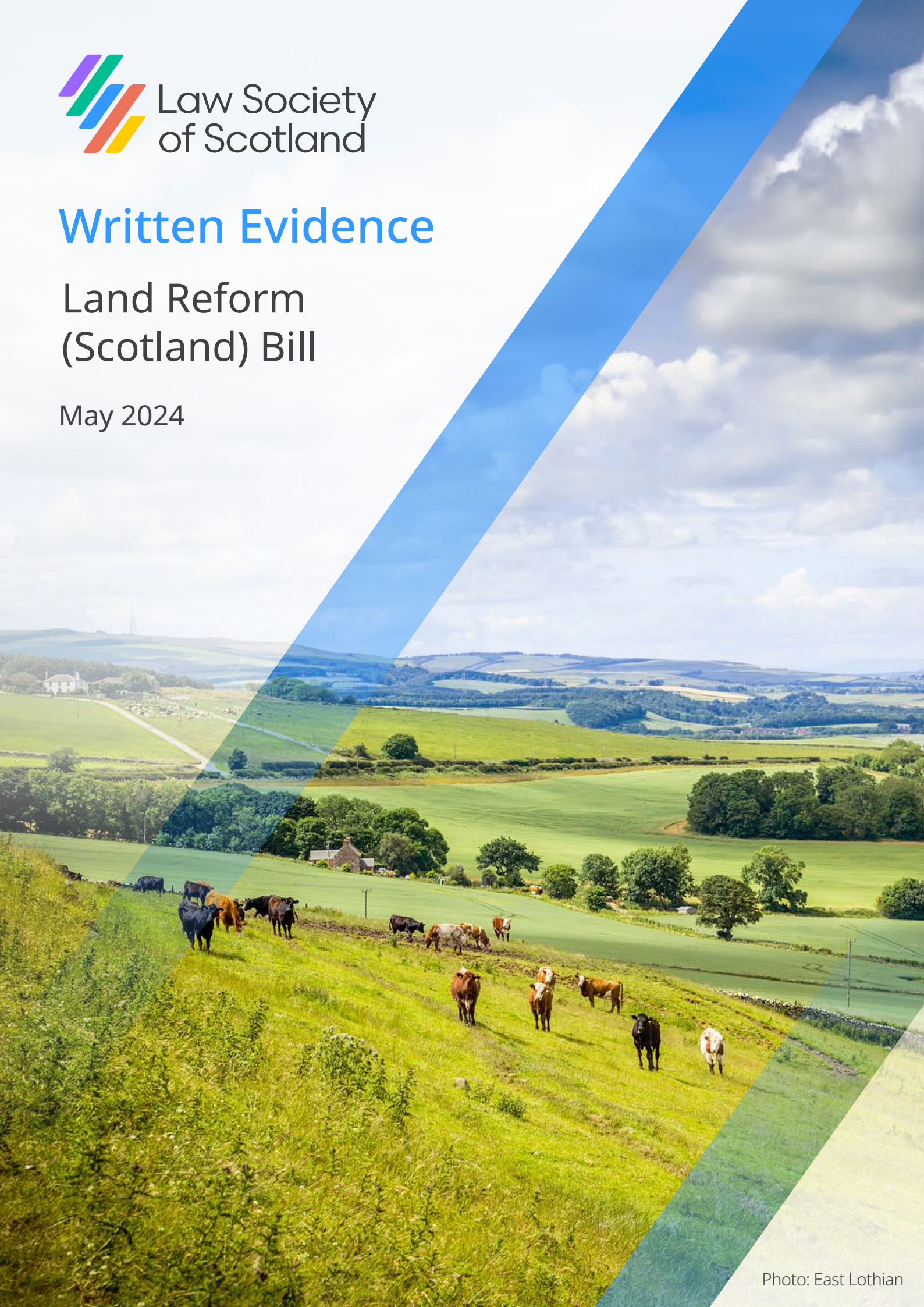


Written Evidence

Land Reform (Scotland) Bill

May 2024



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK, and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the call for views held by the Scottish Parliament's Net Zero, Energy and Transport Committee on the Land Reform (Scotland) Bill (the **Bill**).¹ We have the following comments to put forward for consideration.

