TURCAN CONNELL

Briefing Note

Land Reform (Scotland) Bill

BACKGROUND

The Scottish Government have introduced the much anticipated Land Reform (Scotland) Bill (the "Bill"), which aims to reform the law relating to large landholdings and leases of rural land.

There are two main parts to the Bill (covering (1) large landholdings and (2) agricultural holdings), and six key topics are covered:

1. new land management plans for owners of landholdings which exceed 3,000 hectares (with special rules for islands);

2. government and community priority involvement in the sale of any areas of land from a landholding which exceeds 1,000 hectares;

3. a proposed power to allow the Scottish Ministers to force owners of landholdings which exceed 1,000 hectares to lot land (in accordance with a lotting plan imposed by the Scottish Ministers);

4. a new Land and Communities Commissioner;

5. various changes to agricultural and small holdings legislation; and

6. a new form of environmental agricultural lease.

The Bill is not good news for Scottish landowners. Scottish Land & Estates have called the Bill "destructive", and others in the rural business industry have expressed similar concerns. Andy Wightman, the leading Land Reform activist, has called the Bill a "potential nightmare of bureaucracy". Regardless of the policy of the Bill (and focusing on legal matters only) there are a number of underlying issues with the proposed legislation, as follows:

Uncertainty, not certainty

The drafting of the Bill is complicated and convoluted. If the Bill is enacted, it may actually be a very complicated legal question to ascertain whether you are permitted to sell your own land with or without the Scottish Government's involvement. Further, we would suggest that the present definition in the Bill of a large landholding is unworkable and needs to be revised.

Proportionality

Even taking the policy aims at face value, the Bill proposes very heavy regulation on owners of large landholdings to achieve the policy goals. Owners of large landholdings will not, for example, be able to sell *any* of their property without the intervention of the Scottish Government. The understanding had been that the rules would affect the sale and purchase of large areas of land, but that is not the case – and the sale of any land (however small) which forms part of a large landholding will be covered by the proposed complicated process.

Timescales for Scottish Government interventions in sales

The proposed process and, crucially, timescales around Scottish Government control of land sales is very unspecific, and it would not be possible for landowners to have much predictability around when they may, or may not, be able to progress land sales. If there is to be Scottish Government intervention in the sale of private property, it is crucial that there are clear parameters as to what happens and when. We suggest that the Bill requires re-drafting to make this clear.

Human Rights (private property) considerations

The Bill (as the Scottish Government acknowledges) touches on a range of human rights (right to private property) issues. Inevitably these issues require a careful balance, but it is possible that some of the processes set out in the Bill around the forced lotting of land are so heavily weighted in favour of third parties (and against a landowner wishing to deal with their private property) that further consideration

of human rights issues is required. That is also the case in relation to whether the landowner will, in the end, be suitably compensated for the enforced mode of sale.

A target date for passing the Bill into law has not been publicised and the Bill awaits the parliamentary process where it will be considered and amendments to it are certain to be made. Once enacted, secondary legislation would be required for certain elements and it is likely that there will be transitionary provisions.

The Scottish Parliament's Net Zero, Energy and Transport Committee (the lead parliamentary committee responsible for reviewing the Bill) held a consultation on the Bill. The consultation closed on 21 May 2024 and copies of the published responses are available here.

LARGE LANDHOLDINGS

- *Statutory land management plans will be required if you own a landholding which exceeds 3,000 hectares (with special rules for islands)*

- *New regulations will apply if you own a landholding which exceeds 1,000 hectares in relation to sales*

Different thresholds apply for different purposes and these are explained in more detail below. In all cases, a "single holding" is land which is the whole of a contiguous area in the ownership of one person or set of persons. The Bill also seeks to catch "composite holdings" for the purposes of identifying large landholdings by grouping together adjoining landholdings where the owners are connected. Owners are connected where they are companies within the same group, where one owner has a "controlling interest" in the other or where the same person has a "controlling interest" in the owners. "Controlling Interest" is determined in accordance with the Register of Persons Holding a Controlled Interest in Land which could have unintended consequences, particularly for ownerships in trust and partnership arrangements. This is a part of the Bill which will need drafting and/or policy clarification.

