The Committee will meet at 10.00 am in Aros Centre, Portree, Skye.

1. **Land Reform (Scotland) Bill** The Committee will take evidence on Parts 1-5, and Part 7, of the Bill at Stage 1 from—

   Malcolm Combe, Lecturer in Law, School of Law, University of Aberdeen;

   Andy Wightman, independent researcher;

   Steven Thomson, Senior Agricultural Economist, Land Economy, Environment and Society Research Group, Scotland's Rural College;

   Dr. Jill Robbie, Lecturer in Private Law, University of Glasgow;

   and then from—

   Sarah-Jane Laing, Director of Policy and Parliamentary Affairs, Scottish Land and Estates;

   Peter Peacock, Policy Director, Community Land Scotland;

   Archie Rintoul, Senior Vice Chair, Royal Institution of Chartered Surveyors;

   Andrew McComnick, Vice President, National Farmers’ Union Scotland;

   Pete Ritchie, Executive Director, Nourish Scotland;

   Andrew Prendergast, Development Officer, Plunkett Foundation Scotland;

   John King, Business Development Director, Registers of Scotland;

   Fiona Mandeville, Chair, Scottish Crofting Federation;
and then from—

Rachel Bromby, Managing Agent, Cawdor Estate;

John Glen, Chief Executive, Buccleuch Estates.

Lynn Tullis

Clerk to the Rural Affairs, Climate Change and Environment Committee

Room T3.40

The Scottish Parliament

Edinburgh

Tel: 0131 348 5240

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Land Reform (Scotland) Bill

Introduction

1. The Land Reform (Scotland) Bill\(^1\) was introduced in the Scottish Parliament on 22 June 2015. The Bill was accompanied by Explanatory Notes\(^2\), which include a Financial Memorandum; a Policy Memorandum\(^3\); and a Delegated Powers Memorandum\(^4\).

2. Subsequently, the Scottish Government published an Equality Impact Assessment\(^5\) and a Business and Regulatory Impact Assessment\(^6\) of the Bill.

3. Under Rule 9.6 of \textit{Standing Orders}, the Parliamentary Bureau referred the Bill to the Rural Affairs, Climate Change and Environment (RACCE) Committee to consider and report on the general principles.

4. No secondary committee was appointed to scrutinise the Bill. However, the Finance Committee will consider the Financial Memorandum to the Bill, and the Delegated Powers and Law Reform (DPLR) Committee will consider the Delegated Powers Memorandum, and both committees will subsequently report their views to the RACCE Committee.

Background to the Bill


6. The consultation was predominantly a result of the work of the Land Reform Review Group, which was established by the Scottish Government in 2012 and chaired by Dr Alison Elliot, with a remit to review the need for land reform in Scotland to report to the Scottish Government. The final report of the Group was published on 23 May 2014 and contained 62 recommendations. These recommendations were included as an annexe to the land reform consultation, and were updated to state what action the Scottish Government was taking on each of them.

7. However, the consultation also sought views on the recommendations made by the Scottish Government’s Agricultural Holdings Legislation Review, a process which had been running concurrently with the review of land reform issues throughout this session of Parliament. The Agricultural Holdings Legislation Review, which was

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\(^1\) \textit{Land Reform (Scotland) Bill}, as introduced (SP Bill 76, Session 4 (2015)).
\(^2\) \textit{Land Reform (Scotland) Bill}, Explanatory Notes (and other accompanying documents) (SP Bill 76-EN, Session 4 (2015)).
\(^3\) \textit{Land Reform (Scotland) Bill}, Policy Memorandum (SP Bill 76-PM, Session 4 (2015)).
\(^4\) \textit{Land Reform (Scotland) Bill}, Delegated Powers Memorandum (SP Bill 76-DPM, Session 4 (2015)).
\(^5\) \textit{Land Reform (Scotland) Bill}, Equality Impact Assessment.
\(^6\) \textit{Land Reform (Scotland) Bill}, Business and Regulatory Impact Assessment.
\(^7\) Scottish Government (2014). \textit{A Consultation on the Future of Land Reform in Scotland} Available at: \text{http://www.gov.scot/Publications/2014/12/9659}.
The consultation made 11 main proposals for issues to include in a land reform bill, which were—

- establishing a Scottish Land Reform Commission;
- limiting the legal entities that can own land in Scotland;
- improving information on land, its value and ownership;
- introducing a sustainable development test for land governance;
- establishing a more proactive role for public sector land management;
- introducing a duty of community engagement on charitable trustees when taking decisions on land management;
- removing the exemption of from business rates for shooting and deerstalking;
- providing a new legal definition of common good land and addressing other common good issues;
- implementing some of the recommendations of the Scottish Government’s Agricultural Holdings Legislation Review;
- introducing further deer management measures; and
- clarifying the core paths planning process in relation to public access.

The Scottish Government received 1269 responses in total, of which permission was given to publish 1076. On 15 May 2015 the Scottish Government published an analysis of the consultation responses.

Contents of the Bill

The Bill takes forward many (but not all) of the proposals in the consultation, together with several recommendations made by the Agricultural Holdings Legislation Review group. The issues outlined in the consultation but not being taken forward as suggested are—

- establishing a more proactive role for public sector land management;
- introducing a duty of community engagement on charitable trustees when taking decisions on land management;
- providing a new legal definition of common good land; and
- limiting the legal entities that can own land in Scotland.

12. The Policy Memorandum which accompanies the Bill states that the policy objective of the Bill is to—

- “Ensure the development of an effective system of land governance and ongoing commitment to land reform in Scotland;

- Address barriers to furthering sustainable development in relation to land and improve the transparency and accountability of land ownership; and

- Demonstrate commitment to effectively manage land and rights in land for the common good, through modernising and improving specific aspects of land ownership and rights over land.”

13. The Bill is presented in 11 parts (104 sections in total) and a schedule as follows—

- **Part 1** requires the Scottish Ministers to publish a **statement of their objectives for land reform**;

- **Part 2** establishes the **Scottish Land Commission**, and the Land Commissioners are intended to have a role in helping Ministers to shape those objectives by gathering evidence, by reviewing the effectiveness of law and policies on land and by making recommendations. One of the members of the Land Commission, the Tenant Farming Commissioner, is to have a particular role in relation to agricultural holdings, which includes collaborating with the Land Commissioners in the exercise of their functions;

- **Part 3** contains two regulation-making powers aimed at **obtaining information about proprietors of land** and about persons who, while not technically proprietors, have effective control over land;

- **Part 4** would place a duty on the Scottish Ministers to **publish guidance to landowners and others** (whilst having regard to the desire to further sustainable development) on **engaging with communities affected by decisions taken in relation to land**;

- **Part 5** proposes a **right to buy land to further sustainable development** for certain community bodies or a nominated third party purchaser (if significant harm/benefit can be identified which would be resolved by the transfer of ownership), and is modelled closely on the community right to buy in the Land Reform (Scotland) Act 2003 (as well as the similar provisions in the Community Empowerment Bill);

- **Part 6** would remove the current exemption from non-domestic rates for shootings and deer forests;

- **Part 7** clarifies that where a **local authority wants to appropriate common good land for a different use to the use originally intended**, and it is
unclear that the authority has power to do so, the authority may seek court approval;

- **Part 8** would expand the functions of existing *deer* panels to include engagement with local communities; introduce a power for SNH to require the production of a deer management plans if appropriate deer management is not taking place in an area; and increase the penalties for failure to comply with a Section 8 deer control scheme;

- **Part 9** makes minor changes to the provisions in the Land Reform (Scotland) Act 2003 on *core paths plans* around reviewing and amending such plans and on service of court applications;

- **Part 10** reforms the law on *agricultural holdings* and is divided into a number of chapters—
  
  - **Chapter 1** - sets up a new form of agricultural tenancy (the Modern Limited Duration Tenancy);
  - **Chapter 2** - removes the requirement for a tenant to register an interest in acquiring the holding under Part 2 of the Agricultural Holdings (Scotland) Act 2003;
  - **Chapter 3** - introduces a new power for the Land Court to order the sale of the holding to the tenant or on the open market where the landlord repeatedly breaches his obligations;
  - **Chapter 4** - changes the procedure for rent reviews and the test to be applied in determining the rent of an agricultural holding so it is based on the productive capacity of a holding;
  - **Chapter 5** - expands the class of persons to whom leases of agricultural holdings can be assigned or bequeathed or transferred to on intestacy (where no valid will is present), as well as streamlining the processes around the landlord’s objection to a new successor tenant;
  - **Chapter 6** - provides for a 2 year amnesty period for tenants to seek approval of certain improvements to agricultural holdings so that compensation can be claimed in relation to them at the end of the tenancy; and,
  - **Chapter 7** - introduces a new procedure for tenants to object to any improvement proposed by the landlords if the tenant feels it is not reasonable for the productivity of the holding.

- **Part 11** contains final general and miscellaneous provisions such as—
  
  - general interpretations;
  - details of subordinate legislation (and whether by affirmative or negative procedure);
  - ancillary provision;
  - Crown application;
  - minor and consequential modifications;
  - commencement; and
- the short title.

- The Schedule contains minor and consequential amendments to other agricultural holdings legislation.

**RACCE Committee scrutiny**

14. The Committee agreed its approach to consideration of the Bill at Stage 1 at its meetings on 17 and 24 June 2015. A call for views on the general principles of the Bill was subsequently issued and closed on Friday 14 August 2015. The Committee publicised its call for views via its webpage\(^\text{11}\) and Twitter account, and also by a video\(^\text{12}\) which was hosted on You Tube.

15. The Committee has received 186 written responses\(^\text{13}\) to its call for views to date.

16. The Scottish Parliament Information Centre (SPICe) has published a briefing\(^\text{14}\) on the Bill.

17. The Committee began its oral evidence-taking on the Bill on 2 September when it took evidence on all aspects of the Bill from Scottish Government officials.

18. The Committee will continue its evidence-taking on the Bill as follows—

   **Monday 7 September (in Portree, Skye from 10am):** land reform (parts 1-5, and part 7 of the Bill);

   **Wednesday 16 September:** agricultural holdings (part 10 of the Bill)

   **Wednesday 30 September:** sporting rates (part 6 of the Bill); deer management; (part 8 of the Bill);

   **Wednesday 7 October:** human rights issues theme (all aspects of the Bill); and

   **Monday 2 November (in Dumfries from 5pm):** Cabinet Secretary for Rural Affairs, Food and Environment; and the Minister for Environment, Land Reform and Climate Change (all aspects of the Bill).

19. Any written evidence submitted by those giving evidence to the Committee in Skye on 7 September is attached at the Annexe.

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\(^{11}\) Rural Affairs, Climate Change and Environment Committee. Land Reform (Scotland) Bill - call for views.

\(^{12}\) Rural Affairs, Climate Change and Environment Committee. Land Reform (Scotland) Bill - call for views video.

\(^{13}\) Rural Affairs, Climate Change and Environment Committee. Land Reform (Scotland) Bill – written submissions.

20. The Committee will also take part in a series of fact-finding and engagement visits and events as follows—

- **Monday 14 September**: Fife (Falkland and Kinghorn);
- **Sunday 20-Monday 21 September**: Islay and Jura;
- **Monday 28 September**: the Scottish Borders (Roxburghe); and
- **Tuesday 6 October**: offices of the Registers of Scotland in Edinburgh.

21. If you would like to attend the meeting in Skye then please contact the Parliament for a free ticket by visiting [scottish.parliament.uk/tickets-for-committees](http://scottish.parliament.uk/tickets-for-committees); or telephone 0131 348 5200.

22. The Committee plans to first consider its draft Stage 1 report on the Bill at its meeting on 18 November 2015 and will report to the Parliament in early-mid December 2015 in advance of the Stage 1 debate.

*Clerks/SPICe*
*Rural Affairs, Climate Change and Environment Committee*
Annexe

Written submission from Plunkett Foundation

Plunkett Foundation

The Plunkett Foundation helps communities to take control of their challenges and overcome them together. We support people, predominantly in rural areas, to set up and run life-changing community co-operatives; enterprises that are owned and run democratically by large numbers of people in their community. They help people to tackle a range of issues, from social isolation and loneliness to poverty, and come in many forms including shops, cafes, pubs and land-based initiatives, and everything in between.

The Plunkett Foundation is grateful for this opportunity to provide written evidence to the RACCE Committee on the Scottish Government’s Land Reform (Scotland) Bill. Since the scope of the consultation is wide-ranging, we comment only on those sections which relate to our area of interest and experience; namely Parts 1 – 5.

General Comments

Plunkett Foundation welcomes the Scottish Government’s renewed commitment to continuing the impetus of land reform in Scotland, as an on-going process which encompasses urban, rural, terrestrial and marine environments. We believe that land ownership and access to land can play a crucial role in unlocking communities’ ability to find solutions to their own challenges. We endorse the Scottish Government’s own aspiration for land reform as outlined in the LRRG remit, namely that it should;

- Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland;

- Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development;

- Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland.
Part 1: Land Rights and Responsibilities Statement

Plunkett Foundation notes the Bill’s provision for Scottish Ministers to publish a statement about their objectives for land reform, and set it before the Scottish Parliament. Although the Bill gives no details on what form this ‘statement’ may take, we note that the Scottish Government did previously draft *Land Rights in 21st Century Scotland* comprising a vision and seven guiding principles, which might yet comprise a first step towards a more comprehensive land policy for Scotland as recommended by the LRRG. The current proposal for a statement of land rights and responsibilities could be a step in the right direction if it were to encompass land governance, policy and reform. However, if it is merely a statement of Ministers’ objectives for land reform, it will be of far less value. Having the statement debated by and endorsed by the Scottish Parliament would go some way to giving it the legal force and political commitment that a national land policy might have had.

Part 2: The Scottish Land Commission

We support the Bill’s provision for the establishment of a Scottish Land Commission including a Tenant Farming Commissioner, and we are broadly content with the range of powers, functions and working practices set out in the Bill. We do however note that there is no specific requirement for the Commission to consult widely on its work programme or strategic plan, which is surprising given the repeated emphasis on transparency that has emerged from the consultation process. We would expect the Bill to give some direction or guidance on how the Land Commission is expected to consult before determining its strategic plan or work programme.

We welcome the inclusion of the specific role for a Tenant Farming Commissioner, given the well-documented and complex issues surrounding this sector, and its importance to Scotland’s farming industry and the communities which depend upon it.

Part 3: Information about the control of land

Plunkett Foundation supports any provisions designed to increase transparency about the ownership and control of land, as this can contribute to better informed public debate on land reform, and more effective public policy.

Part 4: Engaging communities in decisions relating to land

Plunkett Foundation welcomes the Bill’s provisions to require Scottish Ministers to issue guidance about engaging communities in decisions about land which may affect them, and to consult widely before issuing such guidance, in the interests of furthering the sustainable development of such land. We believe that communities directly affected by the development of land are often the ones best placed to judge what constitutes truly sustainable development – socially and environmentally as well as economically.
Part 5: Right to Buy in furtherance of sustainable development

We welcome the proposal for a new Right to Buy linked to sustainable development, which is a significant new power to intervene in the land market in the public interest. Hitherto there has been a gap between the existing community right to buy (now extended through the Community Empowerment Bill), and the CPO powers open to certain public bodies, but rarely used. We support the proposal to allow communities to nominate a third party to take ownership of the land in question, as a novel and potentially useful way of unlocking investment in the public interest, where otherwise nothing might happen. We observe however that the extent to which communities are able to make use of these provisions, like those in the CEB, will depend upon their capacity to implement the complex and exacting procedures contained within the Bill, and the extent to which they are encouraged and supported to do so.

Written submission from Community Land Scotland

High Level Summary

CLS supports -

- the general principles of the Bill
- the need for the Scottish Government to publish a Statement of Land Rights and Responsibilities
- the creation of a Land Commission to make land reform a continuous process of change
- greater measures to make who owns Scotland more transparent
- the additional Community Right to Buy to further sustainable development
- the provision for community body nomination of a ‘third party’ to own land
- the re-introduction of ‘sporting rates’
- new powers to SNH to have deer numbers and impacts managed more effectively
- improved rights for tenant farmers

The Bill needs to be stronger by –

- requiring Ministers to have regard to the progressive realisation of human rights, and the delivery of greater diversity in land ownership in making the Statement
- toughening up the requirements for information from proprietors on who owns and benefits from ownership of Scotland’s land, by requiring certain information to be disclosed
• giving further powers to Scottish Ministers to intervene in land ownership, in the public interest, to further sustainable development, and support the creation of new settlements

• toughening up the requirement for land owners to engage with communities, and to include seeking the consent to local land management decisions

Introduction

CLS welcomes the introduction of the Bill and many of its specific provisions and while supporting its general principles believes the Bill needs to, and can be, significantly improved and strengthened to achieve the policy objectives outlined in the Policy Memorandum.

The Policy Memorandum and other accompanying documents to the Bill helpfully set out the policy objectives of the Scottish Government for land reform. These include important references to:

• promoting fairness, social justice, well-being and greater equality

• empowering greater numbers of people

• ensuring greater diversity of ownership and changing the patterns of land ownership

• achieving greater sustainable development

• managing land for the common good

• fairer and more equal access to land

• the progressive realisation of human rights of adequate standards of living, housing and certain rights to work

• more community self-reliance, and increasing economic independence

CLS would like to see more of the specifics of what is in the policy rationale finding a place within the provisions of the Bill itself.

This submission principally focusses on Parts 1 to 5 as being the Parts in which CLS has the greatest experience and insights.

Scope for improvement and strengthening of the Bill. In summary:

Part 1 – The Statement of Land Rights and Responsibilities

a) In making the Land Rights and Responsibilities Statement, Scottish Ministers should be under an obligation to consider the extent to which the Statement will further:

• The progressive realisation of human rights
• Sustainable development
• The achievement of equalities
• The achievement of a greater diversity in land ownership in Scotland, [and, potentially]
• The common good

These would not be the only considerations for Ministers, but the purpose of such changes would be to make clearer that the statement of land rights and responsibilities is about Ministers policy objectives, linking land policy to achieving wider public objectives, as clearly set out in the Policy Memorandum. In this context, perhaps the name chosen for the Statement could be improved?

A draft of what such a Statement could comprise was set out in the consultation, and the contents of which were generally welcomed. There would be no guarantee any future Statement would resemble what was initially suggested. The inclusion in the Bill of what is suggested above would help make clear certain core objectives of land reform policy, to guide the creation of the Statement.

b) It would be important to make explicit on the face of the Bill that the Statement was to be consulted on prior to it being laid before Parliament for approval.

c) A further strengthening would be to require that Scottish Ministers report to Parliament, at least every two years, with an assessment of the extent to which progress was being made against the objectives set out in the Statement.

d) It would further be worthy of consideration whether giving Scottish Ministers a power to make National Priorities in land reform, to be the subject of approval of Parliament, could add to the potential array of measures to drive progress during specific periods of time, in order to help to meet specific requirements of national policy.

Part 2 – The Land Commission

Name: CLS would prefer to see the Commission called the Land Reform Commission, as was proposed in the consultation paper. This would serve to make fundamentally clear that the Commission was concerned with the delivery, over time, of justified reform and change.

Chapter 1

Strategic Plan: A requirement on the Commission to consult on a draft of its Strategic Plan prior to submitting it to Ministers would be desirable. In this context the requirement for the first plan to be submitted within 6 months may be ambitious and act against full consultation.

Programme of work: A requirement to also consult on its “programme of work”.  

11
Membership: It will be important that the Commission, as appears intended, is to comprise people appointed on their individual merit and because of the particular skills they can bring. If, over time, the Commission is to recommend change in current land laws and policies, or the absence of such laws and policies, this is almost always going to be controversial and not likely to be achieved by full and wide consensus – land reform policy always holding the potential to change power relationships in society. As such, the Commission needs to be able to act independently of any established vested interests or the representatives of such interests, and should not seek to be representative of such interests in who is appointed.

Eligibility for appointment: CLS feel these could be strengthened by the addition of expertise or experience in questions of - human rights; equalities; community development.

Chapter 2 - Functions of Land Commissioners:

a) To make explicit that the functions include the impact and effectiveness of the lack of any policy or law, as well as extant policy and law. This may be implied, but it is important this is clear.\(^1\)(a)(b)

b) It may be advantageous to add a provision which would permit the Commission, if they thought it appropriate, to recommend (and potentially issue) any Codes of Practise or Guidance in respect of any matter in which they have an interest, or to assist in the creation of such by other parties.

c) It should be made clear the Commission should have regard to international land policy and international obligations potentially affecting land policy and practise, and thus incurring any expenditure on such would be within vires.

Part 3 – Information about the control of land

This part of the Bill is very weak compared to original consultation suggestions.

CLS would urge the RACCE Committee to closely scrutinise why it has not been felt possible to proceed with the original proposals regarding the requirement for an EU registered base for ownership of land in Scotland, in the hope there is scope to revisit this as still having potential within the Bill. A recent briefing by Andy Wightman rehearses many of the arguments ([http://www.andywightman.com/archives/4300](http://www.andywightman.com/archives/4300)), as did earlier evidence from Global Witness, and CLS commend these to the Committee.

Within the context of what is not proposed, it is welcome that Ministers may make regulations, but the extent to which those regulations could impose requirements on private organisations or individuals is not clear.

While it is recognised there may be considerable legal complexity around what it may be possible to deliver, the new powers given to the Keeper appear particularly weak. The power is, by regulation, to allow the keeper to “request” information relating to proprietors, etc. It is not clear that the request for such information
extends to the identification of those with beneficial interests. It would appear that any such "request" may be simply refused, without any repercussions. The term "request" should at the very least be changed to one which can require information, in order to strengthen the provision.

Even under what is proposed, where any proprietor refused a "request" there should be a requirement for this to be publicly reported by the Keeper to Parliament annually.

The Bill could usefully strengthen any deficiency in current powers available to the Keeper to have information for their records updated when change in what is first lodged. For example, when an SPV is used to own land and the shareholdings and controlling interests potentially change in the SPV, these would not be recorded on the face of the register currently.

Part 4 – Engaging Communities in decisions relating to land

CLS is lukewarm about these proposals as a means of genuinely empowering communities. The provision as it stands is weak as it would be all too easy for owners to engage and then ignore, yet meet the requirement.

a) The provision could be strengthened by making explicit that the Guidance Scottish Ministers must issue, is about "engaging and seeking the agreement of communities for decisions relating to land".

b) Further, the proposed requirements on Ministers to have regard to sustainable development in preparing the guidance would be strengthened by also having regard to the progressive realisation of human rights, and of equalities.

c) A requirement for Ministers to consult in the preparation of such guidance, and to periodically report to Parliament on the utilisation of such Guidance would be further important strengthening of the Bill.

Part 5 – The Right to Buy Land To Further Sustainable Development

While some may regard sustainable development as a vague term, CLS does not share that view and notes the Opinion of the Lord President [Lord Gill] in the cause of Pairc Crofters Ltd and Pairc Renewables Ltd against the Scottish Ministers, 19 December 2012, in a challenge based on an argument that the term was so vague as to be in effect "not law". He concluded:

"In my view the term sustainable development is in common parlance in matters relating to the use and development of land. It is an expression that would have been readily understood by the legislators, the Ministers and the Land Court. …"

More generally, the Bill could strengthen and improve these welcome proposals by:

a. adding a power for Ministers to change by regulations the requirements for certain information on the location and boundaries of land, including land to which tenants might have an interest. A similar provision was agreed in the
passage of the recent Community Empowerment Bill and if experience shows the requirement is too onerous. (45 (6)(b))

b. modifying the requirement for the community body to show the transfer of the land is “the only practicable” way to achieve the significant benefit envisaged, as it may be impossible to ever show something was “the only” way. This could be modified to make it the “only or most practicable way”, or some such formulation. (47(2) (c) (ii))

c. modifying the requirement to show that not granting consent to the transfer of land is likely to result in significant harm to that community. This is a very high hurdle and may be difficult to ever fully show. This could be improved by further qualifying the requirement to be about “harm to the sustainable development potential of the community”, or some such formulation.

d. ensuring Ministers, in considering any application, should be required to have regard to the International Covenant on Economic, Social and Cultural Rights, as is now required for any CRtB applications under Parts 2, 3 and 3A of the Land Reform Act (as amended by the Community Empowerment Act 2015).

e. amending the provision which would block the transfer where the owner is “prevented from selling the land”, which as drafted, may be an invitation for owners to create Trust structures which on the face of it prevent the Trust disposing of the land at any time, as an avoidance mechanism. (47(f)(i))(see further note on the National Trust for Scotland, Annex 1)

f. adding to the provision that requires Ministers to consider the likely effect of granting consent to a transfer, to include consideration of the progressive realisation of human rights, and of furthering the achievement of equalities. (47(10))

Third Party Owner Nomination

This is a welcome and innovative provision for a third party to be nominated by the applicant community body to own the land, particularly as this would potentially enable housing associations or others with particular expertise to be partners. The Bill sets out a number of important safeguards to protect the public interest in the use of this provision and it will be important these safeguards are maintained through the passage of the Bill and strengthened in appropriate ways if necessary.

Part 10 – Agricultural Holdings

CLS does not intend to comment in detail on the proposals which are generally welcome in so far as they go toward further strengthening tenants’ rights.

Significant omission in the provisions and thinking of the Bill.
The Bill provides for only a community body to act when it is believed there is a need to further sustainable development. There are no powers for a Minister to act directly.

It is clear to CLS there may be land in which the community may not be in a position to act for a variety of sound reasons, or there will be land in which there is a public interest, but where there is not a community to act (the community having been cleared from the land, for example).

It must surely be right that Scottish Ministers, accountable to Parliament, should be able to ask the question of whether the ownership of any land holding, or the scale of any ownership of land by any one person, is in the public interest. As matters stand it is only upon application by a community that this matter can be considered by Ministers.

So, if, for example, Ministers referred the question of whether any particular ownership of land was in the public interest to the Land Commission and the Commission said it was in their view not in the public interest, then Ministers, as matters stand and are proposed, would have no powers to do anything by way of, for example, recommending the sale of that land or any part of it.

Similarly, if Ministers were to be persuaded that land was required for the creation of new crofts or for settlement or re-settlement of land, would any extant powers be sufficient to purchase that land for that purpose? As proposed, Ministers would have to depend on a community right to buy application to consider this and the possibility of even this is potentially compromised by the specific current requirements for showing a connection to the land. (47(g))

Provisions to permit Ministers to act on recommendations of the Commission, or otherwise, when they thought it was in the public interest to do so, with appropriate appeals mechanisms, would significantly improve the Bill and answer some of the criticism that it does not go far enough in being able to intervene in land questions if they considered the public interest warranted this.

Further, within the Land Reform Review Group report it was suggested a power be given to local authorities, to approve a “compulsory sale order” in circumstances where it was regarded as necessary to see a change of ownership because of blight or stagnation of the use of the land in question, as an additional option to CPO or community purchase. Such a power would be entirely consistent with the objectives of this Bill and should be considered at this time too.

Conclusion

This evidence paper signals strong support for the general principles of the Bill and many of its detailed provisions, but also illustrates where the Bill could be improved and strengthened.

CLS will continue to work on the ideas contained in this short evidence paper with a view to suggesting more precise changes to the Bill for Stage 2, although it is hoped the Scottish Government will also consider the potential improvements identified with
a view to developing them into Government amendments, something that will be greatly strengthened by the support of the RACCE Committee to any of the strengthening ideas.

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Annex 1

The National Trust for Scotland generally decline to sell land on the basis that they hold the land “inalienably”, although they are understood to be reviewing their policy in this regard. It is not clear if the draft provision is intended to cover this situation. However, even if it is, it is not clear this is appropriate.

The equality impact assessment statement for the Bill rightly says:

“4.18 How land is used in a local area can have significant impacts on local communities. Where communities have been unable to influence development decisions and cannot access land for their own development, this can have detrimental impacts.

Examples show that this can result in:

a) a lack of affordable housing or secure tenancies;

b) a lack of land for agricultural businesses;

c) a lack of community business space or access to property for business opportunities;

d) blight caused by declining appearance of buildings or land, or poor performance of local village/town centres; and 12

e) a lack of land for local food growing, recreation and access developments, or other amenities such as parks or cemeteries.

4.19 This Bill, therefore, proposes the production of guidance to increase engagement between communities and land owners as well as a right to buy land to further sustainable development…..”

This statement would imply that any community denied ownership of land under the proposals in the Bill, because the land was unable to be sold, would enjoy less rights than other communities, and less equality with them. This is another reason for being clear of the implications of (47(f)(i)).

Written submission from Nourish Scotland

About Nourish
1. Nourish Scotland is a not-for-profit organisation campaigning for a fairer food system in Scotland. Nourish facilitates this change through engaging with organisations, community initiatives, politicians and officials, producers and individuals. We work to influence policies from local to EU level and provide a
platform for networking and sharing best practice. We make sure that food is brought to the fore in public debates of various kinds, making the link between a localised food system and its positive outcomes for economic development, community cohesion, job creation, skills development, public health, environmental stewardship and justice.

2. Nourish is pleased to be able to provide written evidence to the RACCE Committee on the Scottish Government’s Land Reform (Scotland) Bill. The consultation is wideranging in its scope and Nourish only comments here on the sections on which we feel we have interest or expertise.

