



The Scottish Parliament  
Pàrlamaid na h-Alba

## RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

### AGENDA

**36th Meeting, 2013 (Session 4)**

**Wednesday 4 December 2013**

The Committee will meet at 10.00 am in Committee Room 3.

1. **Decision on taking business in private:** The Committee will decide whether its consideration of its response to the Standards, Procedures and Public Appointments Committee's review of EU rules, and consideration of its future work programme should be taken in private at its next meeting.
2. **Subordinate legislation:** The Committee will consider the following negative instruments—

Litter (Fixed Penalties) (Scotland) Order 2013 (SSI 2013/315);  
Flood Risk Management (Designated Responsible Authorities) (Scotland) Order 2013 (SSI 2013/314).
3. **Proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014:** The Committee will take evidence from—

David Balharry, Project Team Leader, ECHR Compliance Order, and  
Ashleigh Pitcairn, Solicitor, Directorate for Legal Services, Scottish Government.

Lynn Tullis  
Clerk to the Rural Affairs, Climate Change and Environment Committee  
Room T3.40  
The Scottish Parliament  
Edinburgh  
Tel: 0131 348 5240  
Email: [racce.committee@scottish.parliament.uk](mailto:racce.committee@scottish.parliament.uk)

The papers for this meeting are as follows—

**Agenda item 2**

Note by the Clerk

RACCE/S4/13/36/1

**Agenda item 3**

Note by the Clerk

RACCE/S4/13/36/2

PRIVATE PAPER

RACCE/S4/13/36/3  
(P)

## Subordinate legislation cover note for SSI 2013/314 and SSI 2013/315

### Procedure

1. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament.

2. If that is also agreed to, Scottish Ministers must revoke the instrument. Each negative instrument appears on a committee agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.

### Recommendation

3. **The Committee is invited to consider any issues which it wishes to raise on these instruments.**

### SSI 2013/314

**Title of Instrument:** Flood Risk Management (Designated Responsible Authorities) (Scotland) Order 2013 SSI 2013/314

**Type of Instrument:** Negative

**Laid Date:** 7 November 2013

**Circulated to Members:** 28 November 2013

**Meeting Date:** 4 December 2013

**Minister to attend the meeting:** No

**Drawn to the Parliament’s attention by Delegated Powers and Law Reform Committee:** No

**Reporting Deadline:** 9 December 2013

### Purpose

4. This Order designates as ‘responsible authorities’ for the purposes of the Flood Risk Management

5. (Scotland) Act 2009 (“the Act”), the following public bodies and office-holders—

- the Cairngorms National Park Authority,
- The Forestry Commissioners, and
- the Loch Lomond and The Trossachs National Park Authority.

6. For the purposes of the Act, each responsible authority must, among other things, exercise their flood risk related functions (in or as regards Scotland) with a view to reducing overall flood risk..

7. A copy of the Explanatory Note and the Policy Note are included with the papers.

### **Delegated Powers and Law Reform Committee**

8. At its meeting on 26 November 2013, the Committee agreed not to draw the attention of the Parliament to the instrument.

### **EXPLANATORY NOTE**

This Order designates as ‘responsible authorities’ for the purposes of the Flood Risk Management (Scotland) Act 2009 (“the Act”), the following public bodies and office-holders—

- the Cairngorms National Park Authority,
- The Forestry Commissioners, and
- the Loch Lomond and The Trossachs National Park Authority.

For the purposes of the Act, each responsible authority must, among other things, exercise their flood risk related functions (in or as regards Scotland) with a view to reducing overall flood risk.

### **POLICY NOTE**

The above instrument was made in exercise of the powers conferred by section 5(1)(c) of the Flood Risk Management (Scotland) Act 2009. The instrument is subject to negative procedure.

### **Policy Objectives**

The Flood Risk Management (Scotland) Act 2009 (“the Act”) implements Directive 2007/60/EC of the European Parliament and of the Council on the assessment and management of flood risks (“the Directive”), and sets out a new approach to managing flood risk in Scotland. The Act introduces a more sustainable approach to managing flooding through the production and implementation of strategic flood risk management plans. The Act requires “responsible authorities” to exercise their flood risk related functions with a view to reducing overall flood risk and securing compliance with the Directive, and also with a view to achieving the objectives set out in relevant flood risk management plans.

