Land Reform (Scotland) Bill

Introduction

SRUC (Scotland’s Rural College) welcomes the opportunity to contribute to the consultation on the Land Reform (Scotland) Bill which the Scottish Government introduced on 22 June 2015.

SRUC is an innovative, knowledge-based organisation that supports the rural sector through research, education and expert consultancy services. SRUC wishes to see, and contribute significantly to delivering, a sustainable agricultural and rural land use sector in Scotland. SRUC staff work in a broad range of areas (for more information see www.sruc.ac.uk) and our responses to the questions below reflect this broad expertise, but draw on specific research projects where appropriate.

Several SRUC staff have contributed to this submission¹ which has been co-ordinated by SRUC’s Rural Policy Centre.

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For the Land Reform (Scotland) Bill the Scottish Government has requested that you clearly indicate which part(s) of the Bill you are responding to.

Part 1: Land rights and responsibilities statement (LRRS)

- The Policy Memorandum (PM) indicates that the LRRS should lead us to a proactive position where governance of land is consistent with the aspirations and outcomes desired in Scotland (Point 35). The LRRS should not simply be a statement of intent for land reform (as Point 42 of the PM expresses) but should also aim to establish key principles that the future governance, support and regulation of land in rural and urban Scotland should be founded upon.

- The PM proposes that a Land Rights and Responsibilities Statement (LRRS) would be published by the Scottish Government and renewed every five years (Point 41). This will be a statutory commitment (Point 45). We support the proposed updating of the LRRS every five years and would support it having to be endorsed by the Scottish Parliament.

- Based on our evidence presented in Rural Scotland in Focus 2014, we would welcome the formulation of a LRRS which also seeks to create meaningful linkages with the objectives of other national land use policies and strategies, e.g. NPF3, Land Use Strategy (being refreshed in 2016), National Forestry Strategy, Climate Change commitments, National Parks, CAP Reform, SRDP, Biodiversity Strategy and Targets, etc. An on-going LRRS would create further opportunities for coherence across policy domains and towards shared outcomes “in a holistic manner” (as stated in the PM). (See also point below on a Scottish Land Policy).

- The PM highlights that the previous consultation responses showed the need for clarity of terminology (specific phrases and words) in the LR(S)B (Point 40). The PM then states that the LRRS will provide “a clearer understanding of the Scottish Government’s ambitions and aims for the future of land reform in Scotland” (Point 44). The need for clarity of outcomes, and for a strategy with indicators to underpin their delivery, is something we proposed in terms of an overall rural strategy in Rural Scotland in Focus 2014. We would anticipate that, given the LRRS will apply to rural and urban settings, such clarity will be even more critical, given the range of environments and contexts it will need to address.

Part 2: The Scottish Land Commission

- We support the creation of the Land Commission (Section 2 (19)) and the appointment of Land Commissioners (Sections 20-21) to undertake the functions identified in the Bill independently. The PM (Point 53) states that Land Commissioners will have expertise or experience in: land reform, law, finance, economic issues, planning and development and environmental issues. We suggest that there should be at least one Commissioner with practical land management experience.

- Whilst the Land Commissioners have to have regard for the LRRS, it may be prudent to establish a statutory duty on the Commissioners to establish a Scottish Land Policy that goes beyond the LRRS which takes account of EU and international commitments (e.g. biodiversity, wetlands, etc) and uses best practice examples. A
Scottish Land Policy could provide a holistic overview of land use policy and provide a fully integrated policy (i.e. one which takes account of NPF3, (refreshed) Land Use Strategy, National Forestry Strategy, Climate Change commitments, National Parks, CAP PI, SRDP, Biodiversity Strategy and Targets, etc).

- The blend of expertise/experience the Scottish Land Commission may contain also offers the potential to lend coherence to wider policies for the land. As we set out in *Rural Scotland in Focus* 2014 (and in previous reports), evidence shows there is a need to integrate planning and development into land-use-focused decisions. Further, in *Rural Scotland in Focus* 2010, we published evidence which highlighted the need for on-going integration of environmental outcomes into mainstream land-based policy. The Land Commission therefore provides an exciting opportunity for pulling together multiple strands. Ministers can appoint Commissioners with the appropriate blend of expertise and working knowledge to cover all aspects of land governance, management, support and regulation to the industry.

