

Written submission from NFUS

Thank you for the invitation to submit further evidence to the Committee on the Scottish Government's Land Reform Bill. Accordingly, please find enclosed a submission on the Land Reform Bill that is supplementary to the various evidence NFU Scotland has submitted throughout the parliamentary scrutiny process.

To specifically address the Committee's request for evidence on the proposed Scottish Government amendment on Section 79 (assignment of secure tenancies), NFU Scotland wishes to make the following clarifications.

Firstly, NFU Scotland feels it is vital to highlight that this amendment is a substantial alteration from what was in the initial Bill. Due to the importance of the tenanted sector, the Union has consulted widely with its membership through the consultation stages leading up to the Bill in order that our members are informed about proposals and that our views reflect the views of our membership.

Given the substantive changes proposed to assignment via this amendment it was deemed necessary to undertake an additional period of consulting with our members. This consultation is currently underway via NFU Scotland's network of branches, working groups, Board of Directors, and at our nine Regional AGMs that are taking place throughout the month of January. At NFU Scotland's national AGM on 11/12 February, a panel session with members of the Agricultural Holdings Legislation Review Group will also be held. This activity will assist NFU Scotland in formulating a position that is in the best interest of farmers in Scotland and takes into account all our members views.

Therefore, I wish to confirm that once the Union has gathered the views of the membership, NFU Scotland will be in a position to give a firm view on Section 79 shortly before the Committee's scheduled discussion of Section 10 of the Bill which we understand is probably likely to take place on Wednesday 11 February.

Initial discussions indicate that a consensus amongst farmers on the amendment on Section 79 (assignment of secure tenancies) is unlikely to be achieved. Not all secure tenants who may see a benefit from the suggested change think the same. Not all farmers hold the same view on whether this change will benefit or be to the disadvantage of the tenanted sector. Where there is a consensus is that all farmers want to see a Bill that delivers more land available for rent on a more secure basis. It is important for Scottish farming that this Bill, once made law, is fit for purpose. This Bill is too important to get wrong and we will explain to our members what is being proposed so that they may come to an informed decision.

We hope that this clarification and the enclosed supplementary evidence is useful to the Committee's consideration in the meantime, and as ever NFU Scotland representatives would be more than happy to discuss these issues in further depth if it would be useful.

land reform bill-call for FURTHER evidence

This document outlines the views of NFU Scotland (NFUS) on the Land Reform Bill in light of the Committee's Stage 1 report

NFUS represents over 9,500 farmers and growers throughout Scotland, and as such has a unique oversight of many of the issues covered by this Bill. NFUS has consulted extensively with members since the Bill was published, and at this time is continuing to consult on more specific elements relating to amendments being brought forward by Scottish Government.

NFUS has previously voiced concerns that land reform and agricultural holdings should have been given separate Bill slots. NFUS remains of the opinion that the Agricultural Holdings Legislation Review Group (AHLRG) conducted an excellent piece of work to produce a package of measures which it considered a best balance of the various interests represented by the tenanted sector. It is vital that this balance is at the forefront of decision making in relation to the agricultural holdings provisions which will be taken forward by this Bill.

NFUS has heard repeatedly that good and prudent land managers have nothing to fear from provisions under the Land Reform Bill. However, NFUS remains seriously concerned, particularly with regards to the community aspects of the Bill and the impact that these measures could have on farms. NFUS members feel particularly vulnerable to the proposed measures, which can be mainly attributed to the lack of detail within the provisions.

Having consulted with members, and considered the RACCE Committee Stage 1 report, NFUS suggests the following key amendments to the Bill are necessary:

- a) The LRRS should contain specific reference to agriculture.
- b) Scottish Land Commissioners should have practical land management experience.
- c) There must be a network of Regional Advisory Boards to underpin and advise the Scottish Land Commission.
- d) There should be a statutory code of practice for land agents.
- e) Industry codes of practice for agricultural tenancies should be statutory, and fines should be applied where these are not adhered to.
- f) The Tenant Farming Commissioner duties should include involvement in offering a mediation or arbitration process.
- g) 'Justifiable reason' for requiring information about persons in control of land should be defined.
- h) Guidance on engaging communities should be subject to Parliamentary debate.
- i) Definitions should be provided for 'significant harm' and 'significant benefit'.
- j) Where a community makes an application to purchase a parcel of land, account must be taken of any detrimental impact on the business losing the land.

