

LAND REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Land Reform (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE OF BILL PROVISIONS

2. The purpose of the Bill is to:

- *Ensure the development of an effective system of land governance and on-going commitment to land reform in Scotland;*
- *Address barriers to furthering sustainable development in relation to land and improve the transparency and accountability of land ownership; and*
- *Demonstrate commitment to effectively manage land and rights in land for the common good, through modernising and improving specific aspects of land ownership and rights over land.*

3. To achieve these aims the Bill contains the following provisions:

Part 1: Land Rights and responsibilities statement

- **Land Rights and Responsibilities Statement:** to place a duty on Scottish Ministers to publish and periodically review a land rights and responsibilities statement that sets out the Scottish Minister's objectives for land reform to guide policy development relating to land rights and responsibilities.

Part 2: The Scottish Land Commission

- **Scottish Land Commission:** to establish a Scottish Land Commission consisting of: five Land Commissioners who will carry out research and gather evidence relating to land, review the effectiveness and impact of laws and policies relating to land and make recommendations for changes to any law or policy relating to land in order to inform future land reform in Scotland; and a Tenant Farming Commissioner who will prepare, promote and advise upon codes of practice for the agricultural tenanted sector, consider

claims of breaches of those codes; and work with the Land Commissioners on areas of their work relating to agriculture and agricultural tenancies.

Part 3: Information about control of land etc.

- **Right of access to information on persons in control of land**– to take regulation making powers that allow for a requesting body to require the disclosure of certain information on a proprietor or tenant of land in Scotland, to be disclosed on a case by case basis, where the lack of the information can be shown to be having an adverse effect.
- **Information relating to proprietors of land etc.** – to take regulation making powers to allow for provision of additional powers to the Keeper of the Registers of Scotland to request disclosure of certain types of information relating to proprietors and tenants of land, including information on individuals with a controlling interest in land.

Part 4: Engaging communities in decisions relating to land

- **Guidance on engaging communities in decisions relating to land**– to place a duty on Ministers to publish guidance directed at proprietors or tenants of land about engaging with communities on decisions relating to land that may affect those communities.

Part 5: Right to Buy Land to Further Sustainable Development

- **Right to Buy Land to Further Sustainable Development:** to provide Scottish Ministers with the power to consent to the transfer of land to a community body, or a nominated person, where the transfer is likely to deliver significant benefit, remove or prevent significant harm and further sustainable development, and where only the transfer of the land will resolve those issues.

Part 6: Entry in valuation roll of shootings and deer forests

- **Application of non-domestic Rates to Shootings and Deer Forests:** to remove the exemption from business rates for shootings and deer forests, in order to raise revenue for Local Authorities and to place shooting and deerstalking businesses on a level playing field with other rate paying businesses.

Part 7: Common good land

- **Common Good:** to further modernise the laws relating to common good assets by providing local authorities the same power to appropriate ‘inalienable common good land’ for other uses, as the local authority currently has to dispose of such land, removing the need for local authorities to secure passage by the Scottish Parliament of a Private Bill to authorise appropriation of such land.

Part 8: Deer management

- **Functions of Deer panels, Deer management plans and Increase in penalty for failure to comply with control scheme:** to provide for an additional use of existing deer panels to promote community involvement in local deer management; to provide a power

for Scottish National Heritage to require the production of a deer management plan where, in the view of SNH, the public interest in deer management is not being delivered in a particular area; and to substantially increase the level of fine for failing to comply with a deer control scheme imposed under section 8 of the Deer (Scotland) Act 1996.

Part 9: Access rights

- **Core paths plans:** amendments to Part 1 of the Land Reform (Scotland) 2003 Act to clarify and simplify the core path planning process and amend notification procedures for applications to the sheriff court to determine the existence and extent of access rights to allow for notification of all relevant parties interested in exercising access rights

Part 10: Agricultural Holdings

- **Modern Limited Duration Tenancies** – to provide a modern limited duration tenancy as an option for future agricultural tenancies to replace the existing limited duration tenancy option set out in the Agricultural Holdings (Scotland) Act 2003.
- **Conversion of 1991 Act tenancies into modern limited duration tenancies** – to take a regulation making power to allow Scottish Ministers to make provision for a 1991 Act tenant farmer to convert their 1991 Act tenancy into a 35 year modern limited duration tenancy and to then assign the converted tenancy on the open market.
- **Tenant's Right to Buy** – remove the requirement for a tenant to register their interest in purchasing their holding, with the Registers of Scotland, under the existing Right to Buy provisions in the Agricultural Holdings (Scotland) Act 2003. 1991 Act tenancies will have the pre-emptive right to buy without the need to pre-register.
- **Sale to tenant or third party where landlord in breach of order or award** – introduce new provision to the Agricultural Holdings (Scotland) Act 2003 to enable a tenant of a 1991 Act tenancy to apply to the Scottish Land Court to order the sale of the land comprising the holding, where the landlord is persistently failing to meet their obligations under the tenancy and where this is affecting the tenants ability to maintain the efficient agricultural productivity of the holding.
- **Rent review** – make amendments to simplify and improve the process for triggering and carrying out a rent review for certain agricultural tenancies and change the way the Scottish Land Court is required, on application, to determine rent for those tenancies by moving away from consideration based predominantly on an 'open market' calculation to one based on a 'fair rent' taking into account the agricultural productivity of the holding based on the fixed equipment provided by the landlord, any surplus residential accommodation, and any diversified activity on the holding.
- **Assignment of and succession to agricultural tenancies** - to widen the class of people to whom a tenant farmer can assign their tenancy and to whom they can leave their tenancy upon death; to simplify the ways in which a landlord can object to a potential assignee or successor to the tenancy.

- **Amnesty for Tenant's Improvements** – new provisions to amend the current provisions for compensation at waygo for secure 1991 Act tenancies, providing a two year amnesty period during which a tenant farmer may serve formal notice on the landlord of their intention that, in certain circumstances, specific improvements, not previously agreed by the landlord, may be treated as capable of attracting compensation at waygo.
- **Improvements by Landlord** – new provisions to require the landlord to serve a notice on the tenant setting out when the landlord intends to carry out certain improvements. There are also provisions which provide a right for tenants to object to certain improvements proposed by the landlord if the improvement is not necessary to enable the tenant to fulfil the responsibilities to farm the holding in accordance with the rules of good husbandry; and for certain sanctions to apply if such improvements are carried out by the landlord without serving such notice, or if the tenant objects to the notice and the improvement is not approved by the Land Court.

RATIONALE FOR SUBORDINATE LEGISLATION

4. The Bill contains a number of delegated powers provisions which are explained in more detail below. The Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill or the other Acts being amended by this Bill, to:

- the need to strike the right balance between the importance of the issue and providing flexibility for changing circumstances;
- the need to make proper use of valuable Parliamentary time;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament; and
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

5. Where subordinate legislation is required to implement Government policy some form of parliamentary procedure may be appropriate. A balance must be struck between the different levels of scrutiny involved in the procedures. In the Bill the balance reflects the view of the Government on the importance of the matter delegated by Parliament. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

6. The Bill confers powers on the Scottish Ministers to make orders and regulations in relation to a range of matters dealt with in the Bill. The powers conferred in the Bill are mainly either of a technical and procedural nature, or are concerned with matters which require, because of their nature a flexible approach. It is therefore regarded as appropriate that they be dealt with by subordinate legislation.

7. The regulations and orders are subject to both the affirmative and the negative procedure in Parliament. The Government has chosen the appropriate procedure depending on the nature of the power, further details are provided below.

DELEGATED POWERS

Section 2(5) – The Scottish Land Commission

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

8. Section 2(5) of the Bill allows the Scottish Ministers to amend subsection (4)(a) to alter the number of Land Commissioners.

