LAND REFORM (SCOTLAND) BILL

STAGE 1 EVIDENCE

SUBMITTED TO SCOTTISH PARLIAMENT RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

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INTRODUCTION

We are pleased to be given the opportunity to respond to the call for evidence on the Land Reform (Scotland) Bill. The Bill is a substantial piece of legislation which covers a large range of issues and so our response is quite lengthy. To assist the Committee we have provided an Executive Summary of the key points made in our submission at section 2 below. We have then commented in general on the Ministerial powers under the Bill and the potential effects which the Bill may have on human rights in sections 3 and 4 below before commenting on particular parts of the Bill in the remaining sections. We are happy to assist the Committee with any further information or clarification needed.

EXECUTIVE SUMMARY

2.1 We are concerned about the provision for use of ministerial powers and secondary legislation in the Bill. We consider that there is a risk that the Bill fails, in this area, to strike the proper constitutional balance in order to ensure that the Parliament plays a real and substantial role in relation to scrutiny and accountability in the area of land reform. We are particularly concerned by s100 of the Bill, which is a catch all clause, including ‘Henry VIII’ powers conferring almost unlimited power on Ministers to make further regulations, including regulations amending primary legislation and even the Bill itself.

2.2 A large number of the policies set out in the Bill (or which could be introduced in secondary legislation under one of the many regulation-making powers) are certain or very likely to interfere with the property rights protected under Article 1 of Protocol 1 to the European Convention on Human Rights. For some of those policies, it is not at all clear that the interference can be justified as lawful. In particular, some of the key restrictions appear to go further than is likely to be necessary to achieve the relevant aim.

2.3 Any statement on land rights and responsibilities must aim to protect and promote all interests in land, rural and urban, and must take into account evidence and opinions from a wide cross section of those with an interest in property.

2.4 The diversification of use of land going forward does not require ownership of land to be divided. Different rights in land such as leases, licences, and access rights may be granted to the public and community groups which could benefit owners and communities alike.

2.5 The Scottish Land Commission should gather evidence and opinion from representative bodies, groups and individuals with the full spectrum of interests in land and take account of such evidence and opinion when producing the strategic plan. The strategic plan should set out attainable goals and timescales within which those goals have to be achieved.

2.6 When appointing Land Commissioners, the Scottish Ministers should have regard to experience and expertise in the management and valuation of all types of land. Thought should also be given as to whether the Commission is to have the power to grant funding and / or grant or take security over land.

2.7 We are concerned that, in relation to the power to require information relating to land, the detailed provisions setting out the identity of those who can require information, from whom information can be required and the nature of the information which can be required will not be subject to scrutiny during the Bill’s passage but will instead be the subject of secondary legislation.
The right to buy for sustainable development as drafted also relies on secondary legislation to set out key parts of the right such as the definition of the types of land, buildings and tenancies to be subject to the provisions, and the types of transfers which will be exempt.

The Bill provides for all shootings and deer forests to be entered on the valuation roll. We would urge the Committee to consider whether only those exercising their shooting rights should be taxed. If non-exercised rights are intended to be rated but then exempted (which would avoid, for example, many farmers becoming subject to non-domestic rates), that should be made clear in the Bill, with proposed exemptions set out in detail. The basis for valuation should also be clarified.

With regard to MLDTs, landlords and tenants should be given the freedom to contract for a lease period between 5 and 10 years. This anomaly could easily be addressed by amending the new proposed Section 5A to allow for MLDTs for 5 years or more.

The proposed termination procedure for MLDTs is complicated and we consider that the risk for error on the part of the landlord and the tenant is high. We also question whether the tenant, in the newly introduced pre-irritancy provisions, should be given a year to remedy a breach, particularly where non-payment of rent is concerned.

We are concerned that the Bill contains little detail on the key terms of converted MLDTs and the terms on which a tenant can seek to assign such a tenancy:

If a lengthy duration such as that proposed by the Agricultural Holdings Legislation Review Group (AHLRG) is adopted, such retrospective change would convert a year to year arrangement to one which would potentially deny a landlord the right to recover his property for a generation.

In the case of assignation of a LDT a landlord has the opportunity, in the event of an assignation, to effectively buy out the tenancy. It would seem equitable that a landlord presented with the assignation of a converted MLDT should be afforded the same opportunity – but this is not currently included in the Bill.

We would suggest that the registration system for the agricultural tenant’s right to buy is maintained but the requirement to renew an interest is removed. Removing the need for registration introduces uncertainty and has the potential to significantly impact upon transactional business in the rural market. We would also suggest that, to improve the quality of information, the plan submitted for registration in the RCIL should be required to meet a standard equivalent to that required for registration in the Land Register.

We suggest that the Committee reviews the circumstances in which a tenant is entitled to apply to the Land Court for forced sale of the holding. We also have concerns about the practical outcome if an Order for Sale is made and neither the tenant nor any third party buys the holding.

The proposals for changes in succession and assignation would result in a very significant widening of the ability of an agricultural tenant to pass on a tenancy on death, and also in life. One way of mitigating the overall impact on an owner would be to consider the introduction of additional qualifying criteria for more “remote” successors or assignees. For example, they could be required to have a particular connection to the holding, such as having already worked on it.
3 MINISTERIAL POWERS

3.1 We understand that the Bill must include flexibility which allows government to respond to changing circumstances and that there are matters of administrative detail – such as prescribing the form of applications for consent to a right to buy – which are properly matters for government rather than for parliament.

