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Scottish Tenant Farmers Association

Response to Scottish Land Commission's Advice to Ministers on Part 1 and Part 2 of the Land Reform (Scotland) Bill 2024

17th February 2025

The Scottish Tenant Farmers Association (STFA) welcomed the introduction of the Land Reform Bill in March 2024 and gave evidence to the NZET Committee on Part 2 of the Bill in June 2024. STFA is pleased to see that the Scottish Land Commission (SLC) has published further advice on amendments to strengthen both Part 1 and Part 2 of the Bill and welcomes the opportunity to provide further comments.

Part 1, Large scale land holdings: management and transfer of ownership

STFA agrees with the SLC's recommended changes to Part 1 of the Bill which simplify and strengthen the Bill. We welcome the SLC's recommendation of an aligned threshold of 1,000 ha but note that there is evidence that the threshold could be lowered further to 500 ha.

We wish to make the following points to ensure that the Part 1 measures take account of the interests of tenant farmers on large scale holdings:

Section 1. Community engagement obligations

STFA suggestions:

1) A requirement to engage with farm tenants and to include future plans for tenanted holdings, especially where non-secure fixed term leases are in use;

2) Consider conditions and limits being attached to the receipt of land based subsidies for large scale landholdings to reduce the likelihood of farm tenants being removed against their will;

3) The cost and extent of the Land Management Plan should be proportionate to the scale of the holding, so there is less of a burden on smaller 500 ha holdings should they be included.

4) The threshold set on the face of the Bill could be amendable through secondary legislation so that it can easily be adjusted if future experience justifies a threshold adjustment.

Sections 2-5. Community notification of intention to sell

STFA suggestions:

1) To include farm tenants in the notification of intention to sell, providing time for a tenant to register a pre-emptive right to buy prior to the sale of the land. This will help tenants who

have not registered and will prevent estates being sold privately without the knowledge of the tenants;

2) To ensure lotting takes into consideration the boundaries of tenancies in order to allow for tenants to purchase their farms;

3) Given some of the problems we have seen where a new landlord has purchased an estate, there should be a public interest test applied to any buyer of a large scale holding.

4) To encourage new entrants into farming a requirement for the sale of large scale holdings could be the creation of some crofts or small landholdings which benefit from security of tenure. While the fixed term leases of the Agricultural Holdings (Scotland) 2003 Act work as add ons to existing farming businesses, they have not proved successful for genuine stand alone new entrants who would benefit from security of tenure on a small area.

Section 6. Establishment of the Land and Communities Commissioner (LCC)

To allow for the interests of tenant farmers to be taken into account in relation to community engagement obligations, land management plans, lotting and the proposed transfer test, the LCC should be required to work closely with the Tenant Farming Commissioner (TFC).

In recent years we have seen examples of poor behaviour by large-scale landowners towards farm tenants where intervention by the TFC has failed to improve behaviour and relationships. At present, the TFC has no meaningful powers to resolve these situations.

This Bill is an opportunity to address the conduct of maverick landlords who continue to demonstrate unacceptable behaviour, in particular those in control of large scale holdings.

If the TFC is not to be granted increased powers of investigation and enforcement, then the LCC should have powers to intervene in tenancy matters on large scale holdings by working in conjunction with the TFC.

STFA welcome the SLC's general advice that the LCC should work closely with and consult with the TFC, which should help ensure farm tenants' interests are taken into account under the Part 1 provisions.

Given the experience of the TFC's work which shows that landlords, tenants or other third parties are unlikely to report alleged breaches of codes, STFA welcomes the SLC's advice which allows that the LCC, once aware of of potential breach, can start an investigation rather than have to wait for a third party report of alleged breach which may never come.

Part 2, Leasing Land

Context

For full context and understanding of trends in the tenanted sector there should analysis of the real reasons behind the decline in the area of tenanted land including: (i) the current taxation frameworks governing Capital Gains Tax, Inheritance Tax and Income Tax all act against the use of tenancies, and the implications of the Balfour Case from 2010 have proved damaging for the

tenanted sector with landlords taking steps to reduce areas of tenanted land in order to meet Balfour structuring requirements for tax reasons; (ii) the recent inflows of green capital for alternative land uses have and continue to lead to loss of tenancies; and (iii) speculation around uncapped future rural support for non-farming activities. There are few measures in the land Reform Bill Bill which can mitigate these pressures on the tenanted sector, but there are measures which help ensure fair treatment and just transition for the remaining tenants.

