Written submission from the Dunecht Estates

Introduction

Dunecht Estates is a diverse rural property based business operating over 50,000 acres in Aberdeenshire and Kincardineshire consisting of six separate Estates in the same (Pearson) family ownership. Its interests include farming, forestry, field sports, minerals, residential property, commercial property and tourism.

The Scottish Government has stated that good landowners have nothing to fear from land reform. However there are several aspects within the Land Reform Bill that have serious implications for property rights and rural businesses such as Dunecht Estates regardless of how well they are managed.

It is of particular concern that the subject of agricultural holdings is being addressed in this Bill. The law regulating agricultural tenancies is highly complex and the changes being proposed have very significant implications for existing relationships as well as delivery of the principal objective of creating a vibrant tenanted sector. Agricultural holdings issues should therefore have been addressed in a separate Bill. However recognising that that is now unlikely and given the importance of the agricultural tenancy issues we suggest that it should be renamed the ‘Land Reform and Agricultural Holdings (Scotland) Bill’.

We have commented on the respective parts of the Bill below. As a general comment applicable to various parts of the Bill it is very unfortunate that various proposals are to be implemented through regulations introduced by Ministers. It is essential that when Ministers exercise such powers they ensure that they are subjected to full scrutiny as if they had been included in full in the body of the Bill.

Part 1 – Land Rights and Responsibilities Statement

- We support the principle of a land rights and responsibility statement (LRRS). However we believe that the LRRS should be produced in tandem with the Bill progressing through its parliamentary process given that this will be when there is particular focus on land reform. Preparation and publication of the LRRS during this process will allow parliamentary debate to take account of its content. We highlight that there has already been significant consultation on the content of the LRRS so this issue should not delay production of the first LRRS within the Bill’s timetable.

- We welcome the intention to review the LRRS on a 5 yearly frequency. However the Bill should explicitly state that on each review the proposed new LRRS will be subject to public consultation.
Part 2 – The Scottish Land Commission

- We consider that the Scottish Land Commission’s (SLC) Strategic Plan and Programme Work should be subject to public consultation and widespread stakeholder engagement.
- The Bill sets out eligibility for membership of the SLC and highlights that members should have expertise/experience in various disciplines. We argue that it is essential that these disciplines are extended to include agriculture and forestry. Additionally we believe that at least one of the members must have expertise/experience in agriculture and at least one with expertise/experience in forestry. In addition we suggest that at least one of the SLC’s members has a minimum of 10 years practical experience in land management.
- While we note that the Bill provides for the Tenant Farming Commissioner (TFC) to have expertise/experience in agriculture we believe that this appointment should be further qualified so that the TFC is obliged to have expertise/experience in agricultural tenancies.
- Successful delivery of the functions of the TFC will be vital if the objective of a vibrant tenanted sector is to be realised. Appointment of the TFC will be central to achieving this aim as will their delivery of the TFC’s functions. However we do not agree that Ministers should have power by regulations to modify these functions. We contend that the functions should only be amended following wide stakeholder engagement and the passing of future primary legislation.

Part 3 – Information About Control of Land

- In principle we have no issue with anyone knowing if land/property is owned by Dunecht Estates nor who is ‘in control’ of that land. As such we do not have detailed comments to make about this part of the Bill.

Part 4 - Engaging Communities in Decisions Relating to Land

- We recognise the importance of engaging with communities in relation to land use/development changes that will have a material impact on the local community. Mostly to date at Dunecht this has related to future housing with engagement recognised as a key part of site promotion and any development.
- However we are concerned that engagement with communities becomes a stifling administrative burden on normal land management activities. Unfortunately neither the Bill nor the Policy Memorandum gives any real indication of the level at which engagement is expected and also what actions are subsequently expected of landowners following such engagement. It is therefore important that Ministers engage fully with landowners (and occupiers of land eg tenants) as indicated in the Policy Memorandum when developing guidance under the requirement set out in the Bill.
- It will be essential to avoid creating unnecessary expectations within communities and burdens on rural businesses by ensuring that the guidance developed is proportionate.
Part 5 – Right to Buy to Further Sustainable Development

