Written response from the Scottish Government

Scottish Government response to the 1st Report 2014 (Session 4) by the Rural Affairs, Climate Change and Environment Committee – Report on the proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014

Introduction

The proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 was consulted upon by the Scottish Government (SG) between 22 November 2013 and 7 February 2014. The lead Committee dealing with the Order is the Rural Affairs Climate Change and Environment Committee ("the Committee"). They prepared a report on the said draft Order having received written submissions and having conducted evidence sessions. The report is dated 7 February 2014.

This is the Scottish Government (SG) response to the report. The response covers points raised by the Committee on which a response was invited or is considered appropriate. It does not cover every point considered and reported upon by the Committee. Paragraph numbers relate to the numbering used within the Committee's report for ease of reference.

By way of update, the draft order was laid on 6 March 2014 as was Statement of Observations and Reasons. A copy of the Statement is annexed.

ISSUES CONSIDERED BY THE COMMITTEE

EUROPEAN CONVENTION ON HUMAN RIGHTS COMPATIBILITY (paras 58 and 59)

As we indicated to the DPLRC on 14 January 2014 we consider that the use of section 73 strikes the right balance between landlords' and tenants' rights and given that the Supreme Court in Salvesen v Riddell[1] criticised the inconsistency of outcomes we reached the view that the best way to resolve the issue was to try to ensure that everybody directly affected by the operation of section 72 would be put in the same section 73 scenario. Although groups 1,2 and 3 get to section 73 in different ways the aim is to ensure that everybody ends up in the same section 73 outcome.

As indicated previously, we have considered points raised by stakeholders and it is on this basis that the solutions proposed were formulated.

NUMBER OF LANDLORDS / TENANTS AFFECTED (Para 79)

The SG continues to appreciate and indeed share the Committee's wish to identify all possible cases and continues to engage with stakeholders.

[1] http://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0111_Judgment.pdf

GROUPS OF LANDLORDS / TENANTS AFFECTED

Good faith tenancies (paras 100,101)

SG has investigated the potential existence of "good faith" tenancies. To date, we have found no evidence that this hypothetical circumstance exists nor that it is likely to exist.

To fall within group 2, the tenancy should be treated as continuing to have effect by virtue of section 72(6) with the definition of "relevant tenancy" being provided by section 72A(4). SG consider this is a clear test and our understanding is that any party entering into a tenancy agreement without duress from the defect would in practice prepare written agreements to this effect, rather than relying upon section 72(6). In this case the tenancy would continue to have effect not by virtue of section 72(6) but rather by the written agreement.

In practice, the good faith situation, and theoretical unfairness arising from it, depends on 6 events arising in tandem, namely:

1. the parties in the first instance agreeing a fixed term lease with the landlord regaining vacant possession;

2. the landlord served the dissolution notice pre-2003;

3. the tenant served a section 72(6) notice;

4. the landlord agreed to allow the 1991 Act tenancy (that is, a tenancy under the Agricultural Holdings (Scotland) Act 1991("1991 Act")), and for it to be in good faith, agrees for reasons unconnected to section 72(10) and the uncertainty from the Supreme Court case (<u>or</u> paid a sum of money to secure the arrangement);

5. the tenant, despite the uncertainty from the case (or the fact a sum of money has been paid), does not set up a written agreement but relies on the operation of section 72(6)

6. Finally the landlord, despite the existence of a good faith agreement unconnected with section 72(10) (or payment), decides to seek to recover the property now that the Supreme Court case has been finally determined in favour of landlords. It should be emphasised that in light of the opt in, the landlord is not *forced* to seek to recover.

On balance, we do not accept this is likely and accordingly, submit there is no inconsistency. We consider that the alternative of another avenue into the Scottish Land Court (SLC) would be undesirable, will cause delay and uncertainty for others not in that hypothetical situation and would increase litigation overall to define whether or not there was a good faith agreement.

