



Delegated Powers and Law Reform Committee

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Land Reform (Scotland) Bill

Dear Richard,

At its meeting today the Delegated Powers and Law Reform Committee considered the response from the Scottish Government to the Committee's Stage 1 report on the Land Reform (Scotland) Bill. In so doing the Committee reflected that in a number of respects the response failed to respond to the Committee's recommendations.

The Committee expressed its disappointment with what appeared to members to be a lack of proper consideration given to the Committee's recommendations. Not only does the response fail to consider some of the Committee's recommendations, but it also fails to offer the Committee the necessary information to enable it to draw informed conclusions about a number of delegated powers within the Bill.

The Committee agreed that I should write to you highlighting those matters and reflecting the Committee's ongoing concerns about them.

I would be grateful if you could respond to these matters as fully as possible.

The Committee would welcome an opportunity to consider your response ahead of the Stage 1 debate and accordingly I would be grateful for a response by **Tuesday 8 December**. Copies of this letter are also being sent to the Minister for Environment,

Climate Change and Land Reform and the Convener of the Rural Affairs, Climate Change and Environment Committee.

For your information, I have attached a copy of the original response as an annex to this letter.

The matters on which the Committee is seeking a response are set out below.

General Points

In its report the Committee made a number of general observations about the Bill. The response does not consider these points and the Committee would be grateful for your reflections upon these.

Specifically, the report noted that the Committee found much of the information provided in the DPM, in the written responses and in the oral evidence from the Scottish Government officials to be inadequate and insufficient to enable the Committee to form a clear view about the purpose and effect of the powers. The absence of information in the response to the report has compounded this impression.

Secondly, the Committee remains concerned about the absence of policy development in relation to powers which could interact with individuals' ECHR rights. While recognising that the Committee is not in a position to say that any power within the Bill could never be exercised in a way that would be compatible with ECHR rights, the absence of fuller policy development on the face of the Bill compounded by the taking of very wide delegated powers as a substitute for such policy development leaves the Committee and the Parliament more widely in a position where it is unable to undertake a full assessment of any ECHR implications to which these policies may give rise as part of its scrutiny of the Bill.

The Committee observes in particular that the powers in sections 35 and 79 are both likely to interact with the ECHR rights of parties. Without further information regarding their intended use, however, the Committee is unable to confirm to Parliament whether these powers are to be exercised in a manner that is compatible with the rights protected by the ECHR. That assessment must instead be deferred to the point at which the powers are exercised and the regulations laid before Parliament. This is a matter of considerable concern to the Committee.

The Committee considers that policies which may interact significantly with individuals' ECHR rights should be developed in full on the face of the Bill rather than deferred to regulations.

And finally, insofar as general observations are concerned, the Committee reiterates concerns, expressed most recently in relation to the Community Empowerment (Scotland) Bill, about delegated powers being taken as a substitute for policy development. The Committee finds it extremely troubling that powers are being taken as a substitute for thorough policy development in advance of the introduction of a Bill and invites the Government to reflect on this approach in the context of this Bill and more generally.

Section 35 – Right of access to information on persons in control of land

As you are aware, section 35(1) confers power on the Scottish Ministers to make regulations enabling persons who are affected by land to access information about persons in control of that land. Subsection (2) sets out various matters that the regulations under section 35(1) may make provision about, including the meaning of “persons in control of land” and “persons affected by land”.

Having explored the power with Scottish Government officials, both in writing and in oral evidence, the Committee concluded in its report that the power is framed in wide terms and not by reference to the specific purpose for which the Scottish Government has explained it is being taken.

The Committee noted with some disappointment that the policy behind the power is still under development and consequently the Scottish Government is not in a position to be able to inform the Parliament fully as to its plans for the exercise of the power. The report reflects with concern that a particular consequence of leaving significant policies to be developed in regulations as opposed to on the face of the Bill is that the Parliament does not have the same opportunity to contribute to the proposals as it would with a Bill, by virtue of the amending Stages 2 and 3.

The Committee further noted that regulations made in exercise of the power could impact significantly on the rights of individuals which are protected by Article 8 of the European Convention on Human Rights (“ECHR”).

The report reflects the Committee’s view that policies which may interact significantly with individuals’ ECHR rights should be developed in full on the face of the Bill rather than deferred to regulations.

While the Committee recognised in its report that the power is capable of being exercised in a manner that is compatible with the ECHR rights of the parties involved, the Committee also recognised that the regulations made in exercise of the power will themselves require close and careful parliamentary scrutiny in order that the Parliament can be satisfied that the power is in fact exercised compatibly and that the regulations deliver a fair and proportionate result as between the relevant public interest and the rights of affected private individuals.