- We are fundamentally opposed to the proposals in the Bill and argue that the necessary powers to deliver key facilities in communities where required are available under existing compulsory purchase powers and also within the recently enacted Community Empowerment Act.
- The powers set out in the Bill will apply to all land however well managed eg they could be applied to a situation where land is currently actively managed for the purposes of operating a tree nursery but the community believe that the land should be given over to an alternative use eg allotments. No reference is made to any damage or harm that is done to the landowner and his business as a consequence of any enforced sale.

Part 6 – Entry in Valuation Roll of Shootings and Deer Forests

- We do not agree with the proposal to remove the exemption currently available to shootings and deer forests in relation to non-domestic rates.
- The justification behind this proposal is that it creates parity with other rural businesses in terms of paying tax. However that is a very selective approach given that there will not be parity on other levels regarding the operation and success of individual rural businesses. Some businesses will be eligible for public subsidy where others are not. Some will be able to access grants that others are not. If parity is deemed desirable in relation to tax payment then why should there be discrepancy in respect of ability to attract public support?. Accordingly we do not believe that sound justification has been made for the removal of the exemption.
- There were good reasons for the introduction of the exemption in 1995 including cost effectiveness. We question whether any assessment has been carried out establishing that the removal of the exemption will result in positive net receipts. We consider this very strange given the history behind the removal of the exemption and current pressures on the public purse.
- Additionally we raise concern over the potential impact an increase in costs will have on rural businesses with shooting/deer interests. In our experience running these businesses profitably is a considerable challenge. Any increase in costs unless immediately passed on to customers could thus result in parts of businesses closing down with consequential impact on direct employment (gamekeepers, stalkers etc) and down the line employment too. Many of these jobs are in fragile rural areas where other employment opportunities are severely limited. We argue that a detailed economic impact assessment should be carried out to fully understand the impact on rural employment and dependant businesses. We question the ability to readily pass the additional cost of rates onto shooting/stalking customers. Shooting and
stalking is available in other countries and clients are likely to choose to follow the keenest price.

- It also appears that no consideration has been given to the wider social and environmental implications of job losses in this sector. In remoter parts of the country shooting and stalking providing a significant proportion of local jobs substantially helping to sustain local facilities/amenities including schools, shops, pubs, and village halls etc.

- The environmental benefits secured by shooting and stalking have been well documented by organisations such as the Game and Wildlife Conservation Trust. These benefits will be lost if the shooting and stalking activities cease. For example in upland areas active management for red grouse is recognised for delivering benefit to a wide range of birds including lapwing, curlew, redshank and black grouse.

**Part 7 - Common Good Land**

- We have no comments on this part of the Bill.

**Part 8 – Deer Management**

- We acknowledge the proposal allowing Ministers to extend the functions of Deer Panels by regulations including the engagement of local communities in deer management. However we question whether these provisions are warranted when few Deer Panels exist and community engagement on the issue could be achieved using the guidance proposed within Part 4 of the Bill.

- We have concerns over the creation of powers relating to the preparation of deer management plans. As the Policy Memorandum recognises deer management is something that the RACCE Committee has recently examined and they set a target timescale of the end of 2016 for each deer management group to have a deer management plan. That deadline is still some way off and that decision was presumably taken after careful examination of the scale of the problem. We believe that this timescale should be allowed to run its course before introducing new legislation. If the voluntary approach is not found to be operating well detailed consideration should be given then to what legislative intervention is appropriate.

**Part 9 – Access Rights**

- We have no specific comments on this aspect of the Bill.

**Part 10 – Agricultural Holdings**

**Chapter 1 – Modern Limited Duration Tenancies**

- We are supportive of fixed duration tenancies and are thus pleased that the Bill contains proposals to replace Limited Duration Tenancies (LDTs) with a similar type of tenancy, Modern Limited Duration
Tenancies (MLDTs), with a minimum term of 10 years. However we feel that the Bill contains few provisions that give significant flexibility over LDTs and as such this is an opportunity lost in relation to providing real stimulation to the tenanted sector.