Article 3 sufficiently unambiguous? (paras 104,105)
The wording in article 3 has been altered slightly to make the purpose more direct and clear. It now reads that "An order under paragraph (2) may, in particular…specify the date on which the tenancy to which the application relates is to terminate".

As we indicated to the Delegated Powers and Law Reform Committee[2] to give the SLC the ability to decide what the appropriate termination date seems to us to be a sensible way forward. The court will then be able to balance the different rights and if the landlord is entitled to repossession they will get it at a date that reflects and allows the court to take into account the tenant's submissions on a reasonable outcome. In those circumstances we are confident that the court will achieve the right balance. As further indicated by us the court would also be bound by the European Convention on Human Rights (ECHR) and by the judgment of Salvesen v Riddell.

GROUPS NOT COVERED BY THE DRAFT ORDER (para 122)

SG has offered to pay for and be part of mediation for "key cases" in groups 4 and 5[3]. The mediation process is currently being developed by an independent mediator. As indicated by the Cabinet Secretary to the Committee we will work with anyone who approaches us, however, where we feel that the circumstances have moved beyond the scope of any remedy those persons would be in a separate group and we would need to prioritise those in other groups. We commented previously to the Committee that the most appropriate remedy for groups 4 and 5, should an issue arise, would seemingly be through a court and parties must take their own legal advice on their options. Remedies would depend on the advice parties got at the time and the advice they get now on what to do about it. The draft order is not the place to deal with these issues.

MEDIATION (para 142)

SG has already appointed an independent mediator to prepare a report on the process for mediation. This is being developed in conjunction with stakeholders and SG hopes that, where appropriate, mediation is used by parties affected. It is of note that an initial mediation workshop has taken place at which the independent mediator, SG and stakeholder groups were present. Mediation is however inherently a voluntary route.

POTENTIAL FOR COMPENSATION (paras 156,158, 159)

In his opening statement to the Committee on 15 January 2014[4] the Cabinet Secretary acknowledged that harm had been caused and that the draft order may only be part of the route to just satisfaction. The purpose of the draft order is to remedy the defect identified by the judgment in Salvesen v Riddell. Given the complexity and differences between those affected it is simply not

[2] Official Report DPLRC dated 14 January 2014 column 1224
[3] Official report RACCE 15 January 2014 column 3186.
[4] Official Report of RACCE dated 15 January 2014, at column 3172

possible nor advisable to provide a generic compensation scheme which was accepted by the committee. If claims for compensation are submitted to SG these will be considered on their own facts and circumstances.

POTENTIAL TIME BAR ON CLAIMS (paras 168,170)

SG cannot provide advice on potential time bars and the application and restrictions associated with the relevant legislation on this issue. Rules will apply differently according to different types of claim, of which we do not yet know any facts or detail. Subject to below, some claims may be against SG or between landlord and tenant or third parties and anyone considering such a claim must take their own legal advice on this issue.

SG has given a clear undertaking that where any party enters into the mediation offered by SG as part of the solution in good faith, SG will not treat any clock to start for the purposes of time bar, if it arises, until the end of the mediation or 28 November 2015 (whichever date if earlier) for the purposes of a claim against SG for groups 1,2 and 3. That undertaking cannot apply for those in groups 4 and 5. That said, those within groups 4 and 5 will require to take their own legal advice as to the application of time bar to their particular circumstances. We reiterate that the parties were entitled to raise contemporaneous claims as others did and that there is, in any event, existing scope to waive any existing time bar.

GUIDANCE (para 172)

SG will, in due course, provide guidance on the order to address relevant issues.

Agriculture and Rural Communities
Scottish Government
March 2014

ANNEX

Statement of Observations and Reasons

by the Cabinet Secretary for Rural Affairs

as required by section 13(4) of the Convention Rights (Compliance) (Scotland) Act 2001

Scottish Government (SG) consulted on the proposed draft order from 22 November 2013 until 7 February 2014.

