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Submitted to Call for Views on the Land Reform (Scotland) Bill
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Name:
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Organisation details

1 Name of organisation

Name of organisation:
University of Strathclyde

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I am employed by the University of Strathclyde (a higher education institution based in Glasgow) as a senior lecturer, but I am responding in a personal capacity.

Please also note that I penned a personal blog post about the Bill, which may be of interest to the Committee:
<https://basedrones.wordpress.com/2024/03/26/land-reform-scotland-bill-number-3-introduced-to-holyrood/>

I have nevertheless engaged with the questions put in the online consultation exercise as best I can.

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

Please explain the reasons for your answer.:

In principle, my answer is "yes", although clearly there are nuances and there may be situations where a single large landholding might make a degree of geographic, economic, social or environmental sense. It is however generally accepted that concentrated land ownership is a concern in Scotland and the introduction of further measures to facilitate diversification of ownership will move towards addressing that (to some extent).

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

Not Answered

Please explain the reasons for your answer. You may wish to comment on the Scottish Land Commission's analysis of perceived risks in relation to scale and concentration of landownership.:

The Bill does not contain a public interest transfer test, or at least it does not do so in direct terms.

Looking first at what the Bill can be said to do in this vein, the possibility of more community bodies being able to intervene in a transaction (by amendment to the existing Land Reform (Scotland) Act 2003, Part 2) may indirectly lead to further consideration of whether a land transfer to a community is in the public interest. Next, the lotting provisions may render one individual transferee unable to buy two or more lots from a large landholding that has been split up for sale.

What the Bill does not do is have any particular focus on a transferee (unless one transferee is caught by a lotting decision). Given the transferee is the person who will have an important agenda-setting role for any particular parcel of land going forward, this is perhaps surprising.

Otherwise, the provisions around land management plans point towards communities having more of a say in relation to large landholdings, but the potential impact of such measures is difficult to comment on at this stage in the absence of the implementing regulations. That being said, the fact that new section 44C provides that the regulations must provide the owner of any affected land will be obliged to consider any reasonable request from a community body to lease the land (in whole or in part) will also assist communities to implement plans for a particular parcel of land. Whilst any regulations may sculpt the land that is to be subjected to this obligation to consider a reasonable request, where it applies this obligation will put community bodies dealing with large landowners on a similar footing to community bodies seeking a community asset transfer from a public bodies (in terms of the Community Empowerment (Scotland) Act 2015) and as such could be seen as contributing to land reform objectives.

Section 1

1 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

Please explain the reasons for your answer.:

Although it is an imperfect analogy (given the privileged position communities can have when bidding for an asset), the very fact that statutory community bodies are subjected to various duties as a result of mandatory governance rules - which will include an ongoing commitment to sustainable development - for community-owned landholdings of any size might point towards an equivalent case for any owners of large landholdings to also be subject to certain particular duties to reflect the importance of their role as owners of an important asset. A further imperfection in this already imperfect analogy is that in some situations a community body may also be the owner of a large landholding, but the point that is being adverted to is some land assets are important for communities and it is only in situations where a community also happens to be the owner of a land asset that duties that might be generally desirable for the wider population can arise.

It is acknowledged that direct regulation of certain activities (e.g. development (via planning permission) or anything that may be harmful to the environment (via environmental law)) can limit some of the more egregious examples of landowner conduct, but in the absence of specific regulation for every particular harmful activity - something that is very tricky indeed to legislate for - a general push towards community engagement might be part of a solution for particular local issues.

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

Yes

If yes, do you think the Bill has set an appropriate threshold of landholding size for this duty to apply.:

In principle, consulting on any new and amended management plans and an associated duty to publish these is something that seems appropriate.

I have no comment on the appropriate threshold size. One point I feel obliged to make somewhere though is the proposed scheme for composite holdings is not always a simple one to follow and may lead to some difficulties in application (both in this context and in other contexts for the Bill). This may require some close consideration by the Committee.

I note that other possible criteria for a large landholding (e.g. relating to data zones) have not made the Bill. I commented around these in the earlier consultation exercise for Land Reform in a Net Zero Nation so forgive me for not revisiting that here. (A tangential point around the volume of consultation exercises might be made here, but I will simply raise that issue and move on.)

My one new point relates to simplicity - it will be much easier for legal advisors and land agents (and perhaps land owners) if there is a single trigger point in any future law for all the obligations that will apply to owners of big parcels of land. So as to achieve that harmony, my inclination would be to reduce the trigger value in this particular context (i.e. make the 1000ha trigger in other parts of the Bill of more blanket application such that it applies to new Section 44D and in turn remove the individual island considerations), rather than increase the existing the trigger in other contexts. There may be practical reasons for setting a unique 3,000ha threshold here that others have thoughts on, but unless those are compelling I would prioritise uniformity.

3 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?

