



SCOTTISH LAND COMMISSION
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Scottish Land Commission response to the Call for Views on the Land Reform Bill issued by the Net Zero, Energy and Transport Committee

May 2024

Part 1 of the Bill

General Purpose in Relation to Large Landholdings

1. Do you agree that there is a need for further land reform to address issues around large landholdings in Scotland?

Yes. The Scottish Land Commission's research found that the core issue in relation to the public interest is the concentration of power over decision making and its impacts on others. Scale amplifies the impact, for good or ill, of decisions made. Reforms are needed to regulate and reduce this concentration of power.

In 2018-20 we carried out a major review including:

- Research on interventions to manage land markets and limit the concentration of ownership elsewhere in the world (commissioned from UHI/University of Aberdeen)¹;
- A research review of existing relevant literature and analysis (commissioned from SRUC)²;
- A public call for evidence – attracting 407 responses, followed up with 30 in-depth interviews;
- A [report](#) drawing together this analysis 'Investigation into the Issues Associated with Large Scale and Concentrated Land Ownership in Scotland'³.

The findings of this review were:

- Most of the advantages associated with Scotland's current pattern of land ownership can be associated with potential economies of scale;
- Most of the disadvantages identified relate to concentration of social, economic, and decision-making power;
- In some parts of Scotland, concentrated land ownership is an impediment to economic development and is causing significant and long-term harm to the communities affected;
- The pattern of market and social power in concentrated land ownership, has parallels with monopoly power in wider economic policy;
- There are issues to address beyond ownership, specifically a lack of effective participation in land use change decisions;
- These problems are not associated exclusively with any particular type of land owner – the evidence reveals issues across land owned by private owners, public bodies, NGOs and communities;
- There is little or no method of redress for communities or individuals, where there are adverse economic or social impacts arising from concentrated ownership.

Analysis of the 407 individual responses received during our investigation identified five key themes for issues associated with scale and concentration of land ownership:

- Local economic opportunities
- Community and social cohesion

¹ Glass J et al: *Research on interventions to manage the land market and limit concentration of land ownership elsewhere in the world*, Scottish Land Commission 2018;

² Glass J, McMorrison R, Thomson S: *The effects associated with concentrated and large-scale land ownership in Scotland – a research review*, Scottish Land Commission 2019;

³ Glenn S et al *Investigation into the issues associated with large-scale and concentrated land ownership in Scotland*, Scottish Land Commission 2019;

- The natural and built environment
- Local housing needs
- Agriculture

The most frequently identified issues (40% of issues raised) related to the link between how land is owned and the ability of rural communities to realise their economic potential. The advantages identified related to potential economies of scale, the disadvantages to the power conferred through a concentration of land ownership.

The second most frequent theme within the evidence related to community and social cohesion. All of these issues related to negative experiences and more than half related to poor engagement between landowners and communities.

Around a quarter of respondents felt that Scotland's current pattern of land ownership had a negative impact on the ability to meet local housing needs. These responses identified the power of a dominant land owner to control the supply of land for housing as well as the influence of expectations of land value. Responses also noted the range of factors beyond ownership influencing housing delivery.

A review of our Good Practice Programme [casework from 2020-2023](#)⁴ identified that these issues are persistent. Whilst the principles of the Land Rights and Responsibilities Statement (LRRS) are often implemented proactively and successfully, as demonstrated by the case studies published on our website, our experience of dealing with casework and enquiries tells us this is not always the case. Despite good examples and support, responsible practice in relation to the LRRS principles is not always implemented on a voluntary basis. In our evaluation of the Good Practice Programme, some landowners and land managers indicated that they prioritise legislative and regulatory requirements above good practice expectations as a matter of course⁵.

There continue to be examples of communities raising concerns in the media. From our experience this tends to happen when communities have tried other routes to being heard but have not been successful. In addition, we are sometimes told by individuals or groups in communities of concerns that they will suffer repercussions if they challenge a landowner; in some cases, communities and individuals can give concrete examples of when this has happened. This culture of fear, although rare, is nonetheless real for those it affects.

Our Good Practice Programme demonstrates that there are opportunities to make more of existing good practice – sharing examples and highlighting the benefits of responsible land ownership and management. There is also more that can be done to build capacity in the land sector so that those in positions of power have the knowledge and confidence to engage, share information, and collaborate.

However, it is also clear that we cannot rely on goodwill and voluntary approaches alone to manage what are systemic risks inherent in the current pattern of land ownership. Data including our rural land market reports⁶ suggest that the concentration of rural land ownership is increasing rather than decreasing. Further reforms are needed to address the risks of concentrated ownership, reduce concentration and provide backstop measures for use where

⁴ *Good Practice Casework and Enquiries 2020-23, Scottish Land Commission 2024;*

⁵ *Evaluation of Good Practice Programme, Axiom for Scottish Land Commission 2022;*

⁶ *Rural Land Market Insights Report & Rural Land Market Data Report, Scottish Land Commission 2023*

necessary in order to safeguard the public interest and unlock opportunities for rural economies and communities.

