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Delegated Powers and Law Reform Committee

Land Reform (Scotland) Bill at Stage 1



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Contents

Introduction	1
Delegated Powers Provisions	2
Recommendations	4
Annexe A	26
Annexe B	30
Annexe C	32

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

- a. any—
 - i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - ii. [deleted]
 - iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- c. general questions relating to powers to make subordinate legislation;
- d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
- f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
- g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule.



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Introduction

1. At its meetings on 1, 15 and 29 September and 6 October 2015 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Land Reform (Scotland) Bill at Stage 1 (“the Bill”)¹. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill².
3. The Bill was introduced by the Cabinet Secretary for Rural Affairs, Food & Environment on 22 June 2015. It is a large, multi-strand Bill which makes wide-ranging provision about land and agricultural holdings. It takes forward a number of recommendations made in the report of the Land Reform Review Group, published in May 2014. Part 10 of the Bill concerning agricultural holdings takes forward recommendations of the Agricultural Holdings Legislation Review Group (“AHLRG”), which published its final report in January 2015. A part by part overview of the Bill is included at **Annexe A** of this report.

Delegated Powers Provisions

4. Due to the number of delegated powers contained within the Bill, the Committee adopted a staged approach to its scrutiny. At its first consideration of the Bill the Committee delegated authority to its legal advisers to ask written questions of the Scottish Government. The questions issued and the responses received are included in this report at **Annexe C**. Following receipt of the Scottish Government's answers to the written questions, at its meeting on 15 September³, the Committee took oral evidence from Scottish Government officials on a number of powers in the Bill.
5. The Committee makes no recommendation in respect of the powers listed at **Annexe B** to this report. These powers are divided into powers with which the Committee was initially content and powers with which the Committee was content following both written and oral evidence from the Scottish Government.
6. The Committee's comments and recommendations on the remaining delegated powers in the Bill are detailed below. Before considering the individual powers, the Committee makes the following general observations:
7. **The Committee considers that, as a matter of general principle, delegated powers should be framed as narrowly as possible in order to deliver the identified policy objectives.**
8. **The reasons advanced in the Delegated Powers Memorandum (DPM) for taking many of the powers in the Bill were not sufficiently detailed so as to enable the Committee to reach a view on whether those powers were acceptable in principle. With regard to a number of powers, the necessary information was only obtained following receipt of both written and oral evidence from the Scottish Government. The quality of delegated powers memoranda is an issue that the Committee is monitoring on an on-going basis, and will continue to raise in its annual and quarterly reports and, as appropriate, with the Minister for Parliamentary Business.**
9. **The content of some of the written answers provided by the Scottish Government in response to the Committee's questions was inadequate. As an example, three of the answers given in response to the Committee's questions on the power in section 79 (concerning conversion of 1991 Act tenancies) stated simply that the policy underpinning this power is still under development and is subject to on-going consultation between the Scottish Government and stakeholders. When the Committee explored some of these issues further with Scottish Government officials in oral evidence, the answers given by the officials failed to provide the information sought by the Committee.**

10. In relation to the powers in sections 35 (concerning a right of access to information) and 79 of the Bill, the Committee remains in a position, having considered both written and oral evidence, whereby it is unable to form a view as to how the powers are intended to be used. In relation to section 79 in particular, the Committee finds it concerning that the thinking behind a power of such significance appears still to be in the early stages of development.
11. The Committee observes in particular that the powers in sections 35 and 79 are both likely to interact with the European Convention of Human Rights (“ECHR”) rights of parties. In the absence of 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 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 concern to the Committee.
12. 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.
13. The Committee has previously voiced its concern regarding delegated powers being taken in Bills in the absence of the policy in a particular area having been fully developed. The Committee remains extremely concerned about powers being taken as a substitute for thorough policy development in advance of the introduction of a Bill. It will continue to draw examples of that approach where it sees it to the attention of the relevant lead committees.

Recommendations

14. The Committee's recommendations on delegated powers in the Bill which it wishes to make further comment on, are detailed below.

Part 3 – Information about control of land etc.

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

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

Provision

15. Section 35(1) 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”. Regulations may also make provision about the circumstances in which persons affected by land may request information, and about how the authority to which requests are to be made is to handle such requests.
16. Regulations under section 35(1) may also include provision for civil penalties and offences for failure to comply with the regulations. Where civil penalties are to be imposed, the regulations must provide a right of appeal. Where the regulations create offences, they must provide for those offences to be triable summarily only, and the maximum penalty which can be created is a fine not exceeding level 3 on the standard scale (£1,000). Subsection (6) requires the Scottish Ministers to consult before laying draft regulations before the Scottish Parliament.

Comment

Width of the power / policy development

17. This is a broad power to make regulations enabling the disclosure of information about individuals. The supporting documents do not clearly state what the policy objective is in enabling such disclosure of information, and the Bill does not tie disclosure of information to a particular purpose. Crucially, it does not identify what is meant by “persons in control of land” or “persons affected by land”, with these definitions being held over for the regulations.
18. The Committee explored this power extensively with the Scottish Government, in written and oral questions. Evidence was given to the effect that the purpose for

which the power is being taken is to enable practical difficulties with land to be addressed in a wide range of different circumstances. The Committee also heard that a related purpose is to increase transparency and accountability of land ownership, and that “that could be the other side of the same coin”. Kate Thomson-McDermott, head of the Land Reform Policy Team, explained that:

” the purpose of the regulations that are to be made under section 35 is to provide greater transparency and greater accountability of landowners in specific cases in which the provisions would apply, so that practical difficulties can be better addressed.

19. The Scottish Government considers that the power is framed in a way which reflects that purpose, as it clearly relates to “access to a limited set of information by a limited class of persons”. However the limited class of persons referred to appears to be all persons affected by an area of land, irrespective of the nature of the effect on those persons. That does not appear to be a significant limitation on the exercise of the power.
20. The Committee accordingly reports to the lead committee that the power is framed more widely than is necessary to achieve its apparent purpose.
21. In addition to the width of the power, Committee members asked officials in the evidence session about the **necessity** of taking the power, and the way in which it is intended to be exercised. These considerations are pertinent to understanding whether the provision serves a legitimate aim and whether it is proportionate to that legitimate aim. The Committee notes that requiring disclosure of certain information about an individual potentially interferes with that person’s right under Article 8 of the ECHR to respect for private life and correspondence. Any such interference must be in pursuit of a legitimate aim and proportionate to that legitimate aim.
22. Following the oral evidence session, the Committee concludes 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.
23. The Committee accordingly goes on to consider whether what the Bill proposes is **proportionate to** that legitimate aim. In line with the tests set down by the UK Supreme Court⁴:
 - the measure proposed (i.e. the scheme under which information may be disclosed) must be rationally connected to the legitimate aim;

- the measure must go no further than necessary to achieve the legitimate aim;
 - on a fair balance, the benefits of achieving the aim by the measure must outweigh the disbenefits resulting from the restriction of the relevant protected right.
24. The difficulty for the Committee and for the wider Parliament in addressing these tests in relation to the power in section 35 is that the power is expressed in such broad terms that it is not clear how it will be exercised. There are very few indicators on the face of the Bill as to what the regulations made in exercise of the power in section 35 will look like, or how they may operate in practice.
25. For example, it is not clear whether regulations will provide that a person has to be significantly affected by land in order to access information, or whether a more remote effect will be sufficient. The Committee considers that the balance between the competing private and public interests will fall in a different place depending on whether the effect on a person is severe, or is more minor or peripheral. Equally it may be necessary to consider the nature of the practical effects on those seeking disclosure of information, and to weigh those up against the affected private interests.
26. In addition, the balancing exercise may look quite different where there are concerns around, for example, the personal safety of an individual about whom information is to be disclosed. The balance between competing interests may fall in a different place where there are legitimate privacy reasons such as this which militate against disclosure. However the Government has chosen not to make provision for such situations on the face of the Bill. Instead it explains that the matter of privacy exemptions will be addressed in the regulations, by making provision for circumstances in which information need not be provided. The Government intends to consult further on this matter, and on how the privacy exemptions might operate in practice.
27. The Scottish Government also explained in oral evidence that it would carry out further consultation more generally with stakeholders, on both the detail of the regulations enabling access to information and the way in which the process will work in practice. The power has been drafted widely in order to facilitate that further consultation.
28. The Committee finds however that it is not just matters of detail which have been left out of the Bill with a view to further consultation. The considerations which the request authority must take into account in determining a request for information will be crucial to an assessment of whether the measures proposed go no further than necessary, and are capable of achieving a fair balance. In other words, the Committee cannot properly evaluate proportionality without more information as to how the scheme will work in practice.

29. These circumstances leave the Committee and the Parliament more widely in a position where it is being asked to confer a power on the Scottish Ministers which is likely to impact upon the ECHR rights of parties in circumstances where the Scottish Government has not finalised the policy beneath the power and is not, therefore, in a position where it is able to inform the Parliament as to how the power will be exercised. The power is drafted in deliberately wide terms in order to provide the Scottish Government with flexibility as stakeholder discussions continue, however this means that the Parliament is required to make a decision on the conferral of a significant power in circumstances where very little information is available on the face of the Bill and little evidence has been put to the Committee by the Scottish Government to inform that decision.
30. While the Committee recognises that the power in section 35 is capable of being exercised compatibly with the ECHR, it finds it highly unsatisfactory that the Parliament is being asked to confer such a wide and significant power in these circumstances without further information as to how the power is to be exercised or how that exercise is likely to impact on individuals.