General Comments
3. Nourish welcomes the renewed political attention given to the Land Reform agenda. The Land Reform Review Group’s report provided a balanced, nuanced set of recommendations on how to move the land reform process forward. Nourish welcomes the Scottish Government’s positive and constructive response to that report along with the recognition that land reform is an on-going process and not a one-off event.

4. Nourish is submitting this evidence because of the fundamental role that we believe land ownership and access to land plays in achieving food security and food sovereignty for all in Scotland. Nourish supports land reform measures that will ensure that:
   - Scotland’s land is owned and managed in a way that can deliver public benefits;
   - the system of land ownership is made more transparent;
   - people who want to access land to produce food sustainably can do so;
   - a wider range of communities is able to take advantage of the opportunities available as a result of current and future land reform programmes.

Land Rights and Responsibilities
5. Nourish welcomes the Scottish Government’s draft Land Rights and Responsibilities statement. Nourish endorses the principles as set out during the previous Scottish Government consultation. We are particularly pleased to see such strong emphasis placed on the public benefits to be derived from land ownership and usage and the recognition of the importance of locating land reform within a human rights based framework. We also support the consideration of rural and urban, terrestrial and marine issues being brought into a single overarching context. As Andy Wightman suggests, there may also be a case for using the statement to reference our international obligations on land management and reform and thus to anchor the statement within a higher-level framework. These may include, for example, the voluntary guidelines on the responsible governance of tenure’ developed by the Committee on World Food Security and/or other UN charters and guidelines.

6. We share the Scottish Government’s desire to see a transparent system of land ownership that contributes to building a fairer society in Scotland and promotes environmental sustainability, economic prosperity and social justice. Such a system would also include a more diverse pattern of land ownership, greater community
involvement in the management and ownership of our land based assets, and better consultation and engagement with communities who are affected by land management decisions.

7. Nourish supports the vision and principles outlined in the consultation paper and agrees that articulating these principles is a helpful step forward. We support the requirement in the Bill for these principles to be published and to be reviewed every 5 years. This goes some way towards meeting previous criticisms that the principles lack legal force and could be abandoned by successive administrations. It might also be useful to consider whether the statement should be specifically referenced within the structure of the National Performance Framework and the hierarchy of the strategic policy aims of the Scottish Government. In addition we believe there is merit in considering Andy Wightman’s suggestion that the statement must be laid before, debated and/or endorsed by the Parliament in order to provide it with more weight or political commitment.

Scottish Land Commission
8. The history of land reform in Scotland is complex and fragmented. Rights and responsibilities are set out in numerous statutes ranging from Crofting, Agricultural Holdings, Land Reform, Feudal Tenure and Land Registration through to Nature Conservation. Moving beyond the legal provisions there is an equally complex array of policy areas, from Common Agricultural Policy (CAP) funding, to land use and taxation, planning, housing, energy and environment. Maintaining any form of coherence across these policy and legislative provisions will continue to be challenging and prone to unintended consequences where changes to one area have knock on effects on another.

9. Given this, Nourish supports the Bill’s proposal to establish a Scottish Land Commission, incorporating 5 Land Commissioners and a Tenant Farming Commissioner. Nourish believes that the decision to structure these bodies as one Commission, with the status of an NDPB, is a sensible one. It should enable the role and work of the body to have sufficient independence, weight and authority, without creating unnecessary bureaucracy.

10. Nourish is broadly content with the range of powers, functions and working practices set out in the Bill in relation to the Land Commission. However, given the emphasis on transparency that has emerged during previous consultation processes we are surprised that there are few, if any, requirements for the Commission to consult more widely before determining its work programme or strategic plan. While this may happen as a matter of practice, we would prefer to see this set out on the face of the Bill. We do not offer comment on the Tenant Farming Commissioner provisions, other than noting the importance of these provisions, and the office, being able to maintain the confidence of both landlords and tenants.

Transparency of Land Ownership
11. Nourish supports any steps to improve the availability of better information on the ownership and control of Scottish land. This should provide us with a better understanding of the patterns of land ownership, use and control and thus contribute both to more informed public debate and to better policy being developed, based on
higher quality, more reliable information. While we support the measures set out in Part 3 of this Bill, they do not remove the need for a comprehensive, free-to-access system which can provide accurate, up to date information on land ownership and control. We believe that there is a strong public interest in setting up and maintaining such a system as the current system remains fragmented and sometimes expensive to access.

12. Nourish is also disappointed that the Scottish Government has shelved previous proposals that it should be incompetent in law for anyone wishing to own land in Scotland via a corporate entity to do so via an entity that is not registered in an EU member state. Whilst we accept that this proposal will be challenging to implement we do not believe that it is impossible. Indeed the LRRG gave very careful consideration to the issue before recommending this action. Given that other jurisdictions in the UK have announced plans to publish details of offshore corporate ownership of land, it is important that Scotland does not lag further behind in the reform of land ownership and the transparency of the information available. We would welcome further parliamentary scrutiny and debate on this issue.

Sustainable development and land use
13. In his January 2015 briefing paper, Andy Wightman points out that a human rights approach is now widely entrenched within policy and practice on sustainable development but it is yet to feature much in the debate on land reform. Drawing on comments from Professor Alan Miller, he suggests that, given our obligations under the International Covenant on Economic, Social and Cultural Rights, we should treat land as a national asset to be used for the progressive realisation of sustainable development.

14. The Bill appears to develop this theme, providing that Scottish Ministers may set out guidance about engaging communities in land management decisions that affect them. This as a useful step forward, not least in beginning to define some of the responsibilities that might attach to land owners under the statement of statement of land rights and responsibilities.

15. In preparing this guidance, Scottish Ministers are to have regard to the desirability of furthering the achievement of sustainable development in relation to land. While we believe the intention of section 37 is broadly positive, the wording seems inelegant, passive and subject to confusion over its actual meaning. We would encourage the parliamentary drafters to consider whether a more active and straightforward statement could be developed within the constraints of statutory language.

16. The Bill creates a new right for certain community bodies to buy certain classes of land in order to further sustainable development. This is dependent on the identification of significant harm if the land is not transferred together with significant benefit if the land is transferred. In principle, Nourish supports this power. The proposal creates tests which are not easy to meet; they are likely to be used as a power of last resort. However, a power of intervention, in the public interest, is a useful sanction that would give stimulus to landowners to work together with
communities for a mutually beneficial outcome. It would help balance the power disparity between local communities and landowners and provide greater leverage.

17. Nourish is aware that this new proposed right to buy will sit alongside another newly created right to buy, enacted as part of the Community Empowerment Act. This latter power applies to land that is abandoned, neglected or being managed in ways that cause harm to the environmental wellbeing of a community. While sustainable development considerations also apply, these (as yet untested) provisions are not the same as those in the Bill. Careful consideration will need to be given to the “fit” between these provisions, and guidance will have to make it clear what powers are appropriate to use in various circumstances.

18. Any restriction on the exercise of private property rights must demonstrate a clear public interest or benefit. However, this issue is not just about the rights of landowners to enjoy their property but also about our right to receive public benefit from land. Nourish believes that all land owners and managers – be they public, private, charitable or community – should be responsible for the delivery of public goods that the community around them reasonably needs, and that they should safeguard the capacity of their land to continue delivering public benefit into the future. The right of public benefit from all land should be made explicit in the statement of land rights and responsibilities. Landowners and managers must be held accountable for delivering, through their actions, an appropriate supply of public goods – which include biodiversity, ecosystem services, access and recreation, employment and sustainably produced food.

19. Fundamentally, Nourish would argue that there should be no reward where there have been no positive steps taken to manage assets for the public good. This particularly applies where public monies are being paid to landowners or managers. We therefore welcome the statement in the policy memorandum that the Scottish Government is considering the ways in which a failure to engage with communities on land-based decisions might be taken into account in future decisions on the award of discretionary grants in relation to land.

Support for access to land and encouraging more diverse land ownership

20. We welcome the provisions in part 6 of the Bill which repeal the current exclusions for rates liabilities for shooting and deer forests from 2017 onwards. We especially welcome the use of these additional funds to top-up the Scottish Land Fund and provide further funds for community buy-outs. This is essential if the “1 million acres in community ownership” target is to be achieved. In addition to funding, communities will continue to require access to specialist support and advice on putting together appropriate applications and bids.

21. We agree with Andy Wightman that would be value in examining the whole issue of land and rateable values, including the issue of whether agricultural land should be subject to rates. Nourish generally supports efforts to encourage community ownership and management of land. Large estates and corporate entities that own large tracts of land dominate much of the supply of land in Scotland. This makes it difficult for community groups or individuals to access land for activities such as smaller scale farming and food production. A more realistic valuation of land, and
more affordable rents for tenants, would assist the provision of land for affordable food production.

22. Demand for affordable local food in Scotland far exceeds current supply, and there are significant economic as well as social and environmental gains to be made from developing this market. Research shows that, other things being equal, small farms are more productive per hectare and create more employment per hectare than larger holdings. Short supply chains - underpinned by cooperative marketing and distribution - offer gains in terms of freshness, waste reduction, and less requirement for processing, packaging, chilling and transport. They also have a larger local economic multiplier, with more money being recycled locally. A vibrant local food economy therefore delivers many public benefits. Access to suitable land is one of the most significant barriers to developing vibrant local food economies. It is especially a barrier for young people, in particular women, from non-farming backgrounds.

23. The Scottish farming sector is dominated by the older generation and would benefit from the introduction of new entrants. Nourish therefore wants to see new parcels of land made available for food production. There are various ways in which this can be done. In urban areas, this might take the form of creating sufficient new allotments and community growing sites to meet demand. The Community Empowerment (Scotland) Act takes some steps towards this objective. In rural areas, consideration could also be given to extending crofting tenure and availability of crofts to other parts of Scotland.

24. Nourish wants to see the creation of new investment models to encourage new entrants into farming and new patterns of more diverse land ownership. Some models exist elsewhere in Europe. For example, Terre de Liens is a civil society organisation created in France in 2003 to assist small farmers in securing agricultural land. Terre de Liens supports collective ownership schemes, and has also directly acquired farmland, which it holds in perpetuity for the sake of current and future generations. Terre de Liens' land is let to farmers who undertake to farm organically or biodynamically or who are otherwise committed to respecting the environment. To acquire land, Terre de Liens has created two financial tools: la Foncière, a solidarity investment company; and le Fonds, an Endowment Trust which collects investment or donations in cash or kind. Through these vehicles, Terre de Liens now owns 71 farm estates, amounting to 1900 hectares, where 220 adults live and/or work. This has been made possible by the support of 1200 members and about 5000 (mostly individual) shareholders. A similar model could make significant progress towards freeing land from the commodity market so that it can be preserved in sustainable agricultural production here.

25. In tandem with providing initial funding for new land purchases, and encouraging the breakup of large parcels of land into smaller blocks, subject to more diverse ownership, we should be shifting as much CAP money as possible away from historic channels which benefit larger, wealthier farms and towards rural development, encouraging rural enterprise and repopulation and supporting new entrants.
Conclusion
26. Nourish welcomes the proposals set out in the Bill. In particular, we welcome a principled approach to land management and control being developed, based on the use of land to further sustainable development for the collective public good. We urge cross-party support for any measures which will:

- Contribute towards placing better information about Scotland’s landholdings in the public domain,
- Encourage public, private, charitable and community groups to work together to manage our land for the collective good;
- Encourage a greater diversity of land ownership and greater opportunities for new entrants to farming and new rural development businesses and social enterprises;
- Balance the interests of private landowners with those of the communities that surround the land in the interests of a fairer, more socially just Scotland.

Written submission from Dr Jill Robbie, University of Glasgow

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.

Written submission from Andy Wightman

INTRODUCTION
I welcome the publication of the Land Reform (Scotland) Bill. It represents an important and meaningful stage toward the realisation of comprehensive land reform. I offer the following thoughts in relation to each Part of the Bill. My evidence is restricted to broad observations on the principles and objectives of the Bill.

PART 1 LAND RIGHTS AND RESPONSIBILITIES STATEMENT

I welcome the proposal to have a statutory statement of land rights and responsibilities. However, it is important that such a Statement has a clear purpose.

The proposal derives from the Land Reform Review Group’s recommendation that “The Scottish Government should develop a National Land Policy for Scotland, taking full account of international experience and best practice.” (LRRG report pg.168). Such a National Land Policy exists in many countries and provides the framework within which land rights are defined, allocated and exercised together with the rights and responsibilities involved. In the context of evolving international standards in land governance (see, for example the UN’s Voluntary Guidelines on the Responsible Governance of Tenure1), National Land Policies are now being devised and implemented successfully in countries such as Kenya, Malawi and Bhutan2. Such jurisdictions are now some years ahead of Scotland in terms of providing a modern framework for Land Policy3. The proposal in the Bill, however, is merely for a statement of the “Scottish Ministers’ objectives for land reform” (section 1(2)). It may well be the case that a future Scottish Government has no objectives for land reform and thus the Statement will say nothing of any substance. There are three issues therefore.

1) Such a Statement should be more in line with the draft text contained in the December Consultation Paper, A Consultation on the Future of Land Reform in Scotland. It should be a statement of Land Rights and Responsibilities - a high-level set of principles that could underpin the development of a National Land Policy.

2) Such a Statement should be endorsed by the Scottish Parliament and not simply the Executive.

3) The Bill should contain commitment to the development of a National Land Policy None of these proposals prevents Scottish Ministers developing and publishing their own statement of land reform at any stage if they so wish.

1 See http://www.fao.org/docrep/016/i2801e/i2801e.pdf

2 See, for example National Land Policy of Bhutan


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PART 2 THE SCOTTISH LAND COMMISSION

I welcome the proposal to establish a Scottish Land Commission. In the past, important issues relating to land governance and land rights have often been neglected in policymaking.

One good example is the neglect and unsatisfactory legal framework surrounding common good land. In a report published in 2005, we highlighted the real issues arising across Scotland. Many of these issues remain unresolved. This topic would have been an ideal matter for the Scottish Land Commission to explore and advise upon. Had such a Commission been in existence we might be much further forward in modernising common good law.

My one key suggestion is that the Commission’s remit should be expanded to include a statutory duty to develop and draft a National Land Policy to be approved by Parliament.

This relates to points raised in relation to Part 1 above.

PART 3 INFORMATION ABOUT CONTROL OF LAND

In the December Consultation, the Scottish Government proposed that it should be incompetent in law for anyone wishing to own land in Scotland via a corporate entity (most typically a company) to do so via any such entity that was not registered in an EU member state. In other words, should anyone (literally anyone - Scot, a Peruvian or an Ethiopian) acquire land and seek to register their title in the Land Register in the name of a Bahamas company or a company in Grand Cayman, the Keeper of the Registers of Scotland would be legally bound to reject it. The person concerned would be required to resubmit the application in the name of a company that was registered in an EU member state. In light of ongoing concerns about money laundering, criminality and transparency (most recently highlighted by Prime Minister David Cameron and Transparency International) and in the context of commitments by EU member states to establish registers of beneficial ownership, this move was welcome and timely. By eliminating offshore tax havens from property ownership and insisting on EU incorporation, such landowners would then be legally accountable via Directors and would be required to submit publicly available Annual Returns and Accounts to the relevant Registry including details of the names of beneficial owners. This would represent a substantial step forward in international efforts to tackle the malign impact of secrecy jurisdictions and would set a leading example to the UK Government about how to tackle such impacts. In responses to the December consultation, 79% of respondents agreed with this proposal.

This proposal, however, has been dropped and does not appear in the Bill. What does appear is provision for Ministers to make regulations that would allow only those members of the public affected by land held in secrecy jurisdictions to request that information on beneficial ownership to be divulged. Such requests are to be made to the Keeper of the Registers of Scotland who, in turn, by Ministerial regulation, is given power to request
information from, for example, Hanky Panky Corporation in Road Town, Tortola, British Virgin Islands.

4 Common Good Land. A Review and Critique by Andy Wightman & James Perman.


The arguments advanced by Scottish Ministers as to why the original proposal has been abandoned in the Policy Memorandum (para, 128) are unconvincing. It suggests that barring offshore companies would still allow trusts to own land. That is true but if that is deemed a problem then that should be dealt with on its own merits. It has no bearing on the question of whether to bar corporate entities. I have seen no evidence of offshore trusts owning land in Scotland (plenty offshore trusts hold financial assets). All of the reported instances are of companies.

The argument about companies owned by companies is also specious. By insisting that the parent company is registered in the EU, the primary purpose of ensuring transparency and accountability is significantly enhanced through the public availability of identified persons (Directors) with legal responsibility, through the enhanced availability of information available via annual returns, and through the liability of EU registered companies to disclose beneficial ownership under EU law.

I submit to the Committee that the original proposals contained in the December 2014 Consultation be re-instated in the Bill. This proposal would be effective in preventing the future use of offshore tax havens as places to incorporate and register title to land in Scotland. It also aligns itself well with the proposed register of beneficial ownership contained within Part 7 of the Small Business, Enterprise and Employment Act 2015. If reinstated then all titles held by legal persons will be within the EU and all such corporate entities will be required to disclose their beneficial ownership in a register.

The provision will have to be compatible with EU law - most importantly the Treaty on the Functioning of the EU (TFEU), Article 26 of which provides for the internal market and free movement of goods and capital. Article 345, however makes clear that this in no way prejudices the rules in Member States governing the system of property ownership.

Furthermore there is no discrimination involved. Individuals from anywhere in the world are all free to buy land in Scotland. They simply need to register it either in their own name or in an incorporated body registered in any member state of the EU. Inward investors, for example, typically set up UK subsidiary companies to hold assets and contract within the UK.

The provision should also be made retrospective. This would involve existing companies (such as Hanky Panky Corporation registered in the British Virgin Islands) being obliged to transfer title to an EU registered company. On one reading of the situation, this is problematic and, indeed, that is the view taken by the Scottish
Government in the December consultation (para. 47). This view probably arises as a consequence of Article 1 Protocol 1 of the European Convention on Human Rights which provides that,

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*


Were this proposal to be applied retrospectively, it would require landowners who currently own land held by offshore entities to transfer ownership to a compliant entity such as the human beneficiary of Hanky Panky Corporation or an incorporated body registered within the EU. The ECHR obliges Governments to “secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.” Hanky Panky Corporation, it could be argued, is not within the jurisdiction of any contracting party to the ECHR and thus cannot argue any violation of convention rights.

But even if it was (because it has a registered interest in land in Scotland), such an obligation is arguably entirely consistent with the public interest provisions of the convention. Moreover, the beneficial owner would not be losing their beneficial ownership.

They would still enjoy possession of their land but they would now have to make a different arrangement with regard to holding title to the land. Their convention rights would not have been violated.

The use of offshore secrecy jurisdictions to hold title to land is now increasingly regarded as problematic in relation to transparency and tax avoidance and evasion. In a speech on 31 Oct 2013, the Prime Minister said that, “We need to know who really owns and controls our companies, not just who owns them legally, but who really benefits financially from their existence. For too long a small minority have hidden their business dealings behind a complicated web of shell companies, and this cloak of secrecy has fuelled all manners of questionable practice and downright illegality. This summer at the G8 we committed to do just that: to establish a central register of company beneficial ownership. And today I’m delighted to announce that not only is that register going to go ahead, but it’s also going to be open to the public.”

The Prime Minister has recently made further commitments to crack down on offshore secrecy jurisdictions and it seems odd that the Scottish Parliament should not do everything in its powers to assist this wider process.
The proposals in the Bill are, essentially meaningless. There is no means of verifying that the information on controlling interests to be provided is correct as secrecy jurisdictions refuse to reveal such information. For example, in recent correspondence with HM Governor of the British Virgin Islands, he confirmed that the only circumstances in which the BVI would co-operate in the investigation of the beneficial ownership of a BVI company is under the terms of the BVI Criminal Justice (International Co-operation) act 1993.9 Any investigation to satisfy Scottish authorities of the veracity of any answer to a request made under Part 3 of the Bill is constrained by the term of this Act. The simplest and most effective means of ensuring full transparency is to make it incompetent to record a title in such jurisdictions in the first instance.

7 See www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013

8 See http://www.theguardian.com/politics/2015/jul/28/david-cameron-fight-dirty-money-ukproperty-market-corruption


PART 4 ENGAGING COMMUNITIES IN DECISIONS RELATING TO LAND

I welcome this provision but consider that further thought should be given as to its status in relation to other elements of the Bill. For example, should a breach of the Guidance be a material consideration in Ministers’ decision to consent to the right-to-buy powers in Part 5.

PART 5 RIGHT TO BUY LAND TO FURTHER SUSTAINABLE DEVELOPMENT

This provision adds to an already growing list of right-to-buy powers available to communities across Scotland. These include the original community right-to-buy in the Land Reform (Scotland) Act 2003 and the more recent right-to-buy abandoned, neglected or detrimental land in Section 74 of the Community Empowerment (Scotland) Act 2015.

I welcome this new provision but have the following concerns.

1) The so-called empowerment of communities through the provision of statutory rights to intervene in the land market is contingent on a high degree of capacity in terms of organisation and commitment to see through a complex and potentially controversial process. The Land Reform Review Group suggested that communities should have a suite of community land rights that were co-ordinated and straightforward to understand and implement (see Figure 7 of LRRG Report, page 102). This is an aspiration that the Committee might reflect upon in order to provide greater clarity and cohesion to the exercise of what is now a complex legal landscape.
2) The tests set out in Section 47(2) appear to set the bar very high in terms of eligibility. In particular, the requirement in Section 2(d) that “not granting consent to the transfer of land is likely to result in significant harm to the community” will probably be extremely difficult to establish. Given that the right-to-buy being established here is, in effect, a power of compulsory purchase exercisable by a community body, it needs to meet strict criteria. But these criteria should be framed around necessity and opportunity rather than potential harm. The should be available in circumstances where all reasonable efforts to acquire land in the community have been exhausted.

3) The requirement in Section 44 for the Keeper to establish yet another Register (the Register of Land for Sustainable Development) to add to the Register of Community Interests in Land, the Register of Crofting Community Rights to Buy, and the Register of Community Interests in Abandoned, Neglected or Detrimental Land, reflects a cumbersome administrative framework. These Register all require to be searched and none have any connection with the Land Register. Furthermore, none of the Registers currently established are easily searchable via a map-based interface. There is scope to make these Registers more transparent and integrated with the Land Register and to make the registration of interests a legal interest to be entered in the Land Register.

4) In general I do not believe that decisions on whether such rights should be granted to community bodies should be matters for Scottish Ministers. These are local land matters and could quite competently and properly be determined by Local Authorities. I accept that there is precedent for such a centralised system of decision-making but know of no other example in Europe where such matters are determined by Government Ministers.

PART 6 ENTRY IN VALUATION ROLL OF SHOOTINGS AND DEER FORESTS

I welcome the repeal of the exemption granted to subjects that were formerly liable for non-domestic rates prior to the Local Government etc. (Scotland) Act 1994. The abolition of the rates on shootings and deer-forests attracted considerable criticism at the time from opposition parties and by the then Chairs of Scotland’s Rating Valuation Tribunals who, in a memorandum to the Secretary of State for Scotland, wrote, “Sporting estates like to describe themselves, when it suits them as being part of a sporting industry. In fact they are part of an inefficient trade which pays inadequate attention to marketing their product, largely because profit is not the prime objective. These sporting estates change hands for capital sums which far exceed their letting value and which are of no benefit to the area, and are often bought because there are tax advantages to the purchaser, not necessarily in the UK.”

Dismissing the argument that sporting estates provide employment and should therefore be freed of the rates burden, the chairmen’s report points out that, “...local staff are poorly paid, their wages bearing no relation to the capital invested in the purchase price, and it is not unusual to find a man responsible for an investment in millions being paid a basic agricultural wage. Many of the estates use short-term labour during the sporting season, leaving the taxpayer to pay their staff from the
dole for the rest of the year. Estates can in many cases be deliberately run at a loss, thereby reducing their owner’s tax liability to central funds elsewhere in the UK.”

In principle, there should be no exemptions from liability to pay some form of tax or rating on land but over the past 100 years, exemptions have been granted to, for example, agriculture, which have no rational basis and merely increase the burden of taxation on others. The inclusion of shootings and deer forests on the valuation roll should therefore be the beginning of a process of bringing all land back within the rating system. If certain properties are to be granted relief this should be on a discretionary and transparent basis with full justification.

The re-establishment of a local tax liability on land devoted to shooting and deer forests ends the indefensible abolition of this element of non-domestic rating by the Conservative Government in 1994. To most people, it might seem odd that, whilst the hair salon, village shop, pub and garage are subject to rating, deer forests and shootings pay nothing. To take one example, the Killilan deer forest near Kyle of Lochalsh is owned by Smec Properties Ltd., a company registered in Guernsey which, in turn, is owned by Sheik Mohammed bin Rashid al Maktoum, the King of Dubai and Prime Minister of the United Arab Emirates.

Killeen was included on the valuation roll in 1994 at a rateable value of £3500. By comparison, the local caravan site had a rateable value of £3100. Today, the caravan site has a rateable value of £26,250 and pays £12,127 per year in rates whilst one of the world’s richest men, whose land is held in a tax haven has (unlike the local caravan site) paid no local rates for twenty years on the land he uses for shooting.

One of the consequences of exemptions from land taxes is that they become capitalised into the price of land. This is what has happened in agriculture where the value of agricultural land far exceeds its earning capacity. These issues were explored in some depth in the Scottish Affairs Committee’s Inquiry into Land Reform in 2014-2015.

10 See http://www.andywightman.com/docs/herald_19940609.pdf

In November 2012, the Scottish Government launched a public consultation – Supporting Business:Promoting Growth - exploring how the non-domestic rating and valuation appeals systems can support businesses and sustainable economic growth and on how to improve transparency and streamline the operation of the rating system. Included in the paper was a commitment to “use the period until the next revaluation in 2017 to conduct a thorough and comprehensive review of the whole business rates system.” As far as I am aware this has not been carried out. I thus have two key issues with the Bill in relation to Part 6.

1) I am not convinced that simply re-setting the clock to 1994 and continuing with the same valuation methodology that was devised in the 19th century is appropriate. In 1854, when the rating system was introduced, many estates were occupied by sporting tenants who had long leases - often improving leases. Assessing the value based on the number of animals killed made sense as this reflected the rent paid by those who rented the land in order to kill them. This is seldom the situation today. An
alternative approach would be to take estates as a whole, assess the rental value of the land and levy rates at the same rate (47p) as all other non-domestic subjects. Such an approach would be simpler and more equitable. It would also (since the abolition of rates has been capitalised into land values) reduce the price of land which would make it more available to a wider range of people.

2) The re-introduction of rating for shootings and deer-forests begs the question why agriculture and the exemptions (such as vacant land) remain. In May 2014, in response to a recommendation from the Land Reform Review Group that this exemption should be abolished, the Scottish Government emphasised that they had no plans to do so. This is a question that Parliament might probe more closely.

PART 7 COMMON GOOD LAND

Part 7 of the Bill makes a very modest amendment to the Local Government (Scotland) Act 1973 to allow a local authority to apply to the courts if it wishes to appropriate inalienable common good land - in other words to use it for an alternative purpose but retain ownership of it. Currently, councils can seek such authority where they wish to dispose of land (i.e. sell it) but not where they wish merely to change its use.

The result of this has been that Councils are faced with a time-consuming and expensive process of promoting private legislation such as happened in the case of Portobello High School. The proposed amendment allows the courts to be the arbiter of any such plans in the event of either a disposal or an appropriation.

This is a very modest and welcome reform that remedies the illogical position that a Council can potentially obtain court approval to sell inalienable land but has no powers at all to do something less drastic in the form of appropriating for another use. Application to the courts for approval in such matters was introduced following the abolition of local government by the 1973 Act in order to provide for a judicial means of securing changes to the status of common good land. The fact that the legislation omitted to make any provision at all for the appropriation of inalienable common good land is regarded as an omission on behalf of Parliament at the time. The Bill remedies that defect.

The wider question of reform in the law governing the status, ownership and management of Scotland’s oldest form of community ownership of land remains unresolved. The Community Empowerment (Scotland) Act 2015 provides for a statutory register of common good land and consultation with communities over plans to sell but the underpinning legal framework remains archaic and complex. A fundamental review of this legal framework, however, is urgently needed.

PART 8-10

I have no comments on Parts 8-10 of the Bill.

OTHER MATTERS
The Bill provides a Parliamentary opportunity to implement some other statutory reforms related to land matters and I provide the following two suggestions.

**Repeal the Division of Commonties Act 1695**

This Act was enacted in the pre-democracy era to enable the landowners in a parish to appropriate a share of the common land of the parish. It was a Act that had dramatic and far-reaching consequences and was extremely effective in privatising Scotland’s common lands to the extent that little remains. However, some parcels of commonties do remain across Scotland. Given their historic, cultural and legal importance, it would be appropriate to repeal the Act that would still allow them to be divided.

**Protective Orders for Common Land**

Over the past decade I have uncovered many examples of surviving parcels of common land. The main threat to their continued existence is the use of a non domino dispositions on behalf of (usually) neighbouring landowners) to appropriate the land into their ownership. The local community are never aware of the appropriation since there is no obligation to advertise such claims.

The Scottish Government’s target to complete the Land Register within 10 years poses a heightened risk to surviving commons as it will be more likely that they are either intentionally or inadvertently included in applications to voluntarily register the large parcels of land in Scotland not currently on the Land Register. Again, local people will in complete ignorance of these claims as there is no obligation to advertise them to the public.

