Scottish Land&Estates

Land Reform (Scotland) Bill:

Response to SLC Advice to Ministers

February 2025

OVERVIEW

Scottish Land and Estates (SLE) welcomes the further advice from the Scottish Land Commission (SLC) on Part 1 of the Land Reform Bill published in January 2025, particularly suggestions for simplification. However, we believe the advice does not go far enough to rectify the unworkable nature of many parts of the Bill as introduced. SLE supports improvements to land law and policy which deliver benefits for all but maintains that the Bill will not deliver policy objectives or be balanced and workable, even with the changes suggested by the SLC.

The process of Land Reform does not need to create conflict nor destabilise the land market if undertaken considerately, proportionately and after full consultation with all those affected. Transparency, community empowerment, continued private investment and economic development do not need to be mutually exclusive goals but pitching communities against landowners and generating unnecessary risks in land management are the damaging potential outcomes if this Bill proceeds as drafted.

This paper responds to and builds upon the SLC advice to highlight fundamental problems with the competency and proportionality of the Bill, which requires such extensive change in order to rectify them that it is difficult to see how the Bill can proceed to Stage 2 at this time. We believe that further time is required to allow for the large areas of policy that have been left to secondary legislation to be further developed and draft regulations to be presented alongside the Bill.

SCOPE AND THRESHOLDS

The SLC remains aligned with its original view that concentration of ownership is linked to power imbalance and control of decision making. However, we believe that the supporting argument for the route taken by the Bill (namely to target large scale ownership) remains weak. The underlying premise for action on scale remains the 2019 report by the SLC but this report found that “there is no automatic link between large scale landholdings and poor rural development outcomes but there is convincing evidence that highly concentrated landownership, can have a detrimental effect on rural development outcomes”. We continue to question why large-scale landowners in rural areas are being targeted as a result of research which found that concentration of any size in urban and rural areas is the issue that the SLC identified as one which needed to be addressed.

The SLC states that scale is “a good indicator” and “a good proxy” of where risks to public interest may emerge from misuse of concentration of power. By implication it is acknowledged it is not the only indicator, nor even the primary indicator. We therefore question why it continues to be used as the trigger for provisions and urge the Committee to press the Scottish Government on the rationale for this.

Scale

We urge the Committee to continue to question how imposing additional regulatory burdens on all landowners above an arbitrary area threshold (which itself is subject to change) can be the most proportionate way to tackle instances of abuse of concentration of power –

particularly when the abuses of power could occur at a much smaller scale and not even in a rural setting. We suggest this consideration should include how existing measures to address any negative behaviour, such as barriers to sustainable development, can be used or improved to address the problem. We contend that the target should be damaging behaviours rather than a blanket imposition on all owners above a certain size.

International experience

The SLC refers to international evidence showing that large scale ownership is not necessary to achieve land use goals but nothing about whether it achieves these goals in the most cost effective way for the public purse and at a pace that will create actual change in the timescales we are working to, particularly for net zero or the nature emergency. We appreciate the Scottish Government views diversity of ownership as a policy outcome regardless of impact on what is being delivered for people, jobs and nature. Pursuit of diversity as an end should not be an outcome which slows down the scale and pace at which Scotland can reach its net zero and biodiversity targets. Neither should it act in a way which is detrimental to rural development, housing, employment and all the other benefits which large, diverse land -based businesses already deliver.

It is also relevant to note that the measures in this Bill are not restricted to the management of agricultural land, but focus on housing, commercial and social enterprises for the benefit of rural communities as a whole. In contrast, measures cited as being adopted in other jurisdictions to regulate management and transfer of land are predominately restricted to the management of agricultural land. Comparisons are not therefore straightforward nor even directly relevant to Scotland. These differences call into question the value of these international examples as comparators and the SLC's prior research conceded it was *"challenging to 'fit' Scotland neatly"* into other jurisdiction's shoes.

Single threshold

The SLC recommends a single threshold for all aspects the Part 1 of the Bill and we can see merit in that suggestion – caveated by our view above that a scale threshold is illogical and inappropriate in the first place. To have two definitions of "large" constituted a further confusion to an already illogical principle. We have not seen any evidence presented to justify any particular threshold and the only rationale given appears to be the total number of owners impacted. Inevitably only a tiny percentage (if any) of any chosen number may warrant the interventions proposed, shining a light on the lack of an evidential connection between the legal interventions and the people impacted. Which calls into question the proportionality of the measures.

