Scottish Land Commission Advice on Part 2 of the Land Reform Bill

This advice is supplementary advice from the Tenant Farming Commissioner and Scottish Land Commission on Part 2 of the Land Reform Bill. It follows the advice already provided to the Committee responding to its call for evidence in 2023. The advice reflects the view of the Commission. It is informed by discussions of the Tenant Farming Advisory Forum but does not seek to represent a collective view of members of the forum. It has not been possible to reach consensus on all points within the forum and members have the opportunity to provide evidence to the Committee directly.

Context

The Bill proposals should be seen in the context of a continuing decline in the area of rented land and the caution that should be exercised when making changes to legislation that affect existing agreements and leases that have been freely entered into by landlords and tenants under different circumstances. Ensuring that new entrants and young farmers have access to the land they need to create businesses means creating conditions that are attractive to a tenant, but which also encourage landowners to make land available for rent, and it is through these two lenses that the Bill proposals should be viewed.

1. **Model Lease for Environmental Purposes**

We see some merit 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 but can also include other land uses contributing to enhancement of biodiversity or to climate change objectives.

For this to be useful it should be made clear that this is a new form of lease/tenancy which is outside the scope of the current agricultural holdings legislation and that, subject to the inclusion of such model clauses as may be determined by consultation with the sector, landlords and tenants have freedom to negotiate the terms of such leases.

2. **Small Landholdings**

We support the intention to improve the position of small landholders and to align their rights and opportunities with those of mainstream agricultural tenants.

We also support the intention to bring small landholders within the remit of the Tenant Farming Commissioner. However, we do not feel it is necessary for the Tenant Farming Commissioner to appoint an agent to value compensation due to either landlord or tenant, other than in cases where the parties are unable to agree on the compensation or on the appointment of an agent.

3. **Registration of Interest and Right to Buy**

We support the proposal that Scottish Ministers have powers to make regulations concerning the process by which tenants holding a 1991 Act (secure) tenancy can register a pre-emptive right to buy the holding should the landlord choose to sell it. The current registration process is variously regarded as appropriate or over prescriptive and it would be helpful to develop a process which has broader support within the sector.

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

We support the view that the compensation payable to a tenant when land is legitimately resumed from a tenancy should be reviewed but we have some concerns about the Bill proposals.

a) We note that the proposed method for assessing the compensation uses the methodology that was introduced by the 2016 Land Reform Act and which was intended to be used in circumstances where a 1991 Act tenant offers to relinquish the whole tenancy in return for a payment by the landlord, such payment to be based on an assessment carried out by a qualified agent appointed by the Tenant Farming Commissioner. We have some concerns about the use of this methodology in partial resumptions and over its use in both 91 Act and 03 Act tenancies and recognise that this is an issue where there are different positions within the sector. The proposals represent a material change to the terms and conditions on which exiting tenancies were agreed, particularly in the case of 2003 Act tenancies where their introduction might be a disincentive to landlords considering offering the new 2003 Act (fixed duration tenancies) that are vital to the delivery of the Scottish Government's aim of a thriving tenanted sector. We recommend that further consideration is given to how to assess the compensation due when resumption takes place. If the wider review recommended at the end of this section is not accepted by Ministers, a compromise would be acceptance of the proposed methodology in the case of resumptions involving 91 Act tenancies but with an alternative solution for 03 Act tenancies involving increasing the disturbance payment element.

b) We recommend that this opportunity is taken to clarify the policy intention behind section 17 of the 2003 Agricultural Holdings (Scotland) Act. The area of uncertainty is whether or not contractual resumption is a possibility or whether the landlord's ability to resume is restricted to the circumstances set out in s.17. The former has potentially significant implications for landlords and tenants operating with fixed duration tenancies and clarity is required.

c) We note that the origin of discussions about resumption compensation was in relation to the compensation payable to a 1991 Act tenant who is the subject of

an Incontestable Notice to Quit because the landlord has obtained development consent over the whole holding. The Bill proposes no change in this area so the possibility exists that a tenant losing part of the land within the lease may qualify for more compensation than a tenant who loses the whole holding and associated business, home and livelihood. We recommend that 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.

d) We suggest that landlords and tenants should be free to negotiate the compensation payable in circumstances where the area resumed is small and uncontested, with the statutory methodology available as a backstop in the event of failure to agree. We do not consider it necessary for the Tenant Farming Commissioner to appoint an agent to assess the compensation due, other than in cases where the parties involved cannot agree on the amount or on the appointment of an agent.