In order to ensure that the Parliament has an opportunity to undertake full and detailed scrutiny of the policy, and in the absence of detailed provision on the face of the Bill regarding disclosure of information about individuals in control of land, the report recommended that the Scottish Government amend the Bill at Stage 2 to subject the power in section 35(1) to an enhanced form of affirmative procedure.

The Committee found the response to its report in relation to this power to be unpersuasive and unhelpful.

The Committee remains concerned about the absence of policy development which appears to have precluded the inclusion of more detail on the face of the Bill and has prevented the Committee from being in a position to scrutinise the power fully.

The Committee recognises that regulations creating a scheme for disclosure of information about individuals are likely to be both substantial and significant. The Committee considers that Parliament should have a full opportunity to closely examine such significant policies as well as an opportunity to propose amendments. In light of these considerations, the Committee invites the Scottish Government to develop the policy regarding disclosure of information more fully on the face of the Bill at Stage 2.

If the Scottish Government is not in a position to develop the policy more fully at Stage 2, the Committee continues to believe that an enhanced form of affirmative procedure should be tailored to attach to this power. Such a procedure should be designed in a way that would enable the Scottish Parliament to take evidence and report on draft proposals prior to any regulations being formally laid. The Committee notes that enhanced forms of affirmative procedure, while not formally recognised in terms of the Interpretation and Legislative Reform (Scotland) Act 2010, have been developed in the past for the purpose of ensuring effective Parliamentary scrutiny over substantial powers, notably in respect of the Public Services Reform (Scotland) Act 2010. The Committee considers that if the policy on disclosure of information is not to be developed more fully on the face of the Bill then the power in section 35 requires enhanced procedure in order to secure full and appropriate levels of Parliamentary scrutiny.

The Committee invites a response on these recommendations.

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

Section 36 amends the Land Registration etc. (Scotland) Act 2012 to insert new section 48A. That section confers power on the Scottish Ministers to make regulations enabling the Keeper of the Registers of Scotland to request information relating to proprietors of land and registered leases.

As currently framed, the power is subject to the affirmative procedure on the first exercise of the power and where primary legislation is being amended. It is otherwise subject to the negative procedure.

The Scottish Government advised the Committee that the first use of the power will set out the details of the scheme for requests for information by the Keeper of the Land Register and should accordingly be subject to a high level of parliamentary scrutiny. Subsequent exercises of the power will, in the Scottish Government's view, be more likely to make amendments to the existing definitions, or to add to the categories of information on proprietors of land which may be collected. The Scottish Government considers the negative procedure to be appropriate for these purposes.

The Committee noted in its report however that the power could be used on second and subsequent occasions to amend the original regulations in a substantive way, altering the details of the existing scheme in a manner which significantly affects individuals. It recommended that the power be subject to the affirmative procedure for each exercise of the power.

The response to the report continues to contend that after the first exercise of the power any subsequent exercise of the power will be to cover matters of a technical or administrative nature.

Equally, however, the response recognises that the power allows for future uses of the power to be wider than simple administrative or technical changes.

The response commits the Scottish Government to considering this matter further and confirming its position ahead of Stage 2.

The Committee welcomes this commitment to reflect on the matter further and urges the Scottish Government to bring forward amendments at Stage 2 to make the exercise of the power subject to the affirmative procedure on each occasion when it is used.

The Committee would welcome a commitment to amend the Bill at Stage 2 in this respect.

Part 10 Agricultural Holdings

Section 79 – Conversion

Section 79 of the Bill confers power on the Scottish Ministers to make regulations to provide for the conversion of 1991 Act tenancies into modern limited duration tenancies (“MLDTs”). Section 79(2) provides that conversion will result in the 1991 Act tenancy being terminated and the parties entering into a lease constituting a MLDT which comprises or includes the same land as that comprised in the 1991 Act tenancy and which has effect from the date of termination of the 1991 Act tenancy. The power is subject to the affirmative procedure.

The Committee’s consideration of this power mirrored its consideration of the power at section 35(1) and so too do its concerns.

Likewise, the Committee found the response to its report in relation to this power to be unpersuasive.

The Committee remains concerned about the absence of policy development which appears to have precluded the inclusion of more detail on the face of the Bill and has prevented the Committee from being in a position to scrutinise this power fully.