Reason for taking power

9. Subsection (4)(a) provides that there should be five Land Commissioners who are members of the Scottish Land Commission. However, in the future, it may be necessary or desirable to increase, or indeed decrease, the number of Land Commissioners. For instance, to enable the Scottish Ministers to demonstrate that they have complied with their duty under section 9(1), it may be necessary to appoint more than five Land Commissioners to ensure that there is adequate expertise and experience in relation to land reform, law, finance, economic issues, planning and development and environmental issues.

Choice of procedure

10. Negative procedure is to be used, and it is considered to be an appropriate level of scrutiny for this power, which is procedural in nature and is only in place to give the Scottish Ministers more flexibility when appointing the Land Commissioners. It is also notable that there are similar powers in the Crofting Reform (Scotland) Act 2010, Police and Fire Reform (Scotland) Act 2012 and Historic Environment Scotland Act 2014, and that they are all subject to negative procedure.

Section 22(3) – Functions of the Tenant Farming Commissioner

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

11. Section 22(3) allows the Scottish Ministers to modify the functions of the Tenant Farming Commissioner set out in subsection (1) to amend, remove, or confer new functions on the Commissioner.

Reason for taking power

12. The functions of the Tenant Farming Commissioner set out in subsection (1) are relevant to the current issues that are impacting the tenant farming sector. The functions are to prepare codes of practice in relation to agricultural holdings in accordance with section 25, to promote those codes of practice in accordance with section 26, to inquire into alleged breaches of those codes of practice in accordance with sections 27 to 32, to refer for the opinion of the Land Court any question of law relating to agricultural holdings in accordance with section 34 and to collaborate with the Land Commissioners in the exercise of their functions in so far as they relate to agriculture and agricultural holdings.

13. Going forward, the issues experienced by the sector are likely to change, and it is hoped that the Tenant Farming Commissioner and the codes of practice issued under section 25 of the Bill will help to deal with issues arising in the sector. However, in the future, new problems may arise and it may be that the functions in subsection (1) are no longer capable of supporting the sector. It is also possible that the functions become redundant, so therefore the Scottish Ministers consider that this power is necessary to enable the Tenant Farming Commissioner to be responsive to the future needs of the tenant farming sector.

Choice of procedure

14. Altering the functions of a public body can have significant ramifications in relation to the scope of the body, and the funding required. Whilst the Scottish Ministers are taking this power to ensure that there is flexibility to enable the Tenant Farming Commissioner to respond to the changing needs of the tenant farming sector in the future, it is considered that the Scottish Parliament should have the full opportunity to carefully consider any such changes under affirmative procedure.

Section 35(1) - Right of access to information on persons in control of land

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

Provision

15. Section 35(1) allows the Scottish Ministers to make regulations enabling persons who are affected by land to be given information about persons in control of that land. Subsection (2) sets out various matters that the regulations under section 35(1) may provide for. In cases where an individual, group or body are having problems with an area of land then where the legal owner of land (or tenant) is not an individual then there may be circumstances when establishing the name and contact details of an individual that has control of the land could be helpful in resolving the problem. The power will allow regulations to provide that the person having the problem with the land can make a request to the request authority for information about a person that has control of the land. The regulations could provide that a request cannot be made for information that is already in the public domain. Subsection (6) requires the Scottish Ministers to consult before laying draft regulations before the Scottish Parliament.

Reason for taking power

16. Taking a power will allow the Scottish Ministers to discuss further with relevant public bodies and other interests the detail of how the requests should be processed, the criteria for requiring the information, what person the information can be requested for, when disclosure of information is not required (i.e. for privacy reasons), and the appropriate level of sanctions for failure to comply with the requirements of the regulations and when these should apply. Taking a power will allow a public consultation to be carried out on the detail of the regulations, ensuring that their potential impact on stakeholders, including landowners, can be taken into account before the regulations are laid in draft before Parliament. The initial discussions with key stakeholders will be carried out in parallel with the Bill process and will continue until the regulations are laid in draft before Parliament. In making these regulations it will be essential that views of communities and individuals that may be having issues with land are taken into account. In addition it will be essential that a clear understanding of land ownership structures can be established in order to ensure that the regulations can adequately define persons in control of land. In addition the power will give the Scottish Ministers flexibility to amend the regulations to reflect changes in the types of person that own land. It will also give Ministers flexibility to amend the person that is the request authority.

Choice of procedure

17. This regulation making power is wide in scope and so the affirmative procedure is considered appropriate to allow the Scottish Parliament to give a high level of scrutiny to the use of the power. Before the regulations are made the Scottish Government will take into account the views of stakeholders and the views expressed in any responses to the consultation. These will be used to inform the regulations.

Section 36 – Power of Keeper to request information relating to proprietors of land etc

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative for first exercise of power, and if regulations amend primary legislation, otherwise negative

Provision

18. Section 36 amends the Land Registration etc. (Scotland) Act 2012 to insert a new section 48A. The inserted section 48A(1) gives the Scottish Ministers a power to make regulations enabling the Keeper to request information relating to certain proprietors of land and leases. Section 48A(2) sets out matters that may be included in the regulations made under section 48A(1) including that information may be requested about the category of person or body that a proprietor is and about individuals that have a controlling interest in a proprietor.

Reason for taking power

19. The regulations made under section 48A will allow information about the category of owner to be requested by the Keeper and be entered in the register. Defining what is meant by the category of the owner in regulations will allow the Scottish Ministers to retain the ability to amend the list of categories where the requirement for this information changes over time.

20. Taking a power will enable the Scottish Ministers to have flexibility to amend the regulations to take account of relevant changes. For example changes to the category of person or body that a proprietor may fall into or changes to corporate structures which may affect the definition of a person having a controlling interest in a proprietor of land.

21. Providing for definitions to be set out in regulations will provide that the views of stakeholders can be taken into account before any regulations are made.

Choice of procedure

22. The affirmative procedure will apply to the first exercise of the power and these regulations will include provision about the categories of owner that information can be requested about, and what is meant by a controlling interest in a proprietor. The affirmative procedure will also apply where the power is being exercised to amend primary legislation. This will enable a high degree of Parliamentary scrutiny for the first use of the power setting out details of the scheme for requesting information. The negative procedure will apply to other exercises of the power. Subsequent exercises of the power are more likely to be amendments to the definitions. This should not be a change in the overall policy of providing regulations that allow the Keeper to request additional information, but will involve refinements to the definitions used in the regulations, and therefore the negative procedure would be appropriate.

Section 39(2)(b) – Eligible land

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

23. Section 39 makes provision for the meaning of “eligible land” which is land that may be bought under the Part 5 right to buy. Subsection (1) defines “eligible land” for the purposes of Part 5 of the Bill as any land other than “excluded land”. Subsection (2) lists what “excluded land” means, and subsection (2)(a) provides that an individual’s home is exempt, unless it is occupied under a tenancy. Subsection (2)(b) provides that the Scottish Ministers may make regulations to set out what constitutes another category of “excluded land”, namely land pertaining to the land on which a person’s home is situated under subsection (2)(a).

Reason for taking power

24. The regulation making power in subsection (2)(b) enables the Scottish Ministers to set out in regulations the detail of what is to be considered as land pertaining to an individual’s home. Such land is likely to include garden ground, but may also include other land within the curtilage of an individual’s home. The land pertaining to the land with a person’s home under subsection (2)(b) on it is a detailed matter, and it is not desirable to set out all the various categories in primary legislation. Therefore, the Scottish Ministers consider that such matters of detail should be set out in secondary legislation, which will also enable changes to be made in the future too.

Choice of procedure

25. The Scottish Ministers consider that affirmative procedure is appropriate as what constitutes “excluded land” for the purposes of Part 5 involves important issues of public policy that are fundamental to the scope and application of Part 5. It is necessary that the Scottish Parliament is given the opportunity to fully scrutinise the regulations made.