There are some practical changes to the Agricultural Holdings (Scotland) 2003 Act fixed term tenancies (SLDTs, LDTs and MLDTs) which could be made to encourage their use, for example permitting a SLDT to roll into a new SLDT for the same tenant and amending the minimum term for MLDTs to 5 years so they could be used to fill the 5-10 year lease duration gap, but such changes are unlikely to increase uptake without significant changes to the current fiscal framework. Since their introduction in the 2003 Act, LDTs and MLDTs have been amended to make them more attractive to landlords, eg reducing minimum term length from 15 to 10 years, removing the landlord's burden to provide fixed equipment, and even permitting landlords to place the burden of renewing fixed equipment onto the tenant, but this has made little difference given the recent and current fiscal incentives to remove land from tenancies.

While the 2003 Act fixed term tenancies have been used successfully by existing businesses to expand, STFA are doubtful about their benefits for genuine new entrants who do not have an existing secure farm business to fall back on. Too often we see former new entrants being left without options when a fixed term lease has ended, and sometimes in a worse financial position than at the start of the lease.

Of greater interest to genuine new entrants, in order to provide a small core base with security of tenure from which a land based business could develop, are discussions to extend crofting type tenure beyond the existing crofting counties, possibly under the Small Landholders legislation.

Chapter 1

Section 7. Model Lease for Environmental Purposes (Land Use Tenancy)

STFA agree with the SLC's advice that the Bill should make clear that this new form of lease is outside of existing agricultural holdings legislation.

STFA would prefer to see it restricted to situations where less than 50% of the land use is agricultural due to concerns that some existing tenants may be pressurised into giving up current farm tenancies to be replaced with the new model lease.

Chapter 2

Sections 8 & 9. Small Landholdings

STFA support the alignment with 1991 Act secure tenancies and bringing small landholdings under the umbrella of the TFC.

STFA agree with the SLC's advice that it is not necessary for the TFC to appoint an agent to value compensation, other than cases where the parties cannot agree on the compensation or appointment of an agent.

The small landholders we have consulted with all prefer alignment with the Agricultural Holdings legislation over alignment with crofting tenure. The main reasons are (1) lack of familiarity of the crofting regulations outside of the crofting counties, and (2) many small landholders have developed and planned their livelihoods outside of the crofting regulations and would experience difficulties if they were now to be bound by crofting regulations at this stage in their careers.

Chapter 3

Section 10. Powers to improve the process for registering the tenant's pre-emptive right to buy

Though not commenced, the The Land Reform (Scotland) Act 2016 contains provisions to remove the need to register so that all 1991 Act tenants have an automatic pre-emptive right, as recommended by Richard Lochead's tenancy legislation review from 2014. However, landlords and lawyers have strongly resisted this provision.

Given that there is a contractual agreement between all landlords and 1991 Act tenants, all tenants pay rent, and are in physical occupation, STFA see no reasons why the pre-emptive right should not be automatic.

STFA suggest that the issue could be resolved in this Bill for many tenants under Part 1 Section 2 by requiring farm tenants to be notified prior to the sale of a large scale landholding and given sufficient time to register a pre-emptive right to buy.

Sections 11-13. **Compensation for resumption and incontestable notices to quit in relation to 1991 Act tenancies and 2003 Act fixed duration leases**

The problems around resumption have increased in recent years due to landlords seeking to resume for planting commercial forestry and other greening opportunities, and in areas close to cities there is growing pressure to resume for development. There is also increasing pressure on tenants from landlords to relinquish leases so that landlords can benefit from tax frameworks. For sometime now the statutory compensation available to tenants for resumption and incontestable notices to quit has been seen as unfairly low. STFA agree with the SLC's advice that compensation for resumption should be revised.

a) STFA would like to see the new compensation arrangements detailed in the Bill, at least for 1991 Act tenancies, and not left to future regulation following further consultation for both resumptions and incontestable notices to quit. This is a current problem for tenants, modernisation of the statutory compensation is long overdue, and it would not be acceptable to delay further. A proposal was made in a TFC paper to TFAF members in January 2021 suggesting the use of the Relinquishment valuation as suitable compensation for 1991 Act tenancies for both resumption and incontestable notices to quit. In the intervening 4 year period STFA are not aware of any alternative compensation arrangements proposed or discussed by other stakeholders at TFAF meetings and believe calls for further consultation are only delaying tactics. All the

stakeholders have had 4 years to look at and discuss alternatives, so it is difficult to see the benefits of further consultation other than delay for those who seek delay.

