

Written submission from Scottish Land and Estates

Introduction

Scottish Land & Estates received a paper setting out the proposed amendment to section 79 of the Land Reform (Scotland) Bill from Scottish Government policy officials on 4 December. A further paper was released by policy officials on 22 December setting out further detail on the proposal. Our written evidence is based on the information contained in the papers received from policy officials, as well as the letter sent to the RACCE Committee on 4 December with details of the proposal.

Scottish Land & Estates is strongly opposed to the proposed amendment to section 79 of the Bill which would replace the “conversion to MLDT” model with an “assignment for value” model. We have set out our grounds of opposition to the proposal in principle below, both in terms of procedure and content.

Scottish Land & Estates has endeavoured to contribute to the land reform process as constructively as possible and, to that end, notwithstanding our opposition to the principle of the proposal, we have also set out a number of points relating to the technical aspects of the proposal. However, our comments on technical detail are without prejudice to our fundamental objection to the proposal in principle.

Procedure

Insufficient justification or explanation for policy change at this stage of parliamentary process

The measures aimed at allowing 1991 Act tenant farmers to retire have been discussed throughout the land reform process. The “assignment for value” model was specifically considered by the Agricultural Holdings Legislation Review Group and, in its final report, the Review Group stated that the “public interest case for such a change has *not* been made”. The final report was published after the Review Group’s thorough review of the tenanted sector over a period of many months, gathering evidence and consulting stakeholders across the country. We would question why the Scottish Government has brought forward a proposal which directly contradicts the findings of the Review Group, with no explanation or justification for the policy change.

At the time that the Agricultural Holdings Legislation Review Group’s Report was published, it was made clear by the Review Group that the recommendations were considered to be a “package”. This is clear from the Report which states that the “recommendations have been developed as an integrated package, and reflect the interlinked nature of the challenges being addressed”. Scottish Land & Estates acknowledges that the Bill as drafted does not implement the “integrated package” in its entirety. However, the introduction of the “assignment for value” model shows further movement away from the “integrated package”. The fact that this measure has been introduced separately at stage two of the parliamentary process makes it clear that the Scottish Government does not support the concept of the “integrated package” and instead views each measure as a stand-alone proposal for amendment. Scottish Land & Estates does not support this approach and considers

it to be detrimental to the land reform process, and more importantly to achieving the aim of a vibrant tenanted sector.

The RACCE Committee's Stage 1 Report makes it clear that section 79 as currently drafted is not acceptable as it does not contain sufficient detail and leaves substantive policy to secondary legislation. We, like others, hoped that the Scottish Government's response would be to provide details on how the conversion provisions would work in practice. Instead, the Scottish Government proposed a new policy. We would reiterate again that we do not consider that there has been sufficient explanation or justification for the significant change in policy at this stage of the parliamentary process.

Introduction of proposal at this stage sends a negative message to the industry

Scottish Land & Estates has actively and openly engaged with the land reform process on behalf of its members. We accepted that section 79 could deliver the policy objectives and benefit the sector, notwithstanding that it could have negative consequences for those landowners who may have been expecting to re-gain vacant possession in the near future. We spent considerable time canvassing our members on this issue and reaching a position where impact on individuals was viewed as secondary to the sectoral benefit. We feel that this change of policy at this late stage, without sufficient justification, consultation or explanation, shows contempt for the efforts of Scottish Land & Estates and its members.

The policy aims of the Bill include increasing the amount of land let and securing a vibrant tenant sector. A significant change in policy following the publication of a stage 1 report (which does not contain any recommendations relating to the proposal) is unlikely to assist with achieving these aims, given that landowners will understandably have no confidence to let land (other than perhaps on a short term basis) as a result.

Following notification of the proposed amendment to members, Scottish Land & Estates has received correspondence from a number of members setting out their frustration at the proposal and, in some cases, advising that they fail to see why landlords would let land other than under a short limited duration tenancy in the future. This is entirely the opposite of what the industry is seeking to achieve.

Lack of consultation on proposal

We have obtained a formal legal opinion which suggests that there has been insufficient public consultation on the proposal, particularly in the context of the "assignment for value" model having already been ruled out by the Agricultural Holdings Legislation Review Group. Although we appreciate that we have now been given the opportunity to formally submit evidence on the proposal, we strongly believe that the Scottish Government has not acted in a reasonable manner in relation to the proposed amendment.

