

Stuart McMillan MSP
Convenor
Delegated Powers and Law Reform Committee
The Scottish Parliament
EH99 1SP

14/08/2024

Dear Convenor,

We write to you regarding the response you received from the Cabinet Secretary for Rural Affairs and Islands in relation to the Delegated Powers and Law Reform Committee's concerns about the delegated powers within the proposed Land Reform (Scotland) Bill.

Scottish Land & Estates (SLE) wholly shares the committee's concerns, but we believe the important issues raised by the committee were not adequately addressed in the Cabinet Secretary's response.

Taking each point in turn, our concerns about the Cabinet Secretary's response are as follows:

1. S1(4) – Power to impose obligations on the owner of land

There remains a lack of adequate consultation requirement in this Bill. Across recent legislation, reassurance has been provided on the face of a Bill by including an explicit duty to consult when making regulations. Saying that this Government “also expects to consult” does not provide the assurance required when we are talking about regulations that will impose obligations on how individuals and businesses manage their land.

Consultation with the Land and Communities Commissioner is welcome, although as there is no requirement in the Bill for the commissioner to have any particular qualifications represent the interests of stakeholders, consultation with him/her is not enough. As it stands, there would be no requirement to consult with anyone actually affected by the regulations.

A commitment to adequate consultation with those affected by regulations on the face of the Bill would be in line with existing legislation which imposes obligations on landowners.

2. S1(4) – Power to modify community engagement obligations for owners of large land holdings

In the response to the committee, the Cabinet Secretary admits impliedly that the lack of evidence-based rationale for the hectare thresholds is such that there may be a need to revisit these thresholds in order to deliver the policy objectives. She makes points about using secondary legislation to change the Act if it transpires that scale was the wrong way to go about delivering the policy objectives and concentration would be better. As a general rule, secondary legislation should not be used to make these kinds of material changes to the primary Act.

These powers create unnecessary uncertainty that would have a detrimental impact on land markets. Making law but reserving the right to change it at any time is unsettling for businesses and unhelpful when businesses want to plan for the long term.

Linking this to our first point about lack of consultation obligations, the Cabinet Secretary's response talks about these powers being used where "feedback" showed it was appropriate or necessary. This raises the question of who this feedback would come from, and under what criteria feedback would be sought. These powers would fundamentally impact how a person decides to occupy, manage, and deal with their own property, and it would be inappropriate for them to be exercised without knowing there must be adequate consultation first.

There are a number of aspects of this part of the Bill that the DPLR committee has rightly identified as potentially weak, and the Cabinet Secretary's response does not indicate an intention to strengthen them. The rationale underpinning the response is openly prejudicial towards large landowners in rural Scotland, with the unevidenced threshold focussed on who owns "too much" land, rather than what is done with it.

Two key points in the Cabinet Secretary's response provide evidence for this: There is no explanation as to why the identity of a landowner and a point of contact for the landholding within a Land Management Plan is only of interest if a landholding exceeds 3000ha. And there is no explanation as to why provisions in this Bill specifically target rural landholdings and not urban holdings, where the concentration of ownership and density of affected populations are far greater.

3. S2(4) – Power to modify the extended opportunity to register interest in relation to large land holdings

The DPLR Committee's concerns about the potential change to the 40-day period of prohibition are valid, but not directly addressed by the Cabinet Secretary in their response. As drafted, there would be no limit to how long the 40-day period could be increased to in the Bill. This is supposed to be a last chance measure. Community bodies will already have had opportunities to buy the land under existing right to buy legislation and this is simply a last resort provision. In our view it is unnecessary at all, but if it is to be pursued, needs to be tightly drawn so as not to stifle the land market unnecessarily.

The Cabinet Secretary discusses balancing the rights of landowners and community groups, which is in line with the policy memorandum. However prior notification itself creates an imbalance, so to have powers to make it even wider is adding to the imbalance. Discussion of the Cabinet Secretary's "intention" to monitor these provisions is concerning, as without placing a duty to review on the face of the bill leaves the door open for monitoring to be ignored.

On the Cabinet Secretary's response to the question 3 e) regarding modifying the land and the length of the prohibition by way of subordinate legislation, it is inappropriate to suggest that secondary legislation should be used to alter a primary Act on the premise set out in the Cabinet Secretary's response. She repeats the point she made at 2 above regarding using secondary legislation to amend the Act if it transpires that the method chosen to implement the policy intention was wrong. The interpretation of what is considered 'extensive changes' or 'wide powers' is entirely subjective and by no means based on expert opinion. It is not unreasonable to suggest that moving the goalposts on modification of the land and the length of the prohibition would have serious consequences on the sale or transfer of land for all parties involved, as well as a knock-on effect on land market confidence.

The impact of any changes has not been considered adequately or in consultation with stakeholders. It would, therefore, be more appropriate to provide parliament with the opportunity to scrutinise these provisions within the primary legislation after proper consultation with those who these provisions would affect. The Committee is right to identify compliance with A1P1 of ECHR as a concern and SLE would agree that permitting material changes like this to be left to secondary legislation increases the risk of Parliament leaving itself open to challenge.

4. S4(2) – Power to make further provision about buying land including how land is to be valued

There are certain things that we believe need to be on the face of the Bill when it comes to valuation of any land that Scottish Ministers offer to buy from private individuals. As the largest landowner in Scotland, it would be inappropriate for the Scottish Ministers to leave it to regulations which they draft themselves to set out the way land is to be valued and then be able to appoint the valuers when they are also the purchaser.