STFA is aware of stakeholder opposition to the use of the Bill's proposed compensation arrangements being used for the modern 2003 Act fixed term tenancies. STFA do not see any good reason not to use the provisions for the 2003 Act tenancies but we are prepared to be pragmatic and look at alternatives for the 2003 Act tenancies providing the Bill provisions apply to secure 1991 Act tenancies for both resumption and incontestable notices to quit.

Of the 2003 Act tenancies, resumption and notices to quit may not be a significant issue for SLDTs, but they are of consequence for tenants with longer MLDTs and LDTs, especially where they have been used to extend occupation from previous 1991 Act limited partnership tenancies. An alternative option is to base compensation on the current provisions, but with an extra year of rent added as compensation for each year remaining on the lease.

b) STFA would welcome clarity on S17 of the 2003 Act, as to whether or not contractual resumption is a possibility for MLDT and LDT leases. Given that there are calls from other stakeholders not to improve compensation for resumption for 2003 Act tenants, if compensation is not to be improved then a protection for tenants would be to amend S17 so that contractual resumption is not permitted, only under the restricted circumstances set out in S17 (which appears to be the current interpretation by some practitioners).

c) The Bill appears to have omitted the incontestable notice to quit process and only applies to resumptions. The original policy intention was to include both. Indeed, it was the operation of incontestable notices to quit with minimal compensation for the tenant that originally raised the whole issue around modernising compensation for the loss of land from leases. A paper dated 26th January 2021 written by the TFC for TFAF on compensation for resumption and incontestable notices to quit indicate the Relinquishment valuation as appropriate compensation for loss of lease following an incontestable notice to quit. STFA agrees with the SLC's advice that that incontestable notices to quit be included, with compensation based on the Relinquishment valuation.

d) STFA agree with the SLC's advice that parties should be free to negotiate compensation with the statutory methodology acting as a backstop in the event agreement is not reached. The TFC should only be called to appoint a valuer to assess compensation due where parties cannot agree on a valuation or the appointment of a valuer.

Section 14. Updating Schedule 5 to modernise the list of tenant's improvements eligible for compensation

This should provide tenant farmers with greater ability to invest in agricultural improvements including sustainable farming, climate change mitigation measures, environmental and biodiversity improvements, and activities ancillary to agriculture such as small scale tree planting (eg shelter belts).

In line with the SLC's advice, STFA supports the introduction of a principles based improvement schedule for Part 1 and Part 2 improvements and list based for Part 3.

As presented in the Bill, of the Part 4 improvements there is possible confusion over which require a simple notice served to the landlord, which require landlords consent and which do not require

notice or consent. STFA agree with the SLC's advice that there should be clarity in the Bill and the Part 4 improvements should be allocated to Parts 1, 2 or 3.

STFA have made suggestions to the Scot Gov Bill team as to how each of the Part 4 improvements should be allocated.

Under the umbrella of the TFC, there should be a simple dispute resolution process using a TFC appointed arbiter to decide cases where improvement notices are objected to or consent refused.

Sections 15 - 19. Improving the diversification process and waygo compensation for diversifications

These measures should enable tenant farmers to have greater opportunity to diversify their business and help address climate change and biodiversity loss by easing the process of agreeing proposed diversifications.

STFA agree with the SLC's advice 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 agree with the SLC's advice that S45A of the 1991 Act as amended by the 2003 Act requires further amendment to avoid the risk that tenants might face a claim from landlords at waygo for loss of agricultural value. The most obvious example is tree planting, but other diversified use of land or fixed equipment also risks a claim at waygo for loss of agricultural value.

As with improvements above, under the umbrella of the TFC, there should be a simple dispute resolution process using a TFC appointer arbiter to decide cases where landlord consent to diversify is refused.

Section 20. Changes to game and deer damage compensation

With deer numbers increasing across Scotland (they have doubled in 30 years) we are now more likely to hear from tenants with deer damage than reared game damage, though reared game damage continues to be an issue on some estates. Where commercial game bird shoots continue to operate, the business model works better for high numbers of game birds. RSPB estimate that the number of game birds now released in the UK is 10 times higher than in 1961.