The Scottish Ministers have powers to change the size of land for the purposes of defining a large landholding in all cases.

COMMUNITY ENGAGEMENT

Large landholding

For the purposes of the community engagement proposals, a large landholding is a single holding or a composite holding which **exceeds 3,000 hectares or land which forms part of an inhabited island and which exceeds 1,000 hectares and constitutes more than 25% of the island**.

Land management plans

The Bill gives the Scottish Ministers powers to make regulations (the "Community Engagement Regulations") about land management plans which the owners of large landholdings must produce and make publicly available. The Community Engagement Regulations will set out the information that is to be contained in a land management plan, and this information must include:

- Details of how the ownership of the land is structured.

- The long-term vision and objectives for managing the land, including any potential sale.

- Details of how the owner complies with (or intends to comply with) the obligations set out in the Community Engagement Regulations, the Scottish Outdoor Access Code and the Code of Practice on Deer Management.

- Details of how the owner manages (or intends to manage) the land in a way that contributes towards achieving the Scottish Government's net-zero emissions target, adapting to climate change and increasing or sustaining biodiversity.

The Community Engagement Regulations must be informed by the Land Rights and Responsibilities Statement ("LRRS"). Before making the Community Engagement Regulations, the Scottish Ministers must consult with a new Land and Communities Commissioner. Details of how the Land and Communities Commissioner is appointed and their responsibilities are summarised further below.

The owner must engage with communities in the development of, and significant changes to, the land management plan. The land management plan must be reviewed, and where appropriate, revised every five years.

Legal issues:

Many landowners will have no difficulty in providing these plans. However, there are some potentially private and sensitive pieces of information which the Scottish Government wish to force landowners to disclose. It is difficult to see the justification for requiring a private landowner to disclose when they might propose to sell their property.

Mindful that perceived disclosure failures on the part of landowners are liable to a fine, the list of topics to be disclosed is very wide. How much detail will be required in order to avoid a fine, and will the Community Engagement Regulations (when they are published) actually require different land management?

Is this a back door statutory obligation on landowners to promote net-zero and climate change measures? The Bill suggests that landowners are required to state how they will contribute towards these aims, and it seems unlikely that a statement from a landowner confirming they don't intend to take any steps will be acceptable. Note that this only applies to owners with more than 3,000 hectares (with special rules for islands as noted above), and owners of smaller areas will not be compelled to work towards these aims.

Duty to consider community request to lease land

The Community Engagement Regulations will also require the owner of a large landholding to consider reasonable requests from bodies registered or entitled to register under the community right to buy legislation to lease the land or any part of it.

Legal issue:

Whilst the details are to be set out in more detail in secondary legislation, the proposed powers are potentially extremely wide. Is it reasonable that a community asks to lease the whole of a large landholding, and who will get to decide that?

Breaches of the Community Engagement Regulations

Breaches of the Community Engagement Regulations may be reported by Historic Environment Scotland (HES), the local authority, the Scottish Environment Protection Agency (SEPA) or Scottish Natural Heritage (SNH) to the new Land and Communities Commissioner. Bodies registered (or entitled to register under the community right to buy legislation) can also report breaches.

The Land and Communities Commissioner will have powers to investigate alleged breaches of the Community Engagement Regulations and will be able to impose fines of up to £5,000 per breach (following opportunity to remedy).

Note: The proposals to make compliance with the LRRS and the land being registered in the Land Register requirements of access to land-based subsidies and that all recipients should be registered and liable to pay tax in the UK or the EU that were proposed in the consultation preceding the Bill have not been carried forward in the Bill.

However, the Agriculture and Rural Communities Bill which is also before the Scottish Parliament enables the Scottish Ministers to attach certain conditions when providing financial assistance, including the manner in which the title to the land is registered or recorded. The Agriculture and Rural Communities Bill also provides that the Scottish Ministers may make regulations regarding the refusal

or recovery of support where this is in the public interest. These powers may be relevant to the land reform plans.

