

Agriculture, Food and Rural Communities Directorate

Land Reform and Tenancy Unit

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10 September 2015

Dear Mr Gibson,

Land Reform (Scotland) Bill

Thank you for your letter dated 2 September 2015 to Trudi Sharp following the appearance by officials before your Committee on 2 September 2015. We are pleased to provide a response to the further questions raised by the Committee in the annex to this letter and the associated attachments.

We have also taken this opportunity to let you have a note of the number of delegated powers in the Land Reform (Scotland) Act 2003. The Official Report from 2 September 2015 records that the Convenor said it would be useful to know if “more secondary legislation will be associated with this Bill than was required to enact the Land Reform (Scotland) Act 2003”. The Convenor also wondered whether the number of pieces of secondary legislation for the Bill might be similar to the aggregate number in the Agricultural Holdings (Scotland) Act 2003 and the Land Reform (Scotland) Act 2003. Accordingly, we have answered the following question below:

What amount of secondary legislation was required to enact the Land Reform (Scotland) Act 2003 and the Agricultural Holdings (Scotland) Act 2003 as compared with that required under the Land Reform (Scotland) Bill?

The number of delegated powers in the Land Reform (Scotland) Act 2003 (as enacted) was 27. The number of delegated powers in the Agricultural Holdings (Scotland) Act 2003 was 14. This makes a total of 41 under the two 2003 Acts.

Please note that as amended by the Community Empowerment (Scotland) Act 2015, the Land Reform (Scotland) Act 2003 now includes 70 delegated powers.

The number of delegated powers in Land Reform (Scotland) Bill 2015 is as follows:

Parts 1 – 9 (land reform):	26
Part 10 (agricultural holdings):	17
Part 11 (general):	2

Total: 45

The Committee will note the number of delegated powers required to implement the 2003 Acts is not significantly different from that proposed in the Land Reform (Scotland) Bill.

Please contact us if there is anything further that we can provide to assist the Committee's stage 1 scrutiny of the Bill.

Yours sincerely,

STEPHEN SADLER
Head of Land Reform and Tenancy Unit

(List of annexes-

- a) List of additional/follow-up questions/issues for Scottish Government officials**
- b) Analysis of LRRG Recommendation on EU legal entities**
- c) Estimated Number of Holdings reporting SLAs by County 2014**
- d) Estimated Numbers of Holdings reporting SLAs by County, 2015**
- e) Table of current and proposed agricultural tenancy types**
- f) Number of holdings with tenancy and rental arrangements, 2008 to 2014**
- g) Comparison of Agricultural Rental Values in Scotland and England)**

List of additional/follow-up questions/issues for Scottish Government officials

The Committee ask:-

- 1. A list of clarifications on the Bill which have been sought and provided to stakeholders since the introduction of the Bill;**

The Scottish Government response:-

1. Please find a list of the points we have been asked to clarify in discussion with stakeholders below.

Part 1

- In general it has been confirmed that Scottish Minister's intention is to take the draft Land Rights and Responsibilities Policy Statement set out in the Consultation on the Future of Land Reform in Scotland, and the responses to that consultation, as the basis for beginning to take forward and consult on a draft LRRS required under section 1.
- Section 1(4) and (5) – although Scottish Ministers are required to review and publish a revised statement, it would be open to Scottish Ministers to conclude following the review that the Statement remained fit for purpose and did not require to be amended. In this case the content if the revised statement published under section 1(5) would be the same as the previous statement.

Part 2

- In general have confirmed that the functions of the Land Commissioners and Tenant Farming Commissioner are separate and that the key rationale for including both functions within the same body is that current Scottish Government policy is to minimise the establishment of public bodies as much as possible. Given that the Land Commission and Tenant Farming Commissioner are to be established along similar time frames, efficiencies can be made by having staff that can work flexibly in supporting both the land commissioners and the Tenant Farming Commissioner.
- Section 5(2)(b) – clarified that this provision is intended to allow the Commission to acquire and dispose of land, most likely buildings, necessary to carry out their functions. In practice this is likely to mean office space. This is a power generally provided when setting up public bodies. This provision does not provide the Commission with any form of delivery role in acquiring or disposing of land in order to meet wider land reform objectives.
- Section 5(2)(c) and (d) – person can include 'body' as well as 'individual'.

- Section 9(1)(a) – that the list is non-exhaustive and contains a number of areas that the Scottish Ministers must consider. This does not mean that other areas of expertise or experience will not be considered or that each Land Commissioner must have expertise in one or all of these areas.
- Section 13 – clarified that the rationale for the Scottish Ministers appointing the first chief executive of the Commission is that the chief executive is likely to be required to be in place ahead of, or at the same time as, the Land Commissioners and Tenant Farming Commissioner being appointed. Subsequent chief executives will be appointed by the Commission with approval of Scottish Ministers.
- Section 20 – in response to the question will the Land Commissioners be able to consider any matters relating to land in Scotland if there is no existing law or policy on the matter, it was advised that there is unlikely to be any area where there is not relevant law or policy, and even if this were to be the case it would be open to the Land Commissioners to review the rationale for there being no existing law or policy on an issue.