Section 39 (2)(e) - Eligible land

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

26. Section 39 makes provision for the meaning of “eligible land” which is land that may be bought under the Part 5 right to buy. Subsection (1) defines “eligible land” for the purposes of Part 5 of the Bill as any land other than “excluded land”, with “excluded land” being listed in subsection (2). The categories of “excluded land” include land on which there is a building or structure that is an individual’s home, unless it is occupied under a tenancy; land pertaining to an individual’s home, subsection (2)(b) containing a regulation making power to enable the Scottish Ministers to make regulations regarding such land; croft land under section 68(2) of the Land

Reform (Scotland) Act 2003; land which is owned or occupied by the Crown by virtue of it having being vested as bona vacantia, or it having fallen to the Crown as ultimus haeres; and in subsection (2)(e) land of any other description that the Scottish Ministers may specify in regulations.

Reason for taking power

27. The regulation making power in subsection (2)(e) is included to allow flexibility in the future to enable the Scottish Ministers to exclude other type of land from the application of Part 5. It is anticipated that these will be detailed matters that would be better suited for secondary legislation.

Choice of procedure

28. The Scottish Ministers consider that affirmative procedure is appropriate as what constitutes excluded land for the purposes of Part 5 involves important issues of public policy relating to property rights of individuals. Changing what constitutes “excluded land” could be fundamental to the scope and application of Part 5. It is necessary that the Scottish Parliament is given the opportunity to fully scrutinise the regulations made.

Section 39(3) - Eligible land

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations made by Scottish statutory instrument
Parliamentary procedure:	affirmative

Provision

29. Section 39 makes provision for the meaning of “eligible land” which is land that may be bought under the Part 5 right to buy Subsection (1) defines “eligible land” for the purposes of Part 5 of the Bill as any land other than “excluded land”, with “excluded land” being listed in subsection (2). The categories of “excluded land” include, as set out in subsection (2)(a), land on which there is a building or structure that is an individual’s home, unless it is occupied under a tenancy.

30. Subsection (3) contains a regulation making power to make provision about the buildings and structures that are, or are to be treated as, a home for the purposes of subsection (2)(a) as well as the types of occupation and possession of land that are, or are to be treated as, a tenancy for the purposes of subsection (2)(a).

Reason for taking power

31. The regulation making power will give the Ministers the ability to set out in detail what constitutes a home for the purposes of subsection (2)(a) as well as the types of occupation and possession of land that are, or are treated as, a tenancy. It is anticipated that these will be detailed matters that would be better suited for secondary legislation, following full public consultation.

Choice of procedure

32. The Scottish Ministers consider that affirmative procedure is appropriate as what constitutes excluded land for the purposes of Part 5 involves important issues of public policy relating to property rights of individuals. Changing what constitutes the buildings and structures that are to be treated as a person's home and the types of possession and occupation that are deemed to be tenancies would impact property rights. In addition these matters are fundamental to the scope and application of Part 5. It is necessary that the Scottish Parliament is given the opportunity to fully scrutinise the regulations made.

Section 41(1)(c) – Eligible land: tenant's interests

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations made by Scottish statutory instrument
Parliamentary procedure:	affirmative

Provision

33. Section 41 sets out the circumstances in which the Part 5 right to buy may be exercised in relation to the interest of a tenant over tenanted land. Section 41(1) provides that croft tenancies and tenancies of a dwelling-house are not tenancies in respect of which the right to buy can be exercised. Section 41(1)(c) gives the Scottish Ministers power to make regulations setting out other kinds of tenancy that the right to buy a tenant's interest cannot apply to.

Reason for taking power

34. It is possible that there may be new types of tenancy in the future and it may not be appropriate for the right to buy to apply in relation to these tenancies. Therefore, to afford the necessary flexibility for the Scottish Ministers, it is considered appropriate to take a delegated power to enable the Scottish Ministers to set out other types of tenancy for the purposes of subsection (1).

Choice of procedure

35. The Scottish Ministers consider that affirmative procedure is appropriate as the types of tenant's interest that the right to buy can apply to (or not apply to) is fundamental to the property rights of tenants and thus to the scope and application of Part 5. Therefore the Scottish Parliament should be given the opportunity to fully scrutinise the regulations made.

Section 42(1)(c) - Part 5 community bodies

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

36. Section 42 sets out what constitutes a community body for the purposes of Part 5. Subsection (1)(c) allows the Scottish Ministers to make regulations to specify that bodies of other descriptions may be capable of constituting a community body for the purposes of Part 5.

Reason for taking power

37. It may be that new legal structures will be developed which will be suitable community bodies for the purpose of Part 5. The Community Empowerment (Scotland) Bill is amending the Land Reform (Scotland) Act 2003 to enable Scottish charitable incorporated organisations (SCIOs) and community benefit societies that meet certain requirements to be community bodies for the purpose of the rights to buy in that Act. This clearly demonstrates that flexibility is needed in the future to allow new legal structures that have been developed to undertake a range of activities for their community, including owning land. Therefore, the Scottish Ministers wish to take the power in subsection (1)(c) to enable flexibility in the future.

Choice of procedure

38. The Scottish Ministers consider that affirmative procedure is appropriate as what constitutes a community body for the purposes of Part 5 and related matters involve important issues of public policy, and it is necessary that the Scottish Parliament is given the opportunity to fully scrutinise the regulations made.

Section 42(8) – Part 5 community bodies

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

39. Section 42 sets out what constitutes a community body for the purposes of Part 5. Subsections (2), (3), (4), (5) and (6) set out the requirements that a company limited by guarantee, SCIO or community benefit society needs to meet in order to be a Part 5 community body for the purpose of section 42(1)(a) and subsection (8) allows Scottish Ministers to make regulations to modify these provisions.

Reason for taking power

40. To enable flexibility in the future should matters change in relation to the regulation of the constitution of companies, SCIOs or community benefit societies, the power in subsection (8)

would enable the Scottish Ministers to make any of modifications that are necessary and desirable as a result.

Choice of procedure

41. The Scottish Ministers consider that affirmative procedure is appropriate as what constitutes a community body for the purposes of Part 5 involves important issues of public policy on the constitution of companies and community benefit societies, and it is necessary that the Scottish Parliament is given the opportunity to fully scrutinise the regulations made.

Section 42(9)(a) – Part 5 community bodies

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

42. Section 42 sets out what constitutes a community body for the purposes of Part 5. Subsection (9)(a) provides that a community is defined for the purposes of subsections (2), (3), (4) and (5) by postcode unit or units, or by such area as may be specified in regulations.

Reason for taking power

43. It may be desirable to allow communities to be defined in other manners than just by postcode under subsection (9), so the regulation making power in subsection (9)(a) allows that flexibility. In particular, some communities comprise a large number of postcodes which may also change frequently, making it cumbersome to use these to describe their “community”. There are a number of building blocks which could be used in addition to postcodes and postcode areas, including settlement areas and electoral wards. To list these in the Bill would potentially involve a level of detail that is more suited to secondary than to primary legislation.

Choice of procedure

44. The Scottish Ministers consider that affirmative procedure is appropriate as what constitutes a community body for the purposes of Part 5 and related matters in relation to how a community is defined are important issues of public policy, and it is necessary that the Scottish Parliament is given the opportunity to fully scrutinise the regulations made.

Section 43(4) – Provisions supplementary to section 42

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

45. Section 43 sets out a number of provisions that are supplementary to section 42, which makes provisions in relation to Part 5 Community Bodies. Subsection (2) enables the Scottish Ministers to acquire land compulsorily if a Part 5 community body has bought land purchased under Part 5, but would no longer be entitled to do so. Subsection (4) enables the Scottish Ministers to make provision in regulations for any aspects in connection with the compulsory purchase of such land.