The Order designates as responsible authorities: the Cairngorms National Park Authority, the Loch Lomond and The Trossachs National Park Authority, and The

Forestry Commissioners. This ensures that these authorities are fully involved in the flood risk management planning process and exercise their flood risk related functions with a view to reducing overall flood risk and achieving the objectives set out in relevant flood risk management plans.

### **Consultation**

A public consultation took place from March to June 2012. In accordance with section 5(2) of the Act, SEPA, all other responsible authorities, and those public bodies identified as potential responsible authorities (including those designated by the order) were consulted. A full list of those consulted and who agreed to the release of this information is attached to the consultation report published on the Scottish Government website.

### **Impact Assessments**

An equality impact assessment has been completed on the designation of the Cairngorms National Park Authority; the Loch Lomond and The Trossachs National Park Authority and The Forestry Commissioners.

This policy directly impacts both on those potentially affected by any flood event, and on the staff of each body designated as a responsible authority. The overall delivery of the Flood Risk Management (Scotland) Act 2009 will consistently benefit the former by reducing risk to people and property. The designation order will also consistently benefit staff by affording the opportunity for a wider range of partnership working, with the resultant advantage of increased knowledge sharing. It is considered that these benefits will apply evenly and fairly.

### **Financial Effects**

A partial Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The order is not expected to have any impact on the Scottish Firms and businesses. It only affects those public bodies identified as designated authorities and their office holders. We have therefore not completed any face-to-face discussions with business but are committed to engaging with business if it becomes clear they may be affected in due course.

**SSI 2013/315**

**Title of Instrument:** Litter (Fixed Penalties) (Scotland) Order 2013 SSI 2013/315

**Type of Instrument:** Negative

**Laid Date:** 7 November 2013

**Circulated to Members:** 28 November 2013

**Meeting Date:** 4 December 2013

**Minister to attend the meeting:** No

**Drawn to the Parliament's attention by Delegated Powers and Law Reform Committee:** No

**Reporting Deadline:** 9 December 2013

**Purpose**

9. Sections 33A and 88 of the Environmental Protection Act 1990 provide for the payment of a fixed penalty to discharge any liability to conviction for the waste (including littering and flytipping) and littering offences under sections 33 and 87 respectively of that Act.

10. This Order increases the fixed penalty under section 33A from £50 to £200, and the fixed penalty under section 88 from £50 to £80.

11. A copy of the Explanatory Note and the Policy Note are included with the papers.

**Delegated Powers and Law Reform Committee**

12. At its meeting on 26 November 2013, the Committee agreed not to draw the attention of the Parliament to the instrument.

**EXPLANATORY NOTE**

Sections 33A and 88 of the Environmental Protection Act 1990 provide for the payment of a fixed penalty to discharge any liability to conviction for the waste (including littering and flytipping) and littering offences under sections 33 and 87 respectively of that Act.

This Order increases the fixed penalty under section 33A from £50 to £200, and the fixed penalty under section 88 from £50 to £80.

A business and regulatory impact assessment has not been prepared for this Order as no impact upon business is foreseen.

## **POLICY NOTE**

The above instrument was made in exercise of the powers conferred by sections 33A(10) and 88(7) of the Environmental Protection Act 1990 and all other powers enabling them in that behalf. The instrument is subject to negative procedure.

### **Policy Objectives**

Sections 33A and 88 of the Environmental Protection Act 1990 provide for the payment of a fixed penalty to discharge any liability to conviction for the flytipping and littering offences under sections 33 and 87 respectively of that Act.

This instrument increases the fixed penalty under section 33A (flytipping) from £50 to £200, and the fixed penalty under section 88 (littering) from £50 to £80. We are introducing these rises to:

- strengthen the deterrent effect recognising that the £50 level was set around a decade ago and inflation has eroded its value.
- reduce the gap between cost to the public purse of enforcement action and the income from Fixed Penalty Notices.
- introduce a higher level for flytipping, to recognise that it has the potential to significantly harm the environment, and that there are greater clean-up costs associated with it.

