General Comments

The Land Reform (Scotland) Bill ("the Bill") is a part of a programme of law reform. It therefore deals with a number of different topics and is linked with various other pieces of legislation. Despite this, it is desirable that the Bill has a workable structure and internal logic in order for it to be an accessible and manageable piece of legislation. Clarity and accessibility are particularly important for a Bill that has as among its aims the greater democratisation of land use. In order to exercise effectively the rights conferred by Part 5 of the Bill, the members of community bodies, who are unlikely to be lawyers, should be able to understand the conditions which they need to fulfil. An example of a change that would facilitate understanding the Bill would be placing the key provisions at the beginning of each part. It would therefore be helpful for the structure of the Bill to be reconsidered to better assist the reader.

Some examples of lack of intuitive structure include:

- the provisions relating to the Scottish Land Commission on operational matters, accounts and annual report, and application of legislation relating to public bodies are positioned before the crucial provisions on the functions of the Land Commissioners;

- two parts of the Bill (Parts 6 and 8) containing provisions related to deer are separated, without explanation, by Part 7 on common good land; and

- Part 5 has three different places to look for definitions relevant to that part: the sections concerning Key Terms, section 65 on the Interpretation of Part 5 and section 98 on general interpretation.

There is much content which is notably absent or incredibly vague in the Bill. Examples of vague drafting include the lack of a definition of “sustainable development” and the broad functions of the Land Commissioners. It can be difficult to agree or disagree with the general principles of the Bill when such central issues have not been put forward in sufficient detail.

In many instances, where detail has been omitted in the Bill, a power is given to the Scottish Ministers to make regulations, prepare statements or draft guidance. With a Bill of such importance, the main issues that the Bill concerns should be subject to in-depth discussion and scrutiny in the Scottish Parliament as part of the legislative process for primary legislation rather than being dealt with through secondary legislation or without the requirement of legislative scrutiny.

Part 1 – Land Rights and Responsibilities Statement

I agree with the idea of having a Land Rights and Responsibilities Statement ("the Statement") as this would provide transparency and clarity as to the objectives of land reform. I also agree that the Statement should be reviewed every 5 years. However, due to the formative importance of the Statement, it should be subject to debate and scrutiny in the Scottish Parliament. Accordingly, the Statement should
preferably be created through primary legislation or at least by way of statutory instrument.

There is no requirement of public consultation prior to the drafting or reviewing of the Statement despite the Policy Memorandum for the Bill stating the intention to carry out such a consultation. Due to the potential impact of the Statement, allowing the opportunity for stakeholders to influence the content of the Statement or provide feedback when the Statement is reviewed every 5 years would be beneficial. A statutory requirement for public consultation should therefore be specified.

**Part 2 – The Scottish Land Commission**

I agree with the establishment of the Scottish Land Commission (“the Commission”).

The Commission must produce a strategic plan (section 6). The relationship between this strategic plan (“the Plan”) and the Statement is not explicit. The Plan should be based in the principles of the Statement to facilitate consistency and this should be stated in the Bill. Indeed, the Bill as currently drafted may require the Plan to be submitted before the Statement has even been drafted. It is unclear why the Plan should be revised every 3 years when the Statement is revised every 5. Requiring the submission of a new Plan after the revision of the Statement would allow consistency between the two documents.

Sections 8 and 9 discuss the membership and appointment of the Commissioners. To enable a balanced consideration of proposals and in order for the work of the Commission to obtain support from a wide range of stakeholders, the Commissioners should represent a variety of backgrounds. While the range of factors given in section 9(1)(a)(i)-(vi) is broad, a notable omission is expertise or experience in land management. It is also desirable that an attempt is made to appoint Commissioners from different areas of Scotland so that the views of island communities, for example, are sufficiently represented.

There could be accountability regarding the promotion of diversity in the appointment process by requiring the list of proposed Commissioners, together with an explanation of their relevant experience or expertise, to be submitted to the Rural Affairs, Climate Change and Environment Committee and members of that Committee having the right to veto the appointment of any proposed Commissioner.

As mentioned above, the functions of the Commissioners are very widely drafted and give little indication or steer about how the work of the Commissioners will be carried out.

The purpose of the introduction of the Tenant Farmer Commissioner is to create a neutral body to help resolve disputes in the agricultural sector. To that effect, the Tenant Farmer Commissioner is given significant powers in the Bill to create codes of practice and investigate breaches of those codes. It has been acknowledged in the Policy Memorandum of the Bill that poor landlord and tenant farmer relationships are a recurrent issue in this sector. It is suggested that there should be at least two Tenant Farmer Commissioners, with different backgrounds, to allow a broader range of experience to feed into formulating the codes of practice. The Land Commissioners could also be provided with an oversight function to resolve any
deadlock between the Tenant Farmer Commissioners. These changes would minimise the risk of the Tenant Farmer Commissioner becoming a decisive figure who is viewed as favouring either the landlord or tenant side. Due to their importance, the Scottish Parliament should have the ability to scrutinise the proposed codes of practice and therefore the codes should be laid down by means of statutory instrument.

