Written submission from Neil King

Land Reform (Scotland) Bill – call for evidence

Due to what seems like a pretty short consultation period for such a complex bill, I am only able to focus on two areas:-

1 Part 5 – right to buy land to further sustainable development

If local authorities (LAs) have rights of compulsory purchase where necessary to deliver their services, why shouldn’t community bodies (CBs) as they are, to an extent, a more localised tier of service delivery?

Viewed in that light, the tests in Part 5 (clauses 47(2)(c) & (d)) – that the purchase “is the only practicable way of achieving” a benefit to a community and that refusing it “is likely to result in significant harm to that community” – set the bar too high.

Part 5 needs to be aligned it more with LAs’ compulsory purchase powers but with safeguards reflecting the fact that community bodies may lack the skills, experience and resources of an LA. And also to curb the historical tendency of “over enthusiasm” on the part of some CBs – aided and abetted by the likes of HIE, Scottish Land Fund and Scottish Government who find it politically difficult to say “no” – to take on projects which are not viable.

Case study – Achilitibuie Smokehouse

This purchase by Coigach Community Development Company under Part 2 of the Land Reform Act 2003 was sanctioned by the SG and funded by the SLF on the basis of the following proposals:-

- lease back to existing operator [unlikely since it was that operator’s decision to relocate which prompted the sale]; establish a “fine foods hub”; community workshop space (micro-brewery, artisanal bakery etc.); laundry; visitor attraction (c.f. distilleries, Baxters of Fochabers); bunk house; use the site for social/rented housing; heritage centre

Two years on from the purchase, the Smokehouse remains empty apart from office space for CCDC (which was not one of the uses invoked to justify the purchase). NONE of the proposals above has been delivered or is even in preparation.

(See http://tinyurl.com/pbxnetr and https://ccdcompany.wordpress.com/)

I don’t doubt the good faith and commitment of CCDC but the fact remains the Smokehouse was purchased (and funded) on the basis of aspirations - a “wish-list” - rather than an actual viable plan. Giving communities the chance to “have a go” like this may be OK when it’s a case of pre-empting something a landowner wanted to sell anyway but totally unacceptable for a right of compulsory purchase.

Therefore, the new compulsory right to buy for sustainable development must involve the community body having a definite plan. It must be viable, costed and funded. There should be provision for it to be assessed by an independent body drawn from a panel of people experienced in developing similar enterprises.
In essence, all the ingredients of a viable proposition should be demonstrated to be present with only the necessary land acquisition standing in its way.

2. Part 10 – agricultural holdings

I am particularly disappointed that what is a notoriously complex area of the law is being dealt with by being “tacked on” to the Land Reform Bill. There is a grave risk of agricultural holdings being lost sight of behind “sexier” aspects of (and omissions from) the bill leading to what was mentioned in para. 316 of the Policy Memorandum: “potentially rushing what was likely to be complex legislation, risking insufficient scrutiny and poor legislation.”

I was also disappointed to see Part 10 characterised in a Youtube video put out by the committee as “new rights for agricultural tenants”. It is not. It is about re-setting agricultural holdings law to make it fit for purpose in the 21st century and reflecting a fundamental aim of the AHLRG report, namely, balance and mutuality between landlord and tenant (final report, para 67).

The following is by no means a comprehensive critique of Part 10 but just the things that have jumped out the page at me in the limited time available. And I’m afraid the following comments are inevitably a bit technical!

2.1 Modern limited duration tenancies – new entrant break clause at year 5 (bill clause 76(2) inserting new s.8D into 2003 Act)

The bill doesn’t implement the AHLRG’s recommendation on this.

This is because it doesn’t give the landlord a break. It gives him an irritancy (forfeiture clause) which is legally much more onerous. Irritancies have always been possible in agricultural leases so the bill adds nothing and does not achieve the policy aim of giving landlords additional confidence to let to new entrants long term.

It also fails to deliver the AHLRG’s aim of balance and mutuality because, while the bill gives the landlord an irritancy (the right to attempt to make a case against the tenant), it gives the tenant a break (the right to walk away, no questions asked). Failure of reciprocity.

2.2 Modern limited duration tenancies – fixed equipment obligations (clause 77 inserting new s.16A into 2003 Act)

An error in the drafting of this clause means that, while the landlord is obliged to provide certain fixed equipment (buildings and other farm infrastructure like fences, drains etc.) with a lease, there is nothing to say what condition it should be in.

In order to prevent people being embroiled in expensive Land Court cases, wording needs be added to the effect the fixed equipment provided must be “reasonably fit purpose” (or some other objective criteria).

2.3 Modern limited duration tenancies – irritancy clauses (bill clause 78 inserting new s.18A into 2003 Act)
This clause (18A(6)(b)) gives tenants a 12 month period to remedy any breach of the lease before the landlord can invoke irritancy (forfeiture of the lease). And 18A(7)(b) allows tenants to apply to the Land Court to extend that period.

In the interests of balance and mutuality, landlords should have the equivalent right to apply to shorten it: 12 months is an unusually long period to allow a breach of a lease to continue.

2.4 **Conversion of 1991 Act tenancies to modern limited duration tenancies (cl.79)**

Conversion to MLDT gives the tenant much broader rights of assignation (to non-family members) than are available in a 1991 Act tenancy but with the *quid pro quo* that an MLDT is necessarily of finite duration. The crucial aspect of a “converted MLDT” is therefore its duration. That should be a matter for the full scrutiny of primary legislation rather than left to regulations. This should, therefore, be kept for the second round of primary legislation to implement the remainder of the AHLRG’s recommendations not being taken forward by the present bill as contemplated by the policy memorandum.

2.5 **1991 Act tenancies – new rent review criteria (cl.82 inserting new schedule 1A into 1991 Act)**

Again, the bill doesn’t implement the AHLRG’s recommendation on this.

This is because the AHLRG recommended (final report, para 114; recommendation 3) that rents be determined on the basis of the productive capacity of the holding. But what the bill says (schedule 1A, paras 7(3) & (4)) is that the rent will be the *fair rent having regard to productive capacity*.

What that means is that productive capacity is merely a default presumption for the rent subject to appeal to the overarching criteria of fairness. In other words, either party could argue to the Land Court: “The rent on the basis of productive capacity would be £X but in the particular circumstances of my farm that would not be fair because of XYZ so I request you to fix a lower [or higher] rent of £Z which would be fair.”

That’s fine except it’s not what the AHLRG recommended. And appeal to the nebulous and subjective concept of “fairness” drives a coach and four horses through the AHLRG’s aim of “full transparency and objectivity” in relation to rent review (final report, para. 115).

I have added some more detail on some of the above topics at my blog [http://neilslegalstuff.blogspot.pt/2015/08/land-reform-bill-evidence.html](http://neilslegalstuff.blogspot.pt/2015/08/land-reform-bill-evidence.html) if you are interested.