Part 3

- Section 35 - the request authority is to be set out in the regulations to be taken forward under section 35. No decision has yet been taken on who the request authority shall be.
- Section 36 – the power under section 36 allows the Keeper to request the disclosure of the information on a voluntary basis. The power does not extend to requiring the disclosure of the information, nor does the power provide for sanctions to be imposed for failure to provide the information.

Part 4

- Section 37 – it was confirmed that the provision does not impose a legal duty on any party to consider the guidance to be produced, and that the provision does not contain a power to impose sanctions for non-compliance with the guidance.
- Section 37(4) – confirmed that it is Scottish Ministers intention to develop guidance in consultation with stakeholders, organisations, communities and citizens with an interest.

Part 5

- Section 47(2) – in response to questions about what is meant by ‘significant harm’ and ‘significant benefit’, officials have highlighted the issues that Scottish Ministers must consider set out under section 47(10).

Part 8

- Officials have been asked to clarify when the provisions in Part 8 are intended to be used and have confirmed that given the current on-going action in relation to the development of Deer Management Groups through support from SNH, the provisions would not be commenced immediately, and only then depending on the outcome of the review of the effectiveness of DMGs at the end of 2016.

Part 10

- Section 79 - Conversion of 1991 Act tenancies – clarification sought on what the actual provisions will be. Scottish Government have confirmed that these are being developed and will be shared with stakeholders in due course.
- Section 82 - Rent Review - New Schedule 1A (8) – clarification sought on what will and will not be included in productive capacity in order to calculate rents.
- Section 82 - Rent Review - New Schedule 1A (7) – clarification on whether the farmhouse will be eligible to be treated as fixed equipment provided by the landlord and therefore considered as part of the ‘fair rent’ calculation. The Scottish Government have confirmed that this will be decided in conjunction with stakeholders as part of the on-going rent modelling work.
- Section 82 – Rent Review – New Schedule 1A - clarification sought on why there are two separate dates and if sections (4) and (5) are necessary. Scottish Government have assured stakeholders that they will consider these points.
- Section 81 - Enforced transfer – Section 38N – clarification sought on whether the claw-back provisions under this section should only apply to any increase in value of the landlord’s interest in the lease and land (disregarding increased value on parts of the tenancy belonging to the tenant). Scottish Government have assured stakeholders that they will consider these points.
- Section 81 - Enforced transfer – whether or not the tenant will be eligible to purchase the holding on the open market if they do not exercise their pre-emptive right. The Scottish Government confirmed that section 38M includes a particular provision which gives Ministers the power to specify the persons to whom the land cannot be sold (i.e. the tenant).

Part 3 – Information about control of land etc

The Committee ask:-

- 2. Clarification of why the proposal in the consultation to make it incompetent for non-EU registered entities to register title to land in Scotland is not in the Bill and any analysis that the Scottish Government conducted in this area;**

The Scottish Government response:-

2. Please find the analysis in annex B entitled “analysis of LRRG proposal on EU legal entities”.

The Committee ask:-

- 3. How much land the Scottish Government understands is held in tax havens, and whether it accepts the figure of 750,000 acres as reported by Private Eye magazine**
[\(\[http://www.andyweightman.com/docs/privateeye_1395_26Jun2015.jpg\]\(http://www.andyweightman.com/docs/privateeye_1395_26Jun2015.jpg\)\);](http://www.andyweightman.com/docs/privateeye_1395_26Jun2015.jpg)

The Scottish Government response:-

3. The Scottish Government cannot verify the accuracy of the figure. At present it is difficult to answer questions of this type because of the limited information that is available from the Register of Sasines, which records deeds. The Land Register discloses the names of proprietors and is map based and so the completion of the Land Register will help in answering questions such as this.
4. It has been established from information currently available from the Land Register that in relation to around 0.5% of titles the registered proprietor is a non-natural person, e.g. a company, that is established outside the UK (There are currently around 1.6 million titles registered in the land register, this equates to around 27% of the land mass of Scotland).
5. The term tax haven is one that is commonly used but does not have an agreed definition and there is no officially recognised list of countries and jurisdictions that are tax havens. As such the Scottish Government could not carry out an analysis to establish the amount of land in Scotland that is owned in tax havens.

Part 7- Common good land

The Committee ask:-

- 4. Why has the Scottish Government chosen to include the particular provision relating to Common Good in the Bill rather than either those**

included in the consultation or any other changes that are thought to be needed to modernise Common Good legislation;

Scottish Government Response:-

6. Section 68 of the Bill would remove the need for local authorities to secure the passage by the Scottish Parliament of a Private Bill before they could change the use of inalienable common good land. Instead local authorities would be able to use the same procedure to change the use of such land as they already have for disposals, that is by obtaining the approval of the court. Although cases of this kind only arise rarely, this is nevertheless an important change. The Portobello Park case showed that this issue can have a major impact in particular instances, and it was specifically mentioned in the report of the Land Reform Review Group.
7. The Scottish Government has therefore taken the opportunity afforded by the Bill to address this issue. It was not included in the consultation as it is non-contentious and offers clear benefits.
8. The consultation sought views on whether the need for court applications should be removed and whether there should be a new legal definition of common good, and if so, what a new definition might look like; as well as inviting any other comments. A majority of respondents favoured retaining the requirement for court applications. While the consultation responses showed that there was significant support for a new definition there was no consensus on what a definition might look like, or on any other specific changes to the existing legal framework. Instead, there was a significant body of opinion in favour of further consultation on the issue.
9. In addition, since the consultation the Scottish Government's Community Empowerment Bill has become law. This includes substantial provisions on common good that will require local authorities to establish registers of their common good property, and to consult community groups on disposals or changes of use of such property. The Scottish Government therefore decided not to pursue further modernisation of common good in the Bill, allowing time for these provisions to take effect and inform views as to what direction any future change might take.