Parliamentary procedure

31. In relation to parliamentary procedure, the Scottish Government's position is that the affirmative procedure and the requirement in section 35(6) to consult before making the regulations (with the intention being to consult further with targeted stakeholders on the detail of the regulations) are considered to provide a sufficient level of scrutiny for the exercise of the power.
32. The Committee observes that while the principle of enabling access to information (in line with a process to be operated by a request authority) does appear on the face of the Bill, it is not possible for Parliament to inform itself sufficiently as to whether disclosure of information about individuals is in principle appropriate at present, given that there is no further detail available from the Scottish Government as to how the process will work or where the lines are to be drawn in terms of the circumstances in which information must be disclosed. The Scottish Government has explained that a justifiable reason will be needed before the request authority will require disclosure of information, but not what considerations will inform that justification.
33. If the power remains in the Bill as currently framed, the Parliament's focus will have to shift to scrutinising the draft regulations under section 35 once they are available. With particular reference to the ECHR assessment, the Parliament will require to scrutinise the regulations closely, in order to be satisfied that they deliver a fair and proportionate result that is compatible with the rights protected by Article 8 of the Convention.
34. The Committee accordingly considers that it would be appropriate, taking into account the scope and the clear significance of this power, as well as the lack of information available to Parliament at present as to how it will be exercised, for an enhanced form of affirmative procedure to apply to this power. Any such

enhanced or ‘super’ affirmative procedure should require the Scottish Government to consult the Parliament and other stakeholders on its proposals regarding access to information in advance of formally laying regulations under section 35. It should also afford the Parliament more time to scrutinise the detail of the proposed scheme, including its ECHR implications, and to take evidence and report on the proposals in advance of the regulations being formally laid.

35. **The Committee draws the power in section 35(1) of the Bill to the attention of the Rural Affairs, Climate Change and Environment Committee. The Committee considers that this power is framed in very wide terms and not by reference to the specific purposes for which the Scottish Government has explained it is being taken.**
36. **The Committee considers that, as a matter of general principle, delegated powers should be framed as narrowly as possible in order to deliver the identified policy objectives.**
37. **The Committee further observes that significant aspects of the policy are still under development, notably the definition of persons affected by land, the circumstances in which information may or may not be requested, and the powers of the request authority to require information to be provided. As such, the Scottish Government is not yet in a position to be able to inform the Parliament fully as to its plans for the exercise of this power. The Committee finds it highly unsatisfactory that Parliament is being asked to consent to the taking of a wide power to make regulations in circumstances where very little information is available as to the manner in which that power is likely to be exercised. The Committee observes 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.**
38. **The Committee further notes 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).**
39. **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.**
40. **While the Committee recognises 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 recognises that the regulations made in exercise of the power will themselves require close and careful parliamentary scrutiny in order that 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.**

41. In order to address these points, and to ensure that the Parliament has an opportunity to undertake full and detailed scrutiny of the policy regarding disclosure of information about individuals, the Committee accordingly recommends that the Scottish Government amends the Bill at Stage 2 to subject the power in section 35(1) to an enhanced form of affirmative procedure. The Committee recommends that such a procedure should give the Parliament the opportunity to be fully consulted on the Scottish Government's proposals for access to information once the parameters of the power have been developed, and to have an opportunity to take evidence and report on those proposals prior to regulations in exercise of the power in section 35(1) being formally laid before Parliament for approval in accordance with the affirmative procedure.

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

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative procedure for first exercise of power, and if regulations amend primary legislation; otherwise negative

Provision

42. 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.
43. The information which may be requested is not set out on the face of the Bill, but may be defined in the regulations. In particular, it may include information about the category of person or body into which a proprietor falls (such as a UK company, non-UK company, trust or community body) and information relating to individuals having a “controlling interest” in the legal proprietor of the land (with “controlling interest” to be defined in the regulations). The regulations may also make provision about the circumstances in which information obtained by the Keeper may be passed on to other persons, or may be published.

Comment

44. The Committee observes that the DPM and other supporting documents do not explain the purpose of enabling information about proprietors of land or leases to be disclosed, or published in the land register. In the written and oral evidence however, the Scottish Government expands on the purpose in taking the power. The written response explains that the purpose is to “allow analysis to be carried out that will allow better information on patterns of land ownership to be

established, as well as to allow individuals and communities to have a better understanding of patterns of land ownership”.

45. In oral evidence, officials explained that the provision enables a scheme for the “voluntary disclosure of information across the broad range of land ownership in Scotland and is intended to develop a better evidence base of official statistics on patterns of land ownership throughout Scotland.” Officials also stressed once more the public interest which would be served by having information which is already in the public domain available in one place and easily accessible.
46. The Committee heard that the information which the Scottish Government currently considers is necessary to obtain in order to achieve the policy aim without placing an undue burden on applicants for registration is 1) information about the **category** of land owner seeking registration, and 2) information on individuals having a **controlling interest** in that land owner.
47. When asked to explain why the power is framed more broadly than that, in that it enables the Keeper to request any information relating to proprietors of land, the Scottish Government pointed in oral evidence to the need for flexibility. Kate Thomson-McDermott explained that:

” As time moves on, policies and law on land and even objectives on land reform will develop, and we thought that it was important that ministers should have the scope to add new categories in future if necessary and to remove categories that might no longer be considered relevant or helpful. It is not anticipated that the categories will grow exponentially, but we thought it important to have the flexibility to be able to address future needs and to keep what we are asking under review, to ensure that it remains proportionate and useful.
48. The Committee accordingly considers that the power is framed more broadly than is currently considered necessary, but concludes that a reasonable explanation has been provided of the need for future flexibility. The Committee observes that this power is likely to affect individuals in a less significant way when compared to the power in section 35(1). It enables the creation of a general voluntary scheme for disclosure of information but cannot compel the disclosure of information. That being the case, the Committee considers it acceptable for the Parliament to confer a relatively broad power on the Scottish Ministers to legislate in this area to bring in new categories of information which may be requested, subject of course to consultation with stakeholders and scrutiny by the Parliament.
49. One area where there is potential for interference with an individual’s Article 8 ECHR rights is the disclosure by a legal entity of information about a person with a controlling interest in the entity. The power as framed does not require the consent of such an individual to be obtained prior to information being submitted to the Keeper of the Land Register.

50. The Scottish Government stated in its written response that it is “anticipated that information about an individual with a controlling interest in land will only be disclosed to the Keeper with the consent of that individual” and that this will be set out in the regulations. When asked why no provision was made on the face of the Bill, officials explained that:
- ” That is one of the areas in which the Scottish ministers will want to consult at a significant level of detail with legal representatives and various stakeholders. A number of options are being considered, from requiring the person who is making the application to confirm by ticking a box or signing a statement that they have obtained the permission of a third party, to requiring the keeper to write to the third party to inform them and give them a chance to object before the information appears on the register.
 - ” There are a number of ways in which that aspect could be affected, and Scottish Ministers intend to work with stakeholders and those who interact regularly with the register to ensure that the most appropriate and least onerous procedure is used while still ensuring that the interests of the parties involved are protected.
51. The Government is accordingly giving consideration to how best to ensure that an applicant for registration has obtained consent. The solution which is ultimately brought forward will be liable to close scrutiny once the regulations are laid. The Committee merely notes at this stage that the Scottish Government has signalled a clear intention to make provision in the regulations requiring the consent of affected individuals to the disclosure of information about them.
52. Regarding parliamentary procedure, the Bill provides for the first set of regulations made in exercise of the power to be subject to the affirmative procedure. Thereafter regulations will be subject to the negative procedure (save where the regulations textually amend primary legislation, in which case the affirmative procedure will apply).
53. When asked about the choice of Parliamentary procedure, officials explained that “...the Scottish ministers consider that any subsequent exercise of the power to be inserted into the Land Registration etc. (Scotland) Act 2012 is more likely to make amendments to the definitions contained in section 36 or even additions to the category of information on proprietors that may be collected. It should not bring in a change in the overall policy of providing regulations that allow the keeper to request additional information but will involve refinements to the definitions used in the regulations.
54. However the Committee observes that the Bill does not limit the Scottish Ministers, in a second or subsequent exercise of the power, to making minor or technical changes. The Committee heard in oral evidence that the scheme could change substantially over time, with expanded categories of information about proprietors being requested. Moreover, there is a potential for changes to be

made to the provisions on consent of individuals to disclosure of information, with a corresponding potential for interference with Article 8 rights. The Committee accordingly considers that changes to the regulations should be subject to the affirmative procedure, in the same way as the first regulations made under the power.

- 55. The Committee is content with the power in principle but makes the following recommendation regarding parliamentary procedure:**
- 56. The Committee recommends that the Scottish Government brings forward amendments at Stage 2 to make exercise of the power in section 36(2) subject to the affirmative procedure on each occasion when the power is used.**
- 57. 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 considers 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.**
- 58. In scrutinising the delegated powers in a Bill, the Committee considers not just how they are intended to be used by the current administration, but how they might be used at any time in the future. The Committee notes that whatever the current intention, a government exercising the power to make subsequent regulations is not limited to making technical or procedural provision. Rather the power could be used to amend the definitions in the original regulations in a substantive way, altering the details of the existing scheme in a manner which significantly affects individuals. Examples of such substantive provision might include adding significant new categories of information which may be requested by the Keeper, or making significant changes to the provisions on third party consent to the disclosure of information. These are matters of substance central to the policy under consideration, and on which the Parliament might expect to be afforded a higher degree of scrutiny. Accordingly the Committee considers that the affirmative procedure would be appropriate for each exercise of the power.**

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

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

Provision

59. 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.
60. Section 79(3) provides a non-exhaustive list of matters which may be included in regulations made in exercise of the power in section 79(1). These include the notice that the tenant is to give to the landlord intimating that the tenant wishes the tenancy to convert (which indicates that conversion is to be at the option of the tenant); the effect of a notice of conversion on the rights of both the tenant and the landlord; and the terms of the lease for the MLDT, including its minimum term. The power is subject to the affirmative procedure.

Comment

61. The Committee explored this power extensively with the Scottish Government, both in writing and in oral evidence. The Committee sought an explanation as to why the power is framed in such wide terms as this was not fully explained in the DPM. The written responses provided by the Scottish Government did not address the point fully, stating that matters regarding the process of converting 1991 Act tenancies to MLDTs are currently under consideration with stakeholders and that there is a considerable range of views as to the form the model of conversion should take.
62. In oral evidence, the Scottish Government officials explained that the purpose of conversion is to encourage movement in the tenanted agricultural sector by providing tenants of 1991 Act tenancies who may wish to retire with an opportunity to exit the sector by converting their tenancy to a MLDT which could then be assigned to a third party. A connected objective is to encourage new entrants into farming by making more tenancy opportunities available. In evidence before the Committee, Billy McKenzie, Head of Agricultural Holdings within the Scottish Government, stated:



The review group found that the current situation is not satisfactory in that it does not allow people an effective exit out of the sector. There are people sitting with 1991 Act tenancies who are going to remain sitting there while

the farm is run down. The opportunity for them to exit is not attractive enough to give them a dignified retirement, and that blocks people from coming into the sector as well. It is a static situation that is getting worse.