In summary, the findings of our review show clear impacts associated with the concentrated pattern of ownership which are also reflected in our experience of casework in practice. The pattern of large land holdings creates local concentrations of power over decision-making. The risks of concentrated power are not exclusively related to large land holdings. Context and circumstances can mean that similar impacts may occur in smaller sized holdings (for example in an island or peri-urban context). For this reason, we recommended criteria that would define 'significant' land holdings, beyond scale alone. However, scale is a significant factor as well as a transparent and predictable basis for defining land holdings in scope.

2. Will the proposals in this Bill fulfil the Scottish Government's objectives in relation to land reform?

The proposals will help address the Scottish Government's objectives for land reform as set out in the Bill's Policy Memorandum. However, more systemic change in the pattern of land ownership will need these measures to be accompanied by a programme of further reforms.

The proposed obligation for community engagement and to publish a management plan is a direct way to address some of the impacts of concentrated land ownership, strengthening accountability and transparency. Experience from our Good Practice Programme tells us that a lack of engagement and/or information about a landholding is often the source of tension and conflict between a landowner and a community or individuals within that community. Increasing the amount of publicly available information about a landholding improves transparency and enables all parties to identify opportunities to collaborate for mutual benefit.

The 2016 Land Reform Act introduced the Land Rights and Responsibilities Statement and while good progress has been made, this Bill should seek to strengthen its implementation. There remains limited disclosure making it hard to assess progress in implementing its principles. The land management plan obligation could unlock significant progress in transparency.

The requirement for pre-notification of sale directly addresses the prevalence of off-market or private sales in the rural land market⁷. The requirement will enable more communities, individuals, farmers, and businesses to have the opportunity to participate in the market. Experience from our Good Practice Programme tells us that communities can find out about sales of land too late to consider or prepare their own bid for the land. Where landowners are open to working with communities, a successful negotiated transfer can take place that is mutually beneficial.

The proposed transfer test and the ability for Ministers to require lotting is a means of directly contributing to the objective of reducing the concentration of land ownership. It addresses in part the evidence in the Commission's 2019 report⁸ which identified the impacts associated with scale and concentration of ownership. It is not a public interest test as proposed by the

⁷ *Rural Land Market Insights Report & Rural Land Market Data Report, Scottish Land Commission 2023*

⁸ *Glenn S et al Investigation into the issues associated with large-scale and concentrated land ownership in Scotland, Scottish Land Commission 2019;*

Commission, though our proposal included lotting as a potential outcome⁹. Well-considered lotting could bring land to the market in ways that otherwise may not occur, increasing the opportunities for communities, individuals, farmers, and local businesses to acquire land to meet their needs and ambitions.

In our 2019 advice the Scottish Land Commission recommended:

- An obligation for large land holdings to prepare and engage on a management plan;
- A public interest test at the point of significant land transfer;
- A statutory land rights and responsibilities review mechanism to enable action within existing ownership where necessary.

Longer term systemic change in the pattern of ownership will need measures such as these to be accompanied by a programme of further co-ordinated reforms, for example in tax and fiscal policy, land use planning, and the role of public land. There is also a need for an ongoing programme of good practice support, both for those who are and are not within scope of the statutory requirements.

The Scottish Land Commission's published research and recommendations have provided advice on a range of policy areas to inform the wider programme of land reform. A summary of our research and recommendations is available at [Summary of Research and Recommendations¹⁰](#).

3. Do you support the proposal that the Scottish Ministers may, by regulations, impose obligations on landowners to promote community engagement in relation to large landholdings?

Yes. Community engagement is a key mechanism by which the risks to the public interest posed by the power of concentrated land ownership can be moderated. It is also the basis of a collaborative approach between a landowner and others with an interest in that land, to unlock economic, social, cultural, and environmental opportunities.

The Land Rights and Responsibilities Statement sets out that there should be meaningful collaboration and community engagement in decisions about land. Owners of land at all scales should be proactive in community engagement, taking an approach proportionate to the scale and impact of the landholding and how it is managed. The Bill should seek to strengthen implementation against the principles of the Land Rights and Responsibilities Statement.

Our experience in dealing with Good Practice cases and enquiries makes it clear that community engagement is a key issue for communities and landowners, with our resources on engagement being the most accessed. 26% of our cases and enquiries from April 2020 to March 2023 were predominantly about community engagement and many more had engagement as a key underlying issue¹¹. People contacted us to express concerns about a lack of engagement or poor-quality engagement resulting in serious consequences and stress, or proactively to ask for support and advice about engaging.

