The Land Reform (Scotland) Bill 2015, as passed
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Introduction

As indicated in our recent briefing, the Land Reform (Scotland) Bill was passed by the Scottish Parliament on 16 March 2016. This fulfilled the Government’s ambition to put legislation on the statute book before the Scottish election in May and completes a long and exacting review and consultation process. All that remains for the Bill to pass into law is the Royal Assent. The substantive provisions of the Bill will not come into operation until activated by Regulations, which will not be made until the next Parliament has been elected, and which may involve further consultation.

Although recent publicity surrounding the Bill has been concerned with amendments to the law of agricultural holdings, the Bill contains important provisions in relation to land reform as such and the summary which follows, accordingly, falls into two parts, set out below. We did not, at the time they were published, report on changes to the Bill at Stage 2, but these, along with changes made on the floor of the house at Stage 3 (the final debate by the full Parliament when the Bill was passed) are reflected in the summary.

The Act contains wide-ranging reforms in relation to land use and ownership and the responsibilities arising from that; in addition the Act contains radical proposals affecting the future of tenant farming in Scotland. These reforms have implications for everyone in Scotland who owns or is the tenant of land or aspires to own or tenant land.
Part One Land Reform

1. Land Rights and Responsibilities Statement

Scottish Ministers are charged to prepare a “land rights and responsibilities statement” which is “a statement of principles for land rights and responsibilities in Scotland”. In preparing this statement of principles, the Scottish Ministers must consider various matters, including: the promotion of relevant human rights and international standards for responsible land practices, encouraging equal opportunities, further sustainable development of land, supporting and facilitating community empowerment, and increasing the diversity of land ownership.

A draft statement is to be produced and relevant persons are to be consulted on its content. The final statement must be published and laid before Parliament within a year of this section of the Bill being activated, with five-yearly reviews thereafter.

2. The Scottish Land Commission – Coimisean Fearainn na h-Alba

The Bill establishes the Scottish Land Commission (“SLC”) and the Tenant Farming Commissioner (“TFC”). The SLC will consist of five Commissioners and the TFC. Commissioners will be appointed for up to five years, subject to Parliament’s approval and can be reappointed. That number may be altered by Ministers by Regulations. In making the appointments, Ministers are to have regard to expertise or experience in land reform, law, finance, economics, planning and development, land management, community empowerment, the environment, human rights, equal opportunities and reduction of inequalities which result from socio-economic disadvantage. The TFC is to have experience or expertise in agriculture but must not be a landlord or tenant of agricultural land.

Commissioners will be able to appoint committees, including third-party members with voting rights.

The Commission is to prepare, within six months of its coming into being, and to review every third year, a strategic plan setting out its objectives, priorities and cost estimates which Ministers can approve, modify, or reject. When approved it is to be published and laid before Parliament. The Commission has also to prepare and publish its timetabled programme of work. It will be expected to follow the plan and the work programme in exercising its functions, to keep proper books and accounts, and to prepare annual reports.

Its functions relate to ownership, management and use of land, to review the impact or effectiveness of laws or policies, recommend changes, gather evidence, undertake research, prepare reports and provide information, whether ex parte or as matters are referred to it by Ministers.

The particular duties of the TFC are considered further under The Tenant Farming Commissioner (“TFC”), below.

3. Information about control of land

Ministers will make Regulations, following consultation, in relation to access to information about “persons in control of land” by “persons affected by that land”. The parties who are included in these categories will be defined, but “persons in control of land” will include both owners and tenants. The Keeper will have new powers to request information about land owners, who may be subject to penalties for non-compliance.

Attempts to limit ownership to EU Nationals were rejected at Stage 3.

4. Engaging Communities in Decision Making

Ministers will be required to produce guidance for engaging with communities on decisions relating to land which may affect them. “Relevant persons”, such as landowners and tenants, are to be consulted before making the guidance. The guidance must include information on the types of land and types of decision
affected (the “what?”), the circumstances in which community engagement is required (the “when?”), and how community engagement is to be carried out (the “how?”).

The desirability of various matters is to be considered in the making of the guidance, and this of these is similar, but not identical, to those applicable to the Land Rights and Responsibilities Statement, above. It includes: the promotion of relevant human rights and international standards for responsible land practices, encouraging equal opportunities, and furthering sustainable development of land.

Landowners and others who control land, with substantial landholdings or land close to communities are to engage with communities which might be affected by their decisions. Lack of engagement may be a factor to be taken into account in decisions regarding grants or any application to buy the land.