Contiguity

The SLC's comments about contiguity and the desire to establish whether separate titles are controlled and managed as a single composite holding are fair, as long as holdings which may be under connected ownership, but which are managed very separately can be distinguished. This will be an important requirement to avoid complications arising where there are very valid reasons why holdings should be viewed separately. For example, where two landholdings held in separate trusts share one or more trustees, this does not mean they are managed in the same way nor held for the same purposes. Treating them as single composite holdings for land management plans, lotting or prior notification could create

numerous problems in terms of commercial sensitivities, conflicts and other unintended consequences, including difficulties for communities engaging.

There should be a mechanism to challenge or appeal a decision to treat holdings as composite. Similarly, we agree with the SLC that it could be a disproportionate cost to try to cover every eventuality of corporate structure just to bring a few additional holdings into scope as contiguous.

LAND MANAGEMENT PLANS

SLE has to date been supportive of the principle of transparency and communication which were at the heart of the land management plans (LMPs) proposal. We were pleased to note that the SLC still views LMPs as a vehicle for transparency and disclosure, not a business or operating plan and linking to but not duplicating existing information.

We support this advice and for the regulations which create the duties associated with LMPs to be balanced and workable.

In terms of the engagement element, communication needs to be two-way process if it is to be of value so we would like to see reciprocal duties upon community bodies to engage positively with landowners and without undue delay.

The sections of the Bill dealing with community engagement refer to "communities" rather than community bodies and we have a concern that this could make the engagement process unwieldy and disproportionately expensive for landowners. It could also allow for vocal individuals with a single agenda to disproportionately dominate the engagement process. Community body is a defined term which is widely understood , but "communities" is not defined and could mean any community of interest or community of place. If the objective of LMPs is improved transparency around land use decisions affecting land where people live and work, then the local element is important. If landowners are to be expected to engage with an undefined and unrestricted number of communities then, not only does the cost and time consumed by engagement increase but also the scope for dispute and conflict increases, especially in cases where national aspirations may not be supported by some people locally. A prime example of this would be opposition to renewable energy projects.

Community Engagement

The points above link to the associated problem we can foresee with the SLC's advice to include a duty for the landowner to demonstrate how community engagement has "informed" the LMP. On the face of it this would ensure the process of producing a LMP is meaningful and not simply a tick box exercise, which we would support. However, our members tell us that in many cases there is not one unified community voice and that different sections within a local area can have very different aspirations and needs which may conflict with each other. All a private landowner can do is give due consideration to all those voices but ultimately must take decisions which accord with their own legitimate objectives as long as the community is aware and have been afforded the opportunity to comment.

Breaches

Private landowners must already manage their land in accordance with the law and the raft of regulations which affect all their activities. Where they breach those, there will be penalties under the law. Some landowners may have other charitable or funding obligations, commercial, environmental or social requirements, and breaches of these would be dealt with through the appropriate regulatory body.

The LMP should be a tool to encourage communication between landowners and their communities and to ensure that each understands the needs of the other, and how they can work together to deliver for people, jobs and nature. Such communication already happens across Scotland, but we can see merit in LMPs if it encourages meaningful communication between landowners and their communities where none existed before or where improvement is required. They should not impose undue burdens on those where there is already successful engagement.

The guidance which accompanies LMPs will be important because this can highlight examples of good or best practice, but the legislation itself should not be too prescriptive or layer further regulation on top of existing regulation.

Adding to the list of bodies who can report breaches of regulations seems sensible and these bodies should have internal processes to ensure that vexatious or unfounded alleged breaches are filtered out. For the reasons given above it must be clear that the breaches referred to are breaches of the community engagement obligations under the regulations, not breaches of the aspirations or intentions set out in the LMP. To do otherwise would lead to bland LMPs lacking aspiration in order to avoid any repercussions for non-compliance, which would not be of benefit to communities.

We can see merit in the Land and Communities Commissioner being able to instigate an investigation into a breach of regulations but there should be some criteria before such an investigation would be commenced so that the LCC is not reacting to every anonymous complaint, some of which could be fictitious or vexatious. The LCC should have a level of discretion and guidance within which to work. As mentioned later, this should be linked to the LCC's function as more of a mediator than a regulator.

Local place plans

SLE is fully supportive of the linking of LMPs to Local Place Plans (LPPs) where they exist. Many of the community aspirations could have already been ascertained through that process and we would urge Ministers to fully resource that process to ensure community bodies have adequate skills and resources available to them. We would go further and suggest that the community engagement obligations on the landowner could be scaled back where a similar exercise has already taken place in production of a LPP to avoid duplication of effort and cost as well as avoiding "engagement fatigue" within communities. This will also further incentivise landowners to be active participants in the LPP process.