Part 10 - Agricultural holdings

The Committee ask:-

5. Send the Committee a commentary on the human rights aspects of each Chapter of Part 10 of the Bill, highlighting possible triggers of specific articles and provisions of the ECHR;

The Scottish Government Response:-

10. Paragraph 408 of the Policy Memorandum identifies Article 1, Protocol 1 and Article 8 of the European Convention on Human Rights ("the Convention").

As regards each chapter of Part 10 of the Bill, the following paragraphs of the Policy Memorandum relate to the following provisions of the Bill and provide commentary on the listed Articles of the Convention:

<i>Paragraph of Policy Memo</i>	<i>Section of the Bill</i>	<i>Convention Article</i>
410 to 411	74 to 78 (MLDT)	Article 1, Protocol 1
412 to 414	79 (Conversion)	Article 1, Protocol 1
415 to 416	80 (Right to buy)	Article 1, Protocol 1
417 to 419	81 (Sale)	Article 1, Protocol 1
420 to 423	82 to 83 (Rent review)	Article 1, Protocol 1
424 to 426	84 to 89 (Assignment and succession)	Article 1, Protocol 1
427 to 430	90 to 95 (Landlord improvements)	Article 1, Protocol 1
431 to 432	96 to 97	Article 1, Protocol 1

11. Article 6 is relevant where civil rights and obligations are under consideration and Article 8 is also relevant where a person's home may be involved.
12. We thought it might also assist if we set out the Scottish Government's approach to the compatibility with the European Convention on Human Rights of the provisions of the Bill. In relation to this particular Bill we acknowledge that it may be useful to do so because interested stakeholders are already referring to the ECHR/ human rights in support of their particular positions.
13. As you know, the ECHR has been incorporated into domestic law. It is an important part of the devolved settlement, so every provision of a Bill passed by the Scottish Parliament must be compatible with Convention rights. A provision of a Bill that is not so compatible is outside legislative competence and is not law¹.
14. In preparing draft Bills for Parliament's consideration, we and the Parliament's officials (who advise the Presiding Officer as regards the making of a statement whether the provisions would be within legislative competence²) devote significant resource to scrutinising each provision of the draft Bill for compatibility with Convention rights. We have seen in the case of *Salvesen v Riddell*³ the serious consequences for those directly affected that arise where the Courts decide that a provision of an Act of the Scottish Parliament is incompatible with Convention rights. In that case, that decision was made 10 years after the legislation was passed.
15. In the Land Reform (Scotland) Bill, because many of its provisions have potential for engaging people's property rights, the main focus of that scrutiny exercise is the right to peaceful enjoyment of possessions enshrined in Article

¹ Section 29(1) of the Scotland Act 1998 (c.46).

² Section 31(2) of the Scotland Act 1998.

³ *Salvesen v Riddell and another, Lord Advocate intervening (Scotland)*, [2013] UKSC 22.

1 of Protocol 1 (A1P1) to the ECHR which is interpreted as in substance guaranteeing the right of property. It provides-

16. "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

When is A1P1 engaged?

17. The first step in considering the implications of A1P1 for a draft Bill is whether there is a "property right" in play which is affected by the proposed law. A1P1 is interpreted as comprising three rules, the first being the general principle of peaceful enjoyment of "possessions"; the second rule covers deprivation of possessions; and the third rule recognises the State's entitlement to control the use of property in accordance with the general interest. Whichever rule is in question, the first question is whether there is interference with a person's property. Where the Bill interferes with the property rights of an individual – whether obviously, such as in right to buy provisions, or less obviously, such as in rent review provisions – it is clear that the property rights of individuals are affected and A1P1 is engaged.
18. That right applies to any person whose property rights are interfered with by the legislative provision. This reflects the fact that under the European convention on Human Rights the rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone⁴.
19. The only case since the establishment of the Scottish Parliament in 1999 that the court has decided that a provision of an Act of the Scottish Parliament was incompatible with A1P1, *Salvesen v Riddell*, concerned a provision that was regulating the respective rights of parties to a tenancy of an agricultural holding. Lord Hope's opinion makes it clear that the rights and freedoms that A1P1 guarantees are for both landlords and tenants.