The consultation sought comment on 4 specific questions and invited general observations.

The Rural Affairs and Climate Change and Environment Committee (RACCE) and the Delegated Powers and Law Reform Committee (DPLRC) responded to the Scottish Government (SG), along with the following groups and a number of individuals:- Scottish Courts Service, the Faculty of Advocates,

Scottish Tenant Farmers Association (STFA), Scottish Land and Estates (SLE), Scottish Agricultural Arbiters and Valuers Association (SAAVA), the Royal Institute of Chartered Surveyors (RICS), South Lanarkshire Council. The SG also sought views from the Scottish Land Court (SLC) on the draft Order, in light of the impact on their functions.

In addition to those mentioned above, RACCE also took evidence from Scottish Government officials, STFA, SLE, the National Farmers Union of Scotland, RICS, SAAVA, the Law Society of Scotland and the Cabinet Secretary for Rural Affairs and the Environment.

A summary of the observations to which Scottish Ministers have had regard is presented at Annexes A and B.

Annex A presents those observations which have not resulted in a change to the Order and Annex B presents those observations which have resulted in changes to the order.

Throughout the document, reference is made to the cases that are affected in different ways by the defect. The different cases fall into "groups" and the definition for each group (as well as a flowchart of the groups) is presented at Annex C.

1. STATEMENT OF REASONS

DPLRC highlighted that the "Statement of Reasons" provided with the proposed draft Order could have explained more fully the "compelling reasons" for using a Convention Compliance Order (as opposed to emergency Primary legislation), as required by section 13(3)(a) of the Convention Rights (Compliance) (Scotland) Act 2001. The Committee explored this issue with officials on the 14 January 2014 and welcomed the clarity provided. For clarity and ease of reference a revised Statement of Reasons, taking on board the Committee's comments has been prepared and is laid along with the Draft Order.

2. SOLUTION SHOULD HAVE BEEN INCLUDED WITHIN THE REVIEW OF AGRICULTURAL TENANCIES

Some respondents asked why the solution to the defect could not be linked to the review of Agricultural Tenancies which is due to report in December 2014.

The Supreme Court provided for a period of time to fix the defect stating that "Decisions as to how the incompatibility is to be corrected, for the past as well as for the future, must be left to the Parliament, guided by Scottish Ministers. Both sides of the industry will require to be consulted after the necessary research has been carried out and proposals for dealing with the situation that respects the parties' Convention rights have been formulated. That process will take time, and the court should do what it can to enable it to be conducted in as fair and constructive a manner as possible". It was considered to be inappropriate to link a solution for a closed group to a wider review where that would have caused delays. The consensus from early meetings with

stakeholders was that we should bring the uncertainty to an end as early as possible.

3. NUMBERS AFFECTED

A respondent commented that the Scottish Government has failed to provide a breakdown of those affected persons within groups 1, 2 and 3 and thus no comment could be made on the accuracy of those figures.

It was put to me at the RACCE hearing on 15 January 2014 that some people might be aware of the situation but might not have identified themselves owing to fear that to do so would prejudice their position. I was asked what SG had done to identify all those who are affected.

As I said to the Committee we spoke to stakeholders and publicised the fact that we wanted anyone who felt they had been affected to get in touch with SG. As I indicated, we consider that 20 or so farms or tenancies face being directly affected in the current situation. Although we do not have an exact figure for how many tenancies are affected, we feel that the number is in double rather than treble figures. I cannot give any guarantees on numbers and we urged that anyone who felt they have been affected should get in touch with their association or directly with SG.

4. USE OF SECTION 73

In our consultation we specifically asked if the use of section 73 of the Agricultural Holdings (Scotland) Act 2003 ("the 2003 Act") was an appropriate mechanism through which the landlord could recover vacant possession and I am pleased that there was wide spread support for this approach from all sides. A concern was raised regarding the use of section 73 for group 1 and this is addressed below.