3.2 However, we are concerned about the extent to which the Bill confers powers on Ministers to determine significant matters of policy and to affect the legal rights and interests of owners and tenants of land by way of secondary legislation. We consider that there is a real risk that the Bill fails, in this area, to strike the proper constitutional balance in order to ensure that the Parliament plays a real and substantial role in relation to scrutiny and accountability in the area of land reform.

3.3 This is not an issue of detail which might be regarded as irrelevant to the Committee’s consideration of the general principles of the Bill at Stage 1. Rather it is a concern about the overarching structure of the Bill and the approach being taken in introducing framework legislation of this nature. There may be a concern that time constraints could make it difficult to pass the Bill before the dissolution of the Parliament, and that postponing final decisions on some of the more complex issues until after the Bill has been enacted may therefore assist. However, that is not in our view an appropriate justification for introducing significant reforms by way of secondary rather than primary legislation (nor for delaying them to be made by way of amendment at Stage 2, after interested parties have had their principal chance to make written submissions and provide oral evidence to the Committee).

3.4 A myriad of Ministerial powers are conferred by the Bill. Those in relation to which this particular concern arises include (but are not limited to):

3.4.1 The powers to amend the functions of the Tenant Farming Commissioner (s22), including to make fundamental changes, without a need for further primary legislation.

3.4.2 The powers in Part 3 concerning information on persons in control of land. These provisions are extremely skeletal and it is impossible to tell from the face of the Bill how those powers might be exercised. In our view it will be very difficult for Parliament to scrutinise them effectively, notwithstanding that they could impose potentially significant new disclosure obligations on private bodies and individuals, underpinned by the threat of criminal prosecution and civil penalties. We are particularly concerned by the extremely wide power to be conferred on Ministers to create those new criminal offences and civil penalties and by the provision in s35(7) which empowers the Scottish Ministers to amend the Bill itself – thereby opening up the prospect of the list of matters set out in section 35(2) being expanded or reduced without full Parliamentary scrutiny.

3.4.3 The power in Part 4 to issue guidance on engaging communities in decisions relating to land, which is extremely broad. It is not possible to tell from the Bill what purpose that guidance is intended to serve, what it might include, or whether there will be any consequences of failing to comply with the guidance. In relation to the obligation to consult at Section 37(4) we would
suggest that it should require the Scottish Ministers to consult persons likely to be affected by the proposed guidance, as well as related interested parties.

3.4.4 The powers in Part 5 to define the categories of land and tenants’ interests which may be excluded from ‘eligible land’ for the purposes of the right to buy to further sustainable development. This includes the power to define terms that should be readily capable of definition in the Bill itself, such as what constitutes a “home” and a “tenancy” (indeed, the latter term is used in section 41 without any apparent need for further definition).

3.4.5 The power in section 42 to specify what constitutes a community for the purposes of Part 5, and to alter the provisions which describe what kinds of bodies may be regarded as Part 5 community bodies.

3.4.6 The power in section 43 to make regulations modifying or excluding existing legislation when exercising the compulsory purchase powers conferred in that section, allowing the Scottish Ministers to decide what laws they will and will not apply to a compulsory purchase on a case by case basis.

3.4.7 The powers in section 44 not only to specify additional information to be provided and made available in respect of the Register of Land for Sustainable Development per section 44(2)(l), but to change both the information already specified in section 44(2)(a) to (k) and the provisions in sections 44(4) and (5) that set out the information that is to be excluded from publication.

3.4.8 The powers in section 52 to make regulations controlling what can be done with land or tenants’ interests, and suspending rights in or over land, in respect of which a Part 5 application has been made.

3.4.9 The powers in section 58 to make regulations about the calculation of compensation under that section, a matter which is likely to play a significant role in determining whether Convention rights are complied with.

3.4.10 The power in section 79 to make regulations providing for the conversion of 1991 Act tenancies into modern limited duration tenancies (“MLDTs”), and in particular for such regulations to modify any enactment including the Bill itself. This is a significant legal change the substance of which (such as the minimum duration of the MLDT lease, and the terms to be imposed in the absence of agreement) should in our view be specified in primary legislation, and only capable of amendment through further primary legislation.

3.4.11 Chapter 3 of Part 10, on a sale where the landlord is in breach, which relies heavily on order-making powers even in relation to key issues – for example, the power in section 38M of the 2003 Act (introduced by section 81 of the Bill) to make regulations about the valuation of land to be sold to a third party.

3.5 We are also extremely concerned by s100 of the Bill, which is a catch all clause, including ‘Henry VIII’ powers conferring almost unlimited power on Ministers to make further regulations, including regulations amending primary legislation and even the Bill itself.
3.6 We consider that, in relation to all these powers to make secondary legislation, the Committee should consider whether the Bill should contain the powers at all or whether, in relation to important policy issues, the key legal provisions should instead be clear from the face of the Bill. To the extent that the Committee is satisfied that ministerial powers are appropriate, we would ask the Committee (and the Delegated Powers and Law Reform Committee) to consider carefully whether the Bill contains appropriate safeguards – in terms of duties to consult on the content of proposed secondary legislation and to have those regulations reviewed and approved by the Scottish Parliament.

3.7 In addition to concerns about the appropriateness of secondary legislation in many cases, in the interests of simplicity and improving understanding of a complex area of law, it would in any event be preferable to set out as much of the law as possible in primary legislation. Agricultural holdings legislation in particular is already spread across a range of primary and secondary legislation and, whilst a consolidating Act may not be in contemplation, it would be preferable to have the substance of the latest changes contained within the body of the Bill itself.