- One of the four functions of the Land Commission is “to review the impact and effectiveness of any law or policy in relation to land” (PM Point 53). This function has two specific merits: (i) reviewing progress; and (ii) lending coherence to policy outcomes since the word used here is any policy, meaning that the potential for integration is significant. Evidence shows that for progress to be reviewed, a strategy with underpinning interim measures and indicators will be required (*Rural Scotland in Focus* 2014).

- The need for evidence and for cross-policy coherence is also recognised in the further description of the role of the Land Commissioners to be: "impartial in reviewing existing law and policy in relation to land" and that “their work takes an evidence-based approach” (PM Point 69). We welcome this commitment to impartiality, independence and evidence-gathering to underpin further developments in land reform.

- The PM states that the Land Commissioners “should have the discretion to set their own programme of work in accordance with emerging priorities in relation to land reform” (Point 55). Evidence (*Rural Scotland in Focus* 2014) shows the need not only to identify emerging priorities in the short to medium term, but also for the longer term. The commitment of the Scottish Government that future governments must also set out their objectives for land reform through the LRRS (Point 45) creates the potential for longer-term thinking and planning “in a consistent manner” (Point 42).

- We welcome the appointment of a Tenant Farming Commissioner (TFC) (Sections 22-34), including the Interim Tenant Farming Commissioner, as it increases the likelihood of addressing some of the difficult, and often expensive and time-consuming issues surrounding landlord-tenant relationships. We believe it is essential that the TFC works closely with all stakeholder organisations to establish respect from all parties.

- An industry-wide code of practice on Rent Reviews has already been agreed within the TFF (Tenant Farming Forum) between NFUS, STFA, SL&E etc. However, as it is voluntary, some parties may choose to ignore it. Whilst voluntary codes of practice have not always been successful (e.g. the dairy industry), we recognise that it may be a step too far to expect industry-wide agreement to statutory and enforceable codes of practice given the existing tensions between the different parties in agricultural tenure.
In drafting each code of practice (Section 25 (2)) it is essential that the TFC develops support from all stakeholder groups (beyond the consultation exercise described in the Bill (Section 25 (4))) in order for these codes of practice to carry weight. The tenancy sector has experienced many changes in the last 15 years and consensus building is required to develop a vibrant tenancy sector. We believe that the limit of the statutory power, to a maximum of £1,000, in enforcing the codes of practice should parties be found to be in breach, may limit their effectiveness. We would question whether £1,000 is enough of a deterrent when the rewards of increased rents or the ending of a secure tenancy may be much higher. Whilst the consultative and engagement role of the TFC is crucial, it will also need an appropriate level of power to enhance progress.

Part 3: Transparency of landownership in Scotland

- We support the Bill’s endeavours to improve the transparency of land ownership that will support a number of the Land Reform Bill’s objectives and possible future actions (e.g. land taxation) and we support full landownership transparency as set out in Part 3 of the Bill. However, it is difficult to understand how full landownership details will be voluntarily provided to the Keeper upon request (Section 36 amendment to Section 48 Land Registration etc. (Scotland) Act 2012) should the controlling interest not wish their identity to be known, unless the Keeper has the power to refuse registration of change of ownership.

- Recent research on rural community perspectives of grouse shooting conducted at SRUC highlighted the challenges communities can face in identifying a landholding representative to contact in certain cases. This can have knock on impacts relating to community awareness of, and satisfaction with, estate management activities in their local area. Additionally, the recent evaluation of the Community Right to Buy (conducted by SRUC and Ipsos MORI) evidenced similar barriers being faced by communities when pursuing Community Right to Buy applications. The existence of contact information and an accessible and visible representative for landholdings (particularly larger landholdings) therefore plays an important role in mitigating conflicts and creating opportunities for increasing community awareness of, and community involvement in, decision making processes relating to land use.

- The Bill does not take forward the December 2014 Consultation proposal that only entities registered within the EU could own land in Scotland. In our consultation response we highlighted the need for evidence on how such a restriction would improve transparency, particularly as it is relatively easy to establish a legal entity in the EU (although Directors would be identifiable, owners may not). We also highlighted that such restrictions may reduce GDP and restrict income generation or capital investment in a global market place and could reduce flows of external funds into local economies. Anecdotal evidence suggests that some non-EU owners have spent significant sums on holdings to the benefit of the wider rural economy (e.g. plant hire & builders and the associated multiplier benefits including spend on local goods/services).