- The proposals in the Bill fail to fully embrace the degree of flexibility envisaged in the Agricultural Holdings Legislation Review Group (AHLRG) Report. We specifically highlight Recommendations 29 of the Report.

- Recommendation 29 refers to termination provisions proposing that the tenancy if not terminated in accordance with prescribed notice periods continues on a year to year basis. However the Bill sets out that the tenancy will continue for a further 10 year period in the event that notice procedures are not correctly followed. This is overly punitive and will serve to act as a disincentive to landlords when considering the use of MLDTs. The AHLRG recommendation should be adopted in substitution.

Conversion of 1991 Act Tenancies

- The proposal to allow 1991 Act tenants to convert their tenancy to a MLDT represents retrospective legislation and such retrospectivity does little to install general confidence to the tenanted sector. It is not unreasonable for landlords to expect retrospective legislation to be avoided unless there are compelling reasons to do so as it effectively represents rewriting of the contract with a resulting impact on property rights.

- However we understand that an ability to convert coupled with the right to assign a MLDT for value has potential to deliver policy objectives and specifically the creation of turnover in the let sector thus providing opportunity for new entrants and existing farmers. We argue that conversion to a MLDT has the opportunity to deliver on this and should be pursued instead of widening assignation and succession rights as set out in the Bill (see comments under Chapter 5).

- If conversion is to be pursued then it is critical that the term of the MLDT should take cognisance of the rights of both the landlord and tenant and should be for a period of no more than 20 years. We argue that this will create sufficient value for the outgoing tenant on assignation of the MLDT and therefore achieve the crucial objective of turnover introducing new blood to the farm.

- In order to achieve the correct balance of interests there should be a right a pre-emption included in any conversion process allowing the landlord to match the price being paid by the assignee on assignation of the MLDT. This then allows the landlord to take possession of the holding and have the option of farming it directly or by a family member, selling the holding with vacant possession or changing the land use eg converting to forestry.

- Additionally it also appears equitable that on conversion and any subsequent assignation of the MLDT the tenant should be obliged to obtain landlord’s consent with the landlord entitled to withhold consent on any reasonable grounds. In essence legislative change should
ensure that the assignation provisions relating to LDTs are duplicated for MLDTs. This has the effect of protecting the landlord from accepting a an assignee of questionable character or from someone who he thinks will be unable to farm the holding in accordance with the rules of good husbandry.

Chapter 2 – Tenant's Right to Buy

- We do not agree that there is need to dispense with the requirement for a tenant to register their pre-emptive right to buy. If it is considered unduly burdensome for tenants to be required to re-register every 5 years then this concern should be addressed by removing that requirement and leaving the holding subject to registration unless otherwise removed.
- The registration process facilitates a review of the extent of the holding with reference to plans and the Register of Community Interests in Land (Agricultural Interests) then identifies the area subject to registration. It is thus possible during the conveyancing process when buying/selling rural property to know whether land is within a holding and subject to a registered interest. The removal of this certainty in the sale and purchase of property should not be lost.
- It is disappointing that the Bill has not taken forward Recommendation 18 from the AHLRG Report. This suggested that there should be examination with a view to giving clarity on when the right to buy is actually triggered. There is a danger that without such clarity owners of land will be reluctant to explore economic development opportunities for fear of triggering the right to buy. Often what appears to be an exciting opportunity can disappear once explored further and it would appear draconian for such exploratory investigations/dialogue to result in the land having to be sold to the tenant.
- It is the case that in nearly all instances the purchaser of rural land/property will want to acquire it with vacant possession. As such the landlord has to deal with the tenant either using statutory powers, contractual provisions in the lease or negotiation to obtain vacant possession. It is highly unlikely therefore that land is sold without the tenant being involved in the process.
- The Bill (Section 80 (5)) deletes Section 27 (1)(g)(v) of the 2003 Act, the provision that exempts the requirement to give notice to a tenant with a registered right to buy of a transfer implementing missives concluded or an option that existed prior to the right to buy being registered. We propose that commercial contracts already entered into are excluded from this provision. Failure to provide such an exclusion would have very serious implications for the landowner.