5. Right to Buy to Further Sustainable Development

The Bill provides for communities to have the right to buy land. For this purpose, “land” includes inland waters, canals, foreshore, certain structures and — importantly — salmon fishings and certain minerals owned separately from the surface. There are various exclusions, such as owner-occupied homes, and further exceptions can be added by regulations. Land which is in production for agriculture or other purposes is not excluded from this right.

The right to buy can be exercised only if it is likely to further the "sustainable development" (which is undefined) of the land, and the consequent transfer is in the public interest. In addition, the transfer must be likely to confer a "significant benefit" to the relevant community, with the transfer being the most practicable method of achieving that end. A Stage 3 amendment added the further requirement that not transferring the land is likely to result in harm to the relevant community.

The Bill sets out in considerable detail the process by which communities can apply to Ministers to exercise the right, either on their own or along with other parties. This is broadly similar to that for the Community Right to Buy contained in the 2003 Act, including the formation of Community Bodies and ballots, valuations, appeals etc., right up to the stage of transfer. Those incurring certain loss and expense will be compensated.

A Register of Applications by Community Bodies to Buy Land is to be set up. This will contain information and documents relating to applications to buy to further sustainable development, and also applications to buy abandoned, neglected or detrimental land under Part 3A of the Land Reform (Scotland) Act 2003. (The provisions in the 2003 Act were inserted by the Community Empowerment (Scotland) Act 2015 and have not yet come into force.) The Register will be public.

6. Sporting Rates

The exemption of shootings and deer forests from non-domestic rates is to be abolished from 1 April 2017 (the next revaluation). Assessors are to have regard to such matters relating to deer management as they consider appropriate. The Government has undertaken to engage with stakeholders once valuations have been completed.

7. Common Good Land

Minor changes are made to legislation applying to Common Good land to extend the powers of the Court of Session in certain cases where a local authority wishes to appropriate common good land to another purpose, rather than dispose of it. This addresses a perceived defect in the Local Government (Scotland) Act 1973, which was at issue in Portobello Park Action Group Association v City of Edinburgh Council 2012 CSIH 69, and gave rise to the City of Edinburgh (Portobello Park) Act 2014.

8. Deer Management

Scottish Natural Heritage (“SNH”) will be given powers to require landowners to produce Deer Management Plans for its approval following consultation with Deer Management Groups and deer managers. Failure to agree or implement a plan can lead to SNH implementing Control Orders and Agreements and penalties for failure to comply with a Control Order are raised to a £40,000 maximum.
SNH will have power to require selected owners to make returns on the number of deer they intend to cull in the following year, with a penalty of £1,000 for non-compliance. It will, in addition, have a duty to carry out a three-yearly review of compliance with The Code of Practice on Deer Management and to report its findings to Parliament.

Lastly there is an enabling power to use deer panels to facilitate the involvement of communities in deer management.

9. Access

Provision is made for landowners to be consulted in future when Local Authorities propose to amend core path plans.
The reforms contained in the Bill as passed in relation to the law of agricultural holdings fall into the following 13 categories.

1. The Tenant Farming Commissioner (“TFC”)

The TFC has various functions which are to be exercised “with a view to encouraging good relations between landlords and tenants of agricultural holdings”. The TFC is to prepare and promote (through education and collaboration) Codes of Practice in respect of landlord and tenant matters, which include:

- Rent review
- Improvements
- Succession
- Waygoing compensation
- Management of sporting leases
- Game management

The recent industry-led Guidance Notes on some of these topics, may assist in these tasks. The TFC is also to draft recommendations for updating the lists of tenant’s improvements specified in the Agricultural Holdings (Scotland) Act 1991 and to enquire into and report on the conduct of agents for parties, reporting to Ministers within 12 months of the relevant provision coming into effect.

The TFC will be able to enquire into alleged breaches of the Codes and will publish a report as soon as practicable after the enquiry. Non-compliance with the enquiry process may result in a penalty of up to £1,000, subject to appeal. Information which the TFC collects about an alleged breach may not be disclosed without authority, although the TFC is immune to actions for defamation.

The TFC is entitled to refer legal questions to the Land Court and will also have powers to delegate functions.

The TFC's functions will be reviewed within 3 years of the relevant provisions coming into being. Following review, functions may be amended or removed, or added anew.

2. Modern Limited Duration Tenancy (“MLDT”)

The Bill introduces the MLDT as an option for future tenancies, replacing the Limited Duration Tenancies (“LDT”) for new lettings. The differences between the two are not great, although the MLDT will allow greater flexibility for negotiation over fixed equipment, rent and the purposes of the lease.