63. The Scottish Government also explained in evidence that a wide power to permit conversion is necessary, given that the details of the conversion scheme have yet to be finalised and that a number of options are currently being considered. In evidence, Andrew Campbell of the Scottish Government Legal Directorate stated:

” Clearly, we still need to pull together an evidence base on targeting the power. It is difficult to put the cart before the horse and say, “We know what we want to do, but we have not finalised the evidence base.” Until that evidence base is finalised and is clear and robust, it is difficult to know what the regulations might say.

” As I said, that is why we have taken the power. The Government has to have the flexibility so that the Bill has the headline policy in it but we can expand on that through regulations.

64. Committee members asked the officials about the nature of this power and whether it could be exercised in a manner that is compatible with the ECHR rights of both landlords and tenants. Section 79(3)(a) indicates that conversion is likely to be at the tenant’s option. In evidence the Scottish Government indicated that conversion may take place without the landlord’s consent although the officials explained that these matters were still under consideration with stakeholders. The officials also explained that the Scottish Government’s view is that the power in section 79 is capable of being exercised in a manner that is compatible with the ECHR rights of both landlords and tenants.
65. The Committee considers that the power in section 79 of the Bill is drafted in very wide terms, and not by reference to the specific policy objectives for which the Scottish Government has explained it is being taken. The power appears to the Committee to permit conversion of all 1991 Act tenancies into MLDTs. As such, the power appears to be wider than the policy objectives which have been cited in support of taking it. The Committee recognises that altering existing contractual relationships between tenants and landlords could involve interference with those parties’ rights under the ECHR, notably the right to property enshrined in Article 1, Protocol 1.
66. The Committee also notes that the policy regarding the detail of conversion is still subject to consultation with stakeholders. The Committee accordingly has at present very little information as to how the power in section 79 is likely to be exercised which could guide the Committee in its consideration of the power.
67. These circumstances leave the Parliament in a position where it is being asked to confer a power on the Scottish Ministers where the Scottish Government has not finalised the policy underpinning the power and is not, therefore, in a position where it is able to inform the Parliament as to how the power will be

exercised. The Committee finds it highly unsatisfactory that the Parliament is being asked to confer such a wide and significant power in these circumstances without further information as to how the power is to be exercised or how that exercise is likely to impact on the rights of both tenants and landlords to 1991 Act tenancies.

Parliamentary procedure

68. The Committee asked the officials whether, given the fact that the policy on conversion is still subject to development, it is sufficient that this power is subject to the standard affirmative procedure. The officials stated in response to this question that the Scottish Government considers that the affirmative procedure affords the appropriate level of scrutiny over the exercise of this power.
69. The Committee considers that, while the principle of conversion does appear on the face of the Bill, it is not possible for Parliament to inform itself sufficiently as to whether conversion is in principle appropriate at present, given that there is no further detail available from the Scottish Government as to how the process will work. With particular reference to the ECHR assessment, the Parliament will require to scrutinise the regulations made under section 79 closely, in order to satisfy itself that they deliver a fair and proportionate result that is compatible with the rights protected by the Convention, in particular, by Article 1, Protocol 1.
70. The Committee considers that, in these circumstances, it would be appropriate for an enhanced form of affirmative procedure to apply to this power. Any such enhanced or 'super' affirmative procedure should require the Scottish Government to consult the Parliament and other stakeholders on its proposals regarding conversion in advance of formally laying regulations under section 79. It should also afford the Parliament more time to scrutinise the detail of the conversion process, including its ECHR implications, and to take evidence and report on the proposals in advance of the regulations being formally laid.
71. **The Committee draws the power in section 79 of the Bill to the attention of the Rural Affairs, Climate Change and Environment Committee. The Committee considers that this power is framed in very wide terms and not by reference to the specific purposes for which the Scottish Government has explained it is being taken.**
72. **The Committee considers that, as a matter of general principle, delegated powers should be framed as narrowly as possible in order to deliver the identified policy objectives.**
73. **The Committee further observes that significant aspects of the policy on conversion are still under development with stakeholders and the industry, notably the minimum term of the converted tenancy. As such, the Scottish Government is not yet in a position to be able to inform the Parliament fully as to its plans for the exercise of this power.**

74. **The Committee finds it highly unsatisfactory that Parliament is being asked to consent to the taking of a very wide power to make regulations in circumstances where very little information is available as to the manner in which that power is likely to be exercised given that the Scottish Government has not fully developed the detail of the policy regarding conversion. The Committee observes 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 notes that regulations made in exercise of the power could impact significantly on the rights of both tenants and landlords, notably those protected by Article 1 Protocol 1, European Convention on Human Rights (ECHR).**
75. **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.**
76. **While the Committee recognises that the power in section 79 is capable of being exercised in a manner that is compatible with the ECHR rights of the parties involved, the Committee also recognises that the regulations made in exercise of the power will themselves require close and careful parliamentary scrutiny in order that 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 rights of the affected parties.**
77. **In order to address these points, and to ensure that the Parliament has an opportunity to undertake full and detailed scrutiny of the policy regarding conversion, including the opportunity to propose amendments, the Committee accordingly recommends that the Scottish Government amends the Bill at Stage 2 in order that the power in section 79 is subject to an enhanced form of affirmative procedure. The Committee recommends that such a procedure should give the Parliament the opportunity to be fully consulted on the Scottish Government's proposals for conversion once those proposals are developed, and to have an opportunity to take evidence and report on those proposals prior to regulations in exercise of the power in section 79 being formally laid before Parliament for approval in accordance with the affirmative procedure.**

Section 82 – 1991 Act tenancies: rent review

Inserting new Schedule 1A to the Agricultural Holdings (Scotland) Act 1991 Act ("the 1991 Act"), paragraph 2(4) – form and content of rent review notice

Inserting new Schedule 1A to the 1991 Act, paragraph 8(1) – productive capacity

Inserting new Schedule 1A to the 1991 Act, paragraph 9(6) – surplus residential accommodation

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

Inserting new section 9A(3) in the Agricultural Holdings (Scotland) Act 2003 (“the 2003 Act”) – Form and content of rent review

Inserting new section 9B(3) in the 2003 Act – Determination of rent

Inserting new section 9C(6) in the 2003 Act – Surplus residential accommodation

Powers conferred on:	the Scottish Ministers
Powers exercisable by:	regulations
Parliamentary procedure:	negative

Provision

78. 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 tenancies (section 82) and for limited duration tenancies (“LDTs”) and modern limited duration tenancies (“MLDTs”) (section 83(3)).
79. Under the new procedures, either the tenant or the landlord of an agricultural holding may initiate a rent review by serving a notice on the other party. The rent review notice must state the rent that the person serving the notice proposes should be payable which the parties may then agree between them. The Scottish Ministers may prescribe by regulations the form and content of a rent review notice and the information that is to accompany such a notice.
80. Where no agreement is reached between the parties as to what the rent for the holding should be, the matter may be determined by the Land Court. The Land Court must determine the fair rent payable for the holding, taking account of all the circumstances and having regard, in particular, to—
- (a) the productive capacity of the land comprised in the lease;
 - (b) the open market rent of any surplus residential accommodation on the holding provided by the landlord; and
 - (c) the open market rent of - (i) any fixed equipment on the holding provided by the landlord, or (ii) any land forming part of the holding, used for a purpose that is not an agricultural purpose.
81. Both 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 conferred by sections 82 and 83(3) is subject to the negative procedure.

Comment

82. The Committee explored these powers further with the Scottish Government in both written and oral evidence. In written evidence, the Scottish Government explained these powers are necessary because rent modelling work undertaken in accordance with key stakeholders is required to achieve a practical system for rent review that works. Given that such modelling work is still on-going, the Scottish Government considers it appropriate to take powers to fill in the remaining detail of the new rent review processes in regulations.
83. In oral evidence, the Scottish Government officials explained that the Scottish Government is very close to broad agreement on certain aspects of the new process and that it expects to make progress on more of the technical detail by the end of October. The Scottish Government officials also indicated that the Scottish Government would be willing to share the detail of its consideration of the new process with the Committee when that work has been completed.
84. The Committee finds it unsatisfactory that the Scottish Government has not completed its modelling work with stakeholders in time to inform Parliament fully as to the detail of the new rent review process. The Parliament is again being asked to confer powers on the Scottish Ministers to make regulations in circumstances where full details regarding those powers are not yet available as the policy is still subject to development.
85. The Committee does not consider, however, that the on-going development of the new rent review processes raises the same level of concern the Committee expresses in relation to the power to permit conversion of 1991 Act tenancies set out in section 79 of the Bill. The Committee considers that the delegated powers being taken in sections 82 and 83(3) are more narrowly framed than the power in section 79 and it is clear from considering the provisions of the Bill what the formula to be applied in a rent review is, albeit that a complete picture of that formula will not be available until regulations are made in exercise of these powers.

Parliamentary procedure

86. The powers regarding rent review are subject to the negative procedure. The Committee asked the Scottish Government officials why this was considered to be appropriate, particularly in relation to the powers regarding the determination of productive capacity and the standard labour requirement.
87. In evidence, the officials stated that the powers are subject to the negative procedure because they are concerned with technical detail which will be based on advice provided to the Scottish Government by the industry. It was also stated in evidence that the delegated powers concerning rent review are less contentious

among stakeholders than the power regarding conversion in section 79 of the Bill therefore there is, in the Scottish Government's view, more reason for the powers to be subject to the negative procedure.

