup> LUS (2011) Op.cit



### Mapping of Land Ownership

- 13 The ongoing LUS process will provide increasingly focused guidance on the most appropriate types of land use in the public interest in different locations. The Scottish Government has said this guidance will be followed by public bodies and that the Government will “*strongly encourage*” land owners and managers to operate in accordance with them, using incentives and other mechanisms.
- 14 The Review Group anticipated that indicative mapping of the pattern of land ownership would be a part of the extensive mapping work being undertaken in the pilot areas. This was on the basis that information on the pattern of land ownership is an important part of identifying those with a direct interest as part of stakeholder engagement over the LUS, and then also as part of encouraging the owners of land to act in accordance with the LUS. However, a decision was taken by the Scottish Government's LUS Steering Group and the two local authorities involved, that there would be no indicative mapping of the pattern of land ownership as part of the LUS pilot projects. This was because the Government and local authorities were concerned that to undertake such mapping would “*risk losing the support of some key stakeholder groups who would perceive this as an indication that the LUS workstream is simply a stalking horse for a land reform agenda*”.<sup>8</sup>
- 15 The Group's view is that information on the pattern of land ownership should be a straightforward part of the LUS as it develops. If the Scottish Government is going to “*strongly encourage*” the owners of land in a locality to make land use decisions in accordance with the LUS, then information is needed on land ownership in that locality. This should be both as part of promoting appropriate land use decisions amongst the owners of land and as part of the practical requirements of implementing some land use policies. An example discussed in Section 32 of this report is the management of Scotland's populations of wild deer. These populations move across property boundaries and, as is recognised by the Scottish Government and land owners, information on land ownership is needed to know who is responsible for controlling deer numbers, as part of ensuring that the local deer populations are managed sustainably in the public interest. As a result, an existing example of the indicative mapping of land ownership is the maps that most Deer Management Groups produce of the property boundaries of their members, as illustrated by the map of property boundaries in the Cairngorms National Park in Fig. 22.
- 16 The Review Group considers that indicative maps of the pattern of land ownership above a size threshold such as 100-200 hectares, could be produced relatively straightforwardly in most parts of rural Scotland. One factor that helps this is the concentrated pattern of land ownership in rural Scotland, with a high proportion of the land owned by a relatively small number of large scale private estates (see Section 24). Maps could be built up from a range of sources, including the Land Register and the extensive information held already held by the Scottish Government on the owners and occupiers of land in Scotland. The Government's IACS (Integrated Administration and Control System) Field Boundary Dataset comprises of field boundaries covering 6.3 million hectares of land.<sup>9</sup> This is equivalent to 80% of Scotland's land area and information on the ownership and occupation of this land could be requested from those with agricultural and forestry land mapped as part of the

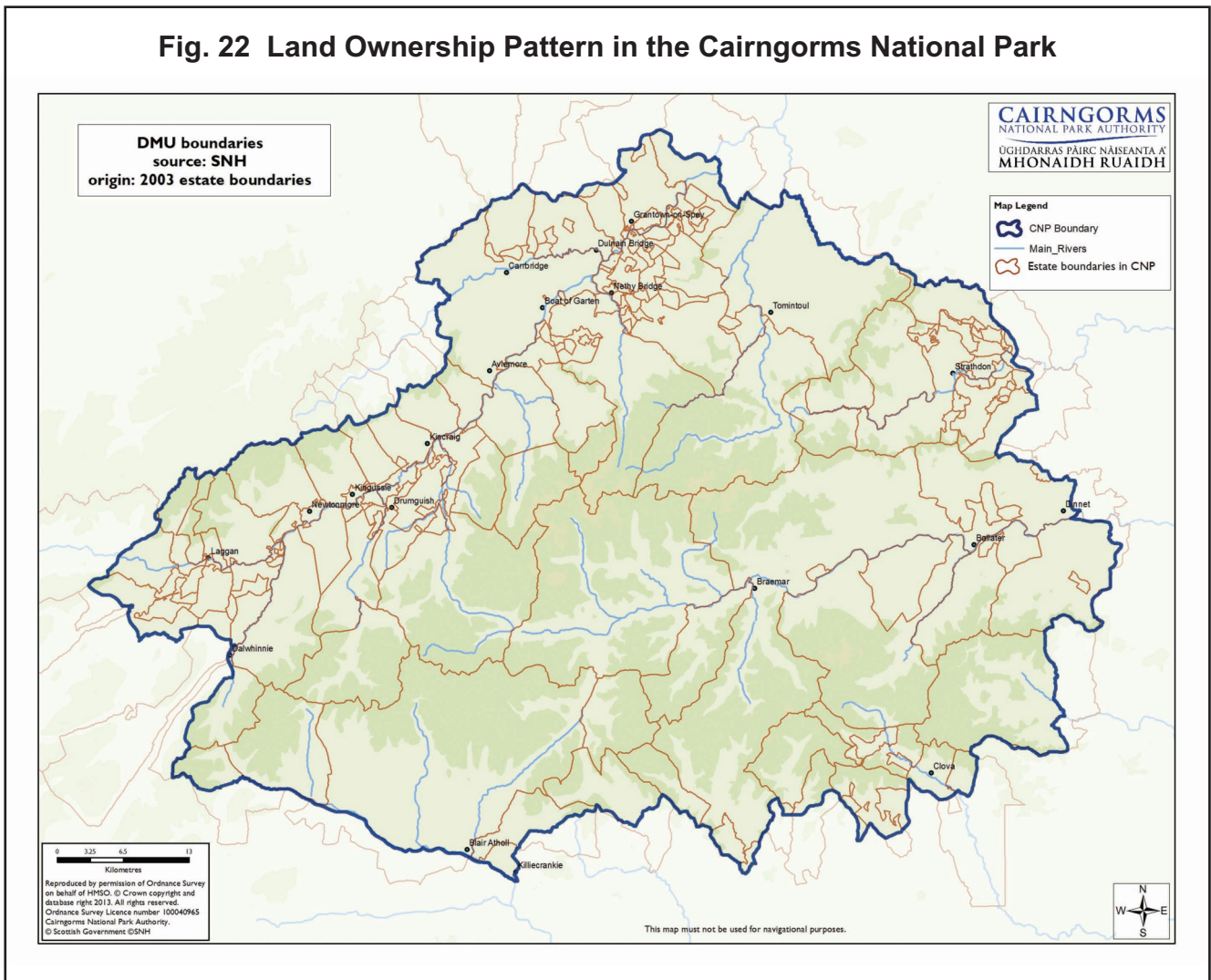
---

<sup>8</sup> SG Briefing

<sup>9</sup> K Buchan, K Matthews, D Miller, W Towers 'Modelling Scenarios for CAP Pillar 1 Area Payments using Macaulay Land Capability for Agriculture' (Macaulay Land Use Research Institute, 2010)

dataset. A further 11-12% of Scotland's land area is owned by Scottish Ministers and other public bodies, while another 3% or more of Scotland's area is urban land.

**Fig. 22 Land Ownership Pattern in the Cairngorms National Park**

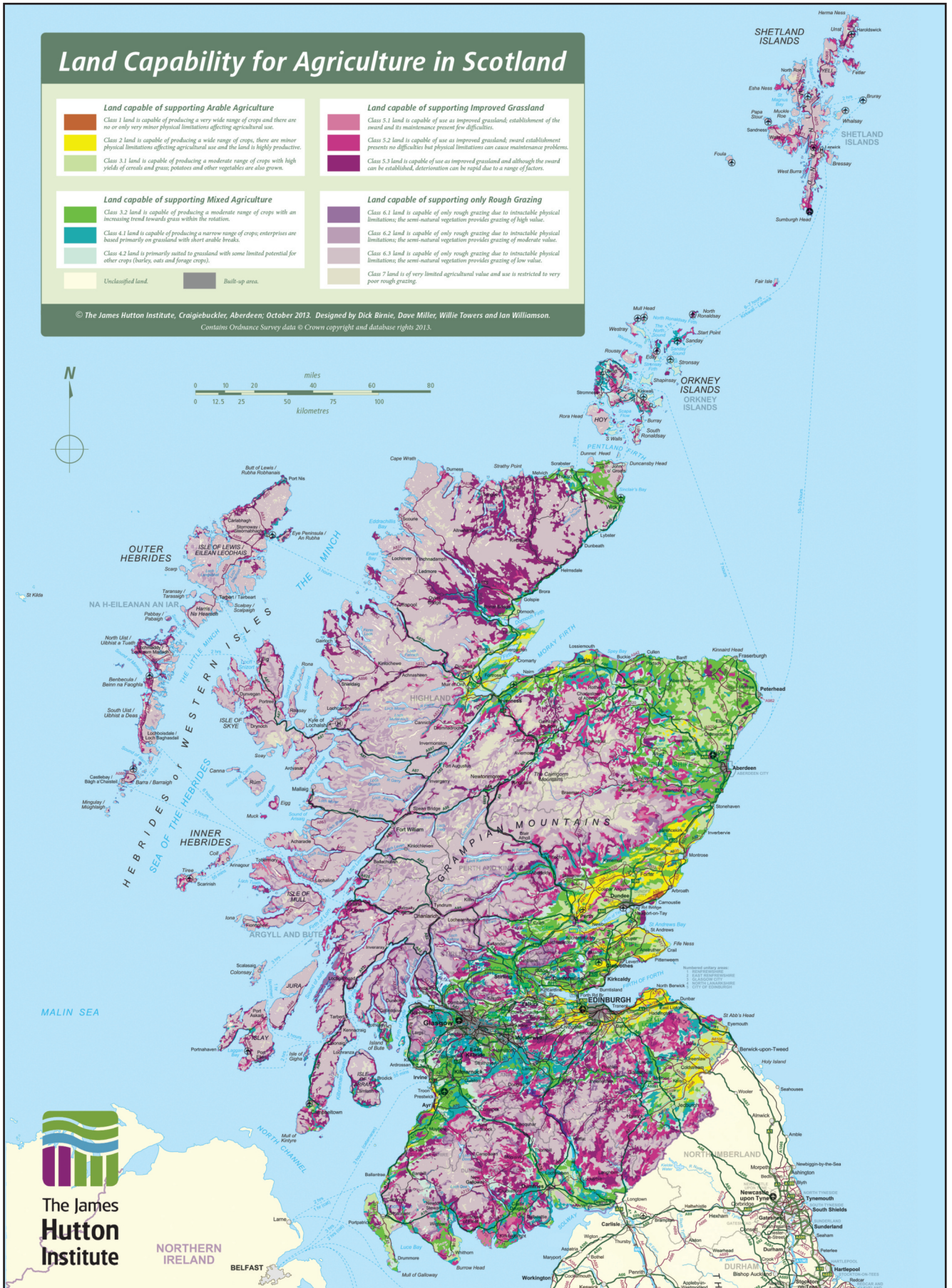


- 17 **The Review Group considers that information on the pattern of land ownership should be an integral component of developing and implementing the Scottish Government’s Land Use Strategy. The Group recommends that the Scottish Government should produce indicative maps of the patterns of land ownership in the Land Use Strategy’s current two pilot areas, and in other areas as the implementation of the Strategy develops.**

Reducing Flexibility

- 18 The LUS will be based on the large amount of information that Scotland has about the nature of its land resources and their main uses, which has been built up by many years research. This includes consideration of the suitability of different types of land for different types of land uses. An example is the map of Land Capability for Agriculture in Scotland in Fig. 23.

Fig. 23 Land Capability for Agriculture in Scotland



- 19 The LUS process will integrate these types of information to provide increasingly focused guidance on the most appropriate land uses in line with the public interest objectives and principles of the LUS. The Scottish Government will then, as stated earlier, “*strongly encourage*” private land owners and occupiers to make their land use decisions in the accordance with this guidance, by using incentives and other mechanisms.
- 20 The clear implication of the LUS process is that the general degree of flexibility that land owners currently have over how they use rural land that they own is going to reduce over time as part of the LUS’s aim of ensuring the appropriate types of land use in the public interest in different localities.
- 21 In considering this context, the James Hutton Institute has described Scotland in terms of three land zones, identifying the middle one as the Squeezed Middle “*which exists between quality farmland and high mountains, in which it is especially challenging to plan the right blend of land uses to best meeting policy objectives and societal demands*”.<sup>10</sup>
- 22 This middle zone is represented by land classes 3.2 - 6.1 on the map of Land Capability for Agriculture in Scotland (Fig. 23). In Scotland’s higher land class farmland, agriculture is the key public interest land use, while there are few land use options in the land classes of the higher and more exposed moorlands, hills and mountains, where environmental considerations should be dominant. In the middle zone by contrast, as the Institutes paper describes, “*Those who own and manage it face multiple choices – it can support relatively intensive livestock farming and limited arable cropping: it often has high potential for tree growth, especially conifers; it contains some relatively intensively managed sport shooting land, especially grouse moors; and increasingly, some areas are managed for conservation or landscape protection. This area is also the living space for diverse rural communities*”.<sup>11</sup>
- 23 In the middle zone, as the Hutton Institute paper observes, “*land use decisions are made not to optimise national outcomes but to satisfy land owners’ predilections*”.<sup>12</sup> A key challenge for the Scottish Government in implementing the LUS will be resolving circumstances where private interest land use choices are not considered the most appropriate use of the land in the public interest. One of the key topics identified by the Institute is the management of better quality uplands, particularly in eastern Scotland, as moorland for grouse shooting. The Review Group anticipates that, in considering the balance between private and public interests in the ways Scotland’s land resources are used, the management of these areas as grouse moor will become an increasing focus of attention as the LUS develops.
- 24 The management of moorland for grouse shooting is an extensive land use in Scotland, in that the estimated land area involved is over 1.5 million hectares.<sup>13</sup> Commercial grouse shooting can also be a significant economic activity in the parts of Scotland where it takes place and an activity which can be very important to those involved. Some grouse moors are owned as sporting estates, where it is the dominant land use and potentially the reason why the owner owns the land. Other grouse moors are part of mixed estates with other land uses including agriculture and forestry, and the grouse moors are managed as part of the wider estate economy.

---

10 *The Squeezed Middle Debate - Discussion Paper (James Hutton Institute, 2013)*

11 *Ibid*

12 *Ibid*

13 C Warren ‘*Managing Scotland’s Environment*’ (EUP, 2009) p.184

- 25 The Review Group considers the question will become the extent to which the choice to continue managing some of these better upland areas as grouse moor, is judged the most appropriate option in accordance with the LUS as it develops. The Group's view is that the LUS has, as a public policy statement, changed the context from that in which grouse moor management has traditionally taken place.
- 26 A central aspect of this change is that the LUS has been produced as a result of Scotland's climate change legislation and reflects the new public interest agenda centred on ecosystem services, including water catchment management, flood control and carbon storage.<sup>14</sup> Within the changed context of this agenda, it seems likely that there will be increasing questions about the sustainability of relatively intensive grouse moor management, because of the degree of its reliance on muirburn and its potential environmental impacts.<sup>15</sup> This muirburn involves burning off the heather on grouse moors on a 10-25 year rotation to create a mosaic of areas of heather of different ages, as this potentially increases the number of grouse that a moor can support for shooting. However, this regular burning off of the biomass across a significant proportion of Scotland's upland environment also produces smoke into the atmosphere and an increased risk of siltation of water courses, as well as potential impacts on soils and increased rates of run-off from catchments maintained as open grouse moor, with the potential of increasing downstream flooding problems.<sup>16</sup>
- 27 Another aspect of this changed context provided by the LUS is the importance of a significant expansion of Scotland's forest area as part of the public interest agenda. This priority is reflected in Scottish Government policies to increase tree cover from the current 17% to 25% by 2050, because of the multiple public interest benefits that forests can bring.<sup>17</sup> However, the scope for this expansion is constrained by the extensive areas of land highly suitable for forests, which are managed as moorland for grouse shooting. Grouse moors are estimated only to account for 50-60% of Scotland's heather moorland. However, the implication is that there could be an increasing 'tension' in public and private interest land use decisions between forest expansion and grouse shooting on the lower lying grouse moors in eastern Scotland with high potential for forests.<sup>18</sup>
- 28 The Scottish Government already offers strong financial incentives to encourage land owners to create new woodlands and forests. However, there are a number of reasons why private estate owners with grouse moors might choose to retain them as that. One aspect of this is the high commercial value of the international demand for grouse shooting in Scotland. While this demand can produce good revenues from letting grouse shooting, it also results in grouse moors having a high capital value. This capital value, currently considered to be £4,500-£5,500 per brace of grouse shot on average, comes from the recreational and sporting value attributed by some to grouse shooting.<sup>19</sup> This tends to make the price of buying a grouse moor significantly more expensive per hectare, than would normally be considered when buying land for forestry. For a grouse moor owner, this high capital value can provide a strong disincentive to converting some or all of their moor into forestry, despite the public incentives to do that.

---

14 *Climate Change (Scotland) Act 2009, section 57*

15 *J Glass et al 'Lairds, Land and Sustainability' (EUP, 2013)*

16 *Ibid*

17 *Hutton Institute Op cit*

18 *Warren Op cit*

19 *'Grouse Moor News' (Summer 2013) (Savills)*

- 29 At present, the development of the LUS is still at an early stage. It therefore remains to be seen how readily land owners' land use choices will move in accordance with the LUS as it becomes more detailed. The Scottish Government is committed to taking forward the implementation of the LUS as a consensual process, while using *"regulations and incentives and other mechanisms for encouraging land managers to act in accordance"*<sup>20</sup> with the LUS. The Review considers that it is implicit in the LUS process that there will be reductions over time in the current degree of discretion which land owners, and particularly larger scale land owners, have over how they use the rural land that they own.
- 30 **The Review Group anticipates that the implementation of the Scottish Government's Land Use Strategy process will lead to reductions in the current flexibility in rural land owners' choices over how they use their land. The Group recommends that the Government ensures that the necessary mechanisms are in place for the successful implementation of the Land Use Strategy in the public interest.**

#### Community Objective

- 31 The LUS has three objectives, relating to economic prosperity, environmental quality and communities. The third objective, relating to communities is described as: *"urban and rural communities better connected to the land, with more people enjoying the land and positively influencing land use"*.<sup>21</sup>
- 32 This objective then translates into three proposals:
- Develop the land use aspects of our Climate Change Adaptation Framework to support communities as they adapt to change
  - Identify and publicise effective ways for communities to contribute to land use debates and decision-making
  - Provide a Land Use Information Hub on the Scottish Government website.
- 34 The strategy recognises that ownership is an important influence on land use and on the ways that people think about the land but it does not elaborate on how this relationship operates nor on why it is important. The social or community element in the strategy is mainly restricted to ensuring that people have the information to enjoy the land responsibly and to participate in decisions when that is thought to be important. As noted previously, this information does not include information about ownership. Yet ownership does impact on use.
- 35 The Scottish Government's view has been that, if the appropriate public interest land use takes place, then the pattern of land ownership does not matter.<sup>22</sup> Thus, for example, if there are well grown fields of barley on suitable land as the appropriate use, it does not matter what type or scale of ownership or tenure is involved as tenant farmers, owner-occupiers, large agricultural businesses and other types of farmers can all grow barley.
- 36 The Review Group considers that the pattern of ownership and control of the land uses is a social factor that needs to be considered in the LUS. If there are for example, 500 hectares suitable for growing arable crops that are owned by five farmers, and the incentives

---

<sup>20</sup> SG Briefing

<sup>21</sup> SG (2011) Op cit

<sup>22</sup> Ibid

provided by the government to encourage those crops to be grown result over time in all the farms becoming owned by one farmer, then that has a social impact on the local community involved. The crops will look the same, but for that to be judged sustainable land use, consideration needs to be given to how such a change impacts on communities, in accordance with the Scottish Government's other related public policies for rural Scotland.<sup>23</sup>

- 37 The type of increasing concentration in the ownership of farms suggested in the example above has been and continues to be the trend in Scotland. The nature of the current incentives for farmers in terms of tax exemptions and direct payments, mean that the ownership of good farmland is becoming progressively more concentrated under fewer owners (see Section 25). For example, in 2013, around 75% of the sales of good farmland in Scotland were to other farmers.<sup>24</sup> This increasing concentration might be seen as a continuation of Scotland's history of farm amalgamations, aimed at achieving economies of scale and improved viability. However, the Review considers that the LUS should have an interest in monitoring this growing concentration in the ownership of Scotland's limited resources of better land, and its implications for the interests of the agricultural sector and rural communities.
- 38 This monitoring is important for several reasons. The Group's own remit, which is a reflection of Scottish Government policy, makes the link between the diversity of ownership in rural Scotland and stronger and more resilient communities. Ownership gives a degree of control over the use of land and its benefits and so monitoring the pattern of ownership is important. And the pattern of ownership gives an indication of how public finances are being distributed, through the system of tax exemptions and land use payments.
- 39 **The Review Group considers that the patterns of land ownership in rural Scotland are an important factor in delivering the Land Use Strategy's community objective, because of the control that ownership gives over land use decisions and benefits. The Group recommends that the Scottish Government should map and monitor the patterns of land ownership in rural Scotland as part of implementing its Land Use Strategy.**

## SECTION 24 - PATTERN OF RURAL LAND OWNERSHIP

- 1 A central issue in the longstanding calls for land reform in Scotland continues to be the very concentrated pattern of private land ownership in rural Scotland, with a relatively small number of land owners with large properties, owning the majority of Scotland's land area.
- 2 It is claimed that currently 432 private land owners own 50% of the private land in rural Scotland. The latest estimate of Scotland's population is 5,327,000, so this means that half of a fundamental resource for the country is owned by 0.008% of the population.<sup>1</sup> As a measure of inequality in a modern democracy, this is exceptional and is in need of explanation.

<sup>23</sup> for example, Scottish Government 'Our Rural Future' (2011)

<sup>24</sup> A Hamilton, SAC session 12.2.14

<sup>1</sup> General Registers of Scotland, April 2014, <http://www.gro-scotland.gov.uk/press/2014/scots-pop-highest-ever.html>

- 3 This remarkable pattern of ownership leads Scotland to be described as having a more concentrated pattern of large scale private land ownership than is found in any other country in the world.<sup>2</sup> Scotland also had a similar type of international distinction in relation to feudal tenure. Up until the Abolition of Feudal Tenure etc. (Scotland) Act 2000, Scotland was the last country where feudal tenure was still the way most land was owned

#### Historical trends in the Pattern of Rural Land Ownership

- 4 The origins and development of Scotland's current pattern of land ownership can be traced back to previous centuries.<sup>3</sup> From the 17th century, into the second half of the 19th century, there was an increasing concentration of land ownership into fewer and fewer private estates.<sup>4</sup> A government survey in 1872 found that 90% of Scotland's land area of 7.9 million hectares was owned by 1,380 private land owners (Fig.24).
- 5 Over the next hundred years or so, that very high degree of concentration did reduce to some extent, mainly due to two developments. Firstly, there was an expansion of public land ownership in rural Scotland during the first half of the 20th century. This was mainly due to the purchase of land through the Forestry Commission and for the Government's land settlement programmes (see Sections 13 and 26). The second main factor was the growth of owner-occupied farms in some lowland areas, particularly during the 1920s and 1930s (see Section 28). However, despite this reduction in the concentration of private ownership, studies in the 1970s showed that 100 years on, less than 1,500 large scale private land owners still owned 60% of Scotland's land area (Fig.24).<sup>5</sup>
- 6 While there was a reduction in the number of the largest private estates of over 8,000 ha (20,000 acres) to around 120 during this period, there was little change in the number of private estates of over 2,000 ha (5,000 acres) at around 550. The total number of private land owners in Scotland owning over 405 ha (1,000 acres) also remained the same, at around 1,750 in both 1872 and 1970.<sup>6</sup> This lack of change in the number of owners with over 405 ha, reflects the degree to which both the underlying structure of private estates, and the concentrated pattern of private land ownership, has continued to survive in rural Scotland.
- 7 In the 40 years since 1970, there has been little change in the pattern of land ownership in Scotland. The amount of publicly owned land, which was considered to be around 13% of Scotland's land area in 1970, currently stands at around 11-12%. Fig. 25 shows that, with rural Scotland accounting for 97% of Scotland's land area, there has been very little change in the concentrated pattern of large scale private land ownership.<sup>7</sup> If anything, the information for 1995 and 2012 might suggest some re-concentration of land ownership taking place, with a reduction in the number of land owners owning 60% of privately owned land. The number of private land owners in Scotland with over 405 ha has also reduced, from around 1,750 in 1970 to 1,550 in 2012.<sup>8</sup>

2 For example, A.McKee, C.Warren, J.Glass, and P.Wagstaff 'The Scottish Private Estate' in *Lairds, Lands and Sustainability* (EUP, 2013) p.65

3 R Callander 'A Pattern of Landownership in Scotland' (Haughend, 1987)

4 *Ibid*

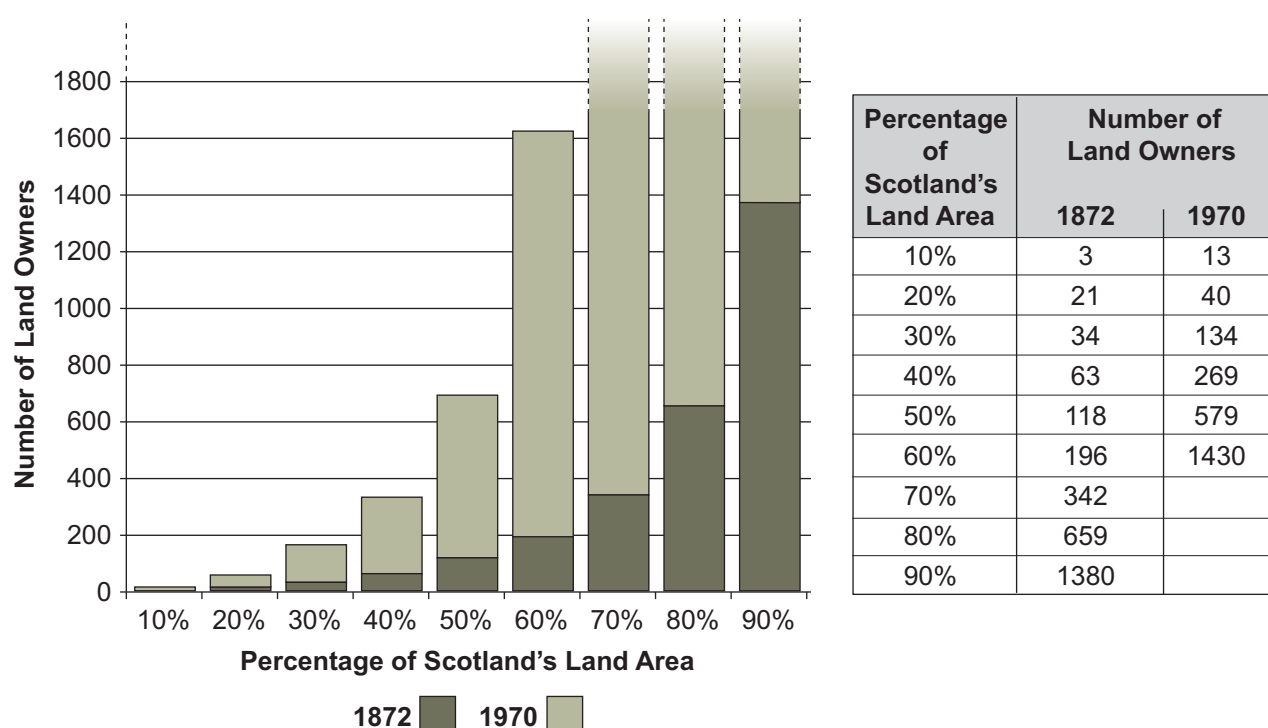
5 *Ibid*

6 Callander *Op cit*

7 A Wightman 'The Poor Had No Lawyers' (Birlinn, 2013)

8 *Ibid*



**Fig.24 Number of Land Owners in Scotland in the 1870s and 1970s****Fig.25 Private Land Ownership in Rural Scotland 1970-2012**

Percentage of Private Rural Land	Number of Land owners		
	1970	1995	2012
10%	18	17	16
20%	51	53	49
30%	110	116	110
40%	207	220	221
50%	370	412	432
60%	1180	854	963

- 8 The composition of the owners of Scotland's larger rural estates has, like the pattern of ownership, shown a high degree of continuity. A study in the 1970s showed that a quarter of the largest 25 estates in Aberdeenshire had been in the same ownership for over 400 years, and over a third of the largest 50 had been owned for over 200 years. Recently, a survey of 228 estates found that, on average, they had been in the same ownership for 122 years, with 35% having been owned for over 100 years. This included 5% which had remained in the same ownership for over 500 years.<sup>9</sup>

<sup>9</sup> R Hindle et al Op cit

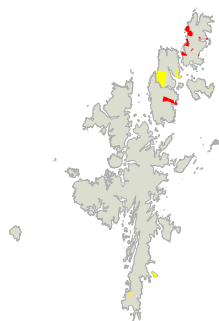
**Fig. 26 Land Owned and Managed by Environmental NGOs in Scotland**

**Map showing land owned and managed by NGOs in Scotland**

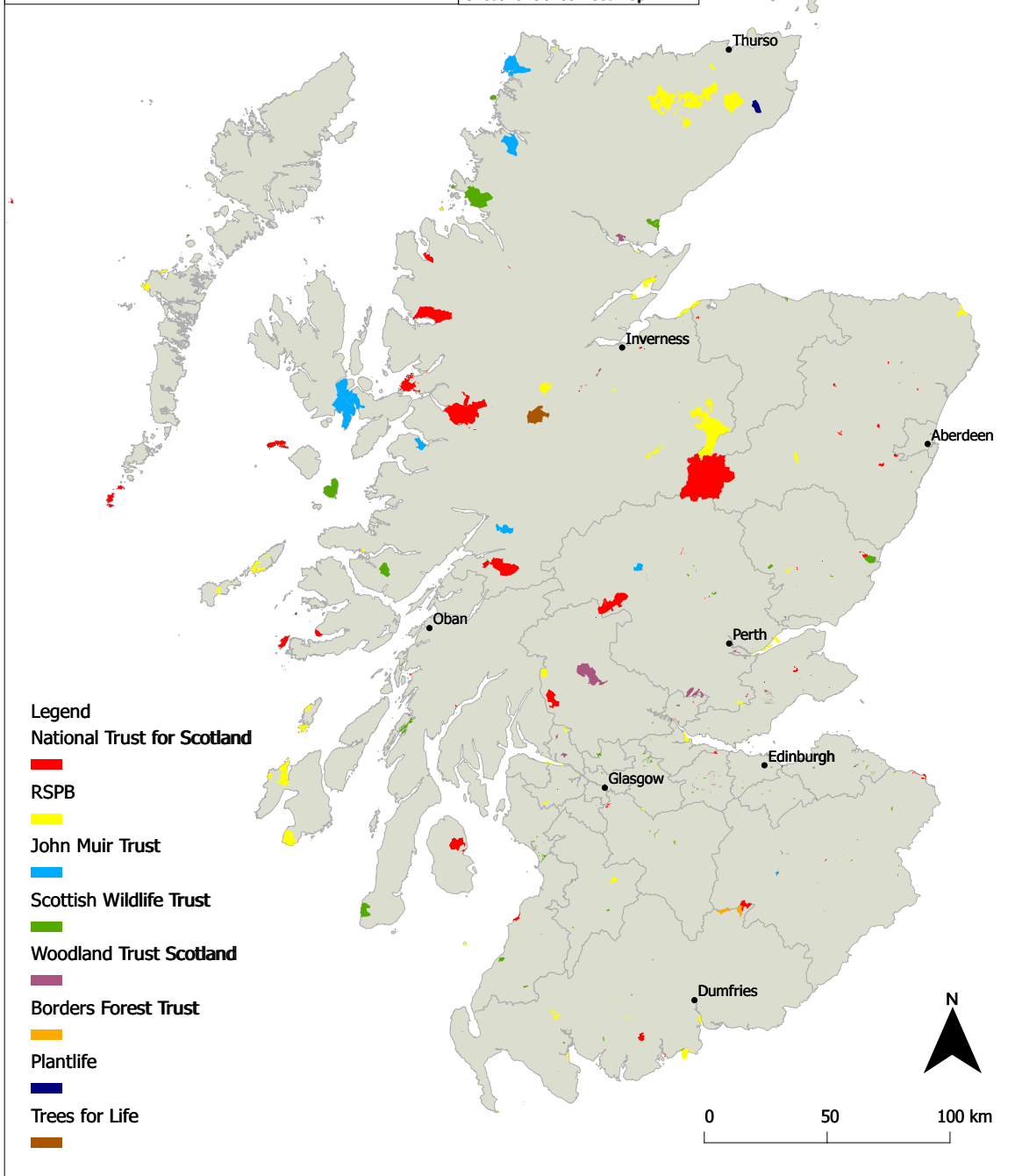
Total area of NGO owned land: 202,391 ha  
 Total % of Scotland owned by NGO: 2.57 %

Map created: 12/03/2013

Contains Ordnance Survey data © Crown copyright and database right 2011



Shetland Islands inset map



- 9 The pattern of land ownership has often reflected historical and economic circumstances. Some estates have been owned since they were acquired in the 19th century with money generated through industry or the British Empire, while others were created from the subdivision of larger estates, particularly during the 1920s and 1930s, due to taxation policy and the economic depression. More recently, different types of owners have acquired Scottish estates, including corporate bodies, overseas owners, and environmental organisations.<sup>10</sup> (Fig. 26) Eight of these environmental organisations own a combined total of 202,391 ha or the equivalent of 2.6% of Scotland's land area. In addition, we have seen the emergence of local community land ownership, described in Part 4 of the Report. There are now around 19 community land owners owning over 405 ha, with a combined total of around 170,000 ha, or 2.2% of Scotland's land area.

### Current and Future Trends in the Pattern of Rural Land Ownership

- 10 The likely re-concentration of land ownership which has taken place over the last 40-50 years is partly explained in terms of the ownership of good farmland, with, for example, about 75% of the farms sold in 2013 being bought by other farmers.<sup>11</sup> The activity of the Danish businessman Anders Povlsen, who has purchased six large estates in recent years (to become Scotland's second largest land owner with around 65,000 ha), has also contributed to this apparent re-concentration. This case also illustrates just how readily the re-concentration of ownership can occur.<sup>12</sup>
- 11 While Scotland's large estates sell for millions of pounds each, these prices are relatively small compared to the billions of pounds which some individuals and companies increasingly have at their disposal. Given the average number of estate sales each year, and the likelihood that a strong market would stimulate further sales, it is not inconceivable that a wealthy individual or company could quickly and easily become the biggest land owner in Scotland. Land is increasingly being regarded as a good long term investment, and the fact that the scope to build up substantial land holdings is generally much more limited in the rest of Western Europe, due to a range of factors, may well encourage increased interest in Scottish land.<sup>13</sup>
- 12 The Review Group is not necessarily anticipating 'a land grab', similar to the on-going, and well documented, activity being undertaken by corporations in some developing countries, which is culminating in a huge amount of land holdings being acquired by single companies.<sup>14</sup> However, there is currently no legal limit on the extent of land which one person or company can own in Scotland, which could potentially leave Scotland vulnerable to interest from wealthy individuals and companies and lead to a further concentration in the pattern of land ownership.