⁹ *Legislative proposals to address the impacts of concentrated land ownership – a discussion paper, Scottish Land Commission 2021;*

¹⁰ *Summary of Research & Recommendations, Scottish Land Commission 2024*

¹¹ *Good Practice Casework and Enquiries 2020-23, Scottish Land Commission 2024*

We surveyed communities, landowners and land managers in 2019 and again in 2022 to better understand their experiences of engagement. Our surveys found that experiences of engagement varied, with communities consistently reporting a need for improved engagement and feeling that their views did not influence decisions, and landowners and managers indicating that they felt reasonably confident about engagement and that that community views do have an impact on the decisions they make about land. In both the 2019 and 2022 survey, c.70% of landowners did not have an engagement plan. In 2022, despite considerable efforts across the sector to improve engagement, only one quarter of community respondents felt engagement had improved. This aligns with the findings of the Scottish Household Survey, with the last reported results from 2022 indicating that only 10% of respondents had participated in land use decisions, a drop from the 15% reported for 2018, the most recent year for which comparable data is available.

In 2019, YoungScot and the Commission worked together to explore young people's views on their urban environment and decision making about land and buildings, engaging more than 200 young people from diverse urban backgrounds. Young people demonstrated concern about how decisions about land are made and about a current lack of engagement in those decisions¹².

Engagement brings important benefits for all parties. In the 2022 survey of land owners and land managers, respondents reported benefits from engaging with communities, including that engagement facilitates co-operation and builds understanding and buy-in, that it enables expectations to be managed, and that it helps them to build positive relationships¹³. This is in keeping with our research on [The Value of Early Engagement in Planning](#), which found that early-stage engagement can benefit any proposal, building trust and a sense of community, while helping to resolve problems early and improve development quality¹⁴. Responses to our consultation on Delivering Community Benefits from Land indicated wide-spread support for the importance of engaging with communities so that landholdings deliver public, private and community benefits.

Overall, our experience suggests there has been positive progress with community engagement but there remains significantly more to do. We support the proposal that for the largest land holdings there should be an obligation to engage local communities with an associated mechanism for accountability.

Any requirement for owners of large landholdings to engage with local communities should be supported by clear expectations and guidance. There is existing guidance in place from Scottish Government and from the Scottish Land Commission through our Good Practice Programme. The principles and expectations they set out should form the basis of an obligation to engage.

4. In principle, do you agree that owners of large landholdings should have a legal duty to consult on and publish land management plans? If yes do you think the bill has set an appropriate threshold of landholding size for this duty to apply?

Yes. In our advice to Ministers the Scottish Land Commission has recommended a requirement for large land holdings to prepare and engage on a management plan. We see this as a

¹² *Young People and their Local Urban Areas, Report for Scottish Land Commission, Young Scot 2022*

¹³ *Community Engagement Survey Results, Scottish Land Commission, 2022*

¹⁴ *Wright N & Tolson S, The Value of Early Engagement in Planning, Scottish Land Commission, 2020*

necessary basis for transparency, collaboration, widening the benefits of land use, and mitigating some of the risks associated with concentrated land ownership.

It is also important for government and others to be able to assess progress against the principles of the Land Rights and Responsibilities Statement. Currently limited disclosure means reporting and assessment of progress is patchy. Reporting on mandatory land management plans, with appropriate minimum requirements, would enable progress in this direction.

The obligation will deliver improved accountability for the way large land holdings deliver in relation to the public interest. The requirement to engage local communities on the development of the plan is important. Experience indicates that many of the benefits of this approach will come from the process of engagement which can unlock opportunities for all parties involved. Our [Guidance on Sharing Information about Land Ownership and Management](#), which was developed with input from different types of landowners, explores different ways that landowners have developed management plans and the important role that engagement has played in all of these¹⁵.

To support transparency and accountability, we consider that articulating how a land holding will deliver against the principles of the Land Rights and Responsibilities Statement should be a key requirement of the obligation. The Statement provides a useful definition of responsible land ownership. This should be clearly articulated in the legislation and subsequent regulations.

We welcome the requirement to consult on significant changes to the management plan and advise that in the event of significant changes, there should be a requirement to update the management plan.

We see significant benefit in an approach that requires public reporting. The experience in the corporate sector is that disclosure on environmental, social and governance issues had a significant impact on culture and practice, enabling information sharing and raising standards.

There are multiple requirements on land owners (in all sectors) to provide management information for different purposes and the opportunity should be taken to streamline and simplify where possible. Development of the secondary legislation should seek to achieve an accessible plan that integrates rather than duplicates, and which does not create an unreasonable resource burden for land owners.

We support the intention that the legal duty should apply to larger land holdings and would not, for example, be intended to apply to most farms. We support the inclusion of specific criteria for populated islands at a lower scale threshold, given the increased risk of localised monopoly in an island context.