- k) Where a community makes an application to purchase a parcel of land, a full business plan and financial projection must be provided. This must include consideration of any detrimental impact on adjacent land, and provision for ongoing compensation for this.
- l) Where a community purchases a parcel of land and the project subsequently fails, the land should revert back to the original owner.
- m) Where an application fails, a community should be responsible for any costs incurred by the landowner during the process.
- n) Scottish Government should be required to make a public register of community projects, to ensure transparency and sharing of best practice.
- o) The ability of a community to act with a third party developer should be removed from the Bill.
- p) Where an application to buy a parcel of land is not successful, it should not be possible for the parcel of land to be subject to another application for a defined period of time.
- q) The section which relates to the removal of the exemption for sporting and deer forests should be removed.
- r) A 'repairing MLDT' for no less than 35 years to new entrants should be included within the Bill, this should contain a break clause at year 5 to be consistent with the non-repairing MLDT.
- s) The portion of the viable unit test which prevents a holder of a secure tenancy from acquiring an additional one should be included as per the AHLRG report.
- t) Landlord entitlement to a proportion of open market rent for surplus residential accommodation should include where a main farmhouse has been sublet.
- u) The waygo amnesty should be for 3 years duration.
- v) A new two stage waygo process should be introduced where a tenant serves a notice of intention to quit and after receiving a valuation serves a final notice to quit.

Land rights and responsibilities statement (LRRS)

NFUS welcomes Scottish Government's confirmation that the LRRS will be consulted on, and debated and approved by Parliament. NFUS has concerns over the RACCE Committee consideration that additional international obligations be taken account of, as there is a danger that this could further complicate issues contained within this debate.

Scottish Land Commission (SLC)

NFUS recognises the formation of the SLC will provide a key focal point for land based policy, and notes again that stakeholders must be provided with the opportunity to comment on any draft strategic plan.

Given the areas of expertise suggested in the original policy memorandum, NFUS has extreme concerns at the potential for a lack of practical land management experience amongst any Commissioners. It is disappointing that the RACCE Committee did not agree with this viewpoint in its Stage 1 report. NFUS members have strongly emphasised that a level of practical land management experience (preferably agricultural) must be a prerequisite for Commissioners.

In addition to this, NFUS remains concerned as to how the Tenant Farming Commissioner will interact with the SLC. Given that the remit for this post is more specific, it is vital that there is an interaction between this and the SLC to ensure consistency of policy.

NFUS members have been keen to stress that centralised decision-making does not always provide a best fit for local priorities. As a result NFUS feels strongly that provision should be made for regional advisory boards as a mechanism to underpin the Scottish Land Commission.

Tenant Farming Commissioner

NFUS pushed for some time the concept of an independent overseer for agricultural tenancies, and was instrumental in asking Scottish Government to implement this as an immediate measure. NFUS feels that excellent progress has been made by the Interim Commissioner, and the guidance which has been produced so far is extremely encouraging. In order for this guidance to have the appropriate level of gravitas, NFUS feels that the industry guidance should be taken forward within the Bill as statutory codes of practice.

NFUS is encouraged that the RACCE Committee welcomed the establishment of the TFC. NFUS also agrees with the Committee that penalties which can be applied also cover non-compliance with the codes of practice.

Land Agents play an integral role within agricultural tenancies, often where there are contentious issues such as waygo and rent negotiations. Whilst the majority of agents are RICS accredited, and as such governed by a professional code, there is unfortunately still evidence to suggest that best practice is not always being adhered to. It is vital that to underpin the excellent work being undertaken by stakeholders and TFC that a statutory code of practice for land agents should be developed.

NFUS notes that currently the maximum fine that the TFC can impose is £1,000, for non-compliance with a request for information. A fine system should be introduced for non-compliance with the statutory codes, and NFUS feels that it is questionable if £1,000 is sufficient enough to deter parties from co-operating.