### Understanding the Pattern of Land Ownership

- 13 As there are no government figures available, the above information on the pattern of landownership in rural Scotland from 1970 onwards relies on the work of a small number of

---

<sup>10</sup> Wightman (1995, 2013) *Op. cit.*, Warren *Op. cit.*

<sup>11</sup> A Hamilton SAC Witness Session 12.2.14

<sup>12</sup> Wightman (2013) *Op. cit.*

<sup>13</sup> *Factors Markets study / report*

<sup>14</sup> for example, K Geary 'Our Land, Our Lives: Time out on the global land rush' (Oxfam Internations, 2012),; Pearce 'The Landgrabbers: The New Fight Over Who Owns the Earth' (Transworld Publishers, 2012)

independent researchers.<sup>15</sup> While these figures therefore lack the status of being official statistics, the research undertaken has become more and more robust, and crucially, has consistently shown the same pattern of land ownership. This overall picture of relatively few large private estates owning a substantial proportion of Scotland, is also supported in other studies.<sup>16</sup> More recently, this concentrated pattern of ownership was reflected in the House of Commons Scottish Affairs Committee's use of the figure '432:50', as shorthand for 432 private land owners owning 50% of the private land in rural Scotland.<sup>17</sup>

- 14 Given the Scottish Government's increasing interest in land reform policy, this situation regarding the lack of official statistics on patterns and trends within land ownership, is one which needs to be addressed as a matter of urgency. The Review Group notes with interest that Scotland is not only the European country with the most concentrated pattern of large scale private land ownership, but also the European country where least is known about the pattern of private land ownership. The need to accurately map out land ownership has already been discussed in Section 23, but it is important that this exercise fully reflects the fact that many of the larger private estates, are often management units rather than single properties. This is because different components of an estate may be owned through different legal arrangements as part of managing the estate.
- 15 Improved information is also need on the pattern of ownership of particular types of natural resources. An example is the very limited and poor quality information on the ownership of Scotland's woodlands and forests. Given Scotland's general pattern of land ownership, it is perhaps unsurprising that *"Of 19 European countries in a position to provide statistics, Scotland has by far the most concentrated pattern of private forest ownership"*.<sup>18</sup> The Review Group considers that woodlands and forests are often particularly suitable for smaller scale and community land ownership, and therefore assembling accurate information on woodlands and forests, and other types of natural resources, would underpin efforts to create a more diverse pattern of land ownership in rural Scotland.
- 16 The lack of government information on the pattern of land ownership is also matched by the lack of research on this topic. Research is needed to better understand the full implications of different patterns of land ownership, and the socio-economic consequences of changes to that pattern of ownership. The historical experience of land ownership in Scotland is littered with examples of larger properties being sub-divided and changes of types of ownership, experience which would lend itself to such study. Research should also focus on the factors which influence changes in the pattern of ownership. A central requirement for the development of effective land reform measures is a greater understanding of the factors that influence the rate and nature of change, or lack of change, in the patterns of land ownership in Scotland.
- 17 **The Review Group considers that the assembling of relevant statistical information and research is crucial to our understanding of patterns of land ownership in rural Scotland, and how they can evolve. The Group recommends that the Government should compile improved information on land ownership and undertake or commission more research into patterns of land ownership.**

---

15 R.Millman *'The Landed Estates of Northern Scotland'* (SGM, 1970), J.McEwen *Who Owns Scotland?'* (EUSPB, 1976), Callander (1987) *Op. cit.*, A Wightman *'Who Owns Scotland'* (1996), Wightman (2013) *Op cit*

16 R Hindle et al *'Economic Contribution of Estates in Scotland'* (SRUC 2014)

17 SAC ref

18 Wightman (2012) *Op cit*

### The Public Interest and Evolving the Pattern of Rural Land Ownership

- 18 As has been outlined above, the current concentrated pattern of large scale private land ownership in rural Scotland has evolved as a product of past circumstances. At present, the current pattern of ownership appears to have remained largely the same for the last forty of fifty years, or, if anything, become slightly more concentrated. How the pattern of land ownership continues to evolve in the future will depend to a large extent, on the specific policy objectives of the Scottish Government, and the impact of a range of factors including the suite of fiscal measures. Central to this is how we regard the public interest.
- 19 Leaving aside the observation that the pattern of land ownership in Scotland is clearly out of step with the much more diversified ownership patterns of our European neighbours, the Review Group considers that the current concentrated pattern of private land ownership is problematic for a number of inter-related reasons. Land is a finite, national resource. Ownership is the key determinant of how land is used, and the concentration of private ownership in rural Scotland can often stifle entrepreneurial ambition, local aspirations and the ability to address identified community need. The concentrated ownership of private land in rural communities places considerable power in the hands of relatively few individuals, which can in turn have a huge impact on the lives of local people and jars with the idea of Scotland being a modern democracy. The Group considers that a less concentrated pattern of land ownership would open up increased economic and social opportunities in many parts of rural Scotland, helping create stronger and more resilient rural communities.
- 20 The Group recognises that the nature of the terrain and land quality in many upland and Highland areas can be taken to imply the need for bigger units of ownership and management. However, the Group considers there is nothing inherent in the scale of the current pattern of larger private estates in Scotland. The land making up most of these estates was part of even larger estates in the 19th century and could be part of a less concentrated pattern in the 21st century.
- 21 The continuing scale of the concentrated pattern of private estates in some areas is illustrated by the map of the estate boundaries in the Cairngorms National Park (Fig.22). The Park covers around 485,000 ha or 6% of Scotland's land area. Part of the Park is the upper catchment of the River Dee, running from the middle of the map eastwards. A survey in 1979 of the land owners in the upper nine civil parishes of Deeside, covering 155,000 ha or 2% of Scotland's area, showed that 95% of the whole locality was owned by 23 private land owners with 405 ha (1,000 acres) or more each.<sup>19</sup> As Fig.22 reflects, that pattern remains essentially the same 35 years later. While Upper Deeside includes large areas of high uplands and mountain land, the area is a substantial locality of over 500 square miles with several towns and thousands of people living in it.
- 22 The Group considers that concentrated patterns of private land ownership in localities like Deeside inhibit the development of the rural communities in these areas. This is not to say that private land owners with large estates are not interested in the wellbeing of local communities. There is clear evidence that many are, with recent reports providing examples of this.<sup>20</sup> The issue is the scale and degree of the control over the land use resources and

---

<sup>19</sup> Callander (1987) *Op cit*

<sup>20</sup> J Glass et al (2013) *Op cit* SRUC (2013) (*estates study*), R Hindle et al (2014) *Op.cit*

the benefits from them, which is held by so few land owners and the extent to which, in the final analysis, land use decisions reflect their interests as the owners of the land. The Group considers that a wider distribution of this control amongst an increasing number of land owners would open up opportunities for improved economic and social development in these areas.

- 23 The degree of control in their own interests that large scale private land owners have over their estates, and the relatively limited accountability for their land use choices, contrasts with the position over public land in rural Scotland. This consists very largely of the widely dispersed National Forest Estate managed on behalf of Scottish Ministers by Forestry Commission Scotland, and the crofting estates owned by Scottish Ministers in the North-West Highlands (see Sections 13 and 26 respectively). This land is managed to deliver the public interest as represented by current public policy, including economic, environmental and social objectives. There can clearly be differences of view over how that is best implemented and particular issues arise, but the decisions involved are democratically accountable to the public interest. With local community land ownership, while the benefits include the control that it gives over the use and benefits of land to the people living in the area, the democratic accountability over decisions is another basic aspect.
- 24 One of the significant changes over the last 40-50 years, in the context of promoting a more diverse pattern of land ownership, has been the substantial increase in the number of people in Scotland with the knowledge and experience to own and manage rural land. Fifty years ago, this was still very largely the domain of estate owners and their factors and farmers. Now there are few residential factors or managers on the larger estates, and many of the private owners of these use the services of the main land management companies. There is no reason why, in terms of professional competence for example, local community land owners cannot manage substantial areas of land. The recent study of the economic impact of 12 of Scotland's largest community land owners since they become owners shows the substantial scale of the benefits that can be delivered by community land owners with their different approach compared to the previous management of these areas.<sup>21</sup>

### Maximum Land Holdings

- 25 The Group considers that there is a scale at which the ownership of a large extent of Scotland's land by one private owner should be considered inappropriate, and contrary to the public interest. Many owners of substantial land holdings take their responsibilities to the wider society and the local community seriously and manage their land well. However, this should not disguise the fact that they do so at their own discretion and that the present arrangements provide limited sanctions against those who do not. This situation arises because of the degree of 'monopoly' control large land owners effectively have over land and other community interests, in ways that can determine the future of whole localities.
- 26 While this can be a problem in cases where the land holding is not particularly large, the risk of communities being at odds with decisions taken by local land owners becomes more serious as the area of the land holding becomes greater and the potential number of other local land owners correspondingly diminishes. The Group therefore considers that an upper ceiling on the overall extent of land that can be held by any one owner should be considered.

---

21 A Bryan & S Westbrook 'Economic Impact Data 2014' (Community Land Scotland, 2014)

- 27 The largest private land owner in Scotland at present is Buccleuch Estates Ltd, with nearly 100,000 ha or just over 1% of Scotland's land area. The Review Group's concern here is not what an upper limit should be, but the principle that there should be an established limit. The United Nations Food and Agriculture Organisation's (FAO's) 'Voluntary Guidelines on Responsible Governance of Tenure' includes the provision that "*States may consider land ceilings as a policy option*".<sup>22</sup> These Guidelines are supported by, amongst others, the G20 group of states including the UK.
- 28 In proposing an upper ceiling on land ownership, the Review Group considers that it should be based on preventing a single 'beneficial interest' exceeding the limit, so the measure cannot be avoided by an individual or single organisation simply using a range of companies or other legal arrangements to accumulate and hold land. The Group recognises that other wider issues also require to be taken into account; for example the need for greater transparency over the identity of the beneficial interests involved in the ownership of land in Scotland, as discussed in Section 5.
- 29 **The Review Group considers that there should be an upper limit on the total amount of land in Scotland that can be held by a private land owner or single beneficial interest. The Group recommends that the Scottish Government should develop proposals to establish such a limit in law.**

#### Increasing the Number and Diversity of Land Owners

- 30 The Review Group considers that it is in the public interest to increase the number and diversity of land owners in Scotland. The Scottish Government has also made clear the direction in which it considers the pattern of land ownership should evolve. In a written parliamentary response in January 2014, the Government set out that its "*vision is for a fairer, or wider and more equitable, distribution of land in Scotland where communities and individuals have access to land*"..."*with greater diversity of land ownership*" and "*1 million acres of land in community ownership by 2020*".<sup>23</sup>
- 31 The Review Group believes that there is no one single measure which can achieve these objectives. Throughout this Report, the Group have suggested a number of measures which, if implemented, would have the cumulative effect of reducing the existing concentration of ownership of private land, and encouraging a greater number and diversity of land owners. These include areas such as the reform of succession rights, new community rights, increased land supply for housing, increased local authority powers, greater public sector led development and reform of crofting /tenant farmer rights.
- 32 The Review Group considers that the Scottish Government needs to clearly articulate its vision, and pull together the relevant recommendations within this Report as part of an integrated policy framework to implement that vision. The Group has already identified the need for the Scottish Government to have clear information on the pattern of rural land ownership, integrated with information on land use and supported by research to inform policy options. The Group considers that the Government should also be identifying policies that are contributing, or could be contributing, to achieving its vision for the pattern of land ownership.

<sup>22</sup> 'Voluntary Guidelines on Responsible Governance of Tenure' (FAO, 2012)(15.2)

<sup>23</sup> 20th January 2014, S4W-19122

- 33 The Review Group considers that the above proposals would provide the key elements in developing a National Land Policy for Scotland.<sup>24</sup> The development of a National Land Policy would recognise the fact that Scotland's land is a finite resource and of fundamental importance to the future of the country. It would also recognise, as this Report has reflected, that factors related to land ownership, land use, land values and land development are involved in a wide range of public policy areas. However, at present, there is no central focus on Scotland's land within the Scottish Government.
- 34 The Scottish Government's aim to increase the number of land owners in rural Scotland should be an integrated part of this national policy framework. As has been suggested, a range of measures can contribute to that aim, including support for increasing community land ownership. However, the Group considers that a central factor which is helping to maintain the current concentrated pattern of large scale private land ownership is the current fiscal regime of tax concessions on land and incentive payments for land use, and these factors are considered further in the next section.
- 35 The FAO Guidelines on Land Tenure referred to in paragraph 27 above, are part of the international context that should inform a National Land Policy for Scotland. The widespread occurrence of national land policies in other countries also means that there is considerable international experience in developing and putting in place national land policies, with the associated arrangements to monitor their effectiveness.<sup>25</sup>
- 36 **The Review Group supports the Scottish Government's aim of *"a fairer, or wider and more equitable, distribution of land in Scotland...with greater diversity of land ownership"*. The Group believes that this requires an integrated approach to developing measures which help deliver this ambition. The Group recommends that the Government should develop a National Land Policy for Scotland, taking full account of international experience and best practice.**

## SECTION 25 - LAND TAXATION, PAYMENTS AND MARKETS

- 1 For many centuries in Scotland, land has been subject to a range of taxes and historically, a significant proportion of all public revenues was raised from assessments on the rental value of land. In this Section, the Review Group firstly considers the relationship between land and the recurrent local taxes that contribute to local government funding. These include the Council Tax and non-domestic or business rates. The Group then considers national taxation as it relates to land.
- 2 The fiscal treatment of land and property has historically been a key influence in how the pattern of land ownership has developed in Scotland. The relationships between the current tax concessions over land, land use subsidy payments, land prices and the land market are, however, complex. The Review Group considers that these important relationships need to be more transparent and better understood. The Group therefore wrote to the Scottish Affairs Committee welcoming their inquiry into land reform with its emphasis on fiscal

---

<sup>24</sup> Know Edge Ltd / submission 328 to LRRG

<sup>25</sup> Submission 328 Op cit



measures, because of the importance of the relationship between public funds involved in those measures and the pattern of land ownership in rural Scotland.<sup>1</sup>

## 25.1 Local Taxation

- 3 The modern system of local land tax dates from mid 19th century, when the Lands Valuation (Scotland) Act 1854 established a uniform system of land valuation across Scotland. Since then, important changes have taken place in local land taxation. Legislation in the 1920s reduced the valuation of agricultural land by 50% and then to 12.5% of its gross value, before agricultural land was removed from the valuation roll completely by the Valuation and Rating (Scotland) Act 1956. Owners' rates were also abolished in 1956, so that rates became paid solely by occupiers whether that was the owner or a tenant. In 1987, rates on domestic property were abolished and replaced by the Community Charge or poll tax. That was then replaced by the Council Tax in 1992.
- 4 Local taxation used to form a far greater proportion of local government finance than it does today. In the post-war years, rates accounted for approximately half of local council funding. The proportion of their finance now raised by local authorities is down to around 10%.

### Council Tax

- 5 As part of the introduction of the Council Tax, domestic properties were categorised into 8 bands A-H based upon the capital value of the property on 1 April 1991. An annual rate is set for Band D and the rate for other bands is a fixed multiplier of this (6/9ths for Band A and 18/9ths for Band H). The Council Tax is a regressive tax in that the more a house is worth, the less of a proportion of the value is paid in Council Tax.
- 6 No revaluation of domestic property has taken place in Scotland since 1991. This means that the value of properties is now almost quarter of a century out of date. There has also been a freeze on the Council Tax rate since 2007. The increasingly historic basis of the value of properties means that Council Tax becomes less and less of a tax on property, just as charging income tax on the basis of earnings in 1991 might no longer be considered a tax on people's income.

### Business Rates

- 7 The non-domestic or business rating system is the last remnant of the historic rating system. All land that is occupied for any of a specified number of non-domestic uses is liable for an annual rate (poundage) based upon the rental value of the property. The Non-Domestic Rate is, however, now different in two key ways from its 19th century precursor. Firstly, the vast majority of the area occupied by non-domestic property is now exempt from rates. Agricultural and wooded land which accounts for over 90% of the land area of Scotland and which was, for most of the past few centuries assessed and taxed, is no longer entered on the valuation roll. Secondly, the Non-Domestic Rate is no longer really a local tax. Since 1990, the rate has been set centrally by Scottish Ministers and while collected locally, the revenue is pooled on a Scotland-wide basis and then redistributed according to a needs-based formula.

---

<sup>1</sup> *Scottish Affairs Committee 'Land Reform in Scotland: Interim Report' (House of Commons, 2014) para.2*

- 8 In 2012, the Scottish Government published proposals for how the Non-Domestic Rate might be improved. Following the consultation, Scottish Government concluded that *“All rates reliefs will be kept under regular review ..... the Scottish Government has on balance decided that all current exemptions provided, including to agriculture, should be retained”*.<sup>2</sup> These exemptions include the exemption introduced in 1994 for sporting rates on fishings and shootings.
- 9 The exemption of agricultural land from business rating has been heavily criticised by a number of reviews of the UK tax system. In 1976, the Layfield Committee on local government finance published the first comprehensive review of local government finance since 1914. The Committee concluded that, *“We can see nothing in the nature of agricultural land or buildings which takes them outside the scope of a tax based very widely, as rates are, on the occupation of property of all kinds. We conclude that there are no grounds of principle for continuing to de-rate agricultural land and buildings”*.<sup>3</sup>
- 10 In 2011, the Mirrlees Review of the UK tax system noted that one of the features of the Non-Domestic Rate which makes it “not a good tax”, is the fact that it discriminates between different sorts of businesses - *“agriculture is exempt, for example”*.<sup>4</sup> In recent evidence to the Scottish Affairs Committee, it was observed that: *“There is one big tax relief in relation to land that is huge, and that is the abolition or the non-rating of agricultural property, which, of course, is geographically the largest part of land in the country. That is the biggest one that is around. It is sometimes seen as a law of nature that farming does not pay tax on land. It is not a law of nature; it is a public policy from the 1920s, at a time when agriculture was in some trouble and the remaining rates in agriculture were abolished then. It is not obviously economically rational that land use for one purpose is taxed and land use for another purpose is not”*.<sup>5</sup>
- 11 The Review Group considers that the historical and universal exemption of agriculture, forestry and land based estate businesses from non-domestic or business rates should be reviewed. Re-introducing rates on these businesses, potentially in a phased manner, would bring them into line with other rural businesses. Land based businesses would then be able to apply for the same types of existing exemptions and discounts as other rural businesses, making the reliefs available to land based businesses a clearer reflection of public policy aims than the current universal exemption. In addition, as considered further below, one important consequence of the current exemption of agricultural and forestry land has been that this business rates relief has been capitalised into higher land values.
- 12 **The Review Group considers that there is no clear public interest case in maintaining the current universal exemption of agriculture, forestry and other land based businesses from non-domestic rates. The Group recommends that the Scottish Government should review this historic exemption, with a view to the phased introduction of non-domestic rates for these land based businesses.**

### Sporting Rates

- 13 Sporting rates are a form of non-domestic or business rate charged on freshwater salmon

<sup>2</sup> Scottish Government 'Supporting Business, Promoting Growth' (2013)

<sup>3</sup> Layfield Committee 'Local Government Finance' (HMSO, 1976), pg 166

<sup>4</sup> Mirrlees Chapter 16 pg 376

<sup>5</sup> J Gallagher oral evidence SAC 4 March 2014 Q 749

fishing, deer stalking and shootings such as grouse moors. Sporting rates were introduced in the mid 19th century when land owners started to lease fishings and shootings commercially, and therefore became liable for local government rates. Initially the rates were only charged if the fishing and shooting rights were let. However, from 1886, the rates were charged independently of whether or not they were commercially let or not.<sup>6</sup>

- 14 The rates are based on attributing a net annual value to the species involved, for example, per red deer stag or brace of grouse, and charging a rate in the pound on that value. With red deer, for example, the rate was charged on the actual or potential cull of stags based on a five year average. Sporting rates were abolished in 1994. This exemption is considered here in relation to three topics covered elsewhere in this Report - salmon fishing, deer stalking and grouse shooting (Sections 31, 32 and 23 respectively).
- 15 The exemption for freshwater wild salmon fishing is different from the exemptions for shootings, because local District Salmon Fishery Boards (DSFBs) still have the power to require the local government rates assessor to assess salmon fishings. However, these rates are then paid to the DSFB rather than the local authority. DSFBs are statutorily created and this levy helps them fulfil their responsibilities. The Review Group proposes in Section 31 that, after 150 years, DSFBs should be replaced by a more modern arrangement and that the levy on salmon fishings should continue to be paid under that arrangement to support the public interest regulation and management of freshwater wild fisheries.
- 16 The Group also considers that the basis of the payment should be reviewed to make the charge a more effective instrument of public policy. The priority is the conservation of freshwater salmon stocks and there has been a substantial reduction in the coastal netting of salmon. However, the size of rod fishing catch has been maintained and accounted for 84% of all salmon caught in 2012 (see Section 31). These salmon fishings have very high capital values based on average catches and, while 74% of the 2012 rod catch was released back into the river for conservation purposes, the level of catch helps maintain capital values. However, if the main public benefit comes from reducing the number of salmon caught (so that stocks increase), the levy system needs to encourage this.
- 17 The position with sporting rates on deer is different from salmon in a number of respects. One of the reasons for exempting deer stalking was that the charges were seen as working against encouraging higher deer culls in the public interest. The need to reduce deer populations continues to be an issue in some areas and a revised approach to sporting rates on deer could help address this. As discussed in Section 32, wild deer belong to no-one until they killed or captured and the owners of land have a monopoly over deer hunting on their land. A revised rate on deer shooting could, for example, be based on the level of deer cull required to protect public interests and then only be charged when an owner or occupier was not achieving adequate culls.
- 18 The exemption of shootings from sporting rates should also be reviewed. At present, for example, grouse shooting makes no contribution to the provision of public services, when the use of muirburn as part of grouse moor management results in call-outs for local fire services. Figures for the Grampian area from the Scottish Fire and Rescue Service for the 3 years 2011-2013, for example, indicate that a third of the wildfires attended by the Service resulted from controlled burning which had got out of control.<sup>7</sup>

<sup>6</sup> R Callander & N MacKenzie 'The Management of Wild Red Deer in Scotland' Rural Forum, 1991)

<sup>7</sup> Scottish Fire and Rescue Service Briefing

- 19 Salmon, deer and grouse are, as wild animals, part of the public domain and rates should be seen as a means of encouraging the appropriate management of these species in the public interest.
- 20 **The Review Group considers that 'sporting rates' could be tailored to each of the species involved and have the potential to be one of the tools available to help deliver the Scottish Government's Land Use Strategy and other rural objectives. The Group recommends that the Government should review the current exemptions from sporting rates and introduce a reformed rates system as appropriate in the public interest.**

### Land Valuation Taxation

- 21 There have long been calls for the reform of the Council tax and non-domestic rates as the basis of local government taxation. In the most comprehensive review in recent years of the current UK tax system, Mirrlees recommended abolishing both these taxes.<sup>8</sup>
- 22 One of the prominent issues is that there is no recurrent tax on land itself. Both Council Tax and business rates apply to the whole package of the built property along with the land on which it stands. However, land and the activity carried out on the land are distinct. The value of the land, known as the site value, can therefore be calculated separately from the value of the property. This is the basis of Land Value Taxation (LVT). The principles of LVT were encapsulated in the evidence to the Scottish Affairs Committee: *"A rational system of property taxation would have as its broad general principle the taxation of all real property, principally on the basis of taxing the value of the land on which the property sits. This has two advantages. The first is that it reduces the disincentive to investment in new buildings (whether residential and non-residential) insofar as the value of the house, office or factory will not itself be subject to additional taxation. The second is that it recognises that much of the value of land is not intrinsic, but is created by the rules which apply to its use, enforced principally through the planning system: this is easily seen in land which has been redefined to housing rather than agricultural use which immediately increases in value: there is an argument of equity for some of that benefit coming back to the wider community through taxation"*.<sup>9</sup>
- 23 Mirrlees suggests there is a strong case for LVT.<sup>10</sup> Wightman argues that it could be a substitute for both the Council Tax and business rates, while views were divided over the merits of LVT in the submission to the Review Group.<sup>11</sup> The Group considers that taxing land is a good basis for local government revenue and that LVT has a number of strong advantages. One is that the tax does not disincentivise the owner from investing in and improving the property. Another is that LVT returns to the public the benefits that result from any increase in land values caused by public investment. These include that there is a recurrent tax on all land, but one which 'returns' to the public the benefits that have not been earned by the owner and does not act as a disincentive to investment by the owner in improving the property.
- 24 There have, however, been difficulties implementing LVT in some countries.<sup>12</sup> There would

<sup>8</sup> Mirrlees, J, *Tax by Design: the Mirrlees Review*, (Oxford University Press, 2011)

<sup>9</sup> J Gallagher, *written evidence to Scottish Affairs Committee Land Reform Inquiry (Op cit)*

<sup>10</sup> *Mirrlees Review (2011)*, Chapter 16, p404

<sup>11</sup> A Wightman 'A Land Value Tax for Scotland' (Scottish Green Party, 2010)

<sup>12</sup> R Andelson 'Land Value Taxation Around the World' (*Studies in Economic Reform and Social Justice*, Blackwells, 2000)

also be particular challenges introducing it in Scotland, because this would require knowing who owns every bit of land. While information on this is currently very limited, the Group considers that Scotland should have a comprehensive map based register of land ownership for the many benefits that would bring (see Section 4). The introduction of LVT would also require the land to be valued and there would be further challenges in managing a transition from the current arrangements to LVT. However, the Group considers that there is a mounting case for serious consideration to be given to LVT in Scotland. The Group notes a recent study evaluating the scope and practicalities of introducing LVT in Northern Ireland.<sup>13</sup>

- 25 The Review Group considers that local government taxation in Scotland needs to be modernised and that Land Value Taxation should be given serious consideration as an option. The Group recommends that there should be a detailed study of the scope and practicalities of introducing Land Value Taxation.**

## 25.2 Fiscal Measures and Land Ownership

### National Taxation

- 26 In addition to local taxation, national taxes have played an important role in the development of land ownership in Scotland. The Land Tax, which was introduced in Scotland in 1667, was paid by the owners of all land according to the size of their landholding. The Land Tax was the first and, for a long time, the only form of direct taxation in the UK and lasted longer than any other form of direct taxation until its final abolition by the Finance Act 1963.<sup>14</sup>
- 27 There have continued to be taxes on the value of land and property at the time of the disposal or transfer of its ownership. One of these is Stamp Duty Land Tax. This is paid by the purchasers of land at the time it is bought and produced revenue of £275 million in Scotland in 2011-12.<sup>15</sup> Responsibility for this tax was devolved to the Scottish Parliament by the Scotland Act 2012 and, in 2013, the Scottish Parliament passed legislation to replace Stamp Duty Land Tax with the Land and Buildings Transaction Tax. This will introduce some improvements to the tax, including how the charge is structured. The Land and Buildings Transaction Tax is a charge on a buyer of land, rather than the owner disposing of land.
- 28 The other two main national taxes on land are both charged on the owner disposing of or transferring the land. These are Inheritance Tax and Capital Gains Tax, both of which are reserved to Westminster. Inheritance Tax on the value of land and property at the time of inheritance dates back to the introduction of Estate Duty in 1894. That was replaced by Capital Transfer Tax in 1975 and then by Inheritance Tax in 1986. Capital Gains Tax on the disposal or transfer of the ownership of land is charged on the basis of the gain that may exist between the cost at acquisition and value at disposal.
- 29 A number of reliefs from Inheritance Tax and Capital Gains Tax exist for the owners of land and property. Domestic property occupied as a principal residence is, for example, exempt from Capital Gains Tax. However, there are also a number of special reliefs for agricultural and forestry land which, as stated in paragraph 7 above, account for around 90% of

<sup>13</sup> R Lyons and A Wightman (2014) 'A Land Value Tax for Northern Ireland' (NICVA, in press)

<sup>14</sup> The Land Tax and role of commissioners' [www.parliament.uk](http://www.parliament.uk)

<sup>15</sup> SPICe 'Land and Buildings Transaction Tax Briefing' (2013)

Scotland's land area. Agricultural and forestry land is, for example, eligible for relief from Inheritance Tax and land of national heritage value may also be eligible for a conditional exemption from Inheritance Tax. While taxing inheritance does not affect many of the larger landholdings as they are owned by companies, there are also special reliefs for agricultural and forestry land from Capital Gains Tax. These 'roll-over' reliefs enable liabilities for Capital Gains Tax to be carried forward.

- 30 These reliefs for agricultural and forestry land from national taxation, like the exemption of this land from business rates, reflect the reduction during the 20th century in the contribution of land to taxation. However, all these reliefs and exemptions are also a cost to public funds in terms of the income foregone. The scale of the income foregone through the different reliefs and exemptions is far from clear, as illustrated by the recent National Audit Office's report of Tax Reliefs.<sup>16</sup> While the UK Treasury now conducts a full impact assessment of new proposed reliefs, existing ones such as those considered here for agricultural and forestry land have apparently never been reviewed or assessed in relation to their public benefits. The Review Group considers that the public interest justification for each of the blanket reliefs and exemptions for agricultural and forestry land should be clear and transparent in terms of the public benefits that result from the income foregone.
- 31 The Review Group also considers that a direct subsidy which is targeted is more effective in the public interest than a blanket or generic tax relief. As the witness from the Institute for Fiscal Studies commented recently to the Scottish Affairs Committee: *"You would want to ask what precisely the reason is that you want to subsidise it. What precisely is the activity you would want to encourage, and then let's subsidise that...whatever it is that you want to achieve, identify that carefully, define it and target that. It is not obvious to me that agricultural relief in business rates or inheritance tax is doing that"*.<sup>17</sup>

### Land Use Payments

- 32 Scotland's two most extensive rural land uses, agriculture and forestry, have been and continue to be eligible for a range of direct payments from public funds. The subsidies for forestry are in the form of grants to plant and maintain woodlands, while for agriculture, the payments are the subsidies paid in Scotland under the European Union Common Agricultural Policy (CAP).
- 33 There are two elements to the CAP funding. The first 'pillar' involves direct payments to farmers and accounts for around three-quarters of the CAP funding, with qualifying farmers receiving these payments as an entitlement. The second 'pillar' is to support rural development and payments are made on a competitive basis, with the largest part of this funding paid through the Less Favoured Support Scheme to farmers on 85% of Scotland's total agricultural land area. The second pillar is managed by the Scottish Government through the Scottish Rural Development Programme (SRDP) and during the SRDP funding scheme for 2007-13, payments totalled around £1.2 billion.<sup>18</sup> The next programme of CAP funding will start in 2015, following 2014 as a transition year.
- 34 There has been no cap or upper limit on the total amount of agricultural subsidy that can be paid to a single business and the inequality in the distribution of the subsidies amongst farm

<sup>16</sup> National Audit Office 'Tax Reliefs' (2013)

<sup>17</sup> S Adam, Oral evidence to SAC 4 March 2014 Q797

<sup>18</sup> SG Briefing

businesses has increased. In 2008, for example, the top fifty recipients were paid £22 million and that had risen to £35 million by 2011, with the top 10% of farm businesses receiving 48.6% of the total amount of agricultural support of £710.4 million that year.<sup>19</sup> The European Parliament voted to limit the amount of agricultural payments to any farm under the new CAP scheme to €300,000, with additional conditions on any farm receiving more than €150,000. However, this was overturned by the Council of Ministers, who decided that any capping of the size of payments to large beneficiaries could be done on a voluntary basis by each country.

- 35 The new system of CAP agricultural subsidies to be introduced in Scotland from 2015, will be based on a fixed payment per hectare of land occupied. While the details are yet to be published, it is already clear that under the new Basic Payments from 2015, the larger the farm business in any payment region, the larger the subsidy payment any farmer will receive. In addition, there are over 1.1 million hectares of land that are potentially eligible for Basic Payments, much of which appears to be part of large upland landholdings and possibly used to a very limited extent for agricultural purposes.<sup>20</sup>
- 36 Agricultural subsidies play an important role in underpinning the viability of farm businesses in Scotland and the wider agricultural sector as a valuable part of the Scottish economy. However, the Review Group considers that there should be limits on the payments to the largest beneficiaries. The agricultural subsidies are, like the tax concessions described above, capitalised into higher land prices and contribute to an increasing concentration in the ownership of farms on Scotland's better agricultural land (see Section 23). The Group also considers that the value for money in terms of public benefits from public funds for aspects of the CAP agricultural subsidy schemes, should be much clearer than is the case at present.