COMMUNITY RIGHT TO BUY: REGISTRATION OF INTEREST IN LARGE LANDHOLDINGS

Large landholdings

For the purposes of these community right to buy proposals, a large landholding is a single holding or a composite holding which **exceeds 1,000 hectares**. The thrust of the proposals here is to:

- prevent owners with landholdings which exceed 1,000 hectares to sell **anything** without involving the Scottish Ministers; and
- force the owner to first of all offer the land that has been identified for sale to the community.

These proposals do not apply to transfers which are exempt under the community right to buy legislation. For example, gifts, transfers into trusts and partnerships for no value, any other transfers at no value, a transfer of croft land to the crofter tenant, a transfer as a consequence of partner or trustee changes, a transfer between companies in the same group and a transfer to a statutory undertaker for the purposes of carrying out their undertaking would not be caught.

List of interested parties

The Scottish Ministers are to keep a list of the contact details of anyone who wishes to be notified of any transfer of a large landholding in a particular area (the "List of Interested Parties").

> Legal issue:
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> The proposed legislation around registration in the List of Interested Parties is very brief. It seems anyone may register in the List of Interested Parties even although they have no legitimate interest in the land (either in terms of connection, geography, or community ownership prospects).

Prohibition on transfers of large landholdings

The owner of a large landholding is prohibited from transferring (or taking any action with a view to transferring) ownership of the whole or any part(s) of that large landholding until the Scottish Ministers have given notice that the prohibition has been lifted.

It is important to note that the prohibition includes **any part(s)** of the large landholding and that "taking action with a view to transferring" includes advertising the land or entering into negotiations, meaning that taking steps to sell just a small part of a large landholding could be caught.

> Legal issues:
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> The implications of this will be very wide ranging, illustrated as follows:
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> An Estate is asked by someone in the village to sell a strip of land to tidy up a title anomaly. The land extends to 0.2 acres, and the agreed price is £2,000. It will be necessary to involve the Scottish Ministers and community in this process. The Estate will not, by law, be able to take any steps to even further the discussion until the community process has completed.
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> A local family wish to buy an Estate cottage. No steps may be taken to even discuss the sale without the Estate first having advised the Scottish Ministers of the plan. The Bill does not set out any timescales for the Scottish Ministers to deal with this. The Scottish Ministers first need to publicise the arrangement. The Scottish Ministers need to tell the local authority and also the community council, perhaps also the National Park authority. Once all that has been done, there is a further moratorium for 30 days. The Scottish Ministers took one month to attend to giving these notices (not being under any constraints in the legislation about timescales). The

30 days then lapsed without any party being interested, and the Scottish Ministers then took a month to deal with the final points. Three months later, the parties are free to proceed.

It is hard to see the proportionality of this proposal.

A connected legal matter is the implications for purchase transactions in the future. Buyers of land will need to carry out careful due diligence on whether the land forms part of a large landholding – because if there is an issue, the risk for the buyer is a void title.

Lifting the prohibition

In order to allow community bodies the opportunity to be notified of proposed transfers of large landholdings and to make it possible for them to use the community right to buy late application process, the Bill sets out a detailed procedure which must be followed when an owner wants to transfer ownership of the whole or any part(s) of a large landholding.

First, the owner of a large landholding must ask the Scottish Ministers to lift the prohibition ("Notice of Intention to Transfer"), in which case the Scottish Ministers must then publish information about the possible transfer on a website together with details as to how a community body can register a community right to buy. The Scottish Ministers must also send this information to the community council, the local authority, the relevant National Park authority and anyone on the List of Interested Parties. As noted above, there are no prescribed timescales as to when the Scottish Ministers deal with this.

Once the Scottish Ministers have complied with their duties to publish and send information about the possible transfer, a community body has 30 days to express an interest to make a late application to register a community interest in the land. If no such expression of interest is made, the Scottish Ministers must give notice to the owner that the prohibition has been lifted. Again, there are no timescales on when such notice must be given by, and an owner eager to sell their property could be waiting an un-necessarily long time.

If, during the 30 day period, a community body expresses an interest to make a late application to register a community interest in land (and the Scottish Ministers are satisfied that it is likely that such an application will be made within 40 days), the Scottish Ministers can impose a further prohibition on transfer. This further prohibition will apply for an additional 40 days to allow the community body to prepare their application. If no application is made within the 40 day period, the Scottish Ministers must give notice to the owner that the prohibition has been lifted. If an application is made during the 40 day period, the process follows the approach taken for any other community right to buy subject to certain modifications.