### **Consultation**

The Scottish Government sought public and stakeholder views within ‘Towards a Litter-Free Scotland: Consultation on a strategy to tackle and prevent litter and flytipping’, from 4 July 2013 to 27 September 2013. The consultation sought views on a number of proposals to prevent litter and flytipping, including using Environmental Protection Act 1990 powers to raise the litter Fixed Penalty from £50 to £80, and the Flytipping Fixed penalty from £50 to £200.

A majority of those who responded to the consultation were in favour of increasing the fixed penalties.

A full list of those who responded to the consultation and who agreed to the release of this information will be attached to the consultation report that will, in due course, be published on the Scottish Government website.

### **Impact Assessments**

There are no equality impact issues. This instrument increases the level of fixed penalty and does not alter the associated principles or delivery arrangements.

The Respondent Information Form for the ‘Towards a Litter-Free Scotland’ public consultation invited views on equalities issues to be factored into an Equalities Impact Assessment for the final National Litter Strategy.

### **Financial Effects**

The Cabinet Secretary for Rural Affairs and the Environment confirms that no BRIA is necessary. The instrument is not expected to have significant financial effects on the Scottish Government, local government or on business.

## **Proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014**

### **Introduction**

1. The proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014<sup>1</sup> (SG 2013/261) was laid in the Scottish Parliament, by the Scottish Government, on Friday 22 November 2013, along with an accompanying Statement of Reasons (SG 2013/262).
2. This proposed draft order is subject to the super-affirmative statutory instrument procedure which involves a 60 day consultation period, after which the Scottish Government will consider views received before laying a draft order, subject to the normal affirmative procedure.
3. The Committee agreed its approach to scrutiny of the proposed draft order at its meeting on 20 November 2013.

### **Scottish Government's consultation**

4. The Scottish Government published its consultation on the proposed draft order on 22 November 2013, and the consultation document is available at the link provided in footnote 1 below.
5. The Scottish Government's consultation document invites responses on the proposed draft order by 7 February 2013. The consultation document outlines the background to the proposed draft order, details the scope of the proposed draft order, and states the effect of the proposed draft order. It also includes a flow chart showing groups that will be affected and lists the consultees.
6. The consultation document then includes a copy of the proposed draft order itself, along with an explanatory note and a policy note.

### **Background to the Order**

7. The Statement of Reasons which was laid alongside the draft proposed order states—

“The reason for proposing the draft Order is that on 24 April 2013 the Supreme Court issued its judgment in the case of *Salvesen v Riddell*, which involved a dispute between a land owner and a tenant over the dissolution of a Limited Partnership. The judgement identified a defect in section 72, holding that the effect of the operation of section 72(10) contravened landlords' rights in certain circumstances under Article 1 of the First Protocol. The Supreme Court suspended their judgement until 23 April 2014 to allow the Scottish Government time to consult

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<sup>1</sup> Agricultural Holdings (Scotland) Act 2013 Remedial Order 2014 consultation document (Scottish Government 2013). Available at: <http://www.scotland.gov.uk/Resource/0043/00438820.pdf>.



with the industry and address how best to achieve the necessary correction.

In their judgement the Supreme Court recognised that any adverse effect on the rights of tenants resulting from the decision will need to be resolved via a “*fair and constructive process*” agreed by the Parliament and Guided by Scottish Ministers. In particular, the Court anticipated that this process would involve consultation with both landlords and tenants.

A Compliance Order following section 13 of the Convention Rights (Compliance) (Scotland) Act 2001 was the most appropriate mechanism with a reasonable prospect of delivering a solution within the timeframe set by the Supreme Court.

Stakeholders bodies representing Tenants and Landlords (STFA, NFUS, RICS, SLE and SAAVA) were consulted during the preparation of the draft Order and further consultation will take place with these stakeholders during the period of the 60 day public consultation.”

### **Content of the Order**

8. The proposed draft order makes amendments to the Agricultural Holdings (Scotland) Act 2003<sup>2</sup> to remove the incompatibility, arising from section 72(10) of that Act, with a Convention right. The proposed draft order seeks to remove the incompatible effect of section 72(10) by inserting a new section 72A into the 2003 Act.

