Written submission from Malcolm Combe

I welcome the opportunity to respond to the Call for Evidence of the Rural Affairs, Climate Change and Environment Committee in relation to Stage 1 of the Land Reform (Scotland) Bill. I am happy for this response to be in the public domain.

This response is made in a personal capacity, but two points should be noted in that regard. First, I am employed by the University of Aberdeen at the School of Law. Second, I was an adviser to the Land Reform Review Group (appointed in June 2013). Neither role has had any direct impact on this submission.

Please note that I submitted responses to:

- the Land Reform Review Group’s Call for Evidence;
- the exploratory consultation and Stage 1 Call for Evidence in relation to what became the Community Empowerment (Scotland) Act 2015; and
- the consultation on the Future of Land Reform in Scotland.

All of those responses are publicly available and may be of interest to the Committee. As such, I do not propose revisiting anything raised in those responses in great detail.

GENERAL

The significant amount of agricultural holdings content in the Bill may justify a change in short title, by the insertion of the words “and Agricultural Holdings” after “Land Reform” (i.e. “Land Reform and Agricultural Holdings…”). Whilst I see no doctrinal problem in including agricultural holdings reform within legislation branded under the “land reform” banner (as opposed to including it in a standalone agricultural holdings statute), the inclusion of “Agricultural Holdings” in the short title would tie this legislation with other measures that affect rural leases, notably the Agricultural Holdings (Scotland) Act 1991 and the Agricultural Holdings (Scotland) Act 2003. Whilst this could seem insignificant, such a step could in fact assist analysts and commentators in the future, not least by easing future database or internet searches.

PART 1 – Land rights and responsibilities statement

There is an argument such a statement should be contained in the primary legislation itself. That said, the Scottish Outdoor Access Code (which provides guidance to access takers under the Land Reform (Scotland) Act 2003) provides a precedent for a non-statutory yet very important (and Scottish Parliament approved) document that has largely been well received.
This part of my response is in Scots Gaelic. An English translation follows.

Mar a tha Bile Ath-leasachaidh Fearainn sgriobhte, bidh a'inm Gàidhlig aig a' Choimisean a-rèir reachd, ach sin an aon uair a nochdas a' Ghàidhlig anns a' Bhile. Chan eil feum air eòlas Gàidhlig a bhith aig ball Coimisean Fearainn na h-Alba. Gabhaidh argamaid làidir a dhèanamh gum bu chóir riathanas mar sin a bhith innte.

Tha diofar riathanasan reachdail gum feum neach labhairt Gàidhlig a bhith air buidhnean rianachd croitearachd (fo na diofar ainmean Ughdarras nan Croitear an agus Coimisean nan Croitearachd) agus Cùirt an Fhearainn an Alba fad bhliadhnaichean. Tha ceangal mar sin le diofar bhuidhnean fearainn Albannaich.

Tha inbhe agus cor na cànain air atharrachadh rè na bliadhnaichean bho na chaidh lagh croitearachd agus Cùirt Fhearainn na h-Alba a chur air bhog. Tha seo a’ ciailladadh nach eil an aon feum air neach labhairt Gàidhlig air adhbharan conaltraidh ri linn ‘s gu bheil Gàidhlig agus Beurla, no dìreach Beurla, ann an sgirean a bha Gàidhealach gu tradaiseanta. Tha e soileir gu bheid nas lugha feum practaigeach air neach labhairt Gàidhlig am measg Coimiseanairean Fhearainn na h-Alba.

Ge-tà, a-rèir Achd na Gàidhlig (Alba) 2005 agus dleastanasan Riaghaltas na h-Alba (agus gu dearbh Riaghaltas an RA) feumar taic a chumail ri mion-chànan an aig ire eadar-nàiseanta. Mar sin gabhaidh argamaid a dhèanamh gum bu chóir co-dhiù tuigsinn air a’ Ghàidhlig a bhith am measg luchd-obrach a’ Choimisein agus gu bheil feum air a leithid anns an reachdhas fhèin. ‘S dochta gum b’ urrainnear a râdh nach eil feum air dealas sònraichte dhan Ghàidhlig anns an reachdhas seo ri linn ‘s gu bheil structar leasachaidh farsainn airson a’ Ghàidhlig anns an latha a th’ ann. Ach bhiodh dealas poblachd don chànan agus an coinhearsnachd a tha ga cleachdadh, a bharrachd air leantainn riaghlaidhean croitearachd agus Cùirt an Fhearainn an Alba, gu math freagarrach agus feumail.