Any lifting of the prohibition in accordance with the above procedures is temporary and will expire after two years.

Financial hardship

The owner of a large landholding can ask the Scottish Ministers to disapply the prohibition if the proposed transfer is being made to alleviate or avoid financial hardship, or if having to wait for the prohibition to be lifted is likely to cause or worsen financial hardship. If this request is successful, the period during which the prohibition is disapplied would be specified in a notice from the Scottish Ministers.

Review of community rights to buy

The Scottish Government have proposed a review of all current rights to buy in summer 2024 (with a report due at the end of 2025) to determine whether new legislation is required. It is therefore possible that any changes made to the community right to buy as a part of this wider process could have a further impact on the transfers of the whole or part(s) of large landholdings (and indeed other land which does not meet this threshold).

Legal issue:

On the basis that community rights to buy form the foundations of land reform, it seems strange that the Scottish Government are promoting a new bill, and then separately reviewing the rights to buy (which may require further legislative intervention).

LOTTING OF LARGE LANDHOLDINGS

Large landholdings and landholdings affected by the lotting proposals

For the purposes of these lotting proposals, a large landholding is land which is a single holding or a composite holding that **exceeds 1,000 hectares**.

The lotting proposals also apply to land which **exceeds 50 hectares and which forms part of a large landholding** (the "50ha+ Area") where:

- Notice(s) of Intention to Transfer has been given in respect of another part(s) of the large landholding; and

- the total area of (1) the 50ha+ Area and (2) the other part(s) of the large landholding affected by the Notice(s) of Intention to Transfer exceeds 1,000 hectares.

  Any area in respect of which missives have been concluded since a Notice of Intention to Transfer was given is disregarded for the purposes of these calculations.

According to the explanatory notes which accompany the Bill, this is intended to mitigate against the risk of landowners avoiding the lotting requirements by transferring smaller lots over time (potentially to the same or connected person(s)).

The lotting proposals apply to both transfers of large landholdings and transfers of 50ha+ Areas which meet the above test.

These lotting proposals do not apply to transfers which are exempt under the community right to buy legislation.

Prohibition on transfers of affected landholdings

Before transferring the ownership of a landholding affected by the lotting proposals (the "affected landholding"), the owner must have a lotting decision from the Scottish Ministers ("Lotting Decision") otherwise the transfer will be of no effect. Any transfer of ownership of an affected landholding is also of no effect if made contrary to a Lotting Decision, or where it results in the same or connected persons owning more than one lot specified in the Lotting Decision.

Examples of "connected persons" include companies within the same group and persons holding a controlling interest in terms of the Register of Persons Holding a Controlled Interest in Land.

Lotting Decisions – process

The owner of an affected landholding wishing to transfer ownership must apply to the Scottish Ministers for a Lotting Decision, who must decide whether or not the land should be transferred in lots. The Scottish Ministers must request and take into account a report prepared by the Land and Communities Commissioner when reaching their decision. A copy of this report must be sent to the person who applied for the Lotting Decision. Unfortunately the Bill does not set out any timescales around the Scottish Ministers dealing with the processes, and the concern is that eager sellers could find sales stalled for an unspecified period of time.

In order to direct that an affected landholding must be transferred in lots, the Scottish Ministers must be satisfied that this is more likely to result in the land being used in ways that might make a community more sustainable than if all of the land was transferred to the same person. They must take into account how often land in the community's vicinity comes available for purchase in the open market and the

extent to which ownership of land in the community's vicinity is concentrated. The Scottish Ministers must have regard to the International Covenant on Economic, Social and Cultural Rights (an international human rights treaty) in reaching their decision. The lots must be specified in the Lotting Decision.

A Lotting Decision is valid for five years, but expires if the ownership of the affected landholding is transferred to an unconnected party before then. It is not possible to apply for a Lotting Decision if one has been issued in respect of the land in question and has not yet expired.

Legal issues:

The proposed lotting rules are possibly the most far reaching of all proposals within the Bill. Owners of large landholdings face the prospect of being forced to lot their land not to maximise value, but to maximise the chances of community ownership.