Section 73 is a proportionate response, balancing competing rights and was chosen primarily to provide consistency with the approach used in the 2003 Act to allow landlords not affected by the defect (ie where a dissolution notice was served at any time after 1 July 2003) to recover vacant possession. In addition, the Supreme Court indicated that one of the problems for Mr Salvesen, as an affected landlord, was that he did not get "the benefit of section 73" which supports our view that the approach involving the use of section 73 is a European Convention on Human Rights (ECHR) compliant solution.

5. MISSING GROUPS

With one exception, all respondents indicated that, in their view, our analysis had correctly identified all the affected groups. The exception suggested that a further two groups should be identified within group 3. We have reviewed both these groups and concluded that the definition is comprehensive for our purposes.

6. GROUP 1

6.1 SLC should be given opportunity to decide rather than conversion to section 73.

A respondent questioned whether, to avoid breaches of article 14 (prohibition of discrimination) and article 6 (right to a fair trial) the SLC should be afforded the opportunity to resolve issues between landlord and tenant when they arise.

As we indicated to the DPLRC on 14 January 2014, we consider that section 73 strikes the right balance between landlords' and tenants' rights, and given that the Supreme Court criticised the inconsistency of outcomes we reached the view that the best way to resolve the issue was to try to ensure that everybody directly affected by the operation of section 72 would be to put them in the same section 73 scenario. Although groups 1,2 and 3 get to section 73 in different ways, the aim is to ensure that everybody ends up in the same section 73 outcome.

The consensus from stakeholders was to avoid lengthy, expensive litigation and it is considered that conversion to section 73 meets that objective without the need for further Land Court procedures. While the SG believes that the SLC is the right forum to determine proceedings already in the Court (group 3), it is not necessary in order to comply with article 14 ECHR to provide for new litigation, where not.

6.2 Vacant Possession should be automatic at the end of the limited partnership (LP) rather than conversion to Section 73

Some respondents submitted that tenancies should terminate on the date of dissolution of the partnership with no right being available to a general partner to continue the tenancy in their own name.

As we indicated to the DPLRC on 14 January 2014 we have attempted to provide consistent outcomes for those affected. Our aspiration in doing so, going forward, is to strike a fair and proportionate balance between the rights of landlords and those of tenants. The lease will have a termination date and the notice periods provided within section 73 ensure that the tenant has the opportunity to make appropriate arrangements to wind down the farm and to move out at the appropriate date in an orderly way. It also provides the landlord with what they do not have under a full Agricultural Holdings (Scotland) Act 1991 tenancy (" '91 Act tenancy"), namely, the ability to regain vacant possession after the due notice period.

7. GROUP 2

7.1 25 year Limited Duration Tenancy (LDT)

One respondent suggested that for a 'relevant tenancy' where a landlord was serving an application notice during the intimation period

to convert the secure ’91 tenancy that the outcome should be a 25 year LDT rather than a section 73. While an attractive outcome for tenants, this option would have created unnecessary inconsistency and imposed a lengthy timescale for the landlord to recover vacant possession. It would create a high risk of ECHR challenge.

7.2 Opt-in v Opt-out

Certain respondents representing the landlords’ interests expressed concern that the Order required landlords whose ECHR rights had been compromised by the defect to take further action to resolve the situation and suggested that this might be a further ECHR breach.

In preparing the draft order, we reflected on the point in some detail. The primary reason for the landlord being required to opt-in is that it provides, in law, a solution that is ECHR compliant whereas the alternative option of using the legislation to change existing arrangements ran the risk of being non ECHR compliant in some situations. This is not an onerous process and could, if required, be combined with the serving of the first notice as required by the section 73 process.