Policy

Policy objectives will not be met – landowners will be discouraged from letting land on long term basis

Scottish Land & Estates anticipates that the introduction of the “assignment for value” model will have a significant impact on a landlord’s decision as to whether to let land and on what basis. However, there is no evidence to suggest that the Scottish Government has carried out a full assessment on the likely impact of the proposal. Scottish Land & Estates urges the Scottish Government to consider the impact which this measure will have on the decision making process of landowners who are currently letting land or may be letting land in the future in Scotland.

The Scottish Government is seeking to encourage landowners to let land on a long term basis. It is difficult to see why landowners would consider letting land on a long term basis when the Scottish Government has made it clear that they are willing to disregard the interests of landowners who are currently letting land on a long term basis. Significant changes to one type of regulated tenancy will undoubtedly have wide ranging consequences for other types of tenancies and the way in which they are used.

Policy aims can be met by “conversion to MLDT” model which is a less harmful alternative

Scottish Land & Estates has shown support for the “conversion to MLDT” model and accepts that it could create churn in the sector. Provided that the model contained suitable provision for balancing the interests of the landlord, we contend that it could potentially meet the policy objective of allowing tenant farmers to retire where there is not a viable successor. The land would also continue to be let on a long term basis. However, we would highlight that those landowners with a reasonable expectation of vacant possession would be negatively affected by such a measure and this should be acknowledged and accommodated.

The Scottish Government has now rejected the “conversion to MLDT” model in favour of the “assignment for value” model. It is clear that the “assignment for value” model has a significantly larger impact on landlords’ rights than the “conversion to MLDT” model. Whereas the landlord’s legitimate expectation of recovering vacant possession would be delayed by a fixed period of time by the “conversion to MLDT” model, it could potentially be delayed indefinitely, if not permanently when one considers other proposals for changes to succession by the “assignment for value” model, unless the landlord is in a position to “buy out the tenancy” at the time of assignment. The impact would be even more significant where the current tenant is a partnership and the landlord would, in the majority of cases, therefore expect to gain vacant possession following a change in the partnership (for example on the death of a partner). If the partnership assigns the tenancy to an individual, a lease which previously had a limited duration would become a secure tenancy.

The option to “buy-out” the tenancy has been put forward as a way of protecting the rights of landlords and ensuring that the measure is balanced. The “buy-out” option will be of little benefit to landlords who do not have sufficient financial resources and, in particular, small landowners who may own one or two farms are unlikely to be able to utilise such a provision.

It is both disappointing and perplexing that the Scottish Government is choosing to pursue the “assignment for value” model when the declared objectives could be achieved in a far less harmful, and therefore more proportionate, way through the

“conversion to MLDT” model. The existence of a more balanced measure which would deliver the objectives would also be key in a human rights analysis (set out in more detail below).

Perpetuation of 1991 Act tenancies

In our view, the change in policy can only be explained by reference to a wish to perpetuate 1991 Act tenancies. Our view is supported by the language contained in the Scottish Government paper dated 4 December which suggests that the Scottish Government does not consider fixed term tenancies to be conducive to productive farming. In particular, we make reference to paragraphs 20 (“a 25 year MLDT was strongly felt to be too short to enable the land to be farmed as productively as possible...”) and paragraph 21 (“We were also concerned that a term of only 25 years could deter farmers from investing as much in their holdings as they might otherwise have done, potentially limiting productivity and hindering modernisation”).

This language seems to be at odds with the Scottish Government’s proposal to introduce the MLDT with a minimum duration of 10 years. Furthermore, this negative attitude towards fixed term tenancies is not reflected in the Agricultural Holdings Review Group’s Final Report which highlights the importance of fixed term vehicles for the sector. Scottish Land & Estates is not aware of evidence gathered by the Scottish Government which supports the view that fixed term tenancies do not provide sufficient security to encourage investment and therefore questions the assertions made by the Scottish Government in the paper.