One useful reform would be to amend the Land Registration etc. (Scotland) Act 2012 to make provision for Protective Orders to be granted by the Keeper over land that does not have an identifiable owner and which appears to be a historic parcel of common land. Before any title could be registered by any party, the Keeper would be obliged to conduct a public consultation with the community affected to ascertain the true legal status of the land.

THANK YOU

Thank you for the opportunity to submit evidence.

Written Submission from Scottish Land and Estates

Executive Summary

In our evidence we have strongly opposed the reintroduction of sporting rates, the widening of succession and assignation for agricultural tenants and the right to buy land for sustainable development. We have pointed out that some of the provisions contained within the Bill lack any clear policy objective or evidential basis and have also underlined the significant erosion of property rights which would result from some of the legislative measures. We have also pointed out that it is unjust to place
a disproportionate burden on one section of society, namely private landowners, to deliver public interest aims.

We have however indicated that we support increased community engagement and increased transparency of ownership, as well as underlining our support for a vibrant agricultural tenanted sector. The main elements of our submission are as follows:

- We agree in principle with provisions relating to the publication of the Land Rights and Responsibilities Statement but have suggested that the content of the statement should be finalised during the passage of the Bill.

- We support the principle of establishing a Land Commission, but strongly suggest that at least 1 commissioner has practical land management experience.

- We support the proposals regarding access to information to improve transparency and accountability, noting that this aligns with our Landowners’ Commitment. We strongly support the requests being limited to legitimate and reasonable grounds.

- We support the community engagement provisions but have made a number of comments regarding proportionality, appropriateness and the need to ensure that support is provided.

- We do not agree with the provisions relating to the right to buy land to further sustainable development as we feel that no evidence has been provided for the need for such powers in addition to those which already exist or have been recently introduced in the Community Empowerment (Scotland) Act 2015.

- We strongly oppose the reintroduction of non domestic rates for shootings and deer forests for a myriad of reasons, including the fact that the claim that this is to ensure parity with other businesses is misleading as many sporting rights are not exercised on a commercial basis.

- We believe that the deer management section is largely unnecessary, and the increase in fine for failure to comply with a control scheme is unjustified and disproportionate.

- We support the proposed changes to access legislation.

- We are supportive of attempts to establish modern letting vehicles but view MLDTs as a missed opportunity.

- We are disappointed that the detail of conversion is left to regulations and not provided on the face of the Bill.

- We disagree with the proposal to allow all secure tenants to have a pre-emptive right by default; experience has shown that the requirement to register is useful for both parties.
• We can support the idea that there should be some sort of sanction on repeatedly failing landlords but believe that the draft proposals need to be revised.

• We accept the move towards a new approach to setting farm rents but have very significant concerns that the legislation is running ahead of the necessary modelling and testing that is required to establish the degree to which any new system actually works.

• We fundamentally oppose the proposals to widen the class of potential assignees or successors, coupled with a restriction in the landlord’s ability to object and the removal of the viable unit test. The extent of the proposed change is significant and will, we believe, represent a significant change in the landowner’s position and potentially infringe their property rights.

• We support the idea of an amnesty so that landlords and tenants can sort out any uncertainties over what will qualify as a tenant’s improvement that would potentially be eligible for compensation at any time.

Introduction and General Comments

Scottish Land & Estates is a member organisation that uniquely represents the interests of landowners and land-based businesses in rural Scotland. Our members make a substantial social, economic and environmental contribution to rural Scotland, and landowners and land-based businesses play an instrumental role in the delivery of key national and local government objectives for the benefit of the entire rural economy and the communities of which they are an integral part.

Landowners play a critical role in ensuring sustainable, healthy and empowered rural communities, providing housing, employment and a wide range of other public benefits. We believe much could be achieved by utilising existing structures and stimulating partnership working rather than simply considering land reform as way of transferring ownership of property. Our organisation enthusiastically supports a range of landownership and management types to deliver a myriad of economic, social and environmental benefits, and believes that private ownership has a key role to play alongside the other diverse ownership and management structures which already exist in Scotland.

Confidence in land as an investment requires a stable political environment and anything which impacts upon the fragility of that confidence has the potential to put off investors, whether local or from abroad. The consequent economic impacts are unpredictable, and we would counsel the effects of societal and attitudinal change are given proper time and consideration before further radical changes are introduced.

We welcome the opportunity to comment on the principles and objectives of the Bill.

Scottish Land & Estates has the following general comments to make on the Bill:
Due to the extent of the Agricultural Holdings provisions contained within the Bill, we would suggest that to provide parity with other legislation and to improve ease of future reference the Bill title should be changed to Land Reform and Agricultural Holdings Bill.

We welcome the recognition in the policy memorandum of the significant benefits already being delivered by those who own and manage land in Scotland.

We believe that the Bill includes some far reaching and fundamental changes to land ownership and governance in Scotland. Whilst we support some of those proposed, we do believe that there are some which would not deliver the aims of the Bill, and also feel that impact of certain measures has not been fully assessed. This is epitomised by the comments in the Financial Memorandum in relation to sporting rates where an admittance of the lack of detailed analysis of costs and of revenue is made.

We would suggest that a disproportionate burden is being placed upon certain private landowners to deliver what has been deemed to be in the public interest. This is particularly true for the suggested intervention measures to address sustainable development and the significant widening of succession and assignation of agricultural tenancies coupled with a restriction in the landlord’s ability to object.

The policy memorandum for the Bill rightly refers to the wide range of other legislative and policy measures being taken forward to deliver land reform objectives. However, we do not believe that the cumulative impact of these changes which include fisheries review, changes to private rented sector regime, review of CPO, changes to the planning system etc etc have been fully assessed.

A number of measures contained within the Community Empowerment (Scotland) Act 2015 will also assist in delivering the aims of the Land Reform Bill, most notably the powers for communities to buy land which is deemed to be abandoned, neglected or causing significant harm to the environmental wellbeing to the community. We believe that the guidance for these provisions should be developed prior to the end of Stage 1 of the Land Reform Bill to ensure that any considerations of the Part 5 provisions are considered in the context of the development of this guidance.

As well as suggesting that the Land Reform Bill is not viewed in isolation, we would also ask that our comments on the Bill are not viewed in isolation either. These comments contained within our written evidence build on those we have made during the land reform review, agricultural holdings review and various land reform related consultations and discussions.

Although we welcome the Scottish Government’s consultation on a vision for agriculture, we remain of the view that the call from SRUC which outlines a clear overall vision for rural Scotland in its totality should be heeded.

The Scottish Government routinely makes the comment that good landowners or landlords have nothing to fear from land reform. However, a number of these
measures will impact detrimentally on owners regardless of how well they manage their land or tenancies.

**Land Governance (Parts 1 and 2)**

**Part 1 Land Rights & Responsibilities statement**

Scottish Land & Estates agrees in principle with having a Land Rights and Responsibilities Statement (LRRS). The content of the statement is of the utmost importance and we suggest that the statement has to clearly set out what success looks like. This is critical if we are to review progress against the land reform objectives. As the statement will provide clarity on the Scottish Government's objectives for land reform we would suggest that the detail of the statement should form part of the Bill discussions. To fully understand if the measures being suggested will deliver the Scottish Government's land reform objectives these objectives should be clearly articulated prior to the finalisation of the legislation.

We welcome the fact that consultation on the LRRS will take place but would contend that significant consultation on the content took place as part of the pre Bill consultation and therefore suggest that the first LRR statement could be finalised during the passage of the Bill.

The LRRS must be balanced, so as not to place an unfair burden on one group of society and to ensure that both rights and responsibilities for all are included within the statement. Whilst the statement will be broad, the terminology used must be clear and meaningful.

We agree with the suggested 5 year review period, but would also point out that the guiding principles of the statement should have longevity to ensure stability and allow businesses and communities to make long term plans within the land rights and responsibilities framework.

We would like to underline that the statement should not be viewed in isolation, it must complement or align with strategic documents such as the Land Use Strategy and National Planning Framework. It should also play a role in pulling together disparate land use related policies and outcomes, for example the National Performance Framework has 15 national outcomes, one of which seeks to achieve ‘strong, resilient and supportive communities, where people take responsibility for their own actions and how they affect others’. Thus the value of the LRRS would be increased through pulling all of these disparate outcomes together into a more joined up framework.

The LRRS must also provide an opportunity for communities to set their own priorities and objectives – it cannot be a centralised dictat. In addition, we would hope that the LRRS clearly recognises that community ownership is one of the means of delivering sustainable land use rather than an end in itself.
Part 2 The Scottish Land Commission

Scottish Land & Estates is not in general a promoter of the establishment of further public bodies, but supports the principle of establishing a Land Commission along the lines set out in the Bill.

We believe that the Commission should have clear, specific, measurable and realistic objectives so that success can be measured and monitored. The appointment process for Commissioners is essential to the success of the organisation and to meeting the Scottish Government’s land reform objectives. Therefore, we suggest that land management experience should be required for at least one of the Commissioners. We believe that practitioner as well as public policy/academic knowledge is critical in the development and monitoring of effective land law and policy. In addition, the Commission must have the power to challenge Scottish Government, providing a real land use/land reform checks and balance function.

We support the inclusion of land use in the functions of the Commission as we have long contended that land reform should not focus solely on land ownership. We would suggest that there should be explicit mention of the Land Use Strategy as well as the LRRS in relation to the things that the Commission should take cognisance of.

We would like clarity on the scope of the Commission’s work. Will it focus on devolved issues or also consider matters reserved to Westminster?

From the financial memorandum and BRIA it would appear that the Commission is to be a fairly substantial body, employing 18 FTE staff. As the work plan for the Commission has still to be established we would be keen to know the basis for this resource requirement, which appears excessive. We would also like further information on the relationship between the Commission and the Scottish Government’s Land Reform Team and Community Land Team – both of which perform a very valuable function. We would like reassurance that the Commission would not simply involve a wholesale transfer of these civil servants to the new body.

With regard to the Tenant Farming Commissioner (TFC), the role as stated would appear to be a sensible approach. Scottish Land & Estates is currently working with the Interim Tenant Farming Adviser and other industry bodies to develop guidance on a range of agricultural holdings issues, which are likely to form the basis of the codes that the TFC will lay before Parliament.

We believe that the powers/functions of the TFC as drafted are appropriate and will have a significant impact on addressing the small number of disputes that exist in the sector as well as driving improvements in practice. We therefore see no requirement for them to be extended further. Further clarity on the interaction between the TFC and the Land Court would be welcomed.

Part 3 Transparency of Landownership in Scotland

Section 35 – Right of Access to Information on Persons in Control of Land
Scottish Land & Estates agrees with the proposals outlined within this section of the Bill, and would underline that they align with the openness principle of our landowners’ commitment. We particularly welcome the certainty provided in relation to the circumstances when the request can be made, which ensures that the powers cannot be used for vexatious or nefarious reasons.

We believe that the examples given in para 111 of the policy memorandum provide a clear indication of the type of situations under which a request can be made.

The provisions in this Bill should not be viewed in isolation but should be viewed in the context of the land registration work being undertaken; actions being taken at UK and EU level re transparency and accountability; and also voluntary initiatives such as the Cairngorms Estate Statements, which Scottish Land & Estates plans to roll out across its membership. An example of this statement is provided as Appendix 1.

We do have a number of specific comments and queries on the provisions contained within Section 35.

- The definition of control to be contained with the regulations – the policy memorandum appears to have a misinformed view of Trust law, particularly in relation to beneficial ownership. The policy memorandum refers to the right to obtain information about individuals that have a controlling interest, or are in some other way involved in making decisions about the management of the land. Thus it would appear that control is being used in a wide rather than legal definition.

- The explanatory notes refer to requesting information on certain proprietors of land – i.e. the owner or holder of the property. The different descriptions as to whom the provisions would cover create some confusion and we would suggest that this should be clarified on the face of the Bill, or through draft regulations being published during the Stage 1 consideration of the Bill.

In addition, Scottish Land & Estates has a number of specific operational questions regarding the provisions: How would multiple requests be dealt with? What can the person who requests information do with it once they have it? Can it then be put in the public domain?

**Section 36: Power of the Keeper to request information relating to proprietors of land.**

Scottish Land & Estates supports this provision but would reiterate comments made above regarding the controlling interest.

**Furthering the Sustainable Development of Land (Parts 4 and 5)**

We have a few general comments to make in relation to Parts 4 & 5 of the Bill:

With regard to para 158 of the policy memorandum. We feel that this should refer to all land managers rather just than landowners as some of the land use decision making which affects communities is made by the occupier or tenant rather than the
landowner. In addition, as stated in the actual legislation the guidance to engage will apply to owners, tenants and occupiers and this should be clear within the policy memorandum.

Para 159 of the policy memorandum refers to powers being particularly useful in situations where the decisions taken by the landowner are not open to public scrutiny or public interest test. Firstly, this should refer to landmanagers to reflect the actual engagement provisions contained within the Bill, and secondly it would be helpful if the Scottish Government could provide examples of the situations referred to.

Para 162 of the policy memorandum states that landowners have to recognise that they have a responsibility to the communities that live and work in and around their land – we would contend that this responsibility is already recognised and evidenced on a daily basis across Scotland. Our helping it happen campaign has showcased only the tip of the iceberg in terms of demonstrating how this responsibility works in practice.

Para 162 also makes the comment that ‘there is a strong argument that the larger a land holding the greater that responsibility’. However, this is not strictly true – scale and influence are not inextricably linked. As we have underlined on many occasions a small farmer who owns all the potential development sites surrounding an East Lothian village may have a greater influence on his local community than someone who owns 10,000 acres of remote and sparsely populated moorland – why should the latter have a greater responsibility to their community than the former.

However, there is clear evidence that Scotland’s largest landowners or landowners who own a high percentage of land in a particular geographical area such as an island, have a very strong ethos of stewardship.

A number of barriers to rural development have continually been identified, and this is acknowledged within the policy memorandum. However, there is limited evidence to suggest that these other barriers to sustainable development are being adequately addressed. If this is the case then the ability of businesses and communities to progress sustainable development is severely restricted. There are a myriad of different factors which can act as barriers to sustainable development – ownership being only one of these. We would suggest that the Scottish Government focus on ownership has 2 implications – firstly it gives the incorrect message that change of ownership is THE route to overcoming sustainable development barriers; and it also means that funding and other resources are focused on ownership change rather than looking at other issues which are likely to have a greater impact on rural sustainable development such as infrastructure, planning, funding, and capacity.

Part 4 – Engaging communities in decisions relating to land

There are clear and tangible benefits of effective engagement for landowners, businesses and communities.

Scottish Land & Estates’ Landowners’ Commitment includes the following principles of good land management:
- Provide the wider estate community with an opportunity to contribute to relevant decision making
- Communicate estate plans with those who are affected by them
- Work with the community where appropriate to assist in the delivery of its social, economic and environmental aspirations

We believe that these align with the approach being suggested by the Scottish Government and welcome the publication of guidance to assist the engagement process. We welcome the fact that it applies to occupiers and tenants as well as owners – this inclusion recognises that those involved in land management all have a responsibility to engage with the wider community, not just owner.

We believe that the guidance has to be clear as to what is required and when. Proportionality is a key element of any engagement process. The engagement process should not be too onerous for either the land manager or the community.

It is imperative that engagement is not viewed as co decision making or formal consultation and it is critical that any voluntary guidance is not viewed as a replacement for formal engagement required through the planning system.

We believe that the development of the guidance should build on work carried out as part of the Perth College Sustainable Estates Project, as well reflecting the National Standards for Community Engagement.

Scottish Land & Estates has undertaken some work on the development and delivery of a Community Engagement Toolkit for members and would ask that the Scottish Government provides resources to support owners, tenants and occupiers in developing skills and capacity in community engagement.

Engagement is of course a 2 way process and support should continue to be given to communities to assist them in engaging. We would suggest that the focus should shift from support to communities wishing to progress community ownership to cover the many communities who want to work alongside private landowners to deliver public benefits. We do not feel that this group is sufficiently catered for at present – with resources being directed at community ownership feasibility.

Communities, as well as landowners, need to undertake a change of approach in relation to engagement. As stated in ‘working together for sustainable estate communities’ (an output from Sustainable Estates for the 21st Century) communities need to ‘identify their needs and priorities and engage with estate representatives. This may require overcoming prejudices and embracing involvement with other partners.’ We often hear claims that a landowner is unwilling to do something when in fact no dialogue has taken place and the unwillingness is perceived rather than real.

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

Scottish Land & Estates does not support this aspect of the Bill.
We cannot ascertain the need for these powers in addition to those contained within the Community Empowerment (Scotland) Act 2015 and the CPO powers which are already in place. During the passage of the Community Empowerment legislation it was stated that it was ‘the Scottish Government’s view that, through a combination of the broad dictionary definition of ‘abandoned’ and ‘neglected’, together with the requirement for Ministers to have regard to the matters set out in regulations made under section 97C(3) of the new Part 3A, the correct balance is struck between the need to provide communities with considerable scope to acquire land which is a barrier to sustainable development, whilst respecting the rights of land owners, giving them certainty as to whether their land is likely to be regarded as “eligible land” for the purposes of Part 3A.’ Thus significant powers have only in the last few months been provided for communities – surely the operation of these should be considered prior to the introduction of any further powers?

Also during the passage of the Community Empowerment Bill, the Minister for land reform stated that certainty regarding scope of the powers and what land it would apply to was critical. This was given as a reason as to why the neglected and abandoned land provisions were not extended to include ‘in need of sustainable development’. We believe that this principle should also be followed for any provisions introduced through the Land Reform Bill, and believe that as drafted the provisions provide neither certainty nor clarity.

The policy memorandum refers to the powers being particularly useful in situations where the decisions taken by the landowner are not open to public scrutiny or public interest test. Scottish Land & Estates would welcome examples of such decisions to further understand the context in which these comments are made.

These powers would appear to apply to land which is occupied and properly tended and managed, which is clearly at odds with the Scottish Government’s assertions that ‘good landowners have nothing to fear from the Land Reform Bill’. Whilst Scottish Land & Estates can accept that powers may be required to bring neglected and abandoned land into productive use, we do not agree with the need to create a power for communities to make a request to forcibly transfer land which is being sustainably used at present – ie productive farmland being transferred to deliver a community tourism project or allotments. We believe that the powers as drafted would allow for this to take place.

We have also previously been assured that these powers would not allow for cherry picking but can see no details within the Bill which would prevent this happening.

We are heartened by the inclusion of robust tests which have to be met, however we believe that the wording of the tests does not adequately clarify which land could be affected by the use of these powers. All parties – communities who wish to make requests and the landowners who would be affected - should be clear as to which land and properties would fall within the scope of the provisions.

We are concerned that differentiation is made between a home which is owned by the inhabitant and someone’s home which is rented. As drafted at present excluded land includes land on which there is an individual’s home, except where the home is occupied under a tenancy. We would question if this is equitable.
No mention is made of the need for Scottish Ministers in considering an application for community benefit to have regard to the damage or harm to the owners of the land in question by its enforced sale. People should not assume that this power would be principally used to transfer land from large landowners to communities – it will affect all landowners of whatever size across Scotland. If you are a small farmer with a holding on the edge of a village and the request is made to transfer your most productive field to the community for housing, or the owner of 2 holiday cottages which provide the bulk of your income but are required for affordable housing, it does not seem equitable that the transfer of land is considered in terms of significant benefit or harm for the community but the significant harm to the individual’s wider livelihood is not a material consideration.

As a result of the omission of the consideration of the impact on the owner, as well as other factors, we do not agree with the assertions made in relation to ECHR contained within para 201 of the policy memorandum.

It cannot simply be assumed that giving an individual the current market value for their land is sufficient to ensure that the individual does not bear an ‘individual and excessive burden’ in comparison to the anticipated community development benefits from a compulsory purchase of property.

Thus we would suggest that a need for Scottish Ministers to have regard to the effect of the transfer of the land on the individual should be contained within the primary legislation.

Finally with regard to the winding up of any Community Body post purchase, we note that the Bill contains the same provisions as the Land Reform (Scotland) Act 2003, namely that surplus assets must be passed to either another Community Body, or to the Scottish Ministers or to such a charity as the Scottish Ministers may direct. We would question if this is workable in circumstances where a third party purchase partner is involved, and would also question whether or not it is equitable to allow for the transfer of the land to a charity but not to a locally based private landowner.

**Part 6 Entry in valuation roll of shootings and deer forests.**

Scottish Land & Estates believes that sporting rates should not be reintroduced. We take this position for several reasons:

1. There is no clear statement of the policy objective of the proposal, with the Policy Memorandum simply stating that the main perceived benefit—to the respondents to the Scottish Government consultation on the proposal—was that it would ensure parity and fairness with other rural businesses. This ignores the fact that sporting rights are only rarely exercised as businesses and that similar land-based businesses continue to be exempt. We therefore challenge the policy basis for this provision.

2. The Scottish Government has itself recently undertaken a public consultation on non-domestic rating and valuation appeals systems and concluded that "all current exemptions provided, including to agriculture, should be retained". These exemptions include the exemption introduced in 1994 for sporting rates on
shootings. This matter has therefore only recently been considered and dismissed by the Scottish Government.

3. The proposal ignores the reasons that the exemption was introduced in the first place (which were on the grounds of cost-effectiveness and practicality).

4. The Scottish Government has failed to undertake an economic impact assessment and therefore cannot show that the reintroduction would raise funds or that it would not have a serious detrimental impact on rural businesses and land management. It also cannot show that the effects of the proposals would not disadvantage some sectors of the population disproportionately.

5. The proposal completely fails to recognise that sporting rights per se are not in fact a business. In some situations, the sporting rights may be exercised as a business, but in the vast majority of cases, the rights are occupied by individuals or groups, at substantial personal cost, for their own recreation or purely for management purposes.

6. If sporting rights are exercised as a business, the income from that business will already be subject to normal business taxation. Rates will be offset against profit and therefore tax take could actually decline as a result. The suggested ‘income’ from reintroducing rates will partly be offset by loss of tax revenue and much of the rest will be soaked up in costs of administration and the loss of jobs etc.

7. For all subjects where the sporting rights are not exercised as a business, this produces the entirely illogical and potentially unlawful situation whereby business rates are being levied on subjects which are not in fact businesses.

8. Since the valuation roll entry would relate to the shooting rights, whether used or not, those people not utilising those rights would still be liable to business rates, which seems to us to be unfair on those people.

9. We believe that the proposal will actually undermine the achievement of the Scottish Government’s own objectives of sustainable economic growth and sustainable land management. In particular, we believe that there would be a negative impact on rural jobs, tourism and land management:

A loss of rural jobs

We believe that if these proposals are enacted this additional tax burden could result in the loss of sporting enterprises. This would mean the loss of rural jobs, such as gamekeepers, but it would also undoubtedly place a financial strain on the many downstream businesses supported by sporting enterprises such as game dealers and processors and those in the hospitality sector.

The land reform consultation responses stated that some people believed initial job losses would be replaced through diversification. However, in preparation for this evidence Scottish Land & Estates surveyed a proportion of its membership on sporting rights (153 responses covering over 1.2 million acres were analysed) and we found that most of the high sporting ground owners have already diversified as
much as the land will allow and further opportunities are simply not available. 51% of Scotland is of the poorest quality (as determined by Macaulay land classification for agriculture) much of which is peatland (45% of Scotland) and would therefore not support or be appropriate for further afforestation. The opportunities for land uses are therefore restricted. Our members are already using this marginal land for renewable energy, agriculture, encouragement of access, conservation, forestry, tourism activities, conservation of designated areas, and peatland conservation. The additional job opportunities are limited and so the loss of jobs associated with sporting activity would be significant, especially in remote rural areas. Our survey shows the average cost of keepers and beaters wages on in hand sporting was £53,860. Almost all of this already cascades down into the local rural economy.

Impact on tourism

Shooting and stalking in Scotland attracts international and national tourists with the PACEC survey for the Scottish Country Sports Tourism Group estimating that shooting and stalking accounted for 280,000 nights and expenditure of £69 million in 2012/13 for overnight visitors, excluding spend by local participants. Shooting and stalking seasons, where applicable, are outwith the summer peak season for Scottish tourists and so shooting and stalking allows the tourist season to be extended and reduces the seasonality of many rural businesses.

There are three primary potential impacts on tourism:

- A reintroduction of rates would push up the cost of accessing sporting activity, restricting access, making it less available to most and only available to those with more disposable income (which is not the case at the moment, with a variety of opportunities available at varying costs).

- Given that there is a competitive market for shooting and stalking, a price differential with England where sporting rates would not be imposed risks encouraging people to stay/travel south of the border for more affordable sport.

- The Scottish Country Sports Tourism Group has carried out significant work with estates and farmers to increase the range of sporting tourism available. We believe that it could be the more affordable and accessible sporting tourism which would be most heavily impacted by the reintroduction due to its marginal financial return.

Impact on land management and conservation

There are several current land management and conservation issues, such as sustainable deer management and sustainable moorland management, where the government, agencies, land managers and wider stakeholders are working together to make progress. In these situations there are different ways of helping everyone move in the right direction, including regulation, incentivisation, and education/collaboration. Scottish Land & Estates would argue that incentivisation is a productive way forward because it pulls people in the direction that society wants to
The proposal to reintroduce sporting rates provides exactly the opposite signal; it potentially imposes greater cost and would seriously impact on beneficial land management.

Our survey found that 91% of sporting enterprises made a loss, with the average cost per acre being £10.72. This is mirrored by the National Forest Estates, where deer management comes at a net cost of £17 per acre (Deer Management on the National Forest Estate, Current Practice and Future Directions 2014 - 2017).

This sort of loss will most likely be offset by other land uses (such as farming and forestry or energy production) and highlights the importance of diversified and integrated estate management. In some cases this demonstrates inward investment which his supporting jobs and management, but the important point with regard to land management and conservation is the number of public benefits which flow from the burden of these costs such as habitat management, legal pest control and fire risk management. The BASC Value of Shooting Survey (2014) puts the economic value of conservation work undertaken by shoot providers at £35 million.

The imposition of even greater cost puts the delivery of this immense and free public benefit at substantial risk. If sporting rights were to be made subject to non-domestic rates, all of this free public benefit is strongly disincentivised and would be reduced to an extent where pest species numbers would not be controlled properly, habitats such as heather would be degraded and lost, species such as hen harriers and waders (which we have a high-profile international obligation to protect) would decline further, designated areas would fail to meet their international objectives and responsibilities, and fire risks increase dramatically. This would achieve the opposite of what respondents to the consultation response would like to see happen. We want to see positive management incentivised.

In summary, we cannot support the reintroduction of a sporting rate tax and believe it is unfair to single out one of the three main rural land uses of sporting, agriculture and forestry without a clear view of how it is justified, how it will be applied and what consequences it may have. We have seen no evidence that reintroduction of sporting rate will achieve economic growth and we are concerned it may actually decrease investment and employment and have a detrimental impact on conservation efforts while raising no net funds.

Should the principle of removing the exemption for shootings and deer forests be supported at stage 1 by Parliament, then Scottish Land & Estates, would stress that:

- Farmers and landowners who have diversified into non-agricultural businesses, which are already rated, could potentially be penalised as small business relief depends on the total rateable value of a farm.

- If the government wants to ensure that positive land management continues and is not disincentivised by the removal of the exemption, consideration should be given to allowing a continued exemption for those that can demonstrate that they adhere to good practice such as through involvement in a recognised accreditation scheme such as Wildlife Estates Scotland.
• Landowners have a responsibility for the welfare and environment of wild deer. The majority of Scotland is now covered by around 45 deer management groups (DMG) plus 10 Lowland Deer Groups (LDGs). While some of the necessary deer management cull as set out in the plan is shot by paying guest, all deer are taken for management purposes. Deer which are culled in line with a DMG plan or forestry plan should be considered separately to deer shot for 'sporting' purposes. If not, deer management may suffer.

**Part 7: Common Good Land**

Scottish Land & Estates has no comments to make on this part of the Bill

**Part 8 – Deer Management**

**General Comments**

Scottish Land & Estates general response to the proposed additions and amendments to existing deer management legislation set out in this Bill, is that these changes create an additional unnecessary regulatory burden on landowners involved in the management of wild deer. We make a number of general points below.

1. Through the work of the Association of Deer Management Groups and the Lowland Deer Network, deer management groups and those involved in deer control in the lowlands, are modernising, becoming more inclusive and more outward-looking so that different perspectives on deer management are recognised and taken account of. Indeed, as recommended by the Rural Affairs, Climate Change and Environment Committee in its letter to the Environment Minister following its evidence sessions on deer management in November 2013, deer management groups have stepped up the pace of delivery of deer management plans to attempt to meet the recommendation of completion by the end of 2016. The deer sector over a number of years has recognised a need for change and has on the whole responded positively to this challenge. The Monadhliaths Deer Management Group, for example, recently held a stakeholder meeting at Alvie Estate, near Kincraig. There were 40 attendees including community councils, local conservation bodies, members of the RACCE committee, crofters, farmers, other deer management groups, Cairngorms National Park Authority staff and estate staff. Interest in the event was also shown by Highland councillors and some of the new Scottish MPs. It is intended to hold the meeting on an annual basis and to also develop web-based information on the work of the Group. It is hoped this will enable strong links to be forged with the local community and other communities of interest. Some deer management groups have moved forward more quickly than others, but that is only to be expected of any process of change that involves a range of individuals with their own views and experiences. Given the effort that those with a private interest in deer management have made to respond positively to calls from Government to modernise and play a full role in the delivery of public benefits, it seems unnecessary to us that further regulation should be imposed upon them at this time.
2. Scottish Land & Estates would also point out that a review of the current approach to deer management is underway and is due to report at the end of 2016. Creating new powers and increasing penalties at this time could undermine the outcome of the review. It should be for the review to assess the effectiveness of the current approach to deer management and make recommendations for change if this is required. We understand from the policy memorandum that accompanies the Bill that the Government do not intend to use the new powers until after the 2016 review, implying that the outcome of the review will determine their use. However, once the powers are available they can be used at any time regardless of the Government’s intention at the time of drafting. As such we do not believe they should be included in this Bill. If powers are required they should follow the outcome of the review.