7.3 Combined notices

In the responses the possibility of combining the “application notice” with the first stage of the section 73 process i.e. the section 73(3) notice was raised as a sensible approach to reducing unnecessary bureaucracy. On further consideration, this has been resisted because it is not necessarily safe to assume that an individual serving an application notice would always wish to start the section 73 process simultaneously – or indeed at all. If they did then we see no reason why, with appropriate wording, the two processes could not be contained within a single document.

7.4 12 month intimation period too short

Comment has been made that the 12 months’ intimation period during which a landlord can elect to convert the ’91 Act tenancy into the section 73 process is too short. However, in deciding what was a suitable time period we had to balance the need to bring to an end the uncertainty faced by those affected with providing a reasonable period for adjustment and we believe 12 months is reasonable.

7.5 Cooling off period is unreasonable

Some respondents commented that the “cooling-off” period deprived landlords from recovering vacant possession earlier and as a consequence compromised their ECHR rights. We understand the point being made but remain of the view that a relatively limited delay in landlords obtaining vacant possession is proportionate in balancing rights, in particular to properly respect tenants’ rights as may arise

under article 8 of the ECHR (right to respect for their home). The SG through mediation encourages an orderly transition to new arrangements (once the Order becomes law), which requires time to support outcomes balancing interests of landlords and tenants. The "cooling-off" period offers this to those in group 2. It is reasonable and justified for that reason and the length of the "cooling off" period is considered appropriate, having regard to these competing rights.

8. GROUP 3

8.1 Subject to the cooling off period

Throughout the consultation we were asked to clarify whether group 3 cases exiting the SLC would be subject to the "cooling off" period. They will not. The regular section 73 process will apply. If, in the event of the SLC granting leave to abandon the proceedings either with or without the agreement of the tenant, the landlord wishes to serve notice of their intent to terminate the tenancy, they will be able to do that 3 years in advance of the appropriate term date. We understand that this may be 28 May 2014 for a small number of cases within group 3 where the term date is Whitsunday and where the landlord wishes to exit the SLC process and is able to do so. SG is committed to providing mediation for these cases and we consider that a satisfactory alternative outcome is best secured through mediation.

8.2 SLC test for 'on-going' tenancies

A number of respondents expressed concern about the level of discretion that the Order provides to the SLC to deal with "ongoing" cases. In particular that the decision could be for longer than provided for by the section 73 process and that the decision once taken could not be appealed.

I have considered both these points in detail.

With regard to the discretion being afforded to the SLC the key points are that a) the order is being provided in the context of a Supreme Court ruling and of a general principle of enabling landlords to recover vacant possession using the section 73 process b) SLC decisions have to be ECHR compliant, c) any tenancy continuing by virtue of section 72(6) can be brought to an end using the section 73 process.

There is specific provision, to avoid ambiguity the point having been raised by the DPLRC, that these cases are appealable to the Court of Session against a determination on a point of law.

9. GROUPS 4 & 5

9.1 Exclusion of groups 4 and 5

Various respondents commented that groups 4 and 5 should not be excluded from the terms of the order.

We have given careful consideration about who to deal with in the order. We have tried to provide a legislative solution for instances in which the operation of the law leads to a difficulty with the ECHR. Although some of the other agreements have been entered into under the shadow of section 72 and influenced by it they were, nevertheless, not required to be entered into and were not a necessary consequence of the section, insofar as found to be non-compliant. Groups 4 and 5 are essentially beyond the scope of the order in two ways. Group 4 circumstances are beyond the scope of the order because it seeks to convert, in one way, or another, existing tenancies into section 73 tenancies. However, if (as in group 4) intervening events between 2003 and now have meant that there is no tenancy to convert, the order cannot convert them. For that reason they fall outwith the scope and the remedy in the order does not address them. That is not to say there are not remedies but the order is designed to ensure that the legislation that affects tenancies is brought into ECHR compatibility and that is why that group is not dealt with in the order.