4 HUMAN RIGHTS

4.1 Various parts of the Bill are likely to engage rights protected under the European Convention on Human Rights ("ECHR"). The rights most likely to be engaged are Article 6 (right to a fair trial), Article 8 (right to respect for private and family life) and Article 1 of Protocol 1 (protection of property).

4.2 We suggest that that issues likely to be relevant to the assessment of the Bill’s compatibility with Convention rights should be dealt with in the Bill where possible, rather than in secondary legislation.

4.3 Article 1 of Protocol 1 ("A1P1")

4.3.1 There are a number of respects in which A1P1 rights are likely to be interfered with under the Bill, in some cases significantly. These include (but are not limited to):

4.3.1.1 The obligation to comply with guidance issued under Part 4, in particular where that restricts the ability of owners to act autonomously and/or take quick decisions in respect of their property, and regardless of whether that is enforced through legal means or by practical sanctions such as the refusal of grants (as suggested at paragraph 167 of the Policy Memorandum);

4.3.1.2 The provisions allowing a forced sale of an owner’s or tenant’s interest in land under Part 5, whether or not a sale actually takes place (an application, and even the threat of an application, having the potential to affect the value, and otherwise to interfere with the peaceful enjoyment, of the property in question);

4.3.1.3 The de facto prohibition on agricultural landlords and tenants from agreeing a lease for a period between 5 and 10 years, even if both wish to do so (see our comments at 8.2.1 below);

4.3.1.4 The fixing of a continuation of a MLDT at a minimum of 10 years, even in cases where a party intended to terminate the lease but made an administrative error in complying with the termination provisions (see 8.2.2 below);
4.3.1.5 The introduction of a one-year irritancy period that would prevent a landlord recovering vacant possession, even in the case of ongoing non-payment of rent (see 8.2.3 below);

4.3.1.6 The introduction of a power to convert a 1991 Act tenancy to an MLDT, in particular the retrospective nature of that power in respect of pre-existing leases and the potential for a long minimum duration to frustrate a landlord’s legitimate expectation of recovering vacant possession at a particular point (see 8.3 below);

4.3.1.7 The provisions allowing a forced sale where a landlord is in breach of his lease obligations; and

4.3.1.8 The provisions on succession to and assignation of 1991 Act tenancies, to the extent that they are likely to significantly interfere with legitimate expectations a landlord may have had about obtaining vacant possession of the property, perhaps even to the point of creating a de facto perpetual tenancy (see 8.8 below), and in particular the absence of any provision for a landlord to have a pre-emptive right to ‘buy out’ a converted MLDT that a tenant wishes to assign (see 8.3.3 below).

4.3.2 To comply with A1P1, an infringement must be justified according to specific legal tests of legal certainty, general and public interest and proportionality. With reference to the Policy Memorandum to the Bill, we have concerns about the approach to consideration of the tests in the preparation of the draft Bill. For example, Paragraph 199 and omits the proportionality requirement, which in most cases will be the key factor in deciding whether a measure is A1P1 compliant. This omission is serious.

4.3.3 We would therefore invite and encourage the Committee to scrutinise both the Bill and the Scottish Government’s intentions in respect of secondary legislation extremely closely, to consider whether there is sufficient recognition and protection of A1P1 rights. In particular, we suggest that it would be appropriate for the Committee to explore the following questions.

4.4 Would the interference with A1P1 rights meet the requirements of legal certainty?

4.4.1 The principal (but not the only) issue here is whether the “sustainable development” conditions (s47(2)) are sufficiently clear such that those who may be affected can have certainty about when they will and will not apply.

4.4.2 The Committee may therefore wish to consider whether:-

4.4.2.1 it will be sufficiently clear when the test for sustainable development will and will not be met; and

4.4.2.2 the extent to which the decision to leave key parts of the legislation to be dealt with in secondary legislation will comply with the need for legal certainty, or
enable the Parliament to comply with its responsibility to ensure that the ECHR rights of those affected by the Bill are protected.

4.5 Do the various restrictions pursue a legitimate aim?

4.5.1 The Bill does not include the proposals set out in the Scottish Government's Consultation on the Future of Land Reform ("the Consultation") relating to changing the pattern, distribution and/or diversity of land ownership, and restricting the types of entity that can own land and we think that omission is positive and appropriate. We think it is unlikely that a desire to change the ownership, rather than just the use, of property could constitute a legitimate aim for the purposes of A1P1.

4.5.2 The Policy Memorandum refers on several occasions to a commitment to give effect to the International Covenant on Economic, Social and Cultural Rights (the "Covenant"), when discussing the justification of certain policies for ECHR purposes. We would ask the Committee to note that the Covenant does not confer rights that may be relied upon to countervail those set out in the ECHR. The Scottish Parliament and Government are obliged to comply with the ECHR while the Covenant has a quite different status in Scots law.

4.5.3 The Committee may wish to consider whether the aims pursued by the Bill are legitimate for ECHR purposes, including exploring with the Scottish Government whether it supports the principles of private property that underpin A1P1, whether its focus has moved from changing the ownership of property to controlling its use, and what weight it is giving to the Covenant in assessing issues of legitimate aim (and indeed proportionality).

4.6 Are the proposed restrictions likely to be capable of achieving the identified legitimate aim?

4.6.1 We would encourage the Committee to closely consider the likely practical outcomes of the various proposals in the Bill and whether the restrictions are likely to be capable of achieving the identified legitimate aim. The Committee must also consider whether the restrictions go further than is necessary to achieve the relevant aim: Is new legislation needed at all or could existing powers be used to achieve the relevant aims?