3. We would add that it is important for any organisation or individual involved in taking steps to modernise and develop the wild deer management sector, to recognise that the nature of deer management by necessity varies from area to area and particularly between the Highlands and Lowlands of Scotland. It is not possible to apply a countrywide approach to deer management planning because of fundamental differences in management approaches. Scotland’s approach to wild deer management needs to recognise the diversity of situations in which deer management exists across Scotland and be flexible enough to accommodate it.

4. We would make one further general point. The current approach to deer management, particularly in the uplands, involves a delicate balance between the private and public interest in deer management that we believe should be valued. The approach enables those who wish to stalk to do so. While it is a marginal activity in itself in terms of profitability for estates, it generates considerable spin-off income into the local economy from food, drink and accommodation. The approach also enables deer to be managed in the public interest at very little cost to the public purse. If this balance can be preserved we have a system that therefore benefits the environment, the rural economy and helps sustain rural communities. If this approach was to breakdown, Government could employ contract stalkers to manage deer and estates would lose out on their stalking. While it is questionable whether there are enough contract stalkers to carry out the work required, the real loser for rural Scotland would be the stalking tourism spend in local communities. Given the points above, we would urge caution in continuing to take an ever increasing regulatory approach to deer management. It would be a great shame to push a sector that is willing to change and modernise and that already provides a cost-effective approach to deer management, to a point where it no longer worked for those within it.

We address the specific changes the Bill proposes below:

**Para 69: Functions of Deer Panels**

While we have no particular issue with the suggested insertions to the Deer (Scotland) Act 1996 that are set out at Paragraph 69 of the Bill, we do question whether these amendments are needed. Deer Panels as created by the 1996 Act have an advisory function. The proposals in the Bill extend those functions to
facilitating and enabling local community involvement and to communicating between deer managers and the local community. However, only a few deer panels have been set up. Deer management groups are more extensive and recognise the need for greater inclusion, openness and transparency particularly with regard to local communities. They are working on a voluntary basis to achieve this. This issue could easily be addressed through deer management groups via good practice mechanisms without the need to make further changes to the 1996 Act.

Para 70: Deer Management Plans

Scottish Land & Estates is concerned about the proposal to create a statutory power in terms of the production of deer management plans. The deer sector has progressively, over a number of years, been working more and more effectively with Scottish Natural Heritage and other interest groups in order to ensure that public benefits are delivered alongside their private interest in deer management. The focus of deer management groups has been changing and groups continue to develop and evolve such that they operate on a more professional and inclusive basis. This has included the voluntary development of detailed deer management plans. As reflected in our general comments above, deer management groups responded positively to the RACCE Committee’s recommendation that all groups need to have plans in place by the end of 2016 and, as a result, the pace of delivery has stepped up significantly. To place additional powers on the deer sector at the current time when it has done so much to respond on a voluntary basis is unnecessary and these powers should be removed from the Bill. The sector should be allowed to prove that it can deliver to the timescales suggested. Powers should only be brought in if the sector fails to deliver, and legislation should be brought forward at that time.

Para 71: Increase in penalty for failure to comply with control scheme

The 700% increase in penalty for failure to comply with a control scheme (from £5,000 to £40,000) seems to us to be entirely disproportionate and unjustified. A fine of this nature is out of step with the other Penalties in the 1996 Act. It also seems to be an unjustified increase when neither SNH, nor its predecessor in deer matters DCS, have ever used Section 8 Control Scheme powers. The Section 7 Control Agreement process has worked well in terms of engaging interested parties and delivering improvements to poor, often designated, habitats. As such matters have never escalated to the point of needing a Control Scheme, it would helpful to understand the Government’s justification for an increase of this magnitude and on what evidence it is based.

Part 9 – Core Paths

Scottish Land & Estates supports the proposed amendments to the Land Reform (Scotland) Act 2003. We are particularly pleased to see the inclusion of a clause which requires notice to be given to owners and occupiers of land when, for the first time, their land is affected by a change to the local core paths plan.
Part 10 – Agricultural Holdings

General remarks

Before looking at the proposals in the Bill, we would like to make some general remarks about the approach being taken on agricultural holdings:

- Scottish Land & Estates understands the political drivers resulting in farm tenancy matters being dealt with in the Land Reform Bill but maintains that agricultural holdings legislation should be dealt with through its own Bill/Act. The policy objectives of the Land Reform Bill are focused on addressing perceived barriers to sustainable development in relation to land and achieving greater diversity of land ownership in Scotland. The policy objectives of a separate Agricultural Holdings Bill should be to better regulate the business relationship between agricultural landlords and tenants, create a better environment for the letting of farmland in the interests of a successful and profitable Scottish agricultural industry and to encourage new entrants into tenant farming. These policy objectives – of land reform and of agricultural holdings reform – do not necessarily sit together very well. In fact the land reform proposals could actually undermine the policy intention of the agricultural holdings provisions by having a negative impact on the farmland letting environment.

- We would wish to record our serious concerns about the lack of time remaining to fully scrutinize the provisions contained within the Bill. It is imperative for the sector that we do not create further problems for the future through not fully considering the consequences of legislative change.

- The members of the Review Group spent considerable time ensuring that they had taken all considerations into account and proposed ‘an integrated package’ that ‘reflects the interlinked nature of the challenges being addressed’. The Bill, however, does not bring forward that integrated package of measures; it contains only a selection of the measures and leaves the more difficult issues for a future date. This is extremely disappointing as it suggests that we are not going to get what the industry needed i.e. legislative change followed by a prolonged period of stability. It suggests that important changes are going to be ‘drip fed’ by constantly changing legislation, which means that we will have ongoing uncertainty and debate about potential change that serves to undermine confidence in the sector from the land owners’ point of view.

- Scottish Land & Estates takes the view that important legislative change should be included in primary legislation rather than deferred to secondary legislation. There are important elements of the Bill—such as on conversion (s.79) and productive capacity (s.82)—that simply enables Ministers to bring forward regulations. This is far from satisfactory and simply highlights the undue haste in which this legislation has been brought forward. The reasons that this is important are, firstly, that the secondary legislation is subject to a lower level of scrutiny, and, secondly, because of the need to keep things as simple as possible. The higher the number of different Acts, Orders and Statutory Instruments that need to be referred to, the greater the chance of confusion and
potential error in future. If at all possible, the legislation should be dealt with as one coherent Act so as to avoid adding complexity in an already complex area.

- The Bill allows Ministers to determine the commencement date for the different provisions (s.103) and so does not provide any clarity to those operating under existing law. For example, notices for Martinmas rent reviews in 2016 could already be served, but those involved will not know which regime they will be required to operate under. The question of how the legislation will be brought to bear in already established processes needs Committee consideration.

Chapter 1: Modern Limited Duration Tenancies

Scottish Land & Estates is supportive of attempts to establish letting vehicles that allow the parties flexibility to adapt to market circumstances in a fast moving agricultural and wider rural sector. As such, Scottish Land & Estates is supportive of the proposed Modern Limited Duration Tenancies although we would emphasise that the differences between current LDTs and the proposed MLDTs appear minimal and so this represents a missed opportunity to develop a truly modern vehicle. On a couple of points of detail:

- Getting the termination of the MLDT wrong is particularly punitive i.e. both parties are tied into another 10 years. We would suggest reverting to the existing LDT position, which provides for a three year continuation in S.8 (6) of the 2003 Act. The risk associated with this provision in the Bill may serve as a disincentive to use MLDTs.

- We welcome the ability to contract out of fixed equipment requirements as this will allow greater flexibility and allow landlords and tenants to reach their own arrangements.

Conversion

Scottish Land & Estates is disappointed that the detail of conversion is left to regulations and not provided on the face of the Bill. This will be an important change in the law and should be included in the primary legislation.

Without having the detail, Scottish Land & Estates generally takes the position that retrospective legislative changes to contractual relationships undermine confidence in those contractual vehicles which can have a detrimental impact on the sector – such as giving 1991 Act tenants a new right to convert into a fixed term tenancy which can be sold. This would be giving a substantial new and valuable right to tenants to continue a tenancy where in many cases it may otherwise have been expected to come to a natural end in the near future.

Scottish Land & Estates does, however, accept that a model which allows for conversion of a 1991 Act tenancy into a fixed term MLDT, if accompanied by reasonable balances for the owner, could be one way of attempting to meet the policy intentions of increasing churn in the sector and assisting in delivering a vibrant tenanted sector.
Should the principle of conversion be supported at stage 1 by Parliament, then Scottish Land & Estates contends that the policy objectives would only be achieved if the detail of the provisions addressed the following points:

- The measures introduced are seen to be balanced between those of the three parties involved: the outgoing tenant, the incoming tenant and the landlord.

- The duration of the new MLDT has to be kept to one which provides sufficient incentive to the outgoing tenant, is affordable for new entrants and does not unduly disadvantage the landlord. We would suggest that this could be best achieved through a 15 year MLDT (i.e. not 35 years as has been suggested), which provides an adequate term for long term business planning, should have a value which is of benefit to an outgoing tenant but limits the loss to the owner (or at least reduces his incentive to claim compensation for the loss).

- The landlord must be seen as an active participant in the process and have a role in relation to the creation of the new tenancy and choice of the new tenant.

- There should be acknowledgement of the fact that some landlords would be disadvantaged through the introduction of such a provision. A mechanism to address this should be contained in primary legislation, including provisions for adequate compensation to be assessed on a case by case basis.

- The landlord should have a right of pre-emption.

Scottish Land & Estates believes that it is very important that Parliament is made fully aware of the potentially negative consequences for some landowners. The people likely to be severely affected are those that could reasonably be expecting to re-gain vacant possession of a holding in the near future; conversion could conceivably push that into the future by as much as a whole generation. This would limit their ability to restructure farm holdings to meet the needs and aspirations of other tenants looking to increase their tenanted land area or add it to their own farming operation to enhance their own efficiency. It would also have a disproportionate impact on those smaller land owners where the let farm might be their only or main asset. So while conversion could represent one way of freeing the sector from the grip of secure tenancies, there is also a significant downside that needs to be acknowledged and accommodated in the legislation. The granting of a new and valuable right to tenants would be achieved at the expense of the land owner’s property rights and it will be important to ensure that the legislation strikes the appropriate balance between the rights of the different parties.

Finally, we note that section 79 (2) (b) refers to a situation where the tenant and landlord are deemed to have entered into an MLDT. This implies that there could be situations where the landlord had conversion imposed on them. Scottish Land & Estates would not support this and argues that conversion should involve the landlord as an active participant.
Chapter 2: Tenant’s Right to Buy

Scottish Land & Estates disagrees with the draft provisions that would allow all secure tenants to have a pre-emptive right by default. Experience has shown that the requirement to register is useful for both parties because it provides an opportunity, through mapping for example, to clarify the precise area with regard to which the tenant is seeking to establish their right. That clarity is useful and would help avoid dispute in the future in terms of when and over what land the right to buy is triggered. Once this step has been undertaken we would accept that it is reasonable that there would be no further need to re-register (currently required every 5 years).

In addition, Scottish Land & Estates is disappointed that the Bill does not address the Agricultural Holdings Legislation Review Group’s Recommendation 18, which focused on providing greater clarity about when the right to buy is actually triggered. The Bill refers to ‘proposes to transfer the land to another person’ but it remains unclear what this actually means. Scottish Land & Estates is concerned about this because a lack of clarity about when the right to buy is triggered could get in the way of constructive dialogue involving all parties about progressive rural development proposals. A landlord may not even want to talk to a third party who has an interesting idea (without any real understanding about whether that idea is going to go anywhere) for fear of triggering the right to buy. If there was greater clarity that the right to buy was only actually triggered when the land is advertised or otherwise exposed for sale, then there would be space for dialogue that could create opportunities in rural areas. It must not be forgotten that the vast majority of purchasers of farmland will want to acquire it with vacant possession i.e. without any tenancy in existence. As such the landlord has to secure vacant possession and to do so he has to either use existing statutory procedures, contractual provisions in the lease (if available) or negotiate with the tenant. As such these sales cannot proceed without involving the tenant.

There is also a strong concern that, in a situation where there are existing missives or option agreements already validly in place, the implementation of a suspensive condition contained therein, after the coming into force of this provision (in particular Bill section 80 (5) which repeals 2003 Act section 27(1)(g)(v)) might trigger the right to buy. Unless balanced by some means to avoid the retrospective nature of this proposed change, it has potentially serious implications for some property owners.

Chapter 3: Sale where Landlord in Breach

Scottish Land & Estates can support the idea that there should be some sort of sanction on repeatedly failing landlords provided that: the land owner has an opportunity to remedy the situation; there are provisions to ensure that the proper value is delivered to the landlord and that the system cannot be abused; there is parity with the sanction on the tenant; and the current approach to obtaining a Certificate of Bad Husbandry is reviewed.

Unfortunately, as currently drafted there is not parity with the sanction on the tenant. This new power is proposed on the basis that while a landlord may serve an incontestable notice to quit on a tenant (e.g. where the landlord has been able to obtain a certificate of bad husbandry from the Land Court), no such reciprocal
provision exists that would enable a tenant to “dispossess” a landlord. This new power to force the sale of the landlord’s property is therefore framed as a reciprocal right which balances the power between tenant and landlord. Scottish Land & Estates believes, however, that this idea of balance is misconceived. While it is true that the landlord can serve a notice to quit on a tenant in some circumstances, the introduction of a power to force the landowner to sell goes further and does not represent a balanced approach. Being forced to give up a tenancy does not equate to being forced to give up ownership. The tenant loses a right of occupation; the landowner would lose a right of ownership.

There are alternative options that are less draconian, such as preventing the landlord who fails to meet their obligations from continuing to be a landlord by appointing a third party to manage on their behalf until the landlord can prove his ability to regain the management rights. Such alternative approaches would allow more of a balance in terms of providing an effective sanction on failing landlords with less of an impact on that person’s individual property rights.

Scottish Land & Estates would argue that there needs to be a full review of all the provisions that exist for a landlord to regain possession, including the use of Certificates of Bad Husbandry. Our members tell us that these certificates are very rarely sought, not because there are no tenants to which these may be applicable, but because of the fear of the potential backlash for using such a mechanism. Therefore these provisions and their use should be reviewed as a priority by the Independent Tenant Farming Advisor or Tenant Farming Commissioner as a priority so that there are workable measures that can be used to actively manage poor performance by both landlords and tenants.

Chapter 4: Rent review

The merits and drawbacks of the existing section 13 of the 1991 Act, which deals with rent reviews, have been debated at length. While the cross-sector Rent Review Working Group (in 2012) recommended that section 13 should not be changed (but that there was a need to improve the process and transparency in the operation of the existing rent review provisions), the Agricultural Holdings Legislation Review Group (AHLRG) did recommend change to the rent review procedures. The argument of the AHLRG was that the open market approach to rents (i.e. the rent normally payable would be that which might be reasonably expected in the open market between a willing landlord and a willing tenant) cannot work in a situation where there is no market in the tenancies being compared. The group took the view that because demand exceeds supply rent levels could be pushed up above what might normally reflect the productive capacity of the land and that such a situation is not in the public interest.

While this argument holds water to some extent—section 13 is not perfect—Scottish Land & Estates had opposed change to s.13 of the 1991 Act. We believe that the established provisions supported by recently enhanced guidance, represented a pragmatic way forward and the more that the procedures are tested in the courts the more robust the procedures become. However, notwithstanding our belief that the system should not be changed and that any new system is unlikely to represent a significantly better approach which makes it worth changing, Scottish Land & Estates
has acknowledged that there is ongoing disquiet about rent reviews and that others in the industry want to see a change. Consequently, Scottish Land & Estates has signalled that it would support moves to review section 13 with a view to basing the rent on the productive capacity of the holding. As such, we are now focused on ensuring that any new system actually works.

We are therefore extremely concerned that the legislation is moving ahead of necessary modelling and testing that is required to establish the degree to which any new system actually works. The Scottish Government is undertaking background modelling work to explore how a new approach based on productive capacity might work and this is intended to inform the Parliament’s deliberations. To date, however, this work has not progressed well. An initial stakeholder meeting, held at the end of July to share progress on the modelling work, revealed that the work had moved forward without involving the expertise of practitioners and views of stakeholders and without building on established valuation principles. We are still a long way from having a clear view of what a new approach looks like and how it works in practice.

This means that it remains unclear what exactly s.13 is going to be replaced with and whether or not the new approach represents an improvement. It seems incredible that the Scottish Government has introduced a Bill with legislative provisions that would introduce a new rent review procedure and a new mechanism that the Land Court should use to determine a ‘fair rent’ without actually having a clear idea of how this would work. This betrays the fact that the Scottish Government itself, at the time of introducing the Bill, cannot have done proper impact analysis of its proposed legislative change.

It cannot be overstated how important it is for everyone involved in the sector to get this proposed change to setting rent correct. Much of the current ‘heat’ in the tenanted sector relates to rents and rent reviews; if the legislation gets it wrong, the likelihood is that sector will be saddled with disquiet and further dispute generated by the legislation itself.

The Bill already provides for the government to bring forward regulations to define productive capacity of the holding. Much as Scottish Land & Estates would prefer that all the important elements of the legislation were on the face of the Bill rather than brought in by regulation, there is an argument to say that if the modelling work has not progressed far enough the whole rent section should be delayed. This is such an important issue that it makes sense to make sure that the new approach (including the inter-relations between productive capacity and surplus accommodation and diversification) has been sufficiently worked through and stress tested by the industry prior to legislating on it.

Finally, on the broad principle of moving to productive capacity, Scottish Land & Estates would take the opportunity to highlight that we are unlikely to be moving to a new regime that is simple and formulaic in the sense that anyone with the appropriate knowledge can key in the figures and arrive at the rental figure. Each farm is different and so there will be a process involving the exercise of expert knowledge and judgement. This suggests that there will still need to be some sort of sense check with regards to comparable evidence.
We would also highlight that the move to determining rent on the basis of the productive capacity of the holding has been framed as a 'fair rent', but what happens if the rent calculation results in a very low or zero rent. That would be unfair to the landlord. Can we really be moving to a system where landlords may be expected to rent out their property for no rental income? It will be extremely important to guard against this eventuality because it would be another disincentive to landlords to let, but it is difficult to know if this is an unjustified concern before we fully understand and test the new regime.

In terms of some of the detail of Chapter 4:

*The form and content of the rent review notice* – The notice must be served no earlier than one year before the rent review date. However it is required to detail the rent proposed and the notice is to be accompanied by information in writing detailing how the rent has been calculated. This will potentially create problems because most parties would presumably prefer the rent to reflect the current economic climate rather than a historical one. For example, parties experiencing a period of low prices could find themselves in the situation where rents were being set with reference to a period of high prices.

*Surplus Residential Accommodation* – The Bill suggests that any accommodation occupied by the tenant is deemed not to be surplus. This is contrary to recommendation six of the AHLRG Report which envisaged that allowance would be made in the rent for any residential accommodation above that necessary for the Standard Labour Requirements for the unit. There will be many small farms which are in effect part-time (and where the tenant has another job), which include accommodation that is out of proportion to the associated land. It is perfectly reasonable that if a tenant of a small unit occupies accommodation that is out of proportion to the associated land, that significant value is associated to the provision of accommodation. This would reflect what anyone would be prepared to pay to stay in that sort of accommodation in that area. The landlord should be able to realise a reasonable return on letting their assets, otherwise the landlord is forced to let accommodation at below market levels. This is particularly significant when accompanied by the removal of the viable unit test on succession which will see a rise in small units occupied by “lifestyle farmers” who earn their income elsewhere and the farm is more of a hobby. It seems unjust that an arguably wealthy lifestyle farmer could avoid paying a market rent for a substantial house on a smallholding.

In addition, it appears that the ability to include rent on surplus housing provisions only applies if the tenant has permission to sublet. However many leases will specifically preclude subletting and so nullify these provisions. There will be many varied situations relating to housing but, for example, a landlord may be unable to achieve a higher rent for surplus accommodation if a second house on the farm is occupied by a member of the tenant’s family with no subletting.

*Phasing of rent increases* – The Bill seems to make no allowance for situations where the rent has been held at a low figure for particular reasons e.g. tenant investment in fixed equipment.
Chapter 5: Widening of assignation and succession

Scottish Land & Estates fundamentally opposes the proposals to widen the class of potential assignees or successors, coupled with a restriction in the landlord’s ability to object and the removal of the viable unit test. The Minister’s Review Group specifically highlighted the potential risks associated with going too far on widening of assignation and succession rights, yet the Bill goes further than envisaged by the Review Group. The extent of the proposed change is significant and Scottish Land & Estates has attempted to diagrammatically represent that change in Appendix 2. We believe that the extent of the change effectively means that while the landlord may currently have some hope of regaining possession of their property at some stage in the future, under the proposed regime this prospect would be all but removed because the tenant would be able to find someone who would qualify. As such, the proposals come close to ring-fencing secure tenancies, which represents a significant change in the landlord’s position.

Our primary concern, however, is for the future of the let sector and of Scottish agriculture. In the context of the decline in this sector over the last 30 years, the widening of the assignation and succession rights of tenants could be understood as somehow protecting the let sector because it would make it less likely that secure tenancies would come to an end. This approach, however, fundamentally fails to understand the sector from the position of the land owner. Land owners would receive yet another signal that the government is very willing to intervene in ways that undermine their interests and so they would be looking for every opportunity to get out of the sector rather than to think about letting in future. So while the extension of assignation and succession rights may achieve the medium-term goal, it would be at the expense of the long-term health of the sector. If we want the let sector to have a long-term future we need land owners to want to let land voluntarily; using legislation to restrict their rights simply undermines the land owner’s position and therefore the sector.

There is also an extremely important point relating to the degree to which the assignation and succession provisions will actually support Scottish agriculture as a whole. Mechanisms that perpetuate the existing system of tenancies potentially result in a system that preserves the current structure of farms. This introduces inflexibility into Scottish agriculture at a moment when it needs greater flexibility. Scottish Land & Estates supports the idea that the ‘family farm’ is the bedrock of Scottish agriculture, but these farmers need flexibility if they are going to survive; the assignation and succession provisions could effectively consign many farmers to difficult times as their options are limited and opportunities reduced.

With regard to some of the detail, Scottish Land & Estates would raise several important issues:

1) Impact on land owner rights

It is clear that by extending the class of those who might inherit the tenancy or have the tenancy assigned to them, the provisions in the Bill, if enacted, would significantly reduce the likelihood of a lease coming back to the land owner. Consequently it is clear that these provisions would infringe land owner property
rights. Yet there is simply no consideration given by (or apparent awareness on the part of) the Scottish Ministers to the interests and legitimate expectation of land owners in relation to existing tenancies. European case law suggests that the legitimate interests of the community in the transformation and reform of the country’s agricultural tenancy supply requires a fair distribution of the social and financial burden involved. This burden cannot be placed on one particular social group, however important the interests of the other group or the community as a whole. At present, the proposed changes fall disproportionately on land owners and we would stress that it is vitally important to ensure that an appropriate balance of rights between land owners and tenants is struck.

This impact is compounded by detailed elements of the proposals, as follows:

- There is a potential loophole in that any potential near relative successor could commit to undertake a course of training to succeed to the tenancy or have it assigned; they would not have to finish the course as it stands.

- Where a landlord objects to an ‘other person’ (i.e. a non-near relative), the ability of the landlord to offer any reasonable ground for not accepting the potential assignee, legatee or acquirer has been countered by the direction that if the potential tenant can offer any reasonable ground for why they should take on the tenancy, the Land Court must quash the landlords objection. The effect of this proposal is that the landlord’s purported ability to object is illusory, compounding the impact on their property rights.

2) The policy justification is weak

The Scottish Government’s Policy Memorandum states (at paras 368-9) that the overall aim of these changes to the assignation of and succession to agricultural tenancies is “to encourage tenants to retire or move on from tenancies with dignity and confidence in order to release land to younger tenants and ensure land continues in productive agricultural use”. However, there is nothing in the Policy Memorandum to clarify what the supposed legitimate aim is or what social policy objective is being furthered by the extension of assignation or succession rights. It is not the social protection of existing tenants (since the Bill gives rights to potential new tenants) or the protection of dependent family relationships (since there is no need for any dependency to be shown to give a right to inherit). Similarly, apart from saying that family structures are changing, nothing is explained as to what social assumptions have changed that would now justify new rights of inheritance of a tenant’s interests beyond the tenant farmer’s immediate family to a new definition of extended family.

3) The logical connection between the policy objective and the proposals in the Bill is poor

We would argue that it is far from clear that the proposed changes are the best way to achieve the espoused objective of encouraging tenants to retire or move on from tenancies with dignity in order to release land to younger tenants and to ensure land continues in productive agricultural use. Indeed we would say that tenants are perfectly able to retire with dignity at present. The tenancy does not necessarily have
to be assigned to another person, for example, for that to be the case. The issues surrounding the ability of tenants to retire with dignity have more to do with appropriate retirement planning throughout their working lifetime than they do with assignation or succession.

There is potentially an issue around the tenant being able to realise the value that they have invested in the holding so that they can better provide for their retirement, but that can be dealt with by a) conversion for value or b) ensuring that waygoing compensation procedures work properly. We therefore believe that the policy objectives are more likely to be met by other proposals in the Bill – conversion and the amnesty on tenant’s improvements – than changes to assignation and succession.

Similarly, we would argue that these changes are not required to ensure that land continues in productive agricultural use. If land returns to the land owner and they farm it themselves, let it to a new entrant or let it to new tenant or to a neighbouring tenant, it is in productive agricultural use. Indeed there is a strong argument that allowing those sorts of changes would lead to an increase in agricultural efficiency as it would allow other farmers to improve their operation, rather than perpetuating existing farm structures and limiting the flexibility of the industry.

Consequently, we believe that while the stated desired outcome might be creating turnover in the let sector with tenants retiring earlier, the actual outcome will be close to ring-fencing and preserving the let sector (which will introduce inflexibility and perpetuate the slow decline of the sector).

If the Parliament decides to retain the changes to assignation and succession, we would highlight two very important points:

1) The need for balance – assignation

Given the fact that the proposals significantly alter the land owner’s position and enhance the tenant’s position, Scottish Land & Estates believes that a much better balance is required to avoid contravening land owner property rights. One such mechanism that could be introduced to attempt to find a better balance would be a pre-emptive right for the land owner at the point of the proposed assignation.

2) The need for balance – succession – focus on hardship

Scottish Land & Estates is not absolutely opposed to any change in the succession provisions. Our understanding from previous cross sector meetings on this issue is that the driver for change in this area has primarily come from specific cases where a tenant’s death has resulted in hardship for other wider family members, such as when a brother working on the farm has been unable to succeed to the tenancy. Scottish Land & Estates understands the distress caused in this sort of situation and so signalled to the AHLRG that if the succession provisions in the Acts were to be changed then they should be focused on cases of hardship and be limited to those with a meaningful connection to the holding.
Chapter 6: Compensation for Tenant’s Improvements

Scottish Land & Estates originally proposed the idea of an amnesty and so we support the principle that landlords and tenants should be given a period to sort out any uncertainties over what will qualify as a tenant’s improvement that would potentially be eligible for compensation at waygo. Scottish Land & Estates sees this as an important issue because if one of the problems is that some tenants feel that they are not being or are unlikely to be fairly recompensed for improvements at waygo, then this can cause resentment and may be causing some to delay retirement or reduce investment in the holding. If we can get to a stage where every holding has an agreed list of improvements, we should be able to remove one of the potential blockages in the working of the let sector and move on to better relations.

Chapter 7: Improvements by the Landlord

Scottish Land & Estates does not have significant concerns about this change in the law. As the Agricultural Holdings Legislation Review Group stated, the circumstances where it would apply are rare.
Appendix 1

**Cairngorms National Park**

**Estate Management Statement**

<table>
<thead>
<tr>
<th>Name of Estate:</th>
<th>Glenlivet Estate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Area (ha):</td>
<td>23,067 ha</td>
</tr>
<tr>
<td>Location:</td>
<td>Tomintoul, Moray</td>
</tr>
<tr>
<td>Ownership:</td>
<td>The Crown Estate</td>
</tr>
</tbody>
</table>

**Overall purpose of management:**
Short statement about purpose/aims with links to online information where relevant.

To manage the estate as an outstanding example of a sustainable highly integrated multiple-use upland estate, which provides a commercial return. The aims are to provide opportunities for sustained employment in agriculture, forestry, sporting and tourism while giving high priority to the long term development of the estate’s community, its recreational, educational and other resources. This is balanced with the need to protect, conserve and enhance the rich natural and cultural heritage of the estate.