In our 2019 recommendation we advised that a threshold in the region of 1000-3000ha would be reasonable. With the inclusion of the criteria for contiguous holdings, at a 3000Ha threshold, we note the obligations would not apply to holdings of some significant land owners who have multiple land holdings below this size. There are several examples across the private,

¹⁵ *Guidance on sharing information about land ownership and management, Scottish Land Commission 2023*

public, NGO and forestry sectors of such ownership in which relatively few of the individual holdings would likely be in scope.

There is a balance for Parliament to consider in relation to effective scope and cost. Reducing the threshold, for example to 1000Ha or with inclusion of cumulative holdings, would bring significantly more holdings in scope and therefore it would also carry increased resource requirements for government, the proposed Land and Communities Commissioner and land owners.

We support the proposed power for Ministers to vary the scale threshold in the future. This is an important means by which the scope can be adjusted in light of experience and as the public interest issues may change, to ensure the measure remains relevant and effective.

5. Do you support the process for investigating alleged breaches of community engagement requirements for large landowners set out in the Bill? Do you support the proposed level of penalty for contravention?

Yes. Our experience through the Good Practice Programme tells us it is possible and practicable for all parties to evidence engagement and/or lack of engagement, although the former is easier than the latter. This approach is therefore workable.

In terms of the parties able to allege a breach, there are other organisations that should be considered. There will be areas across Scotland that do not have community bodies constituted in the terms required by Part 2 of the 2003 Act. Furthermore, the eligibility requirement for other rights to buy are different to Part 2 so setting this requirement could exclude, for example, community bodies in crofting areas set up to be eligible for a Part 3 application. Given the focus of these obligations is not on community ownership but the wider matters of community engagement and the land management plan, we believe community councils, as the locally accountable democratic body, should be considered as appropriate bodies that can allege a breach.

It may also be appropriate for other public bodies, specifically enterprise agencies and national park authorities, to be able to allege a breach given their remit and expertise. We also consider the Land and Communities Commissioner should have the power to initiate investigation without requiring reference from a third party where other information provides sufficient basis.

Regarding the process of making an allegation of a breach, we note that the report submitted to the Land and Communities Commissioner (LCC) must be shared in full with the landowner. Our experience of casework and the 2019 report on concentrated land ownership tells us that this can be problematic for some communities who may fear repercussions. Whilst the investigation must be fair and transparent, there should be provision for identifying details to be removed from the report to the LCC before this is shared with the landowner. In addition, to improve transparency and act fairly and accountably, the response from the landowner and report of the LCC should be shared with the body alleging a breach.

In terms of penalties, we note that failing to provide information results in a maximum £1,000 fine, while the highest penalty available for a breach is £5,000. We note the clear limitations of the level of proposed financial penalties. If wider considerations constrain the level of financial penalties, we advise that other options to support enforcement are also considered.

For example, consideration should be given to the use of conditionality and cross compliance in public funding and licencing. If a land holding is persistently in breach of the obligation to publish a management plan, this should be a factor in determining eligibility for public funding such as rural and agricultural support or forestry grants, and/or in determining licencing or consenting applications where relevant.

Section 2

6. Do you support in principle strengthening community bodies' opportunity to buy large landholdings?

Yes. The Scottish Land Commission has recommended to Ministers that there should be some form of prior notification when large land holdings are to be sold. This is intended to address the significant trend in recent years of private or off-market sales (transfers that do not come to the market or are not advertised) which our rural land market reports suggest occurs for around half of estate transactions, and a third of forestry and farmland sales¹⁶. This trend makes it harder for communities, individuals, farmers, or other local businesses to participate in the land market, as evidenced through our land markets research and our Good Practice Programme enquiries and cases.

We therefore welcome the proposal for prior notification. Prior notification to local communities is important but so is wider public notification in order to support a more open land market in which others, including individuals, farmers, and local businesses, know when opportunities to acquire land arise and can seek to enter negotiations where appropriate.

• If you answered “yes”, does Section 2 of the Bill go about this in the right way to address the Government’s aims?

The proposal is more complex than the Commission’s recommendation for prior notification, which envisaged a simpler form of public notification, in advance of a sale. Our recommendation anticipated a notification process similar to that of development planning or crofting, for example by putting a notice in the local paper, on site, and directly to Community Councils which would support opportunities for negotiated transfers. This would not require the creation and maintenance of a register of interested parties.

Given what is proposed, we support the central collation and publication of proposed sales, for example through a dedicated webspace, that provides enough detail for communities, individuals, farmers, and local businesses to understand the opportunity, as well as providing contact details so interested parties can make an approach to the seller.

We acknowledge the value of seeking to connect pre-notification directly with the existing community right to buy in the way the Bill does, though this does make the provision more complex and it precedes the planned review of Community Rights to Buy. The additional opportunity for communities to register an interest at a late stage if land is coming to the market is welcome, though the short additional time provisions for a community to be in a position to complete a transfer means this is likely to have an impact in a limited number of circumstances.