Any new tenancy for 10 years or more (unless it is a 1991 Act tenancy) will be a MLDT as will one purporting to be for more than 5 but less than 10 years. There may be a break after 5 years in a MLDT to a new entrant. The relocation period is to be 7 years (for the LDT it is 10 years). Subletting will be permitted if the lease specifically allows it. It will be terminable by agreement after the tenancy has started. It will be terminable at the end of its term by the landlord by the now familiar double notice procedure and by the tenant by notice of intention to quit between one and two years before its expiry. There are no short or long continuations, simply relocation for 7 years if not properly terminated or it may be extended by agreement.

A MLDT may contain an irritancy clause as agreed by the parties, though non-residence will not be a ground for irritancy nor will the tenant be in breach of the rules of good husbandry in respect of conservation activities. The landlord will have to give the tenant at least a year’s notice to remedy the breach on which he intends to irritate the lease, plus a further two months’ notice following the expiry of the initial notice if the tenant has failed to remedy the breach.

Default terms in relation to fixed equipment are included.

Otherwise, the provisions of the 2003 Act for LDTs will apply to MLDTs.
Provision for 1991 Act Tenancies and LDTs to be converted to MLDTs by agreement are included in the Bill. A Stage 3 amendment to allow a landlord to apply to the Land Court for conversion where a 1991 Act tenancy had been created inadvertently was rejected.

3. Repairing Tenancies

A new form of letting, a "Repairing Tenancy", is introduced, having a minimum term of 35 years. It has an initial 5-year "repairing period", during which the tenant is to provide, maintain, renew and replace fixed equipment (unless otherwise provided by the lease). Parties will be able to extend the repairing period, either at commencement, or during the 5 years, by agreement, or, if there is no agreement, through the Land Court. There may also be a break. The tenant will be able to terminate the tenancy at any time before the end of the repairing period. The landlord will be able to do so at the end of the repairing period by means of the break if the tenant is failing to comply with the terms of the lease.

There is no power of resumption during the repairing period and 5 years after its expiry, nor can the landlord irritate the lease on the grounds of bad husbandry during the repairing period.

4. Tenant’s Right to Buy

The Bill removes the requirement for a tenant to register interest in purchasing a holding for the purposes of the pre-emptive right to buy. It continues to be the case that the landlord must give notice of a proposed transfer, and that notice triggers the right to buy.

The list of circumstances in which notice of a proposed transfer does not need to be given is also unchanged, with one exception. Under the existing law, no notice was required for a transfer in implementation of missives concluded, or of an option to acquire the land constituted, before the tenant had registered a right to buy.

The Land Reform (Scotland) Bill removes this section in its entirety. This means that a transfer in implementation of missives concluded, or an option constituted, before the tenant took up the tenancy (and so acquired the right to buy) will now trigger the tenant’s right to buy.

5. Sale Where Landlord is in Breach

The Bill enables a tenant to apply to the Land Court for an order for the sale of the holding where the Landlord is in breach of his obligations under the lease and fails to comply with an order for compliance by the Court or an arbiter.

The Court may make the order if satisfied of the following: (1) the landlord has materially failed to comply with its previous order or the arbiter’s award, (2) the failure to comply is substantially detracting from the ability of the tenant to farm the holding in accordance with the rules of good husbandry, (3) greater hardship would be caused by refusing the application than by making the order and, (4) in all the circumstances, it is appropriate for the order to be made.

The order will give the tenant the right to buy the holding but if he does not do so himself, the Court may permit sale to a third party. If the holding is sold to a third party the grounds on which the new landlord can issue an incontestable notice to quit are limited, for 10 years.

Ministers are to make regulations to set the process to be followed where the Land Court orders sale to a third party and to list those persons (being the tenant or landlord’s immediate family) who may not be purchasers. Other conditions attaching to a sale to the tenant or a third party include a clawback to protect the interests of the original landlord.

6. Rent Review

The Bill amends the triggers for, and conduct of, a rent review, and the manner in which the Land Court is, on application, to determine the rent.

The statutory formula for rent review is to move from the current open market calculation to a “fair rent”, under which the Court is to have regard (among other things) to (a) the productive capacity of the holding—that is the income which can be generated from the holding using the landlord’s fixed equipment by a
hypothetical tenant; (b) a proportion of the market rent for any residential accommodation (not including the tenant’s own house) which exceeds the standard labour requirement of the holding, and (c) the open market rent for any land or fixed equipment used for a non-agricultural purpose.