Not Answered

Please explain the reasons for your answer.:

Any regulations that fall to be made under new section 44A of the 2016 Act are required to include certain things. They may include more than this, but as a starting point sections 44B and 44C provide what they must include. With this in mind, section 44B only relates to the introduction of a suitable management plan (and any amendment to it), but that provision says nothing about the need to cater for breaching a management plan. The only continuing obligation that must be included in any regulations is a duty to consider a reasonable request for a lease from a community body (in terms of section 44C), but provided a land owner does indeed consider such requests they can otherwise be passive (unless and until the regulations go further than the new baseline). The lack of continuing obligations seems slightly out of step with the enforcement apparatus that is otherwise provided for in the Bill.

The level of any fine for a new transgression will always involve an element of simply picking a number, but in relative terms the fact an unregistered private landlord can face a fine of up to £50,000 makes a £5,000 fine seem quite low.

New section 44E provides a closed list of who can clype on the owner of a large land holding if there is thought to be a breach of a newly imposed obligation. If there is to be such a closed list, one might question why the Land and Communities Commissioner has the option rather than the duty to investigate a properly made report under new section 44F. Should "may" be changed to "must" accordingly?

Section 2

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

Yes

Please explain the reasons for your answer.:

I recently undertook some research around the occasions when a community body attempting to acquire land under Part 2 of the Land Reform (Scotland) Act 2003 found themselves involved in litigation: see <https://strathprints.strath.ac.uk/87147/>

On every such occasion, the community found themselves in a position where they were unable to obtain title to the targeted land through the statutory scheme. On that basis, I would in principle support a strengthening of opportunities to buy land (including large landholdings). I appreciate there is a separate review of Part 2 of the 2003 Act ongoing, but this nevertheless is an important issue.

Not Answered

Please explain the reasons for your answer.:

The scheme may allow for better or more planned interventions by a community for an application to buy land from land owner who wishes to sell (but not necessarily sell to the community) that may otherwise be "late", so in that regard the Bill offers a degree of progress. I understand some are sceptical as to the extent of this progress (and I note Andy Wightman's consultation response in that regard).

The introduction of a notice period for a sale may also allow for a degree of organisation to take place, albeit communities that fit the bill will still have to be quick. Whilst it is appreciated that vendors and indeed non-community purchasers will wish to be able to transact relatively quickly, it might be worth considering with the time periods as drafted will provide communities with sufficient time to act.

Not Answered

Please explain the reasons for your answer.:

No comment.

Section 4

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

Not Answered

Please explain the reasons for your answer.:

It is appreciated that a lotting decision could increase diversification of land ownership, but this will only happen where a willing seller is seeking to transfer a large landholding (in whole or in part) and - as noted elsewhere - there is no particular consideration of the position of any buyer(s) of the land. It might be questioned accordingly as to whether the correct end (so to speak) of the transaction is being targeted.

I understand there has been an issue raised about the Scottish Ministers (in one capacity) having to make a decision about the lotting of a large landholding in the event of that being sold by Scottish Ministers (in another capacity) (per the submission of Andy Wightman). I agree with Andy that this could present some issues. This might be mitigated a tad if Ministers in the former capacity are suitably deferential to any report produced by the Land and Communities Commissioner in terms of new section 670, but the issue remains.

Please explain the reasons for your answer.:

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

Not Answered

Please explain the reasons for your answer.:

I believe the scheme is workable, in that at least it won't logjam or malfunction when someone tries to use it.

Whether it is particularly accessible (in terms of being easy to navigate) is another question.

Whether it is appropriate is a policy call (and see below re public interest).

One point: is there an error in the new section 67H, with subsections (2) and (3) incorrectly cross-referring to each other?

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

Not Answered

Please explain the reasons for your answer.:

Given this segment of the Bill does not mention "public interest", it is tricky to answer this question.

The lotting scheme is something of a shift away from the public interest test that the consultation adverted to. It does however introduce the community and in turn may introduce public interest points at slightly removed level, such that it is a decision is solely to be informed by the sustainability of a community. Unless I am mistaken, "community" is not ascribed with a particular meaning in the statute.

If there is no resident community, what then? Will there will be any scope for a lotting decision to be made? If not, it might be queried whether this allows a proper consideration of the public interest.

Separately, I note the lack of a compulsory sale order in this Bill. This has been mooted for some time and it could achieve land reform goals in a way that takes the public interest into account. I appreciate it may be unlikely to introduce such an order at this stage. Nevertheless, a strategic power to force assets to be sold (with suitable compensation for a the involuntary seller) could play an important role either alongside or in addition to the lotting provisions.

Section 6

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

Not Answered

Please explain the reasons for your answer.:

Prior to the publication of this Bill, I had not even considered the possibility of such a new role.

In the context of the Bill, the Land and Communities Commissioner makes some sense (and would seem broadly analogous to the Tenant Farming Commissioner). In terms of the workings of the Board, shifting from 6 to 7 Commissioners overall would not strike me as making too much of a difference, but if the Board was to involve any further Commissioners in future it might become a tad unwieldy.