The Committee recognises that regulations creating a scheme for the conversion of 1991 Act tenancies into MLDTs are likely to be substantial and could impact upon the ECHR rights of both tenants and landlords to existing 1991 Act tenancies. The Committee considers that Parliament should have a full opportunity to closely examine these significant policies as well as an opportunity to propose amendments. In light of these considerations, the Committee again invites the Scottish Government to develop the policy regarding conversion of 1991 Act tenancies more fully on the face of the Bill at Stage 2, rather than leaving these matters to regulations.

If the Scottish Government is not in a position to develop the policy more fully at Stage 2, the Committee continues to believe that an enhanced form of affirmative procedure should be tailored to attach to this power. Such a procedure should be designed in a way that would enable the Parliament to take evidence and report on draft proposals prior to any regulations being formally laid. Once again, the Committee notes that enhanced forms of affirmative procedure, while not formally recognised in terms of the Interpretation and Legislative Reform (Scotland) Act 2010, have been developed in the past for the purpose of ensuring effective Parliamentary scrutiny over substantial powers, notably in respect of the Public Services Reform (Scotland) Act 2010. The Committee considers that if the policy on conversion of 1991 Act tenancies is not to be developed more fully on the face of the Bill then the power in section 79 requires enhanced procedure in order to secure full and appropriate levels of Parliamentary scrutiny over these powers.

The Committee invites a response on these recommendations.

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

Section 81 of the Bill inserts new sections 38A-38O into the Agricultural Holdings (Scotland) Act 2003. The new provisions create a process whereby the tenant of an agricultural holding may apply to the Land Court for an order for sale where the landlord is in persistent breach of his or her obligations under the tenancy. An order for sale is an order requiring the landlord to sell the holding to the tenant. Sections 38A-38O set out the order for sale process.

New section 38M(1) of the 2003 Act provides that the Scottish Ministers may by regulations make further provision about the sale of land in relation to which the Land Court has, under new section 38L, varied an order for sale to allow the land to be offered for sale on the open market. Such regulations may in particular include provision about the matters listed in section 38M(2).

Section 38M(3) provides that regulations made under subsection (1) may apply the provisions of the Bill which apply to the order for sale process where the tenant is to buy the land to the process where the land is to be sold on the open market. Such provisions may be applied to the open market process with or without modifications. Section 38M(4) provides that regulations made under subsection (1) may modify any enactment.

The Committee considered that the matters regarding the process applicable where an order for sale is varied to enable an agricultural holding to be sold on the open market should be set out more fully on the face of the Bill, supplemented where appropriate by regulations, as opposed to being left to be set out in regulations in their entirety.

The Committee did not find that the response to the report adequately responded to this concern.

The Committee invites further justification for the approach taken in relation to this power and in particular why it is not, in the view of the Government, appropriate for these matters to be set out on the face of the Bill.

Sections 82 and 83 – Rent review

The two sets of provisions introduced by sections 82 and 83(3) of the Bill set out the new rent review procedures for 1991 Act agricultural tenancies (section 82) and for limited duration tenancies (“LDTs”) and modern limited duration tenancies (“MLDTs”) (section 83(3)).

Sections 82 and 83(3) confer power on the Scottish Ministers to make provision in regulations about the productive capacity of land comprised in leases of 1991 Act tenancies and LDTs / MLDTs, including how the productive capacity of such land is to be determined. Those sections also include provision enabling the Scottish Ministers by regulations to make provision about the standard labour requirement including how that requirement is to be determined (the standard labour requirement is relevant to the determination of what is “surplus residential accommodation”). Each of the new powers is subject to the negative procedure.

In its report the Committee again expressed its disappointment that the Scottish Government is not yet in a position to inform the Parliament in detail of its policy regarding the determination of fair rent at rent review. However the Committee did welcome the Scottish Government’s commitment to sharing with Parliament its information on the development of the new rent review system when that information becomes available. The Committee did also note that the information available on the face of the Bill regarding the new rent review process provides a clearer indication of the manner in which these powers are intended to be exercised than is available to the Committee in respect of the power in section 79 of the Bill regarding conversion of 1991 Act tenancies.

While indicating that it was content that the powers regarding the form and content of rent review notices are subject to the negative procedure, the Committee recommended that the powers in paragraphs 8(1) and 9(6) of the new Schedule 1A to the 1991 Act and those in sections 9B(3) and 9C(6) of the 2003 Act should be subject to the affirmative procedure. The Committee concluded that those powers deal with key aspects of the method for calculating a fair rent, namely the determination of productive capacity and the standard labour requirement which is to be taken into account in the assessment of surplus residential accommodation.

The Committee accordingly recommended that the Scottish Government bring forward amendments at Stage 2 in order that the powers in paragraphs 8(1) and 9(6) of the new Schedule 1A to the 1991 Act and the powers in new sections 9B(3) and 9C(6) of the 2003 Act are subject to the affirmative procedure.