Reason for taking power

46. There may be cases where the Scottish Ministers consider it appropriate to exercise their power to compulsorily acquire land under section 43 and further provision would be of assistance in setting out how this to operate. It is not anticipated that the Scottish Ministers will exercise this power in many instances. Compulsory land acquisitions are complex matters, and it would not be appropriate to set out such detailed matters in primary legislation, and so it is considered that the detail is better suited to secondary legislation.

Choice of procedure

47. Affirmative procedure is considered to be appropriate given the complex and sensitive nature of compulsory acquisitions and the fact that the power can be used to amend primary legislation.

Section 44(7) – Register of Land for sustainable development

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

48. Section 44 imposes a duty on the Keeper of the Registers of Scotland to set up and keep a Register of Land for Sustainable Development. Subsection (7) allows the Scottish Ministers to make regulations modifying certain subsections in section 44. Firstly, subsection (2)(a) to (j) contains a list the documents and information that must be registered in the Part 5 register, and this list could be modified by regulations under subsection (7). Subsection (4) allows for certain information and documents to be withheld from public inspection and held elsewhere by the Scottish Minister. This subsection can be modified by regulations made under subsection (7). Subsection (5) sets out the information and documents to which subsection (4) applies, and this subsection can also be modified by regulations made under subsection (7).

Reason for taking power

49. The power in section 44(7) is required to ensure that the Scottish Ministers can vary the information and documents that are to be kept in the Register of Land for Sustainable Development. It is important that Ministers can respond to the need to make changes to the information that is contained in the Register.

50. The Keeper should be able to recover costs where she has provided members of the public with copies of entries in the Register of Land for Sustainable Development. Taking a regulation making power allows Ministers to keep charges under review.

Choice of procedure

51. Affirmative procedure is considered appropriate in respect of subsection (7), as any exercise of this regulation making power has the potential to change the information that is in the public domain and it also includes a power to amend primary legislation. Therefore, it is appropriate that the Scottish Parliament is given the opportunity to fully scrutinise any changes made under any such regulations.

Section 44(10)(b) – Register of Land for sustainable development

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

52. Section 44 imposes a duty on the Keeper of the Registers of Scotland to set up and keep a Register of Land for Sustainable Development. By virtue of section 44(10) the Keeper must ensure that members of the public are given facilities for obtaining copies of entries in the Register. Section 44(10)(b) enables the Scottish Ministers to make regulations setting charges for such copies.

Reason for taking power

53. The Keeper should be able to recover costs where she has provided members of the public with copies of entries in the Register of Land for Sustainable Development. Taking a regulation making power allows Ministers to keep charges under review.

Choice of procedure

54. It is considered that negative procedure is appropriate for regulations made under subsection (10)(b) given that charging for copies is an administrative matter and the charges to be levied will be relatively small. It should be noted that similar provision was made in section 48 of the Community Empowerment (Scotland) Bill, which inserts section 97F(7)(b) into the Land Reform (Scotland) Act 2003 to make provision for the payment of charges for copies of entries in the Part 3A Register of Community Interests in Abandoned, Neglected or Detrimental Land, this provision is subject to negative procedure.

Section 45(5)(a) and (c) – Right to buy: application for consent

Power conferred on: the Scottish Ministers
Power exercisable by: regulation made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

55. Section 45 sets out provisions for the application for a right to buy under Part 5. Subsection (5)(a) provides that any application must be made in a form specified by the Scottish Ministers in regulations. Subsection (5)(c) sets out that an application must include information as specified by the Scottish Ministers in regulations.

Reason for taking power

56. It is considered that the precise information needed is a detailed matter and it is appropriate that the form of the application and the information required should be set out in secondary legislation.

Choice of procedure

57. Negative procedure is considered to be appropriate given that the form of the application and the related information that is required are administrative matters relating to the documents that are needed as part of the process of making an application under Part 5.

Section 46(4) Right to buy: application procedure

Power conferred on: the Scottish Ministers
Power exercisable by: regulation made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

58. Section 46 sets out the application procedure for an application under section 45. Part of the process, to help to ensure that any person who may be affected by the application under Part 5 is aware of it, is that the Scottish Ministers must give public notice of an application and that views should be sent to the Scottish Ministers within 60 days of the notice. Subsection (4) provides that it is for Scottish Ministers to set out in regulations the manner of the advertisement.

Reason for taking power

59. It is considered that the form of the advertisement is an administrative matter, and that it is appropriate that this level of detail should be set out in secondary legislation. The power also gives the Scottish Ministers flexibility in setting out how such an application is to be given public notice. This allows Ministers to take account of changing means of conveying technology, such as the use of electronic means and social media and developments with such technologies.

Choice of procedure

60. Negative procedure is considered to be appropriate given that the form of the advertisement is an administrative matter.

Section 47(8) – Right to buy: Ministers’ decision on application

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

61. Section 47 contains provision relating to the decision of the Scottish Ministers in respect of an application under Part 5. In particular one of the procedural requirements that Ministers have to be satisfied has been complied with in order to consent to an application to buy land is that the Part 5 community body must, at least 6 months prior to the application being made, have submitted a written request to the owner of the land requesting the transfer of the land and the owner has not responded or not agreed to the request (section 47(3)(a)). In relation to an application to buy a tenant’s interest the procedural requirements include a requirement that at least 6 months before making the application the Part 5 community body have submitted a written request to the tenant requesting the assignation of the tenant’s interest.

62. The regulation making power in subsection (8) enables the Scottish Ministers to make regulations about the form and content of the request to the landowner or tenant, the form and content of the response to such requests and about the circumstances in which an owner of the land is to be taken not to have responded, or not to have agreed, to the request.

Reason for taking power

63. It is considered that the form and content of the request and the response is an administrative matter, and that it is appropriate that the detail should be set out in secondary legislation. In respect of subsection (8)(c), the instances in which an owner or tenant should be deemed to not have responded, or agreed, with a request are also considered to be an administrative and technical matter.

Choice of procedure

64. Negative procedure is considered to be appropriate given that the form and content of the request is an administrative matter. In respect of subsection (8)(c), the instances in which an owner or tenant should be deemed to not have responded, or agreed, with a request are also considered to be largely an administrative and technical matter and negative procedure is considered to be appropriate.

Section 48(2) and (8) – Ballot to indicate approval for purposes of section 47

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

65. Section 48 makes provision for a ballot to demonstrate that an application for a right to buy has the approval of the relevant community. Section 47(2) provides that the Scottish Ministers may set out in regulations how the ballot is to be conducted, and subsection (3) sets out various matters that must be provided for in the regulations. Subsection (8) allows the Scottish Ministers to make provision enabling a Part 5 community body, in certain circumstances, to apply to the Scottish Ministers for reimbursement of the costs of running the ballot.

Reason for taking power

66. It is considered that ballot is an administrative matter, and that it is appropriate that the detail should be set out in secondary legislation. The detail in relation to a ballot process must be set out fully, as it is imperative that the ballot is properly and fairly conducted. It is not considered appropriate to set out the detail of the process in primary legislation but it is imperative that the ballot results are notified in a standard format so that they are clear and there is no ambiguity. The reporting of these results is an administrative matter and is best dealt with in regulations. Similarly, the regulations under subsection (8) in relation to the reimbursement of expenses are considered to be essentially process related, and so the detail should be in secondary legislation. It is also the case that the ballot process in relation to the right to buy for abandoned, neglected or detrimental land in section 48 of the Community Empowerment (Scotland) Bill, that inserts sections 97J(2) and (4) into the Land Reform (Scotland) Act 2003, makes provision for regulations on how the ballot of the community is undertaken, on the form of the ballot return to Ministers, and on matters relating to relating to the reimbursement of expenses in relation to that right to buy.

