Written submission from Community Land Advisory Service

Comments on Land Reform (Scotland) Bill

Part 1 – Land Rights and Responsibilities Statement

s.1(2) If a “land rights and responsibilities statement” is in fact no more or less than a “statement of the Scottish Ministers’ objectives for land reform,” why is it not simply called that?

Part 2 – The Scottish Land Commission

I wholly agree that land reform is a process not an event. I also consider that proposals for future reform should be worked up on an impartial, principled and evidence-based approach by persons with appropriate knowledge and expertise. Establishing a standing commission is however a very expensive way forward and Part 2 does not appear to make any specific provision to ensure that, into the future, the standing commission (which I note from the Financial Memorandum is expected to have 18 full-time equivalent staff in addition to the 6 Commissioners) continues to represent good value for public money.

s.5(2)(c) Whilst this paragraph perhaps says all that requires to be said on the face of the Bill, I think it particularly important that the new Land Commission should be able and required to work in co-operation with the Scottish Law Commission.

s.9(1)(a) I think that the list of desirable expertise and experience should include expertise or experience in land management. Conversely, I do not see that expertise in finance (as distinct from economic matters) is important to the Commission’s functions.

s.10(1)(f) I do not see why a person who is, or has within the last year been, a local authority employee should be barred from being a Commissioner. For example, it could be desirable to appoint an experienced planner who has recently served or still serves in local government. Of course such a person should not vote on any matter that would place themself in a conflict of interest, but that is not a reason for wholly excluding this category of citizens from the potential to be a Commissioner. If however there is a valid justification for excluding local authority staff, surely it should apply equally to National Park staff and civil servants of the Scottish Administration.

s.10(2) I wonder if it may be advisable here to clarify that “owner” and “tenant” respectively include co-owner and co-tenant, and that “tenant” includes sub-tenant. Alternatively perhaps “the” at the start of line 30 should be replace with “a.”

s.17(4) This sub-section introduces the word “audited” but there are no norms concerning audit of accounts earlier in the section. Assuming that accounts are to be audited, I think that this should be expressly provided for and that the section should direct (a) who may be auditor, and who appoints and pays that person; (b) by when after the financial year end audit is to take place; and (c) whether the accounts are to be audited before they are submitted to Scottish Ministers under subsection (2).
s.18(1)(b) and (c) It appears to me that the words “most recently approved” and “most recently published” in these paragraphs may create a problem in the scenario where the Commission’s main objectives or programme have changed during the course of the reporting year, with the effect that work in the earlier part of the year might not be reported upon. Perhaps the provisions should refer to the “strategic plan or plans” and “programme or programmes” in place during the relevant year.

s.18(3)(a) I wonder if the wording “… reports and information …” in this paragraph may be too narrow and might perhaps limit the Commission’s ability to produce other types of publication on an expressio unis est exclusio alterius basis. For example, I consider that the Commission should publish consultations and Discussion Papers (as the Scottish Law Commission does.)

s.20(1) I consider it important that the Land Commissioners should be able to carry out international research to identify good practice and innovative approaches in other countries that might benefit Scotland (again following the example of the Scottish Law Commission.) I wonder if the words “on any matter relating to land in Scotland” might limit the Land Commission’s ability to look beyond our borders. Section 3(1)(f) of the Law Commissions Act 1965 specifically empowers the Scottish Law Commission to “obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.” Perhaps the proposed Land Commissioners should have a similar power?

s.20(1)(a) and (b) Perhaps these paragraphs should be expanded to refer to practices as well as to laws and policies. I suspect that there may be many areas where issues in land relations and land transactions proceed on the basis of convention, tradition or usual practice rather than any specific legal norm or public policy. For example the expectation that, in the grant of a new lease, the tenant should bear the landlord’s legal expenses. Other examples are the practices surrounding offering property for sale such as inviting blind bids at a closing date.

s.20(1)(c) and (d) I think that there is a norm missing after these two paragraphs. Having gathered evidence and conducted research, should the Commission not be empowered and required to undertake analysis before producing reports?

s.25 Should the Tenant Farming Commissioner not be charged with preparing codes of good practice? The current wording of section 25 seems to equally permit preparation of codes of indifferent or even bad practice (however I note that paragraph (a) in section 26 refers to “best practice.”)

s.25(4) I presume that the intention here is that the TFC would normally consult representative bodies – for example, Scottish Land and Estates in the case of landowners. However, I wonder whether the wording of this subsection permits that, or whether these words would require the TFC to consult every individual owner and tenant?

s.26 I think that the proposed activities of the TFC in paragraphs (c) and (e) of this section should be general duties of the TFC and not restricted to the context of promoting codes of practice.
s.27(1) I think that the words “an alleged” should appear before “breach” in line 37 and that the words in parenthesis should be omitted. The current wording appears to require that it be known that a breach has occurred before application may be made to the TFC to investigate the matter.