Scottish Land & Estates strongly supports the concept of fixed term tenancies and is aware of many examples of productive and successful units currently let under limited duration tenancies. We note the current reforms to the process of waygoing which we anticipate will provide tenants with added certainty regarding investment on the holding. We would also highlight that landowners may be more inclined to invest in holdings let under fixed term tenancies due to the certainty involved in the arrangement. The prospect of letting land under fixed term tenancies is also more likely to encourage landowners to let land. However the impact of the language used in this policy proposal and the apparent disregard of the value of fixed term tenancies may well make landowners concerned that future political intervention will arise when a number of them are nearing termination.

The message sent by the “conversion to MLDT” model was one of a sector moving forward to a vibrant and modernised future, a key element of which are fixed term agreements, and this is a message which Scottish Land & Estates endorses. However, the change to the “assignment for value” model sends a message that tenancies with a limited duration, of whatever length, are not conducive to productive agriculture. Scottish Land & Estates completely disagrees with this and believes that this message will be entirely counter-productive to achieving confidence and trust in the sector.

“Assignment for value” will not necessarily result in higher payment from assignee

Scottish Land & Estates understands that there is a view that the “assignment for value” model would result in a higher payment to the outgoing tenant than the “conversion to MLDT” model, thus providing the outgoing tenant with greater

financial security when retiring. This view appears to be based on the belief that a 1991 Act tenancy would always have a higher value in the market than a fixed term tenancy. Scottish Land & Estates believes this to be incorrect.

The process of valuing a 1991 Act tenancy involves calculating income to be generated in the future. A discount would be applied to income to be generated many years in the future and, as a result, the value of the 1991 Act tenancy would not be greater than a long fixed term tenancy. Outgoing tenants would therefore not necessarily be expected to receive a higher figure from an incoming tenant under the “assignment for value” model than they would under the “conversion to MLDT” model.

Broad range of factors affecting tenant’s decision to retire – not only lack of successor

We understand that the aim of section 79 is, firstly, to give farmers with 1991 Act tenancies a route that will enable them to exit their tenancies with dignity and security without being dependent on a family member succeeding the tenancy, and secondly, to increase opportunities for newer tenant farmers to establish themselves.

Scottish Land & Estates supports these aims but questions the extent to which the Scottish Government has fully investigated and researched the range of factors which may affect a farming tenant’s decision to retire. A “Survey of Agricultural Tenants” was published by the Scottish Government in 2014 which highlighted the broad range of factors which could affect a tenant’s decision to retire. In particular, we note that 46% of the respondents said that they would “never want to give up farming”. 28 respondents (out of the 3,095 responses which were received in total) stated the lack of successor as a reason. A report published by the Future of Farming Review Group in England in 2013 also suggests that there are many reasons why farmers may continue to work in the industry beyond the age which people in other sectors would choose to retire, including agricultural subsidies and the inheritance tax framework. The likely impact of the proposal on a tenant’s decision to retire cannot be determined without considering the other relevant factors and the Scottish Government’s own survey indicates that a lack of successor is relevant to a very small minority of tenant farms. It is disappointing that this has not been acknowledged by the Scottish Government.

Human Rights Considerations

Throughout the Stage 1 Report, the RACCE Committee highlights the importance of ensuring that the provisions of the Bill comply with the European Convention on Human Rights. In particular, the Committee makes specific reference to human rights considerations and Part 10 of the Bill and the disastrous impact of the *Salvesen v Riddell* case on the Scottish tenanted sector.

As stated above, Scottish Land & Estates has obtained a formal legal opinion on the legality of the proposed amendment, a copy of which has previously been provided to the RACCE Committee, which analysed the proposal in the context of human rights.

It is clear that the “assignment for value” model interferes with the property rights of landlords because it means that the 1991 Act tenancy can be preserved indefinitely (whereas otherwise the lease would have come to an end if there was no viable successor in terms of the legislation). The interference must therefore be justified. We have set out some of the key aspects of analysis seeking to determine whether the interference is justified below.

It is not clear whether there is a legitimate aim

The broad aims of the measure are stated to be (i) giving farmers a route to retire and (ii) increasing opportunities for newer tenant farmers to establish themselves. However, given that these aims could be achieved by the “conversion to MDLT” model, our view is that the aim of the proposed amendment must relate more specifically to the preservation of 1991 Act tenancies (given that this is the main difference between the two models). It is questionable whether the creation of perpetual tenancies pursues a legitimate aim for the purposes of Article 1 Protocol 1.

