Written submission from Balcaskie Estate

I am writing as the current owner of Balcaskie Estate, in the East Neuk of Fife in response to a request for comments on the current incarnation of the Land Reform Bill. Balcaskie Estate is one of the East Neuk Estates; a collaboration of small, owner-occupied farming estates in the East Neuk of Fife. Balcaskie is made up of a medium-sized in-hand farming operation (which is being taken organic) and a number of let farms.

The comments herewith are submitted by Balcaskie as an individual estate, not on behalf of the East Neuk Estates group.

I welcome the review of land tenure; the current system has lots of problems and is need of reform. However the process of reform is itself corrosive of Landlord and Tenant relations because it ferments difference and encourages dissatisfaction with all aspects of the current legal context. Successful and sustainable land management of all sorts (whether by Landlord or Tenant or any members of a rural community) needs to be undertaken on a stable, long-term basis in step with the cycle-times of the underlying asset: rotations of crops, planting and felling of timber, generational change within communities etc. A perpetual sense of continually shifting sands deters all parties from making long term investments or other commitments to each other and encourages shorter-term exploitations of positions and the land.

The Policy Memorandum states that the process of land reform in Scotland is to be a continuing one: a process, not a single event and that this will be enshrined through the 5-yearly publication of a Land Rights and Responsibilities Statement. This statement will, I understand, assess the then current situation and suggest further changes. The suggested changes to the only-recently-introduced Agricultural Tenancies demonstrates this change and reinforces the sense that no party to an agricultural tenure agreement can rely on the legal status-quo going forward. This discourages precisely the sustainable rural relationships that the Bill suggests are essential to the long-term thriving of the rural economy in Scotland.

Turning to specific measures within the draft Bill, I would comment as follows:

In relation to the proposal to reinstate shooting rates (Part 6), I note the comments of the RSPB to the previous consultation: broadly that care needs to be taken not to tax biodiversity on rural land and also that culling of deer and other wild fauna is often essential to good conservation management. On the question of biodiversity, the Scottish Government should be encouraging management of land to increase its capacity to sustain biodiversity (both animals (wild and farmed) and flora (wild and farmed)). The Bill does not set out the basis on which Rateable Value for shooting will be valued – and this in itself makes analysis of the proposal difficult – but a value based on headage of deer or other game is very likely to penalise just the sorts of farms and estates which are managing their land most environmentally effectively.

In relation to S42: Community, it is essential that community groups are assessed with reference to their context and community. Public benefit needs to be for the public, not just 5 or 10 individuals within a larger silent context.
In relation to S83.11.C: stepped rent reviews. I feel that in principle at least this concession should be available to both Landlord and Tenant on the basis of the balance of needs. If there is a public policy basis for reducing the rent payable by the tenant then it follows that the public purse should be prepared to make up the difference. Further, since the Bill sets out a basis for reviewing farm rents on the basis of productive capacity of the land, an inability to pay a reviewed rent implies an inability to farm to the productive capacity of the land. Why should the Landlord bear the cost of this shortcoming in the Tenant’s activities (over which the Landlord has no control)? Furthermore, given the notice periods set out in the Bill, the Tenant will have a received at least 12 months notice of the maximum possible change in rent under the review. Lastly, it is worth remembering that an increase in rent, especially one based on productive capacity of the land, indicates that the land held before the review was held at a value below its value. Given that Tenants under 91-Act leases can apply for rent reviews if they feel they are paying too much, greater increases in rent when a review does occur reflect longer prior periods w/o any review and therefore a longer period in which the land is held by the tenant at below market value. The Bill, as proposed, would penalise those landlords who had been letting land at below market value and held off reviewing the rents. This seems to be penalising behaviour which the broad thrust of the Bill should really be welcoming.

In relation to Sched 1A, para 8: valuing productive capacity at review: while this basis of review has much to recommend it, the devil is in the detail. Is this the theoretical productive capacity of the land or the capacity of the land as farmed by the incumbent tenant? Should a tenant choosing to grow low-yield, low-value grass on Grade 1 land pay less than a neighbouring tenant growing vegetables on the same type of land? Does organic-status land have a lower productive capacity than similar non-organic land? – it certainly has lower yields, though it is hoped that the market value of the harvest is greater. It is important to the long-term sustainability of a good working relationship between landlord and tenant that interests are aligned. Primarily this must be the maintenance of a healthy soil and landscape. Reinvestment into these by both Landlord and Tenant requires a long-term, stable relationship built on trust. A rent review based on productive capacity could help this … or hinder it depending on how this assessment is implemented.

In relation to the question of succession and assignment and, in particular in relation to Post Sale Obligations (38N) it is important that a broad and liquid market is established for tenancies. The broad proposal of the Bill is to allow the transfer of 91-Act Tenancies to a new-form lease (Modern Limited Duration Tenancy). This updating of a now-outdated and confusing legal tenure is to be welcomed. MLDTs should be set at a generational length - 25 years - to allow sensible investment and generational decisions both for the Tenant and also the Landlord.

There is no clear reason why transfer (assignment or transfer through succession) of MLDTs should be limited to those classes of successor set out in the bill. MLDTs could – and should – be fully assignable. This would allow tenants to release capital if they choose to leave farming (rewarding previous investment by the out-going tenant) and would allow new entrants (not just of existing farming families) to enter the sector. An out-going tenant could, as they wish, favour an assignment (for value or otherwise) to a relation but this is surely a matter for them, not for public policy.
Any assignment or on-ward sale post community buy-out should include a pre-emption for the (current or, in the case of community buy-outs, former) Landlord to pay the price agreed in the transfer (or at a pre-determined market value [needed for the tenant’s tax affairs in any case] if the transfer is not for value). This would complete the sale at a value set in the open market by the tenant/community group (so they would not be prejudiced in any way) but would allow the Landlord to retain the opportunity to consolidate their own farming operations, for example. The balance of an open assignment market for 91-Act leases and the Landlord’s pre-emption would encourage a much more transparent and accessible tenancy sector.

Overall, while some areas of the current legislation are in clear need of reform, it is essential that the Scottish Government can offer clarity and stability for anyone (Landlord or Tenant) entering in to an agreement for the occupation of land. Without this stability, agreements – where they take place at all – will tend to be short and with minimal security. This dooms to further failure the tenanted sector; one of the very things that this Bill seeks to sustain and encourage.