Scottish Land&Estates

Land Reform (Scotland) Bill Part 2

Response to SLC Advice to Ministers

February 2025

PART 2 – LEASING LAND

Context

SLE welcomes the Scottish Land Commission's advice on part 2 of the Bill. We are keen to reiterate that the SLC's advice on Part 2 has been produced after discussions with the Tenant Farming Advisory Forum, of which we are part, but has not been agreed by TFAF as the Forum's consensus view. However, we particularly welcome the SLC's comments giving context to the advice and the dual lenses of creating attractive conditions for tenants whilst encouraging landlords to let land.

SLE is an active participant in the Tenant Farming Advisory Forum (TFAF) and has, in good faith, tried where possible to reach consensus positions on the provisions of the Bill in the interests of the tenanted sector as a whole. We recognise that what is good for the whole sector will ultimately be good for landowners and tenants alike. That whole sector outcome is rarely the absolute best outcome for any one participant so we would urge the Minister to view the Bill from the point of view of improving the position of the whole sector including future tenants and landlords.

It is worth noting that the farm land rental markets in England & Wales have been operating under the same taxation and fiscal regimes as Scotland for the past 20 years, yet the number of tenancies in Scotland is declining while CAAV's annual report in December 2024 found the letting market in England and Wales has been relatively stable. In the report Jeremy Moody refers to the "political risks seen in letting in Scotland" and warns of "much more risk of further decline rather than growth". We cannot therefore ignore the role that legislative interventions have had in Scotland. We would urge Ministers to use this Bill to halt the decline, rather than hasten it, as it currently risks. Any measures which are unbalanced in terms of one party's rights, or any will have the latter effect.

Model Lease for Environmental Purposes

We support the SLC's comments and we also see potential, in principle, in the introduction of a new form of lease that can be used for the letting of land where the intended use is not confined principally to agriculture. While agreements to manage land for non agricultural purposes are already possible under commercial leases or other contracts, we appreciate that some parties may be looking for a specific tenancy vehicle. We agree with the SLC that the Agricultural Holdings legislation should not apply to this form of lease, and this should be made clear on the face of the Bill, even though further details about the lease will need to be consulted upon and set out in secondary legislation. That legal context would be vital in the Bill. The less prescriptive this form of letting can be, the better. We have seen the effects on availability of opportunities of past legislation so we believe it is worth trying a less limiting form of contract which allows parties to come to their own agreements, as in other sectors of the economy.

We think there is potential for these leases to be used primarily for new lettings, particularly for new entrants although there should be the option for existing tenants to be able to use these where their activity does not fit well into the farm tenancy regime. An obvious example would be where a farmer wishes to undertake an activity which results in permanent land use change such as large scale planting of trees on agricultural land. In this case the land

cannot easily be returned to agriculture at the end of a tenancy and agricultural holdings leases cannot be stretched in such a way to achieve a good outcome for both parties. So parties should be able to agree new terms about what happens at the end of the tenancy to encourage farmers who wish to plant woodland to be able to do so on terms that are acceptable to the owner as well.

No one can be forced to use these leases, and we should not underestimate the decline in confidence to let as a result of the political interventions of the past 20 years. We foresee that uptake of these leases could therefore be slow while trust between the sector and government rebuilds. However, if the more damaging aspects of this Bill could be removed and afterwards there was a period of stability with no further statutory intervention which retrospectively changes the nature of agreements owners and farmers thought they had entered into, along with clear Government commitment to a period of stability, then we do see this form of lease as a possible way to increase letting of farm land in the longer term.

Small Landholdings

SLE has not made detailed comments about changes to Small Landholder legislation as we have not had representations from owners of land subject to this form of tenure, and we understand there to be very few within our membership. We also understand that significant amendments will be brought forward by the Minister at stage 2, which we have not had sight of nor been consulted upon, so we reserve our position to comment on those once they are made known.

It does not warrant the resource required for full scale consolidation of the legislation but nevertheless we see the merit in simplifying this form of tenure and aligning it with other farm tenancies. Small landholdings located outside the crofting counties may have some similarities to some crofts, but they do not share the common endeavour associated with crofting on common grazings and the other aspects which are very particular to crofting as a form of tenure in specific areas of Scotland. We agree with the SLC's view that the Tenant Farming Commissioner does not need to be involved in every valuation of compensation.