Application of A1P1 when engaged

20. For a proposed law to be compatible with A1P1 it must also be "in accordance with law". It must be adequately accessible and sufficiently precise to be foreseeable in its effects⁵, and it should not operate in an arbitrary manner⁶. This means its real world effects must be reasonably foreseeable to ordinary people and accessible. Primary and subordinate legislation are readily accessible but they must also be sufficiently detailed as to allow people to predict what will happen to them under it with reasonable certainty. The law

⁴ *RB (Algeria) v Secretary of State for the Home Department* (2009) UKHL 10 per Lord Hope at paragraph 210.

⁵ *Lithgow v United Kingdom* (1986) 8 EHRR 329, para 110.

⁶ *Hentrich v France* (1994) 18 EHRR 440, para 42.

must be adequately accessible in the sense that any person must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case⁷

21. If a provision affects property rights and its impact is reasonably foreseeable then the provision must be tested against the substance of A1P1.
22. The UK Supreme Court is the highest legal authority on legislative competence matters so its rulings on ECHR compatibility have binding application in relation to the interpretation of the legislative competence of Scottish Parliament Bills. It has set out a four stage test for determining whether legislation is compatible with Article 1 of Protocol 1 and it is this test which we have applied to the provisions of the Bill:
 - (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right,
 - (ii) whether the measure adopted is rationally connected to that aim,
 - (iii) whether the aim could have been achieved by a less intrusive measure, and
 - (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.⁸
23. While these tests have effect as a matter of law, it can be observed that determining whether they are satisfied is essentially about determining questions of policy.
24. The “legitimate aim” of a provision is the objective which the law seeks to achieve; it is the public or general interest it is trying to meet. For example, in *Salvesen v Riddell* the Court decided the aim of heading off mass avoidance of the provisions concerning tenancies held by limited partnerships of the Agricultural Holdings (Scotland) Act 2003 was a legitimate aim. The Court respects the legitimate aim identified by the legislature unless it finds it to be “without reasonable foundation or manifestly unreasonable”.
25. A provision will be “rationally connected to a legitimate aim” if it can be shown that the means chosen can be reasonably expected to further the end. Whether the end “could have been achieved by a less intrusive measure” means whether a different approach might have resulted in less damage to a person’s property rights. Neither of these tests means that only one solution is possible, just that where a solution is adopted then it can be shown that that particular solution meets those tests.
26. The critical remaining test is one of fair balance as between the rights of the individual and the demands of the general interest of the community. In

⁷ See *Sunday Times v United Kingdom (no 1)* (1979) A30, at paragraph 49.

⁸ *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill - Reference by the Counsel General for Wales*, [2015] UKSC 3, para 45.

essence, what is considered is whether the public interest demands are strong enough to justify the extent of prejudice to the individual.

27. The European Court of Human Rights accepts that it is for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.⁹
28. The notion of "public interest" is necessarily extensive. The notion is not, however, concerned simply with perceptions of what a large number of persons want. Any decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The European Court considers that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In the context of consideration of the fair balance at the level of the Scottish courts, the concept of "margin of appreciation" is not applicable in the way that the European Court applies it but Scottish courts must attach appropriate weight to informed legislative choices at each stage in the convention analysis.¹⁰
29. But there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The European Court describes this by the notion of "fair balance" that must be struck between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden".¹¹
30. Where the prejudice is great, the public interest must also be great. In *Salvesen v Riddell* the Court said the burden placed on the class of landlords affected by section 72(10) was too great despite the pressing legitimate aim of preventing anti-avoidance. That class was penalised in an arbitrary way and the difference in treatment was unfair and disproportionate. The incompatibility arose from a combination of discriminatory treatment and punitive effects. Retrospective provisions are not impossible but require a special justification over and above that necessary for other types of prejudice.

⁹ James v United Kingdom (1986) 8 EHRR 123 at paragraph 46.

¹⁰ In re Medical Costs for Asbestos Diseases (Wales) Bill (Supreme Court) (2015) 2 WLR 481, *per* Lord Mance JSC at paragraph 54.

¹¹ Sporrang and Lönnroth (1982) 5 EHRR 35, at paragraphs 69 and 73.

The consequences of a decision of a court that a provision of an Act of the Scottish Parliament is incompatible with A1P1

31. In a case where a Bill is passed by the Scottish Parliament that contains provisions that raise a question whether they would be within the legislative competence of the Parliament, there is possibility that one of the Law Officers specified in section 33(1) of the Scotland Act 1998 may refer such a question to the Supreme Court for decision. Such a reference may be made within 4 weeks of the passing of the Bill by the Parliament¹². If such a reference is made the Presiding Officer is not able to submit the Bill for Royal Assent whilst the reference remains to be decided or otherwise disposed of¹³. If the court decided that the provision would not be within legislative competence then the Presiding Officer may not submit the Bill in its un-amended form for Royal Assent¹⁴.
32. In a case where no such reference has been made in relation to the Bill and the Bill has become an Act of the Scottish Parliament, the question whether its provisions are within the legislative competence of the Scottish Parliament may be raised in legal proceedings. Where such a question is raised in legal proceedings, the Court having relevant jurisdiction could (if it decides that a provision is not within the legislative competence of the Parliament) issue a declarator to that effect. The effect of such a declarator would be that the provision is not law and is of no effect. This would also have retrospective effect, but the Court has power (where it considers it appropriate to do so) to make an order removing or limiting any retrospective effect of its decision, or to suspend the effect for any period and on any conditions to allow the defect to be corrected¹⁵.