Parts 4 and 5: Furthering the sustainable development of land

- The PM sets out how the Bill will “introduce a requirement on Scottish Ministers to provide guidance for landowners and tenants on engaging with communities on land-based decisions” (Point 163). Precision around terminology and definitions relating to the types of engagement and consultation required between land owner and
community, and the expected (different) outcomes of such engagement, will be critical to its delivery on the ground. We therefore welcome the commitment that: “the exact nature of the types of decisions, the form of engagement and consultation, what land owners are expected to do following such engagement will be set out in the guidance and the aims sought to be achieved will be set out in this guidance” (Point 164). We have presented evidence on the need for clarity in relation to process and outcomes, in consecutive *Rural Scotland in Focus* Reports.

- We welcome the Policy Memorandum’s outlining of a process of co-construction of guidelines with multiple stakeholders (Point 164) as this will enhance goodness-of-fit of such guidance for all parties. We particularly welcome the fact that such a process will examine what works as well as what doesn’t (Point 164), since our research into communities who do not engage shows the value in understanding why processes and intervention remain ineffective, and can indeed be counterproductive to the original aims.

- As we have outlined in our previous responses to the Community Empowerment (Scotland) Act and the Land Reform (Scotland) Bill, our research shows that creating *guidance* for partnership working will not necessarily result in communities being more empowered. Communities who are used to engaging are able to do so, and to secure the benefits of such processes. Given the emphasis in the PM on social justice, and the associated commitment to upholding the European Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights (Point 147), we would encourage the Scottish Government to include a specific focus on communities who do not engage. This would also allow the Scottish Government to deliver on its commitment “to help ensure all members of society have access to the resources required to meet their needs” (Part 148). Otherwise, our research evidence shows a danger of ‘Darwinian development’ becoming the norm, with less able and less well-resourced communities being left behind.

- Robust key tests need to be identified to define sustainable development. Land owners should also be given the opportunity to highlight any detrimental impacts on their business that may result from potential reductions in the land area available for agriculture and the reduction in land values. In the event of an enforced sale, the inclusion of a clawback clause could be included for situations where land is sold at agricultural value but is later used by the community for a use that is of higher value i.e. housing plots.

- Part 5 statutory provisions (akin to compulsory purchase) are a major new power of intervention in landownership. The provisions themselves suggest that some private landowners are stifling sustainable development whilst other land ownership structures would not. It must be recognised that sustainable development can also be hindered by objectors to the planning processes and by non-land holding inhabitants, in addition to private landowners. Careful consideration will need to be given to whether sustainable development should be prioritised over other considerations such as landscape preservation, habitat and environmental improvement or high level capital investment. Evidence shows that many land holdings can identify some benefits to Scottish society (e.g. employment, capital investment, forestry, biodiversity, food production, scenery, etc.) and consideration of how these benefits will be weighted in Ministerial decision-making will be important and require transparency (for example, regarding which national outcomes have higher priority). The Bill states that any transfer of land must:
  o further the achievement of sustainable development in relation to the land;
  o the transfer of land is in the public interest;
the transfer of land is likely to result in significant benefit to the community, and is the only practicable way of achieving that significant benefit;
not granting consent to the transfer of land would result in significant harm to the community.

The terms “sustainable development”, “public interest”, “significant benefit” and “significant harm” are subjective and mean different things to different people depending on social, economic, environmental and political beliefs, therefore they will need to be defined carefully.

- We support the Register of Land for Sustainable Development (Section 44) and the ability for communities to nominate appropriate third party purchase partners that may aid the community in achieving sustainable development goals.

Part 6 – Removal of the exemption from business rates for shooting and deerstalking

- Anecdotal evidence has highlighted that this proposal has seen some agricultural leases being ended on sporting estates. The sporting tenant is being issued with an agricultural tenancy in an attempt to avoid paying shooting rates. If the Scottish Government move forward with this proposal they should be mindful of unintended consequences and avoidance measures.

Part 10 – Agricultural Holdings

- There is some concern amongst stakeholders that, if agricultural holdings are included within the Land Reform (Scotland) Bill, there will be insufficient time for people to digest the Agricultural Holdings Legislation Review Group’s (AHLRG) recommendations, or to enable solutions to be developed that will resolve many of the difficult issues and may revitalise the agricultural tenancy market. There could be merit, therefore, in considering agricultural holdings being a Bill in its own right, rather than being coupled with the timeframe of the Land Reform Bill.

- The PM lists the eight aspirations for tenant farming that the AHLRG believed should be the focus of the Review’s final recommendations (Point 301). However, the Bill fails to address a number of these aspirations.