88. The Committee considers that the question of whether a power is contentious among stakeholders is not a matter which is of particular relevance to the determination of the appropriate parliamentary procedure. The determination of the appropriate procedure is a question of the level of scrutiny Parliament may wish to apply to a power which it is being asked to confer upon the Scottish Ministers. The question of what is appropriate is informed by Parliament's assessment of the nature of the power in question, rather than stakeholders' views on the policy underpinning the power.
89. The Committee commonly takes the view that while matters which can be described as procedural or administrative in nature may be appropriate for the negative procedure, matters which are more substantive in policy terms or which are clearly central to the policy under consideration should be subject to the affirmative procedure. The affirmative procedure provides Parliament with an opportunity to actively debate the proposed subordinate legislation before considering whether it should be made and subordinate legislation subject to the affirmative procedure cannot come into force until Parliament's approval has been given.
90. The Committee considers that, of the powers conferred in respect of rent review relating to 1991 Act tenancies and LDTs / MLDTs, the powers to prescribe the form and content of rent review notices are appropriately subject to the negative procedure.
91. In the case of the powers regarding the assessment of productive capacity of an agricultural holding and the determination of the standard labour requirement, the Committee considers these powers to be central to the new system of rent review being introduced by the Bill. Regulations made in exercise of these powers will fill in important details regarding the formula for determining a fair rent, such as the manner in which the productive capacity of a holding is to be determined. The Committee further considers that, given that the Scottish Government is still developing the finer points of the policy in this area with stakeholders, the powers should be subject to the higher level of parliamentary scrutiny afforded by the affirmative procedure.
92. **The Committee recognises that the new process for determining rent review is subject to on-going consultation with stakeholders and that the Scottish Government is not yet in a position to inform the Parliament in detail of its plans regarding the exercise of these powers. The Committee finds it unsatisfactory that the detail of the policy remains subject to consultation at this late stage, however the Committee welcomes 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 encourages the Scottish Government to do so at the earliest opportunity. The Committee further considers 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.

93. The Committee is content that the powers regarding the form and content of rent review notices are subject to the negative procedure. The Committee recommends, however, 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 considers 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.
94. The Committee considers that these matters are not appropriately described as administrative in nature given their overall significance to the new method for calculating a fair rent. The Committee considers that the affirmative procedure appears to strike a more appropriate balance having regard to the nature of these powers and the need for parliamentary scrutiny. The Committee accordingly recommends that the Scottish Government brings 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.

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

Inserted section 38M(1) to the 2003 Act – Procedure for sale to third party.

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

Provision

95. 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.

96. Where an order for sale has been made by the Land Court, the tenant must complete the purchase in accordance with the requirements set out as part of the process in sections 38A-38O. The tenant's right to buy the holding may be extinguished in a number of ways, for example if the tenant does not give notice of his or her intention to exercise the right to buy to the landlord or if the tenant fails to complete the purchase of the holding by the specified date. Where the tenant's right to buy is extinguished, new section 38L provides that the tenant may apply to the Land Court for a further order, varying the original order for sale with the consequence that the holding may be sold on the open market to a third party. The Land Court may grant such a further order if it considers it to be appropriate in all the circumstances.
97. 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).
98. 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.

Comment

99. The Committee asked both written and oral questions of the Scottish Government in relation to this power. The Committee was primarily concerned to understand why the Scottish Government considered it appropriate to set out matters relating to the process for sale of a holding on the open market in regulations whereas the process governing the sale of the holding to a tenant under an order for sale is largely present on the face of the Bill.
100. In its written response to the Committee, the Scottish Government explained that the principle of permitting an open market sale where the Land Court has varied an order for sale to the tenant is set out on the face of the Bill (in new section 38L of the 2003 Act). The power in section 38M is intended to allow regulations to deal with the procedural aspects of such a sale. The written response further indicates that the Scottish Government wishes to consult with industry experts, valuers and the Land Court to set out the technical detail and administrative aspects of the sale process.
101. In oral evidence, Scottish Government officials explained that the regulations made in exercise of this power will be technical in nature and will set out the process to be applied in third party sales and how that process will work. The Government officials indicated that section 38M itself sets out a framework for the third party sale process, but that the detail of that process will be filled in in the

regulations made in exercise of the power. The officials also explained that setting these matters out in regulations will help to manage the situation where land prices fluctuate either regionally or nationally in the future.

102. The Committee considers that the Scottish Government has, through its written and oral evidence, provided some further information as to the purpose of the power in the new section 38M and the matters about which regulations made in exercise of the power will make provision. While the Committee does not agree that all of these matters can be described as purely procedural in nature, it considers that the Scottish Government has explained in more detail why particular aspects of the power which the Committee highlighted as substantive are necessary. This information provides the Committee with a clearer indication of how the power in section 38M is to be exercised, and what the Scottish Government anticipates the regulations made in its exercise will look like.
103. The Committee remains of the view, however, that this power deals with a very significant matter, namely the sale of an agricultural holding on the open market against the will of the owner. The sale is to be permitted by virtue of an order for sale being varied by the Land Court where the Land Court considers it reasonable to make such a variation. While the Committee can appreciate the need for provision setting out the process for operating such a sale in practice, the Committee is concerned as to the appropriateness of setting these matters out entirely in regulations as opposed to on the face of the Bill.
104. The Committee notes that, as a direct comparison, the process for selling a holding to the tenant under an order for sale is largely present on the face of the Bill, in new sections 38A-38O of the 2003 Act as inserted by section 81 of the Bill. Those provisions deal with a number of procedural matters, such as the appointment of a person to value the holding; the suspension of various rights in the land while the order for sale process is continuing; and what is to happen where the seller or the buyer fails to complete the transaction. The process for selling the holding to the tenant is therefore largely set out on the face of the Bill and is supplemented by a number of delegated powers. This contrasts with the process for selling the holding to a third party which is being delegated to regulations in its entirety. The Committee considers that, as a matter of broad principle, significant matters such as the enforced sale of an agricultural holding should be set out in primary legislation as opposed to in regulations.
105. **The Committee accordingly draws the power in new section 38M of the Agricultural Holdings (Scotland) Act 2003 to the attention of the Parliament on the basis that, given their significance, the Committee considers that 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.**

Section 100 – Ancillary powers

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative if amending primary legislation; otherwise negative

Provision

106. Subsection (1) provides that the Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of or in connection with this Bill or any provision made under it.
107. Subsection (2) provides that regulations made under subsection (1) may modify any enactment (including this Act).

Comment

108. The Committee has seen in earlier Bills that there are differences in the wording of ancillary powers in the nature of section 100 of this Bill. The Committee reported in the following terms in relation to the ancillary powers contained in the Tribunals (Scotland) Bill at Stage 1 (the powers now being contained in section 80 of the 2014 Act):

” The Committee observes that there appears to be a lack of consistency in the formulation of ancillary powers in Government Bills. That may well be justifiable but no explanation has been provided regarding how the Scottish Government selects which formulation to use in each case. Parliament is accordingly being asked to grant powers which are expressed in different ways, and which presumably have different meanings, without a justification for that having been provided.

109. The wording of section 100 of this Bill differs from, for example, that in section 33(1) of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill. Section 33(1) provides:

” The Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, any provision made by or under this Act.

110. The final words in section 100(1) of this Bill differ:

” ..as they consider appropriate [emphasis added] for the purposes of or in connection with this Act or any provision made under it.

111. Section 25(1) of the Succession (Scotland) Act is different again. It provides:

” The Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to [emphasis added], any provision of this Act.

112. The Committee therefore asked the Scottish Government to explain why the different formulation used in section 100 is appropriate, and what the effect of the provision is. In its written response, the Scottish Government states that consistency is one of the things it considers desirable in Bills. But the main goal is achieving certainty of legal effect in the clearest language possible.

113. The Government’s response also confirms that a drafting policy document on ancillary provision sections is being considered, and whether and to what extent the drafting of such sections can be standardised remains to be determined. The view is taken that, in the absence of agreed standardised wording, minor variations of wording “do not necessarily signify differences of legal effect”. The response comments further that not all ancillary provisions are intended to achieve the same effect. The extent of the proposed ancillary powers may depend on the proposed scope or length of a particular Bill.

114. The Government’s response does not explain the effect of the differences in wording which are indicated above, between for example the ancillary powers in this Bill and the Health (Tobacco, Nicotine etc. and Care) (Scotland) and Succession (Scotland) Bills, or why in that respect particular wording has been chosen. That wording concerns the consideration which the Scottish Ministers must undertake before making any ancillary provision (for example, whether it is considered to be necessary, or expedient, or appropriate, for the purposes of provision in the Bill). The wording also concerns how any ancillary provisions which might be proposed under the Bill must relate, or connect or give effect to the provisions within the Bill.

115. The Committee’s recommendations here are similar to those for the ancillary provision in section 25 of the Succession (Scotland) Bill and section 33 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill, in the Committee’s reports on the delegated powers in those Bills at Stage 1.

116. **The Committee accepts, in principle, that an ancillary powers provision is appropriate to this Bill. It is also content that the exercise of the powers is subject to the affirmative procedure, where the provision would textually amend primary legislation, and otherwise the negative procedure would apply.**

117. **In relation to the general issue of the consistency of drafting of ancillary powers however, the view of the Committee remains the same as reported**

(some time ago) in relation to the ancillary powers in the Tribunals (Scotland) Bill at Stage 1.