Conclusion

33. While the determination of a question whether a provision of an Act of the Scottish Parliament involves legal tests, it is immediately obvious from the nature of the answers needed to satisfy them that when the courts come to look at them the discussion in court is not simply a legal question.
34. It requires assessment of the policy justification for a given provision: what matters is what the public interest is, how individuals might be affected by the provision, whether it is likely to achieve what it claims it will achieve etc. This is part of the evidence base for a policy. The Supreme Court has recently made clear that in relation to the difficult question whether the provisions strike the requisite fair balance, all relevant interests fall to be weighed and

¹² Scotland Act 1998, section 33(2).

¹³ Scotland Act 1998, section 32(2).

¹⁴ Scotland Act 1998, section 32(3).

¹⁵ Scotland Act 1998, section 102(2). The Supreme Court exercised the power to suspend the effect of its decision for a period of one year in the case of *Salvesen v Riddell*.

balanced¹⁶. That means not merely public, but also all relevant private interests.

35. When putting together the package of solutions that make up the Land Reform (Scotland) Bill, SG officials have carefully worked through each of these aspects. Any amendments brought forward by Ministers at stages 2 and 3 of the Bill's passage will also be the end product of that policy-making process to ensure that they are ECHR compatible. Any amendments brought forward by members of the Parliament which the Parliament decides to accept would also need to have regard to that process and also ensure that they do not result in provisions that would not be within the legislative competence of the Parliament.

36. If any provision engages A1P1 and the policy justification does not pass the tests then the effect is that the provision is out-with competence and therefore not law.

The Committee ask: -

6. Send the Committee a map showing the locations of any small holdings across Scotland;

The Scottish Government response:-

37. There are two smallholdings maps provided to the Committee. The first map of *Number of Holdings reporting SLAs by County, 2014*, is contained in annex C, shows the numbers of smallholdings within each county where individuals had previously informed the Scottish Government that they had a smallholding, prior to the Survey run earlier this year.

38. The second map of *Estimated Numbers of Holdings reporting SLAs by County, 2015*, set out in annex D, shows the latest estimated numbers of smallholdings within each county, following the survey. Both maps show figures out with the crofting counties but include the designated crofting areas. (There are no small Landholder Act tenancies within the crofting counties as these became crofts in 1955 under section 3(b) of the Crofters (Scotland) Act 1955.) Exact numbers within each county have been suppressed because numbers may be so low as to permit personal data to be divined from them. The latest estimated total is 76.

The Committee ask:-

7. A list of all the possible agricultural tenancy arrangements that are (or will be if the Bill becomes law) available with a note as to how they differ from each other;

The Scottish Government response:-

¹⁶ In re Medical Costs for Asbestos Diseases (Wales) Bill (Supreme Court) (2015) 2 WLR 481, per Lord Mance JSC at paragraph 52.

39. See annex E for the different types of tenancies and their main features. Please note that the table includes small landholdings but the position as regards small landholdings is complex and the table is not comprehensive on that aspect.

The Committee ask:-

8. Provide a breakdown of the numbers of each tenancy type, and commentary on changes in number of each type in recent years (and in particular whether such changes are a reflection of actual changes or result from the Scottish Government having improved information as a result of the surveys and research it has commissioned);

The Scottish Government response:-

40. Information about the number of holdings with tenancy and rental arrangements from 2008 to 2014 is available on the Scottish Government website, please find it in annex F, and a link to it on the SG website can be found [here](#). Please note, the data for 2013 and 2014 is more accurate, which will account for some of the large changes between 2012 and 2013. However, there are still known issues with the data, and hence these figures should be regarded as best estimates. They do not take into account the further data cleaning carried out in the Small Landholders Act Survey run earlier this year. The Scottish Government will be publishing updated estimates for all tenancy types as part of the Results of the June Agricultural Census, on 27th October.

The committee ask:-

9. Information setting out the Scottish Government's reasoning and evidence base for introducing rents based on the productive capacity of a holding together with information on modelling for the use of this basis for farms of different types, along with any evidence from study of the rent system used in England;

The Scottish Government response:-

41. The current method of calculating rents, based on open market calculation has been the source of many disputes between tenants and landlords, and accounted for the highest number of applications to the Land Court over the last five years. There have been repeated calls from key stakeholders for a revised rent system which takes account of budget data.
42. In August 2012, the TFF established the Rent Review Working Group (RRWG) to examine how the rent review process works in practice and identify what, if any, changes or improvements need to be made to rent reviews.
43. While concluding that section 13 of the 1991 Act did not require amendment, the RRWG noted two specific suggestions made by contributors from the

tenanted sector: that SLDTs and LDTs should not be permitted as comparables; and that the productive capacity of the holding and its related earning capacity should be a factor for the purpose of determining rent.

44. A subsequent stakeholder evidence gathering exercise was conducted by the Agricultural Holdings Review Group (AHLRG) and they concluded that statutory arrangements relating to the setting of rents need to be fundamentally changed to fully reflect the underlying public interest in productive use of agricultural land. In their view this would lead to a more transparent, objective and fairer rental system.