- The AHLRG argued that Assignation for Value would rectify a number of problems in the tenanted sector:
  - the lack of ‘churn’. Older tenants have little means to retire, if they were able to sell their lease it would allow them to retire with dignity. This would in turn free up land for new tenants to take on and invest in;
  - the burden of end of tenancy ‘way go’ on land owners. If the tenancy was sold, the market would set the value of the outgoing tenant’s improvements (which the incoming tenant would pay for) and thus remove a significant point of friction between landlord and tenant. It would also allow the tenant to make suitable investments throughout their tenancy in the knowledge that they would receive a market value for them on way go; and,
  - the ability of a tenant to invest on the same footing as an owner occupier. The option to buy and sell a 1991 Act Tenancy give tenants an asset against
which they could use as bank security and thus allow them the ability to borrow on a more even footing with an owner occupier – this is one of the key recommendations of the AHLRG group.

- The compromise on Assignation for Value of a 1991 Act Tenancy (to be European Court of Human Rights compliant) could in practice translate into the ability to convert a secure tenancy to a 25 year Modern Limited Duration Tenancy (MLDT). This modification of the original AHLRG proposal means that a number of the clear objectives of the AHLRG have now been omitted from the Bill as they were originally viewed as being dealt with by Assignation for Value.

- We identify three key issues regarding the rent review procedure:

  1) How to define the productive capacity of the holding:

     o The definition of this process from RG Williams' Agricultural Valuations Book is 'What a holding is capable of producing in the occupation of a competent tenant practising a system of farming suitable to the holding'.

     o LCA Classification, Macaulay soil maps, IACS data could be used to produce more standard procedures to define the productive capacity. The benefit of using this method is that there is a more standardised procedure that can be referred to if an agreement between the parties can not be reached. The disadvantage is that farming practices vary. For example, land with the same LCA classification can be used to carry different livestock enterprises or grow different crops. Variations also exist between neighbouring holdings and across regions. For example, the effect of a tenant’s improvements need to be taken into account which may render the holding in question not comparable with conditions on other local holdings which maybe all owner-occupied. Considerable expert opinion and knowledge will therefore still be required to adjust for the holding in question.

     o The alternative is to carry on as present (and as is done in England where experts with the knowledge of the holding are used). Benefits of this are that it is tailored to each individual holding and takes account of the specific conditions that are in place on that holding. A considerable list of factors will affect the productive capacity (such as climate, elevation, aspect and location) and expert opinion will allow all of these to be taken into account. Against this is that, without a framework, if parties cannot agree on the fundamental issues relating to productive capacity, then the whole process of the rent review will be flawed. However, this is likely only to be the case in a relatively low proportion of reviews.

     o We conclude therefore that while standard data such as LCA Classification, etc. may be used to inform the basics of the productive capacity, individual characteristics of the holding need to be taken into account by the parties. Clarity is required on the factors that go into the definition of productive capacity so that if there is a disagreement the issue can be decided by arbitrators or the land court.

  2) How to define the hypothetical tenant and the financial performance

     o This is effectively the related earning capacity as practised in England. R.G. Williams defines this as ‘the extent to which, in the light of the productive capacity a competent tenant practising a system of farming suitable for the holding can reasonably be expected to profit from the holding’.
The rent for the holding should be based on an average tenant not the actual activity of the tenant in question. Current financial performance of the tenant should not be taken into account as this can actually be completely divorced from the actual Productive Capacity and Related Earnings Capacity of the holding. This is the ‘competent tenant’ referred to in the R.G. Williams definition above.

This definition is needed because the sitting tenant may have made improvements (which need to be discounted from the whole process anyway) or run their business better or worse than average but this was nothing to do with what the landlord had offered, i.e. the land and any buildings/equipment. This needs to be based on what an average tenant would be capable of producing on the holding with only the landlord’s fixed equipment available to them. However, this is very open to debate and may require some input and expert guidance from an outside party such as an agricultural valuer, which could be beneficial as it could be tailored to the holding in question. Against this, there is no clear framework which could make settlement difficult in the absence of agreement between parties.

The use of standard, independently verified data such as the Farm Accounts Survey may inform this. However, there are limitations to the data as it is up to two years out of date and does not cover all farm enterprises. Similarly, any figures will need to be adjusted to take account of the individual factors that affect each holding and result in any deviation from the standard data.