Tenancies in group 5, sometimes called bilateral agreements, are where the landlord and tenant came to an agreement in some form or another, in light of section 72. However, the outcomes that they came to are not a direct consequence of the operation of the law; they are a direct consequence of the bilateral agreement that the tenant and landlord entered into with each other. In that sense, the order which changes the legislative provisions is a different issue from the bilateral agreements that fall outwith that.

9.2 May or may not be content

A respondent commented that whether those in group 4 and 5 may or may not be content relates to the proposed order or bilateral agreement and considered that it could be inferred that those in groups 4 and 5 have no real interest in the judgment, in the order or in a potential claim.

As indicated by me to the RACCE on 15 January 2014 we will work with anyone who approaches us. However, where we feel that that the circumstances have moved beyond the scope of any remedy those persons would be in a separate group.

The RACCE invited the SG to comment on, should an issue arise with those in either group 4 or group 5 where the remedy would be. We replied that the remedy would certainly be through a court. Parties must take their own advice on what their options are. The remedies for such a party would depend on the advice they got at the time and the advice they get now on what to do about that. The order is not the place to deal with that set of circumstances.

10. "GOOD FAITH" TENANCIES

Both Parliamentary Committees asked me to consider further whether there could be bilateral agreements in group 2 that might have been entered into in "good faith" without any duress from the defect.

The Committees raised this issue hypothetically and highlighted that if such situations existed the Order as drafted would provide an opportunity for these to be unpicked and that this could be problematic on two accounts. Firstly by creating an inconsistency with group 5 bilateral agreements, as the order makes no provision for these to be unpicked. Secondly, by allowing bilateral agreements made in good faith and without duress from the defect to be unpicked.

We have looked at this in some detail and have found no evidence to suggest that this hypothetical circumstance exists nor is likely in practice.

In practice, to fall within group 2 the tenancy should be treated as continuing to have effect by virtue of section 72(6) (see the definition of "relevant tenancy" in section 72A(4). We consider this is a clear test and our understanding is any party entering into an tenancy agreement without duress from the defect would in practice prepare written agreements to this effect rather than relying upon section 72(6), in which case the order would not apply and no conversion would be possible.

On balance, we do not accept the suggestion of inconsistency and consider that the alternative of another avenue into the SLC would be undesirable and it would simply provide further scope for delay, uncertainty and additional cost to meet a hypothetical problem. The situation, and theoretical unfairness arising from it, depends on a range of unlikely events arising in tandem, namely the parties in the first instance agreeing a fixed term lease with the landlord regaining vacant possession; the landlord served the dissolution notice pre-2003; the tenant served section 72(6) notice; the landlord agreed to allow the '91 Act tenancy, and for it to be in good faith, agrees for reasons unconnected to section 72(10) and the uncertainty from the Supreme Court case (or paid a sum of money to secure the arrangement); the tenant, despite the uncertainty from the case (or the fact a sum of money has been paid), does not set up a written agreement but relies on the operation of section 72(6) and finally the landlord, despite that good faith agreement unconnected with the 1991 Act (or payment), now that the case has been finally determined in favour of landlords, decides to seek to recover the property. Moreover, in light of the opt in, the landlord is not forced to seek to recover. In light of that, the SG consider that a new SLC avenue will cause delay and uncertainty for others not in that unlikely situation and would increase litigation.

11. TIME BAR

RACCE requested clarity on the potential time bars and the application of and restrictions associated with the relevant legislation on this issue.

SG cannot provide legal advice and cannot provide guidance on the range of actions as may potentially arise in litigation between different groups of persons. As the RACCE notes, rules will apply differently according to different types of claim. Subject as below, some claims may be against the SG and anyone considering such a claim must take their own legal advice on this issue.

Whether SG would have any time bar point and whether they seek to rely upon it would depend on the circumstances, including the nature of the claim and the extent to which a claimant contributed towards the delay.