45. Annex G “agricultural rental values” provides a comparison of agricultural rental values in Scotland and England.

The Committee ask:

10. Confirmation of the Scottish Government’s view on whether a landlord would be able to take on an assigned lease for value and whether the Bill would allow this to happen;

The Scottish Government response:-

46. Under the current legislation regarding the assignation of 1991 Act tenancies (section 10A), the tenant may assign their lease to any of the persons who are entitled to succeed their estate on intestacy by virtue of the Succession (Scotland) Act 1964. There is currently no option for the landlord to take on the assigned lease for value.

47. The provisions in this Bill have expanded the class of person to whom a tenancy can be assigned in accordance with the new proposals for succession. In line with the 1991 Act, there is no provision for the landlord to take on the assigned lease for value.

Part 3 – Information about control of land etc.

The committee ask:-

11. Why the provisions in Section 36 only allow the Keeper to “request” information; can land owned by “beneficial interests” be identified; what action can be taken if there is a refusal to cooperate?

The Scottish Government response:-

Why the provisions in Section 36 only allow the Keeper to “request” information?

48. Better information on control, interest and ownership of land in Scotland will be a key factor in designing and monitoring on-going policies relating to land in Scotland.

49. The Scottish Government have considered a range of factors and options to improve the transparency of landownership in Scotland and consider that the proposals contained in Bill, together with the commitment to complete the Land Register and explore the establishment of a Scottish land and property information service, are the most appropriate and balanced measures to increase transparency of land ownership in Scotland.

Can land owned by “beneficial interests” be identified?

50. The identity of the legal owner, that is the person, be it an individual, a company or other legal entity that has the legal right of ownership registered in one of the property registers managed by the Registers of Scotland can already be obtained by making an application to the Registers of Scotland and paying a small administration fee.

51. Under Scots property law there is no concept of beneficial interest or ownership (unlike English law). There is no requirement in Scots property or registration law to disclose information on beneficial interests eg in relation to a company that owns land there is no requirement to disclose who the shareholders of that company are.

52. There is anecdotal evidence to suggest that there are cases where individuals, who are not the legal owners of land, can have a considerable influence and control over the legal owner of land and so influence how land is managed and used. It is not possible to identify the extent of this issue.

53. The regulations under section 36 will help to improve the information available on individuals who have a controlling interest in the legal owners of that land. It will also enable information about the category of person or body that a landowner falls into to be requested. This information will be used to identify land ownership patterns and help improve the design and monitoring of policies relating to land in Scotland. In addition where a person is being adversely affected by land, the person could use the regulations that can be made under section 35 to get information about persons in control of land.

What action can be taken if there is a refusal to cooperate?

54. The regulations under section 36 will enable the Keeper to request, not require, information. If an applicant for registration does not supply the information requested then the keeper will not be able to impose any sanctions in respect of this. So the application for registration will still be dealt with. Section 36 does not include provision allowing for regulations to impose civil penalties or offences. If the Keeper was able to require information to be disclosed about controlling interests as a condition of registration this would mean that an owner of land would not be able to obtain a real right to ownership of land without disclosing information about any individuals who had a controlling interest in the owner of the land. At present there is not sufficient evidence as to the benefits of requiring disclosure of such information to justify making this a condition of registration.

Part 5 – Right to buy land to further sustainable development

The Committee ask:-

12. Why there is no requirement in S47(3) to offer market value for the land, or to engage more constructively with the landowner in the first instance?

The Scottish Government response:-

55. In developing the process for the right to buy land to further sustainable development, a great deal of consideration was given to how to best balance the interests of landowners and Part 5 community bodies. In all cases we would expect a Part 5 community body to act in a reasonable and constructive manner and this should include seeking to acquire the land in question by agreement with the landowner without going down the route of using Part 5. There will be many cases in which it is likely that an agreement can be reached with the owner (this could include the owner agreeing to lease the land where this would be acceptable to the Part 5 community body). It may also be helpful to the Committee to note that a community body is not required to make an offer of market value in the criteria for the community right to buy neglected, abandoned or detrimental land under section 74 of the Community Empowerment (Scotland) Act 2015.
56. Part of any negotiation that may take place could involve the Part 5 community body and landowner entering into agreement to ascertain the market value of the land in question, and there is nothing in the Bill to prevent this happening. However, to ensure that community bodies are not prevented from moving forward with an application under Part 5, it is considered that it should not be a requirement that the community body offer market value for the land upfront, as this could immediately give rise to a dispute as to what the market value is. It would not be desirable that a landowner should be able to prevent an application being approved just by disputing whether the community body has offered market value for the land.
57. Please note that a landowner will be entitled to market value for the land in question if the Part 5 community body's application is approved by Ministers, as set out in paragraph 68 below.

The Committee ask:-

13. How the process set out in S47(3) will work in practice; in particular, is it sufficient for a CB simply to have identified and written to the owner without registering an interest in the land under existing community right to buy provisions?