Chapter 3 – Sale Where Landlord in Breach

- We are supportive of the principle of a sanction applicable to landlords who fail to meet their statutory/contractual responsibilities.
- However that sanction has only to be applicable after due process with the landlord given opportunity to challenge the assertion that there has
been such failure and if determined that there has been failure the opportunity within a reasonable timeframe (bearing in mind any requirement to obtain statutory consent for works eg planning permission) to rectify the failing.

- We also argue that where the landlord has been in breach the sale should be to a third party organisation (eg the local authority) rather than a sale to the tenant. There is no necessity for the tenancy to come to an end for the tenant to be protected as instead the third party organisation as replacement landlord becomes responsible for rectification of the failing. This approach has the benefit of avoiding any incentive for false accusations to be made potentially motivated by the prospect of ownership of the farm.

Chapter 4 – Rent Review

1991 Act Tenancies

- We recognise that there is strong demand within a number of stakeholder groups for change to Section 13 and the method of assessing farm rents. However we highlight that the existing rent review approach (although not without fault) has been in place for many years and for many landlord/tenant relationships continues to work well.

- Accordingly any new method needs to be very carefully considered and modelled with stakeholders and practitioners in the industry to ensure that any potential areas for conflict are understood and minimised before it is introduced. If disputes over rents are the single largest cause of friction between parties then it is essential that the regulations to be introduced as referred to in the Bill are clear and capable of implementation without undue disagreement.

- We have significant concern over the requirement set out in the Bill to detail in the new rent review notice the rent that the person serving the notice proposes should be payable for the farm with the notice also to be accompanied by information detailing how the proposed rent has been calculated. Given other provisions this means that the rent proposed must be set out at least 12 months before it is to become effective and as such the proposal is going to be looking at historic rather than current data on commodity prices, costs etc. We contend that there should be no need to set out any proposal in the rent review notice and do not see the necessity to do so.

- The proposals relating to the treatment of surplus residential accommodation do not reflect the findings and Recommendations set out in the AHLRG Report. The Report (Recommendation 6) envisaged that in considering the appropriate rent for a holding provision should be made for any housing provided in excess of that required for the labour requirements of the farm. We believe that the Bill requires revision to implement Recommendation 6 as intended.

- The Bill excludes any residential property occupied by the tenant from the surplus accommodation calculation and in fact only allows property to be included where the tenant has permission to sublet. This is a
very significant departure from the calculation in the AHLRG recommendation and also from the rent that might be expected to be calculated for holdings with significant residential elements under the provisions of S13 as existing.

- We highlight two scenarios in particular that are adversely affected by the proposed treatment of surplus accommodation. There will be many farms let under 1991 Act tenancies that are small in nature with a comfortable farmhouse with significant rental value on the open market. These small farms are unlikely to require input in excess of standard labour units as is evidenced on the ground by the fact that the tenants have off farm jobs, often full time, with the farm work done in evenings/weekends or holiday periods. If the intention is to arrive at a ‘fair rent’ then it needs to be fair to both parties. We argue that it would be unfair if the tenant does not pay anything additional by way of rent if the standard labour unit assessment sets out that the holding only requires the equivalent of half a labour unit. In such circumstances the tenant has the ability to earn off farm income whether that’s via an expanded farming business beyond that operating on the tenanted unit in question or external employment.

- Secondly there are many holdings where there is often surplus residential accommodation but with this occupied by family members (eg father and son) rather than being sublet. It is unjust that in such circumstances the rent cannot reflect the fact that the accommodation is greater than that required by the standard labour units of the farm. The family members may be living on the tenanted farm but running a much more substantial operation (eg contracting or farming other land) or indeed could have off farm employment.