We conclude that while standard data sources such as the Farm Accounts Survey can inform this decision, the individual circumstances of the holding being reviewed can result in significant deviation from ‘standard’ figures and some aspect of expert opinion will still be required. However, some sort of clear framework for the establishment of these figures would potentially be helpful particularly if an agreement cannot be reached and there is the need to use arbitrators or the land court.

3) How to manage price volatility when setting rents

If rents are based on the productive capacity and related earnings capacity then the issue of price volatility needs to be considered. Agricultural commodities are subject to considerable price variation as evidenced by considerable swings to beef, lamb, pig, dairy and cereals prices over recent years. As such, any agreement made based on historic data or even projections based on the current market circumstances could prove to be very different from the situations that unfold.

There is no easy answer to this problem – a three year rent review period is a long time when prices move so much and so quickly. Options to limit the impact of volatility are not clear and may not suit all circumstances. It will possibly come down to cap and collar arrangements or phasing rent changes over time e.g. a third every year over the three years. Similarly this process may result in considerable changes to the rental value which should similarly be phased in as mentioned in Appendix E of the ‘Review of Agricultural Holding Legislation’.

We are in agreement with the points on landlords’ breach as a tenant would have to go to the land court and embark on a lengthy legal process. At each step along this journey, the land owner has the option to take remedial action to correct the breach. Advisors could not recommend that a tenant embark on this course of action, as
considerable cost could be incurred at the land court with the land owner having the ability to rectify the breach right up until a final decision is made by the court.

- The **post sale obligations** (Part 10, Chapter 3, 38N) allow a former landlord to clawback some of the increase in value of the land if it is sold on at a profit within 10 years. There are several potential problems relating to this issue:
  - In a scenario whereby the former land owner has had a number of chances to carry out remedial action and has failed to do so, the property has been forced to sale by a court order and the former tenant has paid the independent valuation for the property, **should the former owner still have property rights under ECHR in this situation?**
  - The former tenant now owns the property. He/she will have spent a significant sum in legal fees (to the land court) and in purchasing the property. The rational thing to do would be to sell off a cottage or a small area of the property to reduce the debt and make the undertaking more manageable. (This is very common with farms purchased on the open market). The bill requires 100% of any uplift to be paid to the former land owner on any sale within the first 5 years dropping down to 33% of uplift up to 10 years. This restriction is a further hurdle to the tenant - **does it breach ECHR as an infringement on the property rights of the new owner?**
  - The price the former tenant paid for the property is normally set by a formula which gives a discount of one third due to the farm being subject to a 1991 Act Tenancy and if the tenant has invested in improving the property a further discount is given for the tenant’s improvements. The result would be a farm being sold to a sitting tenant for roughly 50% of open market value. The proposal for compensating the former land owner for any re-sale could be viewed as compensating him or her with (in part) the value the tenant has earned through his or her improvements.

- Point 38 N5b mentions standard securities and priorities being made to the above obligation. This clause could make bank borrowing more difficult for the former tenant if 100% of uplift is due to go to the former land owner for the first five years.

- **Bequest of 1991 Act Tenancies**
  - Part 10, Chapter 5, 87. We broadly support this measure. Please note that historically the 1948 Agricultural Holdings Act allowed the bequest of a lease to anyone: there were no restrictions at all. That provision has been gradually narrowed over the years and this measure could be viewed as a redress.
  - Currently, the landlord’s rights to object are on grounds of poor character, insufficient resources and insufficient ability. We recommend that this should not be changed.

- **Compensation for Tenants’ Improvements (Chapter 6)**
  - A tenant’s improvements amnesty is a good idea but guidance will need to be given on what can and cannot be registered (which could perhaps be a role for the TF Commissioner). Without guidance, disputes and land court cases may arise.
  - With the changes made to the Assignation for Value, the tenant should be able to choose whether they go down the “way-go” route or the “Assignation
Route”. We believe that the sale of a tenancy to an MLDT could raise considerably less money for an outgoing tenant than going through a properly valued way-go (especially if the tenant has a significant amount invested in improvements).

- The current system for a tenant to end their tenancy is to issue a notice to their landlord. Only after the Incontestable Notice to Quit is issued is the land owner obliged to discuss compensation for tenant’s improvements. This puts the tenant at a huge disadvantage and often agreement isn’t reached till after the tenant has left the farm. A two stage notice to quit would allow a tenant to agree what compensation they would receive before they agreed to leave the holding. This would allow the tenant to continue the tenancy if they felt the compensation for improvements was not sufficient.

END SRUC RPC Consultation Response to the Land Reform (Scotland) Bill