- 118. The Committee acknowledges that there may be reasons, relative to a specific bill, why the ancillary powers should be framed in a particular way. It may also be appropriate on occasion that there should be differences in the effect of ancillary powers, as between particular bills. However, where the Parliament is being asked to grant ancillary powers which are expressed in different ways, the effect of the drafting which is proposed ought to be explained, and why that drafting is appropriate for the bill in question. Where the effect is intended to be the same, there should be consistency in drafting.**
- 119. The Committee welcomes that the Scottish Government is working on a drafting policy document on ancillary powers provisions, and recommends that the work on this document is expedited.**

Annexe A

Overview of the Bill

1. The Bill was introduced by the Cabinet Secretary for Rural Affairs, Food & Environment on 22 June 2015. It is a large, multi-strand Bill which makes wide-ranging provision about land and agricultural holdings. It takes forward a number of recommendations made in the report of the Land Reform Review Group, published in May 2014. Part 10 of the Bill concerning agricultural holdings takes forward recommendations of the Agricultural Holdings Legislation Review Group (“AHLRG”), which published its final report in January 2015.
2. Part 1 of the Bill requires the Scottish Ministers to prepare a land rights and responsibilities statement. This is to set out the Scottish Ministers’ objectives for land reform. The statement must be published and laid before the Scottish Parliament. Provision is made for the review of the statement.
3. Part 2 of the Bill makes provision for the establishment of a Scottish Land Commission. The Land Commission is to be a body corporate, with membership consisting of five Land Commissioners and the Tenant Farming Commissioner (“TFC”). The functions of the Land Commissioners are, on any matter relating to land in Scotland: to review the impact and effectiveness of any law or policy; to recommend changes to any law or policy; to gather evidence; to carry out research; to prepare reports; and to provide information and guidance. The Land Commissioners must also consider and advise on any such matter as the Scottish Ministers may refer to them.
4. The functions of the TFC, who is also a member of the Land Commission, are set out in section 22 of the Bill. These are: preparing and promoting codes of practice on agricultural holdings; inquiring into alleged breaches of codes of practice in accordance with sections 27-32; referring for the opinion of the Land Court questions of law relating to agricultural holdings; and collaborating with the Land Commissioners in the exercise of their functions to the extent that those functions relate to agriculture and agricultural holdings.
5. Part 3 of the Bill concerns information about control of land. Section 35 confers a power upon the Scottish Ministers to make regulations about access to information on persons in control of land by persons affected by that land. Section 36 of the Bill amends the Land Registration etc. (Scotland) Act 2012 to include a power for the Scottish Ministers to make regulations enabling the Keeper to request information relating to proprietors of land registered under section 21, 27 or 29 of the 2012 Act or proprietors of registered plots of land and registered leases.
6. Part 4 of the Bill concerns engaging communities in decisions relating to land. Section 37 provides that the Scottish Ministers must issue guidance about

engaging communities in decisions relating to land which may affect those communities. In preparing such guidance, Ministers must have regard to the desirability of furthering the achievement of sustainable development.

7. Part 5 of the Bill establishes a community right to buy land to further sustainable development. The right to buy is exercisable by a 'Part 5 community body' which meets the requirements set out in section 42. The right is also exercisable by a third party nominated by a Part 5 community body.
8. A Part 5 community body or nominated third party must make an application to the Scottish Ministers for consent to exercise the right to buy under this Part. The application requirements are set out in section 45. The Scottish Ministers may not consent to an application to exercise the right to buy unless they are satisfied that the sustainable development conditions set out in section 47(2) of the Bill are met and that the procedural requirements set out in section 47(3) are fulfilled. The sustainable development conditions are met if:
 - (a) The transfer of land is likely to further the achievement of sustainable development in relation to the land;
 - (b) The transfer of land is in the public interest;
 - (c) The transfer of land is likely to result in significant benefit to the relevant community to which the application relates and is the only practicable way of achieving that significant benefit; and
 - (d) Not granting consent to the transfer of land is likely to result in significant harm to that community.
9. Where the Scottish Ministers consent to an application to exercise the right to buy, a valuer must be appointed to assess the value of the land which must be paid to the landowner. Part 5 also makes provision for the payment of compensation, rights of appeal and mediation.
10. Part 6 of the Bill removes the exclusion from the valuation roll for shootings and deer forests currently set out in the Local Government (Scotland) Act 1994.
11. Part 7 of the Bill relates to common good land. It amends section 75 of the Local Government (Scotland) Act 1973 to permit a local authority to apply to the Court of Session or the sheriff where it wishes to use common good land for a different purpose without disposing of it. At present an application can only be made to the court for authority to dispose of common good land and the court has no jurisdiction to authorise its appropriation for another purpose.
12. Part 8 of the Bill relates to deer management. It makes provision regarding the functions of deer panels under the Deer (Scotland) Act 1996 ("the 1996 Act"), and about deer management plans. Section 70 confers a new power on Scottish Natural Heritage (SNH) to require a land owner or occupier to produce a deer management plan. SNH can approve or reject the plan and failure to develop or

implement a plan would be grounds for SNH to move to the development of a deer control agreement under existing section 7 of the 1996 Act. Section 71 of the Bill increases the maximum fine which may be imposed for the offence of failure to comply with a deer control scheme under the 1996 Act.

13. Part 9 of the Bill relates to core paths. It amends the provisions regarding access rights and core paths as set out in the Land Reform (Scotland) Act 2003. Core paths are systems of paths drawn up by the local authority which are sufficient for the purpose of giving the public reasonable access throughout the local authority area. The amendments relate to the procedures for review of, and amendments to, core paths plans.
14. Part 10 of the Bill relates to agricultural holdings and is further sub-divided into 7 chapters. Chapter 1 creates a new type of agricultural tenancy, called the Modern Limited Duration Tenancy (“MLDT”). The MLDT is a lease of agricultural land for a term of no less than 10 years. Section 79 of the Bill confers a power on the Scottish Ministers to make regulations about the conversion to the MLDT of existing tenancies governed by the Agricultural Holdings (Scotland) Act 1991 (“1991 Act tenancies”).
15. Chapter 2 of Part 10 removes the requirement for an agricultural tenant to register his or her interest in exercising the pre-emptive right to buy conferred by the Agricultural Holdings (Scotland) Act 2003.
16. Chapter 3 of Part 10 provides a new process whereby an agricultural tenant may apply to the Scottish Land Court for an order requiring the landlord to sell the holding to the tenant in circumstances where the landlord is in material breach of his or her obligations under the tenancy. The Land Court may make such an order only where it is satisfied that the landlord has failed to comply with his or her obligations in a material regard by the date specified; the failure substantially and adversely affects the tenant’s ability to farm the holding in accordance with the rules of good husbandry; greater hardship would be caused by not making the order than by making it; and in all the circumstances it is appropriate.
17. Chapter 4 of Part 10 concerns rent review. The provisions reform the system of rent review applicable in respect of 1991 Act tenancies, Limited Duration Tenancies and the new MLDT, moving to a system based on a ‘fair rent’ assessment rather than an assessment based on open market value. There is provision enabling a revised rent to be phased in over a 3-year period if a review results in a rental increase of more than 30%.
18. Chapter 5 of Part 10 concerns reform of the rules on the assignation of and succession to the tenant’s interest in agricultural leases by extending the categories of person to whom a lease may be assigned or who may succeed to the tenancy. It also broadens the class of “near relative” who enjoy more protection from challenge by the landlord to the transfer or bequest.

19. Chapter 6 of Part 10 changes the rules on compensation payable by the landlord at waygo for tenants' improvements. The purpose of this chapter is to introduce a process for tenants to claim that compensation should be payable in respect of improvements which they have carried out but to which they are not currently entitled because they did not follow the relevant statutory requirements. This is described as an "amnesty for improvements" and the process will only be available for a period of 2 years after this chapter is commenced.
20. Chapter 7 of Part 10 introduces new rules limiting the circumstances in which landlords' improvements can be taken into account at rent review or must be maintained by tenants. At present landlords have a right to carry out improvements under 1991 Act tenancies without the agreement of the tenant and without agreeing when it is convenient to carry out the works. A new notice procedure is introduced which must be followed if the landlord is to be permitted to claim recovery of the costs of the improvements through the tenant's repairing obligation and rent due.
21. Part 11 of the Bill makes standard provision in respect of subordinate legislation, ancillary provision, commencement and short title.

Annexe B

1. The Committee was content with the following powers on first consideration of the Bill:

- Section 2(5) – The Scottish Land Commission
- Section 22(3) – Functions of the Tenant Farming Commissioner
- Section 39(2)(b), 39(2)(e) and 39(3) – Eligible Land
- Section 41(1)(c) – Eligible land: tenant's interests
- Section 42(1)(c) – Part 5 community bodies
- Section 42(8) – Part 5 community bodies
- Section 42(9)(a) – Part 5 community bodies
- Section 43(4) – Provisions supplementary to section 42
- Section 44(7) – Register of land for sustainable development
- Section 44(10)(b) – Register of land for sustainable development
- Section 45(5)(a) and 45(5)(c) – Right to buy: application for consent
- Section 46(4) – Right to buy: application procedure
- Section 47(8) – Right to buy: Ministers' decision on application
- Section 48(2) and 48(8) – Ballot to indicate approval for purposes of section 47
- Section 52(1) and 52(3) – Effect of Ministers' decision on right to buy
- Section 58(5) – Compensation
- Section 59(6) – Grants towards liabilities to pay compensation
- Section 61(13) – Appeals to Lands Tribunal; valuation

- Section 69 (inserting section 4(7) in the Deer (Scotland) Act 1996) – Functions of deer panel
- Section 74(3) (inserting new section 5B(3) in the 2003 Act) – Modern limited duration tenancies: break clauses
- Section 78 (inserting new section 18A(4)(b)9ii) in the 2003 Act) – Modern limited duration tenancies: Irritancy
- Section 81 (inserting new section 38A(4)(c) in the 2003 Act) – Sale to tenant or third party where landlord in breach of order or award
- Section 81 (inserting new section 38B(6)(e) in the 2003 Act) – Sale to tenant or third party where landlord in breach of order or award
- Section 81 (inserting new section 38D(4) in the 2003 Act) – Sale to tenant or third party where landlord in breach of order or award
- Section 81 (inserting new section 38G in the 2003 Act) – Sale to tenant or third party where landlord in breach of order or award
- Section 81 (inserting new section 38L(4)(c) in the 2003 Act) – Sale to tenant or third party where landlord in breach of order or award
- Section 81 (inserting new section 38N(4) in the 2003 Act) – Sale to tenant or third party where landlord in breach of order or award
- Section 81 (inserting new section 38O in the 2003 Act) – Sale to tenant or third party where landlord in breach of order or award
- Section 103(2) – Commencement
- Schedule, paragraph 5(29) – Modification of section 92 of the 2003 Act (ancillary provision)