General Remarks

We welcome the introduction of the Bill. Our comments follow our response to the Scottish Government's preceding consultation – *Land Reform in a Net Zero Nation* – in September 2022.²

As an overarching comment, it is important to recognise the context of land ownership in Scotland, including: the reasons for Scotland's current pattern of land ownership; challenges around the use, quality, and value of land; and relevant economic factors such as economies of scale and the availability of public funding (both historically and in the future). In this regard, it is important to bear in mind the different character of land in Scotland from that in some other countries as well as the multiplicity of rights which can be held in the land.

The Bill covers four principal policy areas, the first of which concerns *Land Reform*. The Policy Memorandum states that proposals regarding the ongoing management and transfer of large landholdings are “based on recommendations of the Scottish Land Commission” and “are intended to be targeted and proportionate ways of addressing the risks” that it identified.³ We note that one of the core issues identified in the Scottish Land Commission's investigation concerns the *concentration* of land ownership in Scotland, rather than the *scale* of land ownership *per se*. The use, nature, and impact on local communities of an area of land (for example 1000 hectares) can differ greatly across different geographies, including its proximity to towns and other settlements. We highlight that using *scale* as the determinative factor in the legislative proposals could result in a more

¹ [Call for Views on the Land Reform \(Scotland\) Bill](#)

² The consultation is accessible [here](#); our response is accessible [here](#).

³ Investigation into the Issues Associated with Large scale & Concentrated Landownership in Scotland, Scottish Land Commission, 20 March 2019, accessible [here](#).

limited and less tailored approach compared to a focus on *concentration*; and therefore detract from the policy intentions of the Bill. It is important that the various thresholds in the Bill based on the size of the landholding(s) are underpinned by appropriate data and evidence.

More generally, we note the extensive ongoing and prospective legislative and policy reform within the wider agricultural and environmental legal landscape – including biodiversity matters, deer management, the Agricultural and Rural Communities (Scotland) Bill, and the recent passage of the Wildlife Management and Muirburn (Scotland) Act 2024. We therefore highlight the importance of considering the interplay and overlap between such reforms to ensure a consistent and aligned approach. It is important that there is clarity as to how the land reform policy proposals are intended to align with other relevant areas of law and practice.

It is crucial to upholding the rule of law that the law is clear, comprehensible, and transparent so that requirements can be understood by those whom they will affect. There should be certainty and legal clarity for those owning or considering owning land as to the requirements of doing so.

Questions

Part 1 of the Bill

General Purpose in Relation to Large Landholdings

1. Do you agree that there is a need for further land reform to address issues around large landholdings in Scotland?

Our comments are limited to the proposed legislative changes and legal considerations, in line with the remit and expertise of our membership. We do not look to comment on the policy considerations implicit in the question.

We would, however, highlight the multiplicity of rights which can be held in the land in Scotland, including agricultural and smallholding tenancies, crofting rights, common grazing rights, and shared rights in hill grazing. There is therefore a need to have regard to these various forms of land tenure and have a tailored approach to the legal treatment of “large landholdings” in Scotland.

2. Will the proposals in this Bill fulfil the Scottish Government’s objectives in relation to land reform?

We refer to our general remarks above concerning the scale and concentration of land ownership in Scotland.

As a general point, we note that the detail of many aspects of the proposals is to be set out in regulations. The ability of the proposals to fulfil such objectives will

therefore be linked to the content of the regulations and wider practical considerations – points which at this stage are to some extent uncertain.

In this context we stress the importance of there being appropriate levels of parliamentary scrutiny underpinning legislative and policy developments, and meaningful stakeholder consultation, in relation to such regulations and the implementation of the proposals.

Section 1

3. Do you support the proposal that the Scottish Ministers may, by regulations, impose obligations on landowners to promote community engagement in relation to large landholdings?

Section 1 sets out enabling provisions for Scottish Ministers to make regulations imposing obligations about community engagement on the owners of land of a certain scale. The power is, to some extent, prescriptive, as the Scottish Ministers must “exercise it to impose obligations in accordance with sections 44B and 44C” (inserted section 44A(2)). However, a full assessment cannot yet be made of the obligations to be placed on landowners pursuant to this power until the detail of the regulations is clear.