It seems that owners of large landholdings could have to wait a long time before selling all of their land if the imposed lotting does not work. A forced lotting decision lasts for five years, and the earliest a review can be initiated (by the landowner) is after one year – which is a long time if a landowner wishes to sell their property but cannot, by law, sell as they wish.

Compensation

The owner of an affected landholding is entitled to compensation from the Scottish Ministers for loss or expense incurred in complying with the lotting procedures, attributable to a potential transfer being prevented due to the lotting procedures or attributable to a Lotting Decision specifying that the land may only be transferred in lots. The amount of compensation is determined by the Scottish Ministers (or the Lands Tribunal on appeal). Further regulations would need to follow setting out how claims are made and how compensation is calculated.

Review of Lotting Decision

The owner of an affected landholding can ask the Scottish Ministers to review a Lotting Decision. Any such request can only be made after the expiry of a one year period from the date of the Lotting Decision. The Scottish Ministers have three options:

- leave the Lotting Decision unchanged;
- replace the Lotting Decision with a new one; or
- offer to buy any lots which have not been transferred (which is an option to them whether they leave the Lotting Decision unchanged or replace it with a new one).

During the review of a Lotting Decision, the owner of an affected landholding can also ask the Scottish Ministers to consider making an offer to buy any lots which have not transferred.

The Scottish Ministers can only offer to buy a lot which has not been transferred if they are satisfied that it is likely that it was not transferred because it was less commercially attractive due to the Lotting Decision.

In reviewing a Lotting Decision, the Scottish Ministers must seek advice from a person who appears to them to be suitably qualified, independent and to have knowledge and experience of the transfer of land of a kind similar to the land in question. The price specified in any offer must be determined by a similarly qualified valuer appointed by the Scottish Ministers. There is an appeal process if the Scottish Ministers decide not to make such any offer following request by the owner of an affected landholding.

Appeal against a Lotting Decision

The owner of a large landholding can appeal to the Court of Session against a Lotting Decision stating that the land (or any part of it) can only be transferred in lots. An appeal can only be made on the grounds that the Lotting Decision is based on an error or fact of law or is unreasonable. The Court of

Session may uphold or quash the Lotting Decision and if they decide to quash it, the Scottish Ministers must make a fresh Lotting Decision.

Financial hardship

The owner of a large landholding can request the Scottish Ministers to make a Lotting Decision stating that the land need not be transferred in lots if they are transferring ownership to alleviate or avoid financial hardship and having to wait for the Lotting Decision is likely to cause or worsen financial hardship. If this request is successful, any Lotting Decision issued under this procedure would be valid for one year only and expire if the ownership the large landholding is transferred to an unconnected party before then.

THE LAND AND COMMUNITIES COMMISSIONER

The Bill establishes a new role of the "Land and Communities Commissioner". The Land and Communities Commissioner's role includes enforcing the community engagement duties and preparing reports for the Scottish Ministers in connection with lotting decisions. The Scottish Ministers must consult with the Land and Communities Commissioner before making the Community Engagement Regulations.

The Land and Communities Commissioner is appointed by the Scottish Ministers (who must ensure that they have expertise and experience in land management and community empowerment) and would be a member of the Scottish Land Commission.

Someone who is or has been the owner of a single holding or a composite holding exceeding 1,000 hectares within the one year period preceding the effective date of appointment cannot be appointed. The Land and Communities Commissioner will be automatically disqualified if they become the owner of a single holding or a composite holding exceeding 1,000 hectares during the period of their appointment.

AGRICULTURAL HOLDINGS

Model lease for environmental purposes

The Bill provides for the Scottish Ministers to make available a model lease designed for letting land so that such land can be used wholly or partially for an environmental purpose. This is the "Land Use Tenancy" referred to in the *Land Reform in a Net Zero Nation* consultation of 2022. Land is used for an environmental purposes if it is used:

- for sustainable and regenerative agriculture;
- if it contributes to the Scottish Government's net-zero emissions target;
- in a way that contributes towards adaptation to climate change; or
- in a way that contributes towards increasing or sustaining biodiversity.

