Briefing Note


An End to Scottish Property Law As We Know It?

The LRRG published its full report on 23rd May 2014. In its conclusion the authors of the LRRG encourage the Scottish Government in taking on board its recommendations to be “radical in its thinking and bold in its action”.

Whilst the existing system may not be ideal is the existing system so fundamentally flawed that it requires a “radical” overhaul? We envisage serious problems for the property market and the economic growth of our small country in the event that these recommendations are adopted in full.

The Report’s authors say that the purpose of the Report is to improve land ownership in Scotland for the “common good of the people of Scotland” assessed by reference to “wellbeing”, “economic success”, “environmental sustainability” and “social justice”. Whilst such goals may be admirable at a jurisprudential level, what the Report goes on to do, in our view, is to focus on taking land away from its current owners rather than addressing improvement to land use within the existing framework and encouraging new landowners to come into the existing system. This, in our view erroneous focus, could seriously damage confidence in the Scottish property market as well as potentially infringing human rights.

In January 2014, in the case of Bitto & Others v Slovakia, the European Court of Human Rights reaffirmed that, in dealing with rights under Article 1 of the First Protocol of the European Convention on Human Rights, which protects property rights, the legitimate interests of the community calls for a fair distribution of the social and financial burden involved in transformation and reform. It held that this burden could not be placed on one particular social group, however important the interests of the other group or the community as a whole. It has to be questioned whether the sweeping reforms proposed by the LRRG can be implemented without breaching this requirement.

The recommendations set out in the Report are not law and may never become law (albeit that the Scottish Government Environment Minister has publicly announced legislation in this Parliament).
The 263 page Report contains wide ranging proposed reforms. In detailed summary its substantive considerations and recommendations are as follows:

Part 2 The Ownership of Land

- The Scottish Government should be doing more to increase the amount of land registered in the Land Register including setting a target date for completion of the Register, a planned programme to register public land, and additional triggers to induce first registration of other land.

We understand that the experience south of the border is that it is very difficult indeed to meet such targets. Whilst we would welcome a more straightforward system of land ownership in Scotland we consider that in reality a gradual shift is the only pragmatic solution. The Report ignores the huge costs to the owners of land in achieving this objective (although the cost to the public purse of the registration of public land is noted). The Scottish Government have announced that all land should be on the Land Register within ten years.

- The Scottish Government should make it incompetent for any legal entity not registered in a member state of the EU to register title to land in the Land Register of Scotland, to improve traceability and accountability in the public interest.

The LRRG do not consider this breaches any EU law or discriminates as the owner would “just” need to set up an EU entity in order to qualify. Would this not lead to yet further complexity which the LRRG states it would wish to avoid?

- The Scottish Government should develop proposals in consultation with the Scottish Law Commission for legislation to end the distinction between immoveable and moveable property in the laws of succession.

As the Report notes, this would have the effect of increasing the total amount available to surviving spouses and children in a legal rights claim. It can be the case that such a claim is diminished as a result of the principal asset being heritable property. One result of such a change would be to increase the instances of joint landlords of let property which is recognised as a difficult area in agricultural tenancies. Inevitably the change would also lead to the break-up of the smaller family farm, an entity which the LRRG claim they want to protect and encourage.

- Common land and communities coming to light on the expansion of land registration should be identified and safeguarded.

The Report seeks preservation of rights it acknowledges are very rare, the rationale apparently being that shared community rights may be being encroached upon by private ownership.

- Compulsory purchase powers should be “streamlined” so that they are used more.
- The Scottish Government and local authorities should be given the right to register a pre-emptive right to buy certain areas of land (similar to agricultural tenants and communities).
We wonder why this is necessary where there is such low uptake on current pre-emptive rights.

- Information about publicly owned land (i.e. land owned by public authorities or the Scottish Government) should be more readily available.

**Part 3: Public Land Ownership**

- The Crown Estate Commissioners are criticised by the LRRG for downsizing their Scottish presence and moving their administration to England. The Report recommends that their statutory functions are “devolved” to the Scottish Parliament.

We struggle to see the benefit in forcibly removing the assets of one institution and transferring them to another, particularly where the established institution already invests substantial sums in managing Scottish land.

- Forestry Commission Scotland and the Scottish Government are encouraged to buy more woodlands/develop more woodland.

The creation of new forests and expansion of existing forests would of course be welcome but not at the expense of other appropriate land uses and the environment.

**Part 4: Local Community Land Ownership**

- Communities are to be empowered to have “asset based community development” as an alternative to “large scale top down solutions.” Public policy should support local communities acting on their own behalves. Legal structures should be more flexible.
- A target of one million acres in community ownership by 2020.
- Absolute right to buy for communities where judged in the public interest by Scottish Ministers and, “as a last resort”, the right to request that Scottish Ministers authorise a compulsory purchase.
- Compulsory sale orders should be available in respect of derelict or vacant land.
- More public money should be available from the Scottish Government in anticipation of a rise in demand for community ownership.
- A Community Land Agency should be set up by the Scottish Government as a distinct department to assist communities with managing their purchase and negotiations in connection with that purchase.