Choice of procedure

67. Negative procedure is considered to be appropriate given that the ballot and the reimbursement of expenses are largely administrative matters. The equivalent provision in section 48 of the Community Empowerment (Scotland) Bill is also subject to negative procedure.

Section 52(1) and (3) – effect of Ministers’ decision on right to buy

Power conferred on: the Scottish Ministers
Power exercisable by: regulation made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

68. Subsection (1) enables the Scottish Ministers to make regulations setting out persons who are prohibited from undertaking certain transfers or dealings in respect of land or a tenant’s interest in relation to which an application has been made under section 45. Subsection (2) sets out matters that the regulations may include: specifying transfers or dealings that are not prohibited, requiring or enabling persons specified in certain circumstances to register specified notices in the Part 5 register and requiring certain information to be incorporated into deeds relating to the land in question.

69. Subsection (3) allows Ministers to make regulations suspending rights over land in respect of which an application has been made under section 45. The regulations may set out the rights which are to be suspended and the period for which the rights are to be suspended.

Reason for taking power

70. It is considered that there are many types of land transaction that could potentially hinder a community from exercising its right to buy under Part 5, and there may be different types of land transaction that arise in the future. Given the level of detail and the potential need to modify the types of transfer and dealings that are and are not prohibited, and that the information required could change, it is considered appropriate to make this provision in subordinate legislation.

71. In relation to subsection (3), this power may be used to make regulations providing that at a certain point in the application process for the right to buy, certain rights (of pre-emption, redemption or option to purchase) are suspended until the transfer of the land is completed or it has been determined that the transfer is not to be completed. Ministers require flexibility to set out how these rights will be affected.

Choice of procedure

72. Given that any regulations made could restrict an individual or tenant from dealing with their land or interest, it is considered appropriate that a high level of scrutiny is afforded to the regulations and that affirmative procedure is used.

Section 58(5) – Compensation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

73. Section 58 makes provision in relation to compensation in connection with applications under Part 5. Subsection (5) allows the Scottish Ministers to make regulations setting out details in relation to the entitlement to compensation under this section including:

- I. the amounts payable in respect of certain losses or expenses incurred by any person, including a landowner or former landowner or a tenant in relation to an application under Part 5 to exercise the right to buy and the subsequent exercise of that right to buy ;
- II. other amounts payable to other persons under the regulations themselves (under subsection (5)(b));
- III. the person liable to pay compensation for those amounts; and
- IV. the procedure for claiming for compensation.

Reason for taking power

74. The provisions needed for compensation will include a number of detailed matters. For example, the regulations will need to set out the evidence to be submitted to support the claim for compensation. It is important that these are clearly set out with the appropriate level of detail. Detailed matters relating to payment and procedures and about applications for compensation are considered appropriate matters to be dealt with in regulations. Equivalent provision is contained in section 48 of the Community Empowerment (Scotland) Bill which inserts section 97T(4) into the Land Reform (Scotland) Act 2003).

Choice of procedure

75. Negative procedure is considered to be appropriate given that the precise levels of compensation and the procedure to be followed are essentially administrative matters. Matters relating to the entitlement of compensation are likely to be detailed and administrative in nature and may require to be amended periodically.

Section 59(6) – Grants towards liabilities to pay compensation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

76. In certain circumstances, including if the Part 5 Community Body or third party purchaser has insufficient funds for compensation, as set out in subsection (2), the Scottish Ministers may pay a grant to a Part 5 community body or a third party purchaser. Subsection (6) provides that any application for a grant must be made in such form and in accordance with such procedure as the Scottish Ministers may by regulations specify.

Reason for taking power

77. The form of the application and the related procedure are considered to be administrative matters, the detail of which should be set out in secondary legislation.

Choice of procedure

78. Negative procedure is considered to be appropriate given that the form of the application and the related procedure are essentially technical matters.

Section 61(13) – Appeals to Lands Tribunal; valuation

Power conferred on: the Scottish Ministers
Power exercisable by: rules made by Scottish statutory instrument
Parliamentary procedure: None – dealt with as per Lands Tribunal rules

Provision

79. Section 61(1) provides that the owner of the land, a tenant or the Part 5 community body exercising its right to buy may appeal to the Lands Tribunal against the valuation carried out under section 56. Section 61(13) provides that Ministers' powers to make rules under the Lands Tribunal Act 1949 are extended to the extent that it is necessary to give full effect to section 61. For example, under section 3(6) of the Lands Tribunal Act 1949 rules can be made regulating proceedings before the Lands Tribunal. Rules under section 3(6) are not subject to any Parliamentary procedure. A similar provision is included in section 62(10) of the Land Reform (Scotland) Act 2003 in relation to the community right to buy in Part 2 of that Act.

Reason for taking power

80. This power is needed to ensure that the Scottish Ministers have the same powers in relation to the Lands Tribunal's role under Part 5 of this Bill as they do in relation to other aspects of the Lands Tribunal's role. This will ensure that section 61 operates effectively.

Choice of procedure

81. Ministers require flexibility to ensure that procedure for the Lands Tribunal in relation to Part 5 of the Bill works effectively. This is an administrative matter and can be dealt with in the same way as rules under the Lands Tribunal Act 1949.

Section 69 – Functions of deer panels

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative

Provision

82. Section 4 of the Deer (Scotland) Act 1996 (the 1996 Act) currently provides for the appointment of Deer panels by Scottish Natural Heritage (SNH), intended as a source of expert advice to SNH on any matter relating to the management of wild deer. Their focus is usually a local one but they could be used to focus on a deer management issue of relevance throughout Scotland. The proposal is that they could be used to engender community engagement and so aid transparency. SNH have the power to set up deer panels and make appointments to them. Section 69 provides for a power for Scottish Ministers to make regulations, in order to allow SNH to set up a deer panel for the purpose of engendering community engagement in relation to local deer management measures.

Reason for taking power

83. This power allows Scottish Ministers to confer functions on deer panels, including encouraging and facilitating engagement with the local community, communicating deer management issues between the local community and those engaged in deer management.

Choice of procedure

84. It is appreciated that regulation-making powers which contain a power to amend primary legislation are often subject to affirmative procedure. However, given that section 17A of the 1996 Act (see section 17A(2)(a)(xiii) and (xiv)) already permits amendments to be made to the 1996 Act subject to negative procedure, and that the power to be conferred by inserted section 4(7) is very narrow – it can only be used to make provision conferring further functions on deer panels - negative procedure is considered an appropriate level of scrutiny. Negative procedure will achieve the best balance between use of Parliamentary time and resource on the one hand and the purpose of the regulations on the other.

Section 74 – Modern limited duration tenancies: creation

New section 5B(3) – modern limited duration tenancies: break clauses

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

85. Section 74(3) amends the Agricultural Holdings (Scotland) Act 2003 by introducing a new section 5A and 5B which create Modern Limited Duration Tenancies ('MLDT'). Section 5B provides for break clauses in cases where the tenant is a new entrant. The break clause allows for the tenancy to be brought to an end at five years instead of the minimum ten years that otherwise applies for an MLDT. This is to encourage landlords to let to new entrants with the reassurance to both parties that the contract can come to an end after five years if the new entrant tenant is difficult. Subsection (3) of section 5B provides a regulation-making power for the Scottish Ministers to make provisions for the definition of a "new entrant".

Reason for taking power

86. To make provision to define what a "new entrant" into agriculture is for the purposes of section 5B and enable the Scottish Ministers to undertake further discussion and consultation with the agricultural industry and new entrant representative bodies, and to allow Ministers to reach a considered view on the current and future requirements for the definition of a "new entrant". Current examples of definitions of new entrants for other purposes can be found in the EU Rural Development Regulations No. 1305/2013 governing the rural development provision for the Member States, and Scottish Statutory Instruments 2015/58 and 2015/192. It is anticipated that there will need to be flexibility to amend the definition over time to accommodate changes in agricultural practices.