**Overview of management:**
Brief overview (e.g. bullet points) of the key activities and relative importance of each.

- Let farming (around 35 main tenanted farms)
- In-hand commercial forestry 3500ha
- Let cottages (12 no.)
- Let sporting lease (grouse & pheasant shooting, deer stalking, fishing)
- Other commercial leases (e.g. business units in Tomintoul, peat cutting, ski centre, mountain bike centre)
- Development of new business opportunities; e.g. renewable energy projects (micro-hydro)
- Development of tourism to support local economy (e.g. mountain bike centre, walking trail network, visitor centre and adventure playground, glamping site)
- Habitat management and landscape improvements and enhancement of biodiversity
- Stewardship and enhancement of heritage sites
- Ranger Service (education services, visitor services etc)
- Partnership working; community, customers & stakeholders

**Delivering the National Park Partnership Plan**
Brief overview (e.g. bullet points) of ways in which

The Crown Estate regularly works in partnership with the CNPA and other stakeholders to deliver a number and variety of small and large projects across all areas of the NP partnership plan.
the estate helps deliver the NP Partnership Plan – e.g. participation in projects, ongoing conservation management, delivering visitor experience, delivering community action plans.

- Investment in ranger service to deliver education, volunteering, access, events, interpretation and a welcome to visitors
- Provision and management of high quality visitor facilities and access network – over 100 miles of waymarked trail (all designated as core paths) plus new BikeGlenlivet mountain bike centre
- Management of Tomintoul spur of Speyside Way in partnership with CNPA
- Regular community liaison meetings, newsletters and support of community led initiatives e.g. community broadband
- Close partnership relationship with the Tomintoul and Glenlivet Development Trust.
- Local employer and policy to work with local supplies and locally based contractors
- Led projects to develop economic regeneration of area e.g. mountain bike centre, marketing group, destination management. Significant investment in tourism infrastructure recreational access and community facilities.
- Investment in farm infrastructure and supportive of farm diversification by tenant farmers
- Habitat improvement projects e.g Riparian woodland planting, broadleaf woodland creation
- Support variety of wildlife projects e.g. Highland tiger, wild plants project, Scottish mink initiative
- Deliver aims of Cairngorms Nature/LBAP and contribute to Cairngorms Nature strategy group
- Management SSSI sites and designated sites to favourable status
- Renewable energy projects – Biomass boiler at estate office, micro-hydro and joint venture biomass boiler installations with farm tenants
- Hold WES accreditation, Green tourism award (gold), VisitScotland grading (4star) and numerous other awards
- Member of Cairngorms Business Partnership and variety of other area and community groups and associations

**Contact:**
Email/phone number of main person to contact for more information. Web address if relevant.

Alan Laidlaw
Portfolio Manager
0131 260 6070
www.glenlivetestate.co.uk
CURRENT SITUATION - ASSIGNATION

Note: Potential assignee could be any one of those listed in the Succession (Scotland) Act 1964 depending on who is alive at the point of assignment.
FUTURE SITUATION FOR ASSIGNATION (AS PER BILL)

Note: **Near relative**: landlord can only object on grounds of character, resources or training

**Non-near relative**: landlord can object on any reasonable grounds.
CURRENT SITUATION - SUCCESSION

Note: Potential legatee or acquirer could be any one of those listed in the Succession (Scotland) Act 1964 depending on who is alive at the point of the tenant’s death, but only the ‘near relatives’ are ‘safe’ in the sense that the non-near relatives could be served with an incontestable notice to quit.
Written submission from the SRUC

Introduction

SRUC (Scotland’s Rural College) welcomes the opportunity to contribute to the consultation on the Land Reform (Scotland) Bill which the Scottish Government introduced on 22 June 2015.

SRUC is an innovative, knowledge-based organisation that supports the rural sector through research, education and expert consultancy services. SRUC wishes to see, and contribute significantly to delivering, a sustainable agricultural and rural land use sector in Scotland. SRUC staff work in a broad range of areas (for more information see www.sruc.ac.uk) and our responses to the questions below reflect this broad expertise, but draw on specific research projects where appropriate.

Several SRUC staff have contributed to this submission\(^\text{15}\) which has been co-ordinated by SRUC’s Rural Policy Centre.

Part 1: Land rights and responsibilities statement (LRRS)

- The Policy Memorandum (PM) indicates that the LRRS should lead us to a proactive position where governance of land is consistent with the aspirations and outcomes desired in Scotland (Point 35). The LRRS should not simply be a statement of intent for land reform (as Point 42 of the PM expresses) but should also aim to establish key principles that the future governance, support and regulation of land in rural and urban Scotland should be founded upon.

- The PM proposes that a Land Rights and Responsibilities Statement (LRRS) would be published by the Scottish Government and renewed every five years (Point 41). This will be a statutory commitment (Point 45). We support the proposed updating of the LRRS every five years and would support it having to be endorsed by the Scottish Parliament.

- Based on our evidence presented in Rural Scotland in Focus 2014, we would welcome the formulation of a LRRS which also seeks to create meaningful linkages with the objectives of other national land use policies and strategies, e.g. NPF3, Land Use Strategy (being refreshed in 2016), National Forestry Strategy, Climate Change commitments, National Parks, CAP Reform, SRDP, Biodiversity Strategy and Targets, etc. An on-going LRRS would create further opportunities for coherence across policy domains and towards shared outcomes “in a holistic manner” (as stated in the PM). (See also point below on a Scottish Land Policy).

- The PM highlights that the previous consultation responses showed the need for clarity of terminology (specific phrases and words) in the LR(S)B (Point 40). The

\(^{15}\) Julian Bell, Michael Halliday, Paul Heyhoe, Rob McMorran, Gillian Reid, Sarah Skerratt and Steven Thomson.
PM then states that the LRRS will provide “a clearer understanding of the Scottish Government’s ambitions and aims for the future of land reform in Scotland” (Point 44). The need for clarity of outcomes, and for a strategy with indicators to underpin their delivery, is something we proposed in terms of an overall rural strategy in Rural Scotland in Focus 2014. We would anticipate that, given the LRRS will apply to rural and urban settings, such clarity will be even more critical, given the range of environments and contexts it will need to address.

**Part 2: The Scottish Land Commission**

- We support the creation of the Land Commission (Section 2 (19)) and the appointment of Land Commissioners (Sections 20-21) to undertake the functions identified in the Bill independently. The PM (Point 53) states that Land Commissioners will have expertise or experience in: land reform, law, finance, economic issues, planning and development and environmental issues. We suggest that there should be at least one Commissioner with practical land management experience.

- Whilst the Land Commissioners have to have regard for the LRRS, it may be prudent to establish a statutory duty on the Commissioners to establish a Scottish Land Policy that goes beyond the LRRS which takes account of EU and international commitments (e.g. biodiversity, wetlands, etc) and uses best practice examples. A Scottish Land Policy could provide a holistic overview of land use policy and provide a fully integrated policy (i.e. one which takes account of NPF3, (refreshed) Land Use Strategy, National Forestry Strategy, Climate Change commitments, National Parks, CAP PI, SRDP, Biodiversity Strategy and Targets, etc).

- The blend of expertise/experience the Scottish Land Commission may contain also offers the potential to lend coherence to wider policies for the land. As we set out in *Rural Scotland in Focus 2014* (and in previous reports), evidence shows there is a need to integrate planning and development into land-use-focused decisions. Further, in *Rural Scotland in Focus 2010*, we published evidence which highlighted the need for on-going integration of environmental outcomes into mainstream land-based policy. The Land Commission therefore provides an exciting opportunity for pulling together multiple strands. Ministers can appoint Commissioners with the appropriate blend of expertise and working knowledge to cover all aspects of land governance, management, support and regulation to the industry.

- One of the four functions of the Land Commission is “to review the impact and effectiveness of any law or policy in relation to land” (PM Point 53). This function has two specific merits: (i) reviewing progress; and (ii) lending coherence to policy outcomes since the word used here is *any* policy, meaning that the potential for integration is significant. Evidence shows that for progress to be reviewed, a strategy with underpinning interim measures and indicators will be required (*Rural Scotland in Focus 2014*).
The need for evidence and for cross-policy coherence is also recognised in the further description of the role of the Land Commissioners to be: “impartial in reviewing existing law and policy in relation to land” and that “their work takes an evidence-based approach” (PM Point 69). We welcome this commitment to impartiality, independence and evidence-gathering to underpin further developments in land reform.

The PM states that the Land Commissioners “should have the discretion to set their own programme of work in accordance with emerging priorities in relation to land reform” (Point 55). Evidence (Rural Scotland in Focus 2014) shows the need not only to identify emerging priorities in the short to medium term, but also for the longer term. The commitment of the Scottish Government that future governments must also set out their objectives for land reform through the LRRS (Point 45) creates the potential for longer-term thinking and planning “in a consistent manner” (Point 42).

We welcome the appointment of a Tenant Farming Commissioner (TFC) (Sections 22-34), including the Interim Tenant Farming Commissioner, as it increases the likelihood of addressing some of the difficult, and often expensive and time-consuming issues surrounding landlord-tenant relationships. We believe it is essential that the TFC works closely with all stakeholder organisations to establish respect from all parties.

An industry-wide code of practice on Rent Reviews has already been agreed within the TFF (Tenant Farming Forum) between NFUS, STFA, SL&E etc. However, as it is voluntary, some parties may choose to ignore it. Whilst voluntary codes of practice have not always been successful (e.g. the dairy industry), we recognise that it may be a step too far to expect industry-wide agreement to statutory and enforceable codes of practice given the existing tensions between the different parties in agricultural tenure.

In drafting each code of practice (Section 25 (2)) it is essential that the TFC develops support from all stakeholder groups (beyond the consultation exercise described in the Bill (Section 25 (4)) in order for these codes of practice to carry weight. The tenancy sector has experienced many changes in the last 15 years and consensus building is required to develop a vibrant tenancy sector. We believe that the limit of the statutory power, to a maximum of £1,000, in enforcing the codes of practice should parties be found to be in breach, may limit their effectiveness. We would question whether £1,000 is enough of a deterrent when the rewards of increased rents or the ending of a secure tenancy may be much higher. Whilst the consultative and engagement role of the TFC is crucial, it will also need an appropriate level of power to enhance progress.

**Part 3: Transparency of landownership in Scotland**

We support the Bill’s endeavours to improve the transparency of land ownership that will support a number of the Land Reform Bill’s objectives and possible future actions (e.g. land taxation) and we support full landownership transparency as
set out in Part 3 of the Bill. However, it is difficult to understand how full landownership details will be voluntarily provided to the Keeper upon request (Section 36 amendment to Section 48 Land Registration etc. (Scotland) Act 2012) should the controlling interest not wish their identity to be known, unless the Keeper has the power to refuse registration of change of ownership.

- Recent research on rural community perspectives of grouse shooting conducted at SRUC highlighted the challenges communities can face in identifying a landholding representative to contact in certain cases. This can have knock on impacts relating to community awareness of, and satisfaction with, estate management activities in their local area. Additionally, the recent evaluation of the Community Right to Buy (conducted by SRUC and Ipsos MORI) evidenced similar barriers being faced by communities when pursuing Community Right to Buy applications. The existence of contact information and an accessible and visible representative for landholdings (particularly larger landholdings) therefore plays an important role in mitigating conflicts and creating opportunities for increasing community awareness of, and community involvement in, decision making processes relating to land use.

- The Bill does not take forward the December 2014 Consultation proposal that only entities registered within the EU could own land in Scotland. In our consultation response we highlighted the need for evidence on how such a restriction would improve transparency, particularly as it is relatively easy to establish a legal entity in the EU (although Directors would be identifiable, owners may not). We also highlighted that such restrictions may reduce GDP and restrict income generation or capital investment in a global market place and could reduce flows of external funds into local economies. Anecdotal evidence suggests that some non-EU owners have spent significant sums on holdings to the benefit of the wider rural economy (e.g. plant hire & builders and the associated multiplier benefits including spend on local goods/services).

### Parts 4 and 5: Furthering the sustainable development of land

- The PM sets out how the Bill will “introduce a requirement on Scottish Ministers to provide guidance for landowners and tenants on engaging with communities on land-based decisions” (Point 163). Precision around terminology and definitions relating to the types of engagement and consultation required between land owner and community, and the expected (different) outcomes of such engagement, will be critical to its delivery on the ground. We therefore welcome the commitment that: “the exact nature of the types of decisions, the form of engagement and consultation, what land owners are expected to do following such engagement will be set out in the guidance and the aims sought to be achieved will be set out in this guidance” (Point 164). We have presented evidence on the need for clarity in relation to process and outcomes, in consecutive Rural Scotland in Focus Reports.

- We welcome the Policy Memorandum’s outlining of a process of co-construction of guidelines with multiple stakeholders (Point 164) as this will enhance
goodness-of-fit of such guidance for all parties. We particularly welcome the fact that such a process will examine what works as well as what doesn’t (Point 164), since our research into communities who do not engage shows the value in understanding why processes and intervention remain ineffective, and can indeed be counterproductive to the original aims.

- As we have outlined in our previous responses to the Community Empowerment (Scotland) Act and the Land Reform (Scotland) Bill, our research shows that creating guidance for partnership working will not necessarily result in communities being more empowered. Communities who are used to engaging are able to do so, and to secure the benefits of such processes. Given the emphasis in the PM on social justice, and the associated commitment to upholding the European Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights (Point 147), we would encourage the Scottish Government to include a specific focus on communities who do not engage. This would also allow the Scottish Government to deliver on its commitment “to help ensure all members of society have access to the resources required to meet their needs” (Part 148). Otherwise, our research evidence shows a danger of ‘Darwinian development’ becoming the norm, with less able and less well-resourced communities being left behind.

- Robust key tests need to be identified to define sustainable development. Land owners should also be given the opportunity to highlight any detrimental impacts on their business that may result from potential reductions in the land area available for agriculture and the reduction in land values. In the event of an enforced sale, the inclusion of a clawback clause could be included for situations where land is sold at agricultural value but is later used by the community for a use that is of higher value i.e. housing plots.

- Part 5 statutory provisions (akin to compulsory purchase) are a major new power of intervention in landownership. The provisions themselves suggest that some private landowners are stifling sustainable development whilst other land ownership structures would not. It must be recognised that sustainable development can also be hindered by objectors to the planning processes and by non-land holding inhabitants, in addition to private landowners. Careful consideration will need to be given to whether sustainable development should be prioritised over other considerations such as landscape preservation, habitat and environmental improvement or high level capital investment. Evidence shows that many land holdings can identify some benefits to Scottish society (e.g. employment, capital investment, forestry, biodiversity, food production, scenery, etc.) and consideration of how these benefits will be weighted in Ministerial decision-making will be important and require transparency (for example, regarding which national outcomes have higher priority). The Bill states that any transfer of land must:
  o further the achievement of sustainable development in relation to the land;
  o the transfer of land is in the public interest;
the transfer of land is likely to result in significant benefit to the community, and is the only practicable way of achieving that significant benefit;

- not granting consent to the transfer of land would result in significant harm to the community.

The terms “sustainable development”, “public interest”, “significant benefit” and “significant harm” are subjective and mean different things to different people depending on social, economic, environmental and political beliefs, therefore they will need to be defined carefully.

- We support the Register of Land for Sustainable Development (Section 44) and the ability for communities to nominate appropriate third party purchase partners that may aid the community in achieving sustainable development goals.

**Part 6 – Removal of the exemption from business rates for shooting and deerstalking**

- Anecdotal evidence has highlighted that this proposal has seen some agricultural leases being ended on sporting estates. The sporting tenant is being issued with an agricultural tenancy in an attempt to avoid paying shooting rates. If the Scottish Government move forward with this proposal they should be mindful of unintended consequences and avoidance measures.

**Part 10 – Agricultural Holdings**

- There is some concern amongst stakeholders that, if agricultural holdings are included within the Land Reform (Scotland) Bill, there will be insufficient time for people to digest the Agricultural Holdings Legislation Review Group’s (AHLRG) recommendations, or to enable solutions to be developed that will resolve many of the difficult issues and may revitalise the agricultural tenancy market. There could be merit, therefore, in considering agricultural holdings being a Bill in its own right, rather than being coupled with the timeframe of the Land Reform Bill.

- The PM lists the eight aspirations for tenant farming that the AHLRG believed should be the focus of the Review’s final recommendations (Point 301). However, the Bill fails to address a number of these aspirations.

- The AHLRG argued that Assignation for Value would rectify a number of problems in the tenanted sector:
  - the lack of ‘churn’. Older tenants have little means to retire, if they were able to sell their lease it would allow them to retire with dignity. This would in turn free up land for new tenants to take on and invest in;
  - the burden of end of tenancy ‘way go’ on land owners. If the tenancy was sold, the market would set the value of the outgoing tenant’s improvements (which the incoming tenant would pay for) and thus remove
a significant point of friction between landlord and tenant. It would also allow the tenant to make suitable investments throughout their tenancy in the knowledge that they would receive a market value for them on way go; and,

- the ability of a tenant to invest on the same footing as an owner occupier. The option to buy and sell a 1991 Act Tenancy give tenants an asset against which they could use as bank security and thus allow them the ability to borrow on a more even footing with an owner occupier – this is one of the key recommendations of the AHLRG group.

- The compromise on Assignation for Value of a 1991 Act Tenancy (to be European Court of Human Rights compliant) could in practice translate into the ability to convert a secure tenancy to a 25 year Modern Limited Duration Tenancy (MLDT). This modification of the original AHLRG proposal means that a number of the clear objectives of the AHLRG have now been omitted from the Bill as they were originally viewed as being dealt with by Assignation for Value.

- We identify three key issues regarding the rent review procedure:

1) How to define the productive capacity of the holding:

- The definition of this process from RG Williams’ Agricultural Valuations Book is ‘What a holding is capable of producing in the occupation of a competent tenant practising a system of farming suitable to the holding’.

- LCA Classification, Macaulay soil maps, IACS data could be used to produce more standard procedures to define the productive capacity. The benefit of using this method is that there is a more standardised procedure that can be referred to if an agreement between the parties can not be reached. The disadvantage is that farming practices vary. For example, land with the same LCA classification can be used to carry different livestock enterprises or grow different crops. Variations also exist between neighbouring holdings and across regions. For example, the effect of a tenant’s improvements need to be taken into account which may render the holding in question not comparable with conditions on other local holdings which maybe all owner-occupied. Considerable expert opinion and knowledge will therefore still be required to adjust for the holding in question.

- The alternative is to carry on as present (and as is done in England where experts with the knowledge of the holding are used). Benefits of this are that it is tailored to each individual holding and takes account of the specific conditions that are in place on that holding. A considerable list of factors will affect the productive capacity (such as climate, elevation, aspect and location) and expert opinion will allow all of these to be taken into account. Against this is that, without a framework, if parties cannot agree on the fundamental issues relating to productive capacity, then the whole process of the rent review will be flawed. However, this is likely only to be the case in a relatively low proportion of reviews.
We conclude therefore that while standard data such as LCA Classification, etc. may be used to inform the basics of the productive capacity, individual characteristics of the holding need to be taken into account by the parties. Clarity is required on the factors that go into the definition of productive capacity so that if there is a disagreement the issue can be decided by arbitrators or the land court.

2) How to define the hypothetical tenant and the financial performance

This is effectively the related earning capacity as practised in England. R.G. Williams defines this as ‘the extent to which, in the light of the productive capacity a competent tenant practising a system of farming suitable for the holding can reasonably be expected to profit from the holding’.

The rent for the holding should be based on an average tenant not the actual activity of the tenant in question. Current financial performance of the tenant should not be taken into account as this can actually be completely divorced from the actual Productive Capacity and Related Earnings Capacity of the holding. This is the ‘competent tenant’ referred to in the R.G. Williams definition above.

This definition is needed because the sitting tenant may have made improvements (which need to be discounted from the whole process anyway) or run their business better or worse than average but this was nothing to do with what the landlord had offered, i.e. the land and any buildings/equipment. This needs to be based on what an average tenant would be capable of producing on the holding with only the landlord’s fixed equipment available to them. However, this is very open to debate and may require some input and expert guidance from an outside party such as an agricultural valuer, which could be beneficial as it could be tailored to the holding in question. Against this, there is no clear framework which could make settlement difficult in the absence of agreement between parties.

The use of standard, independently verified data such as the Farm Accounts Survey may inform this. However, there are limitations to the data as it is up to two years out of date and does not cover all farm enterprises. Similarly, any figures will need to be adjusted to take account of the individual factors that affect each holding and result in any deviation from the standard data.

We conclude that while standard data sources such as the Farm Accounts Survey can inform this decision, the individual circumstances of the holding being reviewed can result in significant deviation from ‘standard’ figures and some aspect of expert opinion will still be required. However, some sort of clear framework for the establishment of these figures would potentially be helpful particularly if an agreement cannot be reached and there is the need to use arbitrators or the land court.
3) How to manage price volatility when setting rents

- If rents are based on the productive capacity and related earnings capacity then the issue of price volatility needs to be considered. Agricultural commodities are subject to considerable price variation as evidenced by considerable swings to beef, lamb, pig, dairy and cereals prices over recent years. As such, any agreement made based on historic data or even projections based on the current market circumstances could prove to be very different from the situations that unfold.

- There is no easy answer to this problem – a three year rent review period is a long time when prices move so much and so quickly. Options to limit the impact of volatility are not clear and may not suit all circumstances. It will possibly come down to cap and collar arrangements or phasing rent changes over time e.g. a third every year over the three years. Similarly this process may result in considerable changes to the rental value which should similarly be phased in as mentioned in Appendix E of the ‘Review of Agricultural Holding Legislation’.

- We are in agreement with the points on landlords’ breach as a tenant would have to go to the land court and embark on a lengthy legal process. At each step along this journey, the land owner has the option to take remedial action to correct the breach. Advisors could not recommend that a tenant embark on this course of action, as considerable cost could be incurred at the land court with the land owner having the ability to rectify the breach right up until a final decision is made by the court.

- The post sale obligations (Part 10, Chapter 3, 38N) allow a former landlord to clawback some of the increase in value of the land if it is sold on at a profit within 10 years. There are several potential problems relating to this issue:

  - In a scenario whereby the former land owner has had a number of chances to carry out remedial action and has failed to do so, the property has been forced to sale by a court order and the former tenant has paid the independent valuation for the property, should the former owner still have property rights under ECHR in this situation?

  - The former tenant now owns the property. He/she will have spent a significant sum in legal fees (to the land court) and in purchasing the property. The rational thing to do would be to sell off a cottage or a small area of the property to reduce the debt and make the undertaking more manageable. (This is very common with farms purchased on the open market). The bill requires 100% of any uplift to be paid to the former land owner on any sale within the first 5 years dropping down to 33% of uplift up to 10 years. This restriction is a further hurdle to the tenant - does it breach ECHR as an infringement on the property rights of the new owner?

  - The price the former tenant paid for the property is normally set by a formula which gives a discount of one third due to the farm being subject to a 1991 Act Tenancy and if the tenant has invested in improving the
property a further discount is given for the tenant’s improvements. The result would be a farm being sold to a sitting tenant for roughly 50% of open market value. The proposal for compensating the former land owner for any re-sale could be viewed as compensating him or her with (in part) the value the tenant has earned through his or her improvements.

- Point 38 N5b mentions standard securities and priorities being made to the above obligation. This clause could make bank borrowing more difficult for the former tenant if 100% of uplift is due to go to the former land owner for the first five years.

- Bequest of 1991 Act Tenancies
  - Part 10, Chapter 5, 87. We broadly support this measure. Please note that historically the 1948 Agricultural Holdings Act allowed the bequest of a lease to anyone: there were no restrictions at all. That provision has been gradually narrowed over the years and this measure could be viewed as a redress.
  - Currently, the landlord’s rights to object are on grounds of poor character, insufficient resources and insufficient ability. We recommend that this should not be changed.

- Compensation for Tenants’ Improvements (Chapter 6)
  - A tenant’s improvements amnesty is a good idea but guidance will need to be given on what can and cannot be registered (which could perhaps be a role for the TF Commissioner). Without guidance, disputes and land court cases may arise.
  - With the changes made to the Assignation for Value, the tenant should be able to choose whether they go down the “way-go” route or the “Assignation Route”. We believe that the sale of a tenancy to an MLDT could raise considerably less money for an outgoing tenant than going through a properly valued way-go (especially if the tenant has a significant amount invested in improvements).
  - The current system for a tenant to end their tenancy is to issue a notice to their landlord. Only after the Incontestable Notice to Quit is issued is the land owner obliged to discuss compensation for tenant’s improvements. This puts the tenant at a huge disadvantage and often agreement isn’t reached till after the tenant has left the farm. A two stage notice to quit would allow a tenant to agree what compensation they would receive before they agreed to leave the holding. This would allow the tenant to continue the tenancy if they felt the compensation for improvements was not sufficient.

Written submission from Malcolm Combe

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I welcome the opportunity to respond to the Call for Evidence of the Rural Affairs, Climate Change and Environment Committee in relation to Stage 1 of the Land Reform (Scotland) Bill. I am happy for this response to be in the public domain.

This response is made in a personal capacity, but two points should be noted in that regard. First, I am employed by the University of Aberdeen at the School of Law. Second, I was an adviser to the Land Reform Review Group (appointed in June 2013). Neither role has had any direct impact on this submission.

Please note that I submitted responses to:

- the Land Reform Review Group’s Call for Evidence;
- the exploratory consultation and Stage 1 Call for Evidence in relation to what became the Community Empowerment (Scotland) Act 2015; and
- the consultation on the Future of Land Reform in Scotland.

All of those responses are publicly available and may be of interest to the Committee. As such, I do not propose revisiting anything raised in those responses in great detail.

GENERAL

The significant amount of agricultural holdings content in the Bill may justify a change in short title, by the insertion of the words “and Agricultural Holdings” after “Land Reform” (i.e. “Land Reform and Agricultural Holdings…”). Whilst I see no doctrinal problem in including agricultural holdings reform within legislation branded under the “land reform” banner (as opposed to including it in a standalone agricultural holdings statute), the inclusion of “Agricultural Holdings” in the short title would tie this legislation with other measures that affect rural leases, notably the Agricultural Holdings (Scotland) Act 1991 and the Agricultural Holdings (Scotland) Act 2003. Whilst this could seem insignificant, such a step could in fact assist analysts and commentators in the future, not least by easing future database or internet searches.

PART 1 – Land rights and responsibilities statement

There is an argument such a statement should be contained in the primary legislation itself. That said, the Scottish Outdoor Access Code (which provides guidance to access takers under the Land Reform (Scotland) Act 2003) provides a precedent for a non-statutory yet very important (and Scottish Parliament approved) document that has largely been well received.

PART 2 – The Scottish Land Commission
Gaelic

This part of my response is in Scots Gaelic. An English translation follows.

Mar a tha Bile Ath-leasachaidh Fearainn sgriobhete, bidh ainm Gàidhlig aig a’ Choimisean a-rèir reachd, ach sin an aon uair a nochdas a’ Ghàidhlig anns a’ Bhile. Chan eil feum air eòlas Gàidhlig a bhith aig ball Coimisean Fearainn na h-Alba. Gabhaidh argamaid làidir a dhèanamh gum bu chòir riananas mar sin a bhith inne.

Tha diofar riananas reachdail gum feum neach labhairt Gàidhlig a bhith air buidhnean rianachd croitearachd (fo na diofar aëimmean Ùighdarrass nan Croitearan agus Coimisean nan Croitearachd) agus Cùirt an Fhearainn an Alba fad bhliadhnaichean. Tha ceangal mar sin le diofar bhuidhnean fearainn Albannaich.

Tha inbhe agus cor na cânain air atharrachadh rè na bliadhnaichean bho na chaidh lagh croitearachd agus Cùirt Fearainn na h-Alba a chur air bhog. Tha seo a’ ciialachadh nach eil an aon theum air neach labhairt Gàidhlig air adhbhharan conalraidh ri linn ‘s gu bheil Gàidhlig agus Beurla, no direach Beurla, ann an sgirean a bha Gàidhealach gu tradaiseanta. Tha e soilleir gu bheil nas luga feum praitigeach air neach labhairt Gàidhlig am measg Coimiseanairean Fearainn na h-Alba.

Ge-tà, a-rèir Achd na Gàidhlig (Alba) 2005 agus dleatanasan Riaghaltas na h-Alba (agus gu dearbh Riaghaltas an RA) feumar taic a chumail ri mion-chànanan aig ire eadar-nàiseanta. Mar sin gabhaidh argamaid a dhèanamh gum bu chòir co-dhiù tuigsinn air a’ Ghàidhlig a bhith am measg luchd-òbhrach a’ Choimisein agus gu bheil feum air a leithid anns an reachdhas fhèin. ‘S dòcha gum b’ urrainnear a ràdh nach eil feum air dealas sònraichte dhan Ghàidhlig anns an reachdhas seo ri linn ‘s gu bheil structar leasachaidh farsain airson a’ Ghàidhlig anns an latha a th’ ann. Ach bhiodh dealas poblaich don chànan agus an coimhearsnachd don th a ga cleachdadh, a bharrachd air leantainn riaghlaidean croitearachd agus Cùirt an Fhearainn an Alba, gu math freagarrach agus feumail.