The response notes the Committee’s recommendation and advises that the Scottish Government will confirm its position on this issue ahead of Stage 2.

The Committee urges you to reflect on the centrality of these two sets of powers to the scope of the new rent review process, and to bring forward amendments at Stage 2 to make the powers subject to the affirmative procedure.

As noted earlier, I would be grateful for a response on all of the above points by Tuesday 8 December.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nigel Don', with a stylized flourish at the end.

Nigel Don MSP
Convener

Correspondence from the Scottish Government, dated 17 November 2015

Land Reform (Scotland) Bill at Stage 1

Report of the Delegated Powers and Law Reform Committee

The Delegated Powers and Law Reform Committee reported on the Land Reform (Scotland) Bill at Stage 1 and made some comments and recommendations. I am replying to the committee on behalf of the Scottish Government.

Part 3 Information about control of land etc.

Section 35 – Right of access to information on persons in control of land

The Scottish Government welcomes the Committee's conclusion, in paragraph 22 of the Report, that "...the Government has provided sufficient evidence of the existence of a legitimate public interest aim in enabling access to information about persons in control of land which could justify a restriction of the controlling individual's Article 8 rights, despite the fact that much of the information about land ownership is already in the public domain. There appears to be reasonable evidence of difficulties faced by the public in drilling down through complex company structures to find the relevant persons to approach regarding practical difficulties. There also appears to be evidence of the difficulties experienced in this regard by communities and those working in the areas of wildlife crime and environmental protection".

The Committee has, however, set out its concerns that "...the power is framed in very wide terms and not by reference to the specific purpose the government has explained it has been taken". To address these concerns, the Committee have recommended that the Scottish Government amends the Bill at Stage 2 to subject the power in section 35(1) to an enhanced form of affirmative scrutiny.

The Scottish Government considers that the current wording of the power in section 35 is appropriate. The purpose of the regulations made under section 35(1) is to provide transparency of landownership on a case by case basis, in order to enable practical difficulties with land to be better addressed in a wide range of different circumstances. The regulation making power sets out that certain persons affected by land will be able to make requests to the request authority, for certain information about certain persons with control of land.

The Scottish Government considers it is appropriate that 'persons with control of land' and 'person affected by land' are defined in the regulations. The definitions of these terms must fit within and be appropriate to the purpose of the regulations.

Further, the regulation making power provides that the Scottish Ministers must consult before the regulations are laid before Parliament. This will help to ensure the regulations, when made, will provide an appropriate mechanism and balance between the interests of parties that will allow individuals or communities affected by

land to obtain the information about a person with control of land required to enable further efforts to have the issues affecting them resolved.

By defining these terms in regulations, sufficient flexibility can also be retained so that the definitions can be amended to adapt to changing land ownership patterns and management structures and continue to fulfil the aims of the provisions, without the need to await future primary legislation. As such the Scottish Government are of the view that the purpose and scope of the regulation making power is clearly set out in the Bill.

The Committee are further concerned that the regulations could affect the rights of individuals that are protected under Article 8 of the ECHR. The Scottish Government is of the view that the regulation making power can be exercised within legal competence and welcomes the Committee's recognition of this at para 40 of its Report.

Affirmative procedure is the highest level of scrutiny that is formally recognised and given statutory foundation in the Interpretation and Legislative Reform (Scotland) Act 2010.

Before the regulations are laid in the Scottish Parliament, the Scottish Government will have to ensure they are within the legislative competence of the Parliament. In addition, through the affirmative procedure, Parliament will have the opportunity to scrutinise the regulations when laid.

As noted above, the regulations also provide that the Scottish Ministers must, before laying a draft of the regulations, consult with such persons as the Scottish Ministers consider appropriate. In evidence to both this Committee and the Rural Affairs, Climate Change and Environment Committee, Scottish Ministers have, therefore, committed to carrying out a full public consultation on a set of draft regulations before laying the regulations in Parliament. The Scottish Government believe that this will give Parliament sufficient opportunity to scrutinise the regulations when laid. Even if some form of additional scrutiny were to be considered, the Scottish Government would note that it would be disproportionate for every use of this power to subject to some form of enhanced affirmative procedure, particularly where amendments being made were minor, technical or administrative in nature.

The Scottish Government consider that the combination of the affirmative procedure coupled with the duty to consult will provide the appropriate level of scrutiny for these regulations.

