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Agriculture and Rural Development Division

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8 Sept 2015

Land Reform (Scotland) Bill

Dear Mr Donald,

Thank you for your letter in relation to the delegated powers in the Land Reform (Scotland) Bill. Please find attached the Scottish Government's responses to the questions that were raised by the Delegated Powers and Law Reform Committee.

If you require clarification on any of the responses or require further information please do not hesitate in contacting me.

Yours sincerely

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

Trudi Sharp
Deputy Director

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.