The Committee was content with the following powers after receiving written and oral evidence from the Scottish Government:

- Section 25 – Tenant Farming Commissioner: codes of practice
- Section 37(1) – Guidance on engaging communities in decisions relating to land

Annexe C

Scottish Government response to initial questions raised by the Delegated Powers and Law Reform Committee

Section 25 – Tenant Farming Commissioner – Code of Practice

Power conferred on:	the Tenant Farming Commissioner
Power exercisable by:	code of practice
Parliamentary procedure:	laid only

1. Part 2 of the Bill establishes the Tenant Farming Commissioner. Section 25(1) requires the Tenant Farming Commissioner (TFC) to prepare codes of practice “for the purpose of providing practical guidance to landlords and tenants of agricultural holdings”.
2. Subsection (7) provides that a code of practice published under section 25 is admissible in evidence in any proceedings before the Land Court, and if any provision of such a code appears to the Land Court conducting any proceedings to be relevant to any question arising in the proceedings, the Land Court must take that provision of the code into account in determining that question (subsection (8)). Moreover, a report of the TFC is admissible in evidence in any proceedings before the Land Court (section 31(2)), and if such a report appears to the Land Court conducting any proceedings to be relevant to any question arising in the proceedings, the Land Court must take that report into account in determining that question (section 31(3)).
3. **The Committee therefore asks the Scottish Government:**
4. **Given that a code of practice on agricultural tenancies and reports of the TFC with regard to breach of such codes may influence the determination by the Land Court of relevant questions in relation to agricultural tenancies (standing the requirements in section 25(8) and 31(3) on the Land Court to take these matters into account in proceedings before it), why is there no requirement in the Bill for some form of Parliamentary procedure to attach to the codes of practice?**

The Scottish Government Response;

The TFC must consult widely before publishing or revising a code. Section 25(4) of the Bill provides that the TFC must consult “any persons appearing to have an interest in the draft code”. At that point the TFC could decide to consult Parliament on a draft code.

Once published, in accordance with section 25(5)(b), a code must be laid before the Scottish Parliament.

A code is admissible in evidence and can be taken into account in court proceedings but we do not think it necessarily follows from that, that a code must be subject to a particular form of parliamentary procedure. Persons subject to codes are often put under a duty to take them into account or to have regard to them when carrying out functions to which the codes are relevant. See, for instance, the code of practice under section 48 of the Adult Support and Protection (Scotland) Act 2007. No parliamentary procedure applies to that code.

We therefore considered both the nature of the power involved and its practical operation when framing the procedure for the codes. The power given to the TFC is to promulgate a number of codes of practice on a range of different subjects; an indicative list of 8 subjects can be found in section 25(2). We think it unlikely the TFC would be able to work on all of those topics at once or be in a position to finalise codes on them all to a common end date. Without prejudging the TFC's approach, we think it likely therefore that the TFC will promulgate codes as and when they are ready. That being the case, if all codes were to be subject to parliamentary procedure then it could involve a statutory instrument being made each time a code requires to be brought into effect or revised. Given the purpose of the codes is "providing practical guidance to landlords and tenants of agricultural holdings" we think the procedure strikes the right balance between parliamentary burden and scrutiny.

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

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

5. 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". Regulations may also make provision about the circumstances in which persons affected by land may request information, and about how the authority to which requests are to be made is to handle such requests.
6. **The Committee asks the Scottish Government:**
 - a) **For what purpose(s) is it intended that information about persons in control of land may be disclosed to persons affected by that land?**

The Scottish Government Response;

The regulations to be made under section 35 will make it possible to find out information about the individuals who are making decisions in relation to land, where this information is needed to address particular practical difficulties by persons including the owners of adjoining or related land. It is not possible to list these kinds of difficulties

exhaustively, but one example would be if a neighbour's access over land is being denied; or the boundary fences are not being maintained properly, allowing livestock to stray on to adjoining land owned by the neighbour.

The key consideration will be that the person affected by land must have some justifiable reason for needing this information and that must be related to the land in the question.

b) What is the intended meaning of “persons affected by land”?

The Scottish Government Response;

The regulations will set out what is meant by a person affected by land. This could include individuals and communities who own or use neighbouring land. A person can be affected by land without necessarily owning that land. The definition of persons affected by land is one of the issues that will be consulted upon.

For example, a person could be affected by a land if a right of access the person has over land is being denied or the fences around a piece of land are not being maintained allowing stock to stray on to adjoining land the person owns.

c) Depending on the purpose(s) identified, why is the power not limited to enabling information to be accessed for that or those purposes?

The Scottish Government Response;

It is considered that the wording of the power in section 35(1) is appropriate as this limits the power to access information by persons affected by land and the information that can be accessed can only be about persons in control of land. It is appropriate to take a broad power as there is a range of circumstances in which a person is affected by land may have a reason for wanting information about any person in control of that land and the power will allow flexibility in ensuring that the regulations cover a variety of factual scenarios.

d) Why is the power framed without restriction as to the circumstances under which the regulations may require disclosure, or the type of information which may be sought?

The Scottish Government Response;

The responses above set out the circumstances in which it is envisaged that information may be required to be disclosed. The power is framed broadly to enable regulations to cover a range of circumstances where a person affected by land may have a reason for wanting information about persons in control of land. This could be information about the identity of individuals that have a controlling interest in the person who owns the land or are in some other way involved in making decisions about the management of the land.

As to the type of information that may be sought, the power is framed broadly in order to allow a measure of discretion to be given to the request authority as to the terms in which the authority can require. As indicated in section 35(2)(g) the regulations may also set out “the circumstances in which such information need not be provided”. For example, the intention is for the regulations to provide that where there is a legitimate privacy reason, such as concerns over personal safety, then the persons in control of land do not have to supply information about themselves.

- e) Can the Scottish Government explain why there is no prohibition or restriction in the Bill on the *further disclosure* of any information disclosed to or by the request authority in terms of the regulations? (Contrast the position in the Scottish Elections (Reduction of Voting Age) Bill where a young person’s information may only be disclosed so far as is necessary for the purpose of the carrying out of certain functions related to the electoral register. Further disclosure of the information to another person for a different purpose is an offence.)**

The Scottish Government Response;

The purpose of obtaining the information about a person with control of land is to enable the person receiving the information to seek to address particular practical difficulties in relation to the land. It is the intention that the information will be used to contact and seek to influence the person with control of land in order to resolve the practical difficulties. In addition there may be circumstances where the information may have to be shared with third parties in order to resolve the practical difficulties.

That the information disclosed may be further disclosed by the recipient is a matter that will be considered in making the regulations and in particular when setting out the circumstances in which information is required to be disclosed.

- f) More generally, can the Scottish Government explain why provision enabling access to information about persons in control of land appears in the Bill when the policy is still subject to consultation? Why is it considered appropriate to confer powers to make subordinate legislation about that matter as opposed to making the appropriate primary legislation once the policy development is complete?**

The Scottish Government Response;

In the Consultation on the Future of Land Reform, the Scottish Government consulted upon the LRRG proposal to limit the legal entities that can own land in Scotland to those incorporated in the EU. The policy intention for restricting who could own land in this manner was to provide greater transparency and accountability of land ownership. Although the Scottish Government have formed the view that LRRG proposal would not achieve its policy aim, the responses to the consultation indicated that there was overwhelming support for the desire to increase transparency and accountability of land ownership.

Taking a power will allow the Scottish Ministers to discuss further with relevant public bodies and other interests the detail of how the requests should be processed, the criteria for requiring the information, what person the information can be requested for, when disclosure of information is not required (i.e. for privacy reasons), and the appropriate level of sanctions for failure to comply with the requirements of the regulations and when these should apply.

Taking a power will allow a further consultation to be carried out on the detail of the regulations, ensuring that their potential impact on stakeholders, including landowners, can be taken into consideration in more detail before the regulations are laid in draft before Parliament.

In providing the ability to establish information about persons in control of land it will be essential that regulations provide clear definitions and the appropriate level of detail that will be required for the requests to be made and processed. Providing for this in regulations will allow for this level of detail to be provided and will also provide the flexibility that will be required to amend the details of the scheme, and in particular the definitions of persons with control and persons affected by land to ensure that the regulations continue to meet the policy objective.

Section 36(2) (inserting section 48A(1) in the Land Registration etc. (Scotland) Act 2012) – Power of Keeper to request information relating to proprietors of land etc.

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative procedure for first exercise of power, and if regulations amend primary legislation, otherwise negative procedure

7. 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.

8. The information which may be requested is not set out on the face of the Bill, but may be defined in the regulations.

9. **The Committee therefore asks the Scottish Government—**

1) For what purpose(s) is it intended that the Keeper may request information relating to proprietors of land and registered leases?

The Scottish Government Response;

It is recognised that the Land Register provides a useful resource for information about land and the persons that own land. To reflect this, the land register discloses information other than the information that is required to establish who has a right in

land, for example the register includes information about the consideration that was paid for a property.

Section 36 provides a power for the Scottish Ministers to make regulations enabling the Keeper to request additional information from proprietors and potential proprietors and enabling the Keeper to include this information in the Land Register.

It is intended to use the power to make regulations requesting information about the category of person or body that into which a proprietor falls (section 48A(2)(a)) , for example, are they a community body or a charity and information about individuals having a controlling interest in proprietors eg through ownership of shares in a company that is a proprietor.

The purpose of obtaining the information that can be requested under the regulations made under this section will be to provide additional information about land ownership in Scotland, information about individuals that have a controlling interest over proprietors of land and category of the legal person that owns land in Scotland. Having this information will allow analysis to be carried out that will allow better information on patterns of land ownership to be established, as well as to allow individuals and communities to have a better understanding of patterns of landownership. This ties in with the LRRG comments and recommendation on the need for better information and statistics on land ownership. Along with the other information that the Keeper collects as part of an application for registration this information will be made publically available on the land register.

It is likely that the applicant will be asked to provide this information when an application for registration is being made to the Land Register.

2) Depending on the purpose(s) identified, why is the power not limited to enabling information to be requested for that or those purposes?