Greater clarity on the scope of the term “community” would be welcomed. Similarly, we would welcome more detail on the policy intention underpinning the proposals relating to community engagement – including the intended purpose and legal outcome – to better understand their likely impacts and legal implications.

We stress the need to consider the practical impact and processes behind the proposals to ensure that this step is meaningful and does not solely add cost, increased administrative burden, and delay to property transactions. We also suggest that this will merit an appropriate awareness-raising campaign so as to make stakeholders aware of the procedures and manage their expectations as to the purpose and outcome(s) of the engagement.

We note the requirement that before making regulations under inserted section 44A, the Scottish Ministers must consult the Land and Communities Commissioner (inserted section 44A(5)). We particularly stress the importance of robust and broad consultation on such secondary legislation, to provide an opportunity for scrutiny and critical comment from stakeholders on the details of the measures – and consider that the regulations should be consulted on more widely.

We welcome the proposed use of the affirmative procedure for regulations pursuant to inserted section 44A(1).

We note that the regulations made under the inserted section 44A are “to be informed by the land rights and responsibilities statement” (inserted section 44A(4)). Clarity would be welcomed on whether this reflects a policy intention to

place compliance with the statement on a statutory footing, and a departure from the voluntary approach currently in place.

In relation to the community engagement aspects under a Land Management Plan (**LMP**), we highlight that there are many parallels with other areas of the law, for example, Planning Law. It is important that the requirements are proportionate to the intended aims, and where possible should avoid duplication with analogous engagement requirements applicable to the same land. We also note a potential tension with confidentiality considerations in relation to overlapping consultation requirements, for example for large developments.

Please also see our comments below in response to question 4.

4. In principle, do you agree that owners of large landholdings should have a legal duty to consult on and publish land management plans?

Yes

We generally agree with this proposal in principle in the interests of transparency, public interest, and engagement.

There should be clear expectations as to what is to be included in a LMP so that those subject to the duty may understand their responsibilities and guide their conduct accordingly. We consider that clear and comprehensible guidance, including examples, would therefore be of assistance to landowners in formulating their LMP. We also note the need to balance the required information with other considerations, including excluding commercial and sensitive information.

We highlight generally the usefulness of codes of practice in the current legal framework, those employed by the Tenant Farming Commissioner being an example, and note that there would be merit in a similar approach here especially given the intention in the Bill to establish the new Land and Communities Commissioner.

Inserted section 44B(3)(c)(iii) requires that a LMP must contain information relating to how “the owner is complying or intends to comply with ... the code of practice on deer management in operation in pursuance of section 5A of the Deer (Scotland) Act 1996”. We note that this, in effect, creates a compliance duty in relation to a voluntary code of practice. We also highlight the recent Scottish Government consultation *Managing deer for climate and nature*.⁴ There is an element of uncertainty in relation to what any prospective changes to the current legislative framework on deer management will comprise, and how the provisions in the Bill will interact with this.

We also highlight the range of other current and prospective analogous planning and reporting requirements that large landowners may be subject to – for example under the “30 by 30” proposals and in respect of muirburn. Consideration should

⁴ The call for views is accessible [here](#); and our response is accessible [here](#).

be given to how such requirements could be aligned to avoid duplication and aid compliance.

We refer to our general remarks in respect of the question whether *"the Bill has set an appropriate threshold of landholding size for this duty to apply"*.

5. Do you support the process for investigating alleged breaches of community engagement requirements for large landowners set out in the Bill? Do you support the proposed level of penalty for contravention?

We note that these provisions concern the consequences of non-compliance with the procedural elements of preparing a LMP; rather than non-compliance with its content. This could be seen as somewhat limited, given that a LMP could be published then not adhered to.

We consider, however, that there is a balance to be struck in this regard as it may not be feasible to carry out land management in line with a published LMP for a number of reasons. For example, for landowners who are landlords, what happens "on the ground" may be largely outwith their control. It may not be possible to adhere the LMP for other reasons outwith the control of the landowner, for example, the weather.