These purposes do not set a very high bar for qualification. The interaction with the agricultural holdings Acts is not addressed in the Bill, and therefore it appears that such a lease, if of an agricultural holding, would continue to be regulated by those Acts and as such its purpose is not clear.

Non-agricultural leases of land have been granted for centuries and it is not clear what purpose is served by this proposal which does not deliver what was set out in the preceding consultation.

Agricultural tenant's right to buy

At present a 1991 Act tenant requires to register an interest in purchasing the farm he or she tenants to have a right to buy which is then triggered by the landlord taking steps to transfer the farm or a part of it. The Land Reform (Scotland) Act 2016 provided that registration would no longer be required for the tenant to have a right to buy but this change has not yet been brought into force. The Bill provides

for the Scottish Ministers being able to make regulations in connection with the registration by 1991 Act tenants of their right to buy and provides a non-exclusive list of what such regulations might include.

It is not clear why the 2016 Act provisions have not yet been brought into force nor what the effect of the proposed regulations would be. A major concern of landlords is that, in a great many cases, it is not clear what land is comprised in a lease, which may have been entered into by previous generations a long time ago and/or not have the benefit of a plan, and that it is manifestly unfair for a landlord to be made subject to a prospective right to buy over land that the landlord (and/or the tenant) does not know is comprised in the lease. There is no mention of identifying the extent of the let land as part of any registration process in the (non-exclusive) list of what the regulations might include.

Resumption

The Bill provides that where a landlord under a 1991 Act tenancy, short limited duration tenancy, limited duration tenancy or a modern limited duration tenancy seeks to resume land, the landlord must give written notice to the tenant not less than one year before the date of resumption and copy that notice to the Tenant Farming Commissioner. The notice may have to be in a prescribed form. Where the notice is to resume part of the tenancy the tenant is entitled to serve notice within 28 days of receipt of the resumption notice to terminate the tenancy on the resumption date.

Where resumption is for the purpose of certain quarrying operations, if the land is subsequently returned to agricultural use it is to be restored to the tenancy if the tenancy is continuing when the land is so restored.

A notice of resumption may be withdrawn by the landlord other than where the tenant has served a notice to terminate the tenancy following receipt of the notice of resumption. The withdrawal notice must be copied to the Tenant Farming Commissioner and the tenant is entitled to recover any loss or expense incurred on reliance of the landlord's notice of resumption from the landlord.

On resumption the tenant is entitled to a reduction in rent, to compensation for improvements, disturbance (changes are made to the methods of calculating disturbance compensation on resumption) and reorganisation as at present, but the Bill proposes an additional compensation payment in respect of the tenant's interest in the value of the land being resumed.

Within 28 days of the Tenant Farming Commissioner's receipt of the copy of the landlord's notice of resumption, the Commissioner is to appoint an independent qualified valuer to value the land being resumed (1) if sold with vacant possession and (2) if sold with the tenant still in occupation.

The landlord and tenant may challenge the valuer's appointment on limited grounds or apply to the Land Court to appoint the valuer in place of the valuer proposed by the Commissioner. The valuation provisions are similar to those applying to the relinquishment and assignation process.

The landlord is responsible for meeting the expenses incurred by the valuer along with any expenses incurred by the Tenant Farming Commissioner in connection with the valuer's appointment. The valuer is to ask the landlord and tenant to make written representations and has the right to enter the land and make any reasonable request of the landlord and tenant (with which they must comply).

The valuation is to be on a willing seller and buyer basis and to take account of (1) when the landlord might have been likely to recover vacant possession and (2) any lease (other than the farm lease) affecting the land. No account is to be taken of numerous factors including any use of the land that would be unlawful - which phrase has been interpretated by the Land Court in the context of the agricultural tenant's right to buy as **not** excluding development potential (i.e. development potential could be taken into account).

The amount to be payable by the landlord to the tenant in respect of the value of the land being resumed is half the difference between the value of the land being resumed (1) if sold with vacant possession and (2) if sold with the tenant still in occupation. The valuation has to be carried out within a period that is essentially ten weeks of the date of the notice from the Tenant Farming Commissioner appointing the valuer and may be appealed by either the landlord or the tenant to the Lands Tribunal.