### Rural Land Market

- 37 The price of land can be considered to reflect the anticipated net flow of future costs and benefits from owning that land. Changes in the balance of that equation will affect the capital value of the land, with reduced costs or higher benefits leading to higher land prices. The financial benefits of the special tax reliefs and exemptions for agricultural land, together with the land use subsidies available, contribute to this equation. These special benefits for agricultural land become capitalised into the value of that land and, as described by witnesses to the Scottish Affairs Committee, result in the price of agricultural land being several times what might otherwise be expected.<sup>21</sup>
- 38 The capital value of agricultural land in Scotland has increased considerably over the last ten years, as shown in Fig. 27.<sup>22</sup> The highest increase was in the price of good arable land, which rose from £2,040 per acre (£5,038 per ha.) in 2003 to £7,698 (£19,014 per ha.) in 2013. However, the value of all types of agricultural land in Scotland increased significantly over the period. As the graph also shows, the increases continued through the UK economic recession from 2008. The extent to which Scottish farmland has been a good investment over the period is emphasised by Fig. 28, comparing the increase in its value with that of other assets.<sup>23</sup> Thus, while there was an increase of 32% in UK house prices and 55%

<sup>19</sup> [www.andywrightman.com/?p=2172](http://www.andywrightman.com/?p=2172)

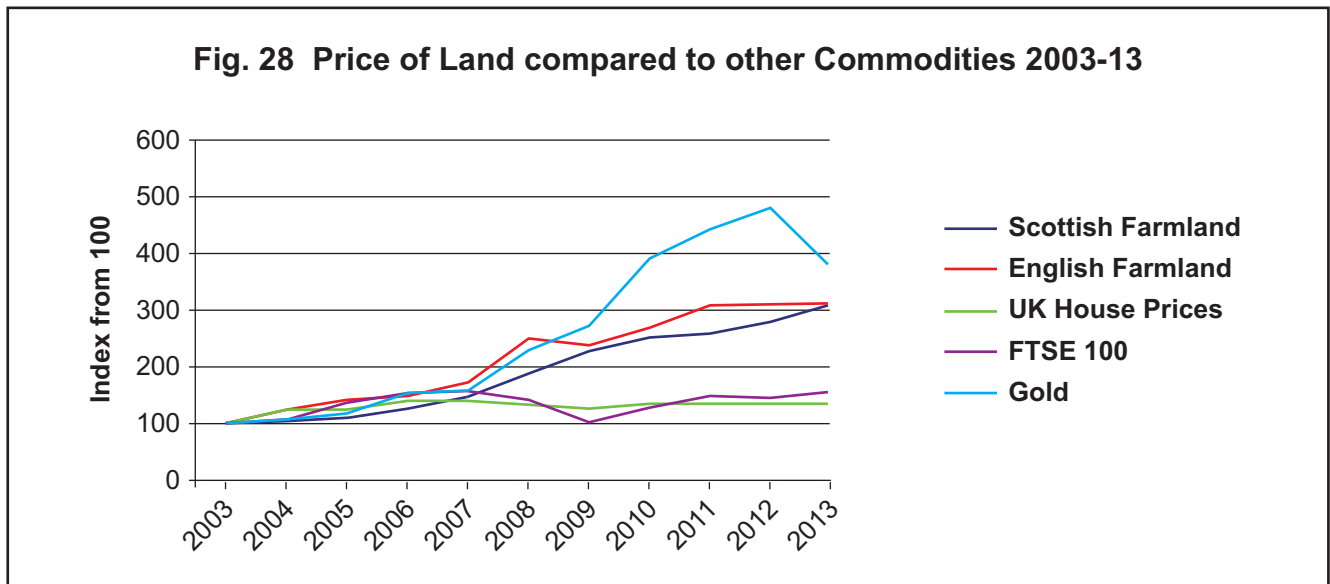
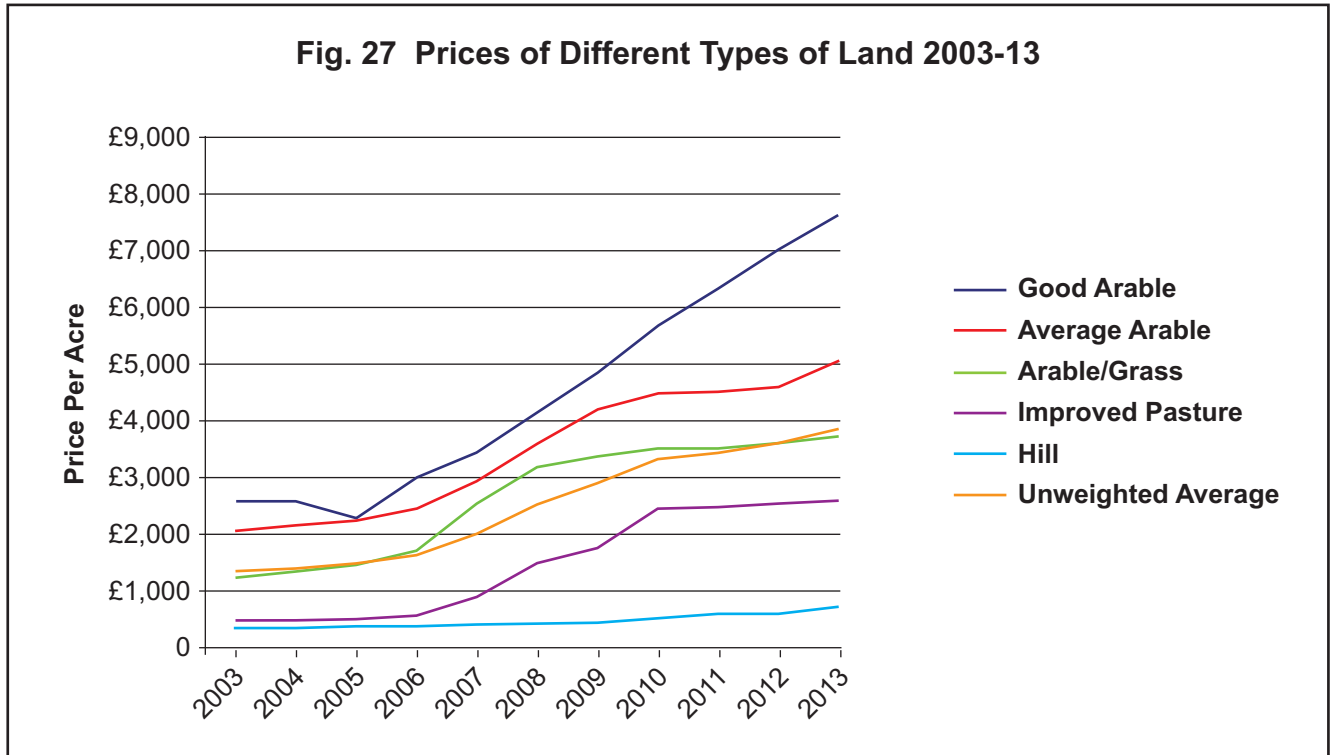
<sup>20</sup> D Miller et al, 2013. *Future CAP: New Areas and Minimum Activity Analysis*, James Hutton Institute

<sup>21</sup> for example, Professor Paul Cheshire, SAC Oral Evidence 28 January 2014

<sup>22</sup> Knight Frank Residential Research (2014).

<sup>23</sup> *Ibid*

increase in the FTSE 100 Share Index, Scottish farmland increased in value by 204% and was only outperformed in the data available by the more variable 286% increase in the price of gold.



39 Agricultural and forestry land with their special fiscal treatment account for over 90% of Scotland's land area, and the value of rural estates has also shown very positive capital growth compared to other investments. One land management company recently reported, for example, that "Rural assets continue to outperform alternative assets and our survey again records a healthy investment performance. In the year to 5 April 2013, the average total return for all estates for all let property (agricultural and residential) was 10.8%



*comprising 1.3% net income return and capital growth of 9.5%".<sup>24</sup>*

- 40 Many factors are involved in the price of land and estates in Scotland. As the same company has commented in the context of the international market in Scottish estates, *"It is possible to buy 10,000 acres in the Highlands with a Grade A listed nine bedroom castle and 10 ancillary dwellings for the same price as a 3 bedroom flat in Knightsbridge".<sup>25</sup>* The Review Group considers, however, that there needs to be far greater transparency and understanding of the particular role that public funds play through tax concessions and payments, in the high price of rural land in Scotland.
- 41 The Group also considers that there should be a much wider examination of the special treatment of rural land in national and local taxation. The current arrangements have evolved through various changes during the 20th century and there seems little evidence to suggest they are best suited to contemporary circumstances. As commented above, both the costs (to public funds) of the existing tax concessions for land, and the public interest justifications for the current blanket exemptions are far from clear.
- 42 The relationships between tax concessions for rural land, land use payments and land markets are complex and the current regime of concessions and payments involves the European Union and both Westminster and Holyrood Governments. The Review Group considers, however, that they are important relationships to understand in the public interest and it welcomes the continuing investigations of the Scottish Affairs Committee into the current fiscal arrangements.<sup>26</sup>
- 43 **The Review Group considers that there is a lack of clarity over the public costs and public benefits that result from the current exemptions and reliefs for agricultural and forestry land in national and local taxation. The Group recommends that each of the exemptions and reliefs should be reviewed and reformed as necessary, to ensure that there is a clear and transparent public interest justification for the public expenditure through revenue foregone.**

#### Rural Land Ownership

- 44 With over 90% of Scotland's land area classified as agricultural and forestry land, there is also the wider question of the influence of the current fiscal benefits of land ownership not simply on land prices, but on the continuing very concentrated pattern of large scale rural land ownership in Scotland.
- 45 At one level, the relatively high price of rural land in Scotland can be considered to limit the number of people who can afford to buy land, while the positive capital growth in land values might be seen to favour those who own land and to provide an incentive for them to continue to hold on to their land. The capital growth may provide a good return if an owner sells their land and mean that existing estate owners can achieve high prices for selling relatively small parts of their land. However, the concentrated pattern of private land ownership continues and, as described earlier, there is also the relatively high degree of intergeneration continuity amongst the owners of larger estates, whether as owners in their own right or the beneficiaries of ownership through companies and trusts (see Section 24).

<sup>24</sup> Savills 'Scottish Estate Benchmarking 2013 Survey' (2014)

<sup>25</sup> Savills 'A Highland estate top of the wish list for international businessmen' (December 2013)

<sup>26</sup> Scottish Affairs Committee (2014) *Op cit*

- 46 The Review Group considers that the continuity in the concentrated pattern of rural land ownership is, like high land prices, one reflection of the very favourable fiscal environment for private estate owners in rural Scotland. There are no recurrent local taxes or public charges on the rural land they own. As their land is very largely classified as agricultural and forestry land, they also receive exemptions and reliefs on that land in national taxation. In addition, they receive public subsidies to manage their land through agricultural, forestry and other grants. As Highlands and Islands Enterprise concluded when commenting on land values that *"are disproportionate to the return on investment that such assets typically generate. This could be shown as a direct legacy of the economic context and fiscal environment of land ownership over time in Scotland, and the legacy which presents a barrier to diversified land ownership patterns in Scotland today"*.<sup>27</sup>
- 47 The Scottish Government's policy aim is now to create *"a fairer, or wider and more equitable, distribution of land in Scotland"*, and as part of the Group's remit, to propose changes *"which will lead to a greater diversity of land ownership, and ownership types in Scotland"* (Annex 1).<sup>28</sup> This could be achieved by a range of measures including, for example, greater support for community land ownership as described in Part 4 of this Report. However, the Review Group considers that any significant increase in the number of land owners in rural Scotland will need the current fiscal regime to be revised. The Group considers that fiscal measures should be more transparent in costs and more accountable in their public interest benefits than the current regime. Additionally, the Group considers that fiscal measures should be progressively structured to promote an increase in the number of land owners in rural Scotland.
- 48 **The Review Group considers that the current fiscal regime for land ownership and use plays an important part in maintaining the concentrated pattern of large scale, private land ownership in rural Scotland. The Group recommends that changes to the current fiscal regime should include structuring them to encourage an increase in the number of land owners in rural Scotland, in the public interest.**

---

<sup>27</sup> Highlands and Islands Enterprise written to Scottish Affairs Committee, quoted in oral evidence (January, 2014)

<sup>28</sup> Ministerial response to written Parliamentary Question, 20th January 2014, S4W-19122

## PART SEVEN

### AGRICULTURAL LAND HOLDINGS

#### Introduction

- 1 Agriculture is Scotland's most extensive and economically important rural land use. Historically, agriculture was carried out very largely on land leased from land owners by tenants. While the amount of Scotland's agricultural land managed by tenants declined throughout the 20th century and continues to do so, a significant proportion remains tenanted.
- 2 The relationships between land owners and different types of agricultural tenants, and the future of tenanted agricultural holdings in Scotland more generally, were prominent issues during the Review Group's inquiry and are considered in the following sections.
- 3 In Scots property law, only land (immoveable property) can be the subject of a lease that binds successor owners and the authority of owners to grant leases over all or part of their property. This is considered one of the basic rights of land ownership. A lease is a contract by which someone (the tenant) is allowed to occupy someone else's land (the land owner's / landlord's) for a finite term (duration) in return for periodic payments (rent). Legislation to safeguard the rights of tenants is amongst the oldest extant Acts in Scots law. The Leases Act 1449 converted leases from a personal right of contract into a right over land by securing a tenant's lease against landlord succession.
- 4 There has been a long history of legislation governing leases in Scotland. This has dealt with both the overall legal framework governing leases and specific provisions related to the different types of leases that exist. With the former, a relevant modern trend has been legislation to abolish types of perpetual and very long leases by converting them into ownership. Since 1979 for example, a particular type of perpetual tenancy held by 'tenants at will' can be converted to ownership through a right to buy.<sup>1</sup> The Scottish Parliament has also both abolished the archaic system of extra payments over and above rent or 'leasehold casualties' in some very long leases (for example, 999 years or more) and reduced the maximum lease allowed in Scots law to 175 years. The conversion of qualifying long leases into ownership is imminent.<sup>2, 3</sup>
- 5 The extent to which there are specific statutory provisions to regulate the relationship between land owners and tenants varies greatly with leases for different purposes. Residential leases, referred to in Section 22, are much more strictly regulated than the lease of a building for commercial purposes, such as shops and offices. The legislation governing leases for agricultural purposes, started with two Acts in the 1880s and has evolved into the current arrangement with a number of different types of statutorily defined agricultural tenancies.
- 6 The first of these two Acts was the Agricultural Holdings (Scotland) Act 1883, which

---

<sup>1</sup> *Land Registration (Scotland) Act 1979*

<sup>2</sup> *Leasehold Casualties (Scotland) Act 2001*

<sup>3</sup> *Long Leases (Scotland) Act 2012*

improved the compensation that tenants were due at the end of their tenancy. The second Act was the Crofters Holdings (Scotland) Act 1886, giving greater rights to small land holders or crofters in seven counties in the Highlands and Islands. Crofters only paid rent to the land owner for the land, their houses and other structures on the land being regarded as their own improvements. A third Act, the Small Landholders (Scotland) Act 1911, then extended the principles of crofting to the rest of Scotland and created small landholders as a distinct type of agricultural tenant.

- 7 This remains the basic pattern today. The agricultural holdings legislation was most recently consolidated in the Agricultural Holdings (Scotland) Act 1991 and the crofting legislation in the Crofters (Scotland) Act 1993. Both these Acts, as amended, remain the primary legislation, while small landholders continue to hold their tenancies under the Small Landholders Act 1911-31. Two new types of statutory agricultural tenancies were also created in 2003 by amending the 1991 Act.<sup>4</sup> Therefore, in addition to the full 1991 tenancies, there are also now Limited Duration Tenancies and Short Limited Duration Tenancies.
- 8 A hundred years ago, in 1912, over 90% of both Scotland's agricultural holdings and agricultural land area were tenanted. By contrast, over 70% of holdings and over 75% of agricultural land are now managed under ownership rather than tenancies. In 2012, 1.65 million hectares, or 24% of Scotland's 5.67 million hectares of agricultural land, was still tenanted.<sup>5</sup> There were around 16,500 tenanted holdings. The majority of these were rented crofts, with only about 100 small landholdings and around 6,700 agricultural tenancies under the 1991 Act accounting for the balance.
- 9 In the first two sections below, the Review Group considers the distinctive position of crofting tenure and the closely related 1911 small landholdings legislation. In the third section, the Group considers the position with tenancies under the 1991 Act.

## SECTION 26 - CROFTS

- 10 The Crofters Holdings (Scotland) Act 1886 created crofts and crofting as a distinct form of agricultural land tenure in Scots law. The Act only applied to crofts in seven of the counties in the Highlands and Islands – Shetland, Orkney, Caithness, Sutherland, Ross and Cromarty, Inverness, and Argyll. These therefore became known as the Crofting Counties.
- 11 The total area still under crofting tenure in those former counties is around three-quarters of a million hectares, with around 538,000 hectares of that consisting of common grazings shared by crofters.<sup>6</sup> There are around 18,000 crofts (including those that are rented and occupied), with the greatest concentrations in the Western Isles (6,000), Skye and some other islands in the Inner Hebrides (1,840), the Shetland Islands (2,700) and on the north and west coast of the mainland (2,300).<sup>7</sup> There are considered to be 10,000-12,000 crofting households with a population of around 33,000.<sup>8</sup> A survey in 2007 indicated that, on average, 30% of the income of crofting households came from crofting.<sup>9</sup>

---

<sup>4</sup> *Agricultural Holdings (Scotland) Act 2003*

<sup>5</sup> *SG Agriculture Statistics (2013)*

<sup>6</sup> *Crofting Commission Briefing 19.11.13*

<sup>7</sup> *Scottish Parliament Information Centre (SPICe) briefing (2010) Crofting Reform (Scotland) Bill*

<sup>8</sup> *Ibid*

<sup>9</sup> *Committee of Inquiry into Crofting (2008) Shucksmith Report*

- 12 Crofting tenure has played a well recognised historical role in helping maintain communities in economically remote and fragile locations. The report of the Committee of Inquiry into Crofting in 2008 ('the Shucksmith Report') highlighted the continued relevance and importance of crofting and crofting communities for a wide range of social, economic and environmental reasons.<sup>10</sup> The Review Group fully endorses this view. The Group also acknowledges the longstanding and distinctive contribution that crofters and crofting communities have made to promoting land reform in Scotland.
- 13 During the Group's inquiry, three particular topics related to crofting were prominent. These were the notorious complexity of crofting law, the arrangements in Part 3 of the Land Reform (Scotland) Act 2003 governing the Crofting Community Right to Buy, and the future of the Scottish Government's crofting estates. Each of these is considered in turn below, after some contextual background about the Crofting Counties.

### 26.1 The Crofting Counties

- 14 The fact that the Crofters Act in 1886 only introduced crofting tenure in the seven most northerly and westerly counties in Scotland, has tended to encourage a view that crofters and crofting have always been something distinct to those areas. However, at the time, there were crofting communities throughout the Eastern and Central Highlands as well.
- 15 A croft is simply the Scottish term for an agricultural smallholding that only provides the crofter with a part time means of subsistence or income. In the subsistence agriculture of medieval times, there were crofts throughout Scotland, as evidenced by historical records and place names on maps. By the 18th century, the commercialisation of agriculture and re-structuring of holdings by land owners had started the reduction of crofts in lowland areas. By the beginning of the 19th century, the clearance of crofting communities to make way for sheep and deer had begun in the Eastern and Central Highlands. This spread north and west through the Highlands and Islands, with increasingly extreme approaches being used to clear communities as the century progressed. This resulted in particular unrest by crofters in the north and west, which led to the appointment in 1883 of a Royal Commission of Inquiry into the Conditions of Crofters and Cottars in the Highlands and Islands. As part of the Inquiry, the Chairman Lord Napier and colleagues sailed from Glasgow. They took evidence from crofters up the west of Scotland, along the north coast and in Orkney and Shetland Islands, before returning to Glasgow. The Commission's report was published in 1884 and is seen as the precursor of the 1886 Act, which gave resident crofters security of tenure, rights of succession, fair rent and compensation for improvements.
- 16 The Napier Report did not lead directly to the 1886 Act in terms of its recommendations, but did inadvertently determine the area covered by the Act. The Government at the time of the Act was keen to limit the impact of the measures to be introduced on land owning interests. However, initial criteria proposed by the Government to define the counties to be covered such as the small average size of the holdings, common grazings and the existence of Gaelic or a distinct dialect, applied equally to all the counties north of the Highland line. The Government therefore decided simply to limit the application of the Act to those counties visited by the Napier Commission. Thus, if a county did not include any of the west and

---

<sup>10</sup> *Ibid*

north coast, it was excluded. An amendment in Parliament to include the counties of Nairnshire, Moray, Banffshire and Aberdeenshire was defeated by 'only' 126 to 87 votes.<sup>11</sup>

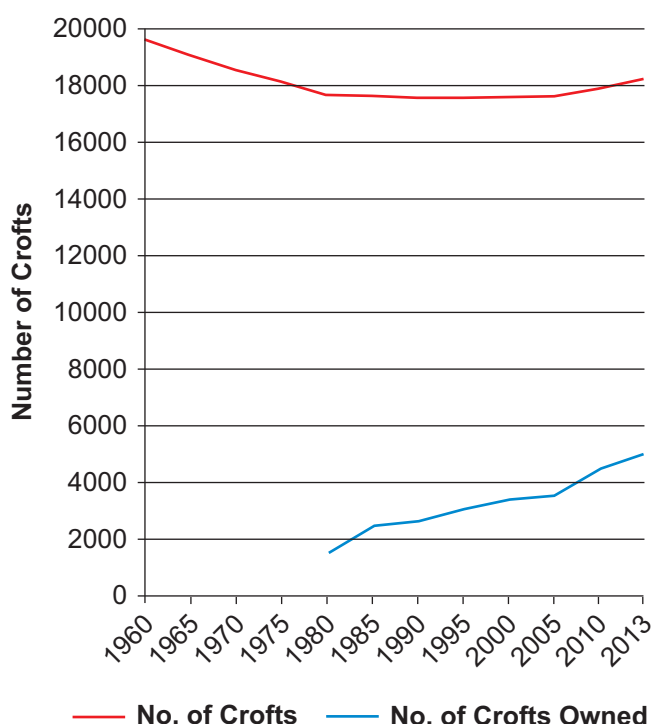
- 17 Thus, due to political expediency, there were only seven counties included, and as a result, crofting communities in the Eastern and Central Highlands continued to decline without the protection of the 1886 Act. If twenty more MPs had voted in 1886 for the amendment rather than against it, the history of those communities would have been different. The Group draws attention to this 'politically expedient line' drawn through the Highlands as it continues to be significant today, in ways not directly related to crofting. The most conspicuous example within the context of this report is that when the Highlands and Islands Development Board was set up in 1964 to counter depopulation, the government of the day used, essentially, the same boundary again effectively excluding much of the Highlands. Thus, today with its successor Highlands and Islands Enterprise (HIE), Highland communities in the Eastern and Central Highlands in places like Upper Deeside and Highland Perthshire still do not receive the same public support as those on the other side of the line (see Section 19 of this Report). At a wider level, the creation of Highland Region (now Highland Council) in 1975 based on similar boundaries, re-enforced a perception that the Scottish Highlands start at the Drumochter Pass.

## 26.2 Crofting Tenure

- 18 The Crofters Holdings (Scotland) Act 1886 both established crofting as a distinct form of tenure and created a Crofters Commission to oversee the operation of the Act. However, under the Smallholders (Scotland) Act 1911 covering the whole of Scotland, crofters became smallholders and the Crofters Commission was abolished, with its powers and responsibilities being transferred to the Scottish Land Court established by the Act.<sup>12</sup> The Crofters Holdings (Scotland) Act 1955 then re-established crofts and crofting as a distinct form of land tenure in the seven Crofting Counties and created a second Crofters Commission, while retaining the involvement of the Land Court in crofting.
- 19 While the 1955 Act re-established crofting tenure as it essentially exists today, there has continued to be important crofting legislation since. A particularly significant development was the Crofting Reform (Scotland) Act 1976 which, amongst other measures, gave crofters a right to acquire ownership of their croft from their landlord if they chose to do so. Fig. 29 shows that, while the total number of crofts has remained very similar since the 1955 Act, the number of crofters who have become owners of their crofts has continued to increase since 1976 and now accounts for around 25% of all crofts. However, the concept of owner occupied crofts has continued to give rise to issues in crofting law since the 1976 Act. In the Crofters (Scotland) Act 1993, which consolidated crofting legislation since 1955 and is now the primary legislation governing crofting, the statutory definition of a crofter remained as the tenant of a croft. This continued to be the case until the Crofting Reform (Scotland) Act 2010.

<sup>11</sup> Carter I. *Farm Life in Northeast Scotland 1840-1914* (John Donald, 1979)

<sup>12</sup> SPICe briefing Op cit

**Fig. 29 Number of Crofts Owned or Rented 1960-2013**

Date	Number of Crofts	Number of which were Owned
1960	19,734	
1965	19,038	
1970	18,539	
1975	18,111	
1980	17,894	1,507
1985	17,744	2,410
1990	17,671	2,730
1995	17,671	3,172
2000	17,725	3,458
2005	17,778	3,686
2010	17,982	4,566
2013	18,129	5,114

Source: Scottish Government

- 20 One of the policy intentions of the 2010 Act was to equalise the rights and duties of owner-occupier and tenant crofters as much as possible. The Act, which came into force 35 years after the 1976 Act, defined owner occupier crofters in crofting law for the very first time. However, issues have continued to arise, as reflected in the need for the Crofting (Amendment)(Scotland) Act 2013 to resolve difficulties over enabling owner-occupier crofters to decroft their land.
- 21 Prior to 2010, the Scottish Parliament had already experienced the complexities and strong views associated with crofting during the passage of the Parliament's first Crofting Act in 2007. A historic component of this Act was to enable the creation of new crofts, both within the crofting counties and in other areas outwith the boundary, designated for the purpose by Scottish Ministers. However, there was significant disagreement between the Parliament's Environment and Rural Committee and Ministers over aspects of the Bill which led to the Act. As a result, the Scottish Government dropped parts of the Bill and established the Shucksmith Inquiry into Crofting. The Committee's recommendations led to some of the changes introduced in the 2010 Act.
- 22 One of these changes is the requirement for Registers of Scotland to establish and maintain a map-based register of crofts and crofting interests. There has never been a complete or up to date register of crofts, despite the requirement for one in previous legislation. As the Shucksmith Report commented "An accurate and current Register of Crofts is a prerequisite for effective regulation of crofting".<sup>13</sup> Amongst other significant changes in the 2010 Act

<sup>13</sup> Shucksmith Op cit para 1.5.24

were separating the Crofters Commission's regulatory and development functions by transferring the latter to HIE, and the re-naming of the Commission as the Crofting Commission with a Board consisting mainly of elected crofters rather than Ministerial appointees.

- 23 Despite the reforms to date, further legislation is still required. During the recent passage through the Scottish Parliament of the 2013 Amendment Act, witnesses gave “*evidence about the many problems in the existing legislation that were causing difficulties for crofters, landlords and others*”.<sup>14</sup> As a result, the Scottish Government undertook to investigate these issues. In addition, the Crofting Law Group, an informal group of experienced experts in crofting law, was established to “*collate the issues and problems that are causing difficulties, prioritise them and indicate how the problems can be resolved*”.<sup>15</sup> The intention is that this “*initiative will hopefully assist the Scottish Government in deciding what to do next with crofting law. It is a notoriously complex area of the law*”.<sup>16</sup>
- 24 The Crofting Law Group plans to submit a report to Ministers in Spring, 2014. The Scottish Government is committed to reviewing crofting law and began formal engagement with key crofting stakeholders at a meeting in December 2013.<sup>17</sup> Another meeting is planned and it is presumed that there will be a public consultation in due course on the measures being proposed. The Review Group anticipates that the proposals will be detailed considerations which address technical inconsistencies, ambiguities and other problems with the current legislation. The great danger is that further measures simply add to the complexity of crofting law, rather than reduce it. During its inquiry, the Group noted the following social media comment from an eminent commentator on crofting, “*To solve crofting law complexity, scrap lot and start again with clean sheet. Each Act always makes things worse*”.<sup>18</sup>
- 25 The Review Group considers that crofting law needs to have a continuing process of modernisation that includes reducing the complexity of the law as a key underpinning objective. Apart from the problems in administering the current law, the complexity holds back the development of crofting, including the development of new crofts. Crofting law is too easily seen as an uninviting disincentive to new crofters, particularly those outside traditional crofting areas. The Group recognises that inevitable tensions exist between safeguarding features which have long protected crofting and the aim of creating a less complex legislative framework. It is also important to recognise the diversity which exists within the overall crofting community, for example, between the histories and cultures of crofting in the Western Isles and crofting in the Shetland Islands.
- 26 **The Review Group recommends that developing a modern and robust statutory framework for crofting should be a priority for the Scottish Government. The Group considers that the crofting community should be at the heart of any such process, and have a clearly defined role within it. The Group further recommends that reducing the complexity of crofting legislation should be an underpinning principle of any such process.**

---

<sup>14</sup> Crofting Law Group news release 28.10.13

<sup>15</sup> *Ibid*

<sup>16</sup> *Ibid*

<sup>17</sup> SG Briefing 14.2.14

<sup>18</sup> J. Hunter tweet June 2013



### 26.3 Crofting Community Right to Buy

- 27 In the last 20 years there have been two pieces of legislation intended to encourage crofters to become the collective owners of the land that makes up the ‘crofting township’ or settlement of which they are a part. The first was the Transfer of Crofting Estates (Scotland) Act 1997 which enables Scottish Ministers to dispose of a crofting property which they own to an approved body, which is representative of the crofting interests in that property. The 1997 Act and the Government’s crofting estates are considered in Section 26.4.
- 28 The other legislation with this intention is Part 3 of the Land Reform (Scotland) Act 2003. In contrast to the pre-emptive right to buy given in Part 2 of the Act to local communities (to purchase registered land if the land comes up for sale), Part 3 gives crofting communities a right to buy whether or not the land is for sale or the owner is willing to sell, where the acquisition can be shown to be in the public interest. A subsequent amendment to Part 3 of the Act, through the Crofting Reform etc Act 2007, also empowered the crofting community to acquire leases over any land involved. The aim of this was to reduce the risk of leases being used as an avoidance measure by land owners.
- 29 The existence of the Part 3 right to buy has generally been enough to encourage successful negotiated purchases by crofting communities of their crofting townships from private land owners. In the one situation where a crofting community has sought to exercise the right, Pairc Estate on the Isle of Lewis, the legislation survived legal challenges by the Estate owner and eventually resulted in the community and owner agreeing to negotiate a final settlement. Importantly, the Court of Session upheld the framework of Part 3, within which is the responsibility of Scottish Ministers to determine whether exercising the right would be in the public interest in any particular situation.<sup>19</sup>
- 30 While the Review Group recognises Part 3 of the Act to be pioneering legislation, it considers that a number of amendments should be made to the provisions in Part 3. While the legislation should be robust enough to protect the legitimate interests of land owners, the aim of these amendments should be to reduce unnecessary burdens on the crofting community in exercising the right, and to reduce the risk of challenges to the right. In particular, the Act should be tightened to prevent the kind of challenges which are based on exploiting ambiguities within the requirements that communities have to fulfil in exercising the right. The Group considers that these amendments will, make the Act more effective in encouraging negotiated settlements and more workable if the right to buy is exercised.
- 31 Two particular aspects of Part 3 which the Group considers should be improved are those defining the residents of the community and mapping the land involved.<sup>20</sup> While clarity over the definition of residents is necessary for determining the members of the crofting community body seeking to acquire the land, it is also necessary to determine those eligible to vote in the ballot which is required within the acquisition process. Clarification of these provisions should mean that the community body can more readily identify the residents as defined, and that ballots are less open to challenge on technicalities.
- 32 The current mapping requirements in Part 3, and the associated statutory regulations, are extraordinarily complex and potentially extremely difficult to fulfil.<sup>21</sup> The Review Group

---

<sup>19</sup> *Scottish Land Court 2012 CSIH 96*

<sup>20</sup> *LR(S)A 2003 Act – sections 71, 73 and 75*

<sup>21</sup> *Act s.73 (5) and Crofting Community Body (Prescribed Form of Application and Notice) (Scotland) Regulations 2009*

considers that the requirements are both unnecessarily onerous on the community body and create needlessly fertile territory for hostile challenges. The mapping requirements go far beyond that which would be required by the Keeper of the Registers of Scotland in order to register title to ownership of such land. The Group consider that the mapping requirements should be substantially simplified, and brought into line with the requirements of registering a title to land.

- 33 Another aspect of Part 3 which should be amended is that of ‘eligible additional land’. This is land owned by the owner of the croft land covered by the application, which is not covered by crofting tenure.<sup>22</sup> The Review Group considers that eligible additional land should not be restricted to that owned by the owner of the croft land, not least to reduce the risk of an owner conveying such land into separate ownership as an avoidance mechanism. Under the current provisions, other eligible additional land already has to be referred by Ministers, to the Scottish Land Court, as a safeguard where the owner of the land has not consented to its sale. Consideration should also be given to modifying the requirement that the purchase of this other eligible land is “*essential to the development of the crofting community*”.<sup>23</sup> ‘Essential’ is potentially difficult to establish and as such, vulnerable to a hostile challenge. The Group recognises that changes relating to eligible additional land would need to be considered in the context of European Court of Human Rights (ECHR), Protocol 1, Article 1, for their implications for the rights of land owners.
- 34 Given the general complexity of the application process, the Review Group considers that there should be an appropriate provision to enable errors or omissions in the application to be rectified - even if future improvements are made to simplify the application process. Errors and omissions can come to light in the consideration of an application by Ministers, and the Group considers that options other than outright rejection should also be available to Ministers.<sup>24</sup>
- 35 In addition to the suggested improvements to Part 3 of the Act, and as proposed for local community bodies earlier in this Report, the Group considers that crofting community bodies should also have the option to be constituted as a Scottish Charitable Incorporated Organisation (SCIO) rather than just a company limited by guarantee (as described in Section 15).<sup>25</sup>
- 36 The Review Group considers that the provisions of the Land Reform (Scotland) Act (2003) Part 3 impose unnecessary burdens on the crofting community in exercising the right to buy and that the ambiguities in the requirements that they have to fulfil can be exploited through unwarranted challenges to the exercising of that right. The Group recommends that the provisions in the Act should be amended to reduce these unnecessary burdens, to reduce the risk of unwarranted challenges and to make other improvements to the provisions.**

---

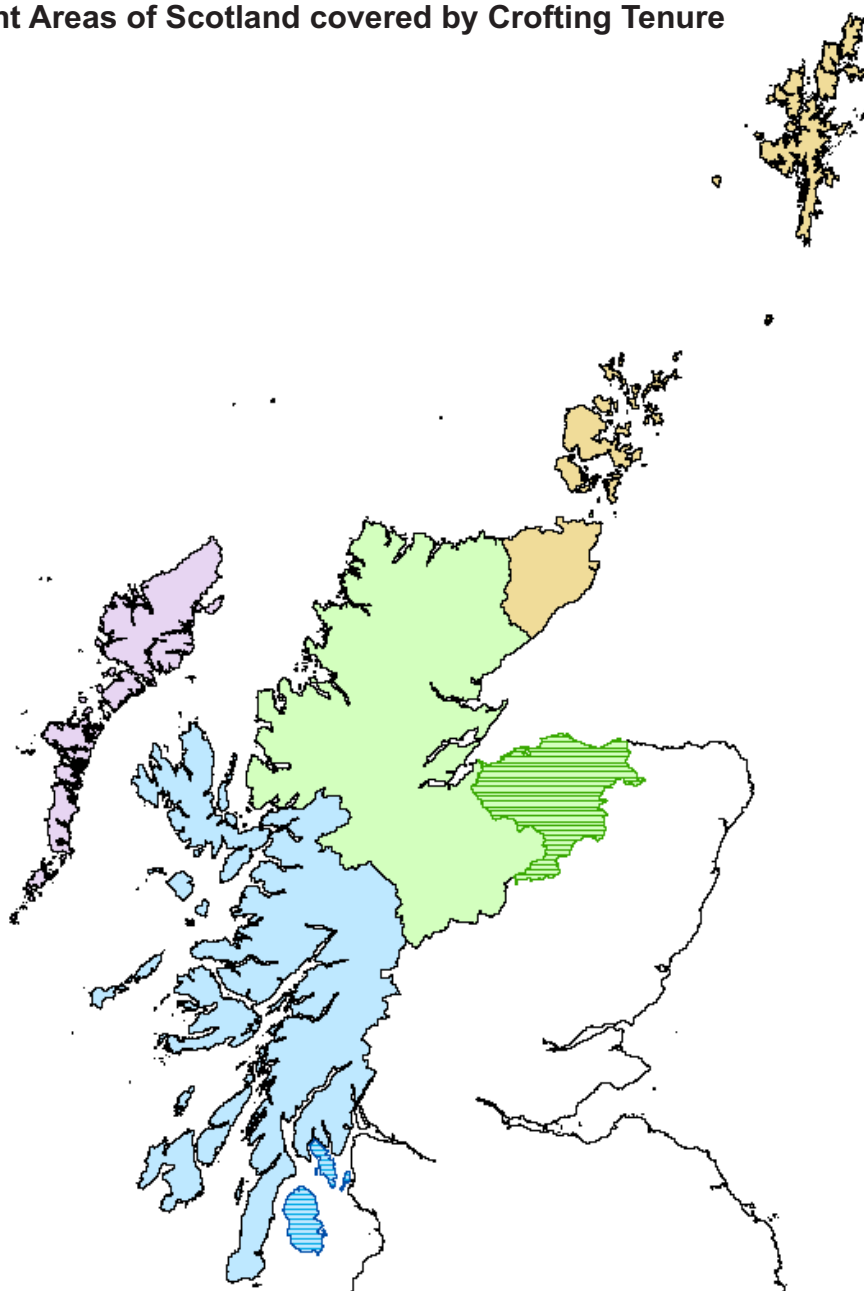
22 Act s.70

23 Act s.77

24 Act s.73

25 Act s.71

**Fig. 30 Current Areas of Scotland covered by Crofting Tenure**



#### 26.4 Scottish Government Crofting Estates

- 37 Scottish Ministers own a number of crofting estates spread throughout the former Crofting Counties (Fig. 30). These estates cover over 95,000 hectares, with 99% of the land under crofting tenure. There are currently around 1,556 crofts on these estates, which represents nearly 9% of all crofts in Scotland.<sup>26</sup> These estates also include a small number of other agricultural holdings. There are, in addition, shooting and fishing leases on some of these estates as well as lets for masts, quarries and other items.
- 38 This substantial public holding nearly all resulted from the government land resettlement programmes which occurred between the 1890s and the 1950s. While the Scottish

<sup>26</sup> *SG Briefing*

Government's crofting estates are a legacy of these historical processes, the Review Group considers the issues below within the context of what the future of these estates should be.