The LRRG appear to recognise at least some of the existing problems concerning registration of pre-emptive rights by community bodies but recommend enhancement and extension of such rights, including such rights being available to urban as well as rural communities. Although stated to be an “independent” Department the LRRG see the Community Land Agency’s goal as being to increase community ownership and to assist the community in negotiations with a third party private landowner.
Part 5: Land Development and Housing

- Local Authorities should be given a new power of Compulsory Sale Order to address the challenge of vacant and derelict land in urban areas.
- Clarify and modernise the rights of common owners (e.g. owners of flats) and replace the current piecemeal legislation.
- More secure tenancy rights to be introduced for the private rented housing sector.

If the aim is to let more houses it has to be questioned whether greater freedom of contract in letting would not be the answer rather than further “tenancy rights”.

- The LRRG recognises that right to buy for social housing tenants was not beneficial and supports its abolition.

The justification given appears to be on all fours with the concerns about the right to buy for the agricultural tenanted sector, but no such parallel is drawn or even, apparently, considered, by the LRRG.

Part 6: Land Ownership and Use

- Agricultural suitability of rural land should be assessed.
- Private landowners should be “strongly encouraged” to put their land to the best agricultural use by the use of incentives and other mechanisms.
- The LRRG considers that it is implicit in the Land Use Strategy that there will be reductions over time in the flexibility rural landowners’ have over how they use the rural land that they own.
- The LRRG recommends putting in place necessary mechanisms for the successful implementation of the Land Use Strategy in the public interest.
- The Land Use Strategy should map and monitor patterns of ownership in rural Scotland.
- A central issue in the longstanding calls for reform is the concentrated number of land owners with large properties.
- It is claimed that currently 432 private land owners own 50% of the private land in rural Scotland. “As a measure of inequality in a modern democracy, this is exceptional and is in need of explanation”.

We disagree with the premise that the existing land ownership pattern is a “wrong” which requires to be addressed. The viability of the alternative land use strategy is not clear but it is clear that small changes to the current system could seriously undermine the fragile rural economy.

- The LRRG considers that there should be an upper limit on the total amount of land which can be held by a single legal entity.

This is fraught with difficulty and could prejudice the viability of rural and island communities as well as prejudicing the position of both Government and of landowning charities.

- The current concentrated pattern of land ownership is problematic for a number of inter related reasons. Ownership is the key determinant of how land is used and the current pattern of ownership can stifle entrepreneurialism and local aspirations.
We disagree with the rationale behind this. Reviewing and resolving the causes of landowner reluctance to let as a land use option might be a more appropriate consideration rather than assuming that the perceived problem is the result of the land ownership pattern. For many businesses a lease is a less risky option than ownership and as said elsewhere by the LRRG the letting of land is vital for the wellbeing of rural communities and this needs the granting of leases. Only a land owner can grant a lease.

- It is in the public interest to increase the number and diversity of land owners in Scotland. In January 2014 the Parliament set a goal of 1 million acres of land in community ownership by 2020. LRRG considers a range of measures are required to achieve this goal as well as a National Land Policy for Scotland being set up to take it forward.

As already stated we have concerns about policies which focus on the removal of land from its existing owners.

- There is no justification for the existing (historic based) exemption of agriculture, forestry and land based business from non-domestic rates and a phased introduction of non-domestic rates for these land based businesses is recommended.

We do not understand how this would fit in with recommendations elsewhere in the Report for greater community ownership, unless there is to be one exception for community ownership and another for private landowners, which we do not see would be Convention compliant. The historic justification was to encourage development of forestry and agriculture where it would otherwise be more economically sensible to pursue commercial enterprise.

- Sporting rate payments should be reviewed so that the charge becomes a more efficient instrument of public policy including a review of exemptions to assist with the Scottish Government’s Land Use Strategy and other objectives.

We are concerned this might stifle business for land owners with detrimental effects for employment and the general enjoyment of estates by the public because these estates would lose a critical income stream. Tourism would also suffer.

- Land Value Taxation should be seriously considered as an option subject to a detailed study of the scope and practicalities of its introduction. The LRRG recognise that firstly a detailed map of who owns the whole of Scotland would need to be available.

Again we struggle to see how this would encourage greater community ownership and new owners particularly given the wider economic climate.

- Value for money to the public from the CAP needs to be much clearer than is the case at present.

Greater clarity on all sources of public funding is to be supported. The CAP as it stands is however the end result of a very major process of review.