¹⁶ *Rural Land Market Insights Report & Rural Land Market Data Report, Scottish Land Commission*

In our 2018 advice to Ministers on community ownership we recommended consideration of ways to simplify the existing community rights to buy¹⁷. We therefore welcome the Government's announcement of a review of community rights to buy in parallel with this Bill and advise this should include looking at ways to simplify and encourage the use of the existing provision for communities to register an interest in land. This would help achieve greater impact beyond the prior notification requirement.

- ***Do you think that 1,000 hectares is an appropriate threshold?***

Our land market research¹⁸ suggests a 1,000Ha threshold would bring 5-15 whole land holding transfers per year in scope, but it is more difficult to anticipate the number of partial sales, from within land holdings that are over 1000Ha, that would be in scope under the proposals.

For context, our evidence suggests that a 500Ha threshold could be expected to bring a further 5-15 whole land holding transfers into scope per year, but again it is more difficult to anticipate the number of partial sales, from within land holdings that are over 500Ha.

Section 4

7. Do you, in principle, approve of allowing the Scottish Ministers to make a lotting decision in relation to sales of large landholdings?

Yes. This provides a direct means to contribute to the objectives of the Bill through reducing the concentration of ownership in specific circumstances. It responds directly to the evidence in the Commission's 2019 findings and provides a mechanism to take action in the public interest that goes beyond a reliance on community ownership as the alternative.

The transfer test is different to the public interest test recommended by the Scottish Land Commission. The fundamental difference is that the transfer test is applied to a seller of land prior to sale, whereas our proposal is for a public interest test to be applied at the point of transfer, with the ability to place conditions on the future ownership of the land holding. Although a different form of test, the Commission had nonetheless advised that lotting should be one of the possible outcomes of the public interest test as we had proposed it, recognising that lotting is a practical means to unlock opportunities for social and economic development, as well as mitigating the risks associated with concentrated power.

We agree that, as framed, it is appropriate for Scottish Ministers, advised by the Land and Communities Commissioner, to take a decision on the application of a transfer test given the judgment required in relation to human rights, the balance of private and public interests, and the potential compensation implications.

Where possible, land reform measures should seek to strengthen the role of local democracy in decisions about land ownership and use. In most European countries that have regulatory mechanisms for land ownership, decision-making is generally embedded at a municipal level.

¹⁷ *Community Ownership and Community Right to Buy: Recommendations to Ministers, Scottish Land Commission 2018*

¹⁸ *Rural Land Market Data Report, Scottish Land Commission 2023*

We acknowledge that would engage wider factors including capacity and resource at a local authority level. While not within scope of this Bill, we consider that the question of devolved local governance in relation to land should remain part of the wider land reform programme.

- ***If so, do you agree that 1000 hectares is an appropriate threshold?***

Our land market research¹⁹ suggests a 1,000Ha threshold would bring 5-15 land holding transfers in scope per year.

For context our evidence suggests that a 500Ha threshold could be expected to bring a further 5-15 land holding transfers into scope per year.

Looking at a three-year average, our evidence suggests that at a 1000Ha threshold, 96% of transfers would be unaffected, or at a 500Ha threshold, 93% would be unaffected.

8. Is the proposed process for making a lotting decision appropriate and workable?

We consider the proposed process is workable in principle. Significant further consideration on the approach to lotting, the criteria and impacts to be taken into account will be needed to shape the approach to be taken by the Land and Communities Commissioner in preparing a report when asked to do so by Ministers. As a point of fairness, all parties involved require a reasonable degree of clarity about the circumstances in which lotting will be required and the criteria which will be considered.

9. Do the Scottish Government's proposals for a "transfer test" adequately take the public interest into account?

The proposed transfer test is more tightly framed than the public interest test recommended by the Scottish Land Commission. The Bill states that a decision to lot can be made if Ministers are satisfied that this would be more likely to lead to the land being used in ways that might make a community more sustainable than if the land was transferred to a single owner.

We consider that well-designed lotting could open up significant opportunities and that this is most likely to be achieved through taking a broad definition of the public interest, recognising that the justification would have to be articulated clearly in individual cases.

The Scottish Land Commission's 2021 paper on legislative proposals set out some of the key factors that we advised could reasonably be considered in relation to a public interest test, addressing the risk of localised monopoly²⁰. These included consideration of whether a single holding included:

- The majority of the stock of privately rented residential properties;
- Strategic local infrastructure – e.g. slipways, petrol stations or sites for telecommunications infrastructure;
- Important community or cultural facilities (particularly where there is only one in the locality);

¹⁹ *Rural Land Market Data Report, Scottish Land Commission 2023*

²⁰ *Legislative proposals to address the impacts of concentrated land ownership – a discussion paper, Scottish Land Commission 2021;*

- The majority of the effective local housing land supply;
- A significant proportion of local employment;
- A significant proportion of local demand for goods and services.

A wider consideration of the public interest now may also add control in delivery of climate and nature action to these factors.

