

A Consultation on the Future of Land Reform in Scotland

**A response from RSPB Scotland
February, 2015**

RSPB Scotland

RSPB Scotland is part of the RSPB, the largest wildlife conservation charity in Europe with over one million members from both urban and rural areas, over 80,000 of which are in Scotland. We campaign on issues affecting wildlife and the natural environment both at home and abroad, carry out scientific research, education, land management and policy advocacy, and promote the conservation of birds and biodiversity, as well as their enjoyment to people of all ages and backgrounds. We benefit from the support of over 1200 volunteers from across Scotland. We are part of the UK partner of Birdlife International.

As part of this work, RSPB Scotland manages 80 nature reserves across Scotland which extend to some 72,000ha. Approximately two-thirds is owned, the remainder being managed under leases or agreements with other landowners. These sites are acquired and managed in pursuance of our charitable objectives, under a variety of tenure arrangements – freehold, lease, management agreements, etc. Management is carried out by RSPB Scotland staff, by local and residential volunteers, and by partners (tenants, graziers, etc) from the local land management communities. Livestock, other agricultural products, timber and venison from our land contribute to local economies. As well as our direct investment, our activities contribute to the delivery of Scottish Government policies and duties in relation to the environment, and support tourism and other local businesses. As a charity, our work is recognised as being for the public benefit – as ‘tested’ and regulated by OSCR (and regulators in other jurisdictions where we are active).

We have been fully aware that we do not manage land in isolation for a very long time. For the past 15 years, we have had a formal policy and set of standards that mean we work closely and proactively with neighbours and local communities. Our management plans are public documents and, where appropriate, we involve local community organisations in their development. We have an approach of using local contractors and suppliers even when there is a cost penalty in carrying out management work, such as fencing and building maintenance, on our nature reserves. We work hard on being a “good neighbour” in the areas where we own or manage land, including the provision of access and other facilities to encourage public engagement with nature. We support local initiatives and projects, and encourage our staff to achieve a sensitive balance between being a good neighbour and pursuing our charitable objectives. Many of our staff are active in the communities in which they live and work, something which we encourage.

We have had a long relationship with community ownership. This was most clearly demonstrated with our involvement in the ‘Not for Profit Landowners Group’. Our staff were office bearers in this group, which cross-fertilised experience between community, crofting and NGO owners of land.

RSPB Scotland therefore welcomes the opportunity to respond to this consultation. We would also be very pleased to provide further information and/or to meet with Ministers or officials to discuss our comments in further detail.

Policy context

RSPB Scotland’s key objective is the conservation of nature – or biodiversity. This is also a stated objective of the Scottish Government and is a key principle of sustainable development – as set out, and supported by the Scottish Government, in *One Future - Different Path: The UK’s Shared*

Framework for Sustainable Development (2005)¹ and reflected in, for instance, the current Scottish Planning Policy². These principles include “living within environmental limits”.

The current biodiversity strategy *It's in your hands*³ states that “biodiversity conservation is an important dimension of sustainable development and a key measure of our success in achieving it” (p.6). This approach is maintained in the supplementary strategy (*2020 challenge for Scotland's biodiversity*⁴) which states at page 3:

“Biodiversity plays an essential role in meeting the Scottish Government’s vision of a smart, sustainable Scotland, and lies at the heart of our economic strategy.”

Sustainable development (in the past, often mis-described as sustainable economic growth), and biodiversity conservation as a key indicator of sustainable development, are therefore central underpinning principles to which all Scottish Government policy should adhere. **All policies should therefore contribute to securing the achievement of sustainable development and biodiversity conservation.** This responsibility is also underpinned by various legislative requirements⁵.

Accordingly, **we welcome the emphasis, in this consultation on environmental sustainability and sustainable development** – and the absence (except once) of the misconceived term sustainable economic growth. In taking forward any proposals, however, it is important that a full understanding and definition of sustainable development is clear – and that this relates to the principles of sustainable development referenced above, including biodiversity conservation.

Land management objectives

There are, and should be, a wide variety of objectives for the management of land. The emphasis that any land manager places on any or each objective is also varied – although may (and should be) influenced by public policy (e.g. regulations, incentives, good practice) and public benefit. **The management of land for environmental objectives is therefore a legitimate activity – and, when delivering Government environmental objectives should be considered to be in the public interest.** In some cases, such management is actually required by Government policy. For instance, owners of land designated as SPA, SAC or SSSI are required to manage those areas in a manner consistent with the conservation of the features for which the land was designated⁶. It must be emphasised this is not only a policy objective – but also a domestic and EU legal requirement; and that failure to do can result in significant penalties for the Government. However, it must also be recognised that such management usually means active management (involving financial input and manpower), and is not a form of abandonment.

Secondly, in the case of charitable organisations, it is a requirement of charity law that assets (including land) are managed for the furtherance of the charitable objectives. Environmental protection or improvement, as well as education, science and volunteering are all charitable purposes recognised by Scottish charity law⁷. **Environmental objectives for land management help to deliver the Government’s ambitions for, and international obligations to, the environment and sustainable development** (see above). This link to the Government’s environmental objectives is illustrated by the UK Governments’ inclusion of NGO nature reserves (whether designated or not) as “protected areas” in their returns (via UNEP/WCMC) to the CPD secretariat as part of their reporting of progress towards the Aichi targets.

However, as well as this intrinsic benefit, it also delivers a range of other ‘public goods’, both social and economic. Contrary to some perceived wisdom, it also creates jobs in remote, economically-

¹ Published by a previous administration (see <http://www.scotland.gov.uk/News/Releases/2005/03/07102535>), but supported by the current administration (see answer by Richard Lochhead to question S3W-38670).

² paras 34-40 at <http://www.scotland.gov.uk/Publications/2010/02/03132605/7>.

³ <http://www.scotland.gov.uk/Publications/2004/05/19366/37239>.

⁴ <http://www.scotland.gov.uk/Resource/0042/00425276.pdf>.