The investigatory role of the Tenant Farming Commissioner is problematic. He/she will be acting as an adjudicator in a dispute between two parties where the consequences could be significant because the report of the Tenant Farming Commissioner must be taken into in any subsequent relevant Land Court proceedings. There is a lack of procedural structure provided by the Bill to regulate the Tenant Farming Commissioner’s investigation into alleged breaches of the codes. Greater procedural transparency is required in the process of this adjudication to ensure fairness and therefore detailed procedural rules regulating the conduct of the Tenant Farming Commissioner should be provided in the Bill.

It is not stated that the Tenant Farming Commissioner in exercising his/her functions must have regard to the Plan and the Statement. This should be made explicit.

**Part 3 – Information about Control of Land**

Section 35(1) as drafted is incredibly broad. There is little guidance provided on what the regulations to be produced by the Scottish Ministers will contain. While transparency and publicity are fundamental principles of property law in Scotland, they also need to be balanced against the privacy and data protection concerns of landowners. To pursue this balance, the Bill should at least specify the purpose of or justification for accessing the information. The Policy Memorandum mentions the justification of where lack of information is shown to be having an adverse effect but this is not mentioned in the Bill.

**Part 4 – Engaging Communities in Decisions Relating to Land**

I agree with the concept of engaging communities in decisions relating to land that affect them. However, this part is again broadly drafted and there is little indication on what the guidance issued under these provisions will contain. Key concepts such as “sustainable development”, “persons with control over land” and “community engagement” are not defined and it is not outlined what the consequences would be for landowners if they do not follow the guidance. Further detail on some of these points is given in the Policy Memorandum but provisions regarding these issues should be provided in the Bill itself.

**Part 5 – Right to Buy Land to Further Sustainable Development**

I am not opposed to the introduction of a general community right to buy. However, I think that doing so requires careful consideration and balancing of various interests. Such a right should be the result of the implementation of a policy of social justice whilst also being a coherent concept that is consistent with the existing principles of property law.
The provisions allowing for nomination of a third party to hold the land undermine the otherwise strict requirements for community bodies specified in section 42. There are no requirements specified for the third party which raises the question of why there are restrictive rules on what qualifies as a community body for the purpose of Part 5.

The definition of community by reference to postcode in section 42(9) is unsatisfactory. I understand that this definition of community is consistent with that used in the Land Reform (Scotland) Act 2003 and the Community Empowerment (Scotland) Act 2015. However, postcode units are primarily designed to facilitate the delivery of mail, they do not, and cannot, have regard to the diverse factors such as shared culture, common language or interest in a particular cause, which could determine whether a group of people constitute a community.

To avoid the unnecessary proliferation of registers, it is possible to include information regarding an application under Part 5 of this Bill in the existing Register of Community Interests in Land created under the Land Reform (Scotland) Act 2003 rather than creating a new register as proposed by section 44.

Regarding the concept of the right to buy, the drafting of section 45 suggests that every natural and legal person holds the right to buy under Part 5 but it may only be exercised if certain conditions are satisfied. Rather than this strange construction which results in a large number of persons holding the right but never being able to exercise it, it is possible to draft the section so that the Scottish Ministers grant the right to buy to a community body following a successful application under Part 5.

A notable omission in section 47 is the definition of “sustainable development”. This concept is fundamental to the Bill as a whole, should be defined and such definition should be subject to detailed scrutiny by the Scottish Parliament. An important principle of property law in Scotland is certainty. To introduce a general right to buy without sufficiently specifying the grounds on which it could be exercised would undermine this principle.

In terms of a potential definition of sustainable development, tensions exist between the competing policies of social justice, economic development and environmental protection. The term has the potential to have regard to each of these policy areas. The aims of the competing policies need to be recognised and discussed to inform land reform. For the sake of transparency and certainty, it would be helpful to outline the mechanisms by which the conflicts between these policy areas would be resolved when they arise in relation to the right to buy.

In order to allow consistency with other areas of law and policy, when assessing applications under Part 5, regard could be had to various planning documents such as the National Planning Framework, Scottish Planning Policy and local development plans which also contain reference to the concept of sustainable development. However, this is not to say that just because a development has planning permission that a community should be unable to apply to buy the land under Part 5 as this would be a simple way to block any community applications. It could also be specified that the Statement should be taken into account by the Scottish Ministers when they are assessing applications.
There is no explanation in section 47 of the difference between public interest and community benefit. Indeed the factors listed in section 47(10) to determine what constitutes significant benefit or significant harm to the community seem to be equally relevant to public interest and community benefit as well as sustainable development.

The requirements of section 47(2) are relevantly robust which helps to ensure that the provisions on the right to buy are compliant with the terms of the protection of property rights in Article 1, Protocol 1 of the European Convention of Human Rights.

Section 49 gives little guidance to the Scottish Ministers about how they should adjudicate between two applications for the same piece of land. There should be some specification as to the factors to be taken into account in deciding which application is to proceed. Section 49(1) also states that only one community body can apply under Part 5 but section 49(2) goes on to consider when two bodies have applied. This is inconsistent and the logic of this section would be assisted if the right to buy was granted by the Scottish Ministers as mentioned above.

Finally, it is not specified what will happen if a community body buys land but proceeds to use that land in a way which is contrary to, or does not fulfil, the terms of its application. Although section 50 states that the Scottish Ministers can make their consent subject to conditions, there is no further detail on what these conditions would be, the mechanisms employed to ensure compliance with these conditions or the consequences of breach. Clarifying these issues would provide reassurance that the right to buy would fulfil its objective of the use of land in Scotland delivering greater public benefit.