Registration of Interest and Right to Buy

The SLC is supportive of the Bill's powers to amend the registration process for the pre-emptive right to buy and by implication support for there being a registration process, which we welcome. The alternative of an automatic notification of an interest without the need to specify the land to which it applies would be problematic and professional members have told us that the registration process is vital to identify potential discrepancies and future issues and resolve them at an early stage. We do however agree that the process should not be unduly onerous on anyone while acknowledging that, where significant value is concerned, some level of effort will be reasonably required to get a registration correct and avoid unnecessary complications further along the process. This process should not be one viewed as a source of conflict. Registration of interest can be a straightforward process. There is perhaps some positive messaging that could be done within the sector to normalize the registration process.

Resumption in Relation to 1991 Act Tenancies and 2003 Act Fixed Duration Tenancies.

SLE shares some of the SLC's concerns regarding the compensation for resumption provisions in the Bill. We would strongly support these provisions as currently drafted being removed from the Bill pending a full consultation on fair compensation for partial resumptions from 1991 Act tenancies and an opportunity to examine what alternatives were considered by Ministers as these were never raised within the Tenant Farming Advisory Forum.

We would welcome further clarity on the policy intentions behind these provisions for resumption of parts of tenancies, which do not materially impact on the rest of the tenant's business. We believe they have become confused with the other very different circumstances where whole tenancies are returned to the owner after they have obtained planning permission for development of the whole holding (referred to as an incontestable notice to quit). With resumption, on the other hand, the tenant farmer continues to have a viable farming business. There will be different considerations to have regard to in each set of circumstances and therefore it is highly unlikely that the policy intentions would be exactly the same. If we are not clear on the policy intentions, then it is impossible to have any clarity on the proportionality of the provisions and whether they are the least detrimental way to achieve the respective policy intentions.

We agree with the SLC that there should be no changes made to 2003 Act tenancies and our comments above in relation to political intervention and allowing a period of stability are relevant here.

We further support clarity being provided on the existing Section 17 of the 2003 Act regarding the validity of contractual resumption agreements already entered into between parties and those which may be agreed going forward. This section lacks the necessary characteristics required of any law namely to be clear, precise, and foreseeable.

We differ with the SLC however in stating that, following the consultation sought, the method of calculation of compensation payable in the case of an Incontestable Notice to Quit is aligned with that which will apply to 1991 Act tenancies where resumption takes place. That would be to pre-empt the outcome of the consultation and in all likelihood, there could be two different approaches taken due to the significant differences in those two processes as outlined above. We think the consultation should be allowed to take place without limiting its outcome in this way on the face of the Bill.

We agree that it is not necessary for the Tenant Farming Commissioner to be involved in every case.

Tenants' Improvements for which Compensation May be Payable at the End of the Tenancy

SLE can see the rationale to move to principles-based schedules for Part 1 and Part 2 improvements (i.e., those requiring either full consent of the landlord or simply be notified to him/her in order to qualify for compensation). This is because we appreciate that fixed lists can become outdated as technology and farming practice changes. We certainly do not want

tenants prevented from participating in modern farming practices and schemes. The SLC advice touches on it, but we would very concerned that the proposals will lead to avoidable disputes where tenants carry out improvements as a Part 2, but landlords view them as being Part 1. Very clear guidance will be needed to avoid this type of dispute. As compensation payments to tenants for improvements can run into hundreds of thousands of pounds the need for clarity on the correct process by which an improvement is undertaken is vital. The Bill should require guidance to accompany these changes to be produced and consulted upon by the sector.

We agree with the SLC that the new Part 4 is not necessary if clear guidance accompanies the new schedules. We shared this view with the Scottish Government in July 2024 and provided suggestions as to how the improvements listed in Part 4 could be covered by Parts 1-3. At the request of the Scottish Government, we and others have recently resubmitted views on this.

Use of Agricultural land for Diversification

SLE remains supportive of enabling farmers to diversify their agricultural business within the confines of an agricultural tenancy including undertaking sustainable and regenerative farming and associated environmental land management. However, there is a risk of the legislation being stretched too far to facilitate non-farming activities with which it was never intended to deal. While clearly being supportive of tenant farmers diversifying their businesses, there will be a point at which those alternative land uses cease to be appropriate for an agricultural lease and in those cases the new form of land use tenancy or a straightforward commercial lease may be more appropriate.