Anns an seadh buannachd an co-aimsireile do Choimisean Fearainn na h-Alba bho dhealas don Ghàidhlig, ‘s dochta gum gabhadh tuigsinn air a’inmean àite Gàidhlig a sgoioleadh agus mothachadh air eachdraidh an fhearainn is mar a bha e air a chleachdadh.

‘S dochta gum biodh buannachd eile don chànan agus cultar na h-Alba ach tha iad doîrbh a mheasadh agus a thomhais agus mar sin cha bhiodh buaidh practaigeach aca air obair làithreach Coimisean Fearainn na h-Alba sam bith. Mar sin cha tèid an cnuasachadh an seo.

Tha modail dealas don Ghàidhlig simplidh: faic earrann 1(5) Achd Cùirt an Fhearainn an Alba 1993 agus earrann 4 Achd Croitearan (Alba) 1993. (Chan
English translation, on the role and place of Gaelic in the Scottish Land Commission

As drafted, the Commission is to have a Gaelic name (Coimisean Fearainn na h-Alba) enshrined in statute, but that is the only occurrence of Gaelic in the Bill. There is no requirement for a member of the SLC to have knowledge of Scottish Gaelic. A strong argument can be made that there should be such a requirement.

There have been legislative requirements for a Gaelic speaker to be on crofting administrative bodies (under the various guises of Crofters Commission and Crofting Commission) and the Scottish Land Court for many years, so there seems to be an analogy with other Scottish land-oriented organisations.

The status, not to mention the state of health, of the language has changed in the years since crofting law and the Scottish Land Court were introduced. This means that the need for the involvement of a Gaelic speaker for communicative purposes has been eroded now that Gaelic is found alongside, or substituted by, English in traditional Gaelic speaking areas. It cannot be denied that there is less of a pressing, practical need for a Gaelic speaker amongst the Scottish Land Commissioners.

That said, in terms of the Gaelic Language (Scotland) Act 2005 and the obligations of the Scottish Government (and indeed the UK Government), commitment to minority languages at an international level, a strong case can be made that there should be at least an understanding of Gaelic within the staffing of the Commission and that a commitment should be contained within the legislation itself. It might be argued that there is no need to embed a specific commitment to Gaelic in this statute owing to the wider regime pertaining to Gaelic that now exists, but an overt commitment to the language and the communities that use it, not to mention continuity with the regimes for crofting and the Scottish Land Court, would seem both justifiable and useful.

In terms of contemporary benefits to a Scottish Land Commission commitment to Gaelic, there could be the slight benefit of bringing understanding of Gaelic place names and an associated awareness of the history and perhaps even the use of such land.

There may be other tangential benefits to the language and Scottish culture, but such benefits are difficult to quantify and substantiate and would not necessarily have a direct bearing on the day-to-day work of any Scottish Land Commission. As such they will not be explored here.

The model for a commitment to Gaelic is simple: see section 1(5) of the Scottish Land Court Act 1993 and section 4 of the Crofters (Scotland) Act
1993. (The latter provision is less directly applicable, as that involves an election rather than appointment.)

**Tenant Farming Commissioner**

The Commission is to comprise five Land Commissioners and the Tenant Farming Commissioner. The one Tenant Farming Commissioner’s role is very important and, as drafted, potentially onerous. Delegation to Land Commissioners (and others) by the Tenant Farming Commissioner is possible in terms of clause 23 and that should allow for a fair distribution of work, provided a practice of effective delegation was allowed to develop.

**PART 3 – Information about control of land etc.**

I note that the Bill does not contain the recommendation of the Land Reform Review Group (2014) that ownership of land in Scotland should be restricted to natural persons and European Union registered entities (Part 2, Section 5 – Owners of Land, paragraph 11). As explained there, such proposals were thought necessary because of the difficulties in finding information relating to entities incorporated in certain jurisdictions with lesser disclosure requirements than those which prevail in Scotland, the UK and the EU.

There are legitimate concerns about the effect such a rule might have on inward investment or existing investment. The following proposals are offered to suggest how certain schemes could be introduced that could have an incremental effect towards increasing transparency without have as drastic an effect on investment as (to take the strongest example) some kind of retrospective ban on non-EU entity ownership. This should not be taken as a rejection of the LRRG’s recommendation. Rather, it is an attempt to set out some alternatives that might be more comfortable to both the market and legislators.