Choice of procedure

87. The provision of a break clause in the new type of lease is a small part of the wider provisions. As the regulations will not amend primary legislation, are of a technical nature and allow Ministers to consider scope of the 'new entrant' definition both now and in the future as agricultural systems change, negative procedure is considered to be the appropriate level of scrutiny for this power.

Section 78 – Modern limited duration tenancies: irritancy

New section 18A(4) – irritancy of lease and good husbandry: modern limited duration tenancies

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

88. Section 78 amends the Agricultural Holdings Act 2003 by inserting a new section 18A, after section 18. Subsection (4) provides a power for the Scottish Ministers to make regulations specifying which grants of a public nature relating to conservation activities should be treated as in accordance with the rules of good husbandry.

Reason for taking power

89. Due to the changing nature of public grants it is necessary to give the Scottish Ministers the flexibility to identify and update those grants to which section 18A(4)(b) will apply.

Choice of procedure

90. This will allow for the addition and removal of grants that are eligible under the provisions, so is largely procedural in nature. Therefore, negative procedure is considered to be an appropriate and proportionate level of scrutiny for this power.

Section 79 - Conversion of 1991 Act tenancies into modern limited duration tenancies

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

91. Section 79 provides a power for the Scottish Ministers to make regulations to provide for the conversion of secure 1991 Act agricultural tenancies into modern limited duration tenancies. The regulations will set out the procedure for and effect of the conversion, including the minimum duration of the MLDT, the terms of the lease for the MLDT, the notice procedure, the information to be included within those notices and associated timescales.

Reason for taking power

92. To enable the Scottish Ministers to consult further with the agricultural industry in order to carry out further work to develop the proposals and to further consider the effects of the conversion, allowing the regulations to set out in detail the process for conversion.

Choice of procedure

93. Affirmative procedure is considered to be appropriate because the nature of the power is significant and merits a high level of scrutiny, given its impact on landlords and tenant business arrangements and given the power allows for the amendment of primary legislation.

Section 81 – Sale to tenant or third party where landlord in breach of order or award

New section 38A(4)(c) - Application to Land Court for order for sale

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

94. Section 81 amends the Agricultural Holdings (Scotland) Act 2003 by inserting a new Part 2A which provides a remedy of sale where a landlord is in material breach of the lease. Subsection (4) of the new section 38A provides a power to allow regulations to be made by Scottish Ministers to specify those other persons who should be informed of a tenant farmer's application to the Land Court for an "order for sale" where a landlord has failed to comply with an order or award made under section 38A (1).

Reason for taking power

95. To enable the Scottish Ministers to be able to set out any additional persons who should be given notice of the application to ensure all individuals with a legitimate interest in a particular holding, for example a secured creditor, will be given notification of the tenant's application prior to the Scottish Land Court's consideration of the application. This will provide such an individual the opportunity to enter the proceedings if need be.

Choice of procedure

96. The power is about setting out who should receive notice of a court action and is consequently considered to be an administrative matter. Negative procedure is considered to be an appropriate and proportionate level of scrutiny for this power. The regulations may also be subject to amendments in the future as new circumstances arise through the use of the provisions.

Section 81 – Sale to tenant or third party where landlord in breach of order or award

New section 38B(6)(e) - Order for sale

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

97. New section 38B contains provision about the granting of an order for sale by the Land Court. Subsection (6) sets out the persons who are to receive notice of any successful application from the Court. Paragraph (e) provides a regulation-making power for the Scottish Ministers to prescribe any additional persons who should receive notice.

Reason for taking power

98. The power is taken to ensure that all those who might have an interest in the property are given notice of the making of an order for sale. It will allow Ministers to set out this level of detail in regulations rather than it having to be stated at length in the Bill itself.

Choice of procedure

99. The power is about setting out those additional persons who should receive notice of a court action and is consequently concerned with an administrative matter. It will also enable regulations to be subject to amendments in the future as new circumstances arise through the use of the provisions, and negative procedure is, therefore, considered an appropriate and proportionate level of scrutiny for this power.

Section 81 – Sale to tenant or third party where landlord in breach of order or award

New section 38C(1) - Effect of order for sale: prohibition of transfer etc.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

100. Subsection (1) of the new section 38C (Effect of order for sale: prohibition of transfer etc.) provides a power to allow regulations to be made by the Scottish Ministers to prohibit persons from transferring or otherwise dealing with land in respect of which an order for sale has been made under section 38B.

Reason for taking power

101. It is considered that there are many types of land transaction that could potentially hinder a tenant or a third party from exercising the right to buy under Part 2A, and there may be different types of land transaction that arise in the future. Given the level of detail and the potential need to modify the types of transfer and dealings that are and are not prohibited, and

that the information required could change, it is considered appropriate to make this provision in subordinate legislation. This will also enable the Scottish Ministers to work with stakeholders in order to ensure the detail is comprehensive and operates properly when making regulations to prohibit or prevent persons from dealing with land being transferred, and other associated provisions relating to that regulation, without having to amend primary legislation.

Choice of procedure

102. Affirmative procedure is considered appropriate. The power will impact on the rights of those with an interest in property to be able to deal with that interest as they see fit during the life of an order for sale. It is therefore appropriate that the Scottish Parliament be given the opportunity to debate their contents and consider stakeholder views before they are made.

Section 81(2) – Sale to tenant or third party where landlord in breach of order or award

New section 38D(4) - Effect of order for sale: suspension of rights

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

103. Subsection (4) of the new section 38D (Effect of order for sale: suspension of rights) provides a power to allow regulations to be made by Scottish Ministers about the suspension and revival of other rights in or over land in respect of which an order for sale has been made under section 38B. The regulations will provide further detail on those rights to which the regulations do and do not apply, the circumstances and the period for the suspension or revival of such rights.

Reason for taking power

104. To enable the Scottish Ministers to have flexibility to make regulations about the suspension or revival of specific rights in or over land, for which an order for sale has been made, without having to introduce new primary legislation. This will also enable the Scottish Ministers to work with stakeholders in order to ensure the provisions operate comprehensively in relation to other primary and secondary legislation. For example, this will enable consideration of shooting rights, where problems caused by inappropriate game management may be a cause of the failure of the landlord to meet their legal obligations and, therefore, in turn relevant to the application for the enforced sale.

Choice of procedure

105. Affirmative procedure is considered appropriate. The power will impact on the rights of those with an interest in property to be able to deal with that interest as they see fit during the life of an order for sale. It is, therefore, appropriate that the Scottish Parliament be given the opportunity to debate their contents and consider stakeholders views before they are made.

Section 81(2) - Sale to tenant or third party where landlord in breach of order or award

New section 38G - Appointment of valuer and valuation of the land

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

106. New section 38G inserted by section 81(2) of the Bill applies various provisions of the Agricultural Holdings (Scotland) Act 2003. One of the provisions applied is section 36 of that Act. Section 36(7) contains a regulation-making power for the Scottish Ministers to make further provision for or in connection with the matters provided for in section 36 (valuation: further provision) as well as sections 33 (appointment of valuer) and 34 (valuation of the land). The power in section 36(7) is subject to the affirmative procedure by virtue of section 91(4)(b) of the 2003 Act. The application by section 38G(2)(d) of section 36 can be said to expand the scope of the power in section 36(7) of the 2003 Act, which is why it is included in this Memorandum.