Within agricultural tenancies there are often conflicting viewpoints. As such, NFUS agrees that the TFC should be involved with a mediation or arbitration process which is designed to avoid parties resorting to the Scottish Land Court.

Transparency of land ownership

It is recognised that with land ownership comes a unique responsibility. NFUS members have voiced concern over the potential motives of persons requiring information about those in control of land. With this in mind, NFUS is very concerned to note that the RACCE Committee considers that the ability to find out information about those in control of land should be extended to anybody in Scotland. NFUS feels strongly that this should be restricted as per the current proposal, to those who are directly affected by such land and who have a justifiable reason for requiring this. NFUS feels that 'justifiable reason' should be defined in the Bill.

NFUS notes the RACCE Committee considerations with regards to transparency of ownership. NFUS agrees with the Committee that persons wishing to buy land in Scotland should provide a name point of contact, and that there should be measures in place to identify beneficiaries, and those in control of such land. These measures will assist in increased transparency, and provide a level of accountability which is consistent with prudent land management.

Engaging communities in land based decisions

NFUS wishes to emphasise strongly that farmers are often an integral part of rural communities. Members have voiced concern over the intention for Ministers to issue guidance about engaging communities in decisions relating to land which may affect communities. NFUS feels that any guidance must be subject to Parliamentary scrutiny, and agrees with the RACCE Committee's recommendation in its Stage 1 report.

NFUS also considers that any guidance must not allow a community to dictate how everyday farming operations are carried out. In considering any 'failure' to adhere to guidance in relation to an application to purchase land for sustainable development NFUS feels that it is imperative that what constitutes a failure is clearly laid out, so that a landowner or occupier cannot inadvertently fall foul of this guidance.

Right to buy land to further sustainable development

NFUS members are extremely concerned by this provision, and this remains a consistent cause for concern across its Regions. NFUS feels that the measures proposed in the Bill are draconian, and give no consideration to the balance of landowner or occupier rights in relation to a community. NFUS is disappointed that the RACCE Committee did not consider that 'sustainable development' required further definition, as this would provide a key benchmark for protection of landowner interests. NFUS is encouraged that the RACCE Committee has recommended that Scottish Government gives further guidance on definitions of 'significant harm' and 'significant benefit', and suggests that this amendment should be reflected in the Bill.

NFUS is also concerned by the recommendation made by the RACCE Committee that 'communities of interest' should be given consideration. Whilst NFUS feels that there are benefits to the formation of community bodies, the target of this should be local benefits. A significant amount of issues have been raised within the land reform debate over 'absentee' owners. NFUS is unsure how a community of interest differs

from this, and does not feel that this measure fits with a targeted approach of local involvement and leadership.

Loss of any parcel of land is recognised as the ultimate sanction against any landowner, and NFUS considers that this should be a last resort. Consideration should be given to allowing a community to enter in a lease arrangement with a landowner, if parties wish, as opposed to a sale which is potentially not based on the willing buyer, willing seller principle. NFUS proposes that consideration must be given to a lease being agreed within the Bill.

In setting out the 'key tests' NFUS notes with concern that there appears to be no regard given to any detrimental effect on the landowner or occupier of the transfer taking place. NFUS suggests that consideration must be given to any effect on the remaining parcel of land, as well as any financial implications. Where it is demonstrated that significant harm is likely to occur to the land owner/occupier this must be a reason for the transfer not taking place and a community must be advised to seek alternative options to achieve its aspirations. This must be reflected in the Bill.

In making an application, communities must be required to complete a full and detailed business plan, and financial analysis for their project. Communities must have to demonstrate why the particular parcel of land is needed, and be clear about the exact extent to what is required.

NFUS is aware whilst there are a number of community led projects which have been a success, there have also been some high profile failures. NFUS feels strongly that Scottish Government must make a register of such projects, in order to examine the successes and failures and reasons for these. Where an initial application fails, it should not be possible for a community to apply within a defined period. This will ensure that communities are motivated to apply with only the most suitable applications, and also protect landowners and occupiers from suffering the stress of repeated applications.

NFUS has previously voiced concern over the proposal within the Bill which would allow a community to act with a third party partner. NFUS is pleased that the RACCE Committee has recognised this concern. NFUS feels that this provision should be removed from the Bill to ensure that profiteering by developers is not possible.