### Origin of Estates

- 39 The land settlement programmes involved the Government both acquiring land to create new holdings, and funding the creation of new holdings on private land. They started in the Highlands and Islands following the Congested Districts (Scotland) Act 1897. This was subsequently expanded to cover all of Scotland through the Smallholders (Scotland) Act 1911. There was then a substantial increase in the programme following the Land Settlement (Scotland) Act 1919. After 1930 the programme was mainly concentrated in lowland areas, and the limited resettlement after the Second World War had effectively come to an end by 1955. By that time, the Secretary of State for Scotland had become owner of 178 land settlement estates covering 182,000 ha and with 3,400 holdings. Government funding had also helped create 1,600 holdings on 142,000 ha of private land.<sup>27</sup> The Land Settlement (Scotland) Act 1919, including its compulsory powers, still remains in force, but appears not to have been used for over 50 years.
- 40 These government land settlement programmes which occurred in Scotland during the first half of the 20th century, should be regarded as a major episode of land reform. The Government's crofting estates are a legacy of that land reform. While part of the original intention with these estates was that crofters would become owner occupiers on a 50 year purchase arrangement, only the tenants on Glendale Estate on Skye stuck with this option. This Estate had been acquired by the Government in 1904 and in the mid 1950s, the Glendale crofters became individual owners of their in-bye land and collective owners of the hill grazings and other estate assets.<sup>28</sup> This continues to be the case. However, the crofters on all the other estates remained tenants. While successive governments then sold off the land settlement holdings outwith the Highlands and Islands, this has never been such a straightforward proposition with the crofting estates.
- 41 Following the Crofting Reform (Scotland) Act 1976, the Government started to sell individual crofts to tenants and continues to do so in response to requests., The crofting tenants have a statutory right to acquire their individually occupied land at fifteen times their annual rent. In the late 1980s, Government interest in disposing of more crofts developed into discussions with the Scottish Crofters Union about crofters acquiring a whole estate themselves as a crofting trust. The Scottish Office then carried out a pilot study looking specifically at the Government's estates on Skye and Raasay.<sup>29</sup> As part of that, a crofting trust structure was developed for the body to take over the ownership and management of an estate. While the crofters turned down the proposal to take over these estates, the crofting trust structure developed has had a continuing relevance. This structure, based on a company limited by guarantee and with charitable status, was the model used by the Assynt Crofting Trust when they purchased a private estate in 1993. The same model has also been used by community land owners since.
- 42 Since the 1990 pilot study, the Government has also continued to be involved in discussions about crofting trusts . These resulted in the Transfer of Crofting Estates (Scotland) Act 1997 under which the Government could dispose of estates to the crofters on an estate. The only

<sup>27</sup> A S Mather *State Aided Land Settlement in Scotland (O'Dell Monograph No 6, University of Aberdeen 1978)*

<sup>28</sup> J Hunter, *pers.comm.*

<sup>29</sup> *The Future of the DAFS Estates in Skye and Raasay. Arkelton Trust (Research Ltd, 1990)*

example to date of a crofting community acquiring an estate through the terms of the Act has been the West Harris Trust (WHT), which acquired three contiguous Government crofting estates covering over 16,000 ha in 2010. Despite the apparent interest of Scottish Ministers in disposing of crofting estates to crofters, the process took three years and included many frustrations for the WHT.<sup>30</sup> Many of the issues which arose during the process have been discussed earlier in this report, including the interpretations of the Scottish Public Finance Manual and State Aid provisions, and the reluctance of the BIG Lottery to fund the acquisition of public land (see Section 18).

### Current Position

- 43 The Scottish Government Rural Payments and Inspections Directorate (SGRPID) manages the Government's crofting estates and their statistics describe the Government as having 58 crofting estates. However, the word 'estate' is being used in the sense of legal rights in land and does not imply anything about the physical scale of the 'estate'.
- 44 As shown in Fig. 31, 17 or nearly 30% of the 'estates' are residual interests following previous disposals. Amongst the remaining 41 properties, the 13 in Caithness and Ross and Cromarty are all less than 200 ha in size and mainly under 50 hectares. These properties mainly have one tenant and at most two. They appear to be the residual final holdings, following previous disposals from these east coast properties.
- 45 While there are other relatively small scale properties, the table below reflects that 93% of the land and 92% of the croft lets in the Government's overall crofting estate are in Skye and Raasay, the Western Isles and Sutherland. Nearly all of the 18 properties in these areas are estates over 1,000 ha and have a minimum of 20-30 or more crofting lets. Three estates are over 10,000 ha and three have more than 100 crofts lets. The largest estate is Kilmuir on Skye covering 18,765 hectares which has 372 crofting lets.

**Fig. 31 Scottish Government's Crofting Estates**

Crofting County	No. of Properties	(Residual Interests)	Hectares	Croft Lets	Other Agricultural Lets
1 Shetland	4	-	2,107	46	1
2 Orkney	-	(1)	-	-	-
3 Caithness	7	-	439	8	-
4 Sutherland	3	-	20,289	156	2
5 Ross & Cromarty	6	(1)	216	9	-
6 Inverness (mainland)	3	(5)	3,008	19	1
Skye and Raasay	7	-	52,869	617	10
Western Isles	8	-	15,154	622	12
7 Argyll	3	(10)	922	47	-
<b>Totals</b>	<b>41</b>	<b>(17)</b>	<b>95,004</b>	<b>1,524</b>	<b>26</b>

<sup>30</sup> Submission Ref 237 to LRRG

- 46 The Scottish Government currently earns an average of around £200,000 a year from its overall crofting estate, from croft rents and other leases.<sup>31</sup> In addition, there is income from property sales which is considered to be an average of around £500,000 a year. However, no figures are readily available for the Government's average annual expenditure for the management of the estates, with different components of the expenditure recorded in various parts of the government. The supposition has always been that, as was the case in the 1990 Skye and Raasay pilot study, the costs of administering the estates and fulfilling the landlord's responsibilities have meant that the Government's overall crofting estate is a net cost on public funds each year.
- 47 In considering the future ownership of the crofting estates, the Government's "*current ongoing policy is to dispose of these properties*" where this can be done in one of three ways.<sup>32</sup> These are, firstly, under the statutory right of a crofter to acquire their croft; secondly, under the 1997 Transfer of Crofting Estates Act; or thirdly, for non-croft property, by sale on the open market.
- 48 With the first two ways, the Government can be described as having a reactive approach in that SGRPID just responds to requests. SGRPID has, for example, neither investigated what potential there might be for crofting trusts or crofting communities to take over the ownership and management of some of the main estates, nor encouraged any interest in doing this.<sup>33</sup> Against that background, the Review Group is concerned that the continuing sale of non-croft assets could in some instances, be inadvertently reducing potential income sources which might assist future community ownership.
- 49 There are many reasons why crofters have traditionally been, and might continue to be, content to have the Secretary of State for Scotland and now Scottish Ministers as their landlord. The Review Group supports the Government's policy of only disposing of croft land from the crofting estates, where the crofters themselves request to do it either individually or collectively under existing legislation. The Group anticipates that the number of small properties will continue to reduce through acquisitions by individual crofters. However, the Group's view is that the Government should be giving more consideration to the position of the larger estates.
- 50 Scottish Ministers have made clear that they would like to see more of the crofting estates become owned by crofting trusts and crofting communities. The Review Group supports that aim. The scale of some of the estates also means that progress in that direction, could start to make a significant contribution to the Government's policy of increasing local community land ownership by over half a million acres (202,429 ha.) by 2020. However, the Group considers that in order to achieve this, the Government needs to have a more pro-active approach than at present.
- 51 A basic requirement for making progress with this ambition is to address the types of obstacles faced by the West Harris Trust (WHT). Central to the barriers encountered is the price at which estates can be transferred to crofting communities under the 1997 Act. Ministers should be able to transfer an estate to an appropriately crofting body at reduced or zero cost and without the transfer falling foul of State Aid, where Ministers judge that this would be in the public interest. The 1997 Act should be amended if necessary to establish this in statute.

---

31 *SG Briefing*

32 *Ibid*

33 *Ibid*

- 52 There would appear to be no logic to the circulation of public funds which characterised the WHT acquisition. In addition, it is instructive to contrast the differing experiences of the West Harris crofters and the Glendale crofters. While the Glendale Crofters became owners of their estate at no cost after 50 years of annual payments, the other crofting communities (including West Harris) have been paying rent for much longer - over 100 years in some cases. It is also worth noting that when the 1997 Act was introduced, there was a clear policy intent that land would be transferred to crofting trusts at no cost, where Ministers considered that justified. Speaking to the House of Commons Scottish Grand Committee, the Secretary of State for Scotland who was responsible for taking the Act through Parliament, stated that *“Such is our commitment to this cause that we are even prepared, if the circumstances justify it, to transfer certain crofts free of charge... Our aim is to make sure that crofting trusts get off to a good start and succeed”*.<sup>34</sup>
- 53 The Review Group considers that the Scottish Government should clearly establish that crofting estates can be transferred to appropriate crofting trusts and crofting community owners at a reduced or zero cost and set out the circumstances within which this would be the case. This change would, in itself, be likely to increase the level of interest in taking over some estates. The Group understands, for example, that the crofters on the 11,000 ha Keoldale Estate in Sutherland previously did not pursue the possibility of taking over that estate, because of the potential cost of the acquisition. It would not be transferred for free.
- 54 The Group considers that the Government needs to take a more pro-active interest in starting to identify which crofting estates might have the potential to be transferred to crofting trusts and crofting community owners. The Group considers that this interest should not be directly through SGRPID with its landlord responsibilities, but through HIE or the Community Land Agency (CLA) recommended in Section 19 of this report. The context for crofting communities considering their options has changed significantly in recent times, with the increase in the number of crofting community owners that have acquired estates from private land owners. These are concentrated in the same areas as the Government’s crofting estates in the North West Highlands and Islands. Experience to date demonstrates that crofting community ownership can open up economic opportunities and reverse the fortunes of what are often fragile and marginal communities.
- 55 **The Review Group considers that crofting trusts or crofting community owners should be able to purchase Scottish Government crofting estates at less than open market value. The Group recommends that Ministers direct the Scottish Government to make provision for this to happen and to clarify the circumstances under which this can occur. The Group also recommends that the Government should take a more pro-active approach to facilitating and supporting such transfers.**

## SECTION 27 - SMALL LANDHOLDINGS

- 1 A particular type of agricultural tenant in Scotland concerns those who hold their land under the Small Landholders Acts 1911-1931. The character of these small landholdings is similar to crofts and the legislation governing them has a shared history with crofting. However,

---

<sup>34</sup> Michael Forsyth, February 1996, quoted in ‘From the Low Tide of the Sea to the Highest Mountain Tops’ J Hunter (2012) pp.74-75

while once numerous, there are few Small Landholders left in Scotland. The Review Group considers that the circumstances of these tenants has been largely neglected by successive Scottish Governments.<sup>35</sup>

- 2 The Crofters Holdings (Scotland) Act 1886 provided a statutory framework governing the relationship between tenants and landlords over small holdings where only the land (as opposed to the house and other structures) is leased. The legislation provided the tenants with rights of security of tenure, succession, fair rents and compensation. However, as described earlier, the restriction of the application of the 1886 Act to seven counties in the Highlands and Islands, meant the qualifying tenants under the legislation were restricted to those counties.
- 3 The Small Landholders (Scotland) Act 1911 then sought to extend the principles of crofting tenure to the rest of Scotland. The purpose of the Act was *“to encourage the formation of small agricultural holdings in Scotland and to amend the law relating to the tenure of such holdings (including crofters’ holdings)”*. The Act provided that the Crofters Acts were to be read as if the expression *“landholder”* were substituted for *“crofter”* and that the Act *“shall have effect throughout Scotland”*.<sup>36</sup>
- 4 The 1911 Act, while giving extra rights to existing small holders outside the Crofting Counties, was related to the Government’s land settlement programme and empowered the Board of Agriculture created by the Act to establish new holdings. The Act also obliged the Board *“to compile and from time to time revise a register of small holdings throughout Scotland”*.<sup>37</sup> However, while the register was started in 1912, it was suspended during the First World War and never updated after that.
- 5 The 1911 Act was followed by the Land Settlement (Scotland) Act 1919 and the Small Landholders and Agricultural Holdings (Scotland) Act 1931. The Crofters (Scotland) Act 1955 then re-introduced the separation between croft tenancies and other small landholdings (which continued to be held under the Small Landholders Acts 1911-31). When Scotland’s agricultural tenancy legislation was consolidated in the Agricultural Holdings (Scotland) Act 1991, which remains the primary legislation, the Act did not deal with crofts or small landholdings. Crofting legislation was then consolidated through the Crofters (Scotland) Act 1993, which also remains the primary legislation. As a result, small landholders are still being dealt with under Acts which have not been updated for over 80 years.
- 6 So while crofters and agricultural tenants have continued to benefit from general improvements in their governing legislation, the tenants still holding under the Small Landholders Act 1911 have not. They have also missed out on the ‘right to buy’ legislation. As outlined above, their holdings are similar to crofts in that typically only the land is leased and they have also shared some of the same legislation as crofters.<sup>38</sup> However, the statutory right of crofters to buy their croft which was introduced in 1976 was not and has not been extended to the 1911 tenants. In addition, these small landholders do not have the pre-emptive right to buy their holding, which was given in 2003 to agricultural tenants holding under the 1991 Act.<sup>39</sup>

---

<sup>35</sup> LRRG submission, correspondence STFA and Wheelhouse July-Sept 2013

<sup>36</sup> SG Briefing Aug 2013

<sup>37</sup> *Ibid*

<sup>38</sup> *In the 1911 Act, if the landlord supplies the house and equipment the tenant is called a ‘Statutory Small Tenant’*

<sup>39</sup> *Agricultural Holdings (Scotland) Act 2003*



- 7 A significant change was, however, introduced as part of the Crofting Reform etc Act 2007. This allowed Ministers to designate areas for crofting tenure outside the Crofting Counties and also amended the 1993 Crofting Act to provide a process by which small landholders under the 1911 Act could convert their small holding into a croft. The first and only designation order came into effect in 2010.<sup>40</sup> This covered those parts of the Highland Council area not within the Crofting Counties, including the former county of Nairn. The Order also covered Moray, three parishes in the Argyll and Bute Council area, Arran and the Cumbraes.<sup>41</sup>
- 8 The inclusion of Arran was particularly significant in this context, as small landholders there have been most prominent in raising the issues faced by them and other small landholders. Scottish Ministers had undertaken to improve their position through the Crofting Reform etc Act 2007 and the Scottish Government Minister of Environment and Climate Change at the time is reported to have announced at a public meeting on Arran that it was his intention to 'right the wrongs inflicted on the Island of Arran 121 years previously' when the island was not included in the areas covered by crofting tenure in 1886.<sup>42</sup> However, the evidence to the Review Group demonstrates that the few small landholders that remain still face difficulties with their tenancies (see Section 28).<sup>43</sup> The Group therefore welcomed the Scottish Government's decision in early 2014, to include agricultural tenancies under the 1911 Act as part of its current Agricultural Holdings Review.
- 9 Small landholders under the 1911 Act were, initially, very numerous, but no statistics on their original number are available as the register of smallholders was not developed by the Board of Agriculture. While it is recognised that their numbers have declined ever since, there is still no clear information on the number and distribution of these tenancies, and it is thought that very few now survive. The Group understands that only around 16 are now left on Arran, down from an estimated 200 or more in the 1920s and '30s. Holdings where the family succession ends revert to the landlord, who is not required to re-let it as a small landholding, and the Group understands that all the remaining small landholders would be able to trace their antecedents in the holdings back well before the 1911 Act.<sup>44</sup>
- 10 The Agricultural Census for Scotland for 2012 gave an overall total of 104 for the number of small landholdings. That number is only based on a sample survey and the total varies to some extent year to year. However, the sample is relatively big (38% of agricultural holdings in Scotland responded in 2012) with limited fluctuation over recent years in the total for small landholders. The average annual total for the five years 2008-12 was 97. The total area given for these small landholdings in the Agricultural Census also fluctuates year to year, but is around 5000 ha. There are no statistics available on the distribution of the 100 or so small landholding tenancies, as the census data cannot be disaggregated.<sup>45</sup> Anecdotal evidence suggests that they are widely scattered from Stranraer to Strathspey.<sup>46</sup>
- 11 The census of agricultural tenants for the Government's current Agricultural Holdings Review may improve the information available about small landholdings. However, it will remain the case that there are now only relatively few small landholders left. The Review Group is

---

<sup>40</sup> *The Crofting (Designation of Areas)(Scotland) Order 2010*

<sup>41</sup> *SPICe briefing (2010) Crofting Reform (Scotland) Bill*

<sup>42</sup> *A McCall Director STFA to Wheelhouse 28.7.13*

<sup>43</sup> *STFA correspondence 2013*

<sup>44</sup> *STFA correspondence 7.10.13*

<sup>45</sup> *SG Briefing 1.8.13*

<sup>46</sup> *STFA email 1.7.13*

concerned that this fact should not be allowed to impede greater progress by the Scottish Government to improve the position of these tenants. The Government's limited expansion of the area designated for crofting tenure only covers some of Scotland's small landholdings. For those covered, the process of converting to a croft has proved very difficult and potentially very expensive for small landholders to try to implement.<sup>47</sup> An unhelpful or hostile landlord can present additional difficulties. The Group's understanding is that to date no small landholders have succeeded in converting their holdings to a croft.

- 12 There are two requirements to be fulfilled by a small landholder before the Crofting Commission will consider their application to convert to a crofter. The first is that they must have a certification of their tenancy from the Scottish Land Court. While the degree to which some small landholders might face difficulties or challenges in establishing their 1911 tenancy, it is not clear, the Review Group notes that this situation is not helped by the Government not fulfilling its obligation to maintain a register. The second requirement is that the small landholder must have paid the required compensation to their landlord. The Group understands the amount of compensation to be the difference between the value of the holding if sold to the sitting 1911 tenant and its value as a croft which can be purchased for 15 times the annual rent.<sup>48</sup> The unusual nature of this valuation could make it wide open to challenge.
- 13 The Review Group considers that the position of the 1911 tenants should be improved in a far more straightforward way. The Group notes that all crofts were 1911 small landholdings for nearly half of the 20th century and considers that small landholders who have certification of their tenancy under the 1911 Act, should also have a statutory right to buy their holding at 15 times its annual rent. The Group recognises that this proposal has EHCR implications for the landlords involved, which would need to be considered carefully. However, such a right to buy could, for example, be achieved indirectly in areas already designated for crofting tenure by making certification of a 1911 tenancy sufficient for conversion to a croft. This would be similar to the way that the 1911 Act straightforwardly made all crofts into small landholdings.
- 14 The Review Group also considers that, more generally as part of the modernisation of Scotland's land tenure, the special category of 1911 small landholdings should be abolished in due course. The Group notes that while the 1911 legislation created a Board of Agriculture in Scotland to administer this, the responsibility in England was given to local authorities. In 2012, local authorities in England owned 94,000 ha for the purposes of smallholdings, with over 2,400 tenanted smallholdings and over 70% of which are under 40ha in size.<sup>49</sup>
- 15 **The Review Group's view is that there should be major improvements in the position of tenants under the Small Landholders (Scotland) Act 1911. The Group recommends that these tenants should, like crofters, have a statutory right to buy their holdings.**

## SECTION 28 - TENANT FARMS

- 1 Agricultural tenancies in Scotland other than those under crofting law and the small

---

<sup>47</sup> LRRG submission Ref 49 Op cit

<sup>48</sup> Ibid

<sup>49</sup> DEFRA 62nd Annual Report to Parliament on Smallholdings in England 1.4.11-31.3.12

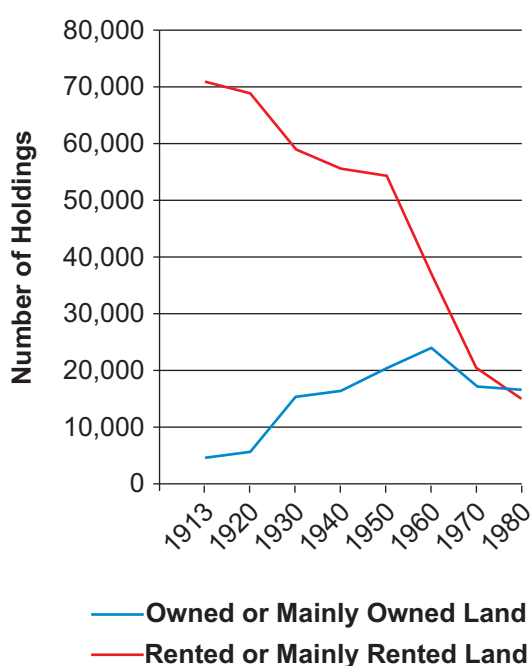
landholdings Acts, are governed by Scotland's agricultural holdings legislation. The current primary legislation is the Agricultural Holdings (Scotland) Act 1991 as amended.

- 2 The future of agricultural tenancies under the 1991 Act was one of the most contentious issues during the Review Group's inquiry. As with many land reform topics considered in this Report, an appreciation of the historical background is a key part of understanding the current issues. The data below is taken from briefings provided by the Scottish Government.

### 28.1 Number of Tenant Farms

- 3 The original legislative framework for agricultural holdings was the Agricultural Holdings (Scotland) Act 1883, introduced over 130 years ago. At that time, over 90% of Scotland's land was owned by 1,750 owners with over 405 ha (1,000 acres) each and over 90% of the agricultural holdings or 'farms' in Scotland were tenanted. Since then, there has been a continuing reduction in the number of tenanted holdings.
- 4 By the 1880s, there had already been a long history of land owners reducing the number of smaller tenant holdings on their land, to create larger units to maintain or improve rents. While this continued, another trend which started in the early 20th century was tenant farmers becoming owner occupiers of their holdings. The most concentrated period of this was in the 1920s when following the impact of the First World War, taxation and economic recession also contributed to the break up of some estates. In lowland areas, with better agricultural land, these sales often resulted in the tenant farms being sold to their occupiers. In the 1920s, while there was little change in the total number of agricultural holdings in Scotland, the proportion that were owner occupied increased from 8% to over 21% (Fig. 32).

**Fig. 32 Number of Agricultural Holdings Owned or Rented 1912-1980**



Year	Holding Owned or Mainly Owned	Holding Rented or Mainly Rented	Total
1913	5,648	71,740	77,388
1920	6,218	69,684	75,902
1930	16,067	59,611	75,678
1940	17,415	57,386	74,801
1950	20,278	54,514	74,792
1960	23,390	37,918	61,308
1970	17,764	20,492	38,256
1980	17,139	14,274	31,413

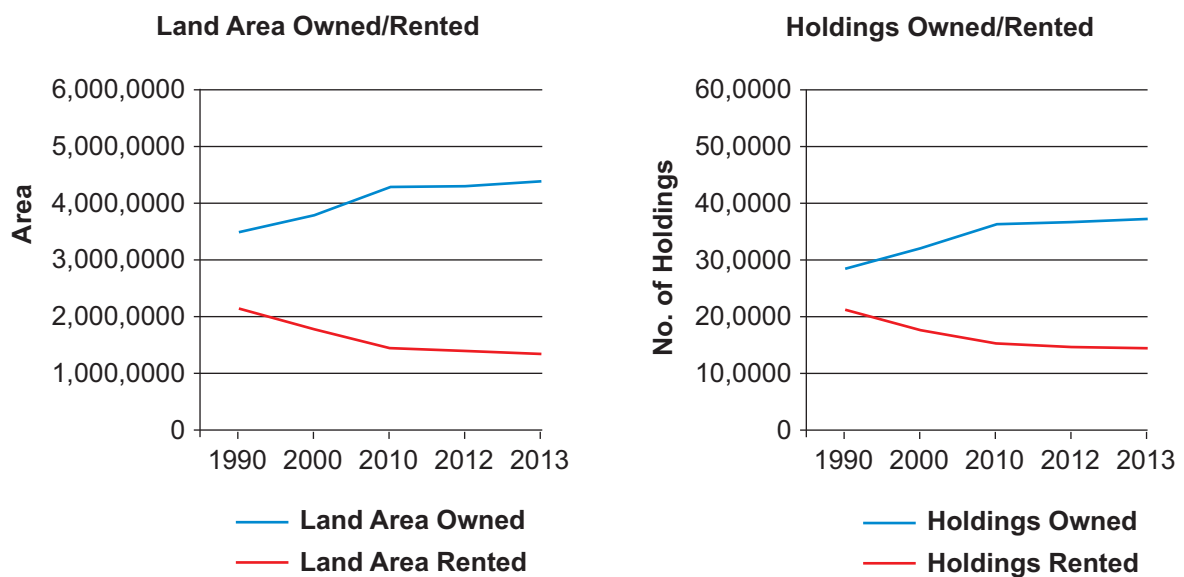
Source: Scottish Government

- 5 This conversion of tenants to owner-occupiers in lowland areas continued to a limited extent during the 1930s and 1940s. By the time the Agricultural Holdings (Scotland) Act 1949 was enacted, 27% of Scotland's agricultural holdings were owner occupied. There were a further significant number of estate farm sales to tenants in the new post war context of the 1950s and by the 1960s, 38% of agricultural holdings and 51% agricultural land was farmed by owners rather than tenants.
- 6 The continued decline, since the 1950s, in the number of tenant farms and the extent of Scotland's agricultural land that they farm, can be attributed to a range of factors. There continues to be some farm sales by land owners to tenants, but this has been limited. However, a major factor in reducing the number of both owned and rented holdings, has been farm amalgamations. Post war public policy for agriculture was focused on increasing output and promoted the amalgamation of holdings to create larger and more mechanised farms. This essentially remains the case today with an ongoing pressure on many farmers to be able to farm more land, to achieve 'economies of scale' and improve viability.
- 7 Another likely influence on the falling number of tenanted holdings have been public subsidies to agriculture. Traditionally, when a tenanted farm became vacant, land owners tended to add the land to existing tenancies as part of ongoing amalgamations. However, from the 1970s, the levels of farm grants compared to the rents from tenants encouraged an increasing number of land owners to further develop their own farming operations and to absorb tenanted land which became vacant into their 'in-hand' land. This could mean remaining tenants were increasingly constrained by their limited acreage, which could in turn result in further tenant land becoming vacant and added to the owner's farm.
- 8 A third key factor in the continuing reduction of the number of tenanted holdings has been the increasing reluctance more generally of land owners to create new farm tenancies. This has been due to the greater security of tenure and other improvements for agricultural tenants in the Agriculture (Scotland) Act 1948 and Agricultural Holdings (Scotland) Act 1949 and continued since by the 1991 Act, as the successor consolidating legislation. The security of tenure significantly reduces the capital value of the land in sales to sitting tenants and in open market sales of land with an existing secure 1991 tenancy. In addition, since 2003, these secure 1991 tenants have also been able to register a pre-emptive right to buy their holding if it is being sold.
- 9 By the 1980s, the supply of land available to rent as a secure tenancy had virtually dried up and despite various initiatives, this has remained the case. Very few new secure tenancies have been created over the last 30 years. Thus, the number and extent of secure 1991 tenancies continue to reduce (Fig. 33). By 2005, the number of secure 1991 tenancies was down to around 6,350 and seven years later in 2012, this total had reduced by 15% to around 5,400 (Fig. 34). During the same period, the total amount of land held by secure 1991 tenants reduced by 18% to 885,000ha (Fig. 35).

**Fig. 33 Agricultural Land Area Owned or Rented 1990-2013  
and the Number of Agricultural Holdings Owned or Rented 1990-2013**

Year	Land Area Owned (Ha)	%	Land Area Rented (Ha)	%	Total (Ha)
1990	3,490,879.1	37.91%	2,131,443.9	62.09%	5,622,323.0
2000	3,740,512.2	33.99%	1,759,811.3	68.01%	5,500,323.5
2010	4,249,174.9	25.88%	1,483,911.7	74.12%	5,733,086.6
2012	4,280,783.2	24.47%	1,387,102.6	75.53%	5,667,885.8
2013	4,304,459.5	24.09%	1,365,931.7	75.91%	5,670,391.2

Year	Holding Owned or Mainly Owned	%	Holding Rented or Mainly Rented	%	Total
1990	27,949	56.25%	21,740	43.75%	49,689
2000	31,801	64.19%	17,743	35.81%	49,544
2010	35,828	70.26%	15,167	29.74%	50,995
2012	36,431	70.87%	14,971	29.13%	51,402
2013	36,670	71.06%	14,937	28.94%	51,607



Source: Scottish Government

**Fig. 34 Number of each type of Agricultural Tenancies 2005-2012**

	2005	2006	2007	2008	2009	2010	2011	2012
Short Limited Duration Tenancy (SLDT)	285	316	344	431	442	447	499	540
Limited Duration Tenancy (LDT)	99	119	166	204	242	262	301	321
91 Act Tenancy	6,348	6,308	6,051	5,795	5,851	5,722	5,557	5,402
91 Act Ltd Partnership	824	740	753	750	548	494	491	512
Small Landholders Act (SLA)			70	91	94	101	96	104
<b>All Tenancies</b>	<b>7,557</b>	<b>7,484</b>	<b>7,384</b>	<b>7,272</b>	<b>7,177</b>	<b>7,026</b>	<b>6,943</b>	<b>6,879</b>
Holdings with rented lands (not crofts)	7,470	7,385	7,202	7,096	7,010	6,841	6,743	6,670
Total Holdings in Scotland	51,136	51,361	51,365	51,489	52,034	52,314	52,543	52,625
% of Holdings with Tenancy Agreements	15%	14%	14%	14%	13%	13%	13%	13%

(1) Holdings can have tenancies of different types, which is why the 'All tenancies' total is slightly higher than the number of "Holdings with tenancy agreements"

(2) Crofts and seasonal rents of less the 365 days are excluded from this table

Source: Scottish Government

**Fig. 35 Areas of Rented Land for each type of Agricultural Tenancy 2008-2013**

Year	Rented Croft Croft	SLA	91 Act Tenancy	91 Act Ltd Partnership	SLDT	LDT	Total Rented Area
2008	156,222	2,467	1,045,431	280,098	74,774	35,623	1,594,615
2009	153,881	4,437	1,059,581	199,338	81,524	36,982	1,535,744
2010	168,827	4,213	1,001,529	181,285	78,131	49,927	1,483,912
2011	164,729	5,822	975,047	183,308	74,033	50,711	1,453,650
2012	159,761	7,139	1,068,963	190,862	90,832	79,281	1,596,837
2013	177,454	5,637	855,090	148,636	94,773	84,342	1,365,932

Figures stated in Hectares

Source: Scottish Government

## 28.2 New Types of 1991 Tenants and Tenancies

- 10 In the 1990s, a new approach was developed by some land owners in which agricultural tenancies were let to a limited partnership, which avoided the consequence of security of tenure. In these arrangements, the land owner is a limited partner who takes no part in the management of the partnerships' affairs while the farmer is a general partner who has sole responsibility for these. By creating the limited partnership for a fixed period of time, the tenancy also comes to end with– the limited partnership – because the 'tenant' no longer exists.
- 11 These Partnership arrangements became the predominant way of letting land prior to the

Agricultural Holdings (Scotland) Bill 2003. However, as a result of measures introduced during the passage of the Bill, many land owners with Limited Partnerships became concerned about the potential impact of the legislation and as a precaution served notices to end their Limited Partnership tenancies. The ramifications from this culminated in the Scottish Government introducing an Agricultural Holdings (Scotland) Act 2003 Remedial Order, which came into force on 27 March 2004. However, the number of 1991 Limited Partnership tenancies has continued to decline since then, reducing from over 800 in 2005 to around 500 in 2012.<sup>50</sup>

- 12 The 2003 Act, however, also amended the 1991 Act to introduce a new form of limited duration statutory agricultural tenancy. This had been recommended by the Land Reform Policy Group in 1999 to encourage new entrants into farming.<sup>51</sup> Two types were created: Short Limited Duration Tenancies (SLDTs) of up to five years duration and Limited Duration Tenancies (LDTs) of 15 years or more. The latter was, subsequently reduced to 10 years or more in 2011.<sup>52</sup> Both these types of tenancies have increased since, with SLDTs increasing from around 280 in 2005 to around 540 in 2012 and LDTs increasing from around 100 to around 320 during that period.<sup>53</sup>

### 28.3 Secure Tenant's Right of Pre-emption

- 13 Another measure introduced in the public interest by the 2003 Act was a right for secure 1991 tenants to register a pre-emptive right to buy over their holding, under which they would be able to buy their holding at the point of sale if the land was being sold by their landlord. These registrations are recorded by Registers of Scotland in the Register of Community Interests in Land and need to be renewed every five years to remain valid.
- 14 There had been 1,463 registrations by early 2014, of which 906 are still active.<sup>54</sup> No information is available on the reasons behind the 557 registrations which have come off the Register. Some registrations would have been removed because they had lapsed, while others may have been rescinded for inaccuracies. In some cases, the right may have been exercised or the tenancy may have ended for other reasons. The Review Group's understanding is that, while no purchases have apparently taken place by a tenant exercising their right under the legislation, the existence of the right has facilitated that outcome in some cases.
- 15 The Group considers, however, that these 1991 tenants should not have to register their interest and then repeat that process every five years, to be able to benefit from the right of pre-emption. The Group's view is that this requirement should be considered an unwarranted constraint on the public interest intent of giving the right to all tenants with secure 1991 tenancies.
- 16 The need for registration is clear in the case of the equivalent right of pre-emption which was also introduced in Part 2 of the LR(S) Act 2003 for local community bodies. In that case, registration is necessary to identify the community body and the land over which it wants to

<sup>50</sup> *SG Tenanted Agricultural Land in Scotland 2012 (June 2013)*

<sup>51</sup> *LRPG Final Report 1999*

<sup>52</sup> *Public Services Reform (Agricultural Holdings)(Scotland) Order 2011*

<sup>53</sup> *SG Tenanted Agricultural Land in Scotland 2012 (June 2013)*

<sup>54</sup> *RoS Briefing 8.2.14*

register an interest in its local area. With secure 1991 tenancies, the tenant and owner of the land are already in a statutorily defined relationship over a defined area of land. The Scottish Parliament has made the right of pre-emption available to all these tenants. The Review Group considers they this should be sufficient, and that tenants should not be denied the opportunity to use the right, simply because they have not registered an interest or their registration has lapsed. In advocating this, the Group understands that some tenants, and perhaps many tenants, do not register their interest as this might be seen by the landlord as a 'hostile' move. In addition, tenants may only find out about land being sold at a relatively late stage in the process.