In line with the SLC's advice, STFA support the Bill's proposals to widen the types of damage eligible for a tenant's claim for compensation. In addition to the current crop damage, the Bill provides for claims for damage to all crops, grass and grazings; disease impact on farm livestock; damage to trees, damage to fixed equipment and damage to habitats.

However, STFA would disagree with the SLC's advice that deer issues on tenanted farms are best dealt with by NatureScot using their powers of intervention under the Deer (Scotland) Act.

Deer problems on tenanted holdings, mainly due to roe and red deer, are now widespread across the length and breadth of Scotland. Evidence suggests that NatureScot do not have the capacity to deal with all these situations, and where they have intervened it has not proven to be a long term solution.

A more effective solution is to amend the Bill to empower and incentivise landlord or tenant to control deer numbers:

Due to the Deer (Scotland) Act 1996 farm tenants have a limited ability to control deer on only improved land within the tenancy, and this limited right to cull will prevent tenants from making a claim for deer damage under the current drafting of the Bill.

To allow tenants to effectively manage deer populations they would need a right to control deer across the whole holding including unimproved areas such as cliffs and hill which are the natural habitats of deer. Such a right to control deer across the whole holding would put tenants on a level playing field with owner-occupiers for deer management.

STFA suggest that the Bill be amended to allow tenants to claim deer damage across the whole holding unless the landlord has given written permission to the tenant giving the tenant the right to control deer across the whole holding.

Given the ever increasing deer numbers in Scotland, lack of deer control on tenanted estates is becoming a significant problem for tenants, not just due to the financial loss through damage to crops, livestock and fixed equipment, but also to human health due to the increasing number of tenant farmers being affected with Lymes Disease.

At present tenants have the financial incentive to cull deer due to the damage they cause, but lack sufficient rights to manage deer numbers effectively because their right to take deer is limited to improved land which is not the natural habitat of deer. Meanwhile landlords have all the rights to manage deer but no financial incentive because they are not liable for deer damage claims from tenants for crop damage. The result is that deer numbers are not being managed effectively in the tenanted sector, especially where there are sporting interests seeking to maintain or even increase deer numbers.

Amending the Bill to allow tenants to claim deer damage from landlords across the whole holding unless the landlord has given written permission allowing the tenant the right to control deer across the whole holding provides a workable and fair solution: if the tenant has permission to take deer in writing then the tenant has both the incentive and the right to manage deer numbers, and if the landlord does not wish to give permission to the tenant then the landlord has both the incentive (since he will be liable for deer damage) and the right.

STFA know of tenanted estates where NatureScot have intervened but this has proved only a temporary fix, and within a year or two deer numbers have increased again. The only situations we know of where deer problems appear to be resolved in the long term are where landlords have given tenants permission in writing to cull deer across the whole holding.

A recent TFC briefing paper on deer states: ‘Many tenants do not have the ability to shoot deer and I have heard of instances of a landlord with sporting interests putting pressure on a tenant not to exercise the right to shoot, or authorise another to do so, and may back this up with threats that a fixed duration lease will not be renewed or that the landlord will in some other way be uncooperative with the tenant. In such circumstances the tenant has no ability to deal with the deer causing damage or to claim for the cost of such damage. Even in cases where the tenant is able to take action, the end result can be unsatisfactory. The tenant shoots a deer on his silage fields at night but the remainder retreat onto land where he has no right to shoot and where the owner or sporting tenant may be unwilling to take action.’

Clearly, to maintain the status quo is not a fair option for tenants. A fair solution for both landlord and tenant is that the landlord should be liable for all deer damage unless the landlord has given the tenant permission in writing to take deer across the whole holding.

The proposals should include a simple dispute resolution process under the TFC, for use where tenants cannot agree on deer and game damage claims with their landlords. Game damage claims are difficult to prove in Court and in the past were assessed efficiently by expert arbiters using their own knowledge and judgement.

Sections 21-22. Changes to waygo provisions; introducing a standard claims procedure

The proposals aim to provide a clear timescale around the waygo process so tenants and landlords settle their waygo claims in good time and can move forward with the next stage of their life whether that be retirement or a mid career move to another farm.

The proposal gives a timeframe for parties to adhere to following the serving of a notice to end the tenancy and require a valuer to be appointed nine months prior to the end of the tenancy, allowing for a timely waygo valuation and payment .

