

Written submission from Cawdor Estate

Written Evidence to the Rural Affairs, Climate Change and Environment Committee (RACCE) on the Government's Proposed Stage 2 Amendment relating to Section 79 of the Land Reform (Scotland) Bill

Introduction

Cawdor Estate provided oral evidence to the RACCE on 7th September 2015. Although this evidence session predominantly concentrated on land ownership in Scotland, questions were asked about some aspects of Agricultural Holdings legislation.

Additionally, Cawdor Estate had previously submitted written evidence in relation to the Land Reform Bill, which included comments on proposed changes to Section 79 of the Land Reform (Scotland) Bill.

We have now taken the opportunity to read and consider the RACCE Stage 1 Report on the Land Reform (Scotland) Bill.

Our written evidence is based on the information available in the public domain.

Cawdor Estate 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.

Cawdor Estate has endeavoured to contribute to the land reform process. However, as currently drafted, we believe Land Reform (Scotland) Bill, and in particular recommendations from the RACCE on s79 will benefit neither landlords nor tenants.

Procedure

There is 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". It is acknowledged 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. Cawdor Estate 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.

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. This is entirely the opposite of what our industry is seeking to achieve.

Policy objectives will not be met

Cawdor Estate believes that landowners will be discouraged from letting land on a long term basis with the introduction of the “assignation for value” model. However, there is no evidence to suggest that the Scottish Government has carried out a full assessment on the likely impact of the proposal.

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 as there is provision for balancing the interests of the landlord and tenant. 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.

The Scottish Government has now rejected the “conversion to MLDT” model in favour of the “assignation for value” model. It is clear that the “assignation 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. Alternatively, the provisions under the existing legislation to tackle tenants not in complete compliance with their tenancy agreement, specifically in relation to good husbandry are strengthened.

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, in turn preventing them from “progressing in the industry” themselves, in particular, small landowners who may own one or two and use the partnership vehicle to farm viably.

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.

If the Scottish Government does not consider 25 year fixed term tenancies to be conducive to productive farming, then allow freedom of contract for fixed term tenancies rather than forcing tenants to continue farming into ‘perpetuity’ which may be the case if a 1991 Act tenancy is of a nature such that it lacks sufficient value to be assigned.

Cawdor Estate 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. This will meet the purported aim of a dynamic tenanted farming sector; something far less likely to be achieved under “assignment for value”. Landowners will be more inclined to invest in holdings let under fixed term tenancies due to the certainty involved in the arrangement and the generally more business-like nature of such arrangements.

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.

In this matter we defer to submissions made by industry consultants and legal experts. However, we wish to comment that as proposed, there may be a very valid case for claims by landowners in accordance with the European Convention of Human Rights.

Valuation Methodology

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

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 current wording 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 rationale for this methodology is not clear and we do 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 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. 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.

Even if the basis of the payment is accepted, there are other significant concerns regarding the valuation methodology. It requires a value for land with a 1991 Act tenant. However, there is virtually 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. However, we believe this is closer to 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 “assignment 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.

If the value of the tenant's improvements is not deducted as part of the calculation, 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.

Class of Potential Assignees

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.

The definition of "farmer wishing to progress" lacks clarity and 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. Our view is that this requirement alone would not sufficiently restrict the definition.

Additionally, it does not aid the furtherance of the Scottish Government's aims as a farmer could be owner occupier of a large holding but still seek to obtain a 1991 Act tenancy via the "assignation for value" model. Also, there are many 1991 Act Tenancies already in existence which can no longer be regarded as viable units, albeit being so when issued at the turn of the last century. The definition as drafted would prevent these tenants from "wishing to progress" and extend their holding by virtue of their existing lease.

The definition of a “farmer wishing to progress in the industry” should exclude farmers who own or lease a viable unit elsewhere, regardless of tenure. 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”. 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. 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

Cawdor Estate understands 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. We believe it imperative to have consistency across the sector to aid clarity for all parties rather than different way-go processes applying depending on the circumstances.

Concluding comments

Cawdor Estate 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 “assignation 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 and wishes to see a vibrant tenanted sector which actively encourages new entrants. In order to achieve both objectives, there requires a need to protect the rights and interests of landowners who currently let land under secure agricultural tenancies. We anticipate that the impact of this measure would be the reduction of land let on a long term basis.

In addition, we believe 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 tenancies will be sold ‘off-market’ and to the highest bidder rather than the most capable. There is no mechanism which prevents tenants already operating quasi sub-letting arrangements through stubble-to-stubble mechanisms from assigning their tenancy for value or acquiring additional land through this method. Additionally, it does not address those tenants not complying with codes of good husbandry. There would be no opportunity for the landowner or indeed the incoming tenant to claim dilapidations, leaving all parties aside from the outgoing tenant in a poorer position.

Additionally, the landlord has no relationship with the incoming tenant, does not know whether they are capable of managing a successful farming business, or indeed whether they have the financial capacity to run a business and pay a rent.

The Cawdor Estate firmly believes that the “conversion to MLDT” model or a tenancy allowing complete freedom of contract 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 is more likely to wish to invest in the holding with the tenant, 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, will not assist new entrants or expansion of successful units, and moves further away from compliance with the European Convention on Human Rights.

Planning applicants looking to take advantage of legislation for building development linked to forestry/agricultural land management should demonstrate the need and sustainability to the Planning Departments and local community, showing that the application is not solely based on a desire to increase land value or for personal gain.

The appointment of an independent party in order to carry out a feasibility study could achieve this objectivity.

Sporting rates

Any landowner deriving any income from shooting on their land should have an obligation to pay sporting rates.

Deer Management

The current deadline of 2016 for the formulation and presentation of Deer Management Plans should be brought forward in order to ensure the proper balance of culling and conserving biodiversity of any given area. The current voluntary Deer Management Code of Practice (2012) has not encouraged enough land managers to present their plans.

Engagement of Deer Panels with local communities, and a legal requirement to produce plans, would be an essential component in Management transparency.

Landowners who choose not to deploy deer fencing because they intend to raise revenue from stalking should be considered as running a sporting estate whether or not they maintain a herd and provide supplementary winter feed.

Core Path and open access

Core paths should satisfy the basic needs of local people. These needs encompass a wide range of outdoor activities, including horse riding mountaineering and walking with or without dogs.

Clarification of access points and a formation of core path networks and clear signage should form part of the Reform Bill.