- 17 The Review Group considers that there should be a more straightforward position where, if the owner of land covered by a secure 1991 tenancy decides to sell any of that land, the tenant should have first option under the legislation. Under current legislation, landlords are already required to send tenants various notices and these could be extended to include notification of a sale of land, giving the tenant a chance to say within a set period if they are taking up their right of pre-emption. Where a tenant chooses to do so, the terms of the purchase might be agreed directly with the owner, failing which through the statutorily defined process. The Group understands that removing the requirement for registration should not raise issues under the ECHR, as the change would not alter the nature of the right.
- 18 **The Review Group's view is that the requirement for registration is an unwarranted constraint on the right of pre-emption of secure 1991 tenants under the Agricultural Holdings (Scotland) Act 2003. The Group recommends that the legislation should be amended to remove this requirement and to provide that all these tenants have first option on buying any part of their tenanted holding which their landlord decides to sell.**

## 28.5 Agricultural Holdings Review

- 19 The long evolution of Scotland's agricultural holdings legislation governing what are now known as secure 1991 Act tenancies, has created a detailed and particularly complex statutory framework for the relationship between landlords and tenants. There have always been issues between landlord and tenant interests over aspects of these arrangements. The current time is no exception with, for example, concerns related to rent reviews and compensation due at the end of tenancies.<sup>55</sup> There have also been discussions and initiatives for many years about the wider issues over the lack of agricultural land available for rent and the effect of this on limiting opportunities for new entrants into farming.
- 20 Legislation in 2011 and 2012 made further refinements to agricultural landlord and tenant relations, including proposals developed by the Tenant Farming Forum at the Scottish Government's invitation.<sup>56</sup> The Forum had been established after the 2003 Act, as an industry-led forum to facilitate debate about matters of common interest to landlords and tenants and to improve relations. At the time of the legislation in 2012, the Scottish Government made a commitment to have a full review of the Agricultural Holdings

<sup>55</sup> *Scottish Tenant Farmers Association (STFA) statement 20.6.13 "STFA working on proposals for Agricultural Review"*

<sup>56</sup> *Public Services Reform ..... Order 2011 Op cit & Agricultural Holdings (Amendment)(Scotland) Act 2012*



legislation. In June 2013 the Cabinet Secretary gave initial details of this review, which included that a right to buy for agricultural tenants would be considered as part of review process.<sup>57</sup> Further details given that September included that the review would be a Ministerial-led review.<sup>58</sup>

- 21 In November 2013, the membership of the Agricultural Holdings Legislation Review Group (AHLRG) was announced with its aim *“to determine what policy and legislative changes may be required to deliver a sustainable Scottish farming sector that is dynamic, gets the best from the land and the people farming it and provides opportunities for new entrants”*.<sup>59</sup> The AHLRG is due to produce an interim report in June 2014 and its final report in December 2014. Following the establishment of the AHLRG, it was also clarified in early 2014 that the scope of the review had been widened to also cover tenancies under the Small Land Holdings legislation.
- 22 The announcement by the Scottish Government of an Agricultural Holdings Review was a prospect for much of our inquiry. We support the aim of the AHLRG and are pleased that it is Ministerial-led by the Cabinet Secretary, as we consider significant changes are required to deliver the AHLRG’s aim and give Scotland a system for renting agricultural land suited to contemporary needs in the 21st century.
- 23 As many commentators have observed, and as reflected in the Government’s review, the evidence is clear that Scotland’s current system for renting agricultural land no longer works effectively. The long running debate also reflects that the system has not provided a supply of let land for many years and is in general terms, seen by both landlord and tenant interests as needing reforms over and above just refining the existing arrangements. We also share the general view that there needs to be new, improved arrangements for renting farm land, where it is in the interests of both the land owner and tenant to be in the relationship, so that rented land can be a valuable component of the future of agriculture in Scotland.

## 28.6 Secure 1991 Tenancies

- 24 In fulfilling its remit, the AHLRG will be spending around a year examining the agricultural holdings legislation and will have the benefit of detailed new information, including the results of the surveys being carried out by the Government of both tenants and landlords. For our part, within the constraints of our inquiry, we have focused on what we consider to be the central land reform issue in the current debate: the future of tenant farmers with secure 1991 tenancies. These 5,400 or so secure 1991 tenancies at present account for over 75% of farm tenancies under the 1991 Act and currently cover around 70% of the land let under 1991 tenancies (Fig. 34).
- 25 There were no statistics available during our inquiry on how many landlords are involved in these tenancies or the numbers of multiple tenancies held by individual landlords from one tenant to seventy or more on some large private estates. The Government’s current survey for the AHLRG should clarify this structure of landlord/tenant holdings. The map of the distribution of tenanted land (Fig. 36) shows the concentrations of tenants in some areas

<sup>57</sup> Richard Lochhead MSP Cabinet Secretary for Rural Affairs and the Environment 20 June 2014

<sup>58</sup> Richard Lochhead 18.9.14

<sup>59</sup> SG Press Statement 8.11.13

and this can be correlated with the location of large estates. While some parishes have been amalgamated in the map to prevent identity disclosure, it can be anticipated that disaggregating the data would further clarify the correlation between concentrations of tenants and particular large estates.

- 26 While we will refer in this sub-section to these ‘secure 1991 Act tenants’ simply as tenants or tenant farmers for ease of reference, it is the security of tenure of the heritable tenancies held by these tenants which defines their position. This is both in terms of the tenant’s rights over their tenanted farm and the reasons why land owners do not grant secure 1991 tenancies anymore. It is also worth noting that there are clear financial benefits to land owners when these tenancies end, both in terms of the increased capital value of the land and in its subsequent management. The significant possibility since devolution of land reform measures that might give these tenant farmers a right to buy, has only increased the interest for landlords in bringing secure tenancies on their land to an end.
- 27 The proposal for tenant farmers to have the option of a right to buy their farms, was prominent at the time of the Land Reform Policy Group in the run up to the establishment of the Scottish Parliament. The demand for this continued and the proposal for a right to buy was a significant issue in debates over the Agricultural Holdings (Scotland) Act 2003, which gave tenant farmers the option of a right of pre-emption over their farm.
- 28 The issue of a right to buy was less prominent following the 2003 Act, as the Tenant Farming Forum developed the refinements subsequently made by legislation in 2011 and 2012. However, the topic of a right to buy has been a dominant issue in the debate leading up to the Government’s agricultural holdings review and is now a core consideration in the work of the AHLRG. The scope of their review as set out by the Government is largely focused on the interests of landlords, tenants and agriculture.<sup>60</sup> However, as the AHLRG’s remit reflects in part, the factors that should be involved in determining the public interest outcome are now significantly wider than in traditional agricultural holdings discussions of those topics.

### Rural Communities

- 29 The Cabinet Secretary has said of the Agricultural Holdings Review that “*Given the current land reform debate in Scotland, we need to consider what is in the best interests of rural communities and the role individual ownership plays in this*”.<sup>61</sup> This is the aspect of the current situation that we have most focused on during our inquiry as the Land Reform Review Group. The Group considers that the position of these tenant farmers as part of Scotland’s rural communities is central to the public interest, and, should become a more central consideration in determining the way forward. Two important factors within this consideration are the distribution and composition of these tenant farmers.
- 30 In terms of distribution, the map of tenanted land in Fig.36 reflects that these farmers tend to be concentrated in areas that might be described as more marginal areas, in terms of both the quality of the land and the nature of the rural communities. Thus, the pattern is concentrated in parts of the Borders and South West, along the Highland Boundary Fault and round the edge of the Eastern Highlands to Inverness. In agricultural terms, they are concentrated in and along the edge of Less Favoured Areas.

---

<sup>60</sup> SG Press release 08.11.2014

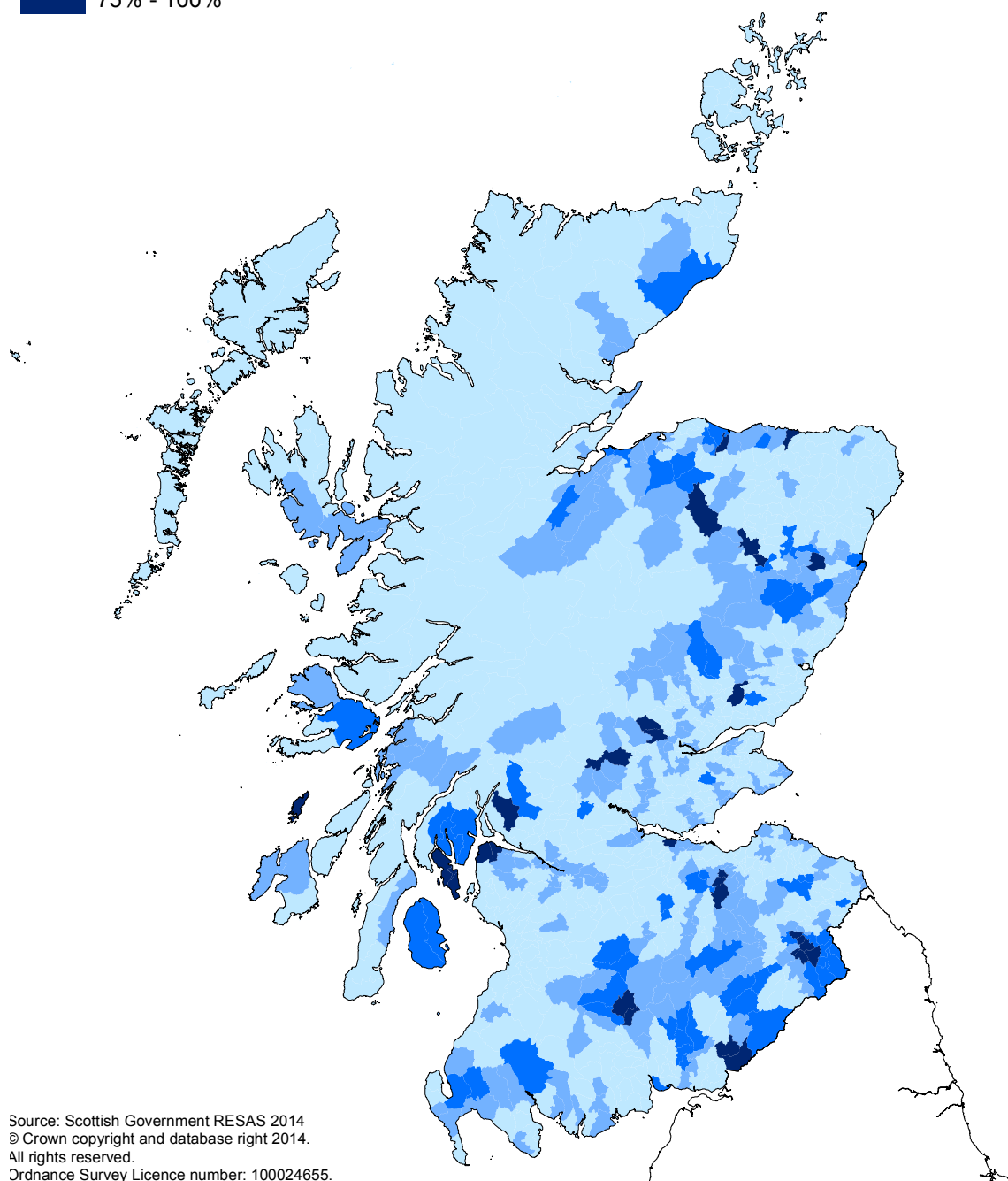
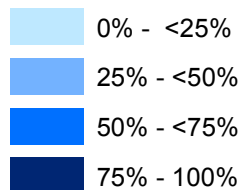
<sup>61</sup> Richard Lochhead 18.9.13 Op cit

**Fig. 36 Tenanted Agricultural Holdings in Scotland 2013 (excluding crofts)**

**PERCENTAGE OF TENANTED AGRICULTURAL LAND BY PARISH  
IN 2013 (excluding tenanted croft land)**

Parish-level rates have been checked to ensure minimum risk of identifying information about individual holdings. Where this might occur, parishes have been merged with neighbouring parishes and the rate for the combined area published. This means that, in such cases, it is not possible to know whether the rate relates to the individual parish or a collection of parishes, while maintaining an accurate overall representation of tenancy rates. Which parishes have been merged is not shown.

Tenancy excludes crofts. There may be some undercounting in crofting counties due to incomplete information for some holdings about whether land is croft or tenanted.



Source: Scottish Government RESAS 2014  
© Crown copyright and database right 2014.  
All rights reserved.  
Ordnance Survey Licence number: 100024655.

- 31 The Group considers that tenant farmers can have a key role in rural communities because of the inter-generational continuity they represent. The family may not always have had the same farm, but they will often have farmed in the same area. The Group were unable to find much data on this, but it seems likely that many tenant farming families have roots in particular communities that go back several generations, and this can be an important component of local social capital. The Agricultural Holding Review survey of tenant farmers may give some improved information on this continuity.
- 32 Inter-generational continuity might be considered to be of little or no direct relevance from a purely agricultural perspective and considerations such as farm investment or output. However, the Group considers the apparent high level of continuity is a significant social factor from a wider rural policy perspective. The Group considers that in broad terms, there is some correlation between the extent of a family's inter-generational continuity through successive generations in a rural area and the extent of their kinship ties in that area. The Group also considers that there is a correlation between the density of kinship ties in an area and the level of social capital, which is recognised as a key factor in the resilience of communities, particularly within a rural community development context. While the Group appreciates that tenant farms involve many and varied circumstances, the Group considers that the tenant farming community tends to score high in these social measures in many of Scotland's more marginal rural communities where community development is an important issue.
- 33 From a rural perspective, the prospects for this tenant farming community with secure 1991 tenancies has not looked good for some time. The number of tenant farmers continues to decline and the average age of those that remain continues to increase. Many are on relatively small farms, with little chance of adding land to their existing tenancy. This decline has been ongoing and the Review Group is concerned that current debates about a right to buy and factors such as the higher value of land with vacant possession rather than with a secure 1991 tenancy, are creating an increasingly harsh situation for some tenant farmers. While the confidential submissions to the Review Group included submissions from land owners who have longstanding and positive relationship with their tenants, there were also confidential submissions from tenants recounting much more negative experiences. Some of these submissions clearly reflected the degree to which the interests of landlord and tenant are now out of alignment. The danger is that, if the right to buy debate continues to develop, technicalities may become increasingly used by land agents as a way of gaining vacant possession.
- 34 The Review Group recognises that the circumstances of tenant farmers in Scotland vary widely. However, many tenant farmers face a bleak future. The Review Group considers that this ongoing process is weakening some of Scotland's rural communities and is undermining the resilience of these communities. This seems at odds with the aim of the Scottish Government in the Group's remit of making "*stronger, more resilient and independent communities*".

#### Owner Occupation

- 35 The Cabinet Secretary's statement quoted in paragraph 29 above refers both to "*the best interests of rural communities*" and also to "*the role individual ownership plays in this*". In considering the second question, the Review Group did not find studies of the economic and social outcomes resulting from tenants on an estate becoming the owners of their own

holdings. There are clearly examples of this happening which have occurred at defined times throughout the last 100 years, and in a wide range of locations. It would have been helpful for the Group to have been able to identify and examine the outcomes of this kind of tenure change and been able to contrast these with similar areas which have remained tenanted. While the Group may have missed studies during its investigations, the limited information identified reflects an important gap in our understanding of patterns of land ownership in Scotland and an area which the Scottish Government may want to consider addressing.

- 36 When tenants become owner occupiers, the financial and other terms by which they became owners will have a major influence on the subsequent outcomes on their land. Money spent by the farmer on the acquisition may, for example, limit the funds available to invest in the land. However, in general terms, ownership provides the tenant with a recognised new incentive to invest in their holding. In addition, ownership may well release latent or frustrated entrepreneurialism given the full opportunity to diversify activities on the farm, without the constraints of an agricultural lease. Many tenanted holdings are concentrated in those marginal rural areas where housing is scarce and ownership may well open up the opportunity for inter-generational housing to be developed within the holdings. Over the years, and within an international context the conversion of tenants into owner occupiers has been seen as a positive objective for rural community development.
- 37 The Review Group recognises that in parts of Scotland where tenant farmers became owner occupiers at some earlier stage in the 20th century, the economic incentives contributed towards a the pattern of ownership becoming concentrated into larger farms. It is however worth noting that the previous development of owner occupation has been mainly in lowland areas with better land where, for example, in 2013, around 75% of farm sales were to other farmers.<sup>62</sup> However, if owner occupation became more of the pattern in the marginal upland areas where many tenant farms are concentrated, the Group considers that it might reasonably be anticipated that there would be less agricultural incentive to accumulate more land and a greater development of farms where families retain their land, but rely less on agriculture, by developing other forms of on or off farm incomes.<sup>63</sup> These ‘pluri-activity holdings’ have, like crofting and part time farming in upland areas long been seen in many European countries, as having a positive impact on maintaining and strengthening rural communities.
- 38 If there was a scheme under which secure tenants had the option to buy their holdings on terms judged fair and reasonable to the land owner and tenant interests, and be in the public interest, some tenants would not want to take up the option and others may not have the capacity to take it up. Others might reach other agreements with their landlords given the context of the tenant’s option to buy. However, in this general context, the Review Group considers that a significant shift to owner occupation would overall be a very positive outcome for rural community development in Scotland and support the wider public interest aims within the Group’s remit.
- 39 The Review Group recognises that the line of discussion developed above does not factor in the potential impact that the introduction of a right to buy would or could have on the

---

<sup>62</sup> *A Hamilton evidence to Scottish Affairs Committee (SAC) session, 12.2.14*

<sup>63</sup> *This includes the concept of pluriactivity. J.Brydon and T.Fuller, Pluriactivity as a Rural Development Option, 1988, (The Arkleton Trust), and J. Brydon et al (eds), Towards Sustainable Rural Regions in Europe, 2011, (Routledge)*

agricultural industry as a whole, the interests of landlords, and on the prospects for the tenanted sector. The Group understands that this is a matter which the AHLRG will be considering.

### Right to Buy

- 40 The Review Group does not consider the continued loss of tenant farming families in Scotland's rural communities to be in the public interest. These families, with their potentially high levels of inter-generational continuity in their localities, are often an important part of the fabric of some of the more marginal rural communities in Scotland.
- 41 These secure 1991 tenants have long had security of tenure, including rights of family succession over their holding. They have therefore already been given rights of perpetual possession of their holdings in the public interest. In 2003 the Scottish Parliament passed legislation to give these tenants a right of pre-emption if their landlord is selling the holding, also in the public interest.
- 42 The security of the 1991 tenants could be strengthened further. Proposals to the AHLRG include giving these tenants greater rights of assignation in determining the successor to their holdings and also designating land under these 1991 tenancies so that it has to remain as '1991 tenanted land' when a tenant farmer leaves a holding. Such measures would bring the tenure of these 1991 tenancies closer to crofting tenure, and would strengthen the position of tenant farmers.
- 43 The Group considers that the position of 1991 tenants in their relationship with their landlords should be improved as part of the Agricultural Holdings Review. While this includes matters of detail in the current arrangements, more significant changes such as greater assignation and designated 1991 land, do not preclude tenants also having a right to buy. Both changes could be introduced, providing an improved position for those tenants who did not take up the option of a right to buy. These changes could also be introduced together where, for example, the right to buy only applied to the farm house, buildings and a certain amount of land, with the other measures applying to the remainder of the holding.
- 44 The Review Group recognises that proposals for a right to buy cause profound concern for landlords with secure 1991 tenancies on their land. While such a right is often called an 'absolute' right to buy, the Group considers that to be an unhelpful term. If the term is intended to distinguish a right to buy from the existing pre-emptive right to buy, then it would be better called it an 'actual' right to buy as any such right would be conditional rather than absolute, and be determined on a case by case basis. The basic starting point of that conditionality is that, as already noted, the introduction of any such right would need to be clearly judged in the public interest in order to protect the rights and interests of the land owners involved under the ECHR.
- 45 Many aspects of the terms of any proposed conditional right to buy would need to be worked out in detail, including the scope of its application to 1991 tenancies. Specific exemptions would be required, for example, on specific types of land where there was a different balance of public interests, such as Common Good Land (See Section 14). Another key aspect to be settled would be valuing the respective interests of the sitting tenant and the landlord. More generally, the overall terms of any conditional right to buy would be central to the level of uptake. The Group considers that if such a right was introduced, the public interest

represented by giving the right should be actively promoted, with a clear and accessible process to take up of the right.

- 46 The Review Group has had limited scope within its inquiry to consider the issue of a right to buy for secure 1991 tenants and in considering it from a land reform and rural development perspective, the Group has had access to a limited evidence base. The Group recognises that the AHLRG will have substantially more resources with which to consider this issue. However the Group considers that wider public policy relating to the future of Scotland's rural communities should be central within any consideration of this issue. The Group's view, in terms of its remit and on the basis of its investigations within that context, is that a public interest case can be made for the some form of conditional right to buy for secure 1991 tenants. This position is entirely in line and consistent with the Group's remit to diversify patterns of ownership and make rural communities stronger, more independent and more resilient.
- 47 **The Review Group considers that the position of secure 1991 tenant farmers and their families as part Scotland's rural communities, should be an important consideration in the Scottish Government's current review of Scotland's agricultural holdings legislation. The Group recommends that the Government should take full account of social and local community factors in determining whether the introduction of a conditional right to buy for tenants with secure tenancies under the Agricultural Holdings (Scotland) Act 1991, would be warranted in the public interest.**





## PART EIGHT

### COMMON PROPERTY RESOURCES

#### Introduction

- 1 Two of Scotland's important assets are its natural resources of fresh water and native wild animals. In Scotland's system of land ownership these can be considered 'common property resources' in the public domain, as neither is owned due to their nature. With the water in Scotland's rivers and lochs, this is by virtue of its flow. With wild animals, it is similarly due to their movement and they belong to no-one until they are rendered into possession by being killed or captured.
- 2 The arrangements governing the management and use of these natural resources are distinctive and important components of Scotland's system of land ownership. Aspects of each have also been topical during the Review Group's inquiry, with, for example, the Scottish Parliament passing its fifth Water Act, the Parliament's Rural Affairs, Climate Change and Environment (RACCE) Committee's inquiry into deer management and the Scottish Government announcing a review of fresh water fisheries.<sup>1,2,3</sup> Deer management and the management of fresh water fishing rights were also issues raised in the submissions to the Group.<sup>4</sup>
- 3 The issues associated with the arrangements governing the management of Scotland's natural fresh water, wild deer and fresh water fishing are considered below. First, however, the Group reviews what might also be considered a common property resource - the rights of access held by the people of Scotland over Scotland's land, including freshwater and marine environments. 120 or 25% of the submissions received by the Group in its Call for Evidence, commented on the management of public access.<sup>5</sup>
- 4 The first two of these topics considered below, public access and natural water, are examples of common property resources where the Scottish Parliament has put in place modern and progressive statutory frameworks. The other two topics, the management of wild deer and of freshwater fish, are examples where this has yet to happen.

### SECTION 29 - PUBLIC ACCESS

#### 29.1 Land Reform Act

- 5 The arrangements governing public access over land in Scotland have undergone a major transformation since devolution. Part 1 of the Land Reform (Scotland) Act 2003 formalised Scotland's traditional 'right to roam' into a statutory framework of public access rights.

---

<sup>1</sup> *Water Resources (Scotland) Act 2013*

<sup>2</sup> *RACCE Committee inquiry into deer management in Scotland, announced September 2013*

<sup>3</sup> *Scottish Government announcement of review of wild fisheries management, January 2014*

<sup>4</sup> *E.g. submission numbers 41, 90 and 250 to LRRG Call for Evidence*

<sup>5</sup> *E.g. submission numbers 216 and 377 to LRRG Call for Evidence*

- 6 These public access rights are based on the principle of responsible access, with obligations on both the access users and the owners of land over which there is public access. Guidance on these responsibilities is set out in the Scottish Outdoor Access Code (SOAC), as developed and promoted by Scottish Natural Heritage (SNH) and approved by Scottish Ministers. Scotland's local authorities and national park authorities act as access authorities in their areas with a number of specific responsibilities. These include developing a Core Path Plan, keeping access routes free of obstructions and establishing a local access forum. There are now more than 17,000 kms of recognised Core Paths in Scotland compared, for example, to less than 100 kms of formally asserted Public Rights of Way in 2003.<sup>1</sup>
- 7 The Review Group recognises that, in the past, there were significant concerns amongst both access and land owning interests about developing a statutory framework for public access, and that years of discussion were involved in developing the provisions contained in Part 1 of the Land Reform Act. Now, ten years after the legislation came into force, the Group's view is that the new statutory framework should be judged a considerable achievement that has delivered significant public benefits and is "*generally working well on the ground*".<sup>2</sup> There are undoubtedly problems to be addressed in some areas as described below and there have been some prominent recent issues. However, the Group considers that these are essentially issues over implementation rather than with the terms of the legislation.
- 8 The Review Group considers, however, that Scottish Ministers could usefully review and update the Guidance they can give to local authorities on implementing their responsibilities under section 27 of the Act. The original Guidance issued by Ministers is now ten years old and was focused on bringing in the new arrangements. The Guidance should be brought up to date, clarifying and refining it in the light of experience.
- 9 Amongst the matters that could be covered in a review of the Guidance is clarifying two aspects of Sections 18-20 of the Act, which are concerned with Core Paths. Guidance could address the apparent lack of clarity in Section 18 (3)-(7) over the number of public consultations that local authorities have to carry out to incorporate changes following a local inquiry dealing with objections to a Core Path Plan.<sup>4</sup> The other aspect raised with the Review Group which could be clarified is that, in Section 20 (1), access authorities can instigate a Core Path Plan review "*at such times as they consider appropriate*"<sup>5</sup> without Scottish Ministers also "requiring them to do so".<sup>6</sup> That requirement should, as appears intended, only be a fall back power to be used by Ministers if necessary. Consideration might also be given as to whether the procedures, in Section 20 of the Act, for local authorities to be able to amend Core Path Plans, could be made less onerous and more straightforward.
- 10 Another particular aspect that should be considered in updated Guidance, is dispute resolution. The Act and SOAC do provide a framework to address local access issues, which is primarily based on the access authorities and Local Access Forums, with recourse to Sheriff Courts if necessary. These issues might be between different user interests, as well as users and the owners or occupiers of land. Resolution of local issues has become an important part of the work of the National Access Forum and the Local Access Forums.

---

<sup>1</sup> SNH Commissioned Report No. 427 "National Overview of Core Paths Plans and Path Provision

<sup>2</sup> NAF briefing Jan 2013

<sup>3</sup> Such as issues highlighted in the media and on social media relating to Ledgowan Estate access issues

<sup>4</sup> NAF Op cit

<sup>5</sup> LR(S)A 20(1)(a)

<sup>6</sup> LR(S)A 20(1)(b)

However, there are issues that may not be resolved through the Local Access Forums and the Group recognises concerns that the next step of taking an issue to the Sheriff Court, can be a potentially difficult and expensive option.<sup>7</sup> The Group considers that the Ministerial Guidance should be encouraging access authorities to make more use of dispute resolution techniques such as mediation and arbitration, including formal arbitration under the terms of Scotland's recently modernised arbitration legislation.<sup>8</sup>

- 11 The Review Group appreciates that some interest groups would like to see some particular aspects of the SOAC changed. However, while a review may be appropriate at some point in the future, the Group does not consider a review of the SOAC is warranted at this point in time. The main tasks at present should be the continued promotion of the Code to build on existing progress, and its improved implementation on the ground.<sup>9</sup> In carrying this out, it is important that access authorities are taking account of the concerns of both land managers and access users. Among the issues raised with the Group were dog fouling and dogs not under control, blocked accesses, tensions between canoeists and anglers, damage by mountain bikes and horses and concerns about wild camping, as well as problems that can arise from commercial and intensive access use.
- 12 Issues over dogs, including commercial dog walking in urban and peri-urban areas, are the most widespread of these problems. In part, this reflects the importance of dogs as part of many people's outdoor recreation, with surveys showing that more than 40% of all visits by adults are accompanied by a dog. While some issues like dog fouling and worrying livestock are generally criminal offences that can be reported to the police, the wider issues over dogs need to be addressed by continuing educational initiatives. Many of the other problems listed above tend to arise in particular locations and can require specific local solutions. However, there is also a continuing need for promotion of the Access Code and education, including the publication of guidance of good practice. Existing examples include guidance developed by a number of different organisations for public access management on golf courses, the management of informal camping and the responsible use of inland water responsibly.
- 13 There is a need for adequate resources to support the promotional and educational work required to improve the implementation of the SOAC. There is also concern that the pressures on SNH and access authority budgets and their many other responsibilities, are squeezing this provision. The Group considers it is therefore important that the wider public benefits of public access for health and wellbeing are appropriately recognised in allocating budgets. Investment in public access that delivers improvements in fitness, for example, can save on public health costs later. Improved public access can also assist in delivering more sustainable transport policies. As part of this, the Group considers that Scottish Ministers might give clearer direction across government and associated public bodies to ensure that they play their part as appropriate in the promotion and delivery of responsible public access. In addition, there should also be suitably accountable funding opportunities available, for example, through the SRDP, to encourage land managers to undertake relatively small scale access projects to deliver on the ground improvements in public access provision.

---

<sup>7</sup> *NAF Op cit*

<sup>8</sup> *Arbitration (Scotland) Act 2010*

<sup>9</sup> *Eg. Overview of Evidence of Land Reform in Scotland (Rural and Environment Science and Analytical Services (RESAS) 2012)*

- 14 The lead responsibilities for improving the implementation of the statutory framework for public access provided by the 2003 Act, rest with SNH and local access authorities. While Local Access Forums are part of that framework, Scotland's National Access Forum (NAF) is not. The NAF is a voluntary association of different interest groups established by SNH to provide advice on national access issues and help SNH fulfil its duty to keep the Access Code under review. The Review Group's view is that the existence of this national level forum has been a helpful and constructive influence in the implementation of the new access rights and responsibilities since the legislation came into force. The Group notes that the NAF is already considering the types of access problems identified in paragraph 7 above and considers that the NAF has a key role in progressing these issues on a consensus basis between access user and land management interests. SNH is due to review the NAF in the coming year and the Group considers that, while there appears no need to put the NAF on statutory footing, the NAF's role and operation should continue to be strongly supported.
- 15 **The Review Group's view is that Part 1 of the Land Reform (Scotland) Act 2003 has delivered a progressive statutory framework for improved public access over land in Scotland, and that the main challenges involve continuing improvements in implementation. The Group recommends that Scottish Ministers should, as part of that, update the Guidance provided to access authorities under Section 27 of the 2003 Act.**

## 29.2 Other Public Access Rights

- 16 The land covered by the statutory public access rights in the Land Reform (Scotland) Act 2003 includes the foreshore, defined in Scotland as the land between the high and low water marks of ordinary spring tides. However, there are other common law public rights over the foreshore and the public also has other access rights over inland waters, seabed and sea. The activities covered by these common law public rights over the foreshore are, as described below, more extensive than those in the 2003 Act. The other common law public rights over water include a right to navigate, a right to fish and a right of recreation.<sup>10</sup>
- 17 The common law rights over the foreshore and seabed are important public rights, yet there is little public awareness of them. More generally, the current position with these rights might be considered archaic. In Scotland's system of land ownership, these rights are held in trust for the public by the Crown and there is no effective system to assert or protect these rights if they are infringed. As the Scottish Law Commission (SLC) has commented: "*In theory at least, the Crown is obligated to protect public rights over the foreshore and seabed. The role of guardian of the public rights is undertaken by the Lord Advocate. However, the power to protect public rights in individual cases has rarely, if ever, been used in modern times*".<sup>11</sup> In addition, there is also a degree of uncertainty over the full scope of the ancient common law rights over the foreshore.
- 18 The Review Group considers that the arrangements governing these common law public rights should now be replaced by statutory public rights to clarify and protect them in the public interest. This should be seen as a next step to follow the formalisation of the public's traditional access rights over land into the statutory access rights in Part 1 of the 2003 Act.

<sup>10</sup> Scottish Law Commission (SLC) Report on the Law of the Foreshore and Seabed (Rept 190, 2003)

<sup>11</sup> SLC Discussion Paper on the Law of the Foreshore and Seabed (DP 113, 2001, para 4.33)

The Group also notes that the SLC's report on the Law of the Seabed and Foreshore at the time of that Act, made proposals for converting these common law public rights into statutory public rights.<sup>12</sup> However, those proposals have yet to be taken forward since.

- 19 A first stage should be to integrate the two sets of public rights over the foreshore, the statutory rights under the Land Reform Act and the common law rights held by the Crown. The 2003 Act Part 1, in introducing access rights, specifically states that "*the existence or exercise of access rights does not diminish or displace any public rights under the guardianship of the Crown in relation to the foreshore*".<sup>13</sup> However, some of the public's common law rights of recreation over the foreshore identified by the SLC would now be considered covered by 'recreational purposes' in the 2003 Act.<sup>14</sup> In a modernised public access rights framework, those common law rights could be superseded by the existing statutory provisions, while the remaining common law rights over the foreshore not covered in the 2003 Act, should then be converted into statutory public rights. This should be done so that they are fully integrated with those under the 2003 Act, for example, in terms of lawful and responsible use and the responsibilities of access authorities for these rights. It might also be noted in this context, that the Crown still owns around 50% of Scotland's 18,000 kilometres of foreshore and that the Review Group has recommended, in Section 11 of this Report, that local authorities should become owners of these areas.
- 20 The remaining common law rights over foreshore not covered by the 2003 Act, principally include the right to fish for sea fish and ancillary activities, the right to gather shellfish, the right to shoot wildfowl over the foreshore and sea, and the right to use the foreshore for purposes ancillary to the common law public rights of fishing, recreation and navigation in the sea. These latter purposes include, for example, embarking and disembarking, loading and unloading, drying nets and gathering bait. Currently, the right to fish excludes salmon and the right to shellfish excludes naturally occurring mussels and oysters, as the rights to these are still held by the Crown in Scotland. The Review Group has recommended abolishing these Crown rights in Sections 11 and 31 of this Report.
- 21 The Review Group's view is that, from the starting point of Part 1 of the Land Reform Act, all the public's common law access rights in Scotland over land, inland water, foreshore, seabed and sea should become modernised without diminution into an effective, integrated and enforceable system of statutory public rights across all these environments. The Group also notes a particular need for the public's rights in the sea to be fully recognised, given the transformation of Scotland's marine environment over the last 15 years or so. This on-going change is both in terms of the sea's increasing use for different purposes, such as renewable energy generation, and the new level of planning and regulation through Marine Scotland, including measures that constrain some of these public rights.
- 22 **The Review Group recommends that Scotland's current common law public rights over the foreshore, inland water and seabed should be replaced by statutory public rights that are integrated with the public's statutory access rights over land under Part 1 of the Land Reform (Scotland) Act 2003.**

---

<sup>12</sup> SLC (2003) Op cit

<sup>13</sup> LR(S)A 2003 section 5(4)

<sup>14</sup> LR(S)A 2003 1(3)(a)

<sup>15</sup> SLC 2003 Op cit

## SECTION 30 - WATER RESOURCES

- 1 A country's natural resources of fresh water are a basic asset that forms part of the land. In Scotland, these resources include all standing or flowing water on the surface of the land (e.g. rivers, lochs, canals and reservoirs), all groundwater and also that in wetlands.
- 2 In this Section, the Review Group considers the current arrangements governing the management and use of these fresh water resources, as part of Scotland's system of land ownership. These water resources are a key consideration for the public interest in Scotland. As the preamble to the European Union Water Framework Directive stated, water *"is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such"*.<sup>1</sup>
- 3 The freshwater flowing through Scotland's rivers, streams, lochs and other water bodies has, by the nature of its flow, defied ownership. However, during the historical development of Scotland's system of land ownership, the rights to use water became attached to the ownership of the adjacent land. Owners came to have full control over the use of any water course or water body entirely within their land and from an early date, legal principles of common interest were also established. Thus, with rivers and streams that flowed through the lands of more than one owner, the doctrine of natural flow meant that each riparian landowner downstream was entitled to receive the flow undiminished in quantity and quality by upstream riparian land owners. Similarly, with lochs or other water bodies surrounded by more than one adjacent land owner, all adjacent proprietors could use all the surface of the water for fishing, boating and other purposes.
- 4 From the 18th century, with the importance of water power to the industrial revolution, the common interest rights of riparian land owners became increasingly contested in the courts. These disputes between the private interests of different riparian land owners continued in the 19th century and the current position over their common interests is still largely defined by 19th century case law.<sup>22</sup> However, in the second half of that century, legislation started to transfer water rights to various public bodies for the emerging public water supply systems. This public interest in water also led to legislation that began to limit pollution. Legislation on both these fronts continued during the 20th century. However, limited progress had been made by the end of the century.
- 5 The law relating to water rights in Scotland has, since the Treaty of Union in 1707, always been a matter of Scots law and there has never been a UK water law.<sup>2</sup> Thus, as with a range of other aspects of Scots property law mentioned in this report, the limited time for Scottish legislation at Westminster meant that by the time of devolution *"Water was just one area crying out for attention from the new devolved Parliament"*.<sup>4</sup> In the case of water, it is one to which much attention has been paid by the Scottish Parliament.<sup>5</sup>
- 6 Since 1999, the Scottish Parliament has passed five pieces of primary legislation relating to water with Acts in 2002, 2003, 2005, 2009 and 2013. Collectively, these Acts have

---

<sup>1</sup> 2000/06/EC

<sup>2</sup> *Menzies v Macdonald* (1854) 16 D. 827; (1856) 2 Macq. 463

<sup>3</sup> Sarah Hendry *Public Rights and Private Responsibilities: Recent Developments in Scots Water Law* (Foundation for Law, Justice and Society, University of Oxford 2013)

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid*

transformed the arrangements governing Scotland's fresh water resources by establishing an integrated public interest statutory framework for the management and use of these resources.