The rational connection between the measure and the policy objectives is debatable

The fact that a landlord will have the opportunity to “buy-out” the tenancy and many landlords will take advantage of this opportunity if they are financially able to do so means that the policy will not increase the amount of land let in Scotland or increase opportunities for new tenant farmers.

The measure does not strike the balance between the rights of tenants and landlords

Although the “assignment for value” model contains some provisions which are seeking to balance the rights of the landlord (for example, the right to “buy out” the tenancy), these are insufficient and we have raised significant concerns relating to these provisions below. The retrospective nature of the proposal means that many landowners’ expectations in respect of their land will be severely affected. The measure does not strike a balance between the rights of landlords and tenants.

We are strongly of the view that the “conversion to MDLT” model could potentially meet the aims of increasing the amount of land let in Scotland and allowing 1991 Act tenants to retire, as well as introducing new blood into the industry (provided that there are suitable safeguards in place to balance the rights of the landlord). This route would be less detrimental to the rights and interests of landlords, and benefit the sector as a whole. There seems to be no justification for pursuing a measure which causes more harm to the interests of landlords without any gain in terms of meeting policy objectives.

Having received Counsel’s Opinion, Scottish Land & Estates is of the view that the amendment could be subject to successful legal challenge on the grounds that it breaches the European Convention on Human Rights.

Technical issues

Payment to be made by landlord (nature of payment and valuation)

Nature of payment payable by landlord is not clear

The basis of the payment which would be payable by the landlord to the tenant if the landlord exercised his “right to buy” is not clear from the information provided by the Scottish Government. The wording contained in documentation from policy officials states that the landlord can “buy the tenant’s interest in the tenancy”. There is also a suggestion that the tenant is being “compensated” beyond any rightful way-go claims. We consider it to be fundamental that the nature of the payment is clearly identified and set out. If the nature of the payment is not clear, it will not be possible to ascertain whether the payment is the correct amount.

Valuation methodology based on capital value is flawed

The methodology put forward by the Scottish Government appears to be based on the concept of capital value. The rationale for this methodology is not clear and Scottish Land & Estates does not consider the capital value of the land to be relevant to the value of the tenancy.

The methodology appears to be loosely based on section 55 of the Agricultural Holdings (Scotland) Act 2003 which makes provision for compensation payable to a tenant where a landlord wishes to sell the holding with vacant possession and enters into an agreement with the tenant. The compensation is half the difference between the estimated value of land if sold with vacant possession and the estimated value of the land if sold with a tenant in occupation. We know of very few instances of these provisions being used in practice since 2003.

We are aware that some believe that the proposed methodology will always result in a 1991 Act tenant receiving a higher payment from the landlord than would be received from an incoming assignee. If that is the case, in effect the landlord would be paying a premium rather than paying the same price as an incoming assignee which breaches the principle of fairness. It is arguable that a challenge could therefore be raised on grounds of discrimination (Article 14 of the European Convention on Human Rights). However, given the lack of modelling carried out in connection with the methodology, it is currently not possible to make a definitive statement on this issue.

Other issues with valuation methodology

Even if the basis of the payment is accepted, we have other significant concerns regarding the valuation methodology.

It requires a value for land with a 1991 Act tenant. However, there is no market for acquiring or buying an individual holding with a 1991 act tenant. There is a commonly held assumption that the value of land with a 1991 Act tenant is 50% of the value of the land with vacant possession but, following consultations with professional valuers, we understand that some place the value at 30% of the value of the land with vacant possession or lower. The methodology is based on the assertion that a valuation can be obtained for the land with a 1991 Act tenant but we query whether such a value can be fairly obtained, given the differing views in the industry and the lack of evidence.

We note that the deemed value of the land with a 1991 Act tenant will depend upon the likelihood of a successor. It is not clear how the “likelihood” of a successor will

be determined. There will be circumstances where there is in theory a successor but, in reality, there is no individual willing to farm the holding. Establishing a valuation on the “likelihood” of a successor will be highly subjective and open to challenge.