This provision is a major change, particularly in so far as it applies to a 1991 Act tenancy where the Bill makes a material retrospective change, very significantly in the tenant's favour, to what is entirely a contractual position (i.e. specifically agreed to by the parties in the written lease).

Compensation for improvements

The list of improvements for which compensation is payable on the termination of the tenancy (Schedule 5 of the Agricultural Holdings (Scotland) Act 1991) is to be materially changed. At present Schedule 5 lists specified improvements in three separate parts – Part 1 where notice to and the consent of the landlord is required; Part 2 where notice to the landlord is required (but not consent); and Part 3 where neither notice or consent is required. The fixed list of improvements has been updated but is generally accepted as being out of date and requiring modernisation.

The Bill changes the entitlement to compensation in respect of a fixed range of improvements to improvements "of a kind referred to or specified" in Schedule 5 and Schedule 5 itself is changed so that:

Part 1 improvements are those "which make a change to land or fixed equipment on the holding" which mean that is it is unlikely that the land will return to its former use or which otherwise have a long term or significant impact on the management of the holding (irrigating land is one of the examples given). Notice and consent are still required;

Part 2 improvements are those which make a change to land or fixed equipment but which do not have a long term or significant impact on the management of the holding (land drainage is one of the examples given). Notice is still required;

Part 3 improvements for which no consent or notice is required where there remains a fixed list of minor improvements from control of bracken to forming hedges; and

Part 4 (an additional part) for improvements which are presumed to facilitate or enhance sustainable or regenerative agriculture with a non-exclusive list including laying down of permanent pasture and peatland restoration.

Diversification

The Bill restricts a landlord's ability to object to a proposed diversification on the grounds of prejudice to future agricultural use of the land by requiring the impact of the diversification to be considered with reference to the **whole** of the tenanted holding (rather than only to the area of the diversification) and by requiring detriment to the sound management of the estate to be **substantial** detriment. These are material changes. In objecting to the tenant's proposed diversification the landlord is to be required to explain why the landlord's grounds of objection or conditions the landlord wishes to impose are reasonable.

Subject to time limits, a tenant may serve an "extension notice" extending the period of time available for the parties to reach agreement on diversification by 30 days.

In considering an objection, the Land Court is to take account of whether the proposed improvement is likely to have a positive environmental effect outweighing the landlord's statutory grounds of objection.

A tenant is not to be entitled to compensation where, as a result of the diversification, the use of the whole of the holding for the purposes of sustainable and regenerative agriculture by an incoming tenant has been substantially prejudiced (rather than the land subject to the diversification is "unsuitable for use for agriculture by an incoming tenant"). This presumably potentially increases a landlord's exposure to making compensation payments considerably.

Game damage

Tenants are to be able to claim compensation for losses other than damage to crops (including damage to grazing, disease impact on livestock and damage to trees and fixed equipment) where the damage is caused (directly or indirectly) by game (game meaning deer, pheasants, partridges and grouse) or game management.

Rent review

Changes are proposed to the rent review process (affecting 1991 Act tenancies, LDTs, MLDTs and the (not yet introduced) Repairing Tenancies). Rather than amending the existing rent review processes in the 1991 and 2003 Acts, what was proposed in the Land Reform (Scotland) Act 2016 but which has not yet been brought into force, as it was considered unworkable, is amended. This note only covers the changes to what was proposed (but is not yet in force) in the 2016 Act.

The factors to be taken into account in determining the rent are to be:

- the productive capacity of the holding;
- the open market rent of any fixed equipment provided by the landlord for a purpose that is not an agricultural purpose;
- the open market rent of any land forming part of the holding that is used for a purpose that is not an agricultural purpose;
- the rent payable on similar holdings; and
- the prevailing economic conditions in the sectors of agriculture relevant to the holding.

It should be noted that the 1991 Act factor "rents of other agricultural holdings (including when fixed) and any factors affecting those rents (or any of them) except any distortion due to scarcity of lets" is replaced by "the rent payable on similar holdings". This appears very different and it will be for valuers to determine the consequences. Regard has to be had to distortion of the market caused by a lack of available lets.

The 2016 Act provisions relating to the rental value of surplus residential accommodation (which have not yet been brought into force) are to be repealed.