Before considering such softer measures, it is submitted that a restriction could, if drafted properly, comply with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), which operates to prevent discrimination. It could also operate alongside any information request regime, such as the one contained in the Bill as drafted. A prohibition on (for example) a Canadian individual owning land directly could be problematic: no proposal to restrict the right of human beings to own land is recommended here.

Other provisions of the ECHR are also relevant to any proposed restriction, including the right to property under Article 1, Protocol 1 (“A1P1”). If existing property owners were forced to restructure arrangements that were entered into at a time when those arrangements were perfectly legal, such owners would have a legitimate cause to complain. By making the new rule prospective rather than retrospective, that concern is mitigated (albeit with the trade-off of allowing existing (potentially non-transparent) schemes to continue).
Another means by which a rule could be introduced would be to make the prohibition of non-EU entities non-absolute. Instead, a non-EU entity could be required to make a case to the Keeper of the Registers of Scotland as to why such an entity is the most suited for the landholding arrangement being proposed. (If this role was thought to be too burdensome for the Keeper, perhaps another relevant office holder, such as a Commissioner of the Scottish Land Reform Commission, could be tasked with it.) Making that case could be twinned with a scheme to compel publication of information that would not otherwise be readily obtainable. Any test would need to be framed in a way not to discourage entities that have a genuine business reason to, for example, retain LLC status in a state of the USA.

Turning now to the terms of Part 3 as drafted, care should be taken to ensure that “persons affected by land” should not be narrowly defined, or should not be left in a way as could be narrowly defined in future, and fees should not be set (or not left in a way so that they can be set) in a way that could price-out persons affected by land in terms of access to information (clause 35).

Sanctions for non-compliance with transparency requirements are also important. For some landowners, a potential financial penalty would be sufficient incentive to comply with any scheme. For others, finances might not be as much of an issue. Two alternative sanctions are proposed for consideration.

The first sanction scheme could be modelled on section 793 of the Companies Act 2006, which is a system designed to flush out information about who controls an asset. Owners of shares can find the entitlements that a shareholder would ordinarily expect withdrawn when they are not transparent about who controls the shareholding entity.

The analogy between incorporeal company shares and tangible land is not exact, so some adaptation would be needed. Further, the suspension of a statutory scheme (for shares) is simpler to demarcate than a sanction which would involve interfering with common law rights and obligations that have developed over many years. Be that as it may, a sanction along the lines of section 793 could be more effective against a (hypothetical) secretive landowner with ready access to finance than a fixed financial penalty would be.

An alternative sanction would be to provide that any owner that does not comply with an information request would be treated as having abandoned land. Here, the word “abandoned” is meant in the sense that is found in Part 3A of the Land Reform (Scotland) Act 2003 (introduced by section 74 of the Community Empowerment (Scotland) Act 2015). The effect of this would be to render the land susceptible to community acquisition without requiring the owner’s consent.
Part 5 – Right to buy land to further sustainable development – and Part 10 – Agricultural Holdings

As the committee will appreciate, the right to property is recognised in the ECHR, as expressed in A1P1. That seems to provide a starting point for a rights-based argument against land reform, but that must be balanced against competing rights such as Article 11 of the UN International Covenant on Economic, Social and Cultural Rights, which guarantees certain rights such as sanitation, food and housing. To paraphrase Professor Alan Miller of the Scottish Human Rights Commission, human rights are neither a red card to be deployed by landowners to dismiss land reform, nor a trump to card to be deployed by those who seek land reform.

This is particularly relevant when considering the provisions of Part 5 and Part 10 (Chapter 3 – Sale where landlord in breach). As drafted, these provide schemes that seek to balance the interests of those who might be involved in a land acquisition in accordance with those schemes. It will always be a matter for careful consideration as to whether this balance is correctly struck, but it might be noted that the hurdles for the community to clear – over and above the established sustainable development and public interest tests found in Parts 2 and 3 of the Land Reform (Scotland) Act 2003 – seem high (see clauses 47(2)(c) & (d)). The word “only” in clause 47(2)(c)(ii) in particular appears to give a strong hand to anyone who would wish to challenge a decision of the Scottish Ministers.

One overarching point remains: a community or a tenant right to acquire is predicated on there being a community or a tenant, as the case may be. If land reform is to go beyond reinforcing the rights of those on the ground – that being a policy decision for government – it would be necessary to open up schemes that are not purely based on whether people are, “resident in that postcode unit…, and entitled to vote, at a local government election, in a polling district which includes that postcode unit…” (clause 42(9)) or whether a person has a 1991 Act tenancy.