We particularly highlight the need for clear communication and educational resources regarding the relevant procedures, and effects of investigations, for landowners and other stakeholders.

We note the list of persons referred to at inserted section 44E(2), in relation to who may submit a report of an alleged breach. There is the potential that some of these stakeholders may have alternative means of taking enforcement action, and we would welcome clarity on the extent to which their powers may overlap. We also note that it is important that there are appropriate resources and capacity to support the operation of these proposals.

We have no specific comments in relation to the level of the penalty other than to note that it should be reasonable in the circumstances and reflect the desire to ensure compliance.

Section 2

6. Do you support in principle strengthening community bodies' opportunity to buy large landholdings?

We do not wish to comment on the policy principle, although would make the following comments in respect of the procedural aspects of the proposals.

We suggest that consideration should be given to whether there should be a *de minimis* threshold to allow for transfers of small plots from a large landholding, as opposed to these proposals applying to *all* sales *by* a large landholding. If the

measures are not proportionate, we note that there could be unintended consequences and cause delays to transactions.

In this context we note that there is a 50 hectare *de minimis* threshold in relation to the lotting provisions at section 4.

We further note the terms of the Land Reform (Scotland) Act 2003 (the **2003 Act**) in relation to the community right to buy. This does not contain a size threshold for the land to be within scope, and note that these proposals represent a departure from this approach. We consider that consideration could instead be given to greater advertisement and increased public awareness of these existing mechanisms.

- *If you answered “yes”, does Section 2 of the Bill go about this in the right way to address the Government’s aims?*

We have no comments to make.

- *Do you think that 1,000 hectares is an appropriate threshold?*

We do not wish to comment, other than noting that it is important that this is underpinned by appropriate data and evidence to support any threshold.

Section 4

7. Do you, in principle, approve of allowing the Scottish Ministers to make a lotting decision in relation to sales of large landholdings?

We anticipate that lotting could be a complex and lengthy exercise. The timescales for the relevant procedures to be completed within are not set out in the Bill. We stress that the timescales should be realistic, whilst also being appropriate in order not to prejudice the interests of the relevant parties. For example, we anticipate a potential tension in the context the executries process, particularly if the lotting process is prolonged – for example, in relation to valuing the estate and establishing the Inheritance Tax position. The Bill would benefit from greater certainty on these points.

Relatedly, there is provision within the Bill for an expedited procedure; however, it is unclear what this is to be “expedited” by reference to, given the absence of any clear timescales.

Further, we highlight the range of legal steps involved in the conveyancing process for land subject to a lotting decision, which would require consideration at the outset of the process and in the context of the timescales for a prospective sale. It will be necessary for the parties to instruct legal and other specialist professional advice in order for the necessary steps to be completed as part of any sale. This would include, for example, ensuring any real burdens, reservations, access rights, services, utilities, and related matters in respect of the land are dealt with

appropriately. Clarity on the position of these costs in the context of the compensation provisions, discussed below, would be welcomed.

We would also welcome clarity in the Bill on whether transfers by way of a lease are intended to be exempt from the lotting and prior notification provisions at Part 1.

We note the provisions in relation to compensation at Chapter 5 of the inserted Part 2A of the 2003 Act (section 4 of the Bill). In particular, we highlight the compensation provisions at inserted section 67V, which gives a right to compensation from Ministers to an owner of land or a creditor in a standard security having a right to sell land for loss and expense arising from various procedures introduced by the Bill. We anticipate that a key step in this process will concern the valuation of the land. Whilst this aspect pertains more to practical points, we highlight the need for there to be sufficient resources and capacity to allow for these procedures to operate effectively.

We suggest it would be appropriate for the Land and Communities Commissioner to have expertise or experience in land valuation, or to have the ability to commission evidence on such matters where relevant. There may be merit in this being listed in the requirements at inserted section 3A of the Land Reform (Scotland) Act 2016 (the **2016 Act**) (section 6(6) of the Bill).

- *If so, do you agree that 1000 hectares is an appropriate threshold?*

As above, we do not wish to comment, other than noting that it is important that this is underpinned by appropriate data and evidence to support any threshold.