Furthermore, assuming that the assignation for value model would be introduced along with the provisions relating to the widening of succession (which we understand is what is proposed), there will be few tenancies where a theoretical successor cannot be identified. The value of the land with a 1991 Act tenant is therefore likely to be low, which means that the sum payable by the landlord to the tenant (based on the difference in the value of the land with a 1991 Act tenant and the value of the land with vacant possession) will be high. Although the valuation may appear at first glance to be attempting to be fair, it prejudices the landlord when viewed in the context of the other provisions of the Bill.

The value of the tenant’s improvements should be deducted from the value of the land in the calculation. If the value of the improvements is not deducted, the value will be double-counted as the tenant will also be paid way-go compensation for the improvements.

We note that account is to be taken of way-go compensation in the valuation figure. Any claims which the landlord has against the tenant should also be factored into the calculation.

As currently drafted, the proposal will involve the following valuations: (i) open market valuation of the land with vacant possession, (ii) valuation of the land with a sitting tenant, (iii) valuation of improvements, and (iv) valuation of any dilapidations. We anticipate that the cost of these valuations (to be met by the tenant) could be as much as £10,000 depending on the circumstances, which may prove to be prohibitively expensive from a tenant’s perspective.

Given the complexities and difficulties involved in identifying a workable and fair valuation methodology, it would have been prudent for the Scottish Government to have obtained detailed professional advice in connection with the proposal before bringing it forward. This does not appear to have been done and, as a result, the valuation methodology is lacking in sufficient detail and, in some aspects, is entirely flawed.

Time Period for the Valuations

As set out above, the valuer will be required to provide 4 valuations within a 6 week period. This is not realistic. In addition, before valuations can be given, the landlord and the tenant will need to reach agreement on the dilapidations and this process can be lengthy.

Objection to the Valuer

The documentation received from policy officials states that the valuer is to be appointed by the Tenant Farming Commissioner and the tenant can object to the valuer if he perceives there to be a conflict of interest. In order to meet the

requirements of fairness, both the landlord and the tenant should be able to object to the appointment of the valuer.

Unwritten Lease

The process as set out does not seem to take account of the situation where the landlord and outgoing tenant have an unwritten lease. An assignee will require the certainty of a written lease, which will require to be negotiated between the landlord and outgoing tenant within the process. The timescales will therefore need to take account of this step. Any expenses, including legal expenses, incurred by the landlord in connection with the negotiation of the lease should be met by the outgoing tenant.

Class of Potential Assignees

Difficulties surrounding framing definition

The ability to assign will be restricted to assignees who are “new entrants” or “farmers wishing to progress in the industry”. We assume that the definition of “new entrant” will follow the definition used for the purposes of the Common Agricultural Policy, though clarity on this point is required as soon as possible.

The definition of a “farmer wishing to progress in the industry” is less certain. Anti-avoidance rules will also need to be carefully considered in this area. For example, where the lease is in favour of the father and the son is employed on the holding, could the son qualify as a “farmer wishing to progress” even though both farms will, in practice, be operated together? We anticipate that it would be very difficult to ensure that the provisions are used only by those who the Scottish Government is seeking to assist with this measure.

At this stage, given the level of detail and modelling, it is difficult to comment on the likely value of tenancies in the open market. However, if the values are high, we would question how a “new entrant” or a “farmer wishing to progress” in the industry will be in a position to pay the outgoing tenant, particularly given the other capital inputs which will be required. In the event that the market value payable by potential assignees for tenancies is low (which is likely where the holding is smaller), it seems that the tenant will have little incentive to use the provisions. Instead the tenant may choose to remain on the holding (we refer here to the other reasons why a tenant farmer may choose not to retire, including not wanting to give up farming or their family home) or simply approach the landlord with a view to reaching agreement outwith the legislation.

Definition of “farmer wishing to progress” lacks clarity

Scottish Land & Estates understands that, at this stage, the only criterion which has been identified for the definition of a “farmer wishing to progress in the industry” is that the farmer may not hold a 1991 Act tenancy of another holding. Scottish Land & Estates’ view is that this requirement alone would not sufficiently restrict the definition. It means that a farmer could be owner occupier of a large holding but still seek to obtain a 1991 Act tenancy via the “assignment for value” model. The definition of a “farmer wishing to progress in the industry” should exclude farmers

who own or lease a viable unit elsewhere. Alternatively, consideration could be given to restricting assignation to those who farm a holding with a Standard Labour Requirement below 1.