⁵ For instance, Nature Conservation (Scotland) Act 2004, s.1, and Marine (Scotland) Act 2010, s.3.

⁶ It should be noted, of course, that the legislation and relevant guidance provide for circumstances, in the public interest, where these requirements can be overturned and/or for appropriate compensation for such management.

⁷ Charities and Trustee Investment (Scotland) Act 2005, s.7.

vulnerable areas, generates economic activity by using local contractors and suppliers, and contributes to Scotland's tourism industry.

In the UK, uses of biodiversity directly support over 35,000 full-time equivalent (FTE) jobs and contribute over £4.8 billion to GDP, while environment-related activities are estimated to support around 500,000 jobs and £18.6 billion of GDP⁸. This is an especially important sector in Scotland, particularly in rural areas. Across Scotland, there are an estimated 17,700 FTE jobs in natural environment protection and management, while activities 'based on a high quality natural environment' support 92,800 FTE jobs (4% of Scottish jobs) and £2.2 billion gross value added and, in the north of Scotland, the sector provides 9% of all jobs⁹.

RSPB Scotland nature reserves and projects contribute to these economic benefits. Some well-known examples include:-

- Abernethy Forest, including Loch Garten Osprey Centre: our expenditure together with that by the 30,000+ visitors per year support 65 FTE jobs, including both on-site jobs and those in the local economy¹⁰;
- Sea eagles on the Isle of Mull: over £5m to the local economy, equivalent to 110 FTE jobs¹¹, and the recipient of a five star Quality Assurance award from VisitScotland¹²; and
- The Galloway Red Kite trial: valued at £21m to the local economy, equivalent to 13 FTE jobs¹³.

Overall, over 350,000 people (both tourists and Scots) visit RSPB Scotland nature reserves and projects annually. This represents both a great input to the local economies but also a good indication of the support for, and enjoyment of, nature. These wider benefits are not purely economic, they also include a range of social benefits including education, volunteering, and the reduction in health inequalities (see, for instance, http://www.rspb.org.uk/Images/wellbeing_tcm9-132872.pdf and <http://eprints.gla.ac.uk/4767/1/4767.pdf>).

Environmental NGOs

There are a wide range of environmental NGOs in Scotland (all autonomous, but many liaising through Scottish Environment LINK¹⁴). Like RSPB Scotland, a number own and/or manage land. Such **NGOs are an integral part of civic society**. By definition, these bodies are independent of Government or its agencies, are non-profit making and most are registered charities. Such organisations were often established as an initiative of groups of citizens, are overseen and accountable to a voluntary management committee (usually trustees) and have a membership or citizen-driven ethos (see <http://www.scotlink.org/files/publication/other/LINKOperatingPrinciples.pdf>).

In meeting their charitable purposes and the wishes of their membership, **the ownership and management of land is a legitimate, and desirable¹⁵, activity**. Indeed, ordinary supporters and members are keen for bodies such as RSPB Scotland, NTS or SWT to undertake land stewardship on behalf of the nation of our most important environments. They willingly support this through their donations. To some extent, this 'fills a void' in comparison with other European or North American countries where the state owns and manages a large proportion of such areas. Moreover, the public's financial support for such charities means that the state is (despite some grant aid) securing the conservation of these areas (and thus compliance with e.g. EU law) at a well below "cost price".

As a group of like-minded citizens, therefore, an NGO is, in one sense, a community. Although sometimes geographically-dispersed, it is a clear community of interest. In the case of RSPB Scotland, we are part of a community of interest that is concerned to ensure Scotland's wild places

⁸ http://www.rspb.org.uk/Images/wellbeing_tcm9-132872.pdf

⁹ SNH (2004) *The role of the natural heritage in generating and supporting employment opportunities in Scotland*. Scottish Natural Heritage.

¹⁰ http://www.rspb.org.uk/Images/Reserves%20and%20Local%20Economies_tcm9-133069.pdf.

¹¹ <http://www.bbc.co.uk/news/uk-scotland-scotland-business-13783555>.

¹² http://www.visitscotland.org/media_centre/5_star_award_mull_eagle_watch.aspx.

¹³ <http://www.bbc.co.uk/news/uk-scotland-south-scotland-11665227>.

¹⁴ www.scotlink.org.

¹⁵ Given that those purposes provide "public benefit" in terms of s.7 of Charities and Trustee Investment (Scotland) Act 2005 (<http://www.legislation.gov.uk/asp/2005/10/contents>).

and the wildlife it supports are cared for. Civic society is a complex concept – made up of many concentric and/or overlapping groups of people but including:-

- **communities of place**, where people live together in a geographically delineated area;
- and/or
- **communities of interest**, where people join together on the basis of shared interest or ambition¹⁶.

In developing legislative and policy proposals for land reform, it is important that the rights and wishes of **all** communities are recognised, including communities of interest. It has on occasion in the past been too easy for commentators to try and create artificial distinctions between these two types of community. As landowners or managers, there can be considerable synergies between what these two types of community and the outcomes they seek to achieve - that is, essentially, to manage an asset, in this case land, for the public good. As such, we would like to see much closer working and exchange of best practice between all such groups in the future.

Current consultation

In light of the above policy context, and comments on the roles of RSPB Scotland and other NGOs, we welcome the observation in the consultation paper (para 33) that:

“The land of Scotland is a finite resource and the land rights that govern how the land is owned and used have a crucial influence on the wellbeing, economic success, environmental sustainability and social justice of the country.”

The land (and seas) of Scotland, and how they are managed, are therefore vital components of a country that is achieving environmental sustainability, including supporting natural and healthy wildlife populations (the other species with which we share this planet). Laws governing the rights and responsibilities of land ownership and management are therefore important, and are interest to RSPB Scotland due to our roles as:

- (1) A voluntary body representing a significant membership of Scots who support the conservation of birds and other wildlife across the country – for its own sake, for its social and economic benefits, and as part of meeting our international responsibilities; and
- (2) A land manager responsible for the stewardship of a small but significant part of Scotland as nature reserves, acquired with charitable funds (sometimes with assistance from public funds), in accordance with our charitable purpose.