- 7 The first Act in 2002 established a single Scotland wide public corporation, Scottish Water, to take over the delivery of public water supplies and sewerage services from three regional authorities.<sup>6</sup> This has remained in the public sector since, as part of the Scottish Government. The 2003 Act then implemented the European Union Water Framework Directive.<sup>7</sup> Amongst other measures, this Act brought in a comprehensive public authorisation system managed by the Scottish Environmental Protection Agency (SEPA) for all uses of the water environment: abstractions, discharges, impoundments, and river works.<sup>7</sup>
- 8 The next Act in 2005 involved giving the Water Industry Commission for Scotland, the power to set charges for public water rather than just advise Ministers.<sup>9</sup> The fourth Act in 2009 implemented the European Union Floods Directive.<sup>10</sup> This gave SEPA further powers and interests including in this context, the removal of historic structures in rivers and identification of land that might be used for 'natural flood management' to help address downstream flooding problems.<sup>11</sup>
- 9 The most recent Act in 2013 partly relates to the Scottish Government's commitment to develop Scotland as a 'Hydro Nation' and the Act places a duty on Ministers to develop 'the value of water'.<sup>12</sup> Amongst other measures, the Act clarified Scottish Water's powers to enter land management agreements to protect upstream water quality. The Act also gave Scottish Water new compulsory rights of entry to private land for various purposes, where that may encompass a water body that subsequently forms part of the public supply.<sup>13</sup>
- 10 After a long evolution from the 19th century, these Acts have retained the delivery of public water in the public sector and established Scotland's fresh water resources clearly in the public domain, after a long evolution from the 19th century. The new legislation provides a comprehensive statutory public interest framework governing the management and use of Scotland's water. All land owners now need permission for all uses of water and this statutory framework has succeeded the historical position, where the management of the use of Scotland's water resources was based on land ownership. Now the management and use of water is determined by the public interest. As a result, the rights of use of land owners have been significantly reduced. However, as has been observed, these major changes have not involved any challenges by land owners to protect their 'rights' using Article 1 of the First Protocol of the European Convention on Human Rights.<sup>14</sup>
- 11 The Review Group regards the Scottish Parliament's series of Water Acts as a progressive achievement. The Group's view is that riparian rights in Scots property law should also now be brought up to date, to modernise the relationship between property rights and the use of water on, adjacent to or below the land owned. This proximity provides the owners of that

---

6 *Water Industry (Scotland) Act 2002*

7 *Water Environment and Water Services (Scotland) Act 2003*

8 *Water Environment (Controlled Activities)(Scotland) Regulations (since updated)*

9 *Water Services (Scotland) Act 2005*

10 *Flood Risk Management (Scotland) Act 2009*

11 *Hendry (2013) Op cit*

12 <http://www.scotland.gov.uk/Topics/Business-Industry/waterindustryscot/ScotlandtheHydroNation>

13 *Hendry p.5 Op cit*

14 *p.4 Ibid*

land with the capacity to apply to use water, not a right to use it. The common interest rules delineated by the courts in the 19th century have also been superseded by the public interest judgement of statutory regulation.

- 12 The Group considers this modernisation should also review the current interpretation in Scots property law, that land owners own the beds of rivers and lochs adjacent to their land out to a mid point with any other adjacent land owners. This historic position might now be seen as something of an anomaly and most conspicuously so for major lochs and the public interests in them, such as Loch Ness. These river and loch beds should be seen as an integral part of the public interest in the water that flows on top of them. These beds could therefore be treated as part of the same public domain. Within the new statutory framework, this would reflect that the interests of adjacent land owners, now amounts to the ownership of a right of use over the bed and not a level of possession that amounts to the ownership of the river or loch bed itself.
- 13 **The Review Group recommends that, following the reform by the Scottish Parliament of the arrangements governing the management and use of Scotland’s fresh water resources, the riparian rights still attributed to adjacent and surrounding land owners in Scots property law should be reviewed and reformed to reflect the public interest in these resources as now defined.**

## SECTION 31 - FRESHWATER FISH

- 1 Scotland has over a dozen native species of freshwater fish. These include Atlantic Salmon, Brown Trout, Arctic Charr, Powan, Vendance, Lamprey and European Eel. There is also a slightly larger number of non-native fish species that now occur in Scotland’s inland waters, as a result of introductions during the 19th and 20th centuries.
- 2 The wild fish in Scotland’s freshwater environment are important for a wide range of environmental, social and economic reasons. In Scots law, these fish belong to no-one until they are rendered into possession by being caught. They are a valuable national public asset. The debate about their management has, however, long been dominated by issues over salmon fishing and the interests of the owners of riparian salmon fishing rights.<sup>1</sup>
- 3 The Review Group consider that it is also striking how little progress has been made in improving the management of Scotland’s freshwater fish populations. This is despite the fact that *“For over a century, there have been a number of committees and commissions which have produced reports recommending ways in which the structure of fishery management in Scotland could be improved.”*<sup>2</sup> In addition, a recent review of six of the main reports over the last forty years concluded that *“In spite of the fact that all the reports and reviews produced so far have included the same broad principles, none of them has ever been implemented either in part or in full.”*<sup>3</sup>
- 4 During the Group’s inquiry, in February 2013, the Scottish Government announced that it would carry out another review *“to modernise the management structure for salmon and*

---

<sup>1</sup> As also reflected in submissions to LRRG (Refs 250,270,287)

<sup>2</sup> *Management of Fisheries: A Baseline Report Maitland 2013*

<sup>3</sup> *Ibid*



*freshwater fisheries*".<sup>4</sup> In January 2014, the First Minister followed this up by announcing the establishment of "an independent review of the management of wild fisheries in Scotland". He also noted that the "*management of wild fisheries is a complex and emotive area which has been the subject of multiple reports and investigations over the last 50 years, but, until recently, has seen little meaningful change*".<sup>5</sup>

- 5 The results of the Government's Wild Fisheries Review will be published after this Report. However, the Review Group considers from its own investigations, that there can be little doubt about the need for significant changes to modernise the arrangements governing the management of Scotland's wild freshwater fish populations.

### 31.1 Salmon

- 6 While wild fish in Scotland have always belonged to no-one, it had been established in Scots property law by the 18th century that no-one could fish in freshwater without the land owner's permission. The right to take wild fish had therefore, with the exception of the ancient Crown right to salmon fishings, become an ancillary part of the ownership of land.
- 7 Since medieval times, there has always been the presumption in Scots law that the right to fish for salmon in freshwater and coastal waters belongs to the Crown unless it has been granted out. This Crown right was established because of the importance of salmon net fishing in Scotland as a source of revenue at that time. The Crown in England never had an equivalent right.
- 8 One consequence of the Crown property right to salmon fishing, was that salmon fishing rights became established in Scots law as a distinct property right, capable of being owned by someone separately from the ownership of the land over which the right was held. This is still the case. Salmon legislation also still includes sea trout, but not brown trout of which sea trout are the migratory form.<sup>6</sup>
- 9 During the 19th century, when rod fishing for salmon in Scotland's rivers and lochs developed as a valuable sporting activity for land owners, the government department in Whitehall that became responsible for administering the right of the Crown in Scotland, actively pursued the Crown's right to salmon fishings.<sup>7</sup> Land owners fishing for salmon were challenged to establish their right directly or indirectly from a Crown grant, otherwise they had to lease or buy the right from the Crown. The Crown also continued to hold many coastal netting stations from which it still derived revenue.
- 10 The growing importance to land owners of salmon fishing for sport in the 19th century, resulted in issues between riparian owners along rivers and also increased concerns over poaching. As a result, legislation was passed in the 1860s which created District Salmon Fishery Boards (DSFBs). These statutory Boards consisted of representatives of the riparian land owners along a river and empowered them to protect their common interest in salmon fishing over the whole river.

---

4 *Wheelhouse to RACCE Comm. 4.2.13*

5 *SG press statement 15.1.14*

6 *Maitland Op cit*

7 *Crown Estate Review Working Group (CERWG) 2007*

- 11 There have only been limited changes to DSFBs over the last 150 years and they remain the statutory structure responsible for managing freshwater salmon fishing outside government. Scotland is divided into 54 statutory salmon districts for the purposes of DSFBs and there are currently 41 constituted DSFBs.<sup>8</sup> (Fig. 37) The recent trend has been for some Boards to merge to cover larger areas, a process that can be implemented by the Scottish Parliament passing a Statutory Instrument.<sup>9</sup> Salmon fishings are exempt from local authority sporting rates, with a levy being paid by each owner of salmon fishing rights to provide core funding to DSFBs.
- 12 In the last 50 years, there have been changes to try to improve the governance of DSFBs. Since 1986, the Boards have been required to include representatives of salmon anglers and salmon netmen in the district.<sup>10</sup> A further revision was made to the constitution of Boards in 1999 to allow for wider representation including public bodies like SEPA and SNH, and others such as local angling clubs. However, elected representatives of the riparian owners still provide the core of the membership of a Board.<sup>11</sup> In 2013, the Scottish Parliament passed further legislation to improve the governance of these statutory Boards by obliging them to act in ways more consistent with public bodies.<sup>12</sup> The new measures include, for example, basic steps such as publishing an annual report and accounts, having a register of members' interests and introducing a complaints procedure.
- 13 A major change in the last fifty years, has been the decline in the catch of salmon in Scotland to historic lows. An important factor has been the impact of sea fishing in the Atlantic on the numbers of salmon returning to Scottish waters. However, these harvests have been greatly reduced by the North Atlantic Salmon Conservation Organisation, an international organisation established by an inter-governmental Convention in 1984.<sup>13</sup> There has also been a substantial reduction in the salmon caught by net fishing around Scotland's coast, which, in 2012, was down to around 5% of the catch in 1952.<sup>14</sup> These reductions in marine and coastal fishing have meant more salmon surviving to enter Scotland's rivers and the overall numbers caught by rod and line have been maintained and increased slightly over the period.
- 14 In 2012, the rod fishing catch of 86,013 salmon accounted for 84% of Scotland's total salmon catch, compared to 11% in 1952.<sup>15</sup> However, 63,331 or 74% of that rod catch was voluntarily released back into the river. 'Catch and release' was 8% of the catch in 1994 and has increase to 74% as part of attempts to conserve Scotland's low stocks of wild salmon.<sup>16</sup> The Review Group would have thought that reducing the catch was a better conservation measure than catching the fish to release them, particularly as fishing records are not a good indicator of fish stocks. The Group notes, however, the economic significance to riparian proprietors of catch levels in their fishing records, both for annual income and the high capital value attributed in property sales to each salmon that is caught on average. The Group also noted that there are conspicuous issues in the debates about conserving Scotland's native stock of wild salmon, between the riparian salmon fishers and both the netmen and marine fishfarming interests.

---

<sup>8</sup> *Maitland Op cit*

<sup>9</sup> *Ibid*

<sup>10</sup> *Salmon Act 1986*

<sup>11</sup> *data.gov.uk / salmon fishery districts*

<sup>12</sup> *Aquaculture and Fisheries (Scotland) Act 2013*

<sup>13</sup> *Maitland Op cit*

<sup>14</sup> *SG Salmon Fishery Statistics 2012*

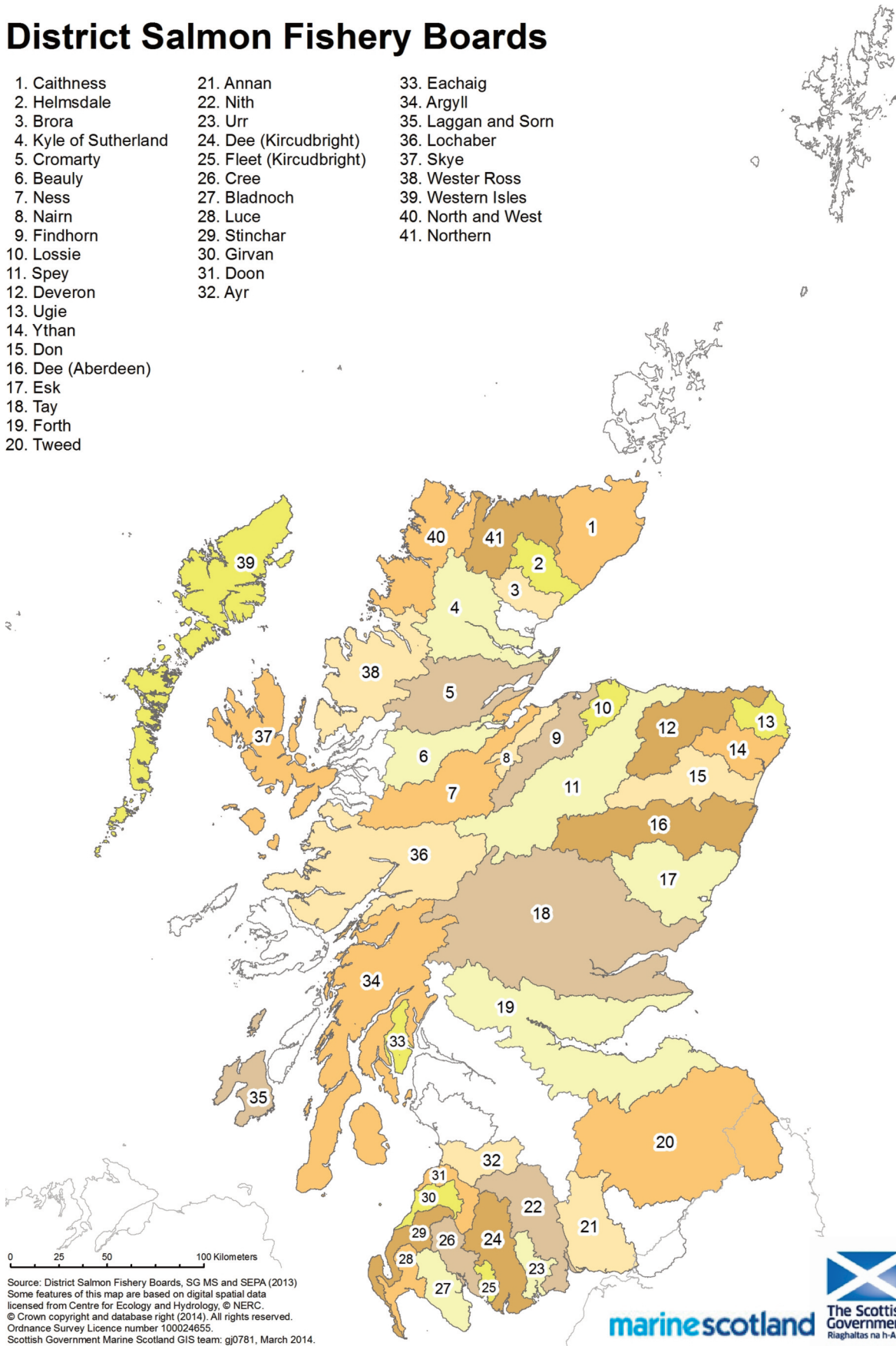
<sup>15</sup> *Ibid*

<sup>16</sup> *Ibid*

Fig. 37 Scotland's District Salmon Fisheries

## District Salmon Fishery Boards

- |                       |                          |                     |
|-----------------------|--------------------------|---------------------|
| 1. Caithness          | 21. Annan                | 33. Eachaig         |
| 2. Helmsdale          | 22. Nith                 | 34. Argyll          |
| 3. Brora              | 23. Urr                  | 35. Laggan and Sorn |
| 4. Kyle of Sutherland | 24. Dee (Kircudbright)   | 36. Lochaber        |
| 5. Cromarty           | 25. Fleet (Kircudbright) | 37. Skye            |
| 6. Beaully            | 26. Cree                 | 38. Wester Ross     |
| 7. Ness               | 27. Bladnoch             | 39. Western Isles   |
| 8. Nairn              | 28. Luce                 | 40. North and West  |
| 9. Findhorn           | 29. Stinchar             | 41. Northern        |
| 10. Lossie            | 30. Girvan               |                     |
| 11. Spey              | 31. Doon                 |                     |
| 12. Deveron           | 32. Ayr                  |                     |
| 13. Ugie              |                          |                     |
| 14. Ythan             |                          |                     |
| 15. Don               |                          |                     |
| 16. Dee (Aberdeen)    |                          |                     |
| 17. Esk               |                          |                     |
| 18. Tay               |                          |                     |
| 19. Forth             |                          |                     |
| 20. Tweed             |                          |                     |



Source: District Salmon Fishery Boards, SG MS and SEPA (2013)  
 Some features of this map are based on digital spatial data licensed from Centre for Ecology and Hydrology, © NERC.  
 © Crown copyright and database right (2014). All rights reserved.  
 Ordnance Survey Licence number 100024655.  
 Scottish Government Marine Scotland GIS team: gj0781, March 2014.

- 15 Central to Scotland's current salmon conservation measures has been the 1992 European Habitats Directive, which was enacted into Scots law in 1994. The Directive established Atlantic Salmon as a European protected species and amongst other measures, Scotland now has 17 rivers designated as Special Conservation Areas where salmon is a qualifying species.<sup>17</sup>
- 16 A development since the 1980s related to DSFBs, has been the establishment of local groups generally known as fishery trusts. In 2005, Rivers and Fisheries Trusts for Scotland (RAFTs) was established as an independent freshwater conservation charity to represent the network of fisheries trusts. RAFTs's core objective is the "*Conservation and enhancement of native freshwater fish and their environments in Scotland*". The 26 trusts currently involved are all charities and generally have close working relationships with their local DSFB.

### 31.2 Other Fish Species

- 17 The right to fish for other species of wild freshwater fish other than salmon always goes with land ownership, as this right of use cannot be separated from the ownership of the land like salmon fishing rights. However, if the ownership of the right to salmon fishing has been separated from the ownership of the land, the right to fish for other species goes with it, as an implied part of salmon fishing rights in Scots law.
- 18 An increasing number of Scotland's other native fish species are now protected by statutory conservation measures, for example, Powan, Vendace and Sturgeon under the Wildlife and Countryside Act 1981 (as amended) and a prohibition on fishing for eels enacted into Scots law in 2009 as a result of European regulations.
- 19 A significant distinction between the right to fish for salmon and the right to fish for other species not protected by conservation legislation, is that fishing for the other species without the land owner's permission is a civil and not criminal offence. However, this fishing becomes a criminal offence if the area is covered by a statutory Protection Order. Since 1976, riparian owners have been able to apply to the government for a Protection Order to be put in place through a Statutory Instrument over the freshwaters in a catchment or group of catchments.<sup>18</sup>
- 20 These Orders are now granted under Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, which consolidated all Scotland's previous salmon legislation since the 19th century. The Orders do not involve salmon however, and are sometimes referred to as Trout Protection Orders although they also cover other freshwater fish species. Under the 2003 Act, an Order is approved by Scottish Ministers if it is judged that the proposals submitted would result in "*a significant increase in the availability of fishing for freshwater fish in inland waters to which the proposals relate.*"<sup>19</sup> There are currently 14 in force across Scotland conveying powers on riparian owners, including the appointment of Water Wardens. (Fig. 38)

---

<sup>17</sup> Maitland *Op cit*

<sup>18</sup> *Freshwater and Salmon Fisheries Act 1976*

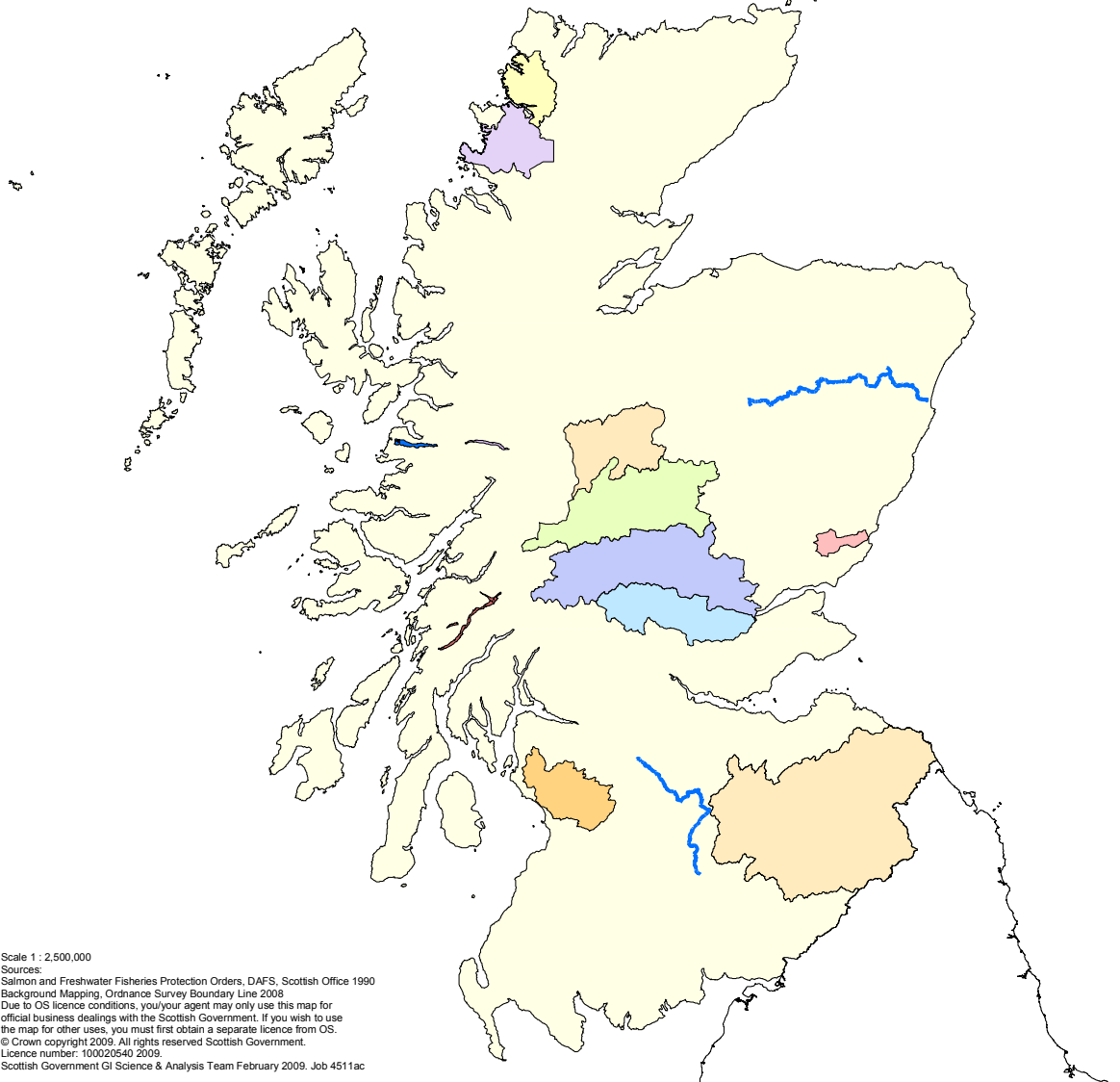
<sup>19</sup> *LR(S)A section 48(1)*

Fig. 38 Salmon and Freshwater Fisheries Protection Orders

# Salmon and Freshwater Fisheries Protection Orders

## Legend

-  River Don Catchment Area (Part) Protection Order 1990
-  River Clyde Catchment Area (Part) Protection Order 1994
-  The Rivers Tweed and Eye Protection (Renewal) Order 1991 Variation Order 1994
-  The River Tummel Catchment Area Protection (Renewal) Order 1991 Variation Order 1994
-  The River Tay Catchment Area Protection (Renewal) Order 1993 Variation Order 1996
-  The Rivers Earn Catchment Area Protection Order 1990
-  The Assynt - Coigach Area Protection Order 2004
-  The North West Sutherland Protection Order 1994
-  The River Lunan Catchment Area Protection (Renewal) Order 1991 Variation Order 1994
-  The Upper Spey and Associated Waters Protection (Renewal) Order 1993 Variation Order 1996
-  The West Strathclyde Protection Order 1988
-  The Loch Morar and River Morar Protection Order 1992
-  The River Arkaig, Loch Arkaig and Associated Waters Protection Order 1995
-  The Loch Awe and Associated Waters Protection Order 1992



Scale 1 : 2,500,000

Sources:

Salmon and Freshwater Fisheries Protection Orders, DAFS, Scottish Office 1990

Background Mapping, Ordnance Survey Boundary Line 2008

Due to OS licence conditions, you may only use this map for

official business dealings with the Scottish Government. If you wish to use

the map for other uses, you must first obtain a separate licence from OS.

© Crown copyright 2009. All rights reserved Scottish Government.

Licence number: 100020540 2009.

Scottish Government GI Science &amp; Analysis Team February 2009. Job 4511ac

- 21 All the current Protection Order areas except one have a Liaison Committee which seeks information from riparian owners and submits reports to Marine Scotland. There appears, however, to have been no overall evaluation of the results of Protection Orders since the Scottish Office carried out a public consultation in the 1990s.<sup>20</sup> The Review Group considers that there should be a thorough review of Protection Orders as part of the Scottish Government's current Wild Fisheries Review.
- 22 Two other important components of freshwater fishing in terms of accessibility to anglers are coarse fishing and stillwater fisheries. Coarse fishing mainly involves introduced species in either standing or running waters, with the majority of coarse fisheries being located within the central belt or southern Scotland. Stillwater fisheries or 'put and take fisheries', are mainly stocked with non-native rainbow trout and are concentrated near settlements.

### 31.3 Modernisation

- 23 The Review Group considers that there is a need to bring in a modern statutory framework to govern the management of Scotland's wild fish populations. The current partial framework based largely on DSFBs has long been out of date, as reflected in the recommendations of the reports over the last fifty years referred to in paragraph 3 of this Section.
- 24 The nature and operation of DSFBs reflects the fact that freshwater fisheries have been one of many aspects of Scots law where the Scottish Parliament has inherited arrangements that largely date from the 19th century and proprietorial interests. The context has however changed very substantially. With the introduction of measures such as the EU Habitat and Water Framework Directives into Scots law, freshwater fishing has become conditional on the public interest. While the Scottish Parliament has tackled an important initial component of modernisation, by consolidating Scotland's past salmon and freshwater legislation in the 2003 Act, reforms are now needed.
- 25 The Scottish Government's recently announced freshwater fisheries review provides an immediate opportunity to develop a modern framework, with the review itself resulting from the difficulty for Scottish Ministers in fulfilling Scotland's European salmon conservation commitments due to the powers still vested in riparian proprietors through DSFBs. The two aims of the Government's review are to:
- *“Develop and promote a modern, evidence based management system for wild fisheries fit for purpose in the 21st century and capable of responding to our changing environment.*
  - *To manage, conserve and develop our wild fisheries to maximise the sustainable benefits of Scotland's wild fish resources to the country as a whole and particularly in rural areas.”*<sup>21</sup>
- 26 The Scottish Government review will be examining many aspects of fisheries management and has the resources to examine matters in considerable detail. The Review Group welcome the Government's review as, even from the limited scope of the Group's investigations for this report, there is a very clear need for a new integrated statutory

<sup>20</sup> Maitland *Op cit*

<sup>21</sup> SG press release 15.1.14

framework to govern the sustainable management of Scotland's wild freshwater fish.

- 27 The Group considers that a key part of that framework should be a single body within government that has lead responsibility for the management of Scotland's freshwater fish and fisheries. At present, there is no such body, with different parts of government handling different aspects, for example: Marine Scotland (salmon statistics); SEPA (water and catchment management) and SNH (species conservation). The need for a single national body, with overall responsibility for Scotland's freshwater fish and fisheries, has been a recommendation in many past reports. The Group considers that SNH would seem the natural choice to act as Scotland's freshwater fish and fisheries authority, given its responsibilities for Scotland's wildlife.
- 28 The Review Group also considers that DSFBs based on property rights have become an historical anomaly as the form of statutory governance at a catchment scale. The Group recognises that some DSFBs work better than others and acknowledges the hard work of some riparian proprietors to try to improve DSFBs. However, the Group considers that after 150 years, DSFBs based on property rights are no longer an appropriate or adequate form of governance and should be abolished. In the contemporary statutory context, following the implementation of the EU Habitat and Water Directives into Scots law, the need is for a new integrated and public interest led approach at a regional or catchment scale, to the management of Scotland's freshwater environment and the wild fish living in it. SEPA has already developed Scotland's first country wide River Basin Management Plan with other public authorities in Scotland, since the introduction of the Water Framework Directive.<sup>22</sup> There have also been a number of initiatives to develop Catchment Management Plans for particular rivers, for example, the Dee in Aberdeenshire.<sup>23</sup> The Group considers that the management of freshwater fish and fisheries should take place as part of an integrated public interest framework for catchment management.
- 29 The interests of the owners of fishing rights should clearly, like those of others concerned with fish conservation and other angling interests, be involved in any new approach along with the many other important interests involved with rivers and catchment management. The Group also considers, as discussed in Section 25, that the levy that the owners of salmon fishings currently pay to DSFBs, should still be raised to contribute to the public administration and management of local fisheries. In terms of fishing interests, the Group notes the importance of salmon netting as part of Scotland's cultural heritage and its continuing local community significance in some particular areas. In the Solway, income from the sale of netting licences contributes to Annan Common Good Fund.<sup>24</sup> Salmon fishing rights are also part of some other Common Good Funds, for example, in Selkirk, as discussed in Section 14.
- 30 **The Review Group considers that the current system of District Salmon Fishing Boards based on property rights is no longer appropriate or adequate as part of the statutory arrangements governing freshwater fishing and fisheries. The Group recommends that District Salmon Fishing Boards should be abolished as part of putting in place a new improved statutory framework to ensure the sustainable management of Scotland's wild freshwater fish populations in the public interest.**

22 *'The river basin management plan for the Scotland river basin district 2009-15' (SEPA)*

23 *SNH website – Catchment Management*

24 *Maitland Op cit*

### 31.4 Crown Salmon Rights

- 31 One of the distinctive aspects of Scotland's current freshwater fishing arrangements is the continued involvement of the Crown. The medieval presumptive Crown property right in Scots law to all salmon fishing unless previously granted out, still exists as part of Scotland's system of land ownership. The right is administered by the Crown Estate Commissioners (CEC) as part of the Crown Estate in Scotland as discussed in Section 11.
- 32 At present, salmon are returning to some rivers or parts of rivers after a very long time due to reductions in pollution and due to public and private investment in removing barriers to salmon movement up rivers. The Crown's presumptive right means that the CEC can then claim the salmon fishing rights on behalf of the Crown, if there has been no historical grant of them, and exploit any opportunity to raise money for the Treasury. The Review Group considers this to be an archaic and counter-productive anomaly. The Group's view is that the Crown's right should be abolished or at least not exercised further by the CEC until the right can be abolished, recognising that the CEC's management of the Crown Estate in Scotland is reserved. This reform should also include the Crown right to salmon in coastal waters, where the right can be considered to have already been superseded by fishing legislation.