4.6.2 Are less restrictive means available to achieve the desired aims? For example, as noted above, measures less restrictive than deprivation of ownership of land may well be capable of achieving sustainable development in at least some cases.

4.6.3 There are at least prima facie grounds for concluding that there are alternatives to the policies pursued in the Bill that could, at least in some cases, achieve the identified aims while reducing the level of interference with A1P1 rights. The Committee may therefore want to explore these potential alternatives in detail.

4.7 Are the compensation provisions adequate?

4.7.1 The Committee may wish to review the valuation and compensation provisions of the Bill closely, to ensure that the outcomes will reflect the actual loss likely to be suffered in the event of deprivation or control of, or interference with, property.
4.7.2 For example, we would encourage the Committee to consider whether it is appropriate to have less protection for an owner whose land is bought under Part 5 than an owner whose land is bought following a breach of their lease obligations, under section 81 of the Bill. The latter contains a ‘clawback’ provision (section 38N of the 2003 Act) to ensure that the previous owner receives at least some of any increase in value of the land if it is sold on. A similar clawback provision in Part 5 (taking account, of course, of any investment made by the community body) would therefore help ensure that owners receive the full value of any land that is taken from them, and so reduce the risk of breaching A1P1.

4.8 Article 6

Article 6 rights to have civil rights and obligations determined in a fair and public hearing by an independent and impartial tribunal will be engaged by the Bill, but should be met as long as appropriate rights of appeal are provided in respect of matters such as whether the relevant grounds justifying interference with property rights exist and whether the valuation of a piece of land is correct. The Committee may therefore want to consider closely the various appeal rights contained in the Bill, as well as other rights to make submissions and representations during the various decision-making processes.

4.9 Article 8

4.9.1 The Article 8 right to respect for private and family life, home and correspondence is likely to be engaged by several aspects of the Bill.

4.9.2 The Bill requires information to be provided and/or published, particularly in Part 3 but also in relation to the Register of Land for Sustainable Development (s44). A breach of Article 8 is most likely to arise if those requirements seek to compel the production of private information relating to persons in control of land, members of community bodies or any other individual. In such cases, data protection obligations under the Data Protection Act 1998 and the related EU Data Protection Directive would also be likely to be relevant.

4.9.3 At present there is very little in Part 3 of the Bill in particular, which simply confers broad powers on the Scottish Ministers to make regulations (see paragraph 3.4.2 above). The Committee may wish to consider whether those powers contain sufficient safeguards to protect against such regulations requiring the provision of information in breach of Article 8 rights.

5 PARTS 1-3 OF THE BILL

5.1 Land rights and responsibilities statement

5.1.1 It is difficult to comment at this stage because there is no indication in the Bill as to what the land rights and responsibilities statement should say. If the statement is to include principles such as those included in the Consultation, we would urge the Committee to seek further definition of the principles.

5.1.2 Any statement on land rights and responsibilities should have as its aim the protection and promotion of all interests in land: rural and urban; landlord and tenant; owner and occupier; user;
employer and employee. It should also be based on evidence and opinions gathered from a wide cross section of those with an interest in property.

5.1.3 Taking the principles that were set out in the Consultation as a guide to what might be covered in a statement on land rights and responsibilities:

5.1.4 The principle that ownership and use of land should be in the public interest and contribute to the collective benefit of the people of Scotland does not sit well with principle 4 which encourages a diverse pattern of public and private ownership of land, or with the principle of private property which underpins A1P1.

5.1.5 Land in its broadest meaning covers all of the following and more: a tenement flat, a detached dwelling house, an industrial unit, high rise office block, oil terminal, shopping centre, village shop, hotel, community hall, quarry, wind farm, farm, and rural estate. We would suggest that the Committee should consider carefully whether it is desirable or in any practical sense achievable to require that ownership of all of these types of land be in the public interest and for the collective benefit. An alternative approach would be to require that ownership of land in Scotland should not interfere with the public interest and should where possible contribute to the collective benefit. The Committee may wish to consider the breadth of the concepts of public interest and collective benefit and whether they should, for example, encompass the promotion of investment and job creation.

5.1.6 The diversification of use of land going forward does not require ownership of land to be divided. Any mandatory change or diversification of use should be based on an identified potential for improvement in the use made of particular land rather than for its own sake.

5.1.7 Community involvement in land in Scotland may be achieved in a range of ways and transfers of ownership may not be the most effective way to achieve that involvement. Different rights in land may be granted to the public and community groups, such as leases, licences and access rights, which could benefit owners and communities alike.

5.1.8 A purchaser of a property will generally require substantial funds upfront to invest in a property for a use which has not yet been tested and before any money has been made from any business / venture carried on in the property. The grant of a lease to a community group would not require such a large amount of funds to be available upfront and might also encourage greater collaboration between those involved. Such a lease could include an option to purchase the property after a period of time: giving the community body a trial period within which to test the viability of their plans for the property. If they decide not to purchase, they can be compensated for any improvement to the property. If they do go ahead with the purchase, the lease can provide a mechanism for agreeing the price to be paid.

5.1.9 The principles in the Consultation referred to but did not define high standards or ownership and use of land. In Scotland, we currently have the law of nuisance, Occupiers’ Liability legislation and health and safety legislation. At this stage it is unclear whether it is intended to build on the
existing law, for example by issuing Codes of Practice similar to those which are to be produced by the Tenant Farming Commissioner.