9. SPICe has prepared a briefing on the draft proposed order which is attached at the **Annexe**.

### **Scrutiny by the Rural Affairs, Climate Change and Environment Committee**

#### *Written submissions*

10. As the Scottish Government is formally consulting on the draft Order, and given that the issue is specific to a small number of individual cases, the Committee did not issue a public call for views. The Committee asked all those invited to give oral evidence to send a copy of their submission to the Scottish Government to the Committee, or to make a separate written submission to the Committee summarising their views on the Order.

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<sup>2</sup> Agricultural Holdings (Scotland) Act 2003. Available at: <http://www.legislation.gov.uk/asp/2003/11/contents>.

*Witnesses*

11. In terms of taking oral evidence, the Committee agreed to take evidence from the—

- Scottish Tenant Farmers Association (STFA);
- Scottish Land and Estates (SLaE);
- National Farmers Union of Scotland (NFUS);
- Royal Institution of Chartered Surveyors (RICS);
- Scottish Agricultural Arbiters and Valuers Association (SAVA); and the
- Law Society of Scotland (LSS).

12. The Committee agreed to take oral evidence from Scottish Government officials, from the organisations above, and from the Cabinet Secretary for Rural Affairs and the Environment, as follows—

**Wednesday 4 December**

- Scottish Government officials.

**Wednesday 18 December**

- Scottish Tenant Farmers Association, National Farmers Union of Scotland, and Scottish Land and Estates; and then
- Scottish Agricultural Arbiters and Valuers Association, the Royal Institution of Chartered Surveyors, and the Law Society of Scotland.

**Wednesday 15 January**

- Cabinet Secretary for Rural Affairs and the Environment.

**Next steps**

13. Given the 60 day period for scrutiny of the draft order, and the Scottish Government's intention to lay a final draft by the end of February/beginning of March 2014, the Committee will consider a draft report to the Scottish Government at its meetings on 22 or 29 January and, if required, 5 February 2014 and then report its views on the proposed draft order to the Scottish Government.

14. The Committee then expects to formally consider the affirmative order in February/March 2014.

**Clerks/SPICe**

**Rural Affairs, Climate Change and Environment Committee**



## **The Proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014**

### **The reason for the order**

On 24 April 2013 the Supreme Court issued its judgment in the case of *Salvesen v Riddell*, which involved a dispute between a land owner and a tenant over the dissolution of a Limited Partnership. The judgement identified a defect in section 72 of the Agricultural Holdings (Scotland) Act 2003. The court found that the effect of the operation of section 72(10) contravened landlords' rights under Article 1 of the First Protocol of the European Convention on Human Rights. The Supreme Court suspended its judgement until 23 April 2014 to allow the Scottish Government time to consult with the industry and address how best to achieve the necessary correction.

The proposed Draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 is a Compliance order following the Convention Rights (Compliance) (Scotland) Act 2001. The 2001 Act enables changes in the law where it is or may be incompatible with a Convention right as defined in the Human Rights Act 1998. The order has been proposed by the Scottish Government as "the most appropriate mechanism with a reasonable prospect of delivering a solution within the timeframe set by the Supreme Court."<sup>3</sup>

### **Background on Limited Partnerships**

#### **Security of tenure under 1991 Act tenancies**

The Agricultural Holdings (Scotland) Act 1991 (as amended) is the main piece of legislation governing agricultural tenancies<sup>4</sup>. It was a consolidating Act and brought together legislation on farm tenancies made between 1949 and 1991. In a tenancy granted under this legislation the landlord's rights to serve a notice to quit are restricted. This meant that leases did not come to an end at the end of a term specified in the original lease, and instead they continued by "tacit relocation", and they are heritable and have passed from generation to generation in many cases. Where a landlord serves a notice to quit on the tenant, the tenant may serve a counter notice on the landlord, which means that the landlord requires to seek an order from the Scottish Land Court to enforce the notice to quit, and the legislation specifies how the Court must

<sup>3</sup> Scottish Government (2003) Statement of reasons for the proposed Draft order – the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014.