The current consultation is, in part, a response to the Land Reform Review Group’s (LRRG) report, *The Land of Scotland and the Common Good*¹⁷. The underpinning principle, in that report, is that the way land in Scotland is used and owned should be in the public interest and for the common good – along with the clear statement that environmental sustainability and the natural heritage form a key part of this public interest/common good. This is a principle that RSPB Scotland welcomes and supports. Indeed, we particularly welcome the implicit statement that Government will view land, not as a market commodity to be traded and used purely for private gain, but as a precious resource to be owned, occupied and managed in the long-term public interest.

While, however, this does the beg the question: what does “in the public interest mean? In our view, this must include sustainable development and the conservation of biodiversity (both interpreted, as above, in line with international and national conventions and EU/domestic law). Thus, it is essential, as these proposals are developed and implemented, that they are complemented by clear definitions, standards and guidance. This will ensure wider understanding, reduce conflict and proportionality.

Although annex B of the consultation provides a proposal-by-proposal response to the LRRG report, it is unclear in the consultation how the specific proposals suggested fit (or not) into a coherent programme to take forward the LRRG recommendations – or why some LRRG proposals/ideas are not being proposed and, conversely, why some proposals not suggested by the LRRG are being proposed.

¹⁶ <http://www.scotlink.org/files/policy/ParliamentaryBriefings/LINKDefiningCommunityEpwrmt.pdf>.

¹⁷ <http://www.scotland.gov.uk/Resource/0045/00451597.pdf>.

In particular, we note the LRRG view that land in Scotland should be **used** and owned should be in the public interest and for the common good (our emphases). However, while the consultation paper often refers to both land ownership and use, few of the specific proposals¹⁸ address land use – and there is no cross-reference to the Government’s own Land Use Strategy, or to other land use policies (e.g. CAP implementation, forestry policy or nature conservation). Given the importance of land management/land use to the public policy outcomes, especially in relation to the environment (see above), this is a serious omission and should be rectified. As such, if the overall policy intention, is to ensure that land is owned and used in the public interest, it is important to be clear (a) that sustainable land use is in the public interest and (b) what is meant by sustainable land use. The Land Use Strategy provides an obvious and useful means to do this – and underlines the need to link the land reform process to the Land Use Strategy.

Moreover, as the Land Use Strategy develops, through successive iterations and, perhaps, the local pilots develop into local expressions of the strategy, there is potential for greater collaborative and meaningful delivery of integrated, sustainable land use – involving all land owners, managers and communities. Thus, there is merit in examining whether Deer Management Groups and deer management plans (whether voluntary or statutory) might be broadened into “Sustainable Land Management Groups” – responsible for ensuring sustainable management across all land uses (and owners/managers) in a local area. This would amount to a “delivery mechanism” for the Land Use Strategy – which is currently lacking. This would also provide an opportunity for sustainable deer management mechanisms to be broadened to address other wildlife management issues at a landscape scale.

Within the context of the general observations, above, which we believe should be taken into account as part of the Government’s response to this consultation, we are pleased to respond to the consultation questions, as follows:-

Chapter 2: A draft land rights and responsibilities policy statement

Q 1. Do you agree that the Scottish Government should have a stated land rights and responsibilities policy?

Q 2. Do you have any comments on the draft land rights and responsibilities policy?

Q. 3. Considering your long term aspirations for land reform in Scotland, what are the top three actions that you think the Scottish Government should take?

In principle, subject to comments below, RSPB Scotland supports the formulation and agreement of a policy statement especially one in which public benefits and the public interest, including environmental sustainability, are core elements.

Indeed, it might be observed that the absence of such a statement has allowed 20 years of ‘land reform activity’ to take place without any clear, overarching statement of what it was intended to achieve. In addition, we support elements related to transparency and accountability.

In offering such conditional support, however, we would observe that the draft as presented is brief and lacks detail – especially as to the outcomes being sought being sought by the implementation of the policy statement. This lack of detail and clarity applies especially in relation to environmental outcomes, the definition of the “public interest” and “high standards”, the role of eNGOs within “an increasingly diverse” pattern of land ownership and how the “national and local aspirations and needs” are to be reconciled.

In relation to the environmental outcomes, the “rights” parts of this policy statement should reflect the Scottish Government’s view that “every person is entitled to live in a healthy environment”¹⁹, while the responsibilities part of the statement should set out the role of land owners/managers in ensuring that such a healthy environment is maintained and/or restored.

Before being able to fully support such a policy, **we believe that more work is needed to provide more clarity and detail** – as well as to engage with all relevant stakeholders, and secure the “buy-in”

¹⁸ Proposal 10 on wild deer management is the notable exception.

¹⁹ S.31(1) of proposed Scottish Independence Bill (see <http://www.scotland.gov.uk/resource/0045/00452762.pdf>).

without which the implementation will be undermined. This may be a task for the proposed Commission (see below) and/or could involve relevant Committees of the Scottish Parliament.

It may also be valuable to ensure that the statement is subject to regular review (perhaps on a five yearly basis), and place a duty on Ministers and/or the proposed Commission to carry out such a review, and publish conclusions/amended statement.

Finally, we welcome the suggestion that the Scottish Government should ensure that “all its policies” take such a statement into account. This however raises two questions:-

- (1) How will the Scottish Government ensure that the policy statement takes account of, and is consistent with its existing policies and comments? These should include its strategies on sustainable development and biodiversity (see above), as well as its international commitments such as the UN Convention on the Conservation of Biodiversity and the various EU commitments on the environment and nature.
- (2) How will the Scottish Government amend its many current policies, especially in e.g. agriculture, that may not be consistent with the vision and principles, as proposed.

RSPB Scotland’s “top three actions” would be:-

1. In the light of comments, below, significantly amend or withdraw proposal 6 on a new duty for charity trustees;
2. In the light of comments, below, amend proposals 4, 5, 7, 9 and 10;
3. Before its adoption, initiate a wider debate, engaging all stakeholders in a participative process to develop (based on the proposed draft) an overarching policy on land rights and responsibilities. This should provide greater clarity and detail, as well as demonstrate a process by which the Scottish Government will ensure all its policies take account of it.