Though the initial aim is to apply this standard claims procedure to waygo claims, the policy intention is to allow the procedure to be applied to other types of claim.

STFA agree with 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.

STFA agree that the standard claims procedure should only apply where landlord and tenant cannot reach agreement. As with the 2016 Act relinquishment provisions, landlords and tenants should be able to agree on compensation with full knowledge of the statutory process as a legal backstop but without the need to follow the statutory provisions.

Valuation of most fixed equipment improvements should be possible in advance of the end of the lease, but items such as growing crops, silage stocks and un-exhausted manures would require a final valuation close to the lease end date.

Sections 23-25. Rent reviews

This measure amends the provisions in the Land Reform (Scotland) Act 2016 and replaces them with a proposal which draws on the work of the Tenant Farming Commissioner and TFAF to create a flexible hybrid system of rent review, taking account of:

1) the productive capacity of the holding;
2) similar rental information, and;
3) the prevailing economic conditions.

These changes are long overdue and will finally remove the primacy of open market evidence in determining rent. (In the 1980s England and Wales replaced their open market rent test with a new rent test based on the productive capacity and related earning capacity of the holding and the use of capable evidence of rents paid by sitting tenants on similar tenancies).

STFA support the intention to add productive capacity as one of the factors to be taken into account.

In addition, STFA believe that the earning capacity should be considered alongside the productive capacity. Focus on the productive capacity alone was a key problem with the 2016 Act provisions, with no weighting given to the earning capacity. The rent test for England and Wales which has worked well for 4 decades which instructs an arbiter to consider 'the productive capacity and related earning capacity', not just the 'productive capacity'. Including 'earning capacity' is more in line with the TFC's original recommendations from August 2020 and the SG consultation in 2022.

STFA support the carrying forward of the usual S13 regards and disregards, and assume the intention is to retain the principle that rent is based on a hypothetical tenant using the land and fixed equipment provided by the landlord.

STFA support the use of the term 'similar holding' in the Bill instead of the 'comparable holding' used in the 1991 Act. One of the main problems with current rent reviews is the use of comparable holdings which are not similar, resulting in large adjustments with a significant margin of error which are difficult to agree on. Disputes will be narrowed by the use of 'similar holdings'.

Alternative Dispute Resolution for rent reviews

STFA would encourage the use of binding short form arbitration or expert determination for rent reviews. No party should be permitted to refer to the Land Court without first making use of cheaper alternative dispute resolution.

Sections 26 & 27. The Rules of Good Husbandry and Good Estate Management

The Bill reforms the Rules of Good Estate Management and Good Husbandry to place a greater emphasis on sustainable and regenerative activities.

The Rules were drafted in 1948 when food was rationed and agricultural production had to be maintained at all costs. Future policy now means that farmers will be expected to enter into environmental, greening and biodiversity options which may well lead to a reduction in farm output. So tenants can avoid risking a breach of lease conditions the Rules of Good Husbandry are to be modernised. The Rules of Good Estate Management are redefined to allow landlords to manage their estates in such a way to enable the tenant to achieve both efficient production and sustainable and regenerative production.

In line with SLC's advice, STFA support these proposed changes.

In addition, STFA suggest that the Rules of Good Estate Management should be strengthened to require landlords to manage deer populations and maintain deer fences. The current Rules of Good Estate Management appear to have no requirement to control deer numbers, only vermin.

With regard to the operation in practice of the Rules of Good Estate Management and the Rules of Good Husbandry, the current balance of powers is weighted exceedingly unfairly in favour of the landlord: Where a tenant is in breach of The Rules of Good Husbandry, the landlord can apply to the Land Court for a Certificate of Bad Husbandry which then allows the landlord to serve a notice to quit on the tenant. This process is often used by landlords in a vexatious attempt to remove tenants (STFA know of past and current examples).

In contrast there is no workable remedy for a tenant where the landlord is in breach of The Rules of Good Estate Husbandry.

STFA suggest that this imbalance should be addressed. There is a remedy contained in the The Land Reform (Scotland) Act 2016, Part 10 Section 4, the forced 'Sale where Landlord in Breach' provision, but it is yet to be commenced via secondary legislation. If this measure was commenced, landlords would pay more attention to complying with lease obligations and the Rules of Good Estate Management.