8. [Is the proposed process for making a lotting decision appropriate and workable?](#)

Please refer to our comments at question 7.

9. [Do the Scottish Government's proposals for a "transfer test" adequately take the public interest into account?](#)

Please refer to our general remarks and our comments at question 30.

Section 6

10. [Do you support the creation of the new role of Land and Communities Commissioner?](#)

Yes

Members have noted the positive work and valuable role of the Land Commissioners and Tenant Farming Commissioner; and consider that there would be merit in creation of the new role of Land and Communities Commissioner in a similar vein.

- *If so, are their responsibilities under the Bill adequate/appropriate?*

We have no further comments to make.

Part 2 of the Bill

Section 7

11. Are you satisfied with the broad duty Section 7 of the Bill places on the Scottish Ministers to develop a model lease for environmental purposes, including the definition of “environmental purposes” set out in Section 7?

No

We consider that greater clarity is required on the purpose, and necessity, of introducing a model lease for environmental purposes.

We note that there are already a number of commonly used model leases, which parties can tailor to take into account specific forms of use or related practical and commercial considerations.

Clarity would also be welcomed on whether the intention is for the proposed model lease to sit within the existing legal framework for agricultural holdings, including the Agricultural Holdings (Scotland) Acts of 1991, 2003, and 2012.

We note that this could add an additional layer of complexity to this area of law and practice which may not be necessary. A simpler and more flexible approach may be to develop model clause(s) for inclusion in relevant leases addressing these points; as opposed to the creation of an entire model lease.

As a recurring comment, greater clarity and detail would be welcomed on the definition of “sustainable and regenerative agriculture” (section 7(4)(a); and elsewhere in the Bill). At present, the scope and content of this term is not evident on the face of the Bill. We note the recent letter sent by the Cabinet Secretary for Rural Affairs, Land Reform and the Islands to the Convener of the Net Zero, Energy and Transport Committee (dated 14 May 2024) providing further information on aspects of the Bill,⁵ in particular the discussion of this term. Whilst we welcome that the proposed Code of Practice on Sustainable and Regenerative Agriculture will be consulted on, the lack of detail on its content and meaning at this stage presents a challenge in assessing the references to, and effect of, the term within the context of the Bill.

⁵ Accessible [here](#).

Sections 8 and 9

12. Do you agree with the provisions in the Bill extending certain rights to small landholders?

Yes

We are broadly supportive of these provisions and greatly welcome the modernisation and consolidation of the law in this area.

13. Do you agree that the Tenant Farming Commissioner's functions should be extended to include small landholders?

Yes

We consider that the availability of a third party can be helpful in regulating discussions between relevant parties.

Section 10

14. Do you agree with repealing Section 99 of the Land Reform (Scotland) Act 2016, and with giving the Scottish Ministers the power to make regulations which modify the requirement for tenants to register their interest in exercising their pre-emptive right to buy?

Yes

We note that section 99 of the 2016 Act is yet to be brought into force. We welcome this approach for reasons of clarity if the Scottish Government does not intend for this section to be commenced in the future. However, more detailed information on the proposed changes to the registration process in future would be welcomed. We stress again in this context the importance of robust stakeholder engagement and consultation, and that any subsequent regulations are subject to appropriate parliamentary scrutiny.

We are supportive of the increased clarity and certainty that an entry in the Register of Community Interests in Land brings, for example in situations where a secured tenancy may have been created verbally.

Sections 11 to 13

15. Do you agree with the changes to resumption proposed in the Bill?

No

We highlight concerns regarding these proposals, in particular that they would retrospectively affect existing arrangements. The legal and practical implications of these proposals require careful consideration.

Whatever the legislative position is for new leases agreed after any proposed changes enter into force, existing leases are reflective of commercial agreements and negotiations between the parties to the lease. We consider that these proposals will significantly impact existing arrangements, which are drafted on the basis that vacant possession can be given within the terms of the lease. These may, for example, reflect a shorter resumption period than in the proposals. The existing leases are also relevant to wider commercial arrangements entered into with other third parties. We stress the importance of legal clarity to allow for all parties to plan their affairs accordingly.

