

This is the accepted manuscript submitted to Edinburgh University Press and now appears in issue 18(3) of the Edinburgh Law Review, at <http://www.euppublishing.com/doi/abs/10.3366/elr.2014.0235> and (2014) 18(3) EdinLR pp. 410-413. Some minor changes were made prior to publication in the journal.

Land Reform Revisited: The Land of Scotland and the Common Good

The Scottish land question is perennial. There may have been times when land law reform has faded from the foreground of public conscience in Scotland, but now is not such a time. Current topicality can be evidenced by the publication of *The Land of Scotland and the Common Good*, the Final Report of the Scottish Government appointed Land Reform Review Group.¹ The Report has brought forward some very interesting – and challenging – proposals for innovation of Scots property law.

A THE GROUP

The LRRG was constituted as an independent review group in 2012. It initially comprised three members and a number of advisers, who were provided with a three pronged remit to explore how land reform would:

¹ (Scottish Government, 2014) ISBN: 978-1-178412-480-9, also available at <http://www.scotland.gov.uk/Publications/2014/05/2852>.

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; and

Generate, support, promote and deliver new relationships between land, people, economy and environment in Scotland.

The broad nature of the remit is immediately apparent.² A “Call for Evidence” relating to this wide remit was issued, to which 484 responses were received.³ Those submissions and other evidence gathered by the LRRG fed into an Interim Report, published on 10 May 2013.⁴ The publication of that report roughly coincided with something of a reshuffle of the membership of the LRRG, where two members (Prof. James Hunter and Dr. Sarah Skerratt) leaving it with four members (Dr Alison Elliot (Chair), Dr John Watt, Ian Cooke and Pip Tabor), one special adviser (Robin Callander) and a number of new advisers, including the writer. That reshuffle and the reasons for it were discussed in the Scottish Parliament,⁵ but despite that discussion the work of the LRRG continued on an arm’s length basis from Scottish Ministers.

² <http://www.scotland.gov.uk/About/Review/land-reform/Remit>

³ The majority of submissions are available here: <http://www.scotland.gov.uk/About/Review/land-reform/LRRG-Submissions>. Some were submitted anonymously, others have been withheld for reasons of confidentiality as explained on the LRRG website. The non-anonymous, non-confidential submission of Malcolm M Combe is one of the available responses.

⁴ See Malcolm Combe, “The road to land reform, but where is it going?”(2013) 58 JLSS 34.

⁵ Scottish Parliament, Official Report cols 20715-20743 (5 June 2013)
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8449>

B. RECOMMENDATIONS

The work of the LRRG culminated in the Report published on 23 May 2013. It is an attractive document, making use of maps, charts and figures in a manner not normally seen in comparable legal reports (such as the work of the Scottish Law Commission). It is not perfect: footnote referencing is a little loose on occasion and comprehension could have been aided by the simple expedients of numbered recommendations and an executive summary. Those quibbles aside, it covers an impressive amount of legal terrain and contains sixty-two (non-numbered) recommendations for the reform of land law in Scotland.

At the time of the Report's publication, the majority of those recommendations sit comfortably within the remit of the devolved legislature that originated the LRRG. Some relate to existing goals, such as a commitment to land registration in furtherance of the Land Registration etc. (Scotland) Act 2012,⁶ while others relate to previous unimplemented proposals, including an endorsement of the work of the Scottish Law Commission on the law of succession and the distinction between heritable (i.e. land) and moveable property when dealing with attempts to disinherit children or a spouse/civil partner.⁷ There is a call to modernise the rules relating to compulsory purchase in Scotland⁸ and, perhaps controversially, there is a steer towards strengthening the current pre-emptive right to buy that "1991 Act"⁹ agricultural tenants have had since Part 2 of the Agricultural Holdings (Scotland) Act 2003 came

⁶ Section 4 of the Report.

⁷ Section 6 of the Report, with reference to Report on *Succession* (Scot Law Com No 215, 2009).

⁸ Section 8 of the Report.

⁹ Agricultural Holdings (Scotland) Act 1991.

into force.¹⁰ Agricultural holdings are the subject of a separate review, set up and chaired by the Cabinet Secretary for Rural Affairs and the Environment. The steer of the Report is acknowledged in the Interim Report of the Agricultural Holdings Legislation Review Group,¹¹ but the Final Report of that review group may take its own direction.

Another controversial area relates to potential restrictions on ownership. One such restriction is a cap how much land might be held by “a private land owner or single beneficial interest.”¹² Another suggests that it should be “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.”¹³ These are challenging and (as recognised in the report) problematic areas, with issues of EU law (relating to free movement of capital) being engaged.¹⁴ There may also be ECHR issues, with the Article 14 prohibition of discrimination seeming particularly in point if the non-EU prohibition was to extend to human beings from non-EU countries. That this was intended to be the case was alluded to in a parliamentary committee session with the members of the LRRG,¹⁵ but the compliance of such a measure with the ECHR is not clear.

Returning to less controversial grounds, communities have had a central role in recent Scottish land reform measures, most notably in Parts 2 and 3 of the Land Reform

¹⁰ Section 28 of the Report.

¹¹ <http://www.scotland.gov.uk/Publications/2014/07/5054> (accessed).

¹² Section 24, paragraph 29 of the Report.

¹³ Section 5, paragraph 11 of the Report.

¹⁴ Articles 26 and 63 of the Treaty on the Functioning of the European Union.

¹⁵ Session of the Rural Affairs, Climate Change and Environment Committee, 28 May 2014, Official Report, cols 3672-3674

[\[http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9215&mode=pdf\]](http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9215&mode=pdf) .

(Scotland) Act 2003.¹⁶ The place of community was evident in the remit of the LRRG and a substantial part of the Report is dedicated to community land rights.¹⁷ Some measures that benefit communities are already in the pipeline, with the suitably named Community Empowerment (Scotland) Bill introduced to Holyrood in June 2013. This legislation will widen the scope of Part 2 of the 2003 Act and enable certain local bodies to buy abandoned or neglected land. Community empowerment was the subject of a separate Scottish Government consultation programme,¹⁸ so it would be imprudent to read too much into this early action that sits well with the recommendations of the LRRG, but it might indicate something of a direction of travel.

C. CONCLUSION

The promise of a new Scottish constitutional order at the end of the last millennium brought land reform to the forefront of the political agenda, with that agenda being embodied in the Land Reform (Scotland) Act 2003. Whether by chance or by design, the potential for greater constitutional change in the form of Scottish independence has coincided with a re-evaluation of Scotland's relationship with its land. The LRRG, the Agricultural Holdings Legislation Review Group and even a report by the Scottish Affairs Committee at Westminster¹⁹ all seem to indicate a further shift of Scottish land law can be expected. The coverage of the Final Report of the LRRG is impressively wide, taking in issues like State Aid, fiscal measures, urban renewal and Crown rights that it has not been possible to address in this note. It gives a

¹⁶ Malcolm M Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: a definitive answer to the Scottish Land Question?" 2006 JR 195.

¹⁷ Part 4 of the Report.

¹⁸ Malcolm Combe, "Rural lessons for urban conveyancing" (2012) 57 JLSS 32.

¹⁹ <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmsscota/877/87702.htm> .

comprehensive reference point for further reform. The implementation or otherwise of this Report will be a gauge against which any future government of Scotland will be measured.

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