Anns an seadh buannachd don co-aimsireile do Choimisean Fearainn na h-Alba bho dheaslas don Ghàidhlig, ‘s dòcha gum gabhadh tuigsinn air a’n ainmean aite Gàidhlig a sgoaileadh agus mothachadh air eachdraidh an fhearainn is mar a bha e air a chleachdadh.

‘S dòcha gum biodh buannachd eile don chànan agus cultar na h-Alba ach tha iad doirbh a mhesadh agus a thomhais agus mar sin cha bhiodh buaidh praitigeach aca air obair lìathteil Coimisean Fearainn na h-Alba sam bith. Mar sin cha tèid an cuasachd an seo.

Tha modail dealas don Ghàidhlig simplidh: faic earrann 1(5) Achd Cùirt an Fhearainn an Alba 1993 agus earrann 4 Achd Croitearan (Alba) 1993. (Chan eil an dàrna eisimpleir ceart cho iomachaidh an seo air sgàth gu bheil taghadh na lùib seach cur an dreuchd.)

English translation, on the role and place of Gaelic in the Scottish Land Commission

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As drafted, the Commission is to have a Gaelic name (Coimisean Fearainn na h-Alba) enshrined in statute, but that is the only occurrence of Gaelic in the Bill. There is no requirement for a member of the SLC to have knowledge of Scottish Gaelic. A strong argument can be made that there should be such a requirement.

There have been legislative requirements for a Gaelic speaker to be on crofting administrative bodies (under the various guises of Crofters Commission and Crofting Commission) and the Scottish Land Court for many years, so there seems to be an analogy with other Scottish land-oriented organisations.

The status, not to mention the state of health, of the language has changed in the years since crofting law and the Scottish Land Court were introduced. This means that the need for the involvement of a Gaelic speaker for communicative purposes has been eroded now that Gaelic is found alongside, or substituted by, English in traditional Gaelic speaking areas. It cannot be denied that there is less of a pressing, practical need for a Gaelic speaker amongst the Scottish Land Commissioners.

That said, in terms of the Gaelic Language (Scotland) Act 2005 and the obligations of the Scottish Government (and indeed the UK Government), commitment to minority languages at an international level, a strong case can be made that there should be at least an understanding of Gaelic within the staffing of the Commission and that a commitment should be contained within the legislation itself. It might be argued that there is no need to embed a specific commitment to Gaelic in this statute owing to the wider regime pertaining to Gaelic that now exists, but an overt commitment to the language and the communities that use it, not to mention continuity with the regimes for crofting and the Scottish Land Court, would seem both justifiable and useful.

In terms of contemporary benefits to a Scottish Land Commission commitment to Gaelic, there could be the slight benefit of bringing understanding of Gaelic place names and an associated awareness of the history and perhaps even the use of such land.

There may be other tangential benefits to the language and Scottish culture, but such benefits are difficult to quantify and substantiate and would not necessarily have a direct bearing on the day-to-day work of any Scottish Land Commission. As such they will not be explored here.

The model for a commitment to Gaelic is simple: see section 1(5) of the Scottish Land Court Act 1993 and section 4 of the Crofters (Scotland) Act 1993. (The latter provision is less directly applicable, as that involves an election rather than appointment.)

**Tenant Farming Commissioner**

The Commission is to comprise five Land Commissioners and the Tenant Farming Commissioner. The one Tenant Farming Commissioner’s role is very important and, as drafted, potentially onerous. Delegation to Land Commissioners (and others) by the Tenant Farming Commissioner is possible in terms of clause 23 and that should
allow for a fair distribution of work, provided a practice of effective delegation was allowed to develop.

PART 3 – Information about control of land etc.

I note that the Bill does not contain the recommendation of the Land Reform Review Group (2014) that ownership of land in Scotland should be restricted to natural persons and European Union registered entities (Part 2, Section 5 – Owners of Land, paragraph 11). As explained there, such proposals were thought necessary because of the difficulties in finding information relating to entities incorporated in certain jurisdictions with lesser disclosure requirements than those which prevail in Scotland, the UK and the EU.

There are legitimate concerns about the effect such a rule might have on inward investment or existing investment. The following proposals are offered to suggest how certain schemes could be introduced that could have an incremental effect towards increasing transparency without have as drastic an effect on investment as (to take the strongest example) some kind of retrospective ban on non-EU entity ownership. This should not be taken as a rejection of the LRRG’s recommendation. Rather, it is an attempt to set out some alternatives that might be more comfortable to both the market and legislators.

Before considering such softer measures, it is submitted that a restriction could, if drafted properly, comply with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), which operates to prevent discrimination. It could also operate alongside any information request regime, such as the one contained in the Bill as drafted. A prohibition on (for example) a Canadian individual owning land directly could be problematic: no proposal to restrict the right of human beings to own land is recommended here.

Other provisions of the ECHR are also relevant to any proposed restriction, including the right to property under Article 1, Protocol 1 (“A1P1”). If existing property owners were forced to restructure arrangements that were entered into at a time when those arrangements were perfectly legal, such owners would have a legitimate cause to complain. By making the new rule prospective rather than retrospective, that concern is mitigated (albeit with the trade-off of allowing existing (potentially non-transparent) schemes to continue).

Another means by which a rule could be introduced would be to make the prohibition of non-EU entities non-absolute. Instead, a non-EU entity could be required to make a case to the Keeper of the Registers of Scotland as to why such an entity is the most suited for the landholding arrangement being proposed. (If this role was thought to be too burdensome for the Keeper, perhaps another relevant office holder, such as a Commissioner of the Scottish Land Reform Commission, could be tasked with it.) Making that case could be twinned with a scheme to compel publication of information that would not otherwise be readily obtainable. Any test would need to be framed in a way not to discourage entities that have a genuine business reason to, for example, retain LLC status in a state of the USA.
Turning now to the terms of Part 3 as drafted, care should be taken to ensure that “persons affected by land” should not be narrowly defined, or should not be left in a way as could be narrowly defined in future, and fees should not be set (or not left in a way so that they can be set) in a way that could price-out persons affected by land in terms of access to information (clause 35).

Sanctions for non-compliance with transparency requirements are also important. For some landowners, a potential financial penalty would be sufficient incentive to comply with any scheme. For others, finances might not be as much of an issue. Two alternative sanctions are proposed for consideration.

The first sanction scheme could be modelled on section 793 of the Companies Act 2006, which is a system designed to flush out information about who controls an asset. Owners of shares can find the entitlements that a shareholder would ordinarily expect withdrawn when they are not transparent about who controls the shareholding entity.

The analogy between incorporeal company shares and tangible land is not exact, so some adaptation would be needed. Further, the suspension of a statutory scheme (for shares) is simpler to demarcate than a sanction which would involve interfering with common law rights and obligations that have developed over many years. Be that as it may, a sanction along the lines of section 793 could be more effective against a (hypothetical) secretive landowner with ready access to finance than a fixed financial penalty would be.

An alternative sanction would be to provide that any owner that does not comply with an information request would be treated as having abandoned land. Here, the word “abandoned” is meant in the sense that is found in Part 3A of the Land Reform (Scotland) Act 2003 (introduced by section 74 of the Community Empowerment (Scotland) Act 2015). The effect of this would be to render the land susceptible to community acquisition without requiring the owner’s consent.

Part 5 – Right to buy land to further sustainable development – and Part 10 – Agricultural Holdings

As the committee will appreciate, the right to property is recognised in the ECHR, as expressed in A1P1. That seems to provide a starting point for a rights-based argument against land reform, but that must be balanced against competing rights such as Article 11 of the UN International Covenant on Economic, Social and Cultural Rights, which guarantees certain rights such as sanitation, food and housing. To paraphrase Professor Alan Miller of the Scottish Human Rights Commission, human rights are neither a red card to be deployed by landowners to dismiss land reform, nor a trump to card to be deployed by those who seek land reform.

This is particularly relevant when considering the provisions of Part 5 and Part 10 (Chapter 3 – Sale where landlord in breach). As drafted, these provide schemes that
seek to balance the interests of those who might be involved in a land acquisition in accordance with those schemes. It will always be a matter for careful consideration as to whether this balance is correctly struck, but it might be noted that the hurdles for the community to clear – over and above the established sustainable development and public interest tests found in Parts 2 and 3 of the Land Reform (Scotland) Act 2003 – seem high (see clauses 47(2)(c) & (d)). The word “only” in clause 47(2)(c)(ii) in particular appears to give a strong hand to anyone who would wish to challenge a decision of the Scottish Ministers.

One overarching point remains: a community or a tenant right to acquire is predicated on there being a community or a tenant, as the case may be. If land reform is to go beyond reinforcing the rights of those on the ground – that being a policy decision for government – it would be necessary to open up schemes that are not purely based on whether people are, “resident in that postcode unit..., and entitled to vote, at a local government election, in a polling district which includes that postcode unit...” (clause 42(9)) or whether a person has a 1991 Act tenancy.

Written submission from the RICS

1. RICS is an independent professional body originally established in the UK by Royal Charter. We have a commitment to provide advice to the government[s] of the day and, in doing so, have an obligation to bear in mind the public interest as well as the interests of its members.

2. RICS in Scotland is therefore in a unique position to provide a balanced, apolitical perspective on issues of importance to the land, property and construction sectors.

3. RICS notes that the Scottish Government views land reform as a process, not an event.

4. Unpredictable legislative change does not create favorable conditions for property and land markets. Indeed, these markets require consistency to reach the necessary degree of stability to create confidence. As such, RICS believes a balance needs to be struck between the land reform process and the establishment of stable, consistent legislative and economic conditions.

5. This Land Reform Bill (LRB) will have a lasting and significant impact on Scotland for generations. For these reasons it is important that the legislation is measured, balanced between all participants in a particular sector or market, and considers environmental and economic sustainability.

6. RICS acknowledges that Parliamentary consideration has to be concluded by March 2016, and we believe that the timetabling of the LRB does not allow for sufficient scrutiny and consideration of some significant provisions in the Bill. RICS believes that this will create legislation that is too vague, undemocratic and open to interpretation.
7. Furthermore, there are many provisions in the LRB that allow for secondary legislation, or the creation of regulations and guidance through an appropriate Minister. This lack of clarity makes commentary difficult to provide.

8. In order to ensure each respective part of the Bill is provided with enough time to look at all issues in detail, we believe that the Scottish Government, and Parliament, have to be realistic as to what Parts of the Bill are both crucial to land reform – as a process - and achievable within the seven month timescale (following the closure of this Call for Evidence).

9. We would suggest that the following parts are the most important, and achievable, priorities to be taken forward in the Bill, at this time:
   - Part 1: Land Rights and Responsibilities Statement
   - Part 2: Scottish Land Commission
   - Part 3: Information about Land Control
   - Part 9: Access Rights

10. Taking into account the list in the previous statement above, we believe the following parts of the Bill require more deliberation, and should be considered further in the next Scottish Parliamentary session:
    - Part 4: Engaging Communities in Decisions Relating to Land
    - Part 5: Right to Buy Land to Further Sustainable Development
    - Part 6: Entry to Valuation Roll of Shooting and Deer Forests
    - Part 7: Common Good Land
    - Part 8: Deer Management
    - Part 10: Agricultural Holdings

11. The main reason for the omissions above is that they are too subjective - particularly the provisions on agricultural holdings.

12. We believe a full assessment of the impact that any new legislation would have on Scotland needs to be undertaken; such as a cost-benefit analysis. RICS is not aware of any Scottish Government-led program of this nature.

13. Having considered, and responded to, the Scottish Government’s consultation on land reform proposals - A Consultation on the Future of Land Reform in Scotland - it appears that the majority of the LRB has reverted focus onto the rural issues of land reform.

14. Indeed, many of the urban-based proposals have been detached from the LRB, thus limiting significant change in Scotland’s urban setting.

15. We would hope that certain recommendations from the Land Reform Review Group report, such as the Housing Land Corporation, will resurface in future legislation or policy.

**Part 1. Land Rights and Responsibilities Statement**
16. RICS welcomes the notion of a Land Rights and Responsibilities Statement (LRRS), but not the proposal to update (refresh) that statement every five years.

17. We believe that an updated statement should only occur when unreservedly necessary. This approach will help build the consistency and stability that property and land markets need, leading to sustained confidence and a stronger economy.

18. Ideally, should a refreshed LRRS be required, it would be compiled shortly after the formation of a new Government (following a Parliamentary election), as this timetabling should provide clarity of any Government’s policy and legislative ambitions for the land of Scotland at the start of their Government tenure. This would ensure accountability.

19. As indicated in the LRB policy memorandum, RICS agree that LRRS will “provide a key reference point for the Scottish Ministers” and “will also provide reference for the planned Scottish Land Commission, public agencies and the Scottish Parliament and provide communities and the private sector with a clearer understanding of the Scottish Government’s ambitions and aims for the future of land reform in Scotland”

20. For this reason, we believe the Scottish Land Commission (the Commission) should be regarded as a partner in the compilation of the first, and future, LRRS.

21. A refresh should also take into account appropriate documents, such as the Scottish Government’s Land Use Strategy, Scottish Planning Policy and National Planning Frameworks – all of which will play a role in any land reform programme, and can be amended as necessary.

22. The LRB should make a requirement for the Government to undertake extensive stakeholder engagement over the 12 month period prior to the publishing the final version of the first statement, and future statements thereafter.

Part 2. The Scottish Land Commission

23. RICS welcomes the proposal of an independent Scottish Land Commission (the Commission) as it would provide continuity as Governments change, and develop a high level of knowledge and expertise that would greatly assist in the implementation of successive Governments’ Land Reform policies.

24. It is essential that the Commission, and its remit, had the support of all of the major political parties in Scotland to ensure a consistent approach, professional reputation and impartiality.
25. Furthermore, the remit of the Commission has to be beneficial to the public, and its role and duties must be clearly defined. The Commission should not be viewed as a Government agency, but as a wholly independent and impartial body with the status of Royal Commission that is able to act in the wider public interest to shape, rather than necessarily burden, land markets.

26. We welcome the Commission’s remit, which does not make recommendations for change, but takes a role similar to that suggested of the Land Reform Review Group (LRRG) report’s Scottish Land and Property Commission; which should have "responsibility for understanding and monitoring the system governing the ownership and management of Scotland’s land, and recommending changes in the public interest".

27. The formation of the Commission may result in increased costs to the public purse, but the potential outcomes of the Commission’s research, evidence gathering and positive impact on land (should it follow the remit outlined above) should outweigh the costs.

28. RICS has always advocated separate offices for Land Commissioners and the Tenant Farming Commissioner (TFC); this option has been discounted in favour of fewer new public bodies and, therefore, costs. This is disappointing.

29. However, should the Commission go ahead as currently provided for, RICS welcomes the provision that does not allow Land Commissioners to delegate their functions to the TFC.

30. Unfortunately, there does not appear to be provisions to prevent the TFC delegating his/her functions to Land Commissioners. This practice should be inhibited, and legislative provisions made to ensure so.

31. The reasons for this is that with the TFC being able to delegate functions to Land Commissioners, this could lead to the TFC taking up a disproportionate amount of time of the commission and the secretariat i.e. commission staff could get overwhelmed with tenant farming issues, leading to the neglect of larger land issues.

32. This would not be beneficial to the principles of land reform and Land Commissioners’ remit to undertake research etc.; there is a need to maintain the priorities of the Land and Tenant Farming Commissioners.

33. All work undertaken by the Commission should be open, transparent and accessible to the Scottish public.

34. As stated previously in this submission, the Government should actively liaise with the Scottish Government in regard to the LRRS.

Land Commissioners
35. RICS welcomes the proposal that the Commissioners will be appointed by Ministers, with approval from Parliament; be required to have relevant expertise and experience in land; and have not served in the political arena for 12 months.

36. It is important that they are non-political, arms-length from Government, and follow the Commission’s remit to monitor the impact of land reform provisions and gather evidence.

37. In the interests of transparency and democracy, and the Commission’s independence from Government, we believe the Commission Chair should also be approved by Parliament, not appointed by Ministers.

**Tenant Farming Commissioner**

38. Should the Bill go forward as currently specified, RICS welcomes the appointment criteria of the TFC, such as relevant expertise and experience in agriculture.

39. RICS is keen to see a vibrant tenant farming sector in Scotland, and we recognise that in order for this aspiration to be met, there is a need for better working relationships amongst sector participants.

40. Accordingly, our preference is for a Tenant Farming Commission that comprises a board of established experts from a range of sector stakeholders; such as RICS, STFA, SAAVA, NFU and SLE, and the Law Society of Scotland – as this would ensure consistency and objectivity.

41. Whilst this may not be case, RICS still welcomes the proposal to appoint a Tenant Farming Commissioner as we believe this will go some way to improve the sometimes fragile landlord/tenant relationships.

42. RICS members advised that there may be financial implications for the TFC – particularly in regard to questions of law being referred to the Land Court. There will need to be legal advice provided to the TFC for these instances, which will come with a cost.

43. With regard to specific legislative provisions within the LRB, RICS has the following comments:

   a. Section 28 (4)(c) – RICS does not understand the purpose of this provision;
   b. Section 31 (1)(e)(iv) – this provision is too vague, and should specify to whom the recommendation should be made.

**Codes of Practice**
44. With regard to the Codes of Practice, at present, the LRB makes no set period for a review of the Codes of Practice. It is therefore imperative that the Codes are developed after extensive stakeholder engagement.

45. The Scottish Government may wish to consider suggesting an approximate timescale review – RICS suggests ten years - to ensure Codes remain applicable and relevant due to changing markets, legislation and best practice.

46. RICS rural practice members represent both landlords and tenants, and can therefore provide an in-depth, impartial perspective of what both sides of the table require in rent reviews and negotiations. Being guided by experiences and views of our experienced members, RICS is therefore ideally placed to assist the appointed, or acting, TFC in producing the proposed Codes of Practice.

47. It may be beneficial to the sector if a Code of Practice panel, comprising the aforementioned stakeholders, was initiated to oversee the development of the code and accompanying guidance. This would ensure transparency and clarity.

48. Land agents in Scotland, who are members of RICS, already operate under the Institution’s strict guidelines and codes of practice; any new code of practice will have to take this into account.

Part 3. Information about Control of Land

49. RICS supports transparency and sharing of appropriate information of land as we consider this to be in the public interest.

50. Furthermore, RICS believes that for the property market to work effectively and efficiently there needs to be sufficient information for participants in the market to act in a knowledgeable and informed manner.

51. Transparency of ownership could also assist communities in identifying who is responsible for the management of land and assets, and therefore would serve in the interests of the public.

52. However, RICS believes that the provisions of the LRB that relate to the procedures that need to be undertaken to ascertain information about control of land are not necessary, add a level of bureaucracy to the process, will not bring an improved level of transparency, and are not in the public interest. It would be much better for such information to be recorded by the Keeper at the outset.

53. In short, RICS believes that when land is registered, all details of ownership should be publicly available - it should be easy to access and free.
Part 4. Engaging Communities in Decisions Relating to Land

54. RICS welcomes the Bill’s legislative provision for guidance on community consultation, and will work with the Government in its development.

55. A definition of “sustainable development” is required, as is an indication of what statutory teeth the engagement programme would have, should a landlord not follow the guidance produced.

56. Furthermore, in ensuring compliance with the guidance, RICS members were quick to point out that it would be easier to hold the public sector to account in comparison to the private sector. This makes it all the more important to set out clear, statutory tests of how the concept of sustainable development would be interpreted in such circumstances.

57. RICS believes that without clarity as to what sanctions will be introduced for not following guidance this part of the LRB should not be an immediate priority.

Part 5. Right to Buy Land to Further Sustainable Development

58. RICS believes that this part of the LRB needs significantly more scrutiny and inspection. First and foremost because a statutory definition of “sustainable development” has not been clearly identified.

59. At global, national and local level RICS, and its members, are committed to promoting sustainable development not only for today, but also for future generations by adhering to the following principles:

   o protection of the environment through the preservation of natural capital;
   o promotion of social equity by ensuring access to services for the benefit of all;
   o support of a healthy local economy, including high levels of employment.

60. We would urge that a robust definition is announced prior to the LRB evidence gathering stage being completed, using the above as a template if necessary, and only after extensive stakeholder engagement; this would ensure clarity.

61. RICS acknowledges that the Scottish Planning Policy uses the Brundtland definition of sustainable development (Our Common Future, The World Commission on Environment and Development, 1987): “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.

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62. This definition does not go far enough, and we believe that the Local Government in Scotland Act 2003, Sustainable Development Advisory Note’s definition is more robust: “development which secures a balance of social, economic, and environmental well-being in the impact of activities and decisions; and which seeks to meet the needs of the present without compromising the ability of future generations to meet their own needs”

63. If the Land Reform Bill was to proceed with this definition, RICS believes there needs to be tests of what constitutes “sustainable development”, as well as “significant harm” and, “significant benefit” – and that they should not be ambiguously referenced in the Land Reform Bill.

64. The provision of such tests will lead to consistency and, therefore, confidence in the land and property markets – which should be a key objective of the land reform process.

Part 6. Entry to Valuation Roll of Shooting and Deer Forests

65. RICS acknowledges that this proposal brings shooting and deer forests into line with other commercial subjects in Scotland. However, it is hard to estimate what the effect of this Bill provision will have on the rural economy of Scotland.

66. The Bill’s Policy Memorandum states that “many small-scale shootings would be expected to eligible for rates relief under the existing Small Business Bonus Scheme”. Whilst this statement may be accurate, without research it is hard quantify how many estates will, and how many will not, benefit from rates relief. Additionally, we do not know the level of value likely to be attributed to the new subjects. Therefore, the actual impact on the rural economies, which are often fragile, will not be known.

67. Furthermore, whilst the Scottish Government has committed to continue the Small Business Bonus Scheme (SBBS) until 2016/17, it has not intimated whether the scheme will continue beyond this date; the proposed date where business rates exemptions will cease. Indeed, it is unknown what reliefs, if any, will be in place in two years’ time.

68. We acknowledge that a previous Government review already suggested that rate relief on agriculture, forestry and sporting rights should not be introduced “until the economic impact had been thoroughly evaluated”. In considering all the aforementioned contentions for consideration (paragraphs 66 and 67), in the interests of market participants and the public RICS strongly concurs that a review has to take place before implementation of this proposal.
69. Section 67, subsection 2, of the Bill states that “The assessor for each valuation area must, when making up or altering a valuation roll, enter separately the yearly value of any (a) shootings, (b) deer forests, in so far as exercisable or, as the case may be, situated in that area”.

70. RICS seeks clarity from the Scottish Government that “yearly value” is the Rateable Value (RV) and, indeed, whether it is to be reviewed annually.

71. For these reasons, we believe this Part should be removed from the current Land Reform Bill.

72. The LRB Policy Memorandum states that “shootings and deer forests are not defined in statute, nor does the Scottish Government propose to do so”. RICS believes there is sufficient case law to clarify this definition and, therefore, does not believe a statutory definition is required.

Part 7. Common Good Land

73. RICS acknowledges that the legal status of Common Good property is that it is owned by the local authority, and is to be managed by the local authority for the benefit of the people of the burgh that the Common Good property pertains.

74. Despite the fact that extensive case law exists, there is still uncertainty and difficulties in defining what “Common Good” is, and whether assets identified as Common Good are alienable or inalienable. This presents profound difficulties to local authorities attempting to affect good estate management of their property portfolio as required by law.

75. RICS believes that while the proposed changes to take into account the issues of the Portobello Park case are welcome, they do not address the main issues.

76. Consequently, the management and disposal of common good property continues to be problematic, contentious and expensive relative to the management and disposal of other local authority assets.

77. Paragraph 244 of the Policy Memorandum states that the proposed change will be a benefit to local government as it should present savings in opportunity costs in terms of time saved in the process of obtaining consent for change of use of common good property. Whilst that may be true, to an extent, the process of obtaining consent from a Sheriff or Court of Session is still an expensive and time consuming process which is a barrier and disincentive to good estate management for the public benefit.
78. RICS is of the view that the current LRB proposals in relation to Common Good represent a missed opportunity to extinguish common good status, which would result in all common good property being treated like all other local authority assets.

79. The current proposals run contrary to many of the policy objectives of the LRB as noted in the Policy Memorandum, particularly objectives outlined in paragraphs 2, 4, 7 and 8.

80. As such, the provisions relating to Common Good have to be considered further, with the view to exploring the possible abolition of Common Good property, and how this might be achieved, while leaving such property within the ownership of local authorities.

Part 8. Deer Management

81. RICS believes that the deer management provisions of the land reform bill should be considered separately and at a later date.

82. This primarily because the provisions appear to preempt the review, scheduled for 2016, in which Deer Management Groups (DMGs) are expected to develop effective and environmentally responsible management plan.

83. By introducing new legislation before this date, there is little, if any, opportunity for the deer management sector to finalise their plans demonstrate that they are working.

84. RICS believes that the deer management proposals in the LRB are only taken forward if Parliament is satisfied, and after robust scrutiny by Scottish Natural Heritage (SNH).

Part 9. Access Rights

85. RICS believes that the LRB’s provision regarding access rights appear to be a sensible tidying up of legislation.

Part 10. Agricultural Holdings

86. RICS wishes to re-emphasise that agricultural holdings is too substantive an issue to be drawn into the LRB, and should be seen as a package that has their own Bill, with separate Parliamentary scrutiny.
87. Having separate legislation for agricultural holdings would diffuse any unnecessary confusion, and we strongly urge the Scottish Parliament to consider this proposition.

88. RICS believes that any changes to legislation are aimed at creating improved market conditions, which are vital in ensuring farming is undertaken efficiently to guarantee security of food supplies, the primary public interest in agricultural production and the original reason behind the introduction of agricultural tenancy legislation.

89. Furthermore, agricultural holdings legislation needs to create greater confidence in the sector which, when coupled with the objective to guarantee food supply, can assist the Scottish Government’s vision for a vibrant tenanted farming sector.

90. Whilst RICS agrees with the Scottish Government’s vision, we sometimes differ on the approach.

91. RICS operates to ensure that the farming sector is open and accessible to new entrants – whether they do so via a tenancy or another means – and at times, it appears that the LRB agricultural holdings provisions looks beyond the intention to be food supply guarantor and concentrate on assisting the well-being of tenant farmers.

92. RICS strongly advocates the notion of ‘Freedom of Contract’, and remain so in light of the rent and contractual proposals in the agricultural holdings chapters of the Land Reform Bill.

93. Freedom of Contract allows the two involved parties – the landlord and tenant – freedom to devise their own contractual responsibilities and obligations; mediated, if necessary, by an experienced RICS rural practice surveyor. As experienced experts who represent both lands and tenants, the RICS membership in Scotland believes that the introduction of more Freedom of Contract, when used in the creation of new farm tenancies, would result in additional security for both landlord and tenant.

94. RICS believes that it would provide the biggest single injection of confidence into the sector as has been seen in England following the introduction of Farm Business Tenancies.

95. That said, RICS agrees with the proposals on creating apprenticeships which will provide greater opportunity for new entrants and the provision for longer term, more flexible letting vehicles to encourage the release of more land into the sector.

96. RICS is pleased that the absolute right to buy is not be included in the LRB provisions; we welcome Government support to facilitate industry leaders to improve landlord/tenant relationships; and we support a rent register.
i. Modern limited duration tenancies (MLDT)

97. It is the experience of many RICS members that landlords do not let beyond five years due to legislation creep; that is, with changing Government administrations comes changing policy and legislation. This lack of consistency - beyond Parliamentary terms - does not provide long-term security for the landlord or tenant and, therefore, damages confidence in the sector.

98. RICS acknowledges that MLDTs will be introduced, and accept the principles. However, there should be added facility for landlords and tenants to agree duration. This, we believe, will create confidence and, as a consequence, lead to more investment from the landlord and longer term relationships.

99. RICS believes there is scope to introduce greater freedom of contract within the MLDT framework.

100. Similarly, concerns were raised by the RICS membership that the draft LRB does not clarify whether the existing form of Short Limited Duration Tenancies (SDLTs) or Limited Duration Tenancies (LDTs) will continue.

101. At present, the LRB reads as though the MDLT will be the only form to be used; this leaves seasonal grazing and cropping arrangements in limbo.

102. There have also been concerns that landowners have been claiming Basic Payment on land let under seasonal agreements. RICS suggests that to try to counteract this, there must be a format for short term grazing, or mowing and cropping agreements that avoids the use of certain devices, such as contracting agreements.

Conversion of 1991 Act Tenancies

103. RICS is concerned that the minimum duration is not mentioned in statute. This needs to be clarified, and not developed through regulations if the Bill is passed through Parliament.

104. That said, RICS would welcome the opportunity to assist the Scottish Government in the development of these regulations.

105. With regard to specific legislative provisions regarding conversation of 1991 Act tenancies within the LRB, RICS has the following comments:

   o Section 79 (3)(f) – the minimum terms needs to be clarified. If it is too long, there could have significant implications on the dynamic of the landlord/tenant relationship.

ii. Tenants Right to Buy
106. Whilst RICS acknowledges that the LRB provisions introduce an automatic registering of interest for a tenant, it is the experience of our members that tenants only register if they have an interest in buying their let farm.

107. RICS believes that this provision is unnecessary and could upset the landlord/tenant balance. If a tenant wishes to buy his/her holding, the process of registering an interest is currently very straightforward.