<sup>4</sup> It has since been amended by the Agricultural Holdings (Scotland) Act 2003; the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 and the Agricultural Holdings (Amendment) (Scotland) Act 2012.

consider such an application from a landlord, the effect of which is to protect the rights of the tenant. A “91 tenancy” therefore provides the tenant with security of tenure and limits the landlord’s ability to obtain vacant possession of land.

The effect of this legislation was to inhibit the creation of new farm tenancies, because if a landlord let land under such a tenancy they had little prospect of regaining vacant possession. Among other things this would affect the value of the land should they ever wish to sell because land with a sitting tenant is much less valuable than land with vacant possession (value around 50-60% of land with vacant possession).

### **Limited partnerships**

Limited partnership tenancies evolved as a response to the Agricultural Holdings (Scotland) Act 1991, to allow the landlord to regain vacant possession of land. In a limited partnership, the landlord or their agent is the limited partner, and the tenant is the general partner. The limited partnership lasts for a minimum term specified in a partnership agreement. At the end of the term specified in the partnership agreement, either the landlord or tenant can bring the partnership to an end, which will effectively end the tenancy.

### **The Agricultural Holdings (Scotland) Act 2003**

Reform of the agricultural holdings legislation was part of the Land Reform programme carried out during the First Parliament. Following the reports of the Land Reform Policy Group the then Scottish Executive considered that a better legal arrangement was needed, and it developed proposals which became enacted in law in the Agricultural Holdings (Scotland) Act 2003. This Act created two new types of tenancy: Short Limited Duration Tenancies which have a maximum duration of 5 years, and Limited Duration Tenancies which had a minimum duration of 15 years. The main feature of these tenancies in terms of security of tenure is that the legislation sets out a procedure to follow for serving notices when the tenancy is coming to an end, and assuming these are followed, the tenancy will end as specified in the lease, i.e. they provide a new vehicle for letting land without giving the tenant security of tenure.

The Scottish Executive's initial proposals did not intend to alter arrangements for existing limited partnership tenants. Nor did they envisage a right to buy for tenant farmers. When the proposals for a draft bill were made, the Executive consulted on a pre-emptive right to buy for secure tenants (i.e. farmers with tenancies under the 1991 Act or earlier legislation). This pre-emptive right to buy remained in the Bill when it was introduced to Parliament, and it has been enacted in the 2003 Act. The right allows a tenant to register an interest in part or all of the land they rent with Registers of Scotland, and then they have a right to buy the land if the landlord wants to sell or transfer it. If they cannot agree a price with the landlord, the legislation provides a process for appointing an independent valuer.

Many landlords sought to bring an end to limited partnership tenancies around the time the legislation was being developed with the draft Bill consultation and when the Bill was being considered by Parliament. The Executive was concerned that some of these notices were made by landlords seeking to avoid the impact the new legislation might have, rather than because this was something that they would have done for other legitimate reasons. This led the Executive to bring forward amendments which were agreed to by the Parliament and which are now enacted in sections 72 and 73 of the 2003 Act. These sections relate to the rights of tenants who were general partners in a limited partnership tenancy where the landlord gave notice to end a limited partnership tenancy after 16 September 2002 (the date when The Agricultural Holdings (Scotland) Bill was introduced to the Scottish Parliament).

**Section 72** affects tenants differently depending on when the notice of dissolution was served (or other event triggering the termination of the tenancy occurred). Where the termination notice was served between 16 September 2002 and 30 June 2003 the general partner may serve notice under section 72(6) which will continue the tenancy as a 1991 Act tenancy with security of tenure. The general partner will then be in the position of the tenant in their own right. In such cases the landlord may apply to the Land Court for an order disapplying the effect of section 72(6). But a landlord will only be successful if the Land Court is satisfied that the notice was not served for the purpose of depriving the general partner (tenant) of the benefit of section 72(6) and the Land Court considers it reasonable to make the order.

By contrast where the termination notice was served on or after 1 July 2003 the general partner can still become the tenant by virtue of section 72(6) but section 72(10) of the 2003 Act then permits the landlord the benefit of section 73. Access to the relief given by section 73 is denied to landlords who served notice before 1 July 2003. 1 July 2003 is the date when section 72 of the Act came into effect.

