Written submission from Dr John MacLeod, School of Law, University of Glasgow

Introduction
My comments are restricted to Parts 1-5 of the bill. There is much to commend the central aims of the bill: creation of a land commission and tenant farming commissioner and the opportunity given to communities to acquire land for sustainable development in cases of serious neglect or abuse. However, aspects of the bill give serious cause for concern. In particular, in a number of situations significant discretion on important matters is given to ministers or to Commissioners with little or no provision for scrutiny of the exercise of that discretion. It is doubtful whether the problems with the bill can be addressed by amendment. Therefore, these issues are appropriate for consideration at Stage 1.

Drafting and structure
I endorse the comments of Dr Jill Robbie about the general structure of the bill and about the particular need for clarity and accessibility in this statute.

In light of these, thought should also be given to reordering the various parts so that the key provision in each part comes at the beginning.

For instance, the reader will better grasp the import of the provisions about the Scottish Land Commission in light of the s 20 which set out the functions of the Land Commissioners. The Commission is there to support the Commissioners in the exercise of their functions and the appropriateness of the rules surrounding the appointment and eligibility of Commissioners make sense only in light of what they are supposed to do. Similarly, it is very difficult for the reader to take in the detail of the rules on eligible land and Part 5 Community Bodies without the context in which they are relevant. Therefore, they would be better presented after key provision on the right to buy: s 47.

Rearranging the provisions in this way would require significant redrafting of some sections but the the intelligibility of the bill would be very much improved.

Part 1
I agree with Dr Robbie’s suggestion that the Land Rights and Responsibilities Statement should be subject to a scheme of public scrutiny and that the statement should in the first instance be part of the bill and be amendable by statutory instrument. In addition to the importance of proper scrutiny for the principles, it is desirable to limit the number of different place where rules are to be found.
Part 2
I agree with the Dr Robbie’s comments regarding the relationship between the Land Rights and Responsibilities Statement and the Commission’s Strategic Plan.

In section 11(3)(c) some consideration should be given to the use of the term voluntary arrangement. The term voluntary arrangement is imprecise and risks being over inclusive. There are many reasons for reaching a settlement with creditors which do not imply insolvency.

The Tenant Farming Commissioner
The Tenant Farming Commissioner has very extensive responsibilities. It seems unwise for all of this responsibility to be concentrated in the hands of a single person. It would be advisable to appoint at least one more Tenant Farming Commissioner and to clarify the responsibility of the other Land Commissioners for oversight of the Tenant Farming Commissioner.

Further, the Tenant Farming Commissioner has responsibility for drawing up the Code of Practice, deciding whether to pursue breaches and imposing fines for breaches. It is not advisable for the same person to be responsible for drawing up rules, pursing them and deciding disputes. The situation is particularly dangerous given that there is no requirement that the Tenant Farming Commissioner has legal training or takes legal advice. Neither is there any provision for procedural rules to support the process of inquiry.

In light of this, I endorse Dr Robbie’s suggestion that the Code be laid down by way of Statutory Instrument, in order to allow Parliamentary scrutiny of the rules. Further, I suggest that proceedings for breach of the code be brought by the Tenant Farming Commissioner before the Sheriff or Land Court in the first instance rather than being decided by the Commissioner. This would allow the Commissioner to act in a role equivalent to the Procurator Fiscal or the Office of Fair Trading: deciding whether to pursue alleged breaches and presenting the case before the court.

Part 3
I have serious concerns about this Part. The discretion given to ministers in s 35 is very broad, particularly in s 35(2)(a) & (b). The policy aims behind this disclosure regime have not been clearly articulated. It is not easy to discern what the provisions will achieve.

As a matter of Scots law, the person with control of land is the owner and (other than some exceptional cases) the owner is determinable by reference to the public registers. It is the owner who is responsible for what is done with the land and the owner is the appropriate defender in any action or enforcement measure regarding the land. That is to say, the owner is the appropriate locus of accountability for what is done with the land.
That owner may be influenced or controlled by other parties but such parties are not in a position to compel them to act in a manner which is contrary to the law of Scotland.

This suggests that the main purpose of Part 3 is not to fix responsibility for land but to establish who takes the benefit of land. Were a policy of maximum thresholds for landownership being pursued, a case could be made for gathering such information. In the absence of such a policy, the rationale is much less clear. It is difficult to believe that ownership of Scots land is an effective means of money laundering or tax evasion but, if it is, such problems are better addressed in legislation directed at that problem than by involving the Keeper of the Registers.

Furthermore, given the range of rights which a beneficiary may have under a trust, it is doubtful whether the Scottish Ministers will be in a position to draft an effective definition of control.

For these reasons, serious consideration should be given to removing Part 3.

**Part 4**
I agree with Dr Robbie that the lack of specificity regarding key terms in this part is deeply regrettable.

**Part 5**
I agree with Dr Robbie’s concerns about Part 5 of the bill. I should, however, also note support for the rigorous requirements before the right to buy can be exercised.

Consideration should be given to ensuring that the understanding of sustainable development in this context coheres with that developed in the context of strategic and local development plans.

The problems around defining a community might be addressed by a two stage application process. An initial outline application would, inter alia, make the case for a particular area being considered a community in the relevant sense and would be followed by a secondary application on the line envisaged by the bill.