The Scottish Government Response;

The purpose of the power is to allow the Keeper to request additional information from proprietors and potential proprietors in order that additional information on proprietors can be held in the Land Register. The power is limited so that requests for information can only be made for information about certain proprietors of land and leases.

3) Why is the power framed without restriction as to the circumstances under which the Keeper may request information, or the type of information which may be sought?

The Scottish Government Response;

The types of information that it is intended will be requested are those set out in section 48A(2)(a) to (c). As set out above it is intended that the power will be used to allow the

Keeper to request information about the category of proprietor and the identity of individuals with a controlling interest in proprietors.

4) Why does the Bill not restrict or limit the circumstances in which information may be disclosed to or by the Keeper without the need for the consent of the individual to whom the information relates?

The Scottish Government Response;

It is anticipated that information about an individual with a controlling interest will only be disclosed to the Keeper with the consent of that individual. This will be set out in the regulations.

As regards information about the category of the proprietor that may be requested, this is information that will be provided by or on behalf of the proprietor in the application for registration. This means that any information disclosed will be with the consent of the proprietor. The information about the category of the proprietor that may be requested is likely to be information that is already in the public domain, for example if the proprietor is a company this can usually be established from the information disclosed on the Register.

Providing the information to the Keeper will be voluntary and it is the intention that at the time of consenting to the disclosure of information an individual or proprietor should be aware that the information will be included in a public register, it is not considered necessary to further restrict the circumstances in which the information may be disclosed by the Keeper.

5) Can the Scottish Government explain further why the negative procedure is considered to confer an appropriate level of scrutiny for second and subsequent exercises of the power (other than where primary legislation is being amended)? The Committee notes that the Bill does not prevent second or subsequent regulations making substantive provision which alters the details of the existing scheme in a way which significantly affects individuals, and which accordingly might be expected to attract the affirmative procedure.

The Scottish Government Response;

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.

Section 37(1) – Guidance on engaging communities in decisions relating to land

Power conferred on:	the Scottish Ministers
Power exercisable by:	guidance
Parliamentary procedure:	none

10. Section 37(1) requires the Scottish Ministers to issue guidance about engaging communities in decisions relating to land which may affect communities.
11. **The Committee asks the Scottish Government to explain the intended purpose of the guidance to be issued under section 37, and why it is considered appropriate for the power to be expressed as a power to issue guidance, rather than as a power to make subordinate legislation.**

The Scottish Government Response;

One of the key policy objectives underpinning land reform measures is that the Scottish Government wants to see better collaboration and engagement between land owners and communities. There is recognition now amongst landowners that there are considerable benefits from working with their local communities and there are many productive partnerships springing up around Scotland. That is why section 37 of the Bill places a requirement on Scottish Ministers to produce guidance on engaging with communities on decisions relating to land.

Scottish Ministers consider that guidance is an appropriate mechanism for meeting their objectives to encourage better collaboration and engagement. It would not be appropriate to make subordinate legislation given the nature of the guidance, which should be capable of being readily accessed by the public and updated by Scottish Ministers. The guidance will be developed in close collaboration with key stakeholders, including community bodies and landowning representative groups, and it is envisaged that it will contain a wealth of examples of existing good practice and material that could not be suitably included within secondary legislation.

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

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

12. Section 79 confers power on the Scottish Ministers to make regulations to provide for the conversion of secure 1991 Act agricultural tenancies into Modern Limited Duration Tenancies (MLDTs). The power is not limited to providing for 1991 Act tenancies to be covered under particular circumstances or for a particular purpose.
13. **The Committee therefore asks the Scottish Government—**
 - 1) **For what purpose(s) is it intended that regulations should permit the conversion of a 1991 Act tenancy to an MLDT?**
 - 2) **Depending on the purpose(s) identified, why is the power not limited to enabling conversion for that or those purposes?**
 - 3) **Why is the power framed without limit in its application to particular circumstances, or by reference to particular criteria or objectives?**
 - 4) **More generally, can the Scottish Government explain why provision enabling regulations to make provision for the conversion of 1991 Act tenancies appears in the Bill when the policy is still under consideration? Why is it considered appropriate to confer powers to make subordinate legislation about that matter as opposed to making the appropriate primary legislation once the policy development is complete?**

The Scottish Government Response;

With regard to the Committee's first query, this point is under further discussion with stakeholders. As can be seen from the written evidence provided to the RACCE Committee, there is a considerable range of views amongst stakeholders as to the most appropriate form this model should take. For example, in terms of the length of the tenancy following conversion, stakeholder's views range widely from a term of 25 years to 99 years. In considering the correct option to implement, the Scottish Government must ensure that the proposal brought forward strikes the correct balance between the rights of the tenant and the rights of the landlord.

With regard to the Committee's second query, as indicated in the paragraph above, the proposals on conversion are being further considered in conjunction with stakeholders. Regulations on conversion will only be made for the purposes necessary.

Regarding the Committee's third query, as indicated in the paragraphs above, the proposals on conversion are being considered further in conjunction with stakeholders. The crucial objectives of conversion are to provide opportunities for those who want to

leave the sector; and to provide opportunities to new entrants and those progressing up the farming ladder, whilst maintaining confidence within the letting sector. In achieving these objectives, there are a number of avenues the Scottish Government is exploring to consider restricting conversion to particular circumstances.

The implications of these considerations will be discussed with stakeholders to ensure the most effective solution possible is developed.

Finally, the aim of providing a conversion process through regulations is to provide flexibility to the agricultural industry in this technical area. The Scottish Government believes conversion is an appropriate way to achieve the broad policy goal. However it is also believed appropriate to take the time required to develop the precise detail of the overarching policy. However, we acknowledge the committee's concerns, also expressed by RACCE, and are happy to consider Parliament's views on this.

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

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

14. 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). These include (among other things) the appointment of a person to sell the land; the valuation of the land; the procedure for the sale of the land; and the period within which the land is to be sold.
15. 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) then provides that regulations made under subsection (1) may modify any enactment.
16. **The Committee asks the Scottish Government for further explanation as to why it is considered appropriate to take a power to set out matters relating to the sale of a holding on the open market in regulations, rather than on the face of the Bill. The Committee observes that the power in the new section 38M of the 2003 Act is a very wide power, the parameters of which are informed by, but not restricted to, the non-exhaustive list in section 38M(2). The DPM does not provide any substantive explanation as to why, as a matter of principle, regulations are the appropriate means by which these**

matters should be set out, other than to say that the Scottish Government expects there to be very few open market sales.

The Scottish Government Response;

Section 38L allows sale on the open market and section 38M is about the process for that sale. As section 38M regulations deal with the procedural aspects of conducting such a sale, the Scottish Government wishes to consult with industry experts, valuers and the Land Court to set out the technical detail and administrative aspects of the sale process. The taking of a regulation-making power also ensures those procedural aspects are adaptable to changing circumstances and practice within the agricultural and rural property market and any impacts of external influences such as taxation. The Scottish Government therefore consider regulations to be the most appropriate approach to deliver the policy objectives listed in section 38M while balancing the need for parliamentary scrutiny.

Section 82 – 1991 Act tenancies: rent review

17. There are 3 powers which section 82 of the Bill confers in relation to the new rent review system. Questions in relation to all 3 powers are outlined at paragraphs 24 and 25.

A) Inserting new Schedule 1A to the 1991 Act, paragraph 2(4) – form and content of rent review notice

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

18. Section 82 amends the 1991 Act provisions on secure agricultural tenancies by substituting section 13 (variation of rent) with a new section 13 and Schedule 1A. Paragraph 2 of Schedule 1A makes provision about the form and content of the rent review notice. A rent review notice must be dated and must include certain prescribed information, including the rent currently payable, the proposed new rent, the date by which agreement must be reached, and the proposed date from which the rent is to be charged.
19. Paragraph 2(4) enables the Scottish Ministers, by regulations, to make further provision about (a) the form and content of rent review notices, and (b) the information that must or may accompany them. This is the first of 3 powers which section 82 of the Bill confers in relation to the new rent review system. The other two are explained below.

B) Inserting new Schedule 1A to the 1991 Act, paragraph 8(1) – productive capacity

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

20. Paragraph 7 of new Schedule 1A requires the Land Court to determine the rent payable for a secure 1991 Act tenancy where the landlord and tenant are unable to reach agreement. The rent payable is the rent that the Land Court, taking account of all the circumstances, considers is the fair rent for the holding. In determining the fair rent for the holding, the Land Court must have regard in particular to—
- (a) the productive capacity of the holding,
 - (b) the open market rent of any surplus residential accommodation on the holding provided by the landlord, and
 - (c) the open market rent of - (i) any fixed equipment on the holding provided by the landlord, or (ii) any land forming part of the holding, used for a purpose that is not an agricultural purpose.
21. Paragraph 8 of Schedule 1A confers power on the Scottish Ministers to make provision (for the purposes of paragraph 7) about the productive capacity of agricultural holdings, including—
- (a) how the productive capacity of an agricultural holding is to be determined,
 - (b) the information to be provided by the landlord and tenant of a holding to the Land Court to have regard to the productive capacity of the holding.

C) Inserting new Schedule 1A to the 1991 Act, paragraph 9(6) – surplus residential accommodation

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

22. As mentioned above, in determining the fair rent for an agricultural holding at rent review, the Land Court must in addition to having regard to the productive capacity of the holding, also have regard in particular to the open market rent of any surplus residential accommodation on the holding provided by the landlord (paragraph 7(4) of Schedule 1A). Paragraph 9(1) provides that residential accommodation on an agricultural holding is surplus to the extent that it exceeds what is necessary to provide accommodation for the “standard labour requirement” of the holding. In determining whether residential accommodation is surplus, the Land Court may take into account whether the standard labour requirement of the holding varies (seasonally or otherwise) (paragraph 9(2)).