Given the number of issues thrown up by the resumption proposals we recommend that Ministers use the Bill to acquire powers to amend the resumption compensation provisions by regulation, following consultation with the sector on the scope of the provisions and on an appropriate methodology for assessing the compensation due.

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

We support the introduction of principles based improvement schedules for Part1 and Part 2 improvements and a list based schedule for Part 3 improvements, though we recognise that in the case of Part 1 and Part 2 improvements this is likely to lead to some disputes over what constitutes an eligible improvement. We recognise the intention behind the introduction of a new Part 4 list but consider that the example improvements suggested as being suitable for Part 4 could either be allocated to part 1,2 or 3 and be accompanied by clear guidance and that this would help to clarify whether they are to be subject to consent or notification while avoiding the need for the introduction of a new list.

6. Use of Agricultural land for Diversification

We support the intention to ensure that tenants are able to fully engage in sustainable and regenerative agriculture and that they are able to diversify into non-agricultural activities in order to make their businesses more robust. We support the proposals in the Bill and consider that they represent a reasonable balance between the rights of a tenant to diversify and the rights of a landlord to have a say in what happens to their land. However, we have one caveat.

a) Section 45A of the 2003 Agricultural Holdings (Scotland) Act prescribes how compensation for tree planting by a tenant is dealt with at the end of the lease. The ability of the landlord to claim compensation which includes the cost of returning the land to agriculture is a big disincentive to any tenant considering planting trees and cuts across the requirements in the Forestry Grant Scheme, and the Woodland Carbon Code, to commit to a permanent change in land use. We suggest that S.45A is deleted and that compensation for tree planting is based on the same principles that apply to other diversifications. i.e. compensation is available to landlord or tenant depending on whether the tree planting has increased or decreased the value of the holding.

7. Compensation for Damage by game

We support the intention to add to the tenant's existing rights to compensation for game damage to crops by including damage to trees, fixed equipment and livestock. This recognises the wider impacts of intensive game rearing and the increasing occurrence of damage of various types by deer.

We recognise the particular issues that arise in the case of deer, where the Deer (Scotland) Act gives the tenant the right to take action on some land types within his/her holding (and therefore cannot claim compensation for damage on those land types) but where the deer causing the damage may be coming from land within the tenancy but on excluded land types or from land outside the tenancy but owned by the tenant's landlord or from land owned by a third party. We believe that such complex circumstances are best dealt with by NatureScot using their powers of intervention under the Deer (Scotland) Act and that this represents a better route to resolution that attempting to find a solution by amendments to the agricultural holdings legislation.

8. Standard Claim procedure

We can see that a standard claim procedure may have merit but expect that further work will be required to ensure that it is appropriate in all circumstances. As currently proposed, it is only applicable to circumstances that can be anticipated. We welcome the intention to use the procedure to improve the waygo process by ensuring that the timetable for the start of waygo negotiations provides sufficient time for the process to be finalised by the end date of the tenancy.

We do not consider it necessary for the TFC to be required to appoint a valuer other than in cases where the parties cannot agree.

9. Rent Reviews

We support the intention to add productive capacity as one of the factors to be taken into account by the Land Court in dealing with rent disputes. This will allow the two main factors (productive capacity and comparable rents) to act as a sense check on each other and to provide a broader basis on which to conduct rent negotiations. However, we note that:

a) the proposed use of the term ‘’similar holding’’ is different from the current use of the term ‘’comparable holding’’ and may be capable of a narrower interpretation of the rents that can be used as comparables. We recommend retention of the term ‘’comparable holding’’.

b) The proposed legislation does not carry forward some of the important provisions currently included in s.13 of the 91 Act such as those relating to regards and disregards and recommend that these are included in any new provisions.

c) Guidance will be required on the definition and assessment of ‘’productive capacity’’.

10. Rules of Good Husbandry and Estate management

We support the proposed changes to the rules of good husbandry and estate management. These changes are essential to ensure that tenants are able to engage in sustainable and regenerative agriculture without fear of breaching their lease conditions.