#### Crown Salmon Fishings

- 33 The Crown in Scotland also still holds coastal salmon netting stations and salmon fishings as ancient possessions. These are all managed by the CEC. The netting stations are all un-let due to conservation measures and are therefore of no commercial value to the CEC. The Review Group considers that the rights to these redundant netting stations should be conveyed by the CEC to Scottish Ministers.
- 34 The locations of the Crown salmon fishing beats held as ancient possessions are shown in Fig. 39. The Group understands this to be the first published map of their locations and the map shows the extent to which they are concentrated in and around the Central Belt. The CEC lets these fishings. There are currently 152 lets, with 77 to individuals, 57 to local angling associations, 5 to DSFBs and 13 vacant.<sup>25</sup> These salmon fishings are public assets held by the Crown in Scotland and the Review Group considers that their ownership should be conveyed to Scottish Ministers. The Group also considers that an aim of their management should, as a matter of public policy, be to let as many of them as possible to suitable local angling associations and appropriate local community bodies.
- 35 **The Review Group recommends that the presumptive Crown property right in Scotland to salmon fishings should be abolished or at least not exercised by the Crown Estate Commissioners until it can be. The Group also recommends that the coastal and freshwater salmon fishings held as ancient possessions by the Crown should be conveyed by the Crown Estate Commissioners to Scottish Ministers.**

---

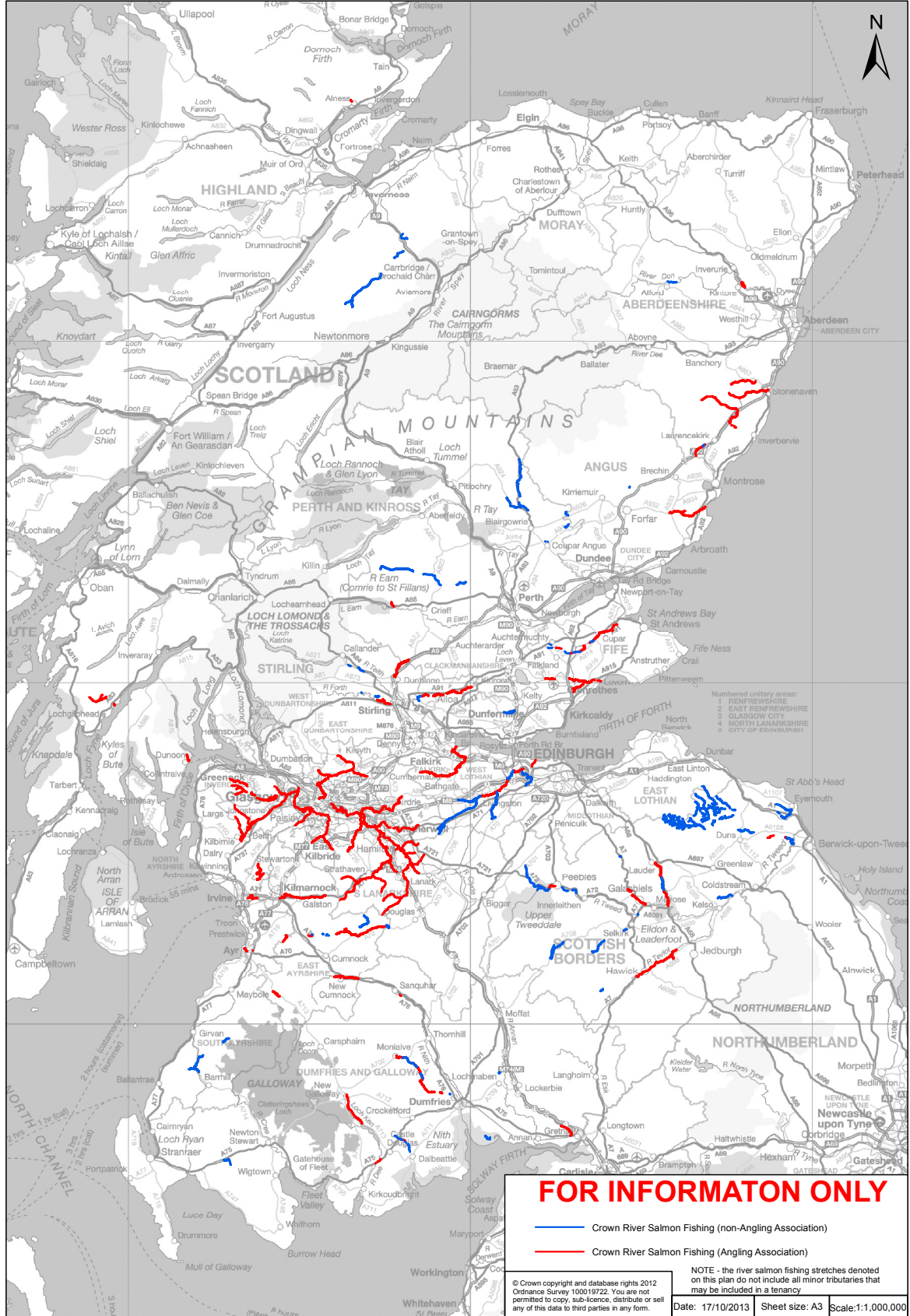
<sup>25</sup> CEC briefing



**Fig. 39 Salmon Fishings held by the Crown as Ancient Possessions**

CROWN RIVER SALMON FISHING STRETCHES IN SCOTLAND

The Crown Estate  
6 Bell's Brae  
Edinburgh EH4 3BJ



### 31.5 Separate Salmon Fishing Rights

- 36 As noted earlier, the current position in Scots law is that the right of salmon fishing can be owned separately from the land over which the right exists. This distinctive feature of salmon fishing rights can be seen as an historic consequence of the Crown's separate property right in Scots law to salmon fishing.
- 37 The Review Group considers this capacity for salmon fishing rights to be bought and sold separately from the land involved, is a legacy that appears to have no apparent environmental logic and is potentially unhelpful to securing sustainable fisheries management. The Group's view is that legislation should end the ability to create new separate tenements or ownerships of salmon fishing rights. Existing separate ownerships of salmon fishings would continue.
- 38 The Group would also consider setting a limit to the maximum duration of any new separate leases of salmon fishings (for example, 20 years), so that any such arrangements better reflect the contemporary public interest and statutory context than much longer leases. Under the Long Leases (Scotland) Act 2012, the maximum duration of a lease in Scots law has been reduced to the still substantial period of 175 years.<sup>26</sup>
- 39 **The Review Group recommends that the capacity in Scots law to create new ownerships of salmon fishing rights separate from the land over which the rights exist, should be ended.**

### 31.6 Public Access to Fishing

- 40 Scotland's wild freshwater fish are a national resource that should be managed in the public interest. The Review Group considers that, as part of recognising the conservation constraints on fishing for some native species, public policy should aim to increase opportunities for members of the public to fish for wild fish as part of wider fishing opportunities, such as 'put and take' still fisheries.
- 41 The Review Group recognises that the imperative with salmon fishing is to reduce the catch as part of conserving Scotland's native salmon stocks. A recent initial investigation of the ownership of salmon fishings by the Scottish Government indicates that around 15% is owned by the public sector. The main component of this is the Crown salmon fishings described above. Scottish Ministers also own salmon fishings as part of the National Forest Estate and the Scottish Government's crofting estates. The Review Group considers that, to the extent that salmon fishing is to be undertaken on public sector land, this should be made available through licensing arrangements to local angling clubs, community bodies or other similar arrangements, rather than let to private individuals or commercial bodies. The Group considers that the Scottish Government should, as part of its existing freshwater fisheries review, develop a clear account of the ownership of Scotland's salmon fishing rights covering both the 15% in the public sector and the 85% owned by others.
- 42 The Review Group considers that the Scottish Government should also investigate the public availability of opportunities to fish for wild brown trout. A part of this should be the

---

<sup>26</sup> *Long Leases (Scotland) Act 2012*

review of the Protection Orders proposed above. The Group's view is that there should be an overall national framework to ensure the availability of public opportunities for fishing in Scotland's rivers and lochs at fair prices.

- 43 The Review Group recommends that the Scottish Government develops a clear policy framework and associated arrangements to deliver improved opportunities for members of the public to fish for wild freshwater fish in Scotland.**

## SECTION 32 - WILD DEER

- 1 Scotland has two species of native deer, red deer and roe deer. There are also two non-native species of wild deer, sika and fallow, which have become naturalised from past escapes and introductions. The overall population of wild deer in Scotland was estimated by SNH in 2011 to be over 750,000 (400,000 red, 350,000 roe, 25,000 sika, 2,000 fallow).<sup>1</sup> The populations of all these deer species are both increasing and expanding their range. Adult deer have no natural predators in Scotland and the populations are usually managed by culling. The level of the annual cull of deer in Scotland has increased over the years and is now around 100,000 deer a year.<sup>2</sup> This includes around 60,000 red deer as well as over 30,000 roe deer.
- 2 In Scots law, wild deer belong to no-one until they are 'rendered into possession' by being killed or captured by someone. By the 18th century, land owners had established that no-one could hunt wild deer over any land without the permission of the land owner. This remains the basic position. The right to hunt deer goes with the ownership of land. However, the owner's right is based on the ability to exclude others and is an ancillary benefit of land ownership, rather than a distinct property right like that for salmon fishing discussed in the previous section. Legislation has also given authority to shoot deer to others without the permission of a land owner, for example, to agricultural tenants and to Scottish Natural Heritage (SNH) as the public deer authority.
- 3 The submissions to the Review Group and the evidence to the Scottish Parliament's Rural Affairs, Climate Change and Environment (RACCE) Committee's recent short inquiry into deer management, reflected that there are a diverse range of issues in Scotland resulting from a lack of adequate culling of wild deer populations.<sup>3</sup> There is also widespread recognition of the need to improve the management of these populations in the public interest to reduce their impacts, as reflected in the Scottish Government's response to the Committee's conclusions.<sup>4</sup>
- 4 The Review Group has been struck during its own investigations by the limited progress in addressing some of the issues over the management of wild deer in Scotland, particularly red deer, despite many years of debate over these issues.

---

<sup>1</sup> *Scottish Parliament Information Centre (SPICe) Briefing 2013*

<sup>2</sup> *SNH annual cull statistics*

<sup>3</sup> *RACCE Committee – Letter to Minister – February 2014*

<sup>4</sup> *Wheelhouse letter to RACCE March 2014*

### 32.1 Background

- 5 The management of wild red deer has been an issue in Scotland for the last 200 years. As noted above, land owners had established a monopoly over hunting deer on their land by the 18th century. Then, from the late 18th century and throughout the 19th century, Highland land use became increasingly dominated by large estates managed for deer stalking. The management of these open hill areas, referred to as deer forests, resulted in a substantial increase in the number of red deer. This gave rise to issues over the need to protect the interests of agricultural tenants and crofters from marauding red deer. While the extent of deer forests started to reduce from the First World War, issues over protecting agricultural interests continued. There were also increasing issues over the need to protect forestry interests from the high numbers of red deer, as the Forestry Commission and other land owners implemented the government's post war policy to expand the nation's timber resources.
- 6 Despite the impact of these issues on the public interest, the influence of estate owners meant that no statutory framework to regulate deer management was put in place until after the Second World War. There were seven separate government inquiries into what was known as 'the red deer problem' between 1872 and 1954, before the Deer (Scotland) Act 1959.<sup>5</sup> This Act, amongst other provisions established the Red Deer Commission (RDC), introduced close seasons for red deer, consolidated the rights of owners and occupiers to kill deer to protect agricultural and forestry interests, introduced authorisations for out of season and night shooting, empowered the RDC to kill deer on its own account and to require any owner of land to submit a Cull Return detailing the deer shot on the owner's land in the previous year (1st April to 31st March). The Act also empowered the RDC to organise voluntary Control Agreements with land owners to reduce deer numbers and to instigate a compulsory Control Scheme if the voluntary approach did not succeed. Other provisions included specifying the ways deer can be killed legally and a licensing system for venison dealers.
- 7 Many of the basic components of the 1959 Act are reflected in Scotland's current primary deer legislation, the Deer (Scotland) Act 1996 as amended. Another factor of continuing significance which was not part of the 1959 Act, was the approach adopted by the RDC when it was formed, of encouraging voluntary Deer Management Groups (DMGs) of local land owners. These were intended to promote cooperation between land owners and improve the standards of local deer management. The first DMGs were formed in the 1960s and there were 39 in the Highlands and Islands by the end of the 1980s.<sup>6</sup> There were 42 DMGs in these upland areas in 2013 and a further seven in lowland areas.<sup>7</sup> (Fig. 40)
- 8 The Deer (Scotland) Act 1996 consolidated the previous amendments to the 1959 Act, including legislation in 1982 that had made the RDC responsible for all species of deer in Scotland.<sup>8</sup> The 1996 Act also replaced the RDC with the Deer Commission for Scotland (DCS) with contemporary arrangements for appointing the Commissioners, and added the protection of natural heritage and public safety interests to the responsibilities of the DCS. The basic framework of the 1959 Act continued including the provisions for Control Agreements and Control Schemes. By 1996, there had not been a compulsory Control Scheme and there has not been one since, despite all the issues over serious damage by

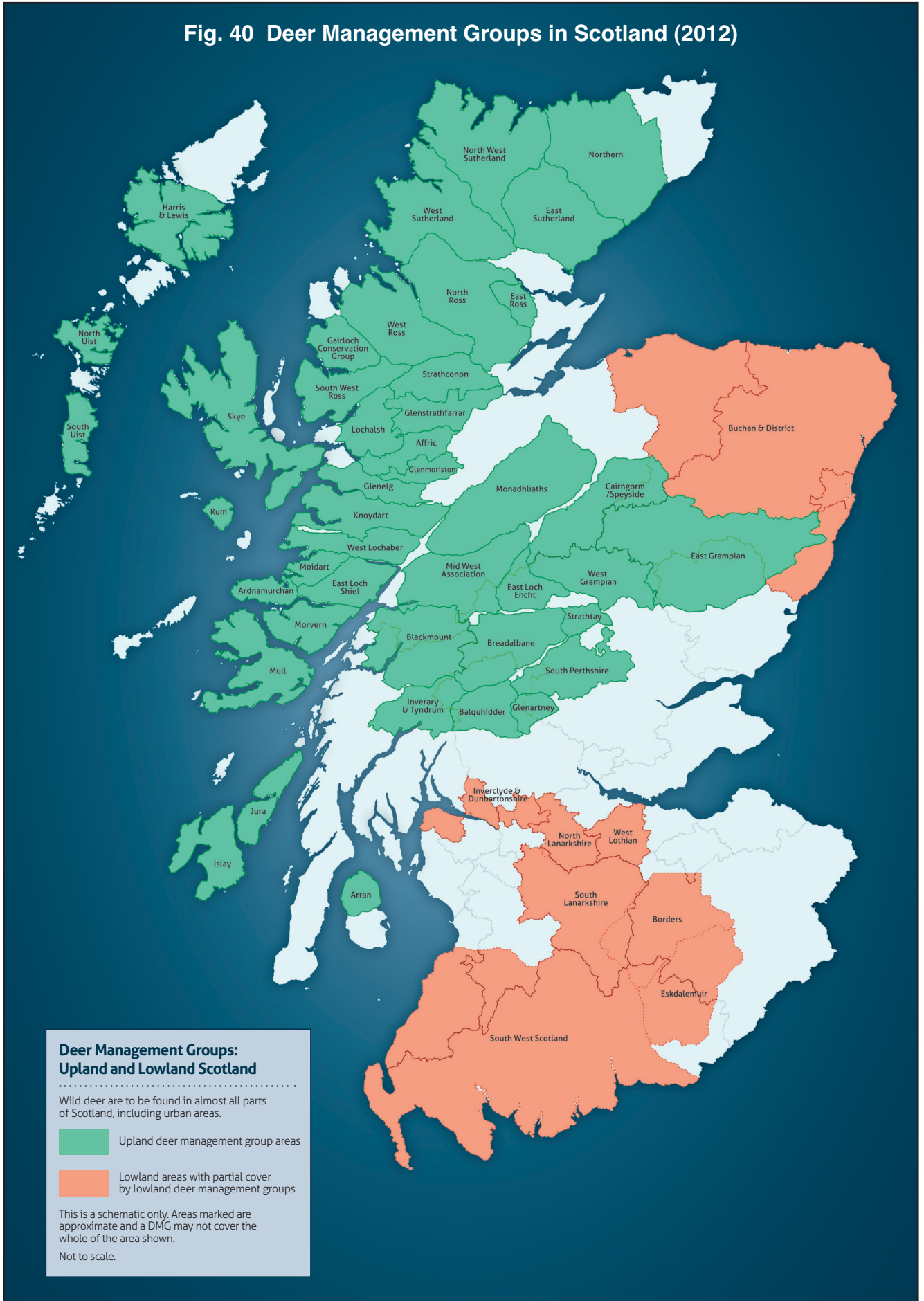
---

<sup>5</sup> *Forest Policy Group submission Ref 152*

<sup>6</sup> *Callander & MacKenzie 1991*

<sup>7</sup> *SPICe briefing*

Fig. 40 Deer Management Groups in Scotland (2012)



deer. This has been because both the RDC and DCS considered the nature of provisions in the legislation made them unworkable in practice.<sup>9</sup>

- 9 The 1996 Act was amended by legislation in 2010 to transfer the Deer Commission's responsibilities to Scottish Natural Heritage (SNH).<sup>10</sup> Further important amendments to the 1996 Act were made in the Wildlife and Natural Environment Act 2011, including the addition of an urban competence to SNH's deer management responsibilities and the introduction of a voluntary Deer Management Code. The 2011 Act also amended the 1996 Act by streamlining SNH's powers to implement compulsory Control Schemes to reduce deer numbers to make them more usable. The Review Group noted in the evidence to the RACCE Committee that SNH anticipates testing these revised powers before long.<sup>11</sup> The aim of public policy under the 1996 Act as amended is now the sustainable management of Scotland's wild deer populations, with that defined in the Deer Management Code as *"managing deer to achieve the best combination of benefits for the economy, environment, people and communities now and for future generations"*.<sup>12</sup>

### 32.2 Current Position

- 10 For over 50 years since the 1959 Act, the RDC, DCS and now SNH have each consistently called for reductions in deer numbers to reduce their impacts on an expanding number of public interests. However, during that period, the overall numbers of wild deer in Scotland have continued to increase and their range has continued to expand. The practical context of deer management has also changed significantly over the last 50 years. Traditionally the focus was on red deer on the open hill in the Highlands and most of the annual red deer cull is still on the open hill. However, a substantial proportion of the red deer population is now in Scotland's woodlands and a majority of the annual cull of deer in Scotland each year is shot in woodlands.<sup>13</sup> Deer are naturally woodland animals and the expansion of tree cover over the last 100 years from 5% to 17% of the land area, has played a major role in the expanding range of deer in Scotland. This has meant that the need to manage deer numbers has spread into more lowland areas, where there are much more diverse and smaller scale patterns of land ownership. It now also involves the need to control roe deer in an increasing number of peri-urban and urban locations.
- 11 The expansion in the range of Scotland's native deer species has brought some benefits, in that they are a natural component of woodlands in Scotland and can be a valuable economic resource. However, there is also now a need to manage deer numbers across Scotland to control their current and potential negative impacts on public interests including, for example, environmental damage to habitats, economic damage to crops and the social costs which can result from deer-vehicle collisions. The nature of many of the impacts of deer damage on public interests and other related factors mean that it is difficult to calculate the overall costs and benefits of the current management of wild deer in Scotland in financial terms.<sup>14</sup> However, the need to increase deer culls in some areas to reduce their impacts on

<sup>8</sup> *Deer (Amendment)(Scotland) Act 1982*

<sup>9</sup> *RACCE Committee SNH evidence*

<sup>10</sup> *Public Services Reform (Scotland) Act 2010*

<sup>11</sup> *SNH evidence to RACCE Committee, 20 November 2013*

<sup>12</sup> *SNH Code of Practice on Deer Management, page 4 (2012)*

<sup>13</sup> *SNH briefing*

<sup>14</sup> *R Putman 'Scoping the economic benefits and costs of wild deer and their management in Scotland' (SNH, 2012)*

environmental, economic and social public interests in those areas, is evident from the RACCE Committee inquiry and other sources.

- 12 The RACCE Committee inquiry focused on the role of the voluntary Deer Management Groups (DMGs) in delivering improved deer management, and set a target that these DMGs should each have a Deer Management Plan for the area it covers, by the end of 2016. The Scottish Government agreed with the Committee *“that the end of 2016 would be a suitable juncture to consider progress and look to take action if the current voluntary system has not produced a step change in the delivery of effective deer management”*.<sup>15</sup>
- 13 In response to this deadline, the Association of Deer Management Groups (ADMG) is actively encouraging DMGs to develop Deer Management Plans (DMPs) and consulting on a DMG benchmark standard for the operation of the DMGs. However, the evidence to the RACCE Committee showed that, despite all the efforts of some in the DMG movement, there has been very little, if any, significant improvement in the operation of DMGs since reports criticising their lack of progress in the previous two decades.<sup>16</sup> Also, while the RACCE Committee emphasised the need for DMGs to have DMPs, the clear evidence to their inquiry was that even where such Plans had been produced with public sector encouragement, the Plans were not then used or updated.<sup>17</sup>
- 14 Improvements in the operation of DMGs would be a positive development. However, these will not directly address the need to ensure adequate culls are carried out where necessary to protect public interests. In addition, DMGs are concentrated in the Highlands and based mainly around cooperation between relatively large scale land owners. There are few DMGs in the rest of Scotland, where that model is generally less directly applicable due to different patterns of land ownership and land use.
- 15 The Review Group considers that some improvements are required in the statutory framework governing deer management, both to enable the voluntary approach to work more effectively in the different circumstances across Scotland and to ensure that public interests are adequately protected in situations when it does not. The Group considers that the need for improvements to achieve this are important, to reduce the current costs of damage by wild deer and to support wider public policies for land use, including on-going forest expansion and a new emphasis on the health of ecological services provided by the environment.
- 16 The Group considers that the Scottish Government should be examining potential improvements to the statutory arrangements governing the management of wild deer in Scotland now, rather than waiting to the end of 2016. The Group considers changes are required independent of the degree to which the performance of DMGs improves in the coming years.

### Next Steps

- 17 Scotland’s existing statutory framework to ensure wild deer are managed in the public interest, shares many elements with the equivalent frameworks regulating the hunting of deer in other European countries. These include the regulation of the hunting seasons,

---

<sup>15</sup> Wheelhouse response 5.3.14

<sup>16</sup> Callander & MacKenzie 1991, DCS ‘Deer Management Groups’ (2003)

<sup>17</sup> Evidence from John Milne, former Chair of the Deer Commission, to RACCE Committee, 20 November 2013

permitted hunting methods, permitted weapons and ammunition, as well as the handling and disposal of venison.<sup>18</sup> Scotland is unusual in not requiring people to have a formal qualification to shoot deer, but it does have a voluntary system in place. While the Wildlife and Natural Environment (Scotland) Act 2011 left this as voluntary, it is anticipated that these qualifications will become a statutory requirement in due course in the interests of animal welfare and public safety.

- 18 The arrangements in different European countries have been recently reviewed, by dividing them into five models of deer management based on the degree of public interest regulation.<sup>19</sup> Scotland was in the least regulated model with the rest of the UK and Eire. The only other country in that category was Sweden, which has very different hunting traditions and systems.
- 19 The Review Group considers that a key distinction between the statutory frameworks governing deer hunting in Scotland compared to other European countries, is the lack of arrangements when necessary to ensure that appropriate numbers of deer are killed to protect public interests and deliver sustainable deer management.
- 20 At present, the Scottish Government considers that the voluntarily Deer Management Code “places very firmly a responsibility on all land owners to actively think about how they engage with and manage deer and whether that requires collaboration”.<sup>20</sup> There is, however, no requirement on land owners to control deer numbers on their land where this is necessary to protect public interests.
- 21 The current arrangements mean that it does not necessarily matter to an owner of land whether or not they choose to cull any deer on their land, in that there are, essentially, no direct consequences for an owner if deer which use their land are damaging public interests. This has led to suggestions that the voluntary responsibility of land owners in the Deer Code should be converted to a statutory duty. However, the Review Group considers that the need is for improvements to the regulatory framework to encourage the voluntary approach to work more effectively and enable adequate culls to be carried out when it does not.
- 22 Wild deer are part of the public domain and the current legislation requires Scotland’s deer populations to be sustainably managed in the public interest. The management of wild deer is conditional on the public interest, including factors such as protecting animal welfare and public safety and preventing damage by deer. These public interests now define the carrying capacity of land for deer and correspondingly, whether more deer might need to be culled in some situations to protect these interests. The Review Group considers that the responsibility rests with the public interest through SNH as the public deer authority, to determine appropriate cull levels in different locations to ensure that public interests are adequately safeguarded.
- 23 Scotland’s deer populations occur in relatively distinct areas, for example, as reflected in the pattern of DMGs. The Review Group considers that SNH should be responsible for determining the cull levels required in the public interest in each of these areas, and in different parts of them where there may be particular issues to address. The Group

---

18 Putman *Op cit*

19 Rory Putman “A Review of the various legal and administrative systems governing the management of large herbivores in Europe” (2013)

20 Wheelhouse to RACCE 5.3.14



considers that this improvement to the current framework, would provide a much clearer context for deer managers determining appropriate culls and cooperating with neighbours over achieving those culls if necessary.

- 24 The Review Group also considers that a second improvement should be a requirement for land owners who intend to cull wild deer on their land, to apply to SNH for a consent for the number of deer they plan to cull. The Group consider that it is an anomaly that, under the current arrangements, there is only an obligation on land owners, through the system of statutory cull returns, to tell SNH how many deer they have shot in the past year. The Group considers that land owners should, as part of the system, also have to apply to SNH with the number of deer that they plan to shoot in the coming year. This will enable SNH to identify situations where it considers that proposed culls will not be sufficient to protect public interests and to seek a higher cull. The existing annual cull returns then enable SNH to monitor the extent to which land owners are achieving the culls required to protect public interests.
- 25 The requirement for land owners to apply for a consent for the number of wild deer they plan to cull should place little extra burden on land owners. Those with deer on their land should be planning the target number of deer that they intend to cull in any event, and applying for a consent would be similar to other consents required in the public interest, such as for water use and tree felling. Many owners of woodlands and forests also already have, for example, agreed deer cull targets as part of Forest Plan contracts with Forestry Commission Scotland (FCS).
- 26 While SNH can already require cull returns from land owners that they identify from venison dealer records as culled deer, SNH should also be able to require cull plans from the owners of land where no deer are being culled and where SNH consider there should be a cull to protect public interests. If the owner does not want to be responsible for the cull, SNH should be able take over the responsibility for achieving it. There are, for example, many smaller scale land owners in lowland areas where deer now need to be culled, who may have neither the capacity nor interest to undertake it. While there is scope to encourage DMGs or groups of hunters to manage local culls where an owner opts out, there can be situations where SNH may decide to carry out culls directly using either its own staff or other appropriately qualified hunters. Around urban areas is a particular example, because of the public safety concerns. The Scottish Government is already by far the largest deer controller in Scotland, with FCS killing around one third of the 100,000 deer shot in Scotland each year.
- 27 The Review Group considers the two types of changes proposed would improve the current statutory framework by helping to promote more sustainable deer management. There would be a clearer set of public interest standards to be met through the cull levels set locally by SNH to safeguard public interests, and also a consent system to ensure planned culls are at an appropriate level to achieve that.
- 28 These proposed changes might be seen in the context of this Report, as having some parallels with the improved statutory framework put in place for the management of Scotland's freshwater as another national common property resource. As described in Section 30, legislation now defines public interest standards for any use of these water resources by land owners and a system of consents to use these resources to ensure these standards are met.

- 29 Introducing a system of standards and consents to cull wild deer as a public resource, includes the possibility of consents not being granted if an owner of land is consistently failing to cull the number of deer required to protect public interests. Land owners should have the first option in culling wild deer on their land. However, if a land owner consistently chooses not to meet the standards required for sustainable deer management in the public interest, they should no longer have a monopoly over hunting wild deer on their land. If this situation occurred, SNH should be able to take over responsibility for the cull required, by either carrying out the cull itself or allocating it to the local DMG or other suitably qualified hunters.
- 30 Improved culls will reduce the costs of adverse impacts on public interests, and costs could be recovered, where appropriate, if SNH has to take responsibility for culls. In Section 25, the Group considers the current exemption of deer hunting from sport rates and the possibility of using these as an incentive to encourage appropriate cull levels to protect public interests.
- 31 The Review Group considers that changes to the current statutory framework along the lines proposed, with clearer public interest cull requirements and a system of consents, would provide an improved context to enable the voluntary approach to work more effectively. Wild deer are a natural asset and hunting deer in Scotland's expanding areas of forests and woodlands, whether for recreational purposes or as part of work, should be an activity that continues to involve an increasing number of people.
- 32 **The Review Group considers that Scotland's populations of native red and roe deer are important national assets that should be sustainably managed in the public interest. The Group recommends that improvements should be made to the current statutory framework governing the hunting of deer in Scotland to ensure appropriate culls are carried out to adequately safeguard public interests.**

## PART NINE

### WAY FORWARD

#### Introduction

- 1 There are two Sections in this final Part of the Report. Section 33 comments on the Group's findings and Section 34 is a summary list of the Group's Recommendations.
- 2 The Review Group was given a very wide remit to examine the role of Scotland's system of land ownership in the relationship between the people of Scotland and the land of Scotland, and to identify land reform measures that would contribute to three overall strategic objectives (Annex 1). This has involved identifying and exploring a wide range of topics. The Group considers this broad approach important because the system that a country has in place for the ownership and management of its land is, as the Group's remit states, "fundamental to the well-being, economic success, environmental sustainability and social justice of the country".
- 3 Scotland's system for the ownership and management of its land can be seen as having three main components. The first is Scotland's system of property laws governing how the land is owned. The second is the system of regulatory laws governing how land can be used. The third is the system of fiscal and other non-statutory measures to influence how land is owned and used. It is important that these three elements work to best effect in the public interest.
- 4 Any system of land ownership needs to be updated and refined on an ongoing basis in response to changing circumstances. The Review Group considers that the purpose of such change should be to promote the common good of the people of Scotland. The Group therefore defines land reform as measures that modify or change the arrangements governing the possession and use of land in Scotland in the public interest, in order to promote the common good of the people of Scotland.

#### SECTION 33 - LAND REFORM, COMMON GOOD AND THE PUBLIC INTEREST

- 5 The term 'common good' describes a comprehensive and complex concept which brings into its embrace questions of social justice, human rights, democracy, citizenship, stewardship and economic development. These are all terms which have expansive, ambitious horizons. Yet each of them can be interpreted in a narrow way which limits its value. The Review Group considers that bringing them together under the common good helps to point towards outcomes that are healthy, rounded and robust.
- 6 Social justice has at its heart notions of fairness and equality, values clearly reflected in the Scottish Government's remit for the Land Reform Review. Human rights have traditionally been a prominent part of the land reform discourse, with the UN Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights (Protocol 1, Article1) providing a framework which seeks to balance the right of the population to an

adequate standard of living, with the right of the individual to the peaceful enjoyment of his or her possessions. A respect for democracy (and democratic accountability) is also a key component of the common good, as is the concept of citizenship – active citizens pursuing not just their own ambitions, but also goals that are for the good of society as a whole.

- 7 Social justice, human rights, democracy and citizenship can apply to various aspects of society, but when they apply to land, special conditions obtain. Land is a resource not just for the present generation, but also generations to come. It is also home to other species. Care of the land therefore calls for a strong sense of stewardship. Finally, successful economic development is also a critical element of the common good: the way in which land is used to generate economic activity and sustainable livelihoods is, and will be, crucial to an economically successful Scotland.
- 8 The Review Group therefore regards the common good as the general outcome which informs and drives land reform. It has guided decisions about which recommendations the Group should support, without the suggestion that any single action will realize the common good.
- 9 The public interest, however, is something which is politically identified at any one point in time. Typically, Ministers, or other elected political representatives, base decisions on what they consider to be in the public interest. They will identify the public interest with reference to policies they believe they have been mandated to implement. Once made, these decisions are subject to public accountability through normal democratic processes.
- 10 The Review Group's recommendations are reforms in the public interest which promote the common good. These are listed in the following section. The merit of each recommendation can be considered in terms of the particular issue it is intended to address. However it is important that these issues and recommendations are also seen within the context of Scotland's overall system of land ownership. Many of these involve similar land related issues and regarded collectively, they highlight several key ways in which the system of ownership in Scotland needs to be reformed.
- 11 While the general approach to land reform taken in this Report involves consideration of the common good, the Review Group has also taken account of the particular outcomes identified in our remit. These have informed the topics identified and explored, and the recommendations made.. In particular the outcomes of 'stronger, more resilient and independent communities', 'the diversification of the pattern of ownership in Scotland' and 'the development of new relationships between land, people, economy and environment' (see Annex 1) have all figured strongly within our deliberations.
- 12 In considering land issues in Scotland the Review Group is conscious of the continuing importance of international issues relating to the control and use of land. In many of the world's developing countries there is increasing pressure on scarce land resources, and there is growing evidence of 'land grabs' by powerful corporate interests to the detriment of local communities and indigenous peoples. One major response to these concerns has been the publishing of FAO Guidelines on Land Tenure and the emergence of the International Land Coalition, whose aim Michael Taylor describes as 'people centred land governance'.<sup>1</sup> The Review Group considers that people centred land governance should be an underpinning principle which informs the future approach to land reform in Scotland.

### A Land Reform Programme

- 13 Land is a crucial, finite resource which is one of the defining features of Scotland as a country. In Section 24 of the Report, the Review Group draws attention to the need for a much clearer and more integrated approach to the underlying issues with Scotland's system of land ownership, and stresses the need for a National Land Policy to focus on land itself.
- 14 The Review Group also considers that a key part of implementing a National Land Policy should be an integrated programme of land reform measures to modernise and reform Scotland's system of land ownership. At present the Scottish Government has no integrated approach to land reform and Scotland has not had a land reform programme for 10 years. The Group considers that the kind of changes needed to modernise and reform Scotland's system of land ownership require the kind of policy coherence delivered through the first Scottish Executive's Land Reform Action Plan. A new land reform programme of this nature would incorporate a range of measures, on different topics, and at different stages of development. The Group considers that the diversity of the recommendations within this Report clearly illustrate the need for Scotland to take a more focused and integrated approach to land reform.
- 15 **The Review Group considers that significant changes are required to make Scotland's system of land ownership a more efficient and effective system for delivering the public interest. The Group recommends that the Scottish Government should have an integrated programme of land reform measures to take forward the changes required to modernise and reform Scotland's system of land ownership.**

### Land Commission

- 16 The extent of our remit, and the influence of land in so many aspects of the lives of the people of Scotland, meant that the Review Group was unable to examine sufficiently all the ideas which emanated from various sources from submissions to our call for evidence, from the Group's advisers and from the Group members themselves. Among these were a proposal for a residency requirement for larger land owners, a requirement for development and land use plans as an integral part of the acquisition of large estates, and a proposal for prospective purchasers of larger areas of land to be assessed against selected 'sustainability test criteria' (as potentially emanating from the Land Use Strategy, or proposed by other land commentators).<sup>2</sup> There were also proposals to transfer Government owned land to an independent charitable trust with the aim of putting it to more productive use in the public interest, and transferring public land to community bodies to own, manage and develop for local benefit.
- 17 These proposals, and other land reform ideas, must await a future opportunity to be examined, but they illustrate that this Report should not be seen as the final statement on land reform in Scotland. The Review Group considers that many issues remain to be addressed, and that Scotland's system of land ownership should be regarded as still in transition. This critical point was made previously by Lord Sewel, Chair of the Land Reform Policy Group, who in 1999, stated "*It is crucial that we regard land reform not as a once-for-all issue but as an ongoing process*".<sup>3</sup> The Review Group supports this statement and

<sup>1</sup> M Taylor 'Contemporary agendas in land reform and community ownership across the globe' (Presentation, Community Land Scotland Seminar, Inverness, 19-20th March 2014)

<sup>2</sup> *Lairds, Land and Sustainability EUP* (2013)

<sup>3</sup> *Land Reform Policy Group 'Recommendations for Action'* (Scottish Office, 1999)

considers that an ongoing, sustained approach is needed to achieve the necessary modernisation and reform of Scotland's system of land ownership. It is equally important that this approach should be coherent and well informed.