Finally, NFUS feels that this Bill is contradictory, in that it is apparent that there is no level of accountability required of communities who undertake projects. This appears totally at odds with increasing accountability for landowners and occupiers under this Bill. NFUS suggests that some thought should be given to having individuals contained within a constituted community body accountable and liable for proposals which they are responsible for driving.

Entry into the valuation role for shooting and deer forests

NFUS does not agree that shooting and deer forests should be entered into the valuation role. NFUS is pleased that the RACCE Committee has sought additional evidence based analysis of the true impacts of this proposal. NFUS has voiced concerns over the potential for small scale farm shoots to be rateable, in particular at

a time where agricultural incomes are extremely volatile. NFUS feels that this section should be removed from the Bill to allow for detailed consideration.

Deer

NFUS is concerned by the proposals outlined in the bill in relation to deer management. Over recent years, there has been substantial moves from within the land management industry to modernise deer control. There is a current deadline of 2016 for the production of deer management plans, and NFUS supports the RACCE Committee view that this should be adhered to.

NFUS members have already voiced concerns over the blunt nature of a countrywide approach, and have voiced concerns about giving a large amount of responsibility to Scottish Natural Heritage. NFUS remains concerned about the scale of the sanctions in the Bill.

Agricultural Holdings

NFUS wishes to emphasise once more the importance of the major review of agricultural holdings undertaken by the Agricultural Holdings Legislation Review Group (AHLRG). The Group was clear that the proposed measures were to be taken as a package, to ensure that the best interests of the industry was reflected and relevant rights balanced. NFUS agrees strongly with this sentiment, and feels that this Bill must strive to deliver a healthy and vibrant tenanted sector that provides enough confidence for both landlords and tenants.

It has become clear during discussions over the passage of this Bill that there is a balance to be struck between assisting secure tenants in areas where issues have been identified, and also ensuring that attitudes towards modern letting vehicles are not impaired. NFUS urges consideration of appropriate balance as being in the long term interests of the sector.

During the course of consultation as part of the AHLRG work, it became apparent that the industry recognised that the system introduced in 2003 of SLDT/LDT could function well given the right circumstances. NFUS remains supportive of the options outlined for modern tenancies, but also feels that the option for a 35-year repairing tenancy (an idea originally introduced by NFUS, and subsequently taken up by the AHLRG), should be included within the Bill. This option could play a valuable role in bringing run down holdings back into the let system, and provide a vital route into the system for a new generation of farmers. This provision should include a break clause at year 5 to match the MLDT for a new entrant provision, and must include safeguards to allow tenants confidence to invest without fear of losing any improvements.

The potential for conversion of secure tenancies is something that has been a point where across the industry there has been strongly opposing views. NFUS originally proposed assignation for a 25 year duration, or to retirement age. NFUS also proposed a limited class of assignees, at that time to target this measure specifically at new entrants. Since that submission was made there has been much debate within the industry about what form this measure should take, whether a value should be attached to it, and what duration it should attract.

As a balance of the interest involved, NFUS notes that the AHLRG recommended a period of 35 years for assigned tenancies. NFUS supports a term of 35 years for converted tenancies as an appropriate balance.

Since the Bill was published, the Scottish Government has amended its original proposals on assignation. The amendment if accepted still enable 1991 Act tenancies to be converted to MLDTs, with the agreement of the tenant and landlord, but also create a new process under which 1991 Act tenants can assign their tenancy to a new entrant or to a progressing farmer, on the same terms as their existing tenancy (i.e. as a 1991 Act tenancy). The landlord will have the option to purchase the tenant's interest during the process, as an alternative to the tenancy being assigned.

This is a substantial alteration to the original proposal. As a consequence NFUS is again consulting widely with our members. As changes of this nature will have serious implications for both those directly affected, i.e. secure tenants and indirectly for those who wish to rent land in the future, NFUS is seeking members' views on what is in the best interest of the farming industry.

