

Nigel Don MSP

Convener of the Delegated Power and Law Reform Committee

T1.01

The Scottish Parliament

Edinburgh

EH991SP



9 December 2015

Dear Nigel

## **Land Reform (Scotland) Bill**

Thank you for your letter on behalf of the Delegated Powers and Law Reform Committee, addressed to the Cabinet Secretary for Rural Affairs, Food and the Environment, which I am replying to on behalf of the Scottish Government.

### **General Comments**

As I hope was indicated in our last response, we welcome the DPLRC's advice on the provisions within this Bill and have given careful consideration to your views and recommendations. I am, therefore, disappointed to read your comments in regard to the information provided in the Delegated Powers Memorandum and in the additional written and oral evidence received by the Committee to date.

Scottish Ministers have sought to be helpful in providing the Committee with the additional information and clarification they have requested and I hope my response, set out in this letter, will provide the Committee with the further clarification it seeks.

I note the comments in relation to policy development and the possible effects that some of the regulation making powers may have on an individual's rights under the European Convention. This Government takes our obligations under the ECHR very seriously and is committed to protecting human rights.

When making regulations the Scottish Ministers do of course, have to ensure that they are within the competence of the Scottish Parliament. In turn Parliament has the opportunity to scrutinise any regulations that are laid before it to ensure they are within competence.

While I recognise the Committee's concerns, the Government considers that there are robust procedures in place to ensure that any regulations brought forward by the Government are within legislative competence, including being ECHR-compliant. The regulation-making



powers that are contained in this Bill can be exercised within competence and we do not see that this Bill and the regulations made under it as being more or less susceptible to legal challenge than any other.

You have also raised concerns in relation to what you see as a lack of policy development in relation to particular sections, most notably section 35 and 79, which I will address in turn later in this letter. Overall, the Government considers that the Bill contains the right balance between details of policy being set out on the face of Bill whilst retaining the flexibility to allow for the further consultation and policy development that will be required to inform the detail of the regulations where this is appropriate.

The Government takes the views of the Committee seriously and, where possible, we will aim to provide further details on the potential detail to be contained in regulations to the Parliament during the passage of the Bill. We will of course also give further consideration to the benefits and practical implications of accepting the recommendations made by the Committee and the recommendations made by the RACCE Committee in their Stage 1 report, and will reflect on this ahead of Stage 2.

## **Section 35**

The Government believes that the purpose of the regulations that can be made under section 35 is clear from the drafting of section 35. I would also like to reaffirm the Government's position that the regulations that will be brought forward under this power can and will be within the competence of the Scottish Parliament including ECHR obligations.

Before laying the draft regulations before Parliament, Ministers are required to consult. This consultation will allow the opportunity for consideration of how the regulations under section 35 interact with people's ECHR rights and for Ministers to consider the views expressed in responses to the consultation.

When the draft regulations are laid, the Parliament will have the opportunity, under the affirmative procedure, to scrutinise the regulations and ensure that they are within competence.

I note the Committee's concerns regarding the perceived lack of detail on the face of the Bill. I also note the comments made by the RACCE Committee in the Stage 1 report of the Bill in relation to section 35.

In light of these concerns we are exploring how best to provide further information on the potential detail of the regulations under this section by the end of stage 2, in line with the recommendation made by RACCE.

In addition we will continue to consider if it will be helpful, and possible, to clarify the scope of the provision and provide any more detail on the face of the Bill at this stage. In considering what information can be provided and what further clarification could be provided on the face of the Bill, we will have to take into consideration the recommendations made by the RACCE committee in their Stage 1 report and views of Parliament during the Stage 1 debate.

I note the Committee's recommendation in relation to the use of some form of enhanced affirmative procedure for regulations made under section 35. Currently, we are not minded to accept this recommendation, and consider the use of affirmative procedure appropriate, but I will reflect on this further to consider if it is desirable, given the other recommendations made by the Committee and the RACCE committee in their Stage 1 report.

## **Section 36**

I note the Committee's concerns in relation to use of the regulations made under section 36 and the possibility that future uses of the power could amend the regulations substantially and such amendments may not necessarily be administrative in nature.

The Government believes that subsequent use of the regulations power will be mainly administrative in nature but given the Committee's concerns we are strongly minded to accept the Committee's recommendation to amend the Bill to provide that the exercise of the power will be subject to the affirmative procedure on each occasion when it is used, subject to further consideration of the views of the RACCE committee in their recently published Stage 1 report, and the views of the full Parliament during the Stage 1 debate.

## **Section 79**

As indicated in our last response, we welcome the DPLRC's advice on this issue and have given careful consideration to your recommendations. Since our first written response to the Committee on 8 September, we have made considerable progress on developing a new approach to take forward the aims underpinning section 79, namely supporting 1991 Act tenant farmers to leave their holdings with dignity and security, while increasing opportunities for newer farmers to establish themselves.

My officials have written to the RACCE committee outlining the full details of our proposal (see attached letter). We have also been engaging with key stakeholders on the policy, both in informal discussions and by providing them with full details of the policy in writing. It is our intention to replace the regulation-making power in section 79 with substantive provisions at stage 2.

## **Section 38M**

As outlined in our letter of 8 September and in our response to the Committee's Stage 1 report, leaving these particular procedural issues to regulations enables the Scottish Government to consult with industry experts, valuers, and internal property colleagues to set out the technical process and detailed aspects of the sale process.

This will ensure the regulations are adaptable to changing circumstances within the agricultural and rural property market, and to any impacts of external influences such as taxation or changes to local planning systems. We fully recognise that the Scottish Parliament should have an opportunity to debate the contents of these regulations before they are enacted, as well as to consider views from stakeholders, and the Bill therefore specifies that the regulations be subject to the affirmative procedure.

## **Section 82 and 83**

In previous correspondence the Committee concluded that those powers which deal with key aspects of the method for calculating a fair rent, namely the determination of productive capacity and the standard labour requirement, should be subjected to a higher level of parliamentary scrutiny than the negative procedure.

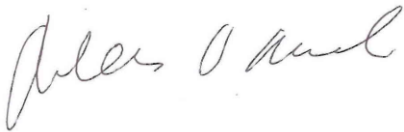
As my officials have previously outlined in written correspondence to the Committee, it is crucial that certain aspects of the rent review procedure are left to regulations to ensure they

are developed in partnership with stakeholders and key industry experts, to test the proposed approach before the new system is introduced to the sector.

However, we have considered the Committee's views on this issue and we are strongly minded to increase the level of parliamentary scrutiny required for the powers in these sections, subject to further consideration of both the views of the RACCE committee in their recently published Stage 1 report, and the views of the full Parliament during the Stage 1 debate.

I trust this addresses the Committee's concerns, if you require any addition clarification please do not hesitate in contacting me.

Kind regards



**AILEEN McLEOD**