5.1.10 The planning system currently provides a range of opportunities for public engagement. If those opportunities are to be added to by requiring wider consultation (as suggested by the principles) we would suggest that the Committee will want to be satisfied that the additional requirements do not add disproportionate further delay and expense to development proposals.

5.2 **The Scottish Land Commission (“the Commission”)**

5.2.1 We are pleased that, as suggested in our response to the Consultation, the Bill makes reference to a Scottish Land Commission and not to a Land Reform Commission. A Land Commission which is charged with promoting interests in Scottish land and property could be seen as a selling point for Scotland.

5.2.2 We would suggest that the Committee explores with Scottish Government whether the Commission will deal with urban as well as rural land matters. For example, the right to buy proposed by the Bill will affect urban as well as rural properties.

5.2.3 Part of the Commission’ remit will be to gather evidence and carry out research. It will be important that easily accessible avenues of communication are set up so that the Commission hears and listens to the voices of all types of persons, bodies and organisations interested in all types of land in Scotland. It may be helpful for each Commissioner to be allocated professional and representative groups with whom they liaise and feed back to the Commission.

5.2.4 Communications from those bodies and groups should help shape the strategic plan to be produced by the Commission.

5.2.5 The strategic plan must set out attainable goals and timescales within which those goals have to be achieved.

5.2.6 At section 5 setting out some of the general powers of the Commission, it is not clear whether is the Commission should be permitted to raise funding, grant security or take security over property. Similarly, at section 20 (5) we would suggest that the Committee considers whether development and funding of land should be included.

5.2.7 At section 9 of the Bill we would suggest that land management and valuation experience be added to the list of expertise and experience to which the Scottish Ministers should have regard. Such experience should include management and valuation of urban and rural land. The Tenant Farming Commissioner (TFC) is to have enforcement powers if a code of practice is breached. It is not clear to us at this stage whether the Land Commission itself will issue codes of practice and have enforcement powers. There is also a need for clarity in relation to situations in which there is a cross over between farming and other types of land. The TFC is to be permitted to refer questions of law to the Land Court and again it is not clear whether the Land Commission will be permitted to refer questions of law to the Lands Tribunal.
5.2.8 The purpose of the office of TFC is to improve relationships between landlords and tenant and therefore the introduction of the role is to be welcomed. We would suggest that at section 22(3) the power for Scottish Ministers to amend the “functions” of the TFC by regulations should be limited to administrative changes to the role. Any fundamental changes to the role should be dealt with in primary legislation and be subject to more detailed parliamentary scrutiny.

5.2.9 It is important that the provisions for publication, review and revision of codes of practice are sufficiently robust given that any code of practice prepared by the TFC is to be admissible in proceedings before the Land Court, and the Land Court will be obliged to take into account any provision of a code of practice “relevant to any question arising in the proceedings”.

5.3 Part 3 Information about the Control of Land etc.

5.3.1 We have commented earlier on the power to be conferred on the Scottish Ministers to make regulations to provide for access to information on persons in control of land by persons affected by land.

5.3.2 When defining persons affected by land, consideration should be given as to whether the following should be included: owners; tenants; occupiers under licence; persons with access rights for example, defined pedestrian or vehicular access or access to take water; persons with sporting rights over the land; persons whose land or property or business lies adjacent to the land concerned and if so, a remoteness test based on a combination of the distance from the land concerned and the effect on value and amenity of the land / rights affected.

5.3.3 We expressed concerns earlier about the lack of content in the Bill on the circumstances in which a person may request information on persons in control of land. Whatever the circumstances, we would suggest that there be a limit on the number of different requests that any individual, body, group may make within one year. If that is not possible, repeated or vexatious requests should be able to be refused.

5.3.4 Financial information relating to land can be sensitive information which an owner or occupier may wish to be kept confidential. The legislation makes provision for financial information relating to a Part 5 application to be kept confidential, and (subject to our comments on that approach set out in section 5 of this submission) it would be equitable to extend equivalent protection to the financial information of others.

5.3.5 The drive to complete the Land Register will assist in making ownership of land more transparent but it must be borne in mind that the information held by the Keeper of the Registers of Scotland is limited and represents a snapshot in time. Land values change over time and it is often a tenant who is in control of land. Tenants rarely take leases of 20 years or more but leases lasting less than 20 years are not registrable in the Land Register in Scotland.
6 PARTS 4 AND 5 OF THE BILL

6.1 Engaging communities in decisions relating to land

6.1.1 If failure to comply with the proposed guidance will have potentially weighty sanctions, those potential sanctions should be made clear on the face of the Bill. Sanctions should relate only to failure to comply with the engagement process, rather than to the decision which is ultimately made.

6.1.2 The guidance is to be relative to "engaging communities in decisions relating to land which may affect communities" and we assume will be directed at decisions by owners/occupiers of land though the wording is far wider. Many decisions about land are taken by persons other than the owners or controllers of that land (Scottish Ministers, local authorities or even judicial bodies will take decisions about land which will affect communities). The Bill, as well as any guidance, should make clear to whom and to what decisions it is to apply.

6.1.3 The obligation to consult at s37(4) gives very wide discretion to the Scottish Ministers. It should be made clear that those parties who would be affected by the guidance, or related interested parties, should be consulted, along with such other persons as Scottish Ministers may consider appropriate.

6.2 Right to buy to further sustainable development

6.2.1 A clear definition of the types of land, buildings and tenancies to be subject to the provisions is fundamental and should be included in the Bill.