It is not possible to fully equalize the rights of owner occupiers and tenants because their respective rights and obligations are different under the law. We do not agree therefore with the SLC's recommended change to parts of S45A (of the 1991 Act) that tenant farmers should be able to permanently change the land use without appropriate compensation being payable to the owner at the end of the tenancy.

That is not to say tenants and owners should not be able to come to an agreement outwith the agricultural lease for this kind of land use change, but the terms need to be fair and appropriate for both parties. The value of the holding at the end of the tenancy in pure monetary terms will not always be a landowner's primary concern. They may simply wish for their land to remain productive farmland.

Compensation for Damage by Game

SLE is aware that damage, particularly by deer, is a problem in some areas of Scotland and the fact that the deer are not owned by anyone means it is not possible to impose a duty on a landowner unless one of the powers under the Deer Act is used for specific reasons. SLE is supportive of the SLC's comments in relation to game damage and would reiterate that existing powers in other legislation be used before imposing unnecessary and unworkable provisions in agricultural holdings legislation to try to deal with the same problems. The SLC's approach here seems to be a common sense way to deal with a difficult issue, but NatureScot may need to engage more closely with the farming sector.

The Bill already significantly extends the damage for which landlords can be liable and we do not feel that there is any need to go further. The right to shoot deer over a whole holding is a separate interest in land and frequently leased separately. If farming tenants wish to acquire

the shooting rights, then this is something that can be negotiated separately to the lease of the agricultural land. It is already common for farm tenants to also hold the lease of the shooting rights. To argue that these additional property rights should somehow now be automatically bundled together with agricultural tenancy rights would be detrimental to the landowner's remaining interest in his property. Farmers, (whether tenants or owner occupiers) will often have to use other means to protect their crops, such as fencing. It cannot always be the landlord's responsibility to deal with deer over which they have no control, and which may stray long distances from land under different ownerships.

Standard Claim procedure

SLE agrees with the SLC that it is not necessary for the TFC to be required to appoint a valuer other than in cases where the parties cannot agree. We also agree that the standard claim procedure set out in the Bill will not be possible for all types of claims where heads of claim cannot be foreseen (such as game damage) so the wording may need reviewed.

We can see merit focusing minds to agree a waygo claim without undue delay but believe that prescriptive timescales will not be workable in every case. Some heads of claim cannot be valued until after the termination date so we suggest that rather than interest starting to run on the final award from the termination date, that a longstop of 6 months is imposed for the claim to be finalized and for interest to become payable only from that date. As it stands the Bill allows interest to run from the termination date even though it will be impossible to know the final amount of the claim until after that date so this would be unfair to the landlord, where significant sums of money could be involved. The landlord may also need some time to arrange borrowing to fund the compensation payment.

Rent Reviews

SLE is supportive of the SLC's advice around rent review but we were disappointed that the SLC advice did not include any reference to how improvements to housing on tenanted farms should be dealt with at rent review where those improvements have been imposed upon one or other of the parties by another enactment such as housing or energy efficiency legislation. This issue was widely discussed at the Tenant Farming Forum and is one where clarity is required in the legislation. We would urge Ministers to consider appropriate amendments at stage 2 to deal with this issue so that both landlords and tenants are able to invest in improvements with the certainty that they will be compensated either at waygo or via the rent for the costs of those works.

We would also urge Ministers to ensure that the Bill addresses the issue of responsibility (or at the very least the Bill requires appropriate guidance to be developed with the sector) so that it is clear who has the duty to make these statutory improvements when it comes to the different types of housing arrangements which occur on tenanted farms including tied houses for workers, houses for family members and sub-let houses. As it stands no one is actually obliged to make those improvements under the agricultural holdings Acts but there are duties on both landlords and tenants under other legislation for residential properties. The difficulty arises because houses are treated as any other type of fixed equipment even though they are very different to slurry stores and milking parlours in terms of their contribution towards the productive capacity of the holding or its efficient operation.

Rules of Good Husbandry and Estate management

SLE has no objections to the proposed changes to the rules of good husbandry and estate management so that tenants are able to engage in sustainable and regenerative agriculture without fear of breaching their lease conditions but this is subject to it being known what that term means otherwise it leaves matters open for dispute.

For more information contact:

Jackie McCreery
Legal Adviser
[redacted]