108. However, the automatic registration could be a risk to sustainable development – one the key components of the Scottish Government’s overall land reform plan.

109. Should a landlord wish to sell land for sustainable development, a farmer (who has automatically registered interest) may intervene and purchase it. The landlord would then relinquish this particular plot of land to the tenant farmer, and be advised to find another plot to ensure s/he meets the sustainable development obligation. This could create another avenue of friction.

110. Essentially, registration could hinder negotiations for a sale for a sustainable development to, for example, a neighbouring business, for fear of triggering the tenant’s purchase. The individual tenant’s rights may, therefore, prejudice the wider public interest of the sustainable development proposed. Automatic registration could impede sustainable development in a way that does not exist at present.

**iii. Sale where landlord in breach**

111. RICS is of the impression that there are already existing remedies in instances where a landlord is in breach – such as referring the dispute to the land court.

112. If the landlord still does not do what land court says, s/he will violate a court order.

113. This provision is another example of where agricultural holdings moves beyond the intention of guaranteeing food supply and promotes the rights enjoyed by a tenant farmer.

**iv. Rent Review**

114. RICS agrees that the current rent review system requires fine-tuning to improve efficiency and effectivity – particularly as comparable rental evidence can produce rents that are in excess of the productive capacity of the holding.

115. However, at the same time, in being based on farm productivity, there could be a substantial increase in rents.
116. Indeed, it is the view of RICS rural practice members that a comprehensive definition of “productive capacity” needs to be established during stage 1, and RICS volunteers its expertise in assisting Government in its development.

117. Furthermore, RICS members believe it would be unusual and bad practice to set a “fair rent” without considering market evidence; other forms of commercial rents are set this way.

118. With regard to specific legislative provisions regarding rent review within the LRB, RICS has the following comments

- Section 2 (1)(d): RICS is not convinced that a landlord or tenant can predict what the rent could feasibly be two years hence;
- Section 2 (3)(a): RICS does not comprehend why rent reviews need to take place in Whitsunday or Martinmas;
- Section 2(3)(b): There may be instances where there are elements within contractual lease agreement whereby rent review dates could be out of sync. This needs to be addressed;
- Section 3(1): RICS believes there needs to be an additional provision which ensures a reduction or increase in rent is taken into account following an increase or reduction in the area let; for example, after the resumption, or addition, of land to or from the tenancy;
- Section 9 (2)(b)(i): RICS suggests that the Bill is amended to read “any accommodation all or part of which needs to be occupied by the tenant of the holding” – this would ensure the farmhouse is considered proportionate to the land farmed;
- Section 11(1): many RICS valuers were not sure how this provision could be implemented. It is assumed that this provision means that the next rent review is still due three years from rent review that went to land court. RICS seeks clarity on this point;
- (83 Limited duration tenancies and modern limited duration tenancies: rent review) Section 3 (9A)(1)(c): RICS is not convinced that a landlord or tenant can predict what the rent could feasibly be two years hence, and believe that guidance needs to be developed as to what is payable.

119. RICS suggests that any new system is extensively trialled before any full roll out. Ideally, the trial should be carried out by RICS regulated land agents, on behalf of the Scottish Government, and last at least three years to ensure it is robust and effective.

Referral of rent to land court

120. RICS believes that the Land Court is not the most appropriate venue for rent disagreement. Whilst referrals to Land Court puts the disagreement in a formal domain, the costs and timings are considered too high and slow, respectively.
121. Indeed, RICS believes that rent disagreements should not be referred to the land court in the first instance, but to a rent assessment panel.

122. RICS is firmly of the view that only after all other mechanisms, such as arbitration and mediation, have been exhausted, should a rent dispute go to the land court.

123. RICS currently offers a service, where we can appoint an Arbitrator or an Independent Expert to resolve a rent review dispute, and are also are able to appoint Mediators if a party wishes to go down this route.

124. Taking a rent review dispute to Court is not commonly the most effective way of finding a resolution; particularly where the parties previously enjoyed, and may well want to continue to enjoy, a close working relationship. This is because it is primarily a hostile process: parties are put in direct opposition to each other to ultimately determine a winner and loser.

125. As a result, the court system tends to heighten the conflict between the parties as each tries to show the other in the worst possible light, rather than trying to reach an amicable compromise.

126. Alternative Dispute Resolution (ADR) is usually cheaper and quicker than taking a case to court. The courts themselves recognise the effectiveness and increasing importance of alternative means of resolving disputes. Indeed, judges will sometimes suggest this course of action prior to a court hearing.

127. Going down the ADR route is generally quicker, more flexible, and cheaper. It is also conducted in private, which both parties usually prefer. Furthermore, the person appointed by RICS is an experienced expert with knowledge of the actual practice in the field, whose decision will reflect this.

128. RICS’ Dispute Resolution Services (DRS) make thousands of appointments each year from its panels of dispute resolvers. This service has been well established in Scotland for many years, and has proven to be dependable and effective for landlords and tenants alike. Only those who are able to reflect the high standards of knowledge and experience expected by RICS are able to join a panel.

129. Another option parties have is Mediation. RICS have a UK wide panel of trained Mediators to choose from. Key advantages include:

   i. Speed - a mediation can usually be set up within a matter of weeks and usually last no longer than two days;

   ii. Accepted outcomes - parties who are frequently unhappy about binding decisions that are handed down would be more satisfied with the ownership of an agreement facilitated by a mediator;
iii. Best service - mediation is a negotiating arena in which landlords and tenants would be better served by chartered surveyors who are more comfortable in advocate mode rather than expert mode.

v. Assignation of and succession to agricultural holdings

130. RICS believes that the widening of the entitled persons to succeed an estate goes too far.

131. A direct consequence of this broadened list is a limiting of the number of new entrants to the farming sector. This contradicts the Scottish Government’s vision for a vibrant tenanted farming sector.

132. RICS believes that the best farmer should be farming the land as far as possible to ensure continuity of the national food supply; this is not necessarily going to be a distant relation of an existing tenant.

vi. Compensation for tenant’s improvements

Amnesty

133. Whilst RICS accepts the proposals around amnesty, there is currently no backstop for a claim. RICS believes this needs to be considered, and suggests a threshold of 30 years. We suggest 30 years to reflect a reasonable maximum period by which improvements would generally be written-off.

Tenant improvement

134. RICS acknowledges that a tenant must be able to reasonably demonstrate that s/he provided equipment – but this Bill’s statement is not entirely clear. A clear definition in the Bill could provide clarity and prevent potential disputes in the future.

Improvement by landlord

135. The Bill provisions do not indicate a trigger date, and RICS suggests this is deduced during stage 1.

136. Furthermore, RICS believes that the provision within the Bill which demands that landlords notify a tenant before any improvements is unnecessary. RICS has heard of no instances where a landlord has made improvements without seeking tenant approval.

137. RICS has issues over section 100 Ancillary provision. This provision states that appropriate Ministers “may by regulations make such incidental,
supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of or in connection with this Act or any provision made under it." Furthermore, “Regulations under subsection (1) may modify any enactment (including this Act).”

138. RICS believes this specific provision bestows too much authority to Scottish Ministers. These provisions are undemocratic and provide the opportunity for Ministers to make amends to legislation, and create new regulations, without sufficient Parliamentary scrutiny. This is undemocratic and could affect consistency and confidence in the sector.

**Written submission from Cawdor Estates**

**General**

We echo the comments made by the Royal Institution of Chartered Surveyors and welcome the Scottish Government’s proposals for change to secure a more dynamic and vibrant rural sector in the future. This legislation is significant and will have a lasting impact on rural regions and very likely urban areas as well. Its impact will be felt for many years.

We do, however, strongly believe that Agricultural Holdings legislation should either be excluded and dealt with in a separate statute or given due recognition in the title of the Bill.

We are also concerned about some of the detail which is not included in the Bill and which will, if enacted as currently drafted, be left to Scottish Ministers to introduce via secondary legislation without further consultation.

We welcome many of the proposals contained within the Bill, but urge caution that yet more layers of regulation and bureaucracy may be imposed on private landowners where, more often than not, the aims of such regulation are already being met.

**Part 1 - Land Rights and Responsibilities Statement**

We welcome a Land Rights and Responsibilities Policy Statement. However, as there are already initiatives such as this in place we do not believe that the Policy Statement is essential. We would not support something emotive and ideological but welcome a clear policy detailing appropriate aspirations and specific and achievable targets for a national Rural Policy.

As one of the larger landowners in Scotland, we are firmly committed to managing land effectively and sustainably to the benefit of all, including for the public good. There is a real opportunity to generate public benefit from private land. We already work closely with the local Community Council, provide extensive rural housing on a long term basis, grant and maintain specific access to land including opportunities for training for the Armed Forces, and significant forestry operations. We deliver
renewable energy, tourism opportunities, specific conservation measures and educational benefits. Much of our management outcomes are at little or no commercial return to the business. This Estate is a business contributing to the local, regional and national economy and as a well-established entity we recognise the importance of taking into account social considerations when making business decisions.

We welcome greater partnership and collaboration with local communities, but would ask for a clear definition of public benefit and community. ‘Community’ can mean a number of different entities and clarity is required. However, we are a willing and enthusiastic partner in delivering public benefit and recognise the potential opportunities within the wider area, especially in relation to education.

We believe that land reform should not just be focused on who owns the land but how effectively it is managed. The easy emphasis on 432 people owning half the land area of Scotland as being undemocratic, as is represented, is untrue: this situation does not in any way impede the right of individuals of voting age to vote or to be represented through the parliamentary system. It may as well be said that it is undemocratic having only 129 MSPs to represent the country, which is a moot point. The real question is, is this situation anti-competitive and in what way? Issues of scale in terms of land ownership are arise almost entirely from the low productivity that vast areas of Scotland can be characterised by: rock, scrub and bog.

Finally, we note that the Bill has not addressed nor clarified many vital elements which need to be considered in relation to the rural economy, namely:

- The impact of the proposed changes to food production
- The impact on financially sustainable farm and estate businesses
- The potential impact on tourism
- A strategy for future investment in Rural Communities

Part 2 - Scottish Land Commission

We welcome the proposal that Minister-appointed Commissioners must have relevant expertise and experience in land. We also agree that the Commissioners must be arms-length from Government with a remit to monitor the impact of Land Reform provisions.

However, we strongly believe that the Tenant Farming Commission and the Scottish Land Commission should remain totally separate. The Land Commission’s remit is far wider than simply agricultural holdings, and the knowledge and expertise required for the latter is very specific. For instance, this process has poorly represented the important forestry sector.

We also note that the creation of the Commission, five Commissioners and a Tenant Farming Commissioner will be a considerable annual cost in the region of £1.3million or more per annum.

Part 2 Chapter 3 - Tenant Farming Commissioner
We welcome the proposal to appoint a Tenant Farming Commissioner.

We are very keen to see a vibrant tenant farming sector in Scotland. We welcome the desire to have better working relationships amongst sector participants. We feel that the current systems lead to unnecessary conflict and divisiveness. As a Landlord, we would welcome the opportunity for more direct negotiation and arbitration but at present are committed to a legalistic and adversarial approach with the Land Court the only means of achieving resolution.

Therefore, we would like to see a Tenant Farming Commission which comprises a number of different, expert stakeholders such as RICS, SAAVA, STFA, NFUS, SLE and the law Society of Scotland. These stakeholders, particularly those from RICS and SAAVA, often represent both landlords and tenants and therefore can offer impartial professional advice and perspective in relation to rent reviews and lease negotiations.

We believe a Tenant Farming Commissioner will help improve the sometimes unfortunate, and unnecessary, fragile relationship between landlords and tenants. Proposed Codes of Practice are already in existence from various member organisations, but we have no objection to the Tenant Farming Commission to produce these provided they are balanced and well thought out.

Implementation of the Codes of Practice will inevitably lead to increased costs to landlords and tenants as additional professional advice will have to be sought. Most tenants and landlords have good working relationships and these additional costs are a real concern.

Part 3 – Transparency of Landownership in Scotland

We welcome the decision to exclude from the Bill the recommendation of the Land Reform Review Group (2104) that ownership of land in Scotland should be restricted to natural persons and European Union registered entities (Part 2, Section 5 – Owners of Land, paragraph 11). We believe there are legitimate concerns regarding inward investment or existing investment.

However, clarification is needed as to possible Regulations in relation to access of information.

We believe that land reform should not be focused solely on who owns the land but how effectively it is managed. We do not understand the very narrow focus on scale entirely divorced from value so far presented: it is arguable that the landholdings of the much-publicised 432 land ownerships have an equivalent value to only a passingly small fraction of Edinburgh New Town for example and are, in value terms or as a proportion of productivity, insignificant. We welcome and support a full land registry giving transparency of ownership and land use and the public benefit that already exists.
Nevertheless, we are concerned that the government is pursuing the fragmentation of larger landholdings without taking any account of what these landholdings actually consist of. Instead of this fragmentation being a virtue it could instead undermine the sustainability the government seeks to foster. For instance, it is already well understood that conservation initiatives function much more effectively at large scale. The positive case for fragmentation has not been properly presented for debate that could help inform successful legislation.

Parts 4 and 5 – Furthering the Sustainable Development of Land

In relation to guidance on engaging communities and decision relation to land, we believe that good practice is the key, and not legislation. There is real concern as to what is appropriate and as to when Community engagement would be required. The Bill offers no guidance on this. The day to day business of an Estate or Farm should not be impacted by a requirement to engage on minor issues.

Within the Bill, there is an extension of the existing community right to buy to ‘further sustainable development’. Whilst there is clarity on when sustainable development conditions are met, there is no detailed definition of ‘sustainable development’ per se and we believe that a proper definition for this must be included. The concept of sustainable development is a moving feast and has expanded somewhat from the original definition laid out in the Brundtland Report (1987)\(^\text{16}\). We would also ask that ‘public interest’ is further defined.

We also believe that it is inequitable for salmon fishings and mineral rights relating to land to be included.

Right to Buy Land to Further Sustain Development

We welcome the principle of community ownership especially where a landowner is in breach of good land management and nefariously treats tenants and other stakeholders.

However, there is a major concern. It is evident that existing large-scale Community Ownerships have not been fully assessed for financial viability. There is a lack of transparency in terms of public funding on an ongoing basis being made to these community ownerships, through Government, Local Government and the EU. A requirement of the Bill should be for the Land Commissioners to produce a fully audited report of costs of large-scale community ownership.

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\(^{16}\) “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of \textit{needs}, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of \textit{limitations} imposed by the state of technology and social organization on the environment's ability to meet present and future needs.”

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The other issue is once a community has bought as an area, there is an unwillingness to support the ongoing maintenance and investment in that asset.

There is a lack of clarity as to the definition of ‘sustainable’ in the Right to Buy Land for sustainable development.

The legislation should not make it possible for others to forcibly acquire the best parts of another person’s assets to the detriment of what remains, and excluded land must include garden and curtilage of property.

We are also concerned that there is considerable scope within the Draft Legislation for misuse, i.e. a community fronting a third party purchaser to acquire a commercial development.

Clarity is again required as to whether commercial tenancies are included, which drafting seems to indicate. If this is the case, there will be a very negative impact on investment in Scotland.

**Community Bodies**

Clarification is required as to the definition of a Community Body and their financial viability through the publication of regular financial statements and the amount of public subsidy. Public benefit must be clearly demonstrated on an ongoing basis. There is also no reference in the Bill as it is drafted as to how any disposal of a previously acquired asset by a Community Body is dealt with. This is a crucial consideration.

**Right to Buy**

A definition of Public Interest is absent from the Bill and it is imperative that this is understood.

We would also state that compensation must reflect the true, open market value of the asset being acquired.

**Part 6: Sections 66 and 67 – Entry in Valuation Roll of Shootings and Deer Forests**

We do not in principle object to the cessation of Sporting Estate Tax Relief and the reintroduction of business rates in line with all other commercial activities. We understand that many businesses will continue to benefit from various business supporting initiatives such as the Small Business Bonus Scheme.

However, as an employer of 10 full time employees directly involved in the management of the sporting element of this estate, and a further two full time seasonal workers and up to 40 day and temporary beaters, we would urge Ministers to ensure a full economic assessment is conducted to determine the potential impact this change will have on the sector which is associated with economically fragile
areas of the countryside. In reality, most deer, shooting and salmon fishing activity operate at a loss. Any additional cost burden will only have a negative effect on employment and maintenance.

Additionally, it is doubtful that the re-introduction of sporting rates would have any net benefit to Government, which is the main reason they were abolished. As noted above, there is the real possibility that the impact on remote communities would be considerable.

Further considerations for Ministers on which to seek clarity are:

- What valuation method will be employed by local authority Assessors in establishing net annual value?
- How will local authority Assessors differentiate between deer culled for sport and deer culled for management purposes? Relief must be given for management culls and culls undertaken in the public interest. Some definition is therefore required that reflects on commercial activity.
- Any additional costs may provide a disincentive to maintain deer management, a key consideration in the Bill. Also, marginal local communities, many of which are already community-owned estates, which have very few alternative sources of non-grant income will be detrimentally effected.
- Will business rates apply to all land, including public and private? There are large area owned by Government and agencies, such as Forest Enterprise Scotland, as well as charities.

Part 8: Sections 69 to 71 Deer Management

We welcome an increase in the powers of Scottish Natural Heritage to permit SNH to request Deer Management Plans to be created as we believe this is part of existing sound land management. We would be interested to know how business rates will apply in this area where cull obligations are already imposed upon land owners.

We would also submit that existing Deer Management Plans and the structure of Deer Management Groups are working effectively and in compliance with SNH.

Part 9 – Changes to Core Path Legislation

We welcome the inclusion of appropriate consultation being made with landowners prior to Core Path plans and amendments being issued. This has on several occasions been absent from previous plan implementation and has resulted in appropriate paths being constituted.

We believe that there should be greater scope for landowners to make applications for amendments to Core Paths where it is evident that the route has significant impact on farming and forestry management and safety, and as a consequence are inappropriate for public use. We would propose that providing the landowner proposes a reasonable alternative route that the local authority authorise the amendment within a fixed timescale of no more than 6 weeks.
Part 10 - Agricultural Holdings

We welcome Scottish Government’s recognition that current legislation requires revisiting in order to support a vibrant, dynamic tenant farming sector. Further flexibility is needed in the Legislation to encourage investment in agriculture as the farming industry has changed dramatically in relation to food production.

However, we believe that this review should not form part of the Land Reform Bill and should be given its own Bill which in turn would allow for more detailed scrutiny of the provisions.

Having said that, we welcome and support the proposal to retain the five-year Short Limited Duration Tenancy. We believe this offers flexibility for both landowners and tenants, especially required in the time of such volatile agricultural commodity prices.

The new Modern Limited Duration Tenancy should provide benefits to landlords and tenants, although we believe it could have gone further, giving more freedom of contract in relation to duration of tenancy and the ability to diversify and apportion rent accordingly.

We also welcome the amnesty on tenant improvements.

However, the widening of succession rights for 1991 Act tenants is far too broad and does not strike the correct balance of power between landlords and tenants. We also fear this may result in tenants who have no experience of agriculture and no working connection to the farm in question. We believe that if the succession eligibility criteria are to be widened then there must be more detailed tests demonstrating suitability. Why an incumbent tenant is the entity best placed to decide on how the future tenancy of the holding should develop or evolve is unclear. Since many tenancies function, in our experience, as de facto retirement schemes it is doubtful that incumbent tenants would necessarily make the best decision on behalf of the holding or to relate it to wider issues in the area, such as sustainability derived from improved economies of scale.

We have grave concerns that there is a lack of detail with regard to the conversion of 1991 Act tenancies to Limited Duration Tenancies. There must be clarification on details of the assigned lease, particularly the length of tenure, as soon as possible. There are benefits to lifetime succession arrangements to encourage and enable retirement from farming which can breathe new life into the sector and give young farmers the opportunity to enter the sector, but the interests of the landlord must be protected. Therefore, we feel that the length of tenure should be set at a level which can encourage this generational change.

With regard to farm rent reviews, under current arrangements, it is proving frustrating to find acceptable comparable rents against which to judge where a review should be set. Whilst it can be argued to be in the landlord’s favour that tendered SLDT and LDT rents can be considered where there is a lack of evidence of secure tenancy rents, we do not believe this is sustainable nor equitable.
We would suggest that the productive capacity of the holding, taking into consideration the terms of the tenancy agreement and any Single Farm Payment or equivalent, is a more objective measure of the individual holding which can be unrefuted. We also strongly believe that the residential elements of holdings must now be taken into consideration. The £1 allowance for farm dwellings is antiquated and severely prejudices landlords. In our experience this archaic provision has the effect of infantilising tenant farmers, who can pretend to be exempted from the economic realities experienced by all other ordinary households. It also appears to be the case that many of the beneficiaries of these economically artificial arrangements (where accommodation has no recognised value) tend not to look after the tenanted property. Alternatively, allowing a provision to link rents to agricultural commodity prices may offer an equitable solution.

Furthermore, we propose that that if the landlord and tenant cannot reach agreement on a new rent within the given timescales and notice period, there should be an opportunity to refer the rent to arbitration in the first instance rather than automatically to the Land Court. This will be a less costly option for both parties and is far less confrontational and should engender better landlord and tenant relationships. This simple provision should have been introduced in the 2003 legislation and it has been a conspicuous and problematic omission.

Additionally, in order to seek clarity for landlords and tenants of 1991 Act tenancies, we would proffer the opinion that there should be the ability for either party to request the other to enter into a written tenancy agreement where none exists.

We welcome that the Absolute Right to Buy has not been included in this Bill and that there will be clarity on the circumstances of trigger of the pre-emptive right to buy for secure 1991 Act agricultural tenants.

However, we strongly believe that the removal of the Registration of Right to Buy is an error. A deemed Right to Buy only undermines the generally very good Tenant-Landlord relationship and potentially leads to a lack of investment. Since the introduction of the Right to Buy, inward investment to Scotland has declined and as a consequence, the tenanted sector.

We also assert that sale to a third party, unless agreed by the Landowner, should not be included in the Bill. Also, there is a conflict of the valuer and the person appointed to sell the land are the same person.

Conclusion

Scottish Ministers are to be congratulated on many of the measures within the Bill. However, we do believe that there should be further clarity provided on a number of issues as noted above and that there should be time for further consultation once these are known. We look forward to seeing the final outcome of this consultation.

Written submission from the Buccleuch Estates Ltd
Part 1: Land Rights and Responsibilities Statement
We are of the opinion that it is beneficial to have an overarching and detailed definition of land rights and responsibilities. However, such a statement must include detail not only of how such rights and responsibilities relate to ownership, but also include obligations for all those, such as tenants and other occupiers, who have an interest in the land to ensure all appropriate rights and responsibilities are defined.

Part 2: The Scottish Land Commission and Land Commissioners
We are fully supportive and enthusiastic of the proposed Land Commission and believe that it will be beneficial to all those with an interest in land. We would however question why there is once again specific mention of ownership within the remit of the Land Commission. Buccleuch have championed the registration of all land onto the Land Register and should this be achieved within the desired timescale then it is difficult to see what role the Land Commission could have in influencing ownership without affecting property rights. We believe that the focus of the Land Commission must be on the use of land and the management of land. The Commission must look to work alongside the National Planning Framework as well as the Land Use Strategy in developing spatial and development strategies for the benefit of Scotland.

We are pleased that the Land Commissioners will have a role in reviewing the impact and effectiveness of any new laws or policies. This review process should include identifying whether the laws and policies promote public benefit as well as any inconsistencies and inefficiencies within the policies/legislation.

We believe that it would be beneficial if the Land Commissioners have a ‘checks and balances’ role within their remit to review the effectiveness and consistency of the use of public funds by the Scottish Government and the influence those funds have on land use.

There is also a role for the Land Commissioners in identifying the public benefit in cases of Community Right to Buy or in Compulsory Purchase Schemes. A review by the Land Commissioners would ensure that any proposals under RTB or CPO would have genuine public benefit. The Commissioners should also be able to investigate if alternative remedies to issues are available and balance these against public benefit.

While the Land Commissioners can review the impact and effectiveness of laws and policies we believe that accountability for the laws, policies and decision making should remain with the Scottish Government.

Attention has been given to the eligibility criteria for Commissioners, as specified within the Bill and we appreciate that provision has been made to ensure the Commission as a whole has a breadth of experience. However, we note that there is no requirement for the Commission to have land use expertise within its makeup and we feel this is an area that would bring a positive added dimension to discussions. We would also wish confirmation that, as far as possible, Commissioners come from all walks of life and diverse areas within Scotland and seek clarity on the definition of ‘land reform expertise’ to understand whether this is defined by the geographical
context of the land under discussion or its potential use. All Commissioners must be in a position to review all matters referred to the Commission in an unbiased manner.

We note the functions of the Land Commissioners as laid out in Chapter 2, subsection 20, and would hope to see, within the final Act, definition of the full powers and remit of the Commission and how these relate to current legislation governing property rights.

**Part 3: Information about control of land etc.**
Buccleuch understand the need to share information about the control of land and would have no issues with this in principle. However, we would seek clarity on the definition of 'control' and wish to understand more about potential fees and penalties which may be levied.

We are actively involved in registering our land on the Land Register but, in our experience, heed must be given to the timeframes and the work which will be required to complete this.

**Part 4: Engaging communities in decisions relating to the land**
As conscientious landowners, where possible, Buccleuch actively engage local communities where major changes to land use may have a lasting impact on the local community / landscape.

Where such engagement is to become part of a Parliamentary Act, clarity and understanding would be sought as to the definition of community (a term currently used in relation to such a diverse range of groups from local and online communities to environmental and other special interest groups, to name but a few) and the geographical and interest boundaries which are to be included. Such a definition must be consistent with existing legislation with regards planning and compensation.

A clearly delineated sequence for community engagement must also be provided; with checks and balances in place to ensure this is not a stand-alone process but that it can run either sequentially or, ideally, in parallel with those already in place.

It would be useful to understand the sequence of how consultation should be undertaken. Should local residents be consulted before the Local Authority and national Government or should it be the other way round? Does it depend on who ultimately makes the decision?

In relation to community engagement, one must be mindful of the quality and agenda of the community voice, which can include both democratically appointed bodies (e.g. community councils) and their self-appointed sub structures, both of whom may claim legitimacy. Care must be taken to ensure any definition pays heed to their ability to represent the wider community as those who actively engage do not always have a subjective voice which can speak for all, rather are driven by their own prejudices.

Our experience of community consultation has been that some people or organisations choose not to engage in structured consultation preferring to pursue
their own agenda through the media without reference to the facts. We believe these people or organisations should be encouraged to engage with the consultation rather than court public opinion on the basis of ignorance of the facts.

**Part 5: Right to buy land to further sustainable development**
As legislation currently exists allowing communities to buy land it is unclear why there is a requirement for another piece of legislation and where this fits with those already in place.

Clarity as to the definition of ‘sustainable’ would also be sought to ensure this is widely understood and agreed.

Under clause 41 of the Bill; *Eligible Land Tenant's Interests*, we do not think that there should be any exclusions, thus allowing for the most equitable rules.

**Part 6: Sporting Rates**
We believe the imposition of sporting rates will be unviable and will cost more to collect than it returns. Such a change may also lead to job losses within the sporting industry, which is vital for some rural economies.

We would also like to point out that control of deer is not always be ‘sporting’. Buccleuch control deer purely as a management action for our commercial woodlands. In this case we would argue that there is no sporting opportunity and consequently no rates would be payable. This view is supported by the fact that we receive grant from the Forestry Commission for the culling of deer to aid establishment of woodland and to protect important habitats.

If as suggested in clause 218 of the Policy Memorandum, the reason for bringing in sporting rates was to ensure parity and fairness with other rural businesses we would question why it is not also being proposed to impose rates on agricultural and forestry businesses?

**Part 8: Deer Management**
Buccleuch already submit Deer Management Plans in relation to our forestry enterprise so we do not envisage that this will have any substantial effect on us.

**Part 10 – Agricultural Holdings**
Conversion of 1991 Act Tenancies to MLDTs
We are supportive of the conversion proposal if it is thought through correctly. We are however concerned by the suggested minimum conversion term to a MLDT that has been mentioned of 35 years as we can understand no logic for the choice of this time period. We would suggest that there should be a maximum term rather than a minimum term as this allows landlords the opportunity to plan for the future. There is also considerable thought required as to the terms that will make up the MLDT and how they will differ from the 1991 Act tenancy which it has converted from. The rent that is paid for a farm is based on the terms of the tenancy and if those terms change then the rent should also be subject to review at the point of conversion.

**Right to buy notice**
We believe that the requirement to initially register for the pre-emptive right to buy should be retained but would think that the requirement to re-register every five years to be superfluous.

**Order for Sale**

We appreciate the purpose of the proposed Order for Sale and understand the requirement for this however there needs to be a comprehensive system of checks and balances to ensure that this is not abused. We are also pleased to read within clause 353 of the Policy Memorandum that the Government wants to ensure the most productive use of our agricultural land. We would therefore suggest that an equivalent sanction be available to the landlord for use where the tenant is not making the most productive use of agricultural land.

**Rent Review**

The change in basis of rent review from open market value to productive capacity is not something which we would take issue with. We do however think that residential dwellings within a farm tenancy should be valued differently depending on the viability of the farm as a full time unit. It is inequitable that a large farmhouse should be included for no value within a tenancy of a small farm simply because the let is an agricultural let.