Notwithstanding that, consistent with the benefits of seeking mediated solutions, I have given a clear undertaking that where any party enters into the mediation offered as part of the solution in good faith, the Scottish Government (for its part) will not treat any clock to start for the purposes of time bar, if it arises, until the end of the mediation or 28 November 2015 (whichever date is earlier), for the purposes of a claim against the Government for groups 1, 2 and 3.

That undertaking cannot apply to groups 4 or 5. However, as I indicated to the Committee, I do not want to limit mediated solutions.

12. ABSOLUTE RIGHT TO BUY (ARTB)

Some respondents expressed concern that the consideration being given to an absolute right to buy for farm tenancies could be regarded as either compromising the ECHR rights of landlords or influencing the decisions that they might take as a result of the order in a way that was detrimental to tenants. The final report for this review is due to be produced in December 2014 and it is only after that time that consideration could be given to any associated legislative change.

I made it clear in my response to RACCE that aRTB was only being considered for secure heritable ’91 Act farm tenancies and that for the avoidance of doubt the following cases affected by the defect would be exempt from the absolute right to buy if that measure is introduced as a result of the review of agriculture holdings

- any Limited Partnerships extended as part of bilateral agreements within group 5
- any remaining Limited partnership
- any secure ’91 Tenancy retained in group 2 (should landlords in that group decide not to into the section 73 process to recover vacant possession).

13. FORMAL RECOGNITION OF HARM CAUSED.

Various respondents asked that SG acknowledge and apologise for the harm caused by the defect in legislation passed by the previous administration specifically with regard to the emotional and financial price paid by those affected.

In my opening statement to the RACCE of 15 January 2014 I acknowledged that harm had been caused and that the remedial order may only be part of the route to just satisfaction. In addition I highlighted that SG will be paying for and also be involved in mediation as part of the solution in key cases. Given the complexity and differences of the cases involved I have also made it clear that it was neither possible nor advisable for me to make a statement which accepted generic liability on behalf of the previous administration.

14. PLAIN ENGLISH GUIDANCE: - THE ORDER AND MEDIATION

I appreciate the legislative arguments surrounding the defect and its solution are extremely complex and that guidance in plain English is required to explain both the impact of the order and SG's proposals for mediation.

This guidance is currently being prepared and will be available to all those affected when the draft order be passed by Parliament.

15. "PURPORTED"

Two responses commented on the use of the word "purported" in the order highlighting that this word was being considered as part of ongoing cases before the court. We do not consider that it is appropriate to make general changes while these cases are ongoing. That would not be as a consequence of the Supreme Court case and may create doubt regarding a term which is used throughout the 2003 Act at present. To the extent a lack of clarity exists, the courts will address the issue and a view can be taken, once completed.

16. COMPENSATION

During the initial consultation stages when the proposed draft order was being prepared a number of commentators suggested that the Order should include a generic compensation scheme. Given the diverse nature and complexity of the cases involved this was simply not practical or advisable. I am pleased that RACCE agrees with this approach and recorded "a unanimous view in oral evidence that the draft order should not include a generic compensation scheme".

Agriculture and Rural Communities
Scottish Government
February **2014**

ANNEX A

This annex highlights all the observations that Scottish Government had regard to, but, on balance, felt that changes to the Order were not necessary or may produce undesirable consequences. The reasons for resisting will be presented under themes. Table 1 provides a summary of those themes and highlights the source of different observations.

Table 1. Summary of observations from respondents.