**Section 73** modifies the requirements for the service of a notice to quit leading to recovery of vacant possession by the landlord. It ensures that a general partner (now the tenant) obtains in most circumstances a guaranteed notice period before they are required to quit the land. There is a double notice provision. Firstly the landlord must give the tenant notice not less than two years, nor more than three years before the end of the lease - notice that they intend to give notice to quit. Then the notice to quit itself must be given not less than one year, nor more than two years before the end of the tenancy specified in the lease, or where the lease has continued beyond the term stipulated at the end of a period of continuation. The landlord may also apply to the Land Court to reduce these notice periods.

### **The Salvesen v Riddell case and the Supreme Court**

The validity of section 72 of the Agricultural Holdings (Scotland) Act 2003 was challenged in the Salvesen v Riddell case, where a ruling in the Land Court was appealed to the Court of Session. The Court of Session found that section 72 was outside the legislative competence of the Scottish Parliament

as it was incompatible with landlords' Convention rights. The Court of Session did not specify a remedy, and the parties settled out of court.

The Scottish Government joined the case, and leave was granted to appeal the Court of Session's judgement to the Supreme Court since the validity of the legislation was a matter of general public importance. The Supreme Court's judgement was given on the 24 April 2013. It agreed with the Court of Session that there was a violation of landlords' Convention rights. However the Supreme Court was more specific about the extent of the breach. It found that only subsection 72(10) of the 2003 Act was incompatible with landlords' rights under Article 1 Protocol 1 of the European Convention on Human Rights (ECHR - relating to the peaceful enjoyment of property) and so was outwith the legislative competence of the Scottish Parliament.

A [press summary](#) accompanying the judgement summarises the Court's findings:

"The relevant provisions are expressed in clear and unequivocal language. Section 72 can be read only in a way that is incompatible with the A1P1 right. It is plain that the whole section needs to be looked at again, as does its relationship with section 73. But the finding of incompatibility ought not to extend any further than is necessary to deal with the facts of this case, and it is important that accrued rights which are not affected by the incompatibility should not be interfered with. The incompatibility arises from the fact that section 72(10) excludes landlords of continuing tenancies from the benefit of section 73 if their notices were served between 16 September 2002 and 30 June 2003. So the Court limits the decision about the lack of legislative competence to that subsection only."

### **The consequences of the Ruling**

The Supreme Court recognised that the legislation has had effect from 2003 and that a number of parties that were not involved in the *Salvesen v Riddell* court case may have been affected. To be in the affected group a party would need to have served or received a dissolution notice for a Limited Partnership between 16 September 2002 and 30 June 2003. The diagram in the Scottish Government consultation (reproduced in Figure 1) sets out circumstances of potentially affected parties:

- where notice to terminate the partnership has been served but the case has not yet reached the termination date (group 1 in figure 1);
- where notice to terminate has been served but parties have reached a bilateral agreement such as: extending the period of the limited partnership; withdrawal of the dissolution notice; vacant possession is recovered; the tenancy has been converted to a short limited duration tenancy or a limited duration tenancy, or some other agreement has been agreed (group 5);

- where the general partner (tenant) may have served a claim notice for a secure tenancy, with no subsequent challenge from the limited partner (the landlord). This may have resulted in—
  - the tenant now having a full 1991 tenancy (group 2); or
  - the landlord having sold either to the tenant exercising a pre-emptive right to buy, or a new landlord (group 4);
- the general partner (tenant) may have served a claim notice for a secure tenancy, with the landlord challenging the claim by applying to the Scottish Land Court for an order under section 72(8) Agricultural Holdings (Scotland) Act 2003. In such circumstances:
  - cases may be sisted (paused or suspended for an indefinite period of time) (group 3); or
  - a bilateral agreement between tenant and landlord may have been made (group 5).

### **Work towards a legal remedy**

Since the Supreme Court's judgement was given, the Scottish Government has been working to develop a legal remedy which will make the relevant provisions of the 2003 Act compatible with the ECHR. It has been consulting with stakeholders including the Scottish Tenant Farmers Association, Scottish Land and Estates, the Royal Institute of Chartered Surveyors, National Farmers Union for Scotland and the Scottish Agricultural Arbiters and Valuers Association.