s.28(1)(b) I notice that this paragraph imposes a different test from that required of the applicant under section 27(2)(b). The effect appears to be that in the scenario where there turns out to be a person with an interest in the tenancy that the applicant was not aware of, the TFC cannot inquire into the alleged breach.

s.30(3) I think that the proposed 28 day time limit for making an appeal is much too short. This is insufficient time in which to reach a considered decision – which is likely to require taking legal advice, and perhaps engaging with the relevant representative body. I appreciate the policy of section 30(1)(d) may be that penalties should be quickly paid however that factor alone should not dictate that insufficient time is given to appeal. Perhaps it should be provided that a penalty may be paid under protest and, if so, if it is subsequently quashed or reduce by the Land Court, the appropriate refund must be made.

s.32(2)(f) I think that the relationship between this provision and the Freedom of Information (Scotland) Act 2002 needs consideration. As it stands, the Bill does not appear to seek to amend FoISA to add the Land Commission to the list of public bodies subject to that Act given in schedule 1 to that Act. However Part 7 of that schedule lists a number of commissions (for example the Scottish Law Commission) and in policy terms it appears that the Land Commission should be subject to FoISA. However, if that amendment to FoISA were made, I wonder if the effect of this paragraph could have the result that there is insufficient protection for commercially confidential (as opposed to personal) information.

Part 3 – Information about control of land etc.

s.35(1) Perhaps the words “in Scotland” should be added after the first use of “land” in line 29?

s.36 In proposed section 48A(1) of the Land Registration (Scotland) Act 2012, I think the word “enabling” should be replaced by “requiring.” In my reading, the use of “enabling” could create the result that the Keeper of the Registers of Scotland has discretion whether or not to request information about (for example) controlling interests in different cases. I think it very important that the Keeper is not given any discretion in this area. The Keeper must be, and be seen to be, an impartial registrar who’s function is to record accurately that which she is required by statute to record. She must not be placed in a position where she becomes subjectively involved in political questions about who should have rights in land, or how those rights are exercised.

Part 4 – Engaging Communities in Decisions Relating to Land

I think there are serious conceptual problems with Part 4 as it currently stands. The only section in the Part, section 37, requires Ministers to produce guidance on community engagement. Why would or should a landowner follow this guidance? There could, I think, be situations in which a landowner could not choose to follow
the guidance because to do so would conflict with duties owed to others. For example, community engagement is always likely to take some time and to involve some administrative cost to the landlord; it may be contrary to the duties a landowner owes to their (for example) shareholders or beneficiaries to accept that delay in taking a decision, or to incur that cost.

Paragraph 162 of the Policy Memorandum says “landowners have to recognise that they have a responsibility to the communities that live and work in and around their land …” This is capable of being read in two ways, and it is not clear which is intended. The first is that there is already a norm in the law of Scotland which states that landowners have a responsibility to communities, but action is required to promote better compliance with this norm. The second is that that norm requires to be created and then recognised.

On the first interpretation, in my understanding there is no current norm in the law of Scotland which imposes a requirement for a landowner to take account of the local community’s needs. In our residual rights constitution, a landowner is free to act (or refrain from acting) as they wish in relation to their land except where there is a law providing otherwise. There are of course specific norms within, as examples, the town and country planning system and environmental legislation that touch on this, but there is no underlying general legal requirement that a landowner must have any regard to the local community.

On the second interpretation, the need to create that norm is recognised, yet the Bill does not do so.

Therefore, on either reading, Part 4 of the Bill fails to achieve the policy stated in the Policy Memorandum. In either event, the solution in principle appears to be that section 37 should be preceded by a section that would create the law that a landowner is to have regard to the needs of the community, or bears a responsibility to the community.

However in practice the scope of that responsibility would need discussion and consultation; which land; which landowners; which decisions? If I decide to re-mortgage my house, that is an example of a decision relating to land. However it is none of my neighbours’ business, and it would be bad policy if the Bill were to require me to consult them in this scenario.

Part 4 of the Bill also fails to address the consequences of failing to follow guidelines, or failing to have regards to the needs of the community. Paragraph 166 of the Policy Memorandum discusses that it may be evidence to support a Part 5 right to buy application, but that would only apply in extreme cases. Paragraph 167 suggests that grants might be withheld from the landowner. In my view, if we are to be serious about having an effective and enforceable responsibility of landowners to have regard to the needs of the community, more effective sanctions than this are needed.

Part 5 – Right to buy Land to Further Sustainable Development
In principle, I agree with the proposed new right. However it appears that it will only be in rare circumstances that a community will be awarded a right to buy under this part and therefore the practical benefit may not be great.