Reason for taking power

107. The power allows the Scottish Ministers to make additional provision to deal with any matters around valuation which are not addressed by sections 33, 34 and 36 of the 2003 Act. That expansion is regarded as appropriate because, first, any regulations which might be made under the sections applied ought to apply also to those sections as applied by section 38G. Secondly, it is conceivable there could be circumstances in which the valuation provisions may require additional or distinct provision to deal with the peculiarities of the situation which an order for sale might create in comparison to the right to buy exercised under the 2003 Act. This will also enable the Scottish Ministers to further consult with valuers, assessor and other relevant stakeholders in order to ensure the detail is comprehensive and provides clarity for valuation methodologies.

Choice of procedure

108. The procedure which regulations under section 36(7) of the 2003 Act follow is affirmative procedure. Due to the nature of the application of those sections we have not adjusted that procedure but consider it remains appropriate for Parliament to consider stakeholders' views and have the opportunity to consider the impact of any changes to the valuation regime which regulations might make due to their significance.

Section 81(2) - Sale to tenant or third party where landlord in breach of order or award

New section 38L(4)(c) - Sale to third party

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

109. New section 38L provides a tenant with the power to apply to vary an order for sale so that the land may be offered on the open market. Where the tenant makes such an application to the Land Court, by virtue of subsection (4), the tenant must notify the owner and any heritable creditor as well as any additional persons prescribed by the Scottish Ministers. This is to ensure all individuals with a legitimate interest in a particular property will be given notification of the tenant's application prior to the Scottish Land Court's consideration of the application and have the opportunity to enter the proceedings if need be.

Reason for taking power

110. There may be a need to specify additional persons having a particular interest in the land who should receive notice of the tenant's application, such as a person with sporting rights over the land.

Choice of procedure

111. Negative procedure is considered appropriate in these circumstances because the nature of the power is to make, in essence, administrative provision about notice of court actions; and given the regulations may be subject to amendment as new circumstances arise and land use changes.

Section 81(2) - Sale to tenant or third party where landlord in breach of order or award

New section 38M(1) - Procedure for sale to third party

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

112. New section 38M (procedure for sale to third party) provides a power to allow regulations to be made by Scottish Ministers about the process for sale of land where the Land Court has varied an order for sale under section 38L so as to allow the land to be offered for sale on the open market.

Reason for taking power

113. The number of cases in which a third party sale is expected to occur are anticipated to be very small indeed. The regulations would address the administrative processes around the Land Court's exercise of its power to order sale to a third party. In that sense they are about the detail of how the Land Court would go about managing a sale. This power would therefore provide flexibility enabling the Scottish Ministers to make regulations in the future on the valuation process and procedure to be followed for the sale on the open market, including any requirement to modify any enactment. It will also enable further consultation with valuers, assessor and other relevant stakeholders in order to ensure the detail is comprehensive and provides clarity for valuation methodologies.

Choice of procedure

114. Affirmative procedure is considered to be appropriate because the regulations would set out significant aspects of the procedure for sale on the open market to a third party, including provision about the sorts of matters covered by new sections 38C to 38K. In addition, the power includes the ability to apply, with or without modifications, the provisions of the 2003 Act to such a sale, as well as the power to modify primary legislation. It is therefore appropriate that the Scottish Parliament be given the opportunity to debate their contents and consider stakeholders views before they are made.

Section 81(2) - Sale to tenant or third party where landlord in breach of order or award

New section 38N(4) - Payment to former landlord where early resale

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

115. Subsection (4) of the new section 38N provides the Scottish Ministers with power to make regulations about the payment that the original buyer must make to the original seller if the land is subsequently resold within ten years.

Reason for taking power

116. To enable the Scottish Ministers to make future regulations detailing the process of determining the level of payment in different circumstances, e.g. where there is a partial onward sale, and how the liability to make a payment can be secured through the granting of standard securities, and setting out the circumstances in which no liability to make a payment arises. The power will also allow Scottish Ministers to undertake discussion with relevant stakeholders on the range of factors which should be considered as part of any regulations.

Choice of procedure

117. The regulations are subject to affirmative procedure as aspects of the procedure for onward sale will affect the impact of the overall proposals on the rights of parties. It is therefore appropriate that the Scottish Parliament be given the opportunity to debate the contents and consider stakeholders' views before the regulations are made.

Section 81(2) - Sale to tenant or third party where landlord in breach of order or award

New section 38O - Compensation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

118. Subsection (2) of the new section 38O, provides the Scottish Ministers with a power to make regulations setting out which losses and expenses may or may not be compensated, the procedure to be followed for claims for such compensation, and how such compensation should be calculated.

Reason for taking power

119. Section 38O makes provision to ensure that any person, including an owner or former owner of land, who has incurred loss or expense in complying with certain requirements of the enforced sale process, or where the tenant or seller has failed to complete the purchase, can apply to the Scottish Ministers for compensation. The regulations are intended to provide further detail and clarification as to those losses and expenses that will attract compensation, the procedure for claiming compensation and the amount and way in which compensation is calculated.

Choice of procedure

120. Regulations are subject to negative procedure as they are considered to be procedural and subject to amendments as new circumstances arise through the use of the provisions, and this is considered an appropriate level of scrutiny for this power.

Section 82(3) – 1991 Act tenancies: rent review

New schedule 1A – paragraph 2 - form and content of rent review notice

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

121. Section 82 amends the Agricultural Holdings (Scotland) Act 1991 by substituting section 13 (variation of rent) with a new section 13 and a new schedule 1A. Paragraph 2(4) of that

schedule provides the Scottish Ministers with a power to make regulations about the form and content of rent review notices for secure 1991 Act agricultural tenancies and the information that must or may accompany them.

Reason for taking power

122. To enable the Scottish Ministers to take into account the outcomes of the rent review modelling process being undertaken during 2015 and the results of further stakeholder engagement following the testing of the modelling prior to providing technical regulations. The power is also to give the Scottish Ministers the flexibility make adjustments once the new rent review system is used in practice.

Choice of procedure

123. Negative procedure is considered to be appropriate because of the stakeholder consultation and involvement in the modelling prior to the regulations being provided; and because of the technical nature of any regulations that will be made.

Section 82(3) – 1991 Act tenancies: rent review

New schedule 1A – paragraph 8 - productive capacity

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

124. Paragraph 8 of schedule 1A provides the Scottish Ministers with a power to make regulations on how the productive capacity of an agricultural holding with a secure 1991 Act tenancy is to be determined for the purposes of calculating the rent; and the information which is to be provided to the Land Court by the landlord and tenant to enable the court to have regard to the productive capacity of that holding.

Reason for taking power

125. To enable the Scottish Ministers to take into account the outcomes of the rent review modelling process being undertaken during 2015. This will include assessing which elements of the productive capacity of a secure 1991 Act agricultural holding should be included as part of a rent review. This will also enable the results of further stakeholder engagement to be considered following the testing of the modelling. There are a number of factors to be taken into consideration when determining the productive capacity of a holding including landlord and tenant provision of fixed equipment, production levels and yield, agricultural inputs (e.g. fertiliser), investments, depreciations, capital repayments and borrowing, labour requirements and labour costs etc. The modelling will help determine what should be taken into consideration and the most straightforward process for parties to determine the capacity of the holding.

Choice of procedure

126. Negative procedure is considered to be appropriate because of the stakeholder consultation and involvement in the modelling prior to the regulations being provided and because of the technical nature of any resultant or subsequent regulations. The power to set this out in regulations is also being taken to ensure sufficient flexibility to make adjustments to those factors to be considered and the processes to be followed in determining productive capacity once the new rent review system is used in practice.

Section 82(3) - 1991 Act tenancies: rent review

New schedule 1A – paragraph 9 - Surplus residential accommodation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

127. Paragraph 9(6) of schedule 1A provides the Scottish Ministers with a power to make regulations on how the standard labour requirement of an agricultural holding with a 1991 Act tenancy is to be determined; and the information to be provided by a landlord and tenant to the Land Court to enable the court to determine the standard labour requirement of the holding.