Rules of good estate management/rules of good husbandry

The rules of good estate management and the rules of good husbandry (which were set out in the Agriculture (Scotland) Act 1948) are to be amended primarily so as to increase the emphasis on sustainable and regenerative agriculture.

Waygo

A new procedure for compensation claims is to be introduced utilising the services of the Tenant Farming Commissioner with the apparent intention of formalising and speeding up the assessment and payment of compensation claims at waygo. The Scottish Ministers may, by regulations, apply the new procedure to any relevant type of compensation.

SMALL LANDHOLDINGS

Small landholdings in their original (and present) form are best defined as crofts, outwith the crofting counties. They share some legislation (an Act from 1886) with crofts, with further legislation applicable only to small landholdings being enacted up to 1931. Crofting law by contrast has been updated at regular invervals, including significant reform in 1993 and 2010 which reforms did not apply to smallholdings. Separately, 1991 Act holdings, the most protected form of agricultural tenancy in Scotland, are subject to their own legislation most significantly the Agricultural Holdings (Scotland) Acts of 1991 and 2003, as amended. This means, as matters stand, crofts and 1991 Act tenancies are subject to completely different sets of statutory rules to each other, and small landholdings have their own legislation, some of which is shared with crofts and none of which is shared with 1991 Act tenancies.

If Chapter 2 of the Bill is enacted, small landholdings will become a hybrid form of tenancy, sharing some rights with crofters and some rights with 1991 Act tenancies and retaining some of their own (pre-

existing) statutory rights and responsibilities. It is estimated that there are 59 small landholders remaining in Scotland.

Under the proposed new legislation, the current smallholding legislation relating to rent review, assignation, succession and compensation for improvements will be repealed and replaced with the provisions of the Bill once enacted. There are detailed provisions on each of these areas. In very short summary they include:

- A new rent review test and ability to review the rent (subject to certain exceptions) at 7 yearly intervals.

- The right to assign the small landholding during the tenant's lifetime (currently only available where the land court is satisfied that the tenant is no longer able to work the small landholding due to old age or infirmity) is replaced with the same sort of provisions which apply to 1991 Act tenants – the right to assign on giving the landlord notice and on the notice having very limited rights of objection personal to the proposed assignee.

- The right to leave the small landholding to a proposed successor subject to the giving of statutory notices within defined statutory timescales.

- The right to compensation for tenant's improvements with a list of defined improvements together with the right to claim for any improvement which the Land Court considers would add value to the incoming tenant.

The proposed new legislation would also add the following rights to the small landholding legislation:

- The pre-emptive right to buy (a right of first refusal should the landlord elect to transfer the tenanted land, subject to certain exceptions). Under the current law, this is a right only available to 1991 Act tenants.

- The right to diversify subject to giving notice and the landlord having a restricted right to object, in a manner similar to the diversification rights currently only available to 1991 Act tenants. The small landholder is also entitled to claim compensation from the landlord for additional value attributable to the diversified activity.

- The right of the landlord to claim compensation for dilapidations.

- The right of either party to require there to be a Record of Condition of the holding (with the cost split equally between the parties).

- The Tenant Farming Commissioner assuming responsibility for small landholdings as well as 1991 Act tenancies and carrying out the same functions (e.g. preparing Codes of Practice in respect of best practice and investigating any alleged breaches) for small landholdings as The Tenant Farming Commissioner currently does in respect of agricultural tenancies (1991 Act tenancies and 2003 Act tenancies).

Although Chapter 2 does propose to replace some of the existing provisions of small landholding legislation, it does not comprehensively repeal the old law and replace it with a new, codified, regime. In light of the type of changes made this is perhaps an opportunity missed. This means that in respect of some questions between landlord and tenant, including, by way of important example, resumption, the law will remain as stated in the legislation dating back to 1886-1931.

If Chapter 2 of the Bill is enacted landlords and tenants of small landholdings will need to ensure that in any question between them or any new venture contemplated on the land subject to the small landholding they have regard to the relevant part of the legislation at the time in force and be mindful of the fact that in some areas the rights will be akin to crofts and in others akin to 1991 Act tenancies.

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