The Scottish Government response:-

58. Section 47(1) sets out that Ministers must not consent to an application to buy land under Part 5 unless they are satisfied that the application meets the

sustainable development conditions and the procedural requirements have been complied with. Section 47(3) sets out the procedural requirements.

59. The procedural requirement in section 47(3)(a) will mean that an application cannot be consented to unless at least six months prior to the application being made, the Part 5 community body must have submitted a written request to the owner of the land to transfer the land to the community body or person named in the application and , that the owner has not responded or agreed to the request.
60. The other procedural requirements include that the Part 5 community body will need to demonstrate that the application relates to eligible land, that the owner and any creditor in a standard security over the land is correctly identified, and where a third party purchaser is nominated, that the party is correctly identified and shown to consent to the application. It will also need to be the case that the owner is not prevented from selling the land or subject to any enforceable personal obligation. There must also be a significant number of the members of the community have a connection with the land, that the land is sufficiently near to land with which those members of the community have a connection, or that the land is in or sufficiently near to the area comprising that community. Finally, the community must have approved the exercise of the right to buy and Part 5 community body must comply with the provisions of section 42 which sets out the requirements a community body must meet in order to be constituted as a Part 5 community body.
61. It is not considered to be appropriate to require a Part 5 community body to register an interest in land under the existing community right to buy provisions prior to making an application to buy land under Part 5 as this would be an additional step in the process. The community right to buy under Part 2 of the Land Reform (Scotland) Act 2003 is a pre-emptive right and so the community right to buy land is only triggered if the owner decides to sell the land. Whereas, if Ministers consent to an application under Part 5 then the owner is required to sell the land to the Part 5 community body or nominated purchaser.
62. It is also considered that it would be an onerous burden to require a Part 5 community body to register an interest under the community right to buy if they do not consider that the owner has any intention to sell the land in the near future. However, the Committee may wish to note that there is nothing to prevent a community body from registering a right to buy under Part 2 of the Land Reform (Scotland) Act 2003, should they wish to prevent the landowner from selling the land without the community body being given the option to buy it.

Part 3 – Information about control of land etc.

The committee ask:-

14. Whether the Part 3 provisions relating to access to information on persons in control of land are sufficient to ensure that the landowner can be identified for the purposes of this right to buy; is it possible that the landowner might still be able to hide behind a trust or shell companies and not be identified?

The Scottish Government response:-

63. In Scotland the owner of land is generally the person who has their real right of ownership recorded in the General Register of Sasines or the Land Register of Scotland. These are the two national property registers and they are under the management and control of the Keeper of the Registers of Scotland. There are some exceptions to this general rule, for example where the title to land was granted prior to the founding of the Registers of Sasines in 1617.

64. Under the Part 5 of the Bill a community body will only need to know the identity of the legal owner of land or the tenant to make an application to buy the land or tenant's interest. Where the ownership is not known or uncertain a search of the General Register of Sasines or the Land Register can be carried out to establish who the owner is, for example if the community has a clear indication of the land they are interested in but do not know who owns the land a search of the Land Register and the Register of Sasines should establish if there is a person with a title to this land.

Part 5 – Right to buy land to further sustainable development

The Committee ask:-

15. Overall, how the tests set out in S47(2) & (3) will operate in practice to ensure that a fair balance is struck between the rights of the landowner and the general public interest in furthering sustainable development?

The Scottish Government response:-

65. Careful consideration has been given to considering the rights of landowners and the general public interest in relation to the tests that must be satisfied before Ministers can consent to application under Part 5 and in the process provided for in Part 5.

66. Section 46 sets out at length the procedures that must be undertaken by Scottish Ministers when they receive an application under section 45 of the

Bill, including seeking the views of the owner of the land on the application. The Scottish Ministers must, when considering whether to consent to an application, have regard to all views on the application that they have received and the responses on those views. (section 46(6)) As well as inviting views from certain people, the Scottish Ministers will also give public notice of the application (section 46(3)).

67. Under section 47(3), Ministers cannot consent to an application under Part 5 unless the sustainable development conditions are satisfied. These include that the transfer of land is in the public interest. Consideration of the public interest does not just include consideration of the interest of the public at large, it also includes consideration of the interests of any person who may be adversely affected by the decision. So in considering the public interest Ministers would have to consider the effect of the transfer of the land on the land owner.

68. Members will also wish to note that in the instance in which Scottish Ministers have approved the application under section 45, further notification is given to all relevant parties under section 51, that the landowner will be entitled to “market” value for the land under section 56. Provision is also made for compensation under section 58 and appeals under section 60.

69. Ministers will have to exercise their discretion to consent to an application in a way that is compatible with Article 1 of Protocol 1 to the ECHR. As the note at paragraphs 10 to 36 above make it clear this will involve consideration of the interference with the landowner’s property rights.

Part 8 – Deer management

The Committee ask:-

16. How the Government arrived at a figure of £40,000 for the maximum penalty for non-compliance with a deer control scheme.