We also note that this could cause delays in the context of development. Consideration could be given to whether the statutory period could be reduced if the parties agree to do so.

We generally highlight that the valuation provisions require careful consideration to avoid unintended consequences. We further suggest that it would be appropriate to only require the Tenant Farming Commissioner to appoint a valuer where the parties disagree on the compensation amount.

Section 14

16. Do you agree with the proposed changes to compensation for improvements for tenant farmers?

We do not have substantive comments on this question – although welcome the inclusion of a clear timescale for agreeing compensation, and note that this can encourage co-operation between parties.

17. Do you believe that the provisions will better enable tenant farmers to engage in sustainable and regenerative agriculture?

We echo our comments above about the need for greater clarity on the definition of “sustainable and regenerative agriculture”; as the scope and content of this term are not evident on the face of the Bill.

We also consider that the link between the legislative proposals and how this will directly impact agricultural practices should be made clear by the Scottish Government.

We note a risk that a more prescriptive legislative framework could complicate discussions between parties. We consider there would be merit in also exploring how non-legislative measures could assist the policy aim, such as through other funding incentives and related support.

Sections 15 to 19

18. Do you agree with the proposed changes in relation to diversification on tenant farms?

We generally note the need for clarity in the relevant definitions for these proposals; and in particular how these interact with those used in the land holdings legislation and use of land for agricultural purposes.

Consistency would be preferable here, to avoid the risk of having two systems running concurrently. For example, it is unclear whether under the proposals a part-use of land for a non-agricultural purpose would mean that this falls wholly outwith the agricultural holdings legislation.

We also refer to our comments above in relation to the proposed environmental model lease, and highlight a need to consider the interaction of this with these proposals.

19. Do you believe these provisions will better enable tenant farmers to engage in sustainable and regenerative agriculture?

We refer to our comments at questions 17 and 18.

Section 20

20. Do you agree with the proposed changes to compensation for game damage for agricultural tenants?

We anticipate that certain stakeholders, for example tenants, will welcome the inclusion of damage caused by “game management”, rather than solely as a result of “game”. Members note that issues relating to these points arise from time to time in practice.

We generally highlight the complexities in this area regarding deer management, and consider that legislative clarity would be welcomed. We note the interaction between the proposed LMPs and deer management (discussed at question 4). We likewise refer to our response to the Scottish Government’s consultation *Managing deer for climate and nature*.⁶ We stress the importance of considering the interplay and overlap between such reforms to ensure a consistent and aligned approach.

⁶ The relevant hyperlinks can be found at footnote 4.

The range of the legislative changes in this area may provide an opportunity for consolidation and coordination where appropriate.

There are other technical aspects which would benefit from clarity in the Bill, for example whether aspects like damage to grass are intended to be included.

Section 21

21. Do you agree with the proposed standard claim procedure for compensation at the end of a tenancy?

We welcome there being clear timescales in place, which can help encourage co-operation between the parties. We consider it is important that sufficient flexibility is built into the procedures should there be any delays or technical barriers in providing the relevant information.

Greater clarity would be welcomed on the date from which interest is payable under inserted section 59C, particularly in the context of any delays to the valuation process provided for inserted section 59B and Schedule 3 of the Agricultural Holdings (Scotland) Act 2003.

22. Do you agree with granting the Scottish Ministers power to apply the standard claim procedure to any relevant type of compensation?

We have no comments to make.

Section 22

23. Do you agree that interest should be payable on outstanding compensation claims?

We don't have specific comments on the question of interest and the appropriate rate, other than to note a preference that this is consistent with the approach taken in other related areas of law and practice. We also refer to our comments at question 21.

24. Do you agree with the rate of interest set out in the Bill?

We refer to our comments at question 23.

Sections 23 to 25

25. Do you agree with the changes to rent reviews proposed in the Bill?

We don't have any substantive comments, although would note generally again the need for clarity in the relevant definitions used, for example, the definition of "productive capacity".

26. Do you agree with the Scottish Ministers being given powers to make provision in relation to matters that are to be taken into account by the Land Court when determining the rent for a holding?

We have no comments to make.