6.2.2 The rights at sections 40(3) and 41(6), giving community bodies rights to acquire sporting/minerals interests and tenant's interests, respectively, within set timeframes from their acquisition of other land will inevitably have an effect on value; the latter provision in particular is likely to result in tenants reluctant to invest in the land and unable to assign the tenancy with such a threat hanging over them.

6.2.3 The provisions dealing with the right to acquire a tenant's interest require expansion. There may be cases where the sustainable development objective of the community is hindered by the tenant, perhaps obstructing development that the owner itself agrees should be pursued. As drafted, obstruction of development by a tenant cannot be addressed without also making the owner's interest subject to an application, which is inequitable. Alternatively the landlord could be given a right to end the lease and recover possession of the land.

6.2.4 In connection with an application for consent, section 46(9) permits a community body or third party purchaser to require the Scottish Ministers to treat as confidential any information or document relating to financing to enable the land to be put to a particular use. If information is to be kept entirely confidential, it is not clear how views (invited to be provided by Section 46(1)(a)) can be properly informed and considered, in the potential absence of details as to funding.
6.2.5 The Register of Land for Sustainable Development has related transparency issues, where information or documents relating to financial arrangements for putting land to a particular use can be kept confidential at the request of the relevant community body (s.44(4), s.44(5)). Withholding information where its release would cause some identifiable substantial prejudice and be contrary to the public interest (as per many of the exemptions in the Freedom of Information (Scotland) Act 2002) may be justifiable, but a blanket, 'on demand' approach to confidentiality is not.

6.2.6 Again, in the interests of transparency, we would hope that the Register of Land for Sustainable Development will cross refer to the Land Register.

6.2.7 The lack of definition of "sustainable development" as used in section 47(2)(a) is problematic.

6.2.8 At Section 52(2), it would be preferable to specify in the primary legislation the transfers and/or dealings which are not to be prohibited when consent to right to buy has been granted, just as was done for the Community Right to Buy.

6.2.9 At Section 53(5), creditors should also receive a copy of the acknowledgement issued by the Scottish Ministers. Also, at Section 61, creditors should be given the right to appeal to the Lands Tribunal against a valuation of land, given the potential impact of that valuation on them.

6.2.10 Scottish Ministers may make their consent to an application under Section 45 subject to conditions. This unlimited discretion as to conditions requires amendment, to narrow and clarify the scope of that discretion.

6.2.11 On sale, any heritable creditor is to be paid in preference to the owner to ensure the transfer of the land free from a security. There is no clear provision as to what happens if the consideration payable is inadequate to satisfy the outstanding debt due to negative equity. Where the transfer crystallises a negative equity position that may otherwise be temporary (and may well be the reason an owner is unable to develop the land as the community – or the owner – might have wished), a creditor may be prompted to take action to recover sums owed, potentially resulting in bankruptcy or insolvency. Losses following a crystallised negative equity position may be recoverable under Section 58(1) and (2). Given that those losses could well be considerable, the Bill should make express provision for what is to happen in such a situation.

6.2.12 Section 56(9) allows parties to submit views on the other's written representations, but with no provision for submission of counter-views. Potential for endless back-and-forth should be avoided, but the valuer should, at least, be given discretion to seek further views, to avoid issues of non-compliance with Article 6 and A1P1 of the ECHR.

6.2.13 Section 58(3) provides that compensation will not be payable if an application is refused. This is inequitable, given that considering and responding to an application could be an onerous task entailing significant time and cost. At the very least, there should be provision for compensation to be paid in respect of any application that the Scottish Ministers decide is vexatious, frivolous or otherwise without proper foundation.
6.2.14 The Scottish Ministers may pay a grant to a community body or third party purchaser to fulfil compensation payments in certain circumstances (s.59(1) and (2)), but only on the application of the community body or third party purchaser. Failure to apply for a grant may therefore frustrate the rights of the persons entitled to compensation. This should be addressed to ensure compensation will always be paid. The issue also relates to the whole question of the financial covenant of community bodies referred to in paragraph 6.2.4 above.

7 PART 6 OF THE BILL: ENTRY ON VALUATION ROLL OF SHOOTINGS AND DEER FORESTS

7.1 The Consultation framed this issue in terms of businesses exercising such rights, and exemption from business rates. “Business rates” is a colloquial term for non-domestic rates and it is to be expected that the Bill uses the correct wording. However, along with removal of the term “business rates” is removal of any reference to businesses exercising the rights.

7.2 As drafted, the section provides that all shootings and deer forests will enter the valuation roll. We are concerned that occupiers of land holding shooting rights are to be taxed simply on holding those rights, without any requirement that they be exercised, whether or not for commercial benefit.

7.3 If non-exercised rights are intended to be rated but then exempted (which would avoid, for example, many farmers becoming subject to non-domestic rates), that should be made clear in the Bill, with proposed exemptions set out in detail. However, if that is the intention, the process of rating only to exempt adds unnecessary bureaucracy to a process in which it is not, in any event, clear that there will be a great return.

7.4 The basis of valuation is unclear and the Policy Memorandum suggests valuation will be a matter for Assessors. The suggestion in the LRRG Final Report to charge rates if landowners failed to meet appropriate cull numbers of deer has not been included in the Bill. We understand that the LRRG suggestion is linked to the fact that rates were historically seen as a disincentive to deer management. Disincentives to private deer management (which often brings wider benefits to rural communities through shooting tourism) simply increase the burden on public authorities such as SNH to compel and enforce such management, further negating any benefit to the public purse sought to be obtained from reintroduction of rates. A basis of valuation related to appropriate cull numbers would incentivise private management.