Ability to designate land /assets of community significance is worth consideration but needs more thought. Achieving a simple process for doing this in a LMP may not be straightforward

as the duty to produce to the LMP sits with the landowner, who may be reluctant to designate land through this process. It should therefore be part of the LPP. In addition, communities should be required to show additionality over and above existing rights such as the right to register an interest to buy under Part 3 or their compulsory acquisition powers under Part 5. To be proportionate in its interference with the owner's interests, there may also need to be consideration given to a restriction in how much of the landholding can be designated as being of community significance. Such a designation should not be capable of effectively blighting significant parts of landholdings. We would advocate a process of communities agreeing assets to be designated with the owner but to do this properly could be a long and expensive process where significant financial interests are involved.

We fully support development of clear guidance around LMPs and look forward to working with the SLC in developing this. This should align with the good practice on community engagement which the SLC has already developed with stakeholders.

Cross compliance

Given that we do not yet know the extent of the obligations beyond the publishing of an LMP and considering lease requests, it is impossible to ascertain the proportionality of any cross-compliance penalty. Legitimate land management practices being carried out in the public interest such as peatland restoration or food production could be adversely affected. This needs significant further consultation with stakeholders as to the impacts and unintended consequences.

Portal

SLE is supportive of a central information portal being developed as long as expense doesn't outweigh the actual benefits and it does not become a mandatory registration process attaching the LMP as a burden to the land. Its value could be in sharing good practice where landowners can see examples of other LMPs in their area.

PRIOR NOTIFICATION

SLE is pleased to note the SLC's comments that prior notification provisions as drafted could be counter to the stated objectives and will have very limited impact. We would have thought that this would have logically led to the SLC suggesting that the provisions are removed from the Bill, and believe that the minor changes suggested will not address the fundamental issues.

SLE would welcome any simplification in the process set out for prior notification, but we maintain the position in our supplementary evidence to the Committee– these provisions are unnecessary as existing legislation can achieve the same (and more) if it was working properly. The additional 90-day process will still delay sales and impinge on landowners' interests when it is not necessary to do so if earlier registration of community interest was less onerous in the first place.

It is concerning that the SLC has considered removing extra costs for Ministers and Communities but appears to have no concern for costs to the seller, which would need to be compensated from the public purse if the measures were unnecessary and

disproportionate. The SLC also says that the additional 90-day period will not encroach on lending considerations but does not elaborate on the reasons for this . We would argue that any additional delay in being able to market a property will impact on its security for lending.

SLE also supports removing the proposal for a central register of interested parties and replacing this with a simple notification process.

The SLC recommends exemptions which would be considered de minimus (except if designated as assets of community significance in the LMP) as well as assets subject to another statutory process such as farm tenant's right to buy).

While developing a set of exemptions appears a sensible way to plug one of the deficiencies in this part of the Bill, we do not underestimate the difficulty in using secondary legislation to capture all those affected and therefore avoid unintended consequences.

There are additional exemptions that would be needed if the prior notification provisions are not to detrimentally affect rural development and those relate to land which is already subject to a planning consent or where development is underway. The Committee has heard about examples such as the Tornagrain new town development. There will also be cases where the landowner has existing contractual obligations to another party, for example in an option agreement. These need to be included in any regulations setting out the exemptions before these sections would be implemented.

We continue to assert that if communities were more easily able to register their interest at an earlier stage, then the prior notification provisions would not be necessary.

TRANSFER TEST AND LOTTING

Our comments below are caveated by our overriding view that lotting is unnecessary and a disproportionate means to achieve the stated policy intention.

SLE was however, interested to read the proposed changes to the transfer test and lotting suggested by the SLC. We are particularly interested in the recommendation for public acquisition of land. While some taxpayers may question this use of public funds, it could remove the most damaging aspects of lotting from the seller. However, the SLC recommends that public acquisition would only take place after a lotting decision, so this does not ameliorate the risks of lotting for the seller (and therefore compensation due). The alternative would be if there is a demonstrable public interest is the land being broken up (with reference to the LPP or LMP), then this should apply before lotting decision.

The SLC recommends that a public interest test is applied to frame what is meant by community sustainability, and we can see logic in that argument. Where government is intervening in private property rights this is one of the tests which must be satisfied for the legislation to be competent. In addition to ECHR compliance, the Scottish Government has stated that it wishes to continue a policy of EU alignment and therefore the European Commission's Interpretive Communication note [i] will be of relevance. In relation to subjecting transfers to a public interest test the Commission states:

" *... for such a scheme to be compatible with EU law, 'it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion.' The criteria must be precise*."

