

Land Reform (Scotland) Bill 2015 – Stage 1 evidence submission to RACCE Committee

High Level Summary

CLS supports -

- the general principles of the Bill
- the need for the Scottish Government to publish a Statement of Land Rights and Responsibilities
- the creation of a Land Commission to make land reform a continuous process of change
- greater measures to make who owns Scotland more transparent
- the additional Community Right to Buy to further sustainable development
- the provision for community body nomination of a 'third party' to own land
- the re-introduction of 'sporting rates'
- new powers to SNH to have deer numbers and impacts managed more effectively
- improved rights for tenant farmers

The Bill needs to be stronger by –

- requiring Ministers to have regard to the progressive realisation of human rights, and the delivery of greater diversity in land ownership in making the Statement
- toughening up the requirements for information from proprietors on who owns and benefits from ownership of Scotland's land, by requiring certain information to be disclosed
- giving further powers to Scottish Ministers to intervene in land ownership, in the public interest, to further sustainable development, and support the creation of new settlements
- toughening up the requirement for land owners to engage with communities, and to include seeking the consent to local land management decisions

Introduction

CLS welcomes the introduction of the Bill and many of its specific provisions and while supporting its general principles believes the Bill needs to, and can be, significantly improved and strengthened to achieve the policy objectives outlined in the Policy Memorandum.

The Policy Memorandum and other accompanying documents to the Bill helpfully set out the policy objectives of the Scottish Government for land reform. These include important references to:

- promoting fairness, social justice, well-being and greater equality
- empowering greater numbers of people
- ensuring greater diversity of ownership and changing the patterns of land ownership
- achieving greater sustainable development
- managing land for the common good
- fairer and more equal access to land
- the progressive realisation of human rights of adequate standards of living, housing and certain rights to work
- more community self-reliance, and increasing economic independence

CLS would like to see more of the specifics of what is in the policy rationale finding a place within the provisions of the Bill itself.

This submission principally focusses on Parts 1 to 5 as being the Parts in which CLS has the greatest experience and insights.

Scope for improvement and strengthening of the Bill. In summary:

Part 1 – The Statement of Land Rights and Responsibilities

a) In making the Land Rights and Responsibilities Statement, Scottish Ministers should be under an obligation to consider the extent to which the Statement will further:

- The progressive realisation of human rights
- Sustainable development
- The achievement of equalities
- The achievement of a greater diversity in land ownership in Scotland, [and, potentially]
- The common good

These would not be the only considerations for Ministers, but the purpose of such changes would be to make clearer that the statement of land rights and responsibilities is about Ministers policy objectives, linking land policy to achieving wider public objectives, as clearly set out in the Policy Memorandum. In this context, perhaps the name chosen for the Statement could be improved?

A draft of what such a Statement could comprise was set out in the consultation, and the contents of which were generally welcomed. There would be no guarantee any future Statement would resemble what was initially suggested. The inclusion in the Bill of what is suggested above would help make clear certain core objectives of land reform policy, to guide the creation of the Statement.

b) It would be important to make explicit on the face of the Bill that the Statement was to be consulted on prior to it being laid before Parliament for approval.

c) A further strengthening would be to require that Scottish Ministers report to Parliament, at least every two years, with an assessment of the extent to which progress was being made against the objectives set out in the Statement.

d) It would further be worthy of consideration whether giving Scottish Ministers a power to make National Priorities in land reform, to be the subject of approval of Parliament, could add to the potential array of measures to drive progress during specific periods of time, in order to help to meet specific requirements of national policy.

Part 2 – The Land Commission

Name: CLS would prefer to see the Commission called the Land **Reform** Commission, as was proposed in the consultation paper. This would serve to make fundamentally clear that the Commission was concerned with the delivery, over time, of justified reform and change.

Chapter 1

Strategic Plan: A requirement on the Commission to consult on a draft of its Strategic Plan prior to submitting it to Ministers would be desirable. In this context the requirement for the first plan to be submitted within 6 months may be ambitious and act against full consultation.

Programme of work: A requirement to also consult on its “programme of work”.

Membership: It will be important that the Commission, as appears intended, is to comprise people appointed on their individual merit and because of the particular skills they can bring. If, over time, the Commission is to recommend change in current land laws and policies, or the absence of such laws and policies, this is almost always going to be controversial and not likely to be achieved by full and wide consensus – land reform policy always holding the potential to change power relationships in society. As such, the Commission needs to be able to act

independently of any established vested interests or the representatives of such interests, and should not seek to be representative of such interests in who is appointed.