The asset transfer part of the Community Empowerment (Scotland) Act 2015 will permit communities to seek not only to buy; but also to lease, occupy, use or manage without taking title; land owned by certain public bodies. In the context of land which is injurious to the local community and is privately owned (or owned by a public body not subject the Community Empowerment Bill right, such as the MoD), I would like to see further thought given to a mechanism whereby the community could seek to take over control or management of the site for the time being without depriving the landowner of title for the future. This would encourage a culture of "meanwhile use" where communities are engaged with and make beneficial use of sites that are temporarily un- or under-used. In many cases it may also be a more proportionate solution than a non-consensual removal of ownership, and because it would be a less draconian interference with the landowners’ rights, the threshold for allowing community use could be lower.

s.38(1) The definition of land is such that a separate tenement of salmon fishings is included whereas a separate tenement of sporting rights created under section 65A of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 is excluded. This appears to me illogical; the two types of right are similar and surely the policy should be that both are included or that both are excluded. In my view both should be included. It seems easy to envisage situations in which the existence of sporting rights could stand in the way of a proposal for sustainable development, for example being incompatible with use of the land for forestry, or flooding it for a reservoir.

s.40(2)(b) If I am reading this paragraph correctly, it prevents a community from seeking to buy minerals or salmon fishings in the scenario where the community already owns the related surface title, having acquired it otherwise than under a Part 5 application. If so, I think the policy is wrong. I am unconvinced that it should be necessary for the community body to have ownership of the surface title at all as any right to use the surface necessary for the sustainable use of the separate tenement may exist in the form subordinate rights of use either constituted as title conditions or implied by law. However, if the view is taken that it is necessary for the community body to have ownership of the surface title, it should not matter by what means that title was obtained.

s.40(3)(b) I do not see the rationale for arbitrarily ending the period during which separate tenements may be subject to a Part 5 application either one or five years after the purchase of the related surface title. Surely the conditions and circumstances that dictate that a community purchase of the separate tenement is appropriate in the interests of sustainable development could arise at any time in the future.

s.41 The foregoing two comments apply equally to tenanted land.

s.46(8)(a) It is not clear why Ministers must wait a further 60 days before deciding an application; neither Explanatory Notes nor Policy Memorandum explain this.
s.47(3)(a) and (6)(a) I consider that a request should not be treated as not responded to or not agreed to unless it offered a fair price for the land or tenancy. Although this issue could perhaps be covered in regulations as to the content of requests made under subsection (8), in my view this is an important point which should appear on the face of the proposed statute.

s.47(6) Subsection (6) fails to replicate the provisions of paragraph (f) in subsection (3). Prohibitions on assignation of tenant’s interests are very common and should be provided for. It is also possible that a tenant may be under a personal obligation to assign to some third party.

s.48(1)(a) This section provides for the ballot to be conducted by the Part 5 community body. This stands in contrast to the changes made to the right to buy under Part 2 of the Land Reform (Scotland) Act 2003 by the Community Empowerment (Scotland) Act 2015 which removed responsibility for conducting the ballot from the Part 2 community body and placed it in the hands of an independent balloter appointed by Scottish Ministers. I consider it better that the ballot be run by an independent person with relevant skill and experience.

s.53 This section appears to be missing an important norm which should not be left to implication. It should be expressly provided that confirmation of intention to proceed is not given as provided for in this section, the right to buy is extinguished.

s.56 I that think this section should empower the valuer to set time limits for the submission of representations under subsection (8) and views under subsection (9).

s.58(2)(a)(i) I am not sure that it is fair that in the case where the community body (and not the third party purchaser) withdraws the application the duty to compensate is place on the third party purchaser.

s.65(3) and (4) In my view it is irrational and a recipe for confusion and mistakes to provide that some stipulated time periods exclude holidays whilst others do not.

**Part 7 – Common Good Land**

s.68 I agree in principle that this is a useful amendment to the Local Government (Scotland) Act 1973 which will go some way toward addressing the difficulties associated with common good land. However I am not sure that the wording is quite right. In my understanding, whilst disposal of land is an “alienation,” appropriation to another use is not. For that reason I think that the following further amendments to section 75 of the 1973 Act are also required –

(a) in subsection (1) insert “appropriate or” before alienate;
(b) in subsection (2) insert “appropriate or” before alienate.

**Part 10 – Agricultural Holdings**

s.81 I consider that subsection (4) of proposed section 38B should be deleted. The only test for the Land Court in ordering sale to the tenant against a contrary personal obligation should be whether the transfer under the personal obligation is part of a series, scheme or arrangement intended to defeat the tenant’s right to
obtain an order for sale. The factors mentioned in subsection (4) appear irrelevant; for example it makes no policy difference whether or not the transfer under the personal obligation would be to a company in the same group.

s.81 Proposed section 38B(8)(a) refers to owner including a person in whom land is vested for purposes of incapacity. In my view this form of words will not encompass a guardian or an appointee under an intervention order in terms of the Adults with Incapacity (Scotland) Act 2002. In terms of the relevant sections of that Act (ss.56(1) and 61(1)), a guardian or intervener does not become vested in the incapable adult’s property; merely in the right to deal with, manage or convey that property.

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