The principles of appointing the valuer (i.e. jointly) as well as the valuation itself need to be set out on the Bill with proper parliamentary scrutiny and approval. The Delegated Powers Memorandum indicates the process for these regulations would be affirmative but it is not clear how we know that because this section is not listed as one of the sections in S29(2) which requires the affirmative procedure, nor does it meet the criteria in s29(4). The Cabinet Secretary should provide clarity on this point.

We would add once again that an ‘expectation to consult’ by this particular government is not a duty to consult. This lack of clarity should be addressed.

5. S4(2) – to make further provision about compensation

Where the financial interests of individuals detrimentally affected by this Bill are concerned, the manner in which they are compensated must be either on the face of the Bill or at the very least subject to the affirmative procedure.

Where negative procedure has featured in previous Bills on a similar issue, does not mean that that precedent was correct or that the provisions were effective or appropriate. Indeed, in this case it is not appropriate. The legislative process should learn from past mistakes rather than double down on them. The Cabinet Secretary’s response lazily assumes that precedent must be followed in this instance without adequately interrogating the operation of preceding legislation.

As the committee is aware, compensation goes to the heart of compliance with ECHR A1P1. We have discussed the need for commitment to statutory consultation on other points, and on this point, we would echo this sentiment, given its importance.

6. S4(2) – power to modify various provisions

As with our comment on point 3 e) we believe the Cabinet Secretary’s intention to use secondary legislation for these purposes is not appropriate. We agree with the DPLR Committee that this is concerning, and do not feel that the Cabinet Secretary’s response to these concerns is adequate.

Our primary concern on this point is that changing these provisions could have wide impacts, for example if any of the current exemptions was to be attacked such as inter family transfers. This could have a significant impact on the viability of hundreds of family-owned estates and

large farms across Scotland. We are concerned about the impact of the primary legislation in this regard, as it could negatively impact land values and the land market in Scotland. However, the ability of the Scottish Government to make significant changes to this part of the bill without adequate parliamentary scrutiny or stakeholder consultation at any time makes that impact even greater.

7, 8, 9, 10. Schedule - Small Landholdings

We understand that consideration is being given to stage 2 amendments on this area of the Bill and will avoid commenting on them until we have seen those changes.

11. Resumption in relation to 1991 Act tenancies, LDTs and repairing tenancies

As you may be aware, the resumption compensation provisions within the Bill were copied and pasted from the Land Reform (Scotland) Act 2016 provisions on relinquishment and assignation. This is why the Delegated Powers Memorandum says little about this, as the policy justification for the 2016 Act provisions do not apply. As applied to relinquishment of a whole tenancy in the 2016 Act, the provisions were to allow farmers to retire with dignity and encourage new blood into the industry.

Compensation for resumption of an inconsequential part of a tenancy has nothing to do with either of those objectives, yet legislation and wording is carried it across to this Bill. What is proposed is not actually compensation, but a windfall payment comprising a percentage of the capital value of the land.

Those provisions were inserted as a stage 2 amendment in 2016 and so there was not full consultation or scrutiny by valuers or other stakeholders at that time either. They have not yet been tested in court and valuers already tell us that there is ambiguity in the drafting – for example some valuers would say the wording allows them to include development uplift in the compensation payment, but others feel this is prevented by the wording. Whether or not development uplift is included goes to the heart of the proportionality of this whole area of the Bill and hence its compatibility with ECHR. The ability to change the valuation provisions by secondary legislation adds a further layer of uncertainty for those involved.

There could be large sums of money involved and people need clear and unambiguous drafting on the face of the Bill. We would call on the Cabinet Secretary to listen to what we, other stakeholders and professional advisers have been telling her officials repeatedly. Otherwise, there will inevitably be unnecessary and costly litigation - not just financially, but also in terms of the wellbeing of the tenanted sector and therefore farming in Scotland. This is the most contentious issue in Part 2 of the Bill, and we urge Cabinet Secretary to take a step back and rethink these proposals.

12. S14 – Compensation for improvements

We agree with the committee that questions remain around the appropriateness of the negative procedure in this part of the Bill. Even if it is an illustrative list the inclusion of something or moving it from one part of the schedule to another will impact on whether something requires landlord's consent or not and this has potentially significant implications for both landlord and tenant in terms of whether compensation is payable at the end of a tenancy. Again, this can run into hundreds of thousands of pounds and proper consultation and scrutiny with affected stakeholders is required.

As a general observation, this Bill brings into focus again the need for regulation of and guidance for Scottish Ministers when drafting legislation as to what they can leave to secondary legislation and when affirmative procedure should be required. At the moment, too much discretion is left in the hands of Ministers and Scottish Government officials, whilst the Parliament's role in scrutinising legislation is weakened due to the lack of clear criteria with which legislation must comply.

In this Bill, it is clear that the Cabinet Secretary intends to use secondary legislation to fill gaps where policy is not yet developed, or ministers simply do not know what to provide. This sets a worrying precedent of contempt for parliamentary scrutiny which SLE believes should be addressed urgently.

Where secondary legislation may be appropriate, there should be clear criteria when it must get affirmative procedure e.g. if significant financial interests are at stake or where ECHR might be invoked. At the moment we are devoid of proper boundaries for secondary legislation.

We would respectfully ask that the response from the DPLR committee would express disappointment in the lack of engagement with the concerns the committee has expressed about the Land Reform (Scotland) Bill and we hope the points we have raised above will be helpful in that regard to encourage the Cabinet Secretary to address these in full with minimal obfuscation.

We would like to commend and thank you and the DPLR Committee for your robust work on standing up for the role of parliament in scrutinising legislation and look forward to collaborating with you on this and future Bills.

Kind Regards.

Yours Sincerely,

Jackie McCreery
Legal Adviser
Scottish Land & Estates