7.5 It is not clear whether “shootings” is intended to cover only wild grouse or all game. The LRRG Final Report deals only with grouse shootings. On the basis that all other winged game is reared and managed, and any value is therefore in the business of the sportings, rather than intrinsic value of the rights themselves, it appears that other rights to take winged game do not properly fit the non-domestic rates model (designed to value the property, rather than the business) and so should not be included. If only grouse shootings are to be subject to non-domestic rates, that should be made clear in the drafting.

7.6 The concept of “deer forest” is not defined in the Bill. While historically a deer forest was in fact open hill, the LRRG Final Report notes that more deer are now culled in woodlands than on hills. If rights to shoot wild deer are what is sought to be taxed, then the opportunity should be taken to properly define this, rather than simply reinstating historic language into legislation and relying on case law to interpret unclear provisions.
PART 10 OF THE BILL: AGRICULTURAL HOLDINGS

8.1 Inclusion within the Bill

In light of the inclusion of Part 10 in the Bill, we would suggest that a more appropriate title for the Bill would be the “Land Reform and Agricultural Holdings (Scotland) Bill”. We question whether or not the current Bill is in fact the most appropriate forum for taking forward the recommendations of the AHLRG given that the timescales involved may limit the scope for full scrutiny of what is a complex area of law. It would be more appropriate to see changes to agricultural holdings legislation dealt with in a separate Bill. That would also allow more of the AHLRG’s recommendations to be addressed than are dealt with within the current Bill.

8.2 MLDTs

8.2.1 Duration

It is disappointing that landlords and tenants have not been given the freedom to contract for a lease period between 5 and 10 years. This anomaly could easily be addressed by amending the new proposed Section 5A to allow for MLDTs for 5 years or more.

8.2.2 Termination and continuation

The scope for error under the termination provisions is high, under both the landlord and tenant notice procedures, and a party making a mistake is heavily penalised through a fixed 10 year lease continuation. The recommendations of the AHLRG, which proposed a much simpler single notice procedure with yearly continuations if notice is not served should be adopted instead.

8.2.3 Irritancy

In principle, introduction of provision for a pre-irritancy notice to enable a tenant to remedy a breach is reasonable but the minimum one year period seems inequitable given that, in the case of non-payment of rent, a tenant could feasibly delay payment for up to a year and still avoid irritancy (and could in fact extend this period further by application to the Land Court). By way of comparison, the pre-irritancy period for non-payment of rent or any other monetary breach under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 is 14 days. Consideration should be given to a shorter pre-irritancy period, particularly for non-payment of rent or other monetary breach.

8.2.4 New entrants

There is no definition of “new entrant” in the Bill itself, which could lead to uncertainty. This should be addressed in the Bill rather than in secondary legislation. The drafting of clause 76(2) does not reflect the AHLRG’s recommendations fully here.

8.2.5 Full repairing MLDT

The failure of the Bill to take forward the AHLRG recommendation of a 35 year “full repairing” MLDT is a missed opportunity.
8.3 Conversion of 1991 Act Tenancies

8.3.1 The extent to which Section 79 relies on secondary legislation is concerning given that conversion represents a fundamental change to the parties’ interests under a lease. Issues such as the duration, key terms and scope of the tenant’s right to assign the converted MLDT should be dealt with in primary legislation, to allow proper scrutiny.

8.3.2 The minimum term of a converted MLDT, which the Bill envisages will be dealt with by way of regulations, is a critical issue. A lengthy duration is potentially a significant interference with a landlord's A1P1 property rights (given that a 1991 Act tenancy is almost always running on a year to year basis, under tacit relocation, and the landlord has a legitimate expectation that vacant possession may be obtained (say) upon the death of the sitting tenant). The tenant's ability to convert removes that expectation, so must be carefully considered. The bulk of 1991 Act tenancies have been in place for many years; a new right to convert would retrospectively change the terms of those tenancies, potentially to the detriment of the landlord's property rights. The AHLRG recommended a minimum of 35 years; such a lengthy extension would constitute a serious interference with a landowner's A1P1 rights, and may well require compensation in order to be ECHR compliant.

8.3.3 A tenant is to have the right to dispose of a converted MLDT, by way of assignation. Where a LDT is assigned, a landlord has the opportunity to, effectively, buy out the tenancy. It would seem equitable that a landlord presented with the assignation of a converted MLDT is afforded the same opportunity. Introduction of such a right would go some way towards balancing the interests of landlord and tenant, and perhaps mitigate the overall impact of conversion on the landlord's A1P1 rights.

8.4 Rent review

8.4.1 The new provisions move away from open market comparables to a “fair rent” assessment, with “productive capacity” being one of the key issues to be regarded in determining a fair rent. “Productive capacity” is not defined. This should be addressed by way of amendment to the Bill.

8.4.2 The Bill suggests that the matters specifically noted, to which the Land Court must “have regard” when determining a fair rent, are not exhaustive. However, it is not clear what other matters are likely to be considered. Given that the intention of the new system is to introduce certainty, this is a concern.

8.4.3 On procedural matters, it is noted that a rent review notice cannot be withdrawn unilaterally. It is not clear what benefit this will bring to either party.

8.4.4 The change to the date on which notice can be served is welcome, as the requirement to serve on an ish date can be problematic in certain circumstances.

8.4.5 The changes to the rent review provisions for LDTs, and provision for MLDTs, are welcome.
8.5 Amendment of existing right to buy – removal of the requirement to register

8.5.1 The intention behind this is good, as it is important that those tenants who wish a pre-emptive opportunity to buy their holding are ensured access to that opportunity. However, we question whether an automatic right for all 1991 Act tenants is the most suitable way of achieving this.