The policy of the Société d'aménagement foncier et d'établissement rural (SAFER) to exercise pre-emptive purchase rights in France has been mentioned as a comparable power, although that scheme is limited to farmland rather than the diversified land management types which will be impacted by the Land Reform Bill. The original goal of SAFER was to restructure and consolidate farmland, rather than to break it up so the fundamental policy objectives also differ. The specific emphasis placed on agricultural law within the European Union may also explain why Member State countries have been able to adopt measures which restrict the use and transfer of agricultural land without impinging on the fundamental freedoms, in a way that could not be done in relation to other types of land. Interestingly, the SAFERs' pre-emptive rights cannot be used on purchases made by existing farmers, on building land with a construction commitment, or on most forest sales. As stated previously, it is important that international comparators are considered carefully.

It is relevant in this context that many large Scottish rural landholdings are diversified land-based businesses, not just farms. Different considerations may also arise if a holding is being sold as a going concern with specific business interests such as commercial forestry, housing, quarry or indeed any of the myriad diverse business activities which take place on large landholdings. It would need to be considered whether lotting of that commercial undertaking could be competent or proportionate and the losses to be compensated from the public purse could be significant.

However, if it was competent, public acquisition should not necessarily be limited to re-sale to a community body as suggested by the SLC because lotting is not about community acquisition as set out in the Bill. This ongoing disparity between stated aims of the Bill and SLC/Scottish Government land reform objectives requires further exploration.

The SLC introduces a concept of 'fair' market value which we would question. 'The issue for a seller will be risk of "fair" market value being below open market value and a process is needed to deal with the situation where they do not agree with the valuation. Joint appointment of the valuer and use of a tried and test valuation methodology such as the Red Book value may alleviate those concerns.

It is common practice already that prior to any sale a landowner will consider lotting of any large landholding and this process should still be able to happen without interference by the LCC. We suggest a very first stage (akin to that suggested by SLC) should be introduced whereby the seller is given the option to produce a lotting plan. The LCC would only be able to step in to consider a lotting decision in very limited circumstances which should be outlined, for example if the owner does not consider lotting and there is a demonstrable need evidenced by the LMP or LCC for further smaller areas of land to be made available for purchase. Owners do not always lot in a way to maximise value and they take many other considerations into account, particularly if they retain a home or other land in the vicinity. They will also consider access for forestry harvest, amenity, tenants' interests and many other factors that we are not confident will be properly assessed by the SLC lotting consideration.

We agree with the SLC that a link to the LMP (if there is no LPP) and the lotting decision-making process is also appropriate as that process should have already identified a specific and identified need, for example additional farms to let, additional commercial units, not just assets for community purchase.

We also believe that any exemptions in terms of the land and properties prior notification proposals should be considered in the lotting process or exempted altogether.

Despite concerns above, we feel that these changes to the provisions should be given further thought and development. The two-phase process suggested by the SLC might not expedite anything other than the most obvious cases where lotting is manifestly not appropriate but at least it will remove some from the net. To achieve the kind of assessment that would be required, it would require a significant amount of time and professional expertise, hence the first stage we have suggested of the owner having the option to produce the lotting plan prior to the sale. We also believe that a professional valuer should assess the impact of lotting on value at the earliest stage so that any potential compensation is clear from the outset.

The lack of timeframes in the SLC's proposals is still a major concern and means these proposed changes suffer from the same defects as the original Bill provisions. The land market needs certainty and to have unrestricted time delays in the process of selling land will be damaging. We are disappointed that the SLC has not addressed this fundamental issue.

LAND AND COMMUNITIES COMMISSIONER

SLE is concerned that the evidence to date has focussed on a regulatory role for the LCC in terms of investigations, enforcement and penalties. The first function of the LCC in the new S38A of the 2003 Act is "to enforce". We think this is unhelpful to fostering better community engagement.

While it may be appropriate for the LCC to have the ability to use that function we strongly believe that the primary function of the LCC should be promoting and encouraging good relations between landowners and local communities, publishing guidance and codes of practice in much the same way as the Tenant Farming Commissioner. Experience has shown that role to have been valuable and effective when this approach is taken, and we suggest the same approach would be far more effective here.

We agree with the SLC that the LCC should operate within and consult the rest of the Board of the SLC rather than stand alone.

For more information contact:
Jackie McCreery
Legal Adviser

[i] Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05)