Proposal 1: A Scottish Land Reform Commission

Q. 4. Do you agree that a Scottish Land Reform Commission would help ensure Scotland continues to make progress on land reform and has the ability to respond to emergent issues?

Q. 5. What do you think the advantages or disadvantages of having a Scottish Land Reform Commission would be?

Q. 6. Do you have any thoughts on the structure, type or remit of any Scottish Land Reform Commission?

RSPB Scotland cautiously supports this proposal. If there is to be a coherent, overarching approach to land reform issues, there is benefit in having some co-ordinating, monitoring and reviewing mechanism for such a public policy initiative, particularly if it is going to be sustained. If a Commission is formed, it is important that it act independently and openly. It should also include all relevant stakeholders in both its membership and its deliberations.

However, while accepting that such a mechanism will probably be required, we have less strong views on whether this needs to be new body, or added to the remit of an existing body (which could, in fact, be a section of the Scottish Government). The benefits of a new body, however, might be that there is a degree of certainty that the land reform programme is sustained, but also kept under regular review as to its efficacy – and would be a specific agency responsible for producing the necessary standards and guidance (see above). It should also be required to report, openly, to Government and Parliament on progress and how/whether the public interest is being advanced.

Any Commission should work to advance the “public interest and common good” (subject to our comments about definition above) to be derived from land. This should mean seeking to ensure its sustainable use and encouraging good ‘stewardship’ and the delivery of wider societal benefits, including the conservation of biodiversity (as set out in the CPD and the Scottish Biodiversity Strategy).

Any such Commission might also be charged with further developing the draft “Land Rights and Responsibilities Policy” (for approval by Government and Parliament) – and it should be specifically

required to include, in this, the issues of defining the public interest, and ensuring this includes sustainable development and the conservation of biodiversity (see above). It should also advise on how to ensure that policies on e.g. agriculture and forestry contribute to these objectives.

Proposal 2: Limiting the legal entities that can own land in Scotland

Q. 7. Do you agree that restricting the type of legal entities that can, in future, take ownership or a long lease over land in Scotland would help improve the transparency of land ownership in Scotland?

Q. 8. Do you agree that in future land should only be owned (or a long lease taken over land) by individuals or by a legal entity formed in accordance with the law of a Member State of the EU?

Q. 9. What do you think the advantages or disadvantages of such a restriction would be?

Q. 10. How should any restriction operate and be enforced, and what consequences might follow if the restriction is breached?

Yes, in principle, RSPB Scotland welcomes this proposal insofar as it relates to EU v. non-EU entities. Moreover, we fully support the principles of openness and transparency in term of landownership, beneficial interests and named contacts. Who owns land should not be hidden from view by complex legal devices.

In terms of public policy, such as enforcement, or notification of environmental duties, transparency and traceability of ownership is crucial. The recent Kildrummy (goshawk) case and the difficulties faced by the Crown in identifying who might be deemed 'vicariously liable' for illegal activities on this estate demonstrate the need greater clarity/openness. Thus, we believe that this proposal might be further developed to ensure real openness of ownership data – but also, potentially, of the levels/type of public support received. Thus, we believe this proposal should be extended so that information on public payments received by land owners and managers is also in the public domain. This information should include amounts received and for what activities and should be on an annually updated public register; for example, information regarding payments under the Common Agricultural Policy and its related schemes. Data on the application of specific land management options under, for example, woodland grant or agri-environment schemes should also be available. In some cases, this is already publically available but openness for all types of owner/manager is to be preferred.

Operationally, this proposal would have no impact on RSPB Scotland as we are an organisation registered in an EU member state (the UK) and with the appropriate charity regular in each jurisdiction of the UK. All our Scottish land holdings are also undergoing registration with the Land Register of Scotland. Moreover, details of our public funding, and agricultural supports payments (as above) are already published.

However, were further proposals for limitations and/or controls on land ownership or management to be proposed, RSPB Scotland would assess those on their merits and respond accordingly. Given that conservation ownership of land in Scotland stands at c2.5%, we see no reason, in principle, to prevent further acquisitions, or land use partnerships, involving conservation bodies.

Proposal 3: Information on land, its value and ownership.

Q. 11. Do you agree that better co-ordination of information on land, its value and ownership would lead to better decision making for both the private and public sectors?

Q. 12. Do you hold data you could share or is there any data you would wish to access?

Q. 13. What do you think the advantages or disadvantages of wider and more flexible sharing of land information would be and do you have any recommendations about how this can best be achieved?

RSPB Scotland welcomes and supports this proposal. For our own land, we are in the process of completing full registration. In principle, it is a good idea, which should be achievable at modest cost and will deliver better analysis of the impacts of public policy – as well as more openness of information. We would be pleased to submit any non-confidential data.

Proposal 4: Sustainable development test for land governance

Q. 14. Do you agree that there should be powers given to Scottish Ministers or another public body to direct private landowners to take action to overcome barriers to sustainable development in an area?

Q. 15. What do you think the benefits would be and do you have any recommendations about how these can best be achieved?

Q. 16. Do you have any concerns or alternative ways to achieve the same aim?

State intervention for the public good in how land is run is not a new thing and is broadly welcome if it delivers defined and measurable public benefits. Intervention in ownership is also well established, through the compulsory purchase powers of the Scottish Government, local authorities and other public bodies. Both CPO and other intervention powers (e.g. Land Management Orders or deer management) may only be used in the public interest, and are subject to appropriate legal safeguards. However, we understand that these powers are, at present, rarely used – either due to likely cost or difficulties of potential challenge – or because of the ‘culture’ of the bodies concerned.