Sections 26 and 27

27. Do you agree with the proposed changes to the rules of good estate management?

We again note the reference to "sustainable and regenerative agriculture" and echo our comments above about the need for greater clarity on the meaning of this term.

28. Do you agree with the proposed changes to the rules of good husbandry?

We do not have any substantive comments on this. We note, however, that members have highlighted that the existing rules of good husbandry operate as a low bar to overcome to show that one is demonstrating good husbandry; and therefore a high standard for anyone to prove that one is not. Any changes should therefore take into account the practical operation of the existing regime in this context.

General questions

Links to the Agriculture and Rural Communities (Scotland) Bill

29. Are the changes proposed in the Land Reform (Scotland) Bill sufficient to enable tenant farmers to engage in sustainable and regenerative agriculture, and to allow them to take part in schemes and programmes under any new agricultural policy?

Greater clarity would be welcomed on the interaction between these legislative developments and how they will be linked to those in the Bill.

We refer to our written comments on the Agriculture and Rural Communities (Scotland) Bill.⁷ We highlighted in particular that as the Bill operates as a framework – which will in turn be supplemented by more detailed secondary legislation – it is

⁷ Our response to the Rural Affairs and Islands Committee's call for views, and our Stage 1 Briefing shared with members of the Parliament ahead of the Stage 1 Debate on the Bill, can be found [here](#).

difficult to fully understand and assess its likely impacts on those operating in the sector.

We similarly highlight that until the details of the various legislative proposals are more developed, it is difficult to assess these points at this stage.

Fairness and checks and balances

30. Do you consider the Bill strikes a balance between the competing interests and rights of landowners, local communities, landlords and tenants, alongside the wider public interest?

We generally refer to our previous comments relating to the level of detail to be set out in secondary legislation; and highlight that care should be taken to ensure that affected stakeholders' interests are appropriately balanced therein.

We refer to our comments at question 15 in relation to the resumption provisions, highlighting that the application of these proposals to existing arrangements could be seen as not balancing interests appropriately, given that current arrangements will already have been negotiated and agreed.

Consideration could also be given to the use of mediation and other forms of alternative dispute resolution (as seen in other areas of the law). We also note the positive role that codes of practice and commissioner guidance can play in this context.

We note the human rights considerations in relation to the Bill, particularly in relation to Article 1 Protocol 1 (**A1P1**) of the European Convention on Human Rights (**ECHR**) regarding the right to peaceful enjoyment of property. It is integral to the constitutional principle of the rule of law that the law must afford adequate protection of fundamental human rights. An interference with an individual's A1P1 rights must be justified by reference to the relevant legal tests, i.e. lawfulness, the pursuit of a legitimate aim, and proportionality.

We would highlight in this context: (1) paragraphs 286 to 293 of the Policy Memorandum, which notes that the Scottish Government considers the Bill to be compliant with the ECHR and details further information on its assessment of the relevant rights engaged; and (2) that both the Presiding Officer and the Cabinet Secretary for Rural Affairs, Land Reform and Islands published the necessary statements that they consider the Bill to be within the legislative competence of the Scottish Parliament.

Tackling the Climate and Biodiversity Crises

31. In your view, does the Bill make adequate provision for the role that land might play in delivering a just transition to net zero and tackling the biodiversity crisis?

We highlight our general remarks regarding the ongoing and prospective legislative and policy reform within the wider agricultural and environmental legal landscape. As mentioned, there is substantial recent, and prospective, legislative and policy development across a range of interconnected areas, including the Bill, the Agricultural and Rural Communities (Scotland) Bill, and the recently passed Wildlife Management and Muirburn (Scotland) Act 2024. At this stage it is challenging to assess how all these changes will interact and how the wider framework will operate.

We therefore highlight again the importance of considering the interplay and overlap between such reforms to ensure a consistent and aligned approach, not least to ensure that the objectives in one area are not disrupted by technical obstacles in others.

We would also refer to our comments on the lotting provisions and the potential fragmentation of large land ownership above. Careful consideration should be given to the impact of the fragmentation of ownership through lotting and the potential impact of this detrimentally affecting large scale development or management for natural capital and biodiversity benefits, and other impacts across wider and legal policy areas.

For further information, please contact:

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