Land Reform (Scotland) Bill

The Law Society of Scotland’s response
August 2015
Introduction

1. The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interest of solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision-making process.

2. The Property and Land Law Reform sub-committee and the Rural Affairs sub-committee of the Law Society of Scotland ("the committees") welcome the opportunity to comment on the Land Reform (Scotland) Bill ("the bill") and have the following observations to make.

General Comments

3. The bill proposes significant legislative changes that will impact property and land ownership in Scotland. As an overriding comment it is our view that the bill in a number of areas lacks sufficient detail and/or clarity to enable stakeholders to understand the changes and act or prepare accordingly.

4. In many parts of the bill the proposed legislation serves only to provide a framework for important changes (e.g. Part 3 (Information about control of land etc), Part 4 (Engaging Communities in decisions relating to land) and Part 5 (Right to buy land to further sustainable development) etc, with the responsibility for the detail of these changes being deferred to a later date when regulations containing the detail are made by the Scottish Ministers. It is therefore not possible in a number of areas for us to fully comment on or understand the consequences of the bill.

5. Part 4 of the bill, for example, provides for future guidance being published by the Scottish Ministers surrounding community engagement however no timescale for that guidance is set out nor is there definition in Part 4 around key terms such as "land", "engaging", "communities", "decisions" and "sustainable development". A period of legal uncertainty would therefore exist where law has been created potentially affecting the future plans of landowners, developers and "communities" however none of the
stakeholders would know pending the future guidance whether they are affected by the law or, if affected, the resultant impact this might have on their land or community.

6. As a general comment it is therefore our view that proposals throughout the bill to defer detail to future Scottish Minister regulation should be reviewed and avoided where possible to avoid the creation of unnecessary periods of uncertainty for stakeholders.

7. As another general comment, we do not think it is suitable to have agricultural holdings legislation tacked on at end of land reform. While the committees appreciate the pressures on parliament’s time, the provisions contained in part 10 are significant and should have been standalone.

8. With further agricultural holdings legislation likely to be combined with crofting proposals, and so much detail being introduced by way of statutory instruments, the areas of property, agriculture and crofting law are becoming more and more fragmented. We consider that it would be appropriate to introduce consolidating legislation once this wave of legislation is passed to make these clearer and more operable for practitioners and lay people alike.

**Specific comments**

**Part 2 – The Scottish Land Commission**

**Chapter 3: Tenant Farming Commissioner**

9. Without being able to see the code of conduct that the Commissioner will apply (which will be drafted in secondary legislation) it is difficult to comment on his or her role but our understanding is that the Scottish Government’s independent adviser on tenant farming is making positive steps in facilitating better relations across the tenanted sector, which we hope the new Commissioner will be able to build on.

**Part 3 – Information about Control of Land etc**
10. As a result of the deferral of detail to future Scottish Ministers regulation the consequences of these provisions is not clear. Further definition as to what constitutes parties who are "affected by land" and the nature of information which can be sought by "requesters" would assist.

11. In relation to the proposed powers of the Keeper of the Registers of Scotland to request information relating to proprietors, further clarity around who or what would prompt such a request being made would be welcomed. We would also query what the consequences would be for any party failing to respond to any such request.

Part 4 – Guidance on engaging communities in decisions relating to land

12. As per the comments above, further definition and clarity as to the intention and meaning of various terms in Part 4 would assist legal certainty.

Part 5 – Right to buy land to further sustainable development

13. Statutory rights to buy for communities already exist under the provisions of the Land Reform (Scotland) Act 2003 and the Community Empowerment (Scotland) Act 2015 and the bill proposes another further statutory power of this type. The bill provides for further regulation to be published by the Scottish Ministers in relation to "excluded land" and early clarity on this would be welcomed given the serious consequences these provisions could have for a landowner. We would also query whether there is potential for conflict to arise between these new right to buy powers and the existing statutory rights to buy e.g. whether there is potential for competing applications to be made concurrently under different statutes (perhaps by the same "community").

14. The proposed wording in Part 5 is wide and general and will lead to legal uncertainty as to what the legislation is intended to cover. Further clarity around what is proposed by "sustainable development" (perhaps taking into account worked examples pursuant to applications under earlier right to buy legislation) and its associated conditions is required to provide greater understanding amongst stakeholders.
Part 7 – Common good land

15. We welcome section 68 of the bill, which amends section 75 of the Local Government (Scotland) Act 1973 by providing for a local authority to apply to either the sheriff or the Court of Session for authority not only to dispose of, but, in terms of section 68, now also to appropriate land forming part of the common good.

16. We believe that this should address the problem of how a change of use of common good land as opposed to a disposal can be authorised without having to resort to Scottish Parliamentary Private Bill procedure.

17. We refer to the City of Edinburgh Council (Portobello Park) Act 2014 which was enacted as a result of decision of the Inner House of the Court of Session in the case of Portobello Park Action Group Association v The City of Edinburgh Council [2012] CSIH 69. In this case, the Inner House held that, despite planning permission having been granted, the Council had no statutory power to change the use of the land held on common good, only to dispose of it. It was the Council’s intention not to dispose of the common good land which formed part of Portobello Park, but rather to build a new school upon it.