Further consideration is needed on the factors to be considered by the Land and Communities Commissioner and Ministers in any decision on lotting. The detail of this is not necessarily appropriate for primary legislation, however a clear reference in the Bill to lotting decisions being made on the basis of furthering the public interest would strengthen the measure and the basis for intervention in the land market.

Section 6

10. Do you support the creation of the new role of Land and Communities Commissioner?

It is for Parliament to consider new or amended functions for the Scottish Land Commission and we are committed to facilitating the role and functions of the proposed Commissioner in the form agreed by Parliament. We believe the proposed role can be effective. We also note other options would include the addition of new functions to the existing Land Commissioner roles established by the 2016 Act.

As well as ensuring the functions of a new Commissioner role are workable, we also see the interaction of a new Commissioner post with the Land Commissioners and the Tenant Farming Commissioner, within the board of the Scottish Land Commission, as an important consideration in effective governance and positive impact and address this further below in relation to responsibilities.

We welcome the recognition in the financial memorandum of the substantial additional resource burden the new Commissioner role and functions would place on the Commission. This would require additional financial resource to fulfil.

- ***If so, are their responsibilities under the Bill adequate/appropriate?***

We believe the experience of the Tenant Farming Commissioner as well as the Land Commissioners, has much to offer in considering how such a role might operate. The Tenant Farming Commissioner has specific statutory functions including the ability to prepare Codes of Practice and inquire into alleged breaches of Codes.

The Tenant Farming Commissioner also has some limited powers to enforce these functions, including the ability to impose a financial penalty in the event of non-compliance with a legitimate request for information, and an obligation to publish a report on the findings of inquiries into alleged breaches. Experience to date suggests that this model has been successful in helping to bring stakeholders together and improve practice within the sector. A statutory review of the functions of the Tenant Farming Commissioner was carried out in early 2020 and found that the current powers of the Tenant Farming Commissioner should be retained, and consideration should be given to an additional power to apply sanctions and a financial penalty in the event of breaches of the Codes.

Drawing on this experience we believe the proposed functions of the Land and Communities Commissioner can be effective. If the functions are vested in an individual Commissioner as

proposed, the interaction of this Commissioner with the functions of the Land Commissioners will be important in creating conditions for success and in sound governance.

The Bill includes a requirement for the Land and Communities Commissioner to collaborate with Land Commissioners. We consider this should be strengthened by a requirement on the Land and Communities Commissioner to consult with Land Commissioners when providing a report to Ministers. This would help ensure effective integration between the statutory obligations that the new Commissioner would oversee and the statutory functions of the Land Commissioners including the provision of advice and guidance which informs policy and supports good practice in implementing the Land Rights and Responsibilities Statement.

Part 2 of the Bill

Section 7

11. Are you satisfied with the broad duty Section 7 of the Bill places on the Scottish Ministers to develop a model lease for environmental purposes, including the definition of “environmental purposes” set out in Section 7?

We recognise the potential value in the proposed land use tenancy but seek clarity on whether this is intended to be a new form of tenancy that is outside the scope of the 1991 and 2003 Acts or whether it is simply a model form of lease that would operate within these Acts, but where the purpose of the letting includes activities that are currently not considered as agriculture.

We consider the value of a new form of lease would require it to be a new form of tenancy that would sit alongside the 1991 and 2003 Act tenancies, and which is outside the scope of the current agricultural holdings legislation, allowing landlords and tenants freedom to agree terms and conditions, guided by the model clauses.

Sections 8 and 9

12. Do you agree with the provisions in the Bill extending certain rights to small landholders?

Yes, we agree it is sensible to clarify and update the rights of small landholders as proposed.

13. Do you agree that the Tenant Farming Commissioner’s functions should be extended to include small landholders?

Yes, we agree it is logical to extend the functions of the Tenant Farming Commissioner as proposed. We welcome the recognition in the financial memorandum of the additional resource requirement this would place on the Tenant Farming Commission and supporting staff resource within the Scottish Land Commission.

Chapter 3 of Part 4 of the Small Landholding Schedule suggests that, when compensation at waygo is applicable, the Tenant Farming Commissioner should be required to appoint an agent to determine the amount of the compensation payable to landlord or tenant. This is not normal practice in relation to other forms of tenancy, in which an agent would be appointed by agreement between the parties and we do not consider it necessary in the case of small landholdings other than in circumstances where the parties can’t reach agreement.

Section 10

14. Do you agree with repealing Section 99 of the Land Reform (Scotland) Act 2016, and with giving the Scottish Ministers the power to make regulations which modify the requirement for tenants to register their interest in exercising their pre-emptive right to buy?