8.5.2 Removing the need for registration introduces uncertainty and has the potential to significantly impact upon transactional business in the rural market. In many cases it may be difficult to establish (and satisfy third parties) what land is, and is not, affected by a right to buy. Without a registration process, any disputes on this type of issue will not be resolved until a sale is imminent and that could be problematic.

8.5.3 Many – but not all – tenants wish to benefit from the opportunity to buy their holding. A much simpler way of protecting those tenants who do wish to have the opportunity is to require a one-off registration and remove the need for renewal of registration. This would remove the risks of a tenant missing out as a result of failure to renew and, importantly, give parties the opportunity at an early stage to establish the extent of the holding affected by the right to buy.

8.5.4 We would also suggest that the plan submitted for registration in the RCIL must meet a standard equivalent to that required by Registers of Scotland in connection with registration in the Land Register. This would be in line with the Bill's principles as it would improve public access to information and enhance the quality of that information.

8.6 Amendment of the existing right to buy – repeal of s.27(1)(g)(v) of the 2003 Act (s80(5) of the Bill)

8.6.1 The above provision currently exempts a landlord from having to give notice to a tenant under s.26 of the 2003 Act in the event of a transfer implementing missives for the sale and purchase of land concluded, or an option to acquire land which existed on a date on which no notice of the tenant's interest was registered (i.e. before the tenant registered an interest in the RCIL).

8.6.2 If the provisions of Part 10 Chapter 2 come into force, there will be no need for the tenant to register; but the date s.80(5) comes into force will, it is assumed, be the cut-off point for concluding missives or entering option agreements which are exempted under s27(1)(g)(v) of the 2003 Act. Section 80(5) will come into force by regulation so there may be little notice of the relevant date.

8.6.3 Once s.27(1)(g)(v) is repealed, exercise of options entered into before then (which would have been a permitted transfer) may trigger the right to buy (see s.26 of the 2003 Act as amended by s.80(4) of the Bill) unless that is excluded. As currently drafted there is no excluding provision, which we assume is an oversight; if not, this needs careful consideration.

8.7 Sale where the landlord in breach

8.7.1 Chapter 3 of Part 10 relies heavily upon secondary legislation, including a general power to amend primary legislation by way of secondary legislation (s38M(4)).
8.7.2 We have concerns about the practical outcome if the Land Court makes an order for sale under Section 38B but the tenant does not wish to exercise a right to buy and, instead, the Land Court makes an order to require the land to be offered for sale on the open market (section 38L). The market for let farms is weak and, in these sort of circumstances, likely to be even more so. It is not clear what will happen if a sale does not proceed and how the landlord-tenant relationship will be taken forward in those circumstances.

8.7.3 The procedure for a sale on the open market is indicative only. There is no certainty and no clear provision for ensuring that a landowner obtains a fair price.

8.7.4 The Bill talks of a material breach of a landlord’s obligation. A more appropriate test would be a breach of a material obligation. Not all obligations are material, and on the tenant’s side, not all breaches of obligations can lead to termination of the lease, so the balance of the parties’ respective interests seems slightly askew here.

8.7.5 The provisions setting out the tests to be met before the Land Court can make an order for sale in the event of a landlord failing to remedy a breach are complex. As a result, the process is likely to be an expensive one for both landlords and tenants.

8.7.6 An order for sale is a drastic measure particularly given that, from a landlord’s perspective, it is difficult to take action against a tenant in breach. We note that the TFC may look at the existing provisions on good husbandry and that may help redress the balance since, currently, in practice, it is extremely difficult for a landlord to prove bad husbandry.

8.8 Succession and assignation

8.8.1 Assignation

8.8.1.1 The Bill provides that a 1991 Act tenant will be entitled to assign to a much wider class of assignee. Within that class, the special “near relative” class of assignees is also expanded and the grounds on which a landlord may object to a near relative assignee are limited to 3 narrow grounds (Section 89(4)). One of those grounds is that the assignee is “not of good character”, which is not defined. Clarification on this would be helpful.

8.8.1.2 The new rules restricting the right to object to an assignation to a near relative to 3 narrow grounds represent a fundamental shift. In practice, due to the widening of the “near relative” class, it is likely that a landlord will be restricted to the 3 grounds in Section 89(4) in the vast majority of cases. Under the current legislation, it is unusual for a landlord to make a successful objection on these types of grounds.

8.8.2 Succession

The class of potential successors is, again, widened and, within that, the special “near relative” class of successor expanded. In practical terms, given the larger class of near relative, in
practice a landlord's scope for objecting to a successor is – in almost all cases – likely to be limited to 3 narrow grounds.

8.8.3 Overall the Bill as drafted would result in a very significant widening of the ability of a tenant to pass on a tenancy on death, and also in life. As a result, the circumstances in which a landlord might obtain vacant possession are considerably reduced. As this is a fundamental change which has retrospective effect (as it will affect tenancies entered into prior to the Bill being passed and brought into force), we have concerns about whether this would be ECHR compliant.

8.8.4 One way of mitigating the overall impact on a landowner would be to consider the introduction of additional qualifying criteria for more "remote" successors or assignees. Perhaps they could be required to have a particular connection to the holding, such as be already working on it. In the case of all MDLTs (including converted MDLTs), the introduction of a right allowing the landlord to "buy out" the tenancy on assignment would also help mitigate the impact on landowners' property rights.