18. Private bill procedure is not the best use of public resources and section 68, in providing for application to the court to appropriate common good land where the Council wishes to build upon common good land, should dispense with the need for similar private bill procedure in future.

19. We also note that, in terms of section 104 of the Community Empowerment (Scotland) Act 2015, the local authority is now under a duty to publish details and to consult with community councils before disposing or changing the use of common good land. In carrying out this duty, the local authority must have regard to Scottish Ministers’ guidance in terms of section 105 of that Act.
20. We therefore question whether the requirement for court approval should continue, and whether local authorities should be entitled to determine how to engage the public in relation to any decisions regarding its land held on common good.

Part 10 – Agricultural holdings

Chapter 1: Modern limited duration tenancies

21. No comment

Chapter 2: Tenant’s right to buy

22. We have identified a number of potential problems that an automatic registration of a 1991 Act tenant’s interest in buying his holding would create for the conveyancing process.

23. A large number of registrations by tenants under the current system include plans of the holding that landlords challenge (or recognise as wrong but do not challenge on the basis that there is no need to do so). Disputes arise in relation to the extent of the property covered by a lease and also the nature of the lease – for example, the landlord believes that the land is let on a grazing lease or an SLDT but the tenant claims it is held on a 1991 Act Tenancy. This is particularly the case with unwritten leases.

24. At present a clear search in the Register of Community Interests in Land (RCIL) is exhibited and a seller can sell the land without fear of the right to buy applying (although of course if there is a tenancy the issue of the tenancy still has to be dealt with). If all 1991 Act tenants were to have an automatic right to buy, it raises the question of what a landowner would do prior to sale to determine whether any occupier in the neighbourhood is a 1991 Act tenant and what the extent of the area occupied by that tenant is. It also raises the question of how the missives of sale would reflect this: if the right to buy were to be triggered by the missives, do the missives fall? What if only part of the subjects of sale are affected?
25. In addition, it is currently the case that if you conclude either missives or an option before a right to buy is registered, the exercise of the option or the missives do not trigger the right to buy. By cancelling this, it would mean that any option that is entered into or missives that are concluded before the new legislation is introduced would then fall foul of the right to buy provisions after the law changes, which will affect a lot of people.

26. This proposal would also cause particular difficulties with the sale of land for development where the tenant may be able to buy at pre-planning values. Vendors will have to be aware of the consequences of a sale being upset by a tenant’s claim where development values are involved and the impact of that. It would also be very problematic if it were a sale by a creditor who had no direct knowledge of the property. The retrospective application of this change to concluded options/missives will give rise to potentially very significant losses particularly where the sale of potential development land is concerned and impact on the sale of land for housing and other development.

27. Ultimately, we think that this proposal would give rise to a series of Land Court cases to have the existence of a tenancy established (or to prove no tenancy existed), which would be time-consuming and costly for all involved. We appreciate the policy intent to give tenants’ rights due recognition but think that the practical consequences of these proposals require more thought.

Chapter 3: Sale where landlord in breach

28. The committees agree with the intent of these provisions but think that they seem quite complicated for what should be a straightforward procedure. Ultimately, the process is likely to be adversarial and expensive and if the landlord is persistently failing to meet his obligations under the tenancy, there are bound to be heritable creditors involved as well, who are unlikely to have prior knowledge of the nature of tenancies and their effect.

Chapter 4: Rent review
29. In relation to the mechanism for determining the appropriate review, again it is difficult to comment, given that it will be established by secondary legislation. However, in general we do not have any issue with the move away from market comparators and are of the view that it determinants such as the productive capacity of land and who owns what in relation to fixed equipment should be used.

30. In paragraph 9 of proposed new schedule 1A (surplus residential accommodation) the committees are of the view that there will be scope for overlap and confusion as to who is responsible for issues in relation to let cottages on tenanted farms. This will become even more the case when regulations are introduced regarding electricity, etc.

31. Surplus residential properties are at the mercy of the agricultural leases used from 1949 to date: some are draconian if the properties are not used for specified reasons, while others are very relaxed. Where the property is used to generate income, we are of the view that the default position should be that the tenants are responsible for meeting the required standards of up-keep.

Chapter 5: Assignation and succession

32. The committees appreciate the benefits of opening up the class of person who would be able to take over a tenancy by way of either assignation or succession however, instead of working down the family tree to establish who is eligible to take over the tenancy, section 87 provides that the process begins with the grandparent of tenant, and so it goes up first and, as a result, out more widely. This is likely to cause confusion and disagreement.

33. We note that the bill does not take account of the recommendation made by the Agricultural Holdings Land Reform Review Group at paragraph 168, where it states that “where a tenant already farms a viable unit, the Review Group considers that there should be a reasonable ground of objection to prevent that tenant from accumulating tenancies and so keeping the holding available for re-letting to another tenant.” We consider this to be an important point that should be included in the bill.
Chapter 6: Compensation for tenant’s improvements

34. This provision seems to take a fair approach, although again a lot of the detail is left to secondary legislation – particularly in relation to how the landlord’s objections will be heard if they do not think compensation is fair and reasonable.

Chapter 7: Improvements by landlord

35. No comment.
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