Sustainable development – if well defined and interpreted (see preamble) – is in the public interest and should be a valid reason for state intervention. RSPB Scotland therefore cautiously welcomes the principle of this proposal. However, this welcome is subject to understanding far more than is available in the consultation paper on the detail of when and how such a new power would be used. In particular, we believe that Government should be much clearer in its definition of sustainable development, and what it means to manage land in the public interest. In itself, the debate on these issues and the ensuing guidance, for use in exercising these powers, will be a positive development.

So, we would welcome clarification on:-

- What evidence is there that delivery of sustainable development needs a new power? What problems or barriers to sustainable development exist that can not be addressed with existing powers or changes to existing policy (e.g. the use of cross-compliance in the agricultural landscape)?
- Why a new power is required and why existing CPO and other intervention powers are inadequate? We ask this, in particular, as several current intervention powers (Land Management Orders or deer management powers) are either unused or significantly underused.
- How are “sustainable development” and the “barriers” to this to be determined? We would expect that “sustainable development” will be interpreted in a manner consistent with the policy context outlined above – and, if not, we would welcome explanation and clarity on the alternatives.
- What criteria will be used to determine how and when to exercise these new powers, and who will be responsible for applying these criteria?
- What will exercise of these powers entail (e.g. sale to the state, or to another owner, or community body, or a requirement to manage differently, etc)? What provisions will be in place to ensure that such powers are used proportionately – that is, to address barriers to sustainable development that are demonstrably against the public interest (as opposed to simply being politically popular)?
- Will there be appeal provisions and to whom?

Thus, while we welcome this proposal, in principle, we consider that it is incompletely thought through and, as yet, lacks the detail to make an informed judgement. Thus, we consider that further information and the opportunity for debate should be provided before this proposal is taken forward.

In particular, we believe that it may be appropriate to examine why existing powers are insufficiently used – and address these issues – rather than establish a new, poorly defined power that may, in practice, be equally unused.

Proposal 5: A more proactive role for public sector land management

Q. 17. Do you agree that public sector bodies, such as Forestry Commission Scotland, should be able to engage in a wider range of management activities in order to promote more integrated range of social, economic and environmental outcomes?

Q. 18. What do you think the benefits would be and do you have any recommendations about how this can best be achieved?

Q. 19. Do you have any concerns or alternative ways to achieve the same aim?

RSPB Scotland welcomes and, in principle, supports this proposal. However, once again, this support is conditional as the proposal is poorly defined in terms of what is actually being proposed.

In particular, we would welcome clarification on:-

- Why the Scottish Government and land-owning public bodies can't already do this, if they wish? If these "wider range" of activities can be undertaken currently, why are they not?
- If further legislation is required, does this mean that the existing functions of the public bodies concerned will be amended? If this is the case, what amendments are proposed and when/how will the Scottish consult key stakeholders of those public bodies?
- If the activities of, for instance, FCS, SNH or local authorities are to be changed, how will the Scottish Government ensure that their work to deliver the requirements of nature conservation legislation and the outcomes of its own biodiversity strategy are retained?

In particular, if the powers and duties of public bodies are extended, this must be done in a manner that does not undermine the existing primary purpose of the body concerned – or the duties it has in carrying out its purpose. For instance, in relation to FCS, any new powers/duties must be undertaken in a manner that is consistent with its sustainable forestry obligations under Section 1(3A) 'reasonable balance duty' of the Forestry Act 1967 – which explicitly includes the conservation of flora and fauna and applies to all its functions such as management of the National Forest Estate. In addition, the Climate Change (Scotland) Act 2009 extends this reasonable balance duty to FCS and their staff when undertaking 'joint ventures' for climate change works (e.g. renewable energy when in joint ventures). It may be appropriate for a similar measure to be applied to any new provisions.

In practice, we believe FCS and SNH have considerable land management experience, which is particularly useful to communities and the private sector, both of which often lack the knowledge or capacity to manage areas of high value to nature. Exploring how to facilitate transferring such knowledge and experience to others is something we would encourage and support.

Thus, while we welcome this proposal, in principle, we consider that it is incompletely thought through and, as yet, lacks the detail to make an informed judgement. Thus, we consider that further information and the opportunity for debate should be provided before this proposal is taken forward. In many ways, this is more about greater coherence/better implementation of policy across the public sector – rather than any need for new legislation.

Moreover, as indicated below, we consider it inappropriate that proposal 6 is to be applied to charitable bodies only – and not to public or private bodies. Were proposal 6 to be taken forward, therefore, we believe that proposal 5 should be expanded to require public bodies to act in manner consistent with that expected of charities under proposal 6.

Proposal 6: Duty of community engagement on charitable trustees when taking decisions on land management

Q. 20. Do you think a trustee of a charity should be required to engage with the local community before taking a decision on the management, use or transfer of land under the charity's control?

Q. 21. What do you think the advantages or disadvantages would be?

Q. 22. How should "community" be defined?

Q. 23. What remedies should be available should a trustee of a charity fail to engage appropriately with the local community?

If the intention/objective of this proposal is to encourage greater openness and engagement by "private" or "family" charities²⁰, we understand the purpose. However, RSPB Scotland believes that, as presented, it is ill-conceived, would not achieve these objectives, and has the potential to add a considerable administrative burden and cost to all charities. It also risks causing conflict through unnecessarily raising expectation and entitlement. As such, **we believe this proposal should not be implemented** unless significantly amended or re-thought.

²⁰ As suggested elsewhere (e.g. <http://www.andywightman.com/archives/4124>), but not explained in the consultation paper itself.

As a charitable land owner/manager, RSPB Scotland engages with local communities in a number of ways. For example, our five-year management plans are all subject to consultation, including with community councils and other local/community organisations. They are also made available locally in, for instance, public libraries or other relevant centres. In developing these plans, our local staff also hold ‘surgeries’ for local people/organisations. At ‘face value,’ therefore, it appears that RSPB Scotland already complies with the potential expectations of such a proposal. Nevertheless, for the reasons given above and below, we believe that it remains inappropriate as a new, legal duty.