The Scottish Government has tried to establish exactly how many limited partnership tenancies are affected by the judgement. It has gathered information through the abovementioned representative organisations, it has also created a [web-page](#) which allows people to register if they think they have been affected, and the Cabinet Secretary has [written](#) to all tenant farmers and landlords who may be involved in Limited Partnerships to ask any parties who may be affected to register through the web page, or contact the Scottish Government team who are dealing with this by email or telephone. The precise number of landlords and tenants who are affected is unknown, although the consultation document states that there may be 20 people in groups 1, 2 and 3.

### **Proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014**

The proposed Draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014, and associated documents were laid in the Scottish Parliament on 22 November 2013. Made under section 12 of the Convention Rights (Compliance) (Scotland) Act 2001, the Order makes amendments to the Agricultural Holdings (Scotland) Act 2003 to address the incompatibility,

arising from section 72(10) of that Act, with Article 1 Protocol 1 of the European Convention on Human Rights.

The Order seeks to provide landlords involved in three of the circumstances set out above with a means to recover vacant possession:

1. where the dissolution notice was served between 16 September 2002 and 30 June 2003 but where the termination date is still in the future and so notice under section 72(6) may still be served (group 1). If such a notice is served the order provides for the section 73 process allowing the tenant the tenancy in their own right but the landlord a route to termination of the lease and the recovery of vacant possession after a double notice period.
2. where the landlord was served with a claim notice under section 72(6) and the tenant now has a 1991 Act tenancy (group 2). The order provides that the landlord has an option (though not an obligation) of engaging the section 73 process (route to vacant possession after a double notice period), by serving notice to that effect during a 12 month period starting on 28 November 2014 (to allow a cooling off period). The Scottish Government is offering to assist with mediation if required in these cases.
3. sisted cases (group 3). The order provides that the Land Court (or other court dealing with the case on appeal) must dispose of the case as it considers reasonable. This could be to allow the case to proceed through the section 73 double notice period process. Alternatively the court could modify the section 73 process by providing for shorter notice periods or the court could itself terminate the lease. In addition the court is given power to deal with such other matters relating to the tenancy or its termination as it considers appropriate. This will allow the court to take account of the individual circumstances and for it to make a decision as to when it would be reasonable for landlords to recover vacant possession.

Other groups are not addressed by the order. The Scottish Government consultation states that “Groups 4 and 5 are deemed to have moved beyond the defect by either the sale of the farm or bilateral agreement between the parties.”

### **Scope of the order**

The draft order seeks to correct a legal defect. It does not address the issue of losses sustained as a consequence of the defect. As set out above the order would apply to groups 1, 2 and 3. People within these groups may have incurred loss and seek compensation. For example, in a new release the Scottish Tenant Farmers Association (25th November 2013) states

“tenants who are at the moment in possession of secure tenancies must be allowed to continue farming, particularly if they have invested in their businesses, anticipating continuing security of tenure...



Similarly the tenants who have been undergoing legal battles to retain their farms must be compensated not only for the legal expenses they will have incurred but also for the time and stress tenants and their families have suffered, and for the loss of their expected livelihoods. Furthermore, these tenants must be allowed sufficient time to rearrange their lives.”

The Scottish Government consultation document states that “It may well be that one or both of the parties have taken action which moves them beyond the defect by, for example, selling their property or entering into a bilateral agreement other than a 1991 Act tenancy. These individuals may or may not be content.” This relates to people in groups 4 and 5. The order makes no provision to redress any losses incurred by such people.

**Further resources:**

[Full judgement of the Supreme Court](#)

[Limited Partnerships after the Supreme Court](#), briefing note by Stronachs Solicitors

Agricultural Holdings (Scotland) Act 2013 Remedial Order 2014 consultation document (Scottish Government 2013). Available at:  
<http://www.scotland.gov.uk/Resource/0043/00438820.pdf>.

Agricultural Holdings (Scotland) Act 2003. Available at:  
<http://www.legislation.gov.uk/asp/2003/11/contents>.

**Tom Edwards and Wendy Kenyon**  
**SPICe Research**  
**28 November 2013**

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

Figure 1: Groups affected by the “defect”