23. The Committee asks the Scottish Government the following in relation to the 3 powers conferred by section 82—

- **Section 82 of the Bill confers 3 powers on the Scottish Ministers in relation to rent review for 1991 Act tenancies, at paragraphs 2(4), 8(1) and 9(6) of Schedule 1A to the 1991 Act. The DPM explains that the outcomes of the rent review modelling process being undertaken during 2015 are awaited, following which there will be a need for further stakeholder engagement on the testing of that modelling. That work and the further stakeholder engagement will inform the regulations to be made under the 3 powers listed.**
- a) **Can the Scottish Government explain why provision about the rent review process for 1991 Act tenancies appears in the Bill when the policy is still subject to consultation? Why is it considered appropriate to confer powers to make subordinate legislation about rent reviews as opposed to making the appropriate primary legislation once the policy development is complete?**

24. Further in relation to the power in paragraph 8(1) of Schedule 1A to the 1991 Act (productive capacity), the Committee ask the Scottish Government:

- b) **Given that the productive capacity of an agricultural holding will be a significant factor in any determination by the Land Court of fair rent for the holding, and given accordingly that provision about the productive capacity of a holding appears to be a substantive rather than technical matter, can the Scottish Government explain further why the negative procedure is considered to confer an appropriate level of Parliamentary scrutiny?**

In particular, can the Scottish Government explain why the on-going stakeholder engagement in the modelling exercise and planned consultation prior to making the regulations is considered to preclude the need for scrutiny of the policy by the Scottish Parliament under the affirmative procedure?

The Scottish Government Response;

Paragraph 2(4) of new schedule 1A deals with administrative matters of detail about the forms to be used and is of an order of detail typically left to regulations. The Scottish Government considers negative procedure to be appropriate for them.

Regarding the other regulation powers on rents set out at paragraphs 8(1) and 9(6) of new schedule 1A, rent modelling work in conjunction with key stakeholders is required to achieve a practical system that works. Following an extensive period of evidence gathering, the Agricultural Holdings Legislation Review Group's final report sets out a new method of calculating rents based on the concept of a fair rent taking into account productive capacity. This method is fully endorsed by the Scottish Government and is reflected in the Bill's provisions. However, it is crucial that these new rent proposals are developed in partnership with stakeholders and key industry experts, to test the

proposed approach before the new system is introduced to the industry. It is also important that the level of detail required in calculating productive capacity is left to regulations rather than placed on the face of the Bill so as to ensure future flexibility to take account of global prices for agriculture, e.g. dairy prices. The Scottish Government has already committed to sharing information on the development of the new rent review system with the RACCE Committee and would be willing to share the same information with your Committee if you would find it helpful. The material being developed with stakeholders should reach a reasonably settled form by the end of October.

In developing the rent review proposals, the Scottish Government considers that negative procedure provides sufficient scrutiny by the Scottish Parliament. However, we will take the Committee's views on board in relation to this matter if it thinks the Bill does not currently strike the right balance on accountability.

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

A) Inserting new section 9A(3) in the 2003 Act – Form and content of rent review

B) Inserting new section 9B(3) in the 2003 Act – Determination of rent

C) Inserting new section 9C(6) in the 2003 Act – Surplus residential accommodation

Powers conferred on:	the Scottish Ministers
Powers exercisable by:	regulations
Parliamentary procedure:	negative

25. Section 83(3) of the Bill inserts new sections 9A to 9C in the Agricultural Holdings (Scotland) Act 2003. These provisions set out the new rent review procedures for limited duration tenancies and modern limited duration tenancies. They are similar to the new rent review provisions for 1991 Act tenancies discussed above. One difference is that rent for LDTs and MLDTs is to be *determined* by the relevant legislative provisions, while for 1991 Act tenancies it is to be determined (in the absence of agreement) by the Land Court, having regard to the legislative provisions.
26. Section 9B(3) confers power on the Scottish Ministers by regulations to make provision about the productive capacity of land comprised in leases of LDTs or MLDTs, including how the productive capacity of such land is to be determined.
27. **The Committee asks the Scottish Government the following in relation to the 3 powers conferred by section 83—**
 - **Section 83 of the Bill confers 3 powers on the Scottish Ministers in relation to rent review for limited duration tenancies and modern limited duration tenancies, at sections 9A to 9C of the 2003 Act. The Delegated Powers Memorandum explains that the outcomes of the rent review modelling**

process being undertaken during 2015 are awaited, following which there will be a need for further stakeholder engagement on the testing of that modelling. That work and the further stakeholder engagement will inform the regulations to be made under the 3 powers listed.

- a) Can the Scottish Government explain why provision about the rent review process for LDTs and MLDTs appears in the Bill when the policy is still subject to consultation? Why is it considered appropriate to confer powers to make subordinate legislation regarding rent reviews as opposed to making the appropriate primary legislation once the policy development is complete?

28. Further in relation to the power in section 9C(4) of the 2003 Act (productive capacity), the Committee asks the Scottish Government:

- b) Given that the rent for an LDT or MLDT may not be determined unless the productive capacity of the land comprised in the lease is known, and given accordingly that provision about the productive capacity of land appears to be a substantive rather than a technical matter, can the Scottish Government explain further why the negative procedure is considered to confer an appropriate level of Parliamentary scrutiny?

In particular, can the Scottish Government explain why the on-going stakeholder engagement in the modelling exercise and planned consultation prior to making the regulations is considered to preclude the need for scrutiny of the policy by the Scottish Parliament under the affirmative procedure?

The Scottish Government Response;

The same rent review system is being proposed for LDTs, MLDTs and secure 1991 Act agricultural tenancies. The need for testing and modelling outlined above is equally applicable to the system for LDTs and MLDTs.

In relation to new section 9C(6) on productive capacity, in developing the rent review proposals the Scottish Government considers that negative procedure strikes the appropriate balance of scrutiny by the Scottish Parliament on this technical subject-matter. However, as always, the Scottish Government will consider the Committee's views carefully in relation to the appropriate level of scrutiny.

Section 100 – Ancillary provision

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	negative procedure, but affirmative where there is textual amendment of an Act

29. Subsection (1) provides that the Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving

provision as they consider appropriate for the purposes of or in connection with this Bill or any provision made under it.

30. The Committee has seen in some earlier bills a discrepancy in the wording of the ancillary powers.
31. **The Committee therefore seeks an explanation from the Scottish Government in relation to the ancillary powers in section 100(1):**
32. **The Committee reported in the following terms in relation to the ancillary powers contained in the Tribunals (Scotland) Bill at Stage 1 (the powers now being contained in section 80 of the 2014 Act):**
33. **“The Committee observes that there appears to be a lack of consistency in the formulation of ancillary powers in Government Bills. That may well be justifiable but no explanation has been provided regarding how the Scottish Government selects which formulation to use in each case. Parliament is accordingly being asked to grant powers which are expressed in different ways, and which presumably have different meanings, without a justification for that having been provided.”**
34. **The wording of the ancillary powers in section 100(1) differs from both the formulation in section 33(1) of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill and the formulation in section 25(1) of the Succession (Scotland) Bill, which Bills the Committee is also presently considering.**
35. **The Committee could therefore ask the Scottish Government to explain why the different formulation used in section 100(1) is appropriate, and what the effect of the provision is (in comparison with the formulations used in, for example, the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill and the Succession (Scotland) Bill).**
36. **The Committee might observe that if it is intended that the effect of these ancillary powers is intended to be the same, then the same wording ought to be used, for consistency.**

The Scottish Government Response;

The Committee raise a question about the consistency of the drafting approach adopted in this section compared with the drafting of similar provisions in other Bills currently before Parliament and in past Bills.

Consistency is one of the things the Scottish Government considers desirable in Bills. But it is not the only, or even the main, goal – which is achieving certainty of legal effect in the clearest language possible. The importance of consistency is that it can assist in achieving certainty and clarity.

Where possible, the Scottish Government aim to avoid unnecessary differences in the drafting of common provisions. As the Committee may be aware, “drafting policies” on

provisions setting out short titles and conferring powers to make subordinate legislation have been prepared and made available to interested parties, including the Parliament's Non-Government Bills Unit and the Parliament's own legal advisers. These policies seek to standardise, where appropriate, the drafting of the provisions to which they relate.

A drafting policy on ancillary provision sections is being considered. That work is ongoing, and whether and to what extent the drafting of such sections can be standardised remains to be determined. In the absence of agreed standardised wording, however, minor variations – such as those the Committee identifies in the Bills presently under consideration – do not necessarily signify differences of legal effect.

It is also the case that not all ancillary provision sections are intended to achieve the same effect. The powers in some Bills have been wider or narrower than the powers in other Bills. In other Bills, no ancillary provision is included where it is considered unnecessary. In this Bill, we anticipate that we may need to make use of all the “ancillary” elements of the power, so have included them all.

While powers to make ancillary provisions are commonly included in Bills, the extent of the power conferred in each case depends largely on the rest of the Bill to which the power is ancillary. In a comparatively short Bill such as the Succession Bill, what can be done is determined by the limited area of law dealt with by the Bill. In the case of a longer Bill such as the Land Reform Bill, more might be done under the power, given the wide number and range of topics in the Bill.

We consider the formulation of the power in section 100 to be appropriate in the context of this Bill and 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.

¹ The Land Reform (Scotland) Bill as introduced is available at the following website:
[http://www.scottish.parliament.uk/S4_Bills/Land%20Reform%20\(Scotland\)%20Bill/b76s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Land%20Reform%20(Scotland)%20Bill/b76s4-introd.pdf)
[Accessed October 2015]

² The Land Reform (Scotland) Bill Delegated Powers Memorandum is available at the following website:
[http://www.scottish.parliament.uk/S4_Bills/Land%20Reform%20\(Scotland\)%20Bill/Delegated_Powers_Memorandum.pdf](http://www.scottish.parliament.uk/S4_Bills/Land%20Reform%20(Scotland)%20Bill/Delegated_Powers_Memorandum.pdf) [Accessed October 2015]

³ The Official Report of the Delegated Powers and Law Reform Committee meeting on 15 September can be found at the following website:
<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10089> [Accessed October 2015]

⁴ See for example, *The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill 2014 – Reference by the Counsel General for Wales* [2015] UKSC 3 (per Lord Mance at paragraph 45).

