



## Response from the Faculty of Advocates to the Land Reform (Scotland) Bill

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#### 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?**

This is a policy question on which Faculty expresses no view.

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

In broad terms, it appears to Faculty that the provisions of the Bill will further the objectives identified in the policy memorandum, but much is likely to depend on the terms of regulations to be made following the enactment of the Bill.

There are two issues that Faculty would raise for consideration which may affect the effectiveness or otherwise of the Bill if enacted.

First, it will be essential to ensure that the Bill is compliant with the European Convention on Human Rights and, in particular, that any interference with the rights of landowners pursues a legitimate aim and is proportionate to that aim.

Second, it will be essential to anticipate the potential measures that may be employed by landowners to avoid the restrictions on the transfer of large landholdings. For example, the Bill proposes to impose a prohibition on transfers of land in certain circumstances. However, land is often held by corporate vehicles. Shares in such corporate vehicles can be readily transferred, together with control of the land, without any transfer of the land itself. The effectiveness of this part of the Bill will largely depend on the effectiveness of the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations made under section 39 of the 2016 Act and any further amendments to them.

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?**

The power to impose obligations on the owners of large landholdings is wide. The only express and relatively limited constraint on the exercise of the power is that the obligations must be imposed for the purpose of promoting community engagement in relation to the land. The question of principle (on which Faculty expresses no view) is whether such a wide and unfettered power to impose potentially onerous obligations on landowners by



regulation should be conferred on the Scottish Ministers or, instead, whether such obligations should be imposed only by the Scottish Parliament by primary legislation.

4. **In principle, do you agree that owners of large landholdings should have a legal duty to consult on and publish land management plans?**

This is a policy question on which Faculty expresses no view.

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?**

In order for the community engagement requirements to be effective, it is obvious that there must be appropriate procedures available to investigate and sanction any breach of those requirements. In broad terms, the provisions for investigation and imposition of a fine appear adequate.

## Section 2

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

This is a policy question on which Faculty expresses no view.

- **If you answered "yes", does Section 2 of the Bill go about this in the right way to address the Government's aims?**

This is a policy question on which Faculty expresses no view.

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

This is a policy question on which Faculty expresses no view.

## 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?**

This is a policy question on which Faculty expresses no view.

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

This is a policy question on which Faculty expresses no view.

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

In broad terms, section 4 of the Bill makes appropriate and workable provision for making a lotting decision. It includes provision for a right of appeal to the Court of Session against a lotting decision. Faculty makes two observations.

First, appeals under the Land Reform (Scotland) Act 2003 (and other parts of the Bill) lie generally to the Lands Tribunal for Scotland or the Land Court, either with or without a



further right of appeal to the Court of Session. To that extent, an appeal directly to the Court of Session may be thought anomalous. It may also produce procedural difficulties. The historic convention is that statutory appeals to the Court of Session are heard by the Inner House, which is ordinarily constituted by a bench of three judges. It is unusual for a bench of three judges to be convened when evidence is to be led (which might be anticipated given an appeal may be taken on the ground that the decision is based on, among other things, an error of fact). There is provision in the Rules of the Court of Session for statutory appeals to be remitted to be heard by a single judge, but it is seldom used. It may be more appropriate for any appeal to be made to the Lands Tribunal for Scotland whose decision might be final or subject to appeal to the Court of Session on a point of law only.

Second, the deadline for an appeal to be brought (28 days from the date of the decision) is relatively short. A prospective appellant will require time to consider the decision, seek appropriate advice, and then decide whether to appeal the decision. There is no obvious need for an appeal to be brought within such a short timeframe. There is also no statutory power conferred on the court to allow an appeal to be brought out of time. The short timeframe and lack of a dispensing power is liable to produce injustice in some cases.

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

No. It is not clear at what point the public interest falls to be taken into account. If there is intended to be a requirement that the public interest should be taken into account, there should be express provision made to that effect.

**Section 6**

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

It is plain that some person or body should be tasked with operating and enforcing the scheme proposed by the Bill and the appointment of a commissioner specifically tasked with implementing the scheme proposed by the Bill appears appropriate.

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

In broad terms, the provision made in the Bill in relation to the functions and responsibilities of the Land and Communities Commissioner appear adequate and appropriate.



## 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?**

Faculty has no comment to make on the proposal to develop a model lease for environmental purposes — it is a matter of policy. We do, however, question the need for section 7 of the Bill. It does not create any special rules regarding the operation of the proposed lease for environmental purposes; nor does it grant any special privileges to them. The Scottish Government (and, indeed, any other public or private organisation) is already at liberty to prepare and publish a model lease for any purpose, including environmental purposes. The need for a statutory duty to do so, and the likely benefits to be obtained thereby, are not clear to us.

### Sections 8 and 9

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

Faculty is supportive of the proposals to modernise the law relating to small landholders, the majority of which is now more than 100 years old. We express no view on the particular rights which are proposed to be extended to small landholders. We do, however, question whether the opportunity should be taken to wholly codify the law relating to small landholdings, rather than (as proposed) leaving elements of the Landholders Acts in place.

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

Faculty takes no position on the proposal to extend the Tenant Farming Commissioner’s functions as proposed.

### 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?**

Faculty takes no position in relation to the repeal of section 99 of the 2016 Act. We express some concern regarding the breadth of the power to make regulations set out in the proposed section 31A of the 2003 Act, in particular in relation to the power to make provision about the effect of registration. It would permit the Scottish Ministers to make significant and substantive changes to the operation of the Right to Buy by statutory instrument. We question whether such a broad power is appropriate.

### Sections 11 to 13

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

Faculty has no comment to make on the policy underlying the proposed changes.



#### Section 14

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

Faculty takes no position on the policy underlying the proposed changes to compensation for improvements.

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

This is not a matter on which Faculty can comment.

#### Sections 15 to 19

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

Faculty takes no position on the policy underlying the proposed changes to diversification on agricultural holdings. We express some concern about the proposed power granted to the Scottish Ministers to amend section 40(9) of the 2003 Act. The addition or removal of a ground of objection to a notice of diversification could have significant effects on parties' interests in existing contracts, and is arguably not a matter properly left to subordinate legislation.

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

This is not a matter on which Faculty can comment.

#### Section 20

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

Faculty takes no position on the policy underlying the proposed changes to compensation for game damage.

#### Section 21

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

Faculty agrees with the general principle of a single procedure for dealing with all compensation claims, although we note that this proposal will almost certainly supersede agreed contractual provisions in agricultural leases which already deal with these questions, possibly with the effect of depriving parties of rights which they currently enjoy.

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

We refer to our previous answer.



## Section 22

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

This is a question of legislative policy, on which Faculty takes no position. As with section 21, the effect of this provision may be to displace existing contractual provision for interest.

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

This is a question of legislative policy, on which Faculty takes no position.

## Sections 23 to 25

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

Faculty lacks the expertise to comment on this question.

**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?**

The factors to be taken into account in determining the rent for a holding are of substantive, and potentially substantial, effect. We question whether it is appropriate for such matters to be left to subordinate legislation.

## Sections 26 and 27

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

Faculty has no comment to make.

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

Faculty has no comment to make.