Section	Nature of observation	Respondent*
1.	Statement of reasons	5
2.	Solution should have been included within the review of Agricultural Tenancies	E
3.	Numbers of farms affected	D
4.	Use of section 73 as the means to recover vacant possession	2,3,4,5,6,7,8,9,11,12,13 b,c,d,e
5.	Identification of groups	3, 6, 9, 11
6.	Group 1	
6.1	SLC should be given opportunity to decide rather than conversion to section 73.	e
6.2	Vacant Possession should be automatic at the end of the LP rather than conversion to Section 73.	2
7.	Group 2	
7.1	25yr LDT,	10
7.2	Opt-in v Opt-out,	8
7.3	Combined notices	2,3,4,11
7.4	12 month intimation period too short.	11
7.5	Cooling off period is unreasonable	2, 3, 6
8.	Group 3	
8.1	Subject to the cooling off period	stfa
8.2	SLC test for 'on-going' tenancies.	2, 5, 12
9.	Groups 4 & 5	
9.1	(Exclusion of grp 4 5),	7, 8,
9.2	May or may not be content	6
10.	"Good faith" tenancies	5, 6, 12
11.	Time bar	
12.	Possible introduction of aRTB in the future	2, 3, 8
13.	Formal recognition from SG of harm caused.	2, 3, 4, 7, 12
14.	Plain English guidance on the Order and Mediation	2, 5, 6, 8, 12
15.	"Purported"	2, 3, 4
16.	Compensation	2,3,4,6,7,8,9,10,11, 12,13,14,b,c,d,e

* Numerical = submission to SG, alphabetical submissions to Committees

1	Scottish Courts Service	7	STFA	13	RICS
2	An individual	8	SLE	14	South Lanarkshire Council
3	An independent landlord	9	SAAVA	a	Law Society of Scotland
4	An independent landlord	10	An independent tenant	b	RICS
5	DPLRC	11	An independent landlord	c	SAAVA
6	Faculty of Advocates	12	RACCE	d	SLE

ANNEX B

The changes to the draft order (from the proposed draft order) are technical in nature. They serve to facilitate comprehension and are in line with DPLRC recommendations. These are the changes to the heading for article 2 and article 4(1)(b) and 4(3). There is also a change in article 3(3) to correct a reference to a subsection.

Article 3(3)(b) has been altered slightly to make the wording more direct in relation to the court's powers. It is noted in response to concerns that the court may uphold section 72(6) tenancies, that section 73 operates in tandem with section 72.

Article 4(1) has been altered as in its original form it unintentionally applied to landlords who served a dissolution notice on or after 01 July 2003. This alteration is in line with the DPLRC's recommendation.

ANNEX C

Groups of case identified when the remedial Order was being drafted. These groups are presented diagrammatically in Figure 1.

Group 1. (red border) Cases where the limited partner (landlord) served on the general partner (tenant) a dissolution notice under s72(3) for a date in the future. The general partner has the option, within 28 days of the purported termination of the tenancy to serve a notice claiming the tenancy in their own right under section 72(6). In group 1 cases the date at which the tenant can serve the claim notice is yet to arrive.

Group 2. (red border) Cases where the former general partner (tenant) is now in receipt of a full 1991 tenancy as a result of the landlord opting either not to apply to the Scottish Land Court (SLC) for an order under s72(8) or withdrawing from the SLC process which could have had the effect that the tenant's claim notice should not apply. These cases are regarded as 'acquiesced in' or 'capitulated in' tenancies depending on the extent to which the limited partner sought to resist the claim notice.

Group 3. (red border) Cases where the tenant's claim on the tenancy was challenged by the landlord under s72(7) and the cases were subsequently sisted pending the outcome of the test case.

Group 4. (green border) Cases where either a) the tenant bought the farm under pre-emptive right-to-buy (pRTB) and as a consequence the tenancy no longer exists, or b) the original landlord sold his interest onto another landlord. In these cases, the purchasing landlord bought the land in the full knowledge that there was a tenant on the land. This fact would have been reflected in the purchase price.

Group 5. (green border) Cases where the tenant and landlord have reached a bilateral agreement, other than an agreement for the s72(6) tenancy). These agreements have been entered into at two different stages in the legal process either a) following the serving of a dissolution notice but prior to the tenant serving a claim notice or b) following the landlord applying to the SLC for an order under s72(8) as a result of the tenant serving a claim notice.