Please explain the reasons for your answer.:

The responsibilities seem adequate/appropriate (by analogy with the TFC).

On the specific "disqualification from membership" provision (introduced by section 6(7) of the Bill), does this only relate to land directly owned by the LCC (or the LCC to be)? Would there need to be some kind of semi-analogy with bankruptcy law, so as to capture situations where someone has "gratuitously alienated" (so to speak) land to a spouse or other family member to avoid the disqualification provision? And what of shares in landowning companies/juristic entities?

And one hypothetical scenario - what happens if someone in the office of Land and Communities Commissioner acquires land otherwise by purchase (perhaps by inheritance), and in so doing that tips the LCC into disqualification?

Section 7

1 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?

Not Answered

Please explain the reasons for your answer.:

I am nonplussed by section 7.

It is not clear what benefits this letting vehicle will bring to either landlord or tenant that could not be achieved with a common law (non-agricultural, non-residential) lease for a specific purpose. It might even be uncharitably noted that even with a model lease that is entirely voluntary I am not clear what benefits there might be,

That being said, a model lease may allow parties to think about aspects that one or both of them might not otherwise have considered, and furthermore this may level the playing field as between one-time players and repeat players. That is not exactly a legal point though and as such I will leave it at that.

Sections 8 and 9

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

Not Answered

Please explain the reasons for your answer.:

Small landholders have been somewhat neglected since crofting law was restricted to the Highlands and Islands (again) in the middle of the 20th century. As such, extending rights to them now seems equitable, and "better late than never". There is however the inescapable point that there are not many small landholders out in the wild, so much so that individual small landholders and their landlords can probably be consulted directly without that being an impossible burden. Accordingly, I will leave any commentary to such parties.

2 Do you agree that the Tenant Farming Commissioner's functions should be extended to include small landholders?

Yes

Please explain the reasons for your answer.:

Yes. This is a gap, and it makes sense to fill it with the TFC.

Section 10

1 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?

Yes

Please explain the reasons for your answer.:

Although I sometimes feel a tad sceptical about such matters being left to regulations, in this context it just about makes sense (assuming we do indeed get regulations to follow on from the primary legislation this time). Further, if indeed section 99 is not to be brought into force, it should be repealed to clean up the statute book.

Sections 11 to 13

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

Not Answered

Please explain the reasons for your answer.:

In principle the changes seem fine, but I will defer to others who are interacting with such provisions more regularly than I do.

Section 14

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

Not Answered

Please explain the reasons for your answer.:

Again, these changes seem to be fine in principle, but I will defer to others with more expertise and experience with regard to such matters.

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

Not Answered

Please explain the reasons for your answer.:

I believe they will, or at least I cannot see any particular reason why they would not.

Sections 15 to 19

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

Not Answered

Please explain the reasons for your answer.:

Again, these changes seem to be fine in principle, but I will defer to others with more expertise and experience with regard to such matters.

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

Not Answered

Please explain the reasons for your answer.:

I believe they will, or at least I cannot see any particular reason why they would not. Further, presumably the Land Court having a specific role in considering whether sustainable and regenerative agriculture will address any concerns that this question might be aimed at.

Section 20

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

Not Answered

Please explain the reasons for your answer.:

In principle I do, although I would be interested to hear what those more directly involved in deer management might think, including in relation to the (potentially overlapping?) operation of the Deer (Scotland) Act 1996.

Section 21

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

Not Answered

Please explain the reasons for your answer.:

No comment.

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

Not Answered

Please explain the reasons for your answer.:

No comment.

Section 22

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

Not Answered

Please explain the reasons for your answer.:

This seems fair but I am happy to stakeholder with skin in this particular game.

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

Not Answered

Please explain the reasons for your answer.:

Again, this seems fair. It certainly should be no higher than the judicial rate of interest.

Sections 23 to 25

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

Not Answered

Please explain the reasons for your answer.:

No comment.

2 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?

Not Answered

Please explain the reasons for your answer.:

No comment.

Sections 26 and 27

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

Not Answered

Please explain the reasons for your answer.:

No comment.

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

Not Answered

Please explain the reasons for your answer.:

No comment.

Links to the Agriculture and Rural Communities (Scotland) Bill

1 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?

Not Answered

Please explain the reasons for your answer.:

No comment.

Fairness and checks and balances

1 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?

Yes

Please explain the reasons for your answer.:

I have answered "yes" in terms of the public interest as manifested in Article 1 of the First Protocol to the ECHR. I do not envisage any particular problems with the the Bill as a whole.

Tackling the Climate and Biodiversity Crises

1 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?

Not Answered

Please explain the reasons for your answer.:

Whether it makes "adequate provision" is something I don't feel able to answer, but it does at least seem to include steps in the right direction (in relation to agricultural land use and management of large land holdings).