First, we note that this proposal does not feature in the LRRG report – and we are uncertain of the analysis from which it has been generated. It has been suggested that that is was recommended by an earlier process (the Land Reform Policy Group – established by Lord Sewel in 1997, and whose final recommendations were published in 1999)²¹. However, Annex B (LO15 in the table of recommendations) of the “Recommendations for Action” from this process states:-

“Encourage non-Governmental organisations to secure community involvement.....
without legislation”

and the earlier “Identifying the solutions” paper favoured a code of practice [on community engagement] for all private landowners, including NGOs. It is unclear what process or analysis the Scottish Government has used to conclude that a legislative process is necessary – especially as several years of work, including assessing much evidence, by the LRRG did not reach this conclusion.

Second, the non-legislative approach – favoured by the Land Reform Policy Group – has been widely adopted and there is no evidence that it (for eNGOs at least) is not working. The National Standards for Community Engagement²², primarily for public agencies but more widely applicable, are in existence. Whether or not, eNGOs/charities adopt these standards precisely, the objectives of this non-statutory document are met by the processes being used. RSPB Scotland, for instance, has a policy of community engagement/consultation in relation to the management of its land holdings – and we are aware that many other eNGOs operate likewise. This policy, as well as a range of *ad hoc* initiatives to benefit communities, was outlined in our evidence to the LRRG²³. We note that, having received such evidence, the LRRG determined that no further recommendation was required. Accordingly, we are unclear what problem, in relation to fully open and transparent charities, this proposal is seeking to solve.

Third, we note the Scottish Government’s response to the proposed amendment 2 to the (then) Historic Environment Bill²⁴. This amendment sought to apply a duty (very similar to proposal 6) to the new public body Historic Environment Scotland. In response the Cabinet Secretary responsible said:-

“HES will be a body with a national remit. Local concerns cannot, and should not, always be the overriding consideration.....

“Local communities can be hard to define. They might be the occupiers of a small group of houses beside a monument, the inhabitants of an island or even people who do not live locally but feel a special bond to a particular place. Therefore, legal definition of “local communities” is difficult.

“HES, like any other public body, will be expected to take account of all relevant factors in reaching its decisions. That is how public bodies are required to work as a matter of first principle. The local decision-making process is already covered in different areas, such as planning, environmental impact assessment and listed building legislation.” (col 4334).

There is no doubt that the above considerations apply equally to national charities acting on behalf of the (historic or natural) heritage as they do to HES. The Cabinet Secretary herself has, here, identified the difficulties presented by proposal 6!

²¹ <http://www.scotland.gov.uk/Topics/farmingrural/Rural/rural-land/right-to-buy/Resources/Land-Reform/2007Research>.

²² <http://www.scotland.gov.uk/Resource/Doc/94257/0084550.pdf>.

²³ <http://www.scotland.gov.uk/Resource/0043/00432882.pdf>.

²⁴ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9492&mode=pdf> – see col. 4332 *et seq.*

Notwithstanding the above, if the Scottish Government does determine it is appropriate to introduce this new duty, RSPB Scotland believes that it needs considerable more clarity and detail. This raises a number of questions, including:-

- What constitutes a decision on the management, use or transfer of any land? Does this apply when land is sold or leased **by** the charity or **to** the charity? Does this apply to every management decision (which could be taken daily, weekly, seasonally or annually) or to for instance a five year management plan?
- Many decisions will relate to matters involving public (community) consultation or, at least, public advertisement, such a planning, SSSI consent, forestry grants, etc; do these require an additional, parallel consultation?
- What form should the engagement take?
- How is community defined? As the Cabinet Secretary with responsibility for Historic Scotland said “local communities can be hard to define” (see above), and RSPB Scotland has experience of concerns expressed by some sections of communities that are at odds with others, including the community council or local authority. What, therefore, happens if one section of the community has views/wishes that differ from other sections? And, in such circumstances, who determines the “community view” and what weight to attach to it?
- How is the task of “balancing” community views/wishes with the other duties of Trustees to be undertaken? If this decision does not satisfy the community (or a part of the community), what remedies do they have? There is no arbitration process, or appeal, proposed and this will simply generate resentment – especially when/if Trustees decide that community wishes cannot be accommodated.
- Has the additional administrative burden process been subject to a “Business Impact Assessment”?

The administrative burden of this proposal is not easy to estimate – but clearly could be significant (and thus divert charitable funds from the ‘frontline’). Although on one reading, this proposal is not necessary as its objectives are – in many cases - already being met by a non-statutory process, if it is translated into statute it would require considerable more administration to ensure a appropriate “paper trail” in case of challenge and/or investigation. Moreover, there is a risk, if it was implemented by statute, of inadvertently generating a sense, within communities, of expectation and entitlement to direct management decisions (as opposed to being engaged with), and this will generate additional challenges and/or investigations.

Further, and in particular, most charities that own and manage land (in any way other than as a commercial investment), are environmental NGOs (see preamble), and this land forms an essential part of the delivery of their charitable objectives. By definition, it is therefore managed in the public interest. This is underlined by the extent to which acquisition and management of such land is supported by public policy (e.g. it is often funded by NHMF, HLF, SNH, landfill tax, etc; and/or much of the land is notified as SSSI or as a Natura site and, thus, regulated by SNH on behalf of the Government’s wider responsibilities). As Trustees will inevitably, as is their legal duty, determine that a charity’s charitable purposes (often encouraged by Government or its agencies) and/or the requirements of designations must be met, notwithstanding any expression of wish by others, it is unclear why it is appropriate or necessary to encourage those alternative wishes to be expressed (when they cannot, legally, be met).

Finally, it is unclear why this proposal is being applied to one form of landowner (charities), which will concentrate public attention on those, while large private, corporate, community and public landowners have no similar burden being placed upon them. While many charities, including RSPB Scotland do, as described above, engage openly, it is – in our experience – very rare for private (or indeed public) owners to do so – either with communities of place or communities of interest. This makes the proposal ‘feel’ poorly targeted. It has been suggested that charities are required to comply with ‘higher standards’ due to the public support they receive. This, however, neglects the public support provided to private or corporate landowners through agricultural payments or tax relief (e.g. that available to pension funds).