- The Group considers that the existing tax regime and in particular exemptions for agricultural and forestry land should be reviewed to ensure there is a clear public interest justification for the loss of tax revenue brought about by these reliefs.
We struggle to see how this would be enacted at a practical level and in particular what the effect would be on the let farm which the LRRG sees as playing a key role in rural communities.

Part 7: Agricultural Land Holdings

- Developing a modern and robust statutory framework for crofting should be a priority of the Scottish Government including reducing the complexity of the existing statutory framework.

We understand this was the rationale behind recent crofting law reforms which have largely only led to further complexity. The complexity arises from a system regimented by statute without flexibility for those actually owning and working the land.

- The crofting community right to buy should be amended to prevent challenges exploiting ambiguities in the existing requirements and reduce unnecessary burdens on the crofting communities trying to exercise such rights.

We reiterate our concerns about the history of crofting legislation creating more obstacles and difficulties than less.

- Crofting trusts or crofting community owners should be able to purchase Scottish Government crofting estates at less than open market value. Government should take a more proactive approach to facilitating and supporting such transfers.

This offers a benefit to one group of crofters over another. Those who happen to have a particular type of landlord benefit where others do not. We struggle to see how disposing of public assets at under value in this way would be viewed as fair and democratic by the public at large.

- The LRRG recommends there are major improvements in the position of smallholders including the statutory right to buy their holdings.

The Report appears to mix up agricultural tenants’ rights and crofters’ rights. The two have always been treated as completely separate. In many cases crofting law, designed to protect a “way of life”, would be imposed on areas of Scotland where these traditions have long since ceased to exist.

- The LRRG recognises the reduction in the number of secure agricultural tenants,

We see this as inevitable and not necessarily harmful. The LRRG recognises that 2003 Act lets are increasing and the problems for landowners with 1991 Act Tenants in possession.

- The requirement that an agricultural tenant register an interest in purchasing is an “unwarranted constraint” contrary to the public interest of giving the right to all 1991 Act Tenants. Automatic registration avoids considerations by many tenants as to whether the move to register will be considered “hostile” by their landlord.

This could result in practical complexities arising on the sale of land, would further reduce the land exposed for sale (one of the issues the Report seeks to address in the first place) and ignores the large numbers of applications that have been made to date in circumstances where there was in fact no right to register.
The LRRG support the aim of the Agricultural Holdings Legislation Review Group “to determine what policy and legislative changes may be required to deliver a sustainable Scottish farming sector that is dynamic, gets the best from the land and the people farming it and provides opportunities for new entrants”.

The LRRG considers the position of 91 Act Tenants as part of Scotland’s rural communities is central to the public interest and should become more central in defining the way forward.

To extol the virtues of such tenants but to then recommend a right to buy, by which tenants cease to be tenants, and to then promote the break-up of the farms acquired by these farmer tenants through changes to succession law seems ill thought out.

The LRRG considers 91 Act Tenants play a key role because of “inter-generational continuity”.

Privately owned farms and estates have inter-generational continuity. It is to be wondered how recommended changes to the law of succession (for example) might impact on the inter-generational continuity of the family farm.

Part 8: Common Property Resources

- Access rights over inland water, foreshore and seabed should be modernised and replaced by statutory public rights integrated with the “right to roam”.
- The current law whereby land owners own the beds of rivers and lochs to the mid-point should be reviewed.
- The District Salmon Fishing Boards should be abolished and a new integrated statutory framework introduced to ensure the sustainable management of Scotland’s wild freshwater fish.
- The ability to own salmon fishing as a separate tenement should be abolished but existing ownerships should continue.
- There should be greater opportunity for public fishing in Scotland’s rivers and lochs.
- The current statutory framework governing the hunting of deer should be improved to ensure appropriate culls are carried out to safeguard the public interest.

This could impose an obligation on landowners, including communities, to actively manage deer in accordance with centrally imposed targets.

Prejudicing income streams from salmon fishing and deer stalking would have detrimental knock on effects for rural communities. Preventing landowners obtaining any benefit from resources on their land would have a detrimental effect on investment and property ownership in Scotland.
Part 9: Way Forward

• The Scottish Government should have an integrated programme of land reform measures to take forward the changes required to modernise and reform Scotland’s system of land ownership.
• There should be a single body with responsibility for understanding and monitoring the system gauging the ownership and management of Scotland’s land and recommending changes in all public interest – a Scottish Land and Property Commission.

Legislation implementing aspects of the LRRG’s recommendations has been promised within the current Parliament.

This note is intended as a brief summary of the report of the Land Reform Review Group “The Land of Scotland and the Common Good”. No responsibility can be accepted for any action taken in reliance on this note and specialist advice should be taken in every case. Turcan Connell would be happy to provide such advice.
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