7. **Assignation and Succession**

The Bill extends the class of persons to whom the tenant can assign the tenancy or on who may inherit it on the tenant’s death.

The Landlord will be able to object to an assignation of 1991 Act tenancies to a non-near relative on any reasonable ground while objection to a near relative will be possible only on grounds of character, lack of resources or where the proposed assignee has neither sufficient training nor expertise (except where the assignee is undertaking training).

In the case of succession, the Bill widens the categories of potential acquirers and amends the landlord’s rights to object to potential successors, to bring them into line (in the case of near relatives) with those which relate to Assignation.

In the case of a non-near relative, the landlord has the right to object, but the successor may apply to the Land Court for an order to the effect that the successor has established a reasonable ground why the bequest should stand.

8. **Relinquishment and Assignation of 1991 Act Tenancies**

The concept of an “Assignation for Value” was introduced by the Government during Stage 2. It involves two steps:

8.1. The tenant intimates to the Landlord the intention to relinquish the lease. The Landlord has the right either to buy out the tenancy for half the difference between the value of the holding if sold with vacant possession and that subject to tenancy, plus tenant’s improvements, or (actively or passively) to decline to do so.

8.2. If the landlord declines, the tenant can, within one year, assign the tenancy for value but only to a “new entrant to”, or a person “wishing to progress in”, farming (both of which expressions will be defined by regulations) provided the assignee is not a person to whom the tenancy may be assigned under section 10A of the 1991 Act (specified relatives).

A number of amendments in relation to what the valuer should have regard to were carried as was one to the effect that, as the valuer is to be appointed by the TFC the TFC should pay the valuer’s fee and recover it from the tenant.

Although attempts were made at Stage 3 to reintroduce what is known as the “conversion route” – the conversion of a 1991 Act Lease to a fixed period MLDT following assignation – they were rejected. Also rejected were attempts to restrict the power to assign to tenants seeking to retire, to structure the buy-out ability of the landlord and to allow a lease which has been assigned under the Assignation for Value process outlined above to be terminated after 25 years. The result is that the concept of restricting the period of occupancy by an assignee has been abandoned, in favour of a straight assignation of the 1991 Act Lease, with all its rights in terms of security of tenure, assignability and succession.

9. **Tenant’s Improvements**

The Bill gives effect to the proposed amnesty of 3 years for certain improvements by a 1991 Act tenant. The tenant must serve a notice on the landlord setting out the intention to treat specific items as tenant’s improvements at waygoing, for which compensation is to be payable.

This is a saving provision for tenants who failed to serve notice on their landlords of proposed improvements before they were carried out or, having done so, have lost the notices. Tenants will be precluded from serving notice where they carried out (Part 1) improvements without landlords’ consent, or in a different manner to that for which they obtained consent, or in breach of a Land Court order.
The landlord will be able to issue counter-notice during the amnesty, in which case it is for the tenant to apply to the Land Court for a ruling on whether the notice should be allowed, including whether it is just and equitable for the landlord to compensate the tenant at waygoing.

10. Landlord’s Improvements
The Bill requires landlords to give tenants prior written notice of a proposed improvement (other than emergency works to services etc.), specifying the proposals and demonstrating the improvement is necessary for the tenant to maintain efficient production. The tenant may serve counter-notice on the ground the proposed improvement is unnecessary for the holding to be farmed in accordance with the rules of good husbandry. There is a right of appeal to the Land Court.

Should the landlord carry out the improvement without giving notice to the tenant, or contrary to a Land Court order, or (where the tenant has served counter-notice) without the Court’s approval, it will not be taken into account at the next rent review.

Landlords will also be required to notify the tenants of the period during which the work is to be carried out to enable the tenant to organise business accordingly.

11. Diversification
The provisions of the 2003 Act on diversification will be amended so that a landlord can make only one request for information on the proposal. Additionally, where the landlord objects, the onus will be on the landlord to apply to the Land Court for a determination that those objections are reasonable.

12. Dispute Resolution
The Bill will permit disputes arising from the amnesty on tenant’s improvements, records of condition and approval for tenant’s improvements to be settled by arbitration, if preferred over the Land Court.

13. Irritancy
An amendment was passed at Stage 3 to the effect that the landlord can only irritate a LDT or Short Limited Duration Tenancy (SLDT) for non-payment of rent where he has first served on the tenant a demand for payment within two months and the tenant has failed to comply with the demand.

14. Small Landholdings
An amendment at Stage 3 obliges Ministers to review the law of small holdings and to report to Parliament by 31 March 2017. Small landholders and other persons considered to be appropriate must be consulted as part of the review.