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

The Scottish Government notes the Committee's comments as regards the regulation making power in section 36 and in particular notes that the Committee are content with the power in principle. The Committee have commented on the parliamentary procedure for the regulations, recommending any regulations under the provisions inserted by section 36 should be subject to the affirmative procedure.

When the Bill was introduced to Parliament the Scottish Government considered it was appropriate for the first use of the power should be subject to the affirmative procedure and subsequent uses should be subject to the negative procedure.

Our reasoning for this was set out in our letter to the committee dated 08 September 2014;

“The affirmative procedure will apply to the first exercise of the power and these regulations will include provision about the types of information that may be requested including setting out the categories of proprietor, and what is meant by an individual having a controlling interest in a proprietor. 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 affirmative procedure will also apply to subsequent exercises of the power where primary legislation is amended.

The negative procedure will apply to other exercises of the power. Subsequent exercises of the power are more likely to be technical amendments to the regulations, such as refining definitions and in practice these are not likely to have as significant effect on individuals and proprietors. The negative procedure is considered to be appropriate for this. The Scottish Government will consider the Committee's views carefully in relation to the appropriate level of scrutiny.”

The Scottish Government have considered the Committee's recommendation and the Committee's concerns regarding the use of the negative procedure for future uses of the power. The Scottish Government's view remains that after the first use of the power, where it is not amending primary legislation, changes will be mainly technical in nature such as amending the definitions used in the regulations.

However, the Scottish Government recognises the power as drafted would potentially allow future uses of it to be wider than simple administrative or technical changes to the definitions set out in the first use of the power.

As such the Scottish Government will further consider the Committee's recommendation and to confirm their position on this issue ahead of the start of Stage 2 of the Bill.

Part 10 Agricultural Holdings

Section 79 – Conversion

The Committee has recommended that the proposal in section 79 be subjected to an enhanced form of affirmative procedure. As we have said in our comment's above in relation to section 35 the affirmative procedure is the highest level of scrutiny that is formally recognised and given statutory foundation in the Interpretation and Legislative Reform (Scotland) Act 2010. The Scottish Government does not consider that an enhanced form of affirmative procedure is required for regulations made under section 79.

Following further consideration, and taking on board comments made by RACCE and others during parliamentary scrutiny, the Scottish Government is in the process

of finalising the policy proposal on 1991 Act tenancies. We are discussing the detail of this with stakeholders to further assess the potential impact, and we anticipate we will be able to share the proposals with the committee and the Scottish Parliament before stage 2.

As part of this process, we have listened carefully to the Committee's concerns about the level of parliamentary scrutiny that the proposals should be afforded. The Scottish Government notes the committee's concerns in relation to Article 1 Protocol 1 of the ECHR and effect that the regulations will have on individuals. It is recognised that any regulations laid before parliament must be compliant with ECHR obligations and the Scottish Government is of the view that the regulation making power can be exercised within legal competence.

The Scottish Government recognises that the regulations may have significant effect on landlords and tenants and we commit to continue to consult with stakeholders in developing the regulations and will carry out a public consultation on the regulations before they are laid.

Section 38M - Procedure for sale to third party

The Committee has expressed concern that the details of sale to a third party are left to regulations.

To ensure we fully explore all the technical issues which could arise as a result of the regulations, we will carry out a public consultation with industry experts, valuers, solicitors and the Scottish Land Court prior to bringing forward affirmative regulations for the scrutiny of the Scottish Parliament.

It is vital that we consult with these experts to decide on how the land is to be valued, how the auction process works, who is to be excluded from bidding at the auction and the operation of any clawback provision.

We believe affirmative procedure will afford the Scottish Parliament the appropriate level of scrutiny.

Section 82 – rent review

The Committee expressed concern about the regulation making powers contained in the Bill regarding information contained in rent review notices, how productive capacity and standard labour requirements are calculated and the fact that these are subject to negative procedure.

The Scottish Government welcomes the Committee's view that the powers to prescribe the form and content of rent review notices are appropriately subject to the negative procedure.

In the case of the powers regarding the assessment of productive capacity of an agricultural holding and the determination of the standard labour requirement, Scottish Government note the Committee's arguments that these powers are central

to the new system of rent review and are further considering whether these powers should be subject to affirmative procedure.

The Scottish Government will confirm their position on this issue ahead of the start of Stage 2 of the Bill.

Section 100 – Ancillary provision

We note the Committee's recommendation. As confirmed in previous correspondence we will continue to liaise with interested parties, including the Parliament, to establish the extent to which the drafting of ancillary provisions can be standardised.

I hope that the Committee have found this response helpful.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Trudi Sharp', with a stylized, flowing script.

Trudi Sharp
Deputy Director