The Scottish Government response:-

We opted for a substantial increase in the maximum fine for refusing or wilfully failing to comply with any requirement of a deer control scheme made under section 8 of the Deer (Scotland) Act 1996. £40,000 is a maximum fine and is comparable with other fines relating to certain wildlife or environmental crime. For example, the introduction of an invasive non-native species carries a financial penalty of up to £40,000 on summary conviction. Compliance with a deer control scheme could potentially bear significant cost and we would wish to avoid the situation where it may be cheaper and easier to pay a fine than to carry out the required deer management measures.

Part 10 – Agricultural holdings

The Committee ask:-

17. Re the sale where a landlord is in breach in Part 10, what consideration has been given to parity between landlord and tenant, in the light of evidence to the Committee that forced sale is not reciprocal to the landlord's right to obtain a certificate of bad husbandry which results in removal of tenant.

The Scottish Government response:-

70. The Scottish Government believe that these provisions strike the correct balance between landlords and tenants. It is only proper and fair that those landlords who repeatedly fail to comply with their legal obligations under the tenancy should be open to some sort of sanction. Such failures can damage agricultural productivity and cause hardship to 1991 Act tenants, some of whose families have farmed their holdings for generations.
71. It is important to note that the Land Court will only be able to order the sale where a landlord has failed to comply with a previous court order issued by the Land Court. In other words the landlord will have an opportunity to remedy the breach before the order for sale would be considered by the Court. In addition, there are a number of tests which must apply before the Land Court orders the sale. For instance, the breach has to be a material one and the Land Court must consider that the sale is appropriate in all circumstances.
72. Finally, the landlord will receive the proceeds from the sale and may also be eligible for compensation as a result of any loss or expense incurred in fulfilling their obligations under the Act.

The committee ask:-

18. To provide an update on the agricultural holdings rent-review modelling work that has been carried out on since the Bill was introduced.

The Scottish Government response:-

73. To date, two stakeholder meetings have occurred to develop a suitable rental model as proposed in the Bill. The Scottish Government would be happy to share the minutes of these meetings with the committee if they would find that useful. However, these meetings were to scope out initial thoughts and direction of travel and it is expected that by the end of October we will have a much clearer picture of what the final model will look like, and it might be more beneficial for committee members to see it at that stage.

The committee ask:-

19. What consideration has been given to other possible changes to the process for waygo, such as agreeing the value of tenants' improvements before the tenant gave a notice to quit?

The Scottish Government response:-

74. The Bill contains new provisions to provide for an amnesty period during which a tenant may serve formal notice on the landlord of their intention that specific items which had not previously been agreed by the landlord as tenants improvements, are to be considered tenants improvements for the purposes of establishing the tenant's right to compensation at waygo. There are a number of circumstances where the proposed provisions will provide clarity for both tenants and landlords as to what improvements are eligible for compensation at waygo. This will facilitate better retirement and business planning for both tenant farmers and landlords.

75. The Scottish Government is listening to the submissions from stakeholders and is aware of the concerns that exist in this area and we will consider all the evidence gathered during stage 1 on this issue.

The committee ask:-

20. What consideration was given to equipping the TFC with stronger powers, and whether they considered having more than one Tenant Farming Commissioner?

The Scottish Government response:-

76. The main role of the Tenant Farming Commissioner (TFC) is to foster good relationships between landlords and tenants by producing and promoting codes of practice. The role is primarily an administrative one as opposed to a legal one and therefore it is not appropriate to give the TFC powers which could be seen to cut across the functions of the Land Court or impact upon the entitlement of all parties to have issues relating to legal rights determined in a court of law. Instead the Bill enables the TFC's report to be considered as evidence of the facts of a particular case in any subsequent Land Court proceeding or in any arbitration hearing. The TFC is also provided with a power to issue fines for non-compliance (i.e. non co-operation of requests for information).

77. In addition, section 22 of the Bill contains provision to enable Scottish Ministers to review the functions of the TFC within 5 years of that section of the Bill coming into force and publish their findings. This section also enables Ministers to make regulations to amend, remove and confer functions of the TFC.

78. With regard to the suggestion by some stakeholders that it may prove helpful to have more than one TFC, section 23 of the Bill, will enable the TFC to

authorise other individuals to exercise some of their functions, providing flexibility for the TFC, as and when required. However, we are of course listening to stakeholders views on this point.

Analysis of LRRG Recommendation on EU legal entities

Background

The report from the Land Reform Review Group, *The Land of Scotland and the Common Good*, recommended that;

“The Scottish Government should make it incompetent for any legal entity not registered in a member state of the European Union to register land in the Land Register of Scotland, to improve traceability and accountability in the public interest.”

This recommendation was made as a result of issues related to the lack of traceability and accountability of some legal bodies based overseas who own land in Scotland.

The review group considered whether there might be scope in Scots Law to exclude certain types of overseas bodies from owning land in Scotland, in the interests of traceability and accountability. The group recognised there is a clear presumption against restricting the persons who can hold land in Scotland. The review group stated that this was as a result of Scotland’s position within the European Union and the treaties that govern the operation of the single market. This includes rules on the free movement of capital that includes the ability to invest in land. The rules on free movement of movement of capital also extends to movement of capital from countries outside the EU.

In line with the recommendation made by the review group the Scottish Government’s consultation on the Future of Land Reform in Scotland asked respondents to give their