- The proposal for dealing with phasing of rent increases in excess of 30% needs to take account of any situation whereby the existing rent has been kept artificially low eg in recognition of the tenant undertaking renewal/replacement of fixed equipment or other investment on the holding. Also in the interests of equity any assessment of the farm rent that results in the rent reducing by 30% or more should be similarly phased.

Limited Duration Tenancies and Modern Limited Duration Tenancies

- We have the same comments in relation to the rent review provisions relating to LDTs and MLDTs as made above in respect of 1991 act tenancies.

Chapter 5 – Assignation of and Succession to Agricultural Tenancies

- The proposed extension of assignation and succession rights for 1991 Act tenancies and tenants under LDTs represent a very significant erosion of the landlord’s property rights. We are fundamentally opposed to the provisions as set out in the Bill.

- The extension of the class of potential successors/acquirers/assignees and the limited grounds under which the landlord is able to object to the assignation/succession represents a substantial change from the
current legislative position and are without sound justification. So far as applicable to existing tenancies it is retrospective legislation that is severely damaging to the landlord’s interests. Additionally the proposals strike at the heart of the necessary confidence required to let land. If the changes are enacted then prospective landlords will fear future retrospective legislation affecting MLDTs and are likely to be dissuaded from using the new letting vehicle.

- We believe that the policy objective of creating turnover and introducing new blood to farming are better achieved through conversion as set out under Chapter 1 above. This would have a less significant impact overall on the landlord’s property rights while allowing retiring tenant’s to retire with dignity. Additionally and importantly conversion will present opportunities for farmers both existing and new entrants who do not have access to a farm via family connections. The proposals as drafted favour existing family members as future tenants and are therefore discriminatory in nature.
- The Bill’s Policy Memorandum makes reference to the proposals facilitating continuation of the family farm. However as drafted there is every prospect that these family farms could be run by a family member who is not resident in Scotland and has no affinity with it or necessarily a desire to see productive agriculture. The 2003 Act removed the requirement on the tenant to live on the holding and the proposed grounds on which the landlord can object to a future assignation/succession are limited. If someone is of sound character, has financial means and previously undertook agricultural training then they are in a position to take on the tenancy.
- We previously understood that the focus for extending succession rights was to deal with those situations where a family member who was dependant on the farm for their livelihood could find that they are left without any right to continue farming the holding following the death of the family member who was the tenant eg two brothers farming in partnership with only one as the tenant and that brother then dies.
- We contend that there should be limited extension of succession rights to deal with these dependant/hardship cases and that otherwise the passing of farms to family members more widely than already possible under current legislation is achieved via the conversion route as set out in Chapter 1.

Chapter 6 – Compensation for Tenant’s Improvements

- We support the principle of the amnesty. The proposal (although retrospective in nature) provides an opportunity for works with potential to be classed as improvements to be formally recognised. Importantly this is balanced by a right of objection on certain prescribed grounds including that it is not fair and equitable for compensation to be payable at waygo for the relevant improvement. It is also the case that the following payment of compensation the rent the holding can command is increased.
- Additionally the legislation needs to be clear that actual payment of compensation may not be applicable for all improvements that appear
in the amnesty notice even if unchallenged. Compensation is only payable on the termination of the tenancy and it could be the case (eg due to obsolescence) that the improvement has no value at the point the tenancy ends.

- Also the value must be the value of the improvement to an incoming tenant to that holding. The incoming tenant cannot be assumed to have other land and as such any fixed equipment constituting tenant’s improvements beyond that necessary for the holding in question should not be entitled to compensation. There will be instances where for reasons applicable to their own farming circumstances (eg they also farm land other than the relevant holding) tenants will have constructed buildings far larger than required to service that holding. It would be inequitable to expect the landlord to pay compensation in such cases.

Chapter 7 – Improvements by Landlord

- We do not have any difficulty with the provisions requiring landlords to serve notice on tenants in respect of intentions to carry out improvements.