Eligibility for appointment: CLS feel these could be strengthened by the addition of expertise or experience in questions of - human rights; equalities; community development.

Chapter 2 - Functions of Land Commissioners:

- a) To make explicit that the functions include the impact and effectiveness of the lack of any policy or law, as well as extant policy and law. This may be implied, but it is important this is clear.(1)(a)(b)
- b) It may be advantageous to add a provision which would permit the Commission, if they thought it appropriate, to recommend (and potentially issue) any Codes of Practice or Guidance in respect of any matter in which they have an interest, or to assist in the creation of such by other parties.
- c) It should be made clear the Commission should have regard to international land policy and international obligations potentially affecting land policy and practice, and thus incurring any expenditure on such would be within vires.

Part 3 – Information about the control of land

This part of the Bill is very weak compared to original consultation suggestions.

CLS would urge the RACCE Committee to closely scrutinise why it has not been felt possible to proceed with the original proposals regarding the requirement for an EU registered base for ownership of land in Scotland, in the hope there is scope to re-visit this as still having potential within the Bill. A recent briefing by Andy Wightman rehearses many of the arguments (<http://www.andywightman.com/archives/4300>), as did earlier evidence from Global Witness, and CLS commend these to the Committee.

Within the context of what is not proposed, it is welcome that Ministers may make regulations, but the extent to which those regulations could impose requirements on private organisations or individuals is not clear.

While it is recognised there may be considerable legal complexity around what it may be possible to deliver, the new powers given to the Keeper appear particularly weak. The power is, by regulation, to allow the keeper to “request” information relating to proprietors, etc. It is not clear that the request for such information extends to the identification of those with beneficial interests. It would appear that any such “request” may be simply refused, without any repercussions. The term “request” should at the very least be changed to one which can require information, in order to strengthen the provision.

Even under what is proposed, where any proprietor refused a “request” there should be a requirement for this to be publicly reported by the Keeper to Parliament annually.

The Bill could usefully strengthen any deficiency in current powers available to the Keeper to have information for their records updated when change in what is first lodged. For example, when an SPV is used to own land and the shareholdings and controlling interests potentially change in the SPV, these would not be recorded on the face of the register currently.

Part 4 – Engaging Communities in decisions relating to land

CLS is lukewarm about these proposals as a means of genuinely empowering communities. The provision as it stands is weak as it would be all too easy for owners to engage and then ignore, yet meet the requirement.

- a) The provision could be strengthened by making explicit that the Guidance Scottish Ministers must issue, is about “engaging and seeking the agreement of communities for decisions relating to land”.
- b) Further, the proposed requirements on Ministers to have regard to sustainable development in preparing the guidance would be strengthened by also having regard to the progressive realisation of human rights, and of equalities.

c) A requirement for Ministers to consult in the preparation of such guidance, and to periodically report to Parliament on the utilisation of such Guidance would be further important strengthening of the Bill.

Part 5 – The Right to Buy Land To Further Sustainable Development

While some may regard sustainable development as a vague term, CLS does not share that view and notes the *Opinion of the Lord President [Lord Gill] in the cause of Pairc Crofters Ltd and Pairc Renewables Ltd against the Scottish Ministers*, 19 December 2012, in a challenge based on an argument that the term was so vague as to be in effect “not law”. He concluded:

“In my view the term sustainable development is in common parlance in matters relating to the use and development of land. It is an expression that would have been readily understood by the legislators, the Ministers and the Land Court. ...”

More generally, the Bill could strengthen and improve these welcome proposals by:

- a. adding a power for Ministers to change by regulations the requirements for certain information on the location and boundaries of land, including land to which tenants might have an interest. A similar provision was agreed in the passage of the recent Community Empowerment Bill and if experience shows the requirement is too onerous. (45 (6)(b))
- b. modifying the requirement for the community body to show the transfer of the land is “the only practicable” way to achieve the significant benefit envisaged, as it may be impossible to ever show something was “the only” way. This could be modified to make it the “only or most practicable way”, or some such formulation. (47(2) (c) (ii))
- c. modifying the requirement to show that not granting consent to the transfer of land is likely to result in significant harm to that community. This is a very high hurdle and may be difficult to ever fully show. This could be improved by further qualifying the requirement to be about “harm to the sustainable development potential of the community”, or some such formulation.
- d. ensuring Ministers, in considering any application, should be required to have regard to the International Covenant on Economic, Social and Cultural Rights, as is now required for any CRtB applications under Parts 2, 3 and 3A of the Land Reform Act (as amended by the Community Empowerment Act 2015).
- e. amending the provision which would block the transfer where the owner is “prevented from selling the land”, which as drafted, may be an invitation for owners to create Trust structures which on the face of it prevent the Trust disposing of the land at any time, as an avoidance mechanism.(47(f)(i))(see further note on the National Trust for Scotland, Annex 1)
- f. adding to the provision that requires Ministers to consider the likely effect of granting consent to a transfer, to include consideration of the progressive realisation of human rights, and of furthering the achievement of equalities. (47(10))