In conclusion, **RSPB Scotland believes this proposal should not be progressed**. This is not because we consider the principles of community engagement to be inappropriate. Rather, it is because, where possible, we apply these principles already and this is unlikely to make much material

change to outcomes. It also has potential to create a lot of community friction, additional bureaucracy for charities, and is patently discriminatory to one form of landownership.

Instead of this legislative proposal, we would suggest that, if there is a case for action, it is for a non-statutory code of good practice (built on or more widely applying the National Standards) that applies to all land owners.

Notwithstanding the above, if this proposal is pursued, it must be subject to considerable further development – to clarify its purpose and how it might operate – and, in particular, to prevent unnecessary conflict and additional administrative burdens. In addition, we believe it may be made less of a concern if:-

- There was a parallel duty on OSCR to produce guidance on the interpretation of the new duty, and that any issues of compliance or not with the new duty should be determined in accordance with such guidance;
- Community (of place) land owners could also be subject to a duty to engage with communities of interest with expertise in, for instance, the cultural or natural heritage of their landholding; and/or
- The new duty should apply to all landowners – including public, community and private (corporate or individual) – and not just to charities.

Proposal 7: Removal of the exemption from business rates for shooting and deer stalking

Q. 24. Should the current business rate exemptions for shootings and deer forests be ended?

Q. 25. What do you think the advantages would be?

Q. 26. What do you think the disadvantages would be?

In principle, subject to the comments below, RSPB Scotland supports this proposal.

For charitable landowners, such as us, this support is subject to the application of charitable relief to these rates as it is to other non-domestic rates (i.e. 80% mandatory and up to 100% discretionary²⁵). Moreover, there are occasions where we, as an environmental body, acquire the shooting or stalking rights on land, but – for conservation reasons - do not exercise them. We would welcome clarity from the Scottish Government that rates would not be applied in such cases (irrespective to any commercial potential, not being realised).

In relation to deer stalking, we recommend that this proposal is considered, and potentially modified as below, to ensure consistency with wider deer management objectives. Shooting or stalking of deer is often required for conservation reasons and this is often easier if an income can be realised. It is important that the imposition of rates does not, inadvertently, reduce culling activity where this is needed in the public interest. The application of flexible relief for achieving deer management purposes would assist in this regard.

As observed by the LRRG, there is no reason why one (or a few) groups or one (or a few) types of businesses should be exempt from non-domestic rates. It is therefore entirely consistent to apply business rates to these businesses. The Government's lack of consistency is, however, demonstrated by its rejection of the LRRG recommendation to review the historic and universal exemption of agriculture, forestry and other land-based businesses.

Clearly, the simple advantage of this proposal is the raising of revenue for the state, and the simple disadvantage is the added (albeit limited in most cases) cost implications for the businesses concerned. However, in our view, the proposal would gain greater advantages and, for progressive businesses, reduce costs and disadvantages, if the opportunity was taken to use the re-introduction of this fiscal mechanism to incentivise improved land management.

Thus, as well as simply removing the exemption, we would recommend that the Scottish Government introduce new reliefs, available to shooting or stalking businesses that meet high land management standards including meeting cull targets to benefit woodland regeneration and SSSI site condition and thus deliver additional public benefit. Standards required to secure relief should be demonstrably

²⁵ <http://www.scotland.gov.uk/Topics/Government/local-government/17999/11199/brief-guide>

higher than “complying with the law” or basic GEAC standards and could be e.g. meeting agreed deer culls, delivering a favourable condition on SSSIs via a management agreement.

Notwithstanding the above, as well as this new fiscal incentive to better manage shooting or stalking businesses, we continue to support improved, statutory deer management planning (see proposal 10) and the introduction of licensing for shooting estates. The latter should be added to the Government’s longer term land reform programme – and would be consistent with the clear direction of travel suggested by the LRRG, of statutory oversight and regulation of the management of common resources, such as water, deer, salmon, etc in recognition that their status contributes to the common good.

Proposal 8: Common Good

Q. 27. Do you agree that the need for court approval for disposals or changes of use of common good property, where this currently exists, should be removed?

Q. 28. If removed, what should take the place of court approval?

Q. 29. Should there be a new legal definition of common good?

Q. 30. What might any new legal definition of common good look like?

Q. 31. Do you have any other comments?

This is a proposal that does not affect RSPB Scotland and, insofar as we can ascertain, does not affect nature conservation. We therefore offer no view.

Proposal 9: Agricultural Holdings

Q. 32. Do you agree that the Scottish Government should take forward some of the recommendations of the Agricultural Holdings Legislation Review Group within the Land Reform Bill?

Q. 33. What do you think the advantages would be?

Q. 34. What do you think the disadvantages would be?

The recommendations of the Agricultural Holdings Legislation Review Group have now been published. For the vast majority of its recommendations, they have little or no impact on nature conservation, and thus RSPB Scotland has no comments.

However, we note that recommendation 33 proposes that consideration be given to the concept of “conservation tenancies.” Such an idea, previously proposed by RSPB Scotland, has been supported in principle by the Cabinet Secretary²⁶. We therefore welcome and support this recommendation, subject to clarity on the detail. For instance, as our land is usually subject to five year management plans (often agreed with SNH in respect of Natura sites or SSSIs), we believe that the ability to offer such tenancies, as modified SLDTs as well as modified LDTs, should be available.

We would therefore welcome a discussion, with officials, on the detail, and timescale, for the implementation of recommendation 33 – as well as a small number of detailed issues on the other aspects of this report.

Proposal 10: Wild Deer

Q. 35. Do you agree that further deer management regulation measures should be introduced to be available in the event that the present arrangements are assessed as not protecting the public interest?