For that reason we believe that all surplus residential accommodation, including an element of the tenant’s accommodation for part time farms should be taken into account for rental purposes. We would also like to draw the committee’s attention to the fact that the productive capacity of a farm is very subjective and budgets can be composed to show a multitude of observations. This may lead to difficult conversations between landlords and tenants. The Committee should not assume that the change in method of calculating the rental value will reduce disagreement between parties.

**Assignation and Succession**

We object to the proposed widening of classes of successor and assignees. There seems to be a common preconception that landlords always want to gain vacant possession of their land. In Buccleuch’s case we are a long term landlord. We let land and we want the best the farmers to farm the land. If there is an extended family member working on the farm who have made their home in the community then subject to them being appropriate then we would look to work with them to take forward the farm.

We have a current example where we have identified the farm manager of a tenant as a potential successor on the unit. They have no legal claim to a tenancy but they have proved themselves as somebody we want to work with going forward. We would not support someone who succeeds to a farm where they are not suitable or competent. The widening of the succession and assignation makes this more likely.

**Compensation for Tenants Improvements**

We are supportive of the proposed amnesty for tenants’ improvements. It is key however that the improvements should only be eligible as an improvement if it is an
improvement for the benefit of the let holding. Should it be unnecessary to the requirement of the let area then it should remain as a fixture. We would like to remind the committee that the compensation provisions for tenants improvements and fixtures are both based of the premise of ‘Value to an Incoming Tenant’.

Written submission from NFU Scotland

NFU Scotland (NFUS) welcomes the opportunity to comment on this draft Bill. NFUS represents over 9,500 farmers and growers throughout Scotland, and as such has a unique oversight of the spread of issues covered by this Bill. NFUS realises that for many of its members, land reform is a very emotive issue. As such, NFUS has conducted extensive consultation with its membership, both internally via Committee structures, and via open meetings in its Regions.

NFUS previously noted that it considered agricultural holdings merited a separate Bill. Within the scope of the draft Bill, provisions relating to this forms a large and important portion. With this in mind, NFUS feels that renaming this Bill ‘Land Reform and Agricultural Holdings’ could go some way to acknowledging this, and also assist in dealing with perception within the industry.

NFUS recognises that Scottish Government considers land reform to be an ongoing process, but feels that it is vital that the emphasis must be on how land is utilised, rather than who holds ownership. An, understanding of the practicalities and implications for land management and farming must be at the forefront of policy discussions and decisions. With farming being the prime use on the bulk of rural land and the food and drinks industry a major employer across Scotland land reform should be complimentary to the Scottish Government’s objective of growing the food and drink industry. Good and prudent land managers must have nothing to fear from these provisions.

Land rights and responsibilities statement (LRRS)

NFUS noted previously that having a stated LRRS should prove to be a positive step, and for the most part members have been in favour of this as a framework for the new Scottish Land Commission. However, NFUS wishes to emphasise once more, that any LRRS must have specific regard for agriculture. As the foremost land use in Scotland, it is vital that any policy produced has adequate consideration for the importance of food production.

Scotland’s food exports now surpass £1.1 billion with total food and drink exports valued at £5.1 billion in 2014. Increasing international awareness and appreciation of the quality and provenance of Scottish food, and Scotland’s distinguished heritage as a food-producing nation is helping to drive year on year export growth. In order for this to continue, along with the associated benefits to the rural economy that it brings, it is vital that the importance of food production is strongly recognised in land reform. Food production is the largest manufacturing industry in Scotland. This bill will have impacts on this, and the LRRS has the potential to impact upon primary production.
Scottish Land Commission

NFUS recognises the formation of the SLC as part of Scottish Government’s recognition that land reform is an evolving process. The Bill notes that the SLC will be required to prepare a strategic plan, with set objectives and priorities, and that it will be approved by Ministers. Scrutiny of these proposals will be critical, it is important that local communities and stakeholders have the opportunity to provide views on any draft strategic plan, and this should also seek approval from the Parliament.

It is essential that the plan is fit for purpose and delivers the best opportunities for development within these areas. In order for success it is essential that the individuals who make up the SLC come from a broad range of interests and represent all views and opinions. An SLC that is seen to be dominated by one agenda will fail to garner the support of the broad community.

NFUS members voiced concern over the suggested areas of expertise as outlined in the Bill. Agriculture, and any mention of practical land management experience is a notable omission from the current list. NFUS suggests strongly that this should be a prerequisite within the Commissioners, it is not enough to simply have the whole of agriculture represented by the Tenant Farming Commissioner. It should also be made clear how the Tenant Farming Commissioner interacts with the wider Scottish Land Commission.

Recognising that land reform is an evolving process, there must be clear operational standards set between the Commission and other government departments. Rural Scotland does not operate in isolation, the work of other departments has significant impacts, and if overall objectives are to be achieved it will important that policy moves consistently in one direction and rural dwellers do not find themselves competing against policies with differing objectives.

In recent years in recognition that centralised decisions don’t always provide the best outcome there has been a political move to grant greater devolution and local autonomy. NFUS members are concerned about how a centralised Commission can truly appreciate the complex matrix of localised needs and aspirations that are contained within rural Scotland. Some provision should be made for a framework of regional advisory boards.

Tenant Farming Commissioner

NFUS has pushed for some time the concept of an independent overseer for tenancies. The work completed by the Agricultural Holdings Review Group (AHLRG) was commendable, and it was encouraging to note that the Group considered that many tenancies function well in the interests of the parties involved. However, it was also recognised that in some instances this was not the case, and NFUS is pleased that Scottish Government has included a position for a Tenant Farming Commissioner within this Bill.

NFUS has been working with the Interim Commissioner, and will continue with discourse on behalf of members. NFUS is encouraged by work undertaken so far,
and will continue to engage whilst the Commissioner works to produce industry codes.

NFUS realises that in the first instance it will be difficult to foresee the volume of issues which will be referred to the new Commissioner. NFUS wishes to urge Scottish Government to make provision to review the allocated time and budgets attributed to this role, to ensure that this can be increased if dictated by demand.

It is very encouraging to note that the Bill contains a list of codes of practice for the Commissioner to prepare. During consultation, NFUS members have felt that in order to be able to make a real difference these codes must be statutory, which will ensure that the Commissioner can enforce meaningful sanctions if he considers this necessary. It has however been noted that the maximum sanction which the Commissioner can apply within the Bill is £1,000. This level is set far too low to be meaningful, and NFUS feels this should be reviewed.

NFUS believes that the Tenant Farming Commissioner must be pro-active, there is a role in terms of providing support and assistance to individuals involved in disputes, as well as additional information. One of the roles of the Commissioner is to produce statutory codes, and the Commissioner must be proactive to ensure that these are being followed. Where bad practices is uncovered the emphasis should be on remedying this at the earliest possible stage.

Two issues that are often central to many disputes are rent reviews and waygo. The fear of lengthy legal procedure often results in one of the parties agreeing to a settlement which would otherwise not be deemed acceptable. If the sentiment of the industry is to change the Commissioner will have an important role to play.

**Transparency of land ownership**

It is recognised that with land ownership comes a unique responsibility, which in turn relies on accountability of those who own or control land. NFUS members have voiced concern over the motives of persons requiring this type of information, however realises that in principle increased transparency is very hard to argue against.

As a safeguard, NFUS wishes to stress that any fee applied to seeking this information must be high enough so as to prevent malicious applications for information. In addition to this, NFUS understands that the intention of the Bill is to ensure that third parties must have a ‘justifiable reason’ for requiring such information. NFUS feels that exactly what constitutes a ‘justifiable reason’ should be clearly described.
Engaging communities in land based decisions

NFUS wishes to emphasise strongly that farmers are often an integral part of rural communities. Members have voiced concern over the intention for Ministers to issue guidance about engaging communities in decisions relating to land which may affect communities. NFUS wishes to be included in stakeholder engagement relating to any guidance.

There is very little detail contained within the Bill in its current form, and as a result members are worried about what the guidance may contain, and what this will mean for their farming businesses. Members feel strongly that communities should not be able to dictate to a farming business how operations are carried out, and that safeguards must be in place to ensure that a community cannot have a detrimental impact on how such businesses go about their day to day business.

NFUS feels that it is imperative that Ministers consult not just with communities in producing such guidance, but also includes NFUS and other landowner representative bodies in discussions. Only by doing so will landowner interests be adequately protected from potential harm.

In considering any ‘failure’ to adhere to guidance, in relation to an application to purchase land for sustainable development, NFUS feels that it is imperative that what constitutes a failure is clearly laid out, so that a landowner or occupier cannot inadvertently fall foul of this guidance.

NFUS is encouraged to note that this guidance is to apply to land held by charities, and that the conduct of trustees will be of relevance. Increased transparency and accountability of trusts is something which a number of NFUS members feel is vital to improving where there are ongoing management issues which they have been unable to resolve at the current time.
Right to buy land to further sustainable development

NFUS does not understand why this provision is contained within this Bill, when Local Authorities have had the ability to exercise compulsory purchase powers since 1973. The Community Empowerment bill introduced additional ability for communities to purchase ‘neglected or abandoned’ land, but this right to buy appears much more of an absolute one. NFUS feels that this is unnecessarily harsh, and does not seem to give due consideration to the balance of landowner or occupier rights.

NFUS is very concerned to note that there is no definition provided for ‘sustainable development’. Without this definition, it is difficult to give a thorough consideration to the appropriateness of this proposal. NFUS feels strongly that a definition should be provided within this Bill, and as such this should be subject to detailed scrutiny by the Scottish Parliament.

NFUS notes that in policy guidance it is stated that ‘fundamental to this is the identification of significant harm’. However it is not noted in the Bill what constitutes ‘significant harm’. NFUS considers that a clear definition of this must be provided, so that both communities and land owners/occupiers are well informed.

NFUS suggests that within the context of this Bill, it could be suggested that this measure is targeted at urban land, or land held under large landownership. This measure will affect all land in Scotland, and many farmers on urban fringes in particular feel very threatened by this portion of the Bill.

NFUS recognises that for some areas of Scotland there is some evidence that local development can prove difficult due to reticence of land owners or occupier involved to participate in proposals. However, it is important to realise that there can be valid reasons for a landowner or occupiers interests not aligning with the wishes of the local community. A landowner may have genuine reasons for not wishing to sell a piece of land for another use, and Scottish Government must have a thorough appreciation of such reasons and the rationale for these.

Loss of any parcel of land is recognised as the ultimate sanction against any landowner, and NFUS considers that this should be a last resort. Consideration should be given to allowing a community to enter in a lease arrangement with a landowner, if parties wish, as opposed to a sale which is potentially not based on the willing buyer, willing seller principle.

In setting out the ‘key tests’ NFUS notes with concern that there appears to be no regard given to any detrimental effect on the landowner or occupier of the transfer taking place. NFUS suggests that consideration must be given to any effect on the remaining parcel of land, as well as any financial implications. As noted previously, there are many farms on urban fringes, some of them extremely marginal, and the loss of land to any such unit could have disastrous consequences. NFUS feels strongly that a statement which ensures that Ministers must have due consideration for detrimental impacts on the business losing the land must be included in this Bill.
In addition, where it is demonstrated that significant harm is likely to occur to the land owner/occupier this must be a reason for the transfer not taking place and a community must be advised to seek alternative options to achieve its aspirations.

NFUS members have voiced extreme concern about the criteria for constituting a community outlined in this Bill. Members frequently report issues where parties have moved into a locality, often from a previously urban existence, and often end up at odds with the rural businesses who have often been established in that location for generations. NFUS members feel that in order to prevent such individuals from steering their own agendas through community rights that individuals should have held residency in a community for at least five years.

NFUS members have also voiced concern over how communities can be constituted. NFUS understands that the definitions provided are consistent with previous legislation, but cannot understand the rationale for using a postcode area. This blunt instrument takes absolutely no account of diverse factors such as shared culture or common interests, and NFUS feels that better definition should be sought.

In making an application, communities must be required to complete a full and detailed business plan, and financial analysis for their project. Communities must have to demonstrate why the particular parcel of land is needed, and be clear about the exact extent to what is required.

NFUS is aware whilst there are a number of community led projects which have been a success, there have also been some high profile failures. NFUS feels strongly that Scottish Government must make a register of such projects, in order to examine the successes and failures and reasons for these.

If a transfer does successfully take place, there must be adequate compensation provisions for the land owner losing the land. Regard must be given to established compensation heads of claim, including severance, injurious affection, and disturbance for remaining land. In addition to this, the purchasing community should also be required to make provision to cover the landowner’s costs in relation for any necessary professional representation in the context of the transfer.

In addition to this, NFUS members feel strongly that if land is purchased under this proposal and subsequently developed, the landowner must be entitled to additional compensation payable by the community to reflect the increase in value of the land lost.

NFUS wishes to voice concern over the proposal to allow communities to act with a third party partner. Whilst the logic for this is likely to be funding, NFUS has already heard some evidence to suggest that the unintended consequence of this will in fact result in third party developers seeking out communities for their own profits, rather than the assumed intention of communities being in the driving seat and the third party being brought in as a partner. NFUS assumes that profiteering by developers is not an aim of this Bill, and suggests caution around this measure.
NFUS to make it clear that being subject to any proposed right to buy is stressful for any owner or landowner. Where an application has been made which has not been successful, NFUS feels that consideration should be given to a timespan being applied during which a community cannot make any further application to the same parcel of land. This should ensure that only the most robust community projects succeed, but also ensure that landowners are not subject to repeatedly stressful situations which could impact on their ability to plan their business.

Where a community is successful in purchasing a piece of land for a project which subsequently fails, the community making the application must be liable for the landowner’s associated costs. NFUS suggests that Critchel Down Rules are applied to ensure that land is offered back to the former owner.

Finally, NFUS feels that this Bill is contradictory, in that it is apparent that there is no level of accountability required of communities who undertake projects. This appears totally at odds with increasing accountability for landowners and occupiers under this Bill. NFUS suggests that some thought should be given to having individuals contained within a constituted community body accountable and liable for proposals which they are responsible for driving.

**Entry into the valuation role for shooting and deer forests**

NFUS does not agree that shooting and deer forests should be entered into the valuation role. NFUS considers that many estates provide substantial rural employment in areas, and as a result play a vital role in sustaining rural communities where otherwise there would be none. There are substantial tourism benefits from such businesses, and this results in inward investment in such areas. NFUS is very concerned that this proposal is contained within the Bill, as it is not aware that Scottish Government has carried out any research into the full financial implications of this proposal. Whilst it is clear that ‘parity’ is the aim of Scottish Government, NFUS feels that this proposal must be researched more fully before any changes are implemented.

NFUS notes in the policy guidance that ‘many small scale shootings would be expected to be eligible for rates relief under the existing Small Business Bonus Scheme’. NFUS understands that this scheme is calculated on the total combined rateable value of all properties within a business. Many farm businesses will pay non domestic rates on properties which are currently not covered by exemptions. As a result of this, farm businesses which have diversified (e.g. farm shops) in order to strengthen their business and reduce their risk will be exposed to these rates with no exemptions applied. This system will directly apply a penalty to farm businesses which have shown initiative. In addition to this, NFUS has serious concerns that this proposal will act as direct disincentive for farm businesses to diversify in the future.

In addition to this, NFUS notes that in theory the straight application of a rating system would apply to any land which has sporting rights, regardless of whether these are exercised or not. At a time when agriculture is suffering historically low prices, NFUS has concerns about the additional burden that this will place on such businesses.
NFUS also questions the context of this proposal in relation to the deer control methods. The proposals appear to be contradictory in that landowners will have additional requirements to control deer, whilst at the same time potentially have to pay rates which could be based on numbers killed.

Finally, NFUS questions how deer farms will be treated if any rate applied is based on numbers killed.

Common Good Land
NFUS has no comment to make in relation to the proposals which relate to common good land.
Deer
NFUS is concerned by the proposals outlined in the bill in relation to deer management. Over recent years, there has been substantial moves from within the land management industry to modernise deer control. There is a current deadline of 2016 for the production of deer management plans, and NFUS is unsure why the results of this have been pre empted by this Bill. Until this deadline has passed, it seems unfair to impose further regulation at this time. The creation of additional powers, with hefty sanctions, runs the risk of undermining the good work which is already being carried out.

NFUS members have also voiced concern over the bluntness of these proposals. The necessity of deer management varies from area to area, for example the stark differences which can be seen in the Highlands and Lowlands. As a result of this, a countrywide approach to deer management will be difficult to apply as a one size fits all approach.

NFUS also questions the requirement for the substantial increase in the fine for failure to comply with a control scheme. NFUS members are concerned about the scale of this, and NFUS would like Scottish Government to clarify justification for this.

Core Paths
NFUS does not have any significant concerns with the proposals contained within the Bill. It is positive to note that the importance of engaging with landowners in relation to paths has been covered by some of the proposals.

Generally, NFUS members are supportive of access takers. However, some members report repeated issues with irresponsible access. In these circumstances recourse is almost impossible from a landowner’s point of view. In the spirit of encouraging local authorities to work with landowners in relation to public access, NFUS is pleased to see that landowner consultation is noted in the Bill. However, NFUS feels that consultation requirements should be stringently laid out, and not left to an individual local authority to determine what it deems suitable. A path may seem relatively innocuous on a plan, but it could have severe detrimental impacts to the landowner concerned, so a robust consultation process which allows for objections to be scrutinised appropriately is a must.

NFUS would also like to take this opportunity to voice ongoing concerns relating to the maintenance of access provision. There is very little funding available for the ongoing upkeep of paths, and whilst Government targets aim to increase the use of such recreational facilities, there is no composite plan to ensure that these remain fit for purpose, and to ensure that landowners are not inadvertently exposed to liabilities.

Agricultural Holdings
NFUS has been pleased to engage with the recent review of agricultural holdings legislation by the Agricultural Holdings Review Group (AHLRG). It was pleasing to note that the AHLRG considered that the tenancy sector was not fundamentally
broken, as NFUS considers that a healthy and vibrant tenanted sector is a vital component of Scottish agriculture.

**Modern Tenancies**
There are a range of vested interests within the tenanted sector, and in providing views NFUS has consulted widely with its membership and taken a view on what it considers to be in the best interests of the industry as a whole. Crucial to the future success of the Bill is the restoring of confidence within the tenanted sector. Letting land is ultimately a choice, and without this it is unlikely that landowners or owner occupied farmers will find letting land a viable or safe option.

During the course of consultation as part of the AHLRG work, it became apparent that the industry recognised that the system introduced in 2003 of SLDT/LDT could function well given the right circumstances. The system introduced in 2003 intended SLDT’s be used for cropping lets and LDT’s for livestock farming. The clear distinction between shorter and longer duration is the principle that largely is accepted, but due to circumstance distortion has occurred within the industry with much shorter letting periods being the norm than either party would like under ideal conditions.

The Bill recommends a new version of letting vehicles, starting with retention of the SLDT option to accommodate lets of 1-5 years in duration. Some NFUS members have voiced concerns that landlords acting on the advice of professional advisors will elect to use the shortest duration as a default option, in order to minimise their risks. However, NFUS notes that the lack of ability to provide a fiscal incentive for letting of a certain duration means that the risk of including a single longer term option could result in landlords opting to use contract farming or annual agreements which are much less secure and in general less preferable than fixed term letting agreements.

The industry requires the right conditions that encourage and promote long term sustainable letting. It is for the benefit of all parties to work together to achieve this. There are good examples, even in the uncertainty of the last ten years, of those who have rented land with agreements that have functioned well. But all too often circumstance has dictated short term agreements, which are not conducive to a productive industry. Where this exists, with the fear that leases will not be renewed, this discourages investment, lower levels of production, and less confidence. NFUS is encouraged by evidence in Scottish Government’s statistical analysis as part of the AHLRG workstream which showed that over 70% of SLDT/LDT tenants reported to have had agreements renewed at the end of their fixed term.

The success of the modern tenancies is imperative for the sector, and Scottish Government must bear in mind that any changes brought about to 1991 Act tenancies will also have a bearing on the confidence of current and future landlords to let land. NFUS is aware that in 2017 the first generation of LDTs will come to an end, and these tenants must be able to reach agreements which work for their business, whether this is in the form of a new agreement, or a supply of additional or other let land.
NFUS also notes the second option the ‘MLDT’, of not less than 10 years in duration, to replace the current LDT option but provide a greater level of flexibility. NFUS feels that in order to ensure that the interests represented are taken account of there should be standard templates for such agreements, and that the industry must take collective responsibility for urging individuals to be clear as to the terms they are signing up for. The ability to insert a break clause at year 5 for new entrants is seen as a sensible precaution, however it would be prudent to distil the specific terms under which such a tenancy can be terminated by either party under this provision.

NFUS has considered the various options for tenancies outlined by this Bill. With the provisions applied, it is quite clear that land will be more likely to be let to existing or developing businesses under the MLDT system. As such, NFUS is concerned that aside from other initiatives such a starter farms, there are no options which will assist new entrants in getting on the farming ladder.

NFUS was pleased to see the AHLRG recommendation relating to repairing tenancies for a period of 35 years when let to a new entrant, and is disappointed to note that this is not contained within this Bill. NFUS feels strongly that starter farms have their place in the system, however would like to see this provision facilitated to offer an option to new entrants.
Assignation/Conversion

Currently it is possible to assign a 1991 Act tenancy to those who would have been entitled to succeed an estate under the laws of intestacy. Often tenants do not have a successor, or anybody to which they could assign their lease where the landlord would not be entitled to object. This is another reason why many 1991 Act tenants choose to extend their working life, or stay on farms till death. As a result, there can be a knock on effect of stagnation for the sector, and a further barrier to those wishing to come into farming.

The potential for conversion of secure tenancies is something has been a point where across the industry there has been strongly opposing views. NFUS originally proposed assignation for a 25 year duration, or to retirement age. NFUS also proposed a limited class of assignees, at that time to target this measure specifically at new entrants. Since that submission was made there has been much debate within the industry about what form this measure should take, whether a value should be attached to it, and what duration it should attract.

Conversion provides secure tenants with an alternative to the waygo process should they wish to leave their tenancy, and whilst not all landlords agree with the principle of this proposal, this will mean that some tenancies which would otherwise have continued in perpetuity may revert back to the landowner at some stage. In short, this option has the potential to offer something positive to both landlord and tenant.

Calls for open assignation allowing secure tenancies to be ring fenced have come mainly from secure tenants, including the NFUS Tenants Working Group, who believe that land held under such tenancies should continue to be so in the future. Other tenants who have concerns about their ability to realise adequate compensation at wagyo have also supported this as an alternative.

NFUS understands that this option was substantially investigated by the AHLRG, who recommended a term of 35 years was applied. NFUS also understands that there are substantial legal uncertainties over whether this option is possible either in an open or limited version. Therefore, NFUS suggests that at this current time this places the industry in an impossible position with regards to this option. Clarity is required on what is actually possible so that the industry can discuss the issue from an informed position and come to a conclusion that is in the best interest of the tenanted sector. NFUS asks that the Scottish Government as a matter of urgency confirm to the industry definitive guidance over what is possible.

As an aside, NFUS notes that currently there is no automatic right of first refusal for the landlord to purchase any assignation. Application of this seems a basic fairness, which should be given some consideration. In addition, there should be a requirement for involvement of the landlord in discussions over any assignee. In the spirit of fostering and facilitating positive business arrangements going forward this is the sort of discourse the industry should be encouraging.

Assignation/Succession

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Because the structure of families has changed, assignation and succession provisions have been another source of contention within the industry. As a pre requisite, NFUS believes that assignation and succession provisions should relate to family ties, and provide a solution where death occurs out of turn. Succession provisions should ensure that a family farm can continue to operate as such.

Understandably, there is concern from some landowning members that any changes to current assignation and succession provisions are retrospective in nature, and in effect altering the terms of what parties signed up for in the first instance.

By making changes as proposed, it must be acknowledged that there will be circumstances where landlords who anticipated farms coming back in hand may now find that this will not be the case, and find their situation unacceptably compromised. In addition, it must also be recognised that any changes applied to 1991 Act tenancies will undoubtedly have an effect on attitudes towards future letting arrangements. It has been expressed to NFUS on a number of occasions by landowners and their professional representatives that changes of this nature are the sort which undermine confidence within the sector, and there is a fear that fixed term tenancies will suffer as a result of this.

As with assignation for conversion, wider assignation and succession have been topics on which NFUS members have had polarised views. Secure tenants, including the Tenants Working Group, believe that secure tenancies should be propagated as much as possible, and generally feel that the much wider proposals in the Bill are a positive step.

NFUS has previously noted that where a party has been actively involved in a farm business it would seem fair if they were able to have a tenancy assigned to them, or succeed one on death. If the policy aim is to extend the lifespan of secure tenancies then the proposals in the Bill will aid this, however if the policy aim is to address unfairness of death out of turn or the inability of direct family to take over a business, the proposals seem to go wider than what is required.

NFUS notes that the AHLRG recommended the removal of the ‘viable unit test’, aside from retention of the part which allows a landlord to object to a successor tenant on the basis that he already farms another viable unit. The rationale for this was to prevent single parties from accumulating multiple secure tenancies. NFUS is unsure if the omission of this from the Bill is due to error, or intended. In the context of this Bill, if succession and assignation is widened significantly as proposed, it is possible to suggest that this scenario is much more likely to occur that previously. NFUS agrees with the AHLRG that this portion of the viable unit test should be retained in order to prevent this from occurring.
Pre Emptive Right to Buy
NFUS is pleased to see this provision contained with the Bill, and feels that for secure tenants who have been in their holdings for a long period of time this seems a reasonable step. This removes a perceived area of contention, and is seen as a positive portion of this Bill.

Enforced Sale
Enforced sale is recognised as something which will be useful in the context of landowners are persistently negligent in relation to the terms of their tenancy obligations. However there is a recognition that this is unlikely to occur often.

Rent Review
NFUS welcomes the move to assessing the rent of 1991 Act tenancies based mainly on productive capacity of the holding. The current system of comparables, coupled with recent case law has provided a key area of dispute and mistrust within the sector. NFUS and other stakeholders are already engaging with Scottish Government in relation to the mechanics of how this new system should work.

With regards to the other provisions under rent reviews, NFUS members recognise that there is a disconnection between the open market for residential rents and farm rents. Many farm tenancies also contain a number of residential properties, which are sublet to third parties. It is also recognised that some are sublet with consent, and some do not have consent.

It seems fair that where there is surplus residential accommodation which exceeds the labour requirement of that holding that a landlord is entitled to a proportion of the rental income for such property. NFUS notes however, that this does not match with the AHLRG recommendation that any housing provision in excess of reasonably required labour should be taken into account. Some members feel aggrieved by this, as there are instances of very large farmhouses on proportionally small farms. In addition to this, some tenants have reported that whilst they have sublet cottages, they have taken these on in their unimproved state, and thus do not feel that it is fair that a landlord should benefit from this.

The 2003 Act removed the requirement for a tenant to reside on the holding. As a result, some tenants have been able to sublet the main farmhouse, which due to high residential rents will often pay the complete rent for the main holding under the 1991 Act tenancy. This appears a basic unfairness for the affected landlords.

Finally, NFUS recognises the portion of this section which notes that an open market rent should be paid for what the landlord has provided in relation to a diversification. This measure is a difficult balance to strike, at the very least the landlord has provided the bare land, but the venue has succeeded as a result of the tenant’s ingenuity. Further guidance will be required in relation to this part of the proposals.

Waygo
NFUS strongly believes that all tenants are entitled to receive fair compensation at the end of their tenancy. In order to clarify what can be an uncertain process due to the fact that notice may be lost or not served, and to bring everything up to date, the idea of an amnesty is widely supported by the industry. All parts of the sector recognise the issue of improvements which have not been notified. This causes confusion and concern in relation to waygo. It is generally accepted that an amnesty process is positive, to allow things to be brought up to date.

The AHLRG suggested a three year period, this coincides with the length of time for rent reviews. NFUS were disappointed to see that the Bill suggested a shorter period of time, and strongly suggest that an amendment is forthcoming for a three year period. The period noted is for a 2 year duration, however it is not clear if improvements must simply be registered during this time, or if all disputes over improvements must also be settled during this period. In addition, it is not clear what will happen to improvements which are not registered, and it must be made clear if these are to become fixtures.

During the course of discussions, it has become apparent that waygo disputes are now one of the key areas of contention within the industry. NFUS recognises the importance of waygo, as it can act as a direct disincentive for farmers who would otherwise retire and make way for others in their place. At this current time a tenant must give notice to quit his holding without knowing what his waygo payment will be. The perception is that this weakens the tenants negotiating position. It should be noted however, that there are some examples of excellent practice where there is a substantial amount of informal discussion around an intention to exit before any formal notice is given.

NFUS feels that the concept of a double notice provision must be introduced and should from part of this Bill. This would allow a tenant to serve a notice of intention to quit the holding, thus formalising the informal discussions noted previously that take place in some cases and that could be considered to be best practice. This would then allow the landlord the opportunity to formulate a waygo offer and hold discussions with the tenant. If an agreement on waygo is reached between both parties then this could be followed with a second notice, within a defined timeframe, noting final intention (or otherwise) to quit the holding based on safe knowledge that the waygo sum has been agreed and will not change.

Ends.