Third Party Owner Nomination

This is a welcome and innovative provision for a third party to be nominated by the applicant community body to own the land, particularly as this would potentially enable housing associations or others with particular expertise to be partners. The Bill sets out a number of important safeguards to protect the public interest in the use of this provision and it will be important these safeguards are maintained through the passage of the Bill and strengthened in appropriate ways if necessary.

Part 10 – Agricultural Holdings

CLS does not intend to comment in detail on the proposals which are generally welcome in so far as they go toward further strengthening tenants’ rights.

Significant omission in the provisions and thinking of the Bill.

The Bill provides for only a community body to act when it is believed there is a need to further sustainable development. There are no powers for a Minister to act directly.

It is clear to CLS there may be land in which the community may not be in a position to act for a variety of sound reasons, or there will be land in which there is a public interest, but where there is not a community to act (the community having been cleared from the land, for example).

It must surely be right that Scottish Ministers, accountable to Parliament, should be able to ask the question of whether the ownership of any land holding, or the scale of any ownership of land by any one person, is in the public interest. As matters stand it is only upon application by a community that this matter can be considered by Ministers.

So, if, for example, Ministers referred the question of whether any particular ownership of land was in the public interest to the Land Commission and the Commission said it was in their view not in the public interest, then Ministers, as matters stand and are proposed, would have no powers to do anything by way of, for example, recommending the sale of that land or any part of it.

Similarly, if Ministers were to be persuaded that land was required for the creation of new crofts or for settlement or re-settlement of land, would any extant powers be sufficient to purchase that land for that purpose? As proposed, Ministers would have to depend on a community right to buy application to consider this and the possibility of even this is potentially compromised by the specific current requirements for showing a connection to the land. (47(g))

Provisions to permit Ministers to act on recommendations of the Commission, or otherwise, when they thought it was in the public interest to do so, with appropriate appeals mechanisms, would significantly improve the Bill and answer some of the criticism that it does not go far enough in being able to intervene in land questions if they considered the public interest warranted this.

Further, within the Land Reform Review Group report it was suggested a power be given to local authorities, to approve a “compulsory sale order” in circumstances where it was regarded as necessary to see a change of ownership because of blight or stagnation of the use of the land in question, as an additional option to CPO or community purchase. Such a power would be entirely consistent with the objectives of this Bill and should be considered at this time too.

Conclusion

This evidence paper signals strong support for the general principles of the Bill and many of its detailed provisions, but also illustrates where the Bill could be improved and strengthened.

CLS will continue to work on the ideas contained in this short evidence paper with a view to suggesting more precise changes to the Bill for Stage 2, although it is hoped the Scottish Government will also consider the potential improvements identified with a view to developing them into Government amendments, something that will be greatly strengthened by the support of the RACCE Committee to any of the strengthening ideas.

Annex 1

The National Trust for Scotland generally decline to sell land on the basis that they hold the land “inalienably”, although they are understood to be reviewing their policy in this regard. It is not clear if the draft provision is intended to cover this situation. However, even if it is, it is not clear this is appropriate.

The equality impact assessment statement for the Bill rightly says:

“4.18 How land is used in a local area can have significant impacts on local communities. Where communities have been unable to influence development decisions and cannot access land for their own development, this can have detrimental impacts.

Examples show that this can result in:

a) a lack of affordable housing or secure tenancies;

b) a lack of land for agricultural businesses;

c) a lack of community business space or access to property for business opportunities;

d) blight caused by declining appearance of buildings or land, or poor performance of local village/ town centres; and
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e) a lack of land for local food growing, recreation and access developments, or other amenities such as parks or cemeteries.

4.19 This Bill, therefore, proposes the production of guidance to increase engagement between communities and land owners as well as a right to buy land to further sustainable development.....”

This statement would imply that any community denied ownership of land under the proposals in the Bill, because the land was unable to be sold, would enjoy less rights than other communities, and less equality with them. This is another reason for being clear of the implications of (47(f)(i)).

ENDS

Community Land Scotland

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