If the process for registering a pre-emptive right to buy cannot be resolved in the Bill, then it is appropriate to provide for proposals to be brought forward by means of secondary legislation. The content of that legislation is for discussion in the future but we consider that it should only be necessary for a tenant to register an interest in buying such land as is in the tenancy at the point when the option to buy becomes a reality and that it is not necessary to define the boundaries at the initial stage of registering a pre-emptive right to buy.

Sections 11 to 13

15. Do you agree with the changes to resumption proposed in the Bill?

Further consideration should be given to whether the proposed arrangements should apply equally to both 1991 Act and 2003 Act tenancies. The proposal to value the land being resumed using the same methodology contained in the Relinquishment and Assignment provisions raises a number of questions.

The R&A provisions relate only to 1991 Act tenancies and have, effectively, established a capital value attributable to a 1991 Act lease. These provisions do not apply to 2003 Act leases and there is no corresponding capital value attribution. In the case of a 1991 Act tenancy there is logic in saying that the compensation provisions applicable to relinquishment of the whole holding might be equally appropriate in the case of a partial resumption, but there is a legitimate argument that the same does not hold true for 2003 Act leases.

The risk of doing so is that too much alignment of statutory lease terms with 1991 Act tenancies through legislation risks reducing the supply of fixed duration tenancies.

It is not clear whether the proposed methodology is mandatory or to be used when parties cannot agree. The latter would allow a more proportionate approach to be taken when small areas are being resumed.

We do not see a need for the Tenant Farming Commissioner to appoint valuers other than in cases where the parties cannot agree on one. To make this an automatic requirement would be to add significant and unnecessary resource burden.

The Bill does not address the important issue of whether section 17 of the 2003 Act does or does not enable a contractual resumption clause to be included in a 2003 Act lease. If the latter is the case, this will remove some of the issues around valuing compensation in 2003 Act leases as resumption will only be applicable in restricted circumstances. The opportunity should be taken to clarify the policy position.

We note that the enhanced compensation proposals only apply in the case of a resumption. Our understanding is that concerns about the level of compensation originate from the situation where a tenant is subject to an Incontestable Notice to Quit as a result of the landlord obtaining planning consent for development over the whole of the holding. It would be

iniquitous if enhanced compensation was provided for a tenant who loses part of the holding through resumption but not for a tenant who loses the whole holding, home, business and livelihood as a result of an Incontestable Notice to Quit, and we consider that the proposed enhanced compensation arrangements should also apply in such cases.

Section 14

16. Do you agree with the proposed changes to compensation for improvements for tenant farmers?

We recognise that the introduction of principle-based improvement schedules will avoid the need to periodically update list-based schedules, but also recognise that this may lead to more disputes about what improvements are in scope. On balance, however, we support the intention that Part 1 and Part 2 schedules are principle based, while Schedule 3 is list based.

We recognise the intention behind the introduction of a new Part 4 Schedule but foresee some disagreements over whether a Part 4 improvement requires consent or notification.

Accordingly, we recommend that consideration is given to splitting the examples given in Part 4 into two parts, those requiring consent and those requiring notice.

17. Do you believe that the provisions will better enable tenant farmers to engage in sustainable and regenerative agriculture?

The proposals should ensure that tenants are able to engage in sustainable and regenerative agriculture. However, the changes do not appear to resolve the problem of the compensation arrangements when a tenant who has planted trees quits the land. The ability of the landlord to claim for the cost of returning the land to agriculture is one of the main factors holding tenants back. We consider that, as long as the landlord retains the existing right to object to a tenant's tree planting plans, and to attach appropriate conditions to consent, a woodland created by the tenant with the landlord's consent should be treated like any other tenant's improvement with respect to compensation arrangements.

Sections 15 to 19

18. Do you agree with the proposed changes in relation to diversification on tenant farms?

It is important that tenants are able to engage in activities which support wider government policy on nature and climate change mitigation or which involve a non-agricultural business activity. That must be balanced with the right of a landlord to have a say in the way in which their land is used, particularly where the proposed diversification involves a significant or permanent change in land use. On balance, we consider that the proposals are proportionate and appropriate.

19. Do you believe these provisions will better enable tenant farmers to engage in sustainable and regenerative agriculture?

Yes

Section 20

20. Do you agree with the proposed changes to compensation for game damage for agricultural tenants?

The proposals extend the circumstances in which a claim by a tenant might be possible. The difficult issue is how to quantify and evaluate the damage. The Bill does not propose a methodology but some guidance on this is likely to be needed in future.

Section 21

21. Do you agree with the proposed standard claim procedure for compensation at the end of a tenancy?

The proposal to have a standard claim procedure has merit. As currently drafted, it is only relevant to issues that can be anticipated (e.g. waygo compensation) but that could be subject to change by secondary legislation. The aim of securing a final agreed waygo payment by the end date of the tenancy is to be welcomed.

The statutory process may be overly complex in circumstances where the waygo relates to a small area and uncontested issues (e.g. a single field where there are no improvements or dilapidations involved). There should be scope for landlords and tenants to reach agreement without following the statutory process.