- 18 Given the importance of Scotland's land to the country's future, the Review Group believes that there should be a single body with responsibility for understanding and monitoring the system governing the ownership and management of Scotland's land, and recommending changes in the public interest, where required. This single body is referred to here as the Scottish Land and Property Commission (SLPC), with 'and Property' included to emphasise that such a commission would be concerned with 'land' in its full meaning in Scots property law, not simply with land in a rural sense.
- 19 The SLPC would provide a single, overall and integrated focus on the different aspects of Scotland's system of land ownership, including land information, property law, land use, fiscal measures and land markets. It should have the expertise to provide a central overview that links social, environmental and economic public policies with the legal and technical aspects of Scotland's system of land ownership. The SLPC would be distinct from existing specialist bodies such as the Lands Tribunal for Scotland, or the Scottish Land Court, and would be different from that of the Scottish Law Commission (SLC), with its legal expertise and specialist role in updating and improving the law of Scotland.
- 20 The Review Group considers that the SPLC should operate within the framework of the proposed National Land Policy. It would have agreed programmes of work, with the balance of expertise amongst commissioners evolving to reflect current priorities and programmes. In designing such a Commission, the Group believes Scotland could draw significantly from the widespread international experience of land commissions, which exist as part of institutional arrangements within national land policies.<sup>4</sup>
- 21 **The Review Group considers that there is a need for a single body with responsibility for understanding and monitoring the system governing the ownership and management of Scotland's land, and recommending changes in the public interest. The Group recommends that the Scottish Government should establish a Scottish Land and Property Commission.**

#### Final Remarks

- 22 As the Report illustrates, there is no single measure, or 'silver bullet', which would modernise land ownership patterns in Scotland and deliver land reform measures which would better serve the public interest. Within the constraints of the review process, the Group has examined as wide a range of land reform topics as was possible, and made over 60 recommendations. Some of these recommendations amend existing policies and legislation, while others will require to be the subject of new legislation. Some recommendations can be implemented relatively quickly, while others are more medium term in nature, requiring further testing and consideration.
- 23 In addition to making specific recommendations, the Report offers a particular approach to future decisions about the possession and use of land in Scotland. This approach is orientated towards serving the common good, and can be encapsulated within the phrase

---

<sup>4</sup> Know Edge Ltd / Submission 328

people centred land governance. If this approach was to be embedded in future policy developments relating to land, the Group would regard this as a fitting legacy for the Review.

- 24 The Group recognises that this is a critical time for the future of Scotland. Along with the people of Scotland, land is the most important resource in the nation. How it is owned, managed and used is of fundamental importance to Scotland's future prospects, whatever constitutional direction the country chooses. The Group believes that we have reached a critical point in relation to land issues. We offer the Scottish Government, a range of recommendations, summarised in Section 34, and we encourage it to be radical in its thinking and bold in its action. The prize to the nation will be significant.

## **SECTION 34 - RECOMMENDATIONS**

### **Part Two - The Ownership of Land**

#### **SECTION 4 - LAND REGISTRATION**

- 32 The Review Group considers the limited progress to date in the coverage of Scotland's Land Register is a major issue. Given the economic and wider public benefits this will deliver, the Group recommends that the Scottish Government should be doing more to increase the rate of registrations to complete the Land Register, including a Government target date for completion of the Register, a planned programme to register public lands and additional triggers to induce the first registration of other lands.

#### **SECTION 5 - OWNERS OF LAND**

- 11 The Review Group recommends that the Scottish Government should make it incompetent for any legal entity not registered in a member state of the European Union to register title to land in the Land Register of Scotland, to improve traceability and accountability in the public interest.

#### **SECTION 6 - SUCCESSION LAW**

- 20 The Review Group recommends that the Scottish Government should, in the interests of social justice, develop proposals in consultation with the Scottish Law Commission for legislation to end the distinction between immovable and moveable property in Scotland's laws of succession.

#### **SECTION 7 - OWNERLESS LAND**

- 11 The Review Group considers that the expansion of land registration is likely to result in surviving examples of common land and commonties coming to light. The Group recommends that these distinctive forms of land tenure should be identified and safeguarded as part of modernising Scotland's system of land ownership.

#### **SECTION 8 - COMPULSORY PURCHASE**

- 14 The Review Group considers there is a clear need to update Scotland's system of compulsory purchase. The Group recommends that the Scottish Government should take forward the modernisation and reform of Scotland's compulsory purchase legislation, with a clear timetable for introducing a Bill to achieve this into the Scottish Parliament.
- 18 The Review Group recommends that the Scottish Government and local authorities should have a right to register a statutory right of pre-emption over land, where that is in the public interest.



## **Part Three - Public Land Ownership**

### **SECTION 9 - EXTENT OF PUBLIC LAND**

- 28 The Review Group considers that information on the properties in Scotland owned by the Scottish Government, local authorities and other public bodies, should be more readily available. The Group recommends that the Scottish Government, local authorities and other public bodies in Scotland should publish online property registers that are publicly accessible.

### **SECTION 11 - CROWN PROPERTY RIGHTS**

- 31 The Review Group considers that ending the Crown Estate Commissioners' involvement in Scotland would deliver wide ranging and important benefits to Scotland. The Group recommends that the Crown Estate Commissioners' statutory responsibilities in Scotland, under the Crown Estate Act 1961, should be devolved to the Scottish Parliament.
- 40 The Review Group considers that, following the abolition of feudal tenure, there should be further significant reductions in types of Crown property rights in Scotland. The Group recommends that the Scottish Government reviews the current Crown property rights in Scots law and brings forward proposals for the abolition of these rights or their replacement statutory provisions, as appropriate in the public interest.

### **SECTION 12 - HISTORIC NATIONAL PROPERTIES**

- 6 The Review Group recommends that the Scottish Government should ensure that the two reservations inserted by the Crown Estate Commissioners into the titles to Edinburgh Castle and other former Crown properties now owned by Scottish Ministers are removed.

### **SECTION 13 - NATIONAL FOREST ESTATE**

- 21 The Review Group considers that the size and composition of the National Forest Estate should continue to evolve to meet changing circumstances. The Group recommends that the Scottish Government and Forestry Commission Scotland should develop a more integrated and ambitious programme of land acquisitions in rural Scotland, as part of delivering multiple public interest policy objectives.

### **SECTION 14 - COMMON GOOD LANDS**

- 21 The Review Group considers that the position over Common Good lands should be improved to ensure they are adequately safeguarded and appropriately managed. The Group recommends that a new statutory framework should be developed to modernise the arrangements governing Common Good property.

## Part Four – Local Community Land Ownership

### SECTION 15 - LOCAL COMMUNITIES

- 28 The Group considers that while there should be an agreed set of criteria which defines an ‘appropriate community body’, the Government should be flexible in terms of which legal structures are eligible. The Review Group recommends that there should be a clear focus in public policy on supporting appropriate local community bodies that are owned and managed by local communities acting on their own behalves.

### SECTION 16 - LAND AND COMMUNITY DEVELOPMENT

- 15 The Review Group recognises that there is now a wide range of types of property owned by communities and also types of community owners. Given the target of one million acres in community ownership by 2020, set by the First Minister, the Group recommends that the Scottish Government sets up a short life working group whose task would be to improve information on the numbers and types of community land owners and the land that they own, and to develop a strategy for achieving this target.
- 23 The Review Group considers that Trust Ports and other forms of local community control over harbours, piers, slipways and similar coastal assets should be encouraged as a form of community land ownership. The Group recommends that the Scottish Government should develop specific initiatives to assist this process.
- 38 The Review Group recognises that significant progress has been made in the growth of community owned land. The Group recommends that the Scottish Government, using the evidence and recommendations for change presented in this report, should develop a policy statement, with clear direction to all parts of Government and its agencies, on the objective of diversified land ownership in Scotland, and a strategic framework to promote the continued growth of local community land ownership.

### SECTION 17 - LOCAL COMMUNITY LAND RIGHTS

- 11 The Review Group considers that the Scottish Government’s planned Community Empowerment (Scotland) Bill provides a crucial opportunity to improve Part 2 of the Land Reform (Scotland) Act 2003. The Group recommends that improvements to Part 2 of the Act should include widening its scope to cover urban areas; enabling appropriate community bodies to be constituted as SCIOs; allowing communities to define their area by a boundary on a map; increasing the period of registration to ten years and decreasing the requirements of re-registration; and more generally to make the legislation more straightforward and less onerous for local communities to use.
- 27 The Review Group concludes that local communities, acting through appropriate community bodies, should have the opportunity to use a range of statutory land rights which are defined to suit different needs and circumstances. The Group recommends that the statutory land rights of local communities should include a right to register an interest in land, the existing right of pre-emption over land and a right to buy land, as well as rights to request the purchase of public land and to request Scottish Ministers to implement a Compulsory Purchase Order.

- 33 The Review Group recommends that Local Authorities should have the right to exercise a Compulsory Sale Order over an area of vacant or derelict land, and also that Community Councils, or appropriate community bodies, should have the right to request that a local authority exercises a Compulsory Sale Order.

## **SECTION 18 - COMMUNITY ACQUISITION COSTS**

- 18 The Review Group concludes that while funding packages for community land acquisitions and development are becoming more diversified, public funding remains critical. The Group recommends that the Scottish Government should ensure that there is an integrated legislative and financial support structure to help local communities in urban and rural Scotland buy and develop land and buildings. The Group further recommends that an adequate level of funding should be made available to meet an expected increase in demand for local community land ownership.
- 28 The Review Group considers that current interpretation of State Aid regulations in Scotland is inhibiting the further growth and development of community land ownership. The Group recommends that the Scottish Government should publish new Guidance on State Aid to ensure public bodies take a more solution-focused and less risk-averse approach to their interpretation of the Rules. The Group further recommends that the Government should enter into dialogue with the European Commission to improve the scope for public assistance to non-profit distributing appropriate local community bodies.
- 43 The Review Group concludes that the Scottish Public Finance Manual need not prohibit the transfer of public land at less than market value. The Group recommends that the Scottish Government should have a clear policy framework for the disposal of public property to appropriate local community bodies by the Government and associated public bodies, including a more integrated and focused approach to disposals for less than open market value where that is in the public interest.
- 48 The Review Group considers that there is significant potential community benefit in the transfer of selected local authorities' assets to communities. The Group recommends that all local authorities should have a 'Community Assets Transfer Scheme' to encourage greater local community land ownership, and that the arrangements in these Schemes should all follow the same consistently high standard of best practice.

## **SECTION 19 - COMMUNITY SUPPORT SERVICES**

- 14 The Review Group concludes that communities embarking on land and property ownership and management requires considerable support. The Group recommends that the types of support services provided in the Highlands and Islands should be made available to local communities in the rest of Scotland and that the Scottish Government should take a more integrated and focused approach to encouraging and supporting the growth of local community land ownership.

- 20 The Review Group concludes that communities require a wide range of support and advice in seeking to acquire and manage land. The Group recommends that the Scottish Government should establish a Community Land Agency, within Government, with a range of powers, particularly in facilitating negotiation between land owners and communities, to promote, support and deliver a significant increase in local community land ownership in Scotland.

## **Part Five - Land Development and Housing**

### **SECTION 20 - URBAN RENEWAL**

- 32 The Review Group considers that further mechanisms are required to address the persistent challenge of vacant and derelict land in urban areas. The Group recommends giving local authorities a new power of Compulsory Sale Order.
- 40 The Review Group considers that additional policy tools are required to more effectively enable land assembly for urban renewal purposes. The Group recommends that the Scottish Government explores the feasibility of introducing a Majority Land Assembly measure.
- 49 The Review Group considers that the well-established international practice of property land readjustment or land-pooling provides another effective means of addressing fragmented or multiple ownership of land. The Group recommends that the Scottish Government investigates the potential of introducing an Urban Partnership Zone mechanism in Scotland.
- 59 The Review Group notes the greater public interest outcomes from public interest led development processes and considers this to be a necessary requirement for most effectively addressing urban renewal challenges in Scotland. The Group recommends that the Scottish Government should encourage and support a greater emphasis on public interest led development.

### **SECTION 21 - NEW HOUSING**

- 21 The Review Group considers that a strong self-build sector is a key factor in the efficient use of land and in encouraging different forms of home ownership. The Group recommends that encouraging and supporting the development of a vibrant self-build sector should be an explicit aim of a housing strategy in Scotland.
- 39 The Review Group considers that existing mechanisms are unlikely to deliver national housebuilding targets, in a manner compatible with Scottish Government place-making aspirations. The Group recommends the establishment of a Housing Land Corporation, a new national body charged with the acquisition and development of sufficient land to fully achieve these objectives.
- 50 The Review Group considers that specific attention requires to be focused on the housing needs of rural communities. The Group recommends that, in these areas, the Housing Land Corporation should have explicit performance targets that recognise the specific needs of small rural communities and an extended operational role to enable these to be addressed.

## SECTION 22 - EXISTING HOUSING

- 8 The Review Group recognises that it is now 10 years since the Abolition of Feudal Tenure etc (Scotland) Act, 2000, the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004 were introduced. The Group recommends that the Scottish Government introduces a more comprehensive legal framework for common property, which clarifies and modernises the rights and responsibilities of both the individual ownership and the collective governance of such property.
- 24 The Review Group considers that, to address housing need and the changing nature of the private rented sector, a change is required in the nature of tenancy arrangements within the sector. The Group recommends that the Scottish Government introduces longer and more secure tenancies in the private rented sector.

## Part Six - Land Ownership and Use

### SECTION 23 - RURAL LAND USE

- 12 The Review Group recognises that the Scottish Government's Land Use Strategy is an important development to encourage the use of Scotland's rural land in ways which contribute more to the public interest. The Group recommends that the Government should make rapid progress in implementing the Strategy across the rest of Scotland beyond the two pilot areas.
- 17 The Review Group considers that information on the pattern of land ownership should be an integral component of developing and implementing the Scottish Government's Land Use Strategy. The Group recommends that the Scottish Government should produce indicative maps of the patterns of land ownership in the Land Use Strategy's current two pilot areas, and in other areas as the implementation of the Strategy develops.
- 30 The Review Group anticipates that the implementation of the Scottish Government's Land Use Strategy process will lead to reductions in the current flexibility in rural land owners' choices over how they use their land. The Group recommends that the Government ensures that the necessary mechanisms are in place for the successful implementation of the Land Use Strategy in the public interest.
- 38 The Review Group considers that the patterns of land ownership in rural Scotland are an important factor in delivering the Land Use Strategy's community objective, because of the control that ownership gives over land use decisions and benefits. The Group recommends that the Scottish Government should map and monitor the patterns of land ownership in rural Scotland as part of implementing its Land Use Strategy.

## SECTION 24 - PATTERN OF RURAL LAND OWNERSHIP

- 17 The Review Group considers that the assembling of relevant statistical information and research is crucial to our understanding of patterns of land ownership in rural Scotland, and how they can evolve. The Group recommends that the Government should compile improved information on land ownership and undertake or commission more research into patterns of land ownership.
- 29 The Review Group considers that there should be an upper limit on the total amount of land in Scotland that can be held by a private land owner or single beneficial interest. The Group recommends that the Scottish Government should develop proposals to establish such a limit in law.
- 36 The Review Group supports the Scottish Government's aim of "a fairer, or wider and more equitable, distribution of land in Scotland...with greater diversity of land ownership". The Group believes that this requires an integrated approach to developing measures which help deliver this ambition. The Group recommends that the Government should develop a National Land Policy for Scotland, taking full account of international experience and best practice.

## SECTION 25 - LAND TAXATION, PAYMENTS AND MARKETS

- 12 The Review Group considers that there is no clear public interest case in maintaining the current universal exemption of agriculture, forestry and other land based businesses from non-domestic rates. The Group recommends that the Scottish Government should review this historic exemption, with a view to the phased introduction of non-domestic rates for these land based businesses.
- 20 The Review Group considers that 'sporting rates' could be tailored to each of the species involved and have the potential to be one of the tools available to help deliver the Scottish Government's Land Use Strategy and other rural objectives. The Group recommends that the Government should review the current exemptions from sporting rates and introduce a reformed rates system as appropriate in the public interest.
- 25 The Review Group considers that local government taxation in Scotland needs to be modernised and that Land Value Taxation should be given serious consideration as an option. The Group recommends that there should be a detailed study of the scope and practicalities of introducing Land Value Taxation.
- 43 The Review Group considers that there is a lack of clarity over the public costs and public benefits that result from the current exemptions and reliefs for agriculture and forestry land in national and local taxation. The Group recommends that each of the exemptions and reliefs should be reviewed and reformed as necessary, to ensure that there is a clear and transparent public interest justification for the public expenditure through revenue foregone.
- 48 The Review Group considers that the current fiscal regime for land ownership and use plays an important part in maintaining the concentrated pattern of large scale, private land ownership in rural Scotland. The Group recommends that changes to the current fiscal regime should include structuring them to encourage an increase in the number of land owners in rural Scotland, in the public interest.

## Part Seven - Agricultural Land Holdings

### SECTION 26 - CROFTS

- 26 The Review Group recommends that developing a modern and robust statutory framework for crofting should be a priority for the Scottish Government. The Group considers that the crofting community should be at the heart of any such process, and have a clearly defined role within it. The Group further recommends that reducing the complexity of crofting legislation should be an underpinning principle of any such process.
- 36 The Review Group considers that the provisions in the Land Reform (Scotland) Act Part 3 impose unnecessary burdens on the crofting community in exercising the right to buy and that the ambiguities in the requirements that they have to fulfil can be exploited in the form of unwarranted challenges to the exercising of the right. The Group recommends that the provisions of the Act should be amended to reduce these unnecessary burdens, to reduce the risk of unwarranted challenges and to make other improvements to the provisions.
- 55 The Review Group recommends that crofting trusts or crofting community owners should be able to purchase Scottish Government crofting estates at less than open market value. The Group recommends that Ministers direct the Scottish Government to make provision for this to happen and to clarify the circumstances under which this can occur. The Group also recommends that the Government should take a more pro-active approach to facilitating and supporting such transfers.

### SECTION 27 - SMALL LANDHOLDINGS

- 15 The Review Group's view is that there should be major improvements in the position of tenants under the Small Landholders (Scotland) Act 1911. The Group recommends that these tenants should, like crofters, have a statutory right to buy their holdings.

### SECTION 28 - TENANT FARMS

- 18 The Review Group's view is that the requirement for registration is an unwarranted constraint on the right of pre-emption of secure 1991 tenants under the Agricultural Holdings (Scotland) Act 2003. The Group recommends that the legislation should be amended to remove this requirement and to provide that all these tenants have first option on buying any part of their tenanted holding which their landlord decides to sell.
- 47 The Review Group considers that the position of secure 1991 tenant farmers and their families as part Scotland's rural communities, should be an important consideration in the Scottish Government's current review of Scotland's agricultural holdings legislation. The Group recommends that the Government should take full account of social and local community factors in determining whether the introduction of a conditional right to buy for tenants with secure tenancies under the Agricultural Holdings (Scotland) Act 1991, would be warranted in the public interest.

## Part Eight - Common Property Resources

### SECTION 29 - PUBLIC ACCESS

- 15 The Review Group's view is that Part 1 of the Land Reform (Scotland) Act 2003 has delivered a progressive statutory framework for improved public access over land in Scotland, and that the main challenges involve continuing improvements in implementation. The Group recommends that Scottish Ministers should as part of that, update the Guidance provided to access authorities under Section 27 of the 2003 Act.
- 22 The Review Group recommends that Scotland's current common law public rights over the foreshore, inland water and seabed should be replaced by statutory public rights that are integrated with the public's statutory access rights over land under Part 1 of the Land Reform (Scotland) Act 2003.

### SECTION 30 - WATER RESOURCES

- 13 The Review Group recommends that, following the reform by the Scottish Parliament of the arrangements governing the management and use of Scotland's fresh water resources, the riparian rights still attributed to adjacent and surrounding land owners in Scots property law should be reviewed and reformed to reflect the public interest in these resources as now defined.

### SECTION 31 - FRESHWATER FISH

- 30 The Review Group considers that the current system of District Salmon Fishing Boards based on property rights is no longer appropriate or adequate as part of the statutory arrangements governing freshwater fishing and fisheries. The Group recommends that District Salmon Fishing Boards should be abolished as part of putting in place a new improved statutory framework to ensure the sustainable management of Scotland's wild freshwater fish populations in the public interest.
- 35 The Review Group recommends that the presumptive Crown property right in Scotland to salmon fishings should be abolished or at least not exercised by the Crown Estate Commissioners until it can be. The Group also recommends that the coastal and freshwater salmon fishings held as ancient possessions by the Crown should be conveyed by the Crown Estate Commissioners to Scottish Ministers.
- 39 The Review Group recommends that the capacity in Scots law to create new ownerships of salmon fishing rights separate from the land over which the rights exist, should be ended.
- 43 The Review Group recommends that the Scottish Government develops a clear policy framework and associated arrangements to deliver improved opportunities for members of the public to fish for wild freshwater fish in Scotland.



**SECTION 32 - WILD DEER**

- 32 The Review Group considers that Scotland's populations of native red and roe deer are important national assets that should be sustainably managed in the public interest. The Group recommends that improvements should be made to the current statutory framework governing the hunting of deer in Scotland to ensure appropriate culls are carried out to adequately safeguard public interests.

**Part Nine - Way Forward****SECTION 33 - LAND REFORM, COMMON GOOD AND THE PUBLIC INTEREST**

- 15 The Review Group considers that significant changes are required to make Scotland's system of land ownership a more efficient and effective system for delivering the public interest. The Group recommends that the Scottish Government should have an integrated programme of land reform measures to take forward the changes required to modernise and reform Scotland's system of land ownership.
- 21 The Review Group considers that there is a need for a single body with responsibility for understanding and monitoring the system governing the ownership and management of Scotland's land, and recommending changes in the public interest. The Group recommends that the Scottish Government should establish a Scottish Land and Property Commission.

## ANNEX 1

### Land Reform Review Group

#### REMIT

“The relationship between the land and the people of Scotland is fundamental to the wellbeing, economic success, environmental sustainability and social justice of the country. The structure of land ownership is a defining factor in that relationship: it can facilitate and promote development, but it can also hinder it. In recent years, various approaches to land reform, not least the expansion of community ownership, have contributed positively to a more successful Scotland by assisting in the reduction of barriers to sustainable development, by strengthening communities and by giving them a greater stake in their future. The various strands of land reform that exist in Scotland provide a firm foundation for further developments.

The Government has therefore established a Land Reform Review Group.

The Land Reform Review Group has been appointed by Scottish Ministers to identify how land reform will:

- Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland;
- Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development;
- Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland.”

*from Scottish Government statement August 2012*

## ANNEX 2

### Land Reform Review Group

### MEMBERS and ADVISERS

#### Members<sup>1</sup>

Alison Elliot (Chair)	former Moderator of the General Assembly of the Church of Scotland
John Watt	Chair of Scottish Land Fund Committee
Ian Cooke	Director of the Development Trusts Association Scotland
Pip Tabor	Project Manager of the Southern Uplands Partnership

#### Special Adviser<sup>2</sup>

Robin Callander	Independent Specialist Adviser
-----------------	--------------------------------

#### Advisers<sup>3</sup>

Professor David Adams	Ian Mactaggart Professor of Property and Urban Studies, University of Glasgow
Amanda Bryan	Rural and Community Development Consultant
Malcolm Combe	Lecturer in School of Law, University of Aberdeen
Simon Fraser	Solicitor, Anderson MacArthur, Stornoway
Priscilla Gordon Duff	Partner, Drummuir Estate
Richard Heggie	Director, Urban Animation
Donald MacRae	Chief Economist, Lloyd's Banking Group Scotland
Professor Jeff Maxwell	former Director of the Macaulay Land Use Research Institute
Dr David Miller	Research Leader, James Hutton Institute
Bob Reid	former Convenor of the National Access Forum
Agnes Rennie	Chair of Urras Oighreachd Ghabhsainn
Dr Madhu Satsangi	Head of Housing Studies, School of Applied Social Science, University of Stirling

---

<sup>1</sup> Dr Alison Elliot, Professor Jim Hunter and Dr Sarah Skerratt were appointed in July 2012. Professor Hunter and Dr Skerratt resigned for personal reasons in April and May 2013 respectively. Ian Cooke and John Watt, previously Advisers to the Group, were then appointed in April and June 2013 respectively. Pip Tabor was also appointed in June 2013

<sup>2</sup> Appointed June 2013

<sup>3</sup> Appointed September 2012, with Richard Heggie and Malcolm Combe appointed in April and June 2013 respectively, when Ian Cooke and John Watt became Members of the Group. Andrew Bruce Wootton resigned as an Adviser in April 2014

## ANNEX 3

### Land Reform Review Group

#### LIST OF PUBLISHED SUBMISSIONS

The Land Reform Review Group issued a Call for Evidence on 4th October 2012. By the close of the Call for Evidence on 18th January 2013, the Group had received a total of 484 submissions. 321 of these were published (56 anonymously) and are listed below. The remaining 163 were not published, because either privacy was requested by the respondents (93) or the respondents failed to return a Respondent Information Form authorising publication.

During this Call for Evidence period, the Group also visited several areas of Scotland and had meetings with a variety of different interests. As part of this, the Group arranged public events and open meetings in:

Greenock	12th November 2012
Tarbert, Harris	11th December 2012
Fort William	12th December 2012
Dumfries	10th January 2013
Glasgow	27th February 2013

#### Published Submissions<sup>1</sup>

Ref No	Name / Organisation
1	Greenspace Scotland
2	Scotland's Rural College (SRUC)
3	Scottish Branch, Chartered Institute of Arbitrators
8	John Muir Trust
9	Di Alexander
13	Ian Thomas
15	East Ayrshire Council
16	Orkney Islands Council
18	Sir Peter Hutchison
19	Anonymous
20	Robbie Pennington

<sup>1</sup> Available on the LRRG website ([www.landreformreview.org](http://www.landreformreview.org)) under the reference number shown

21	Scottish Anglers National Association
23	Julia Campbell
26	Reforestation Scotland
27	South Lanarkshire Horse And Pony Access Group
28	Hazel Cameron
29	Centre for Human Ecology
30	Derek Pretswell
31	Jamie McIntyre
32	Jamie McKenzie Hamilton
33	Leith Community Crops in Pots
34	Jonathan Agnew
35	Anonymous
36	Henry Trotter
37	Sideactivity
38	Alex Gordon-Duff
39	Scottish Land & Estates
40	Anonymous
41	Scottish Natural Heritage
42	Anonymous
43	North East Mountain Trust
44	Anonymous
45	Oxfam
46	Dr Robert McMorran
48	Ross Paton
49	Scottish Tenant Farmers Association
50	Steve James
52	East Lothian Council
53	Eadha Enterprises
54	Riddell Estate
56	Kinnordy Estate
58	Ron Greer
59	John Sinclair
60	Ludwig Appeltans
61	Anonymous
62	Comhairle nan Eilean Siar

63	Rio Tinto Alcan
64	Highland Council
65	Laurence Keeley
69	Tenant Farming Forum
70	Paul Cochrane
73	Anonymous
74	Dunnichen Community Company
75	Arran Centre for Strategic Land Use
79	I.M.M.Crichton
81	Shared Voices Group
84	Malcolm Combe
89	John MacKintosh
90	Association of Deer Management Groups
93	James Hutton Institute
94	Anonymous
96	Womens Land Reform Group
100	Alastair Riddell
101	Stonefield Farms
102	R Coleman
103	Balnamoon Farms Co
104	Joyce Bruce
105	Scottish Council for Voluntary Organisations
106	Church of Scotland
107	Highlands & Islands Enterprise
108	Anonymous
109	Historic Houses Association
110	The Applecross Trust
111	Anonymous
114	Nourish Scotland
115	Shinness Estate
116	Scottish Rights of Way and Access Society (ScotWays)
117	Andrew Finlayson
118	Vanessa Halhead
119	John Thomas
120	CTC scotland

121	Planning Aid for Scotland
122	Scottish Crofting Federation
123	Anonymous
124	Southern Uplands Partnership
125	Anonymous
129	Val Robson
130	Highland Perthshire Communities Land Trust
131	Stewart Jamieson
132	Anonymous
133	Anonymous
134	Mary Howlett
135	Ian Gillies
136	Aigas Community Forest
137	North Harris Trust
138	Catherine Francis
140	Northern Deer Management Group
141	Ekklesia
142	Prof Denis Mollison
143	Calum MacLeod
145	Confederation of Forest Industries
147	Gilbert Bannerman
148	Jamie Roberts
149	Andy Wightman
150	Anonymous
152	Forest Policy Group, wild deer management
153	UPM Tilhill
154	Forest Policy Group, forestry reform
155	Comrie Croft
156	Deirdre Stewart
157	Scottish Borders Council
159	Anonymous
161	Anonymous
162	Ronald MacLean
163	Alasdair Laing
165	Community Woodlands Association

166	Centre for Rural Development
167	Sue Hilder
168	Islay Estates Company
169	Royal Institution of Chartered Surveyors
172	Scottish Agricultural Arbiters & Valuers Association
173	Wemyss Estates Trustees
176	The Crown Estate
180	Loch Choire Estate
181	Anonymous
182	NFUS
185	Ramblers Scotland
186	Andy Inglis
187	Wemyss and March Estates
188	The National Trust for Scotland
189	Donna Mackenzie
193	Rural Housing Service
194	Strutt & Parker LLP
196	Michael Foxley
197	Richard Callander
198	Anonymous
199	Anonymous
200	Game & Wildlife Conservation Trust
201	Andrew Hamilton
203	Shelter Scotland
206	Royal Town Planning Institute Scotland
207	Scottish Water
208	Malcolm Nicol
209	Anonymous
210	Scottish Community Alliance
211	Glenernie Estate
213	Anonymous
215	Anonymous
216	Loch Lomond & The Trossachs National Park
219	Anonymous
220	Alastair Riddell



221	Anonymous
222	Development Trusts Association Scotland
223	Scottish Sports Association
224	Anonymous
226	Moray Estates
227	Malcolm Younger
230	Mark Iaing
231	Lianne Hackett & Chris Fremantle
233	Colin Corlett
234	Association for the Protection of Rural Scotland
235	Stirling Council & Stirling Area Local Access Forum
236	Cromar Community Council
237	West Harris Trust
241	Woodland Crofts Partnership
242	Bowhill and Dalkeith Estates of Buccleuch Estates
243	Anonymous
247	Scottish Council for Development and Industry
248	Carnegie UK Trust
249	British Horse Society
250	Association of Salmon Fishery Boards
251	Mark Nicolson
252	Smiths Gore
253	Dr Jayne Glass
255	Sustrans Scotland
256	Richard Stirling-Aird
257	Blair Atholl & Struan Community Council
258	Achentoul Estate Company Ltd & Achentoul Farms Ltd
259	RSPB Scotland
260	Anonymous
262	Trustees of Cawdor Maintenance Trust, Cawdor Estate
263	Brian Inkster
264	Anonymous
265	Alexander Baillie
266	Robert Balfour
268	Scottish Allotments and Gardens Society

269	Joe Gibbs
271	Haddington Estate
272	Roxburghe Estate
272A	Duke of Roxburghe
273	Eilidh I.M. Ross
274	Dunecht Estates
277	James Baillie
280	Philip Astor
281	Lord Balniel
282	Queensberry Estate
284	Anonymous
285	Anonymous
287	Esk District Salmon Fishery Board
288	Daye Tucker
289	Richard Sidgwick
290	Nordic Enterprise Trust
291	Kinghorn Community Land Association
293	Brian Marden
294	Andrew T Wood
295	Anonymous
296	Scottish Woodlot Association
298	Tom Gray
300	Caledonia Centre for Social Development
302	Douglas & Angus Estates
303	Andrew Salvesen
305	Anonymous
307	David Robertson
308	James Galbraith
310	Anonymous
311	Anonymous
313	William Parente
314	Law Society of Scotland rural sub-committee
315	Seafield and Strathspey Estates
317	Community Land Scotland
320	James Baillie

321	Justin Kenrick
325	Greens Chartered Surveyors
326	Scottish Outdoor Access Network
328	Know Edge Ltd
329	Peter Landale
330	Euan J. Webster
331	Big Lottery
332	The Mountaineering Council of Scotland
333	Noel Darlow
336	Scottish Countryside Alliance
337	Kevin Findlater
339	Dr Jean Balfour
342	Mid West Association of Highland Estates Deer Management Group
346	John Digney
347	British Association for Shooting and Conservation
350	Scottish Canoe Association
351	The MacRobert Trust
353	Society of Local Government Lawyers and Administrators in Scotland
355	Anonymous
357	Anonymous
358	Holmehill Community Buyout Group
359	Glenfalloch Estate
361	Scottish Land & Estates Moorland Group
364	Bidwells
366	Donna Skelly
368	Arthur Greenan
369	Storas Uibhist Ltd
370	Anonymous
372	Anonymous
373	Anonymous
375	J. Martin Haldane
376	Stracathro and Careston Estate
377	Alvie & Dalraddy Estates
378	Atholl Estates
379	Drummuir Estate

380	Balloch Riders Access Group
382	Anonymous
384	Lochcarron Estate
385	Richard Cooke
387	Torwoodlee and Buckholm Estate
388	William John Buchanan
392	Anthony Foyle
393	Anonymous
394	Martin Girvan
395	Anonymous
399	Anonymous
400	Jack Whitaker
401	Peter Graham
402	Anonymous
403	Friends of Loch Lomond and The Trossachs
404	Embo Trust
406	John Macdonald
407	Andrew Lorrain-Smith
408	James Duncan Millar
409	Anonymous
410	Ewan G Kennedy
412	Ewen MacPherson
413	Helmsdale District Salmon Fishery Board
414	Argyll and Bute Local Access Forum
415	Anonymous
416	Cove Harbour Conservation
419	Anonymous
421	Anonymous
423	Kincardine Estate
425	Prof. Colin T. Reid and Dr. Walters Nsoh
426	Prof Jane Bower
427	Michael Wigan
428	Anonymous
431	Hawick & Jedburgh Branch of NFUS
432	Anonymous

434	Woodland Trust Scotland
435	Glenmuick Estate
436	Edward Baxter
437	Dunbeath Estate
438	John Randall
440	Stratherrick and Foyers Community Trust
443	RHS Gordon
444	Mark Crichton Maitland
445	Anonymous
446	Graham Tuley
447	Colin Strang Steel, Threepwood
448	Jamie Orr Ewing
449	Marion Boyle
452	Anonymous
453	Anonymous
455	J & S Grant
458	Alexander Gordon Morison
459	Druidaig Estate
463	Dormont Estate
465	Miff Tuck
467	Cambo Estate
470	Anonymous
471	Hopes Estate
475	Michael Maciocia
477	Scottish Federation of Housing Associations
478	Reginald Melton
480	Anonymous
481	Highlands Small Communities Housing Trust
482	Environmental NGOs, Centre for Mountain Studies
483	Scottish Environment LINK
484	David Merrick

## ANNEX 4

### Land Reform Review Group

#### Examples of Acts of the Scottish Parliament containing land reform measures<sup>1</sup>

2000 asp 5	Abolition of Feudal Tenure etc. (Scotland) Act 2000
2001 asp 5	Leasehold Casualties (Scotland) Act 2001
2001 asp 10	Housing (Scotland) Act 2001
2003 asp 2	Land Reform (Scotland) Act 2003
2003 asp 9	Title Conditions (Scotland) Act 2003
2003 asp 11	Agricultural Holdings (Scotland) Act 2003
2003 asp 15	Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003
2004 asp 6	Nature Conservation (Scotland) Act 2004
2004 asp 11	Tenements (Scotland) Act 2004
2007 asp 7	Crofting Reform etc. Act 2007
2010 asp 14	Crofting Reform (Scotland) Act 2010
2011 asp 6	Wildlife and Natural Environment (Scotland) Act 2011
2011 asp 14	Private Rented Housing (Scotland) Act 2011
2012 asp 5	Land Registration etc. (Scotland) Act 2012
2012 asp 6	Agricultural Holdings (Amendment) (Scotland) Act 2012
2012 asp 9	Long Leases (Scotland) Act 2012
2013 asp 7	Aquaculture and Fisheries (Scotland) Act 2013
2013 asp 10	Crofting (Amendment) (Scotland) Act 2013
2013 asp 11	Land and Buildings Transaction Tax (Scotland) Act 2013

<sup>1</sup> Where land reform measures are defined as provisions that modify or change the arrangements governing the possession and use of land in the public interest