NFUS believes that assignation and succession provisions should relate to family ties, and provide a solution where death occurs out of turn. Succession provisions should ensure that a family farm can continue to operate as such. The changes outlined in the Bill will undoubtedly extend the lifespan of some secure tenancies. NFUS notes the RACCE Committee concern over contravention of ECHR and is hopeful that in making its recommendation Scottish Government will have ensured that any Bill is ECHR-compliant.

NFUS notes that the AHLRG recommended the removal of the 'viable unit test', aside from retention of the part which allows a landlord to object to a successor tenant on the basis that he already farms another viable unit. The rationale for this was to prevent single parties from accumulating multiple secure tenancies.

In the context of this Bill, if succession and assignation is widened significantly as proposed, it is possible to suggest that this scenario is much more likely to occur than previously. NFUS agrees with the AHLRG that this portion of the viable unit test should be retained in order to prevent this from occurring.

Pre Emptive Right to Buy

NFUS supports giving all secure tenants an automatic right of pre-emption, and is pleased to see a proposal which it asked for being included in the Bill.

Enforced Sale

Enforced sale is recognised as something which will be useful in the context of landowners are persistently negligent in relation to the terms of their tenancy obligations. Whilst there is a recognition that this is unlikely to occur often, the provision is a useful backstop.

The issue of clawback for any increase in value to the holding has been raised. NFUS agrees with the RACCE Committee recommendation, and suggests that this merits further discussion.

Rent Review

NFUS has been an active participant in the Scottish Government's stakeholder working group which has sought to add detail to the framework of the productive capacity test for rent reviews. As one of the most contentious issues around secure tenancies, it is important that this area is paid keen attention by the Tenant Farming Commissioner. NFUS believes that the new productive capacity test will be more transparent, and remains supportive of the proposal within the Bill.

Discussions to this point have led to some areas of contention, with one such area being the treatment of farmhouses. NFUS notes the RACCE Committee suggestion that residential properties on farms should be subject to amendment at Stage 2, and suggests that this area requires to be further explored with stakeholders. This area is extremely contentious, as whilst farmhouses are subject to the 'black patch' approach which means that no rent attributed to them, there are also that some are below tolerable standard. This issue is compounded by relatively high residential rents for privately let properties, to which a substantial amount of housing legislation applies. It seems fair that landlords are expected to invest where they can see a return, however it is important that tenants are not subjected to open market rents for their properties.

It seems fair that where there is surplus residential accommodation which exceeds the labour requirement of that holding that a landlord is entitled to a proportion of the rental income for such property. NFUS does however note that this does not match with the AHLRG recommendation that any housing provision in excess of reasonably required labour should be taken into account. Some members feel aggrieved by this, as there are instances of very large farmhouses on proportionally small farms.

In addition to this, some tenants have reported that whilst they have sublet cottages, they have taken these on in their unimproved state, and thus do not feel that it is fair that a landlord should benefit from this and receive rent for cottages in their improved state.

The 2003 Act removed the requirement for a tenant to reside on the holding. As a result, some tenants have been able to sublet the main farmhouse, which due to high residential rents will often pay the complete rent for the main holding under the 1991 Act tenancy. This appears a basic unfairness for the affected landlords, NFUS feels that in this instance the Bill should provide that where the main farmhouse is sublet the landlord should be entitled to a proportion of the rent for this.

Waygo

NFUS strongly believes that all tenants are entitled to receive fair compensation for improvements at the end of their tenancy. NFUS is pleased to see that provision has been made for an amnesty on registration of improvements. NFUS agrees with the RACCE Committee, and suggests that this is extended to a period of 3 years as

opposed to the 2 years in the current Bill. NFUS also feels that it must be made clear how improvements which are not registered in this time will be regarded.

NFUS also feels that the concept of a double notice provision must be introduced and should form part of this Bill. This would allow a tenant to serve a notice of intention to quit the holding, thus formalising the informal discussions noted previously that take place in some cases and that could be considered to be best practice. This would then allow the landlord the opportunity to formulate a waygo offer and hold discussions with the tenant. If an agreement on waygo is reached between both parties then this could be followed with a second notice, within a defined timeframe, noting final intention (or otherwise) to quit the holding based on safe knowledge that the waygo sum has been agreed and will not change.