A valuer nominated by the claimant is likely to meet opposition from the other party. It would therefore seem appropriate to require the parties to agree on a valuer, failing which the Tenant Farming Commissioner is requested to appoint one.

22. Do you agree with granting the Scottish Ministers power to apply the standard claim procedure to any relevant type of compensation?

Yes, subject to detailed consideration of its applicability in other types of compensation.

Section 22

23. Do you agree that interest should be payable on outstanding compensation claims?

Yes

24. Do you agree with the rate of interest set out in the Bill?

Yes

Sections 23 to 25

25. Do you agree with the changes to rent reviews proposed in the Bill?

We support the introduction of productive capacity (and related earnings potential) as a factor to be taken into account in rent review negotiations. This will provide an appropriate additional factor to complement the use of rents from comparable holdings.

We note however that there may be an important distinction between the proposed use of the term “similar holding” and the current use of the term “comparable holding”, with the former capable of a narrower interpretation in respect of which other holding rents can be used as comparables.

We note also that the proposed legislation does not contain the important provision that rent cannot be charged on tenant’s improvements, a provision that currently exists and which is essential to operation of a fair and reasonable rent review process.

26. Do you agree with the Scottish Ministers being given powers to make provision in relation to matters that are to be taken into account by the Land Court when determining the rent for a holding?

Yes

Sections 26 and 27

27. Do you agree with the proposed changes to the rules of good estate management?

Yes, this is essential to ensure that tenants are able to engage in sustainable and regenerative agriculture without fear of breaching their lease conditions.

28. Do you agree with the proposed changes to the rules of good husbandry?

Yes, this is essential to ensure that tenants are able to engage in sustainable and regenerative agriculture without fear of breaching their lease conditions.

General questions

Links to the Agriculture and Rural Communities (Scotland) Bill

29. Are the changes proposed in the Land Reform (Scotland) Bill sufficient to enable tenant farmers to engage in sustainable and regenerative agriculture, and to allow them to take part in schemes and programmes under any new agricultural policy?

We consider that the changes will achieve this aim but ongoing consideration of the impact of new legislation and support arrangements on tenants will be essential.

Fairness and checks and balances

30. Do you consider the Bill strikes a balance between the competing interests and rights of landowners, local communities, landlords and tenants, alongside the wider public interest?

In relation to Part 1 we have noted in our response where we advise further consideration on some of the detail of the proposals and where we believe proposals could be strengthened, including specifically in relation to the context of the public interest for the transfer test.

We also consider that Part 1 of the Bill could go further, in line with our recommendations and evidence, to strike a fair balance between all parties' rights and interests, and the wider public interest.

Further, we note that the Bill does not exist in isolation and that other legislative changes in human rights, agriculture and natural environment, the forthcoming review of community rights to buy, ongoing review of local democracy and other policy and fiscal changes all have an impact on the balance of rights and interests.

In relation to Part 2 we welcome the Scottish Government's commitment to a thriving tenanted sector and concur with the view that tenants should be able to plan their businesses with confidence and certainty. We draw attention, however, to the continuing decline in the area of tenanted land, the excess of demand over supply and the difficulty experienced by new entrants in accessing land to rent.

A thriving tenanted sector depends on a continuing supply of tenancies by willing landlords so each new piece of legislation must involve consideration of how it will advantage existing tenants and how it might prejudice future opportunities by disincentivising the letting of land. The proposals on compensation for resumption in fixed duration tenancies is an example of a proposal that would be advantageous to existing tenants but which risks reducing the future supply of tenancy opportunities.

Tackling the Climate and Biodiversity Crises

31. In your view, does the Bill make adequate provision for the role that land might play in delivering a just transition to net zero and tackling the biodiversity crisis?

Land plays a fundamental role in delivering on the twin net zero and biodiversity crisis. Delivery at scale is required, though this is not the same as ownership at scale. It is evident that land holdings of all scales can and do contribute to climate and nature action and that there are many established ways of landscape-scale collaboration and scaling delivery.

The key challenge for land reform is to help ensure this is a just transition, in which the risks and benefits are fairly shared. The measures in the Bill will help achieve a just transition, for example by better enabling tenant farmers to engage in sustainable and regenerative agriculture, by improving disclosure about land management on large land holdings, by reducing concentration where land is lotted.

However, other measures will likely have more impact on delivery of a just transition, for example changes in regulation, reforms to taxation and to land use incentives and support. In the Commission's 2023 advice on natural capital and a just transition, we advised that in addition to land ownership reforms, there is a need for²¹:

- Stronger regulation of carbon and nature markets;
- Improved targeting and stronger conditionality in public funding;
- Stronger and more accountable regional land use planning;
- Effective policy to secure a fair share of capital land value for public benefit.

²¹ *Natural Capital and Land Reform: Next steps for a just transition, Scottish Land Commission 2023*