Process for determining who is a “new entrant” and a “farmer wishing to progress in the industry” needs to be established

It is not clear at this stage what the process will be for determining whether a farmer meets the criteria of a “new entrant” or a “farmer wishing to progress in the industry”. Scottish Land & Estates does not consider that this is something which can be determined by the landlord as the relevant information will not be available to him.

There appears to be a risk that the policy objective will be undermined by both the landlord and the tenant having an interest in the assignee being as established in the farming industry as possible (and therefore not meeting the “new entrant” and “farmer wishing to progress in the industry” tests). From the landlord’s perspective, an assignee who is well established means that the farming enterprise is more likely to have access to sufficient resources and, from a tenant’s perspective, it means that the assignee will be in a position to pay the highest sum for the tenancy. There would therefore be a need for the identity of assignees to be monitored independently and we suggest that this responsibility should be placed with the relevant Scottish Government department. A procedure would need to be established which requires current or prospective tenant farmers to make a proactive application to the Scottish Government in order to determine that they meet the criteria. If a tenant farmer meets the criteria, he would then be eligible to be an assignee (subject to the other requirements of the legislation, including the landlord’s right to object).

Way-go Process

The papers received from policy officials indicate that way-go under the “assignation for value” model is a 2 stage process – the tenant will obtain an independent valuation of the sum they will be awarded at the end of the tenancy and they can then consider it with no commitment. We understand from the Scottish Government’s Response to the RACCE Committee’s Stage 1 Report that the Government does not intend to bring forward the two stage way-go process for wider implementation. Scottish Land & Estates queries whether it would be prudent to have consistency across the sector (rather than different way-go processes applying depending on the circumstances).

Concluding comments

Scottish Land & Estates does not consider there to have been sufficient justification, consultation or explanation for the change in policy by the Scottish Government at this late stage of the parliamentary process. The proposed amendment to section 79 directly contradicts the findings of the Agricultural Holdings Legislation Review Group which were set out clearly in their Report following extensive consultation. It also shows that the Scottish Government does not appreciate that the proposals contained in Part 10 should be viewed as a package and cannot be considered alone.

The “assignment for value” model would have significant consequences for many aspects of the tenanted sector and the use of other types of letting vehicles. The lack of any kind of detailed impact assessment by the Scottish Government means that the full extent of the consequences have not been identified but the proposal will act as a strong disincentive to landowners to let land on anything other than on a short term basis. The Scottish Government is seeking to encourage landowners to let land on a long term basis whilst at the same time bringing forward a measure which disregards the rights and interests of landowners who currently let land under secure long term tenancies. Scottish Land & Estates anticipates that the impact of this measure would be the reduction of land let on a long term basis.

In addition, due to the way the section 79 proposal is framed, there is a high probability that the “assignment for value” model will not actually achieve its stated aims of providing opportunities for new entrants and progressing farmers because in most cases (where the landlord can afford it) the tenant is more likely to sell to the landlord at a higher price than would be paid by an assignee.

Scottish Land & Estates firmly believes that the “conversion to MLDT” model could deliver the policy objectives of this section of the Bill far more successfully than the “assignment for value” model. The “conversion to MLDT” model would deliver a more positive message to the industry about the value of fixed term tenancies of a significant duration, thus encouraging landowners to let land (because they would have the certainty of being able to regain possession of the holding at a fixed date if required).

Furthermore, the “conversion to MLDT” model would be less detrimental to the landlord’s interests than the “assignment for value” model. The tenant’s rights would clearly be improved from their present position as a result of being able to capitalise on their work and retire. However, the landlord would have a reasonable expectation of recovering possession of the holding following the fixed term and the measure would therefore be less likely to be challenged on human rights grounds, thus delivering more stability and certainty for the sector. We firmly believe that the “assignment for value” model is not proportionate or balanced.

In summary, we believe that the proposal as drafted is counterproductive to the Bill’s aims and moves further away from compliance with the European Convention on Human Rights.