Reason for taking power

128. To give the Scottish Ministers flexibility to take into account the outcomes of the rent review modelling process being undertaken during 2015 and the results of further stakeholder engagement following the testing of the modelling, prior to providing technical regulations. The power is also to give the Scottish Ministers the flexibility to make adjustments to surplus residential accommodation once the new rent review system is used in practice, and to provide the potential to respond to future changes in housing and private rented sector.

Choice of procedure

129. Negative procedure is considered to be appropriate because of the stakeholder consultation and involvement in the modelling prior to the regulations being provided and due to the technical nature of any resultant or subsequent regulations.

Section 83(3) – Limited duration tenancies and modern limited duration tenancies: rent review

New section 9A - Form and content of rent review

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

130. Section 83 amends the Agricultural Holdings (Scotland) Act 2003. Subsection (3) inserts a new section 9A and provides a power for regulations to be made on the form and content of rent review notices for Limited Duration Tenancies (LDTs) and Modern Limited Duration Tenancies (MLDTs) and the information that must or may accompany them.

Reason for taking power

131. To enable the Scottish Ministers to take into account the outcomes of the rent review modelling process being undertaken during 2015, and the results of further stakeholder engagement following the testing of the modelling prior to providing technical regulations. The power is also to give the Scottish Ministers the flexibility to make adjustments to the form and content of notices once the new rent review system is used in practice.

Choice of procedure

132. Negative procedure is considered to be appropriate due to the stakeholder consultation and involvement in the modelling prior to the regulations being provided and the technical nature of any resultant or subsequent regulations.

Section 83(3) – Limited duration tenancies and modern limited duration tenancies: rent review

New section 9B - Determination of rent

Power conferred on: the Scottish Ministers
Power exercisable by: regulation made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

133. Section 83 amends the Agricultural Holdings (Scotland) Act 2003 and subsection (3) inserts a new section 9B. Subsection (3) of section 9B provides a power for regulations to be made on how the productive capacity of land comprised in a lease of a Limited Duration Tenancy (LDT) or Modern Limited Duration Tenancy (MLDT) is to be determined for the purposes of calculating the rent.

Reason for taking power

134. To enable the Scottish Ministers to take into account the outcomes of the rent review modelling process being undertaken during 2015, including assessing which elements of the productivity capacity of land comprised in a lease of a LDT or MLDT should be considered as part of a rent review. This will also enable the results of further stakeholder engagement to be considered following the testing of the modelling. The power is also to give the Scottish Ministers the flexibility to make adjustments to productive capacity once the new rent review system is used in practice.

Choice of procedure

135. Negative procedure is considered to be appropriate because of the stakeholder consultation and involvement in the modelling prior to the regulations being provided and due to the technical nature of any resultant or subsequent regulations.

Section 83(3) - Limited duration tenancies and modern limited duration tenancies: rent review

New section 9C - Review of rent under limited duration tenancies and modern limited duration tenancies: surplus residential accommodation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

136. Section 83 amends the Agricultural Holdings (Scotland) Act 2003 and subsection (3) inserts a new section 9C. Subsection (6) of section 9C provides a power for regulations to be made on how the standard labour requirement of the land comprised in a lease of a Limited Duration Tenancy or Modern Limited Duration Tenancy should be determined.

Reason for taking power

137. To enable the Scottish Ministers to take into account the outcomes of the rent review modelling process being undertaken during 2015 and the results of further stakeholder engagement following the testing of the modelling, prior to providing technical regulations. The power is also to give the Scottish Ministers the flexibility to make adjustments to the standard labour requirement once the new rent review system is used in practice.

Choice of procedure

138. Negative procedure is considered to be appropriate because of the stakeholder consultation and involvement in the modelling prior to the regulations being provided and due to the technical nature of any resultant or subsequent regulations.

Section 100 – Power to make ancillary provisions

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

Provision

139. The provision empowers the Scottish Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provisions by regulations as they think appropriate. Subsection (2) allows such regulations to make changes to primary legislation.

Reason for taking power

140. This is a general provision in standard terms that allows the Scottish Ministers to make provision by regulations to support the full implementation of the Bill. The power is considered appropriate for a Bill of this length and complexity.

Choice of procedure

141. Regulations of the type under section 99(1) are in general made subject to negative procedure but an exception is made where the regulations add to, replace or omit any part of the text of an act. In that case, affirmative procedure applies. This approach on procedure is in line with the approach taken in other Bills and there are not considered to be any reasons for a different approach in this case.

Schedule –Agricultural holdings: minor and consequential modifications

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: affirmative, if amending primary legislation, otherwise negative

Provision

142. Paragraph 5(29) of the schedule amends section 92(2) (ancillary provision) of 2003 Act. Section 92(1) of the 2003 Act allows the Scottish Ministers, by order, to make incidental, supplementary, consequential, transitional, transitory or saving provision as they consider necessary or expedient. Section 92(2) states that any order made under section 92(1) may amend provisions of any enactment relating to 1991 Act tenancies or land held under 1991 Act tenancies so as to apply them to short limited duration tenancies and limited duration tenancies or land held under such tenancies. Paragraph 5(29) amends section 92(2) to include Modern Limited Duration Tenancies (MLDTs).

Reason for taking power

143. The Bill provides for the setting up of a new letting vehicle, MLDTs, and the 2003 Act is amended accordingly to allow the Scottish Ministers to make, by order, any incidental,

supplementary, consequential, transitional, transitory or saving provision as they consider necessary or expedient to amend provisions relating to modern limited duration tenancies or land held under such tenancies.

Choice of procedure

144. As section 92(2) allows for amendment of primary legislation, the procedure is affirmative. Where an order under this section does not amend primary legislation, negative procedure applies. Provision for this is already made for this by section 91(3) and (5) of the 2003 Act.

Section 103 – Commencement

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations made by Scottish statutory instrument
Parliamentary procedure:	laid, no procedure

Provision

145. Subsection (1) provides that this section and sections 98 to 100 and 104 come into force on the day after Royal Assent.

146. Subsection (2) provides that any remaining provisions of this Act come into force on such date as the Scottish Ministers may by regulations appoint. It is usual to allow such provision in conjunction with a power to commence the provisions of a Bill. Subsection (3) clarifies that different days may be appointed for different purposes.

147. Subsection (4) provides that regulations under subsection (2) may include transitional, transitory or saving provision.

Reason for taking power

148. Some formal sections of the Bill are commenced on the day of Royal Assent. The Scottish Ministers may consider it appropriate for the substantive provisions of the Bill to be commenced at such a time as they appoint to be suitable. This is to provide flexibility to enable the provisions of the Bill to be brought into force in a coordinated and managed way, so as to give proper effect to the Bill without having to resort to primary legislation. It is usual practice for such commencement provisions to be dealt with by subordinate legislation. It should be noted that any transitional, transitory or saving provision under subsection (4) is separate to and narrower than the power to make equivalent provision under section 100, being dependent on commencement.

149. As an example of the exercise of this power, transitional or saving provision is likely to be required in relation to the repeal, by section 74, of section 5 of the 2003 Act. While new limited duration tenancies will not be possible, existing ones will continue for some years.

Choice of procedure

150. It is normal practice for commencement regulations to be laid before Parliament but not subject to additional procedure. Commencement regulations bring into force provisions whose policy have already been considered by the Parliament during the passage of the Bill. It is thought to be sufficient that any regulations under this section are laid before Parliament as soon as practicable after it is made (and before it comes into force). This is provided for by virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

This document relates to the Land Reform (Scotland) Bill (SP Bill 76) as introduced in the Scottish Parliament on 22 June 2015

LAND REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM