

Deborah Cook
Assistant Clerk to the Delegated Powers and Law Reform Committee
Room T1.01
Scottish Parliament
EH99 1SP

16 November 2015

Land Reform (Scotland) Bill at Stage 1

Report of the Delegated Powers and Law Reform Committee

Dear Ms Cook,

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

Part 3 Information about control of land etc.

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

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

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

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

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

Further, the regulation making power provides that the Scottish Ministers must consult before the regulations are laid before Parliament. This will help to ensure the regulations, when made, will provide an appropriate mechanism and balance between the interests of parties that will allow individuals or communities affected by land to obtain the information about a person with control of land required to enable further efforts to have the issues affecting them resolved.

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

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

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

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

As noted above, the regulations also provide that the Scottish Ministers must, before laying a draft of the regulations, consult with such persons as the Scottish Ministers consider appropriate. In evidence to both this Committee and the Rural Affairs, Climate Change and Environment Committee, Scottish Ministers have, therefore, committed to carrying out a full public consultation on a set of draft regulations before laying the regulations in Parliament. The Scottish Government believe that this will give Parliament sufficient opportunity to scrutinise the regulations when laid.

Even if some form of additional scrutiny were to be considered, the Scottish Government would note that it would be disproportionate for every use of this power to subject to some form of enhanced affirmative procedure, particularly where amendments being made were minor, technical or administrative in nature.

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

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

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

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

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

"The affirmative procedure will apply to the first exercise of the power and these regulations will include provision about the types of information that may be requested including setting out the categories of proprietor, and what is meant by an individual having a controlling interest in a proprietor. This will enable a high degree of Parliamentary scrutiny for the first use of the power setting out details of the scheme for requesting information. The affirmative procedure will also apply to subsequent exercises of the power where primary legislation is amended.

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

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

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

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

Part 10 Agricultural Holdings

Section 79 - Conversion

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

Following further consideration, and taking on board comments made by RACCE and others during parliamentary scrutiny, the Scottish Government is in the process of finalising the policy proposal on 1991 Act tenancies. We are discussing the detail of this with stakeholders to further assess the potential impact, and we anticipate we will be able to share the proposals with the committee and the Scottish Parliament before stage 2.

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

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

Section 38M - Procedure for sale to third party

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

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

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

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

Section 82 – rent review

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

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

In the case of the powers regarding the assessment of productive capacity of an agricultural holding and the determination of the standard labour requirement, Scottish Government note the Committee's arguments that these powers are central to the new system of rent review and are further considering whether these powers should be subject to affirmative procedure.

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

Section 100 – Ancillary provision

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

I hope that the Committee have found this response helpful.

Yours sincerely



Trudi Sharp
Deputy Director