Q. 36. What do you think the advantages would be?

Q. 37. What do you think the disadvantages would be?

The Rural Affairs, Climate Change and Environment Committee of the Scottish Parliament carried out a review of the impacts of wild deer populations and on the natural heritage in 2014. Both RSPB Scotland and the LINK Deer Task Force provided evidence – both written and oral. There is now a substantial body of evidence (documented in our response to RACCE), which demonstrates that in the absence of natural predators, rising deer populations in many parts of Scotland are having

²⁶ <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/47865.aspx> - paras 88-94.

significant impacts on the natural heritage, by both excessive browsing of vegetation and trampling. This chronic and long standing problem is preventing the Scottish Government from meeting a range of its public policy objectives including the delivery of the Scottish Biodiversity Strategy; the favourable condition targets for protected areas; woodland expansion targets; and climate change adaptation commitments. The Native Woodland Survey of Scotland, published in 2014 by Forestry Commission Scotland is the latest commissioned evidence to highlight that an important habitat is in poor condition, to a large extent due to the impacts of deer damage.

RSPB Scotland supports increased regulation of deer management in Scotland, and learning from deer management structures that are already in place in other European countries, and North America. These systems in other similar countries include Government setting required cull targets and deer densities; preparation and implementation of effective deer management plans; and obligatory cull returns by landowners to inform sustainable management of wild deer populations. The LINK Deer Task Force has taken independent legal advice on this issue and we understand that an equivalent deer management system could be constructed for Scotland by the public authorities, which protects private property rights, and is therefore compliant with the European Convention on Human Rights.

We note and welcome that the RACCE Committee recommendation from early 2014 that the voluntary system of deer management prevailing in Scotland should be reviewed in 2016, highlighting also that the pace of reform of deer management systems in Scotland has been too slow. We trust that the 2016 review will include a benchmark of landowner compliance with the voluntary Code of Practice on Deer Management 2011, including the results of any monitoring programme being carried out by SNH.

On this basis, we agree that further deer management regulation is required, and that SNH should be given increased powers to intervene in the public interest. We also suggest that SNH should make greater use of the powers that already exist under sections 7 and 8 of the Deer (Scotland) Act 1996. At present, compulsory powers for SNH to intervene and reduce deer populations in the public interest under section 8 of the Deer Act have not been used. We believe that this is due to the complexity of the burden of proof that SNH would be required to produce in support of the case for compulsory intervention, as well as the fear of legal challenge by landowners. Any simplification of these procedures to allow effective implementation without delay would be helpful and we recommend that this is considered now as part of the legislative reforms to enhance the powers of SNH to protect the public interest.

In paragraph 93 of the consultation document, it is suggested that SNH powers may be increased to require landowners to put in place sustainable deer management plans that protect the public interest and that the plans are fully carried out. Whilst the details of how this might work in practice are not fully explained, we support any such measure as an improvement on the present system. Many Deer Management Groups in Scotland still do not have any Deer Management Plan in place, let alone a plan which is effectively implemented. The voluntary approach to putting effective deer management plans in place has been given a significant time in which to deliver, with limited effect, and it is now time for SNH to have greater powers to intervene in the public interest.

In due course, as well as the above, , there is (as observed above) merit in examining whether Deer Management Groups and deer management plans (where voluntary or statutory) might be broadened into "Sustainable Land Management Groups" – responsible for ensuring sustainable management across all land uses (and owners/managers) in a local area. This would provide for integration across all land uses – and act as a "delivery mechanism" for the Land Use Strategy – which is currently lacking.

Proposal 11: Public Access: clarifying core paths planning process

Q. 38. At present, section 18 of the Land Reform (Scotland) 2003 Act is silent on the issue of resolving objections to a core path plan consultation. Do you agree that access authorities should be required, in the interests of transparency, to conduct a further limited consultation about proposed changes arising from objections?

Q. 39. Do you agree that section 20 of the 2003 Act should be clarified so that Ministerial direction is not required when an access authority initiates a core path plan review?

Q. 40. Do you think that the process for a minor amendment to core path plan (as set out in section 20 of the 2003 Act) should be simplified to make it less onerous than that for a full review of a core path plan?

RSPB Scotland supports these three proposals. They are specific proposals to amend the Land Reform (Scotland) 2003 Act and are minor, simplifying measures in relation to core paths and access authorities. As a member of the National Access Forum, we are aware of the proposals, and their rationale, and welcome them.

As in the past, we would expect NAF, and the access authorities, to recognise nature conservation (and the statutory requirements of e.g. Natura sites) in delivering their access policies.

Business and Regulatory Impact Assessment

Q. 43. Please tell us about any potential costs or savings that may occur as a result of the proposals for the Bill, and any increase or reduction in the burden of regulation for any sector. Please be as specific as possible.

Proposal 6, see above, has significant potential to add regulatory cost and burden to the charities affected. The scale of this cost is difficult to assess as the proposal is currently very ill-defined, and would depend on how the proposal is developed/implemented, and how communities seek to respond. This cost is even more concerning as it will mean that funds, donated for application to charitable purposes, will need to be re-applied to administrative processes which could, *in extremis*, involve lengthy dialogue and disputes. This cost would in most cases be additional to that expended on the existing statutory consultation/engagement required under planning, forestry consents, EIAs, etc – and it is, therefore difficult to see where the “added value” can be found.

Strategic Environmental Assessment

Q. 45. Please tell us about any potential impacts, either positive or negative, you feel any of the proposals contained in this consultation may have on the environment. Please be as specific as possible.

Paragraph 6 of the consultation paper indicates that the Scottish Government will consider the potential environmental impacts of any proposals and if a Strategic Environmental Assessment will be required. Given that land forms the basis of all our (terrestrial) natural heritage, RSPB Scotland considers that it is unlikely that these proposals, or the Land Reform programme as a whole, can not have an environmental impact.

However, determining this impact – and, if negative, how it might be mitigated will be difficult unless the overall coherence of the proposals, and the desired outcomes of the programme, is further clarified. These difficulties should not, however, be used as a reason not to conduct an SEA, which we believe is required.

The proposed Land rights and responsibilities policy, and the operations of the proposed Commission should be subject to SEA, in themselves, to ensure full compatibility with all relevant EU laws, as well as the objectives of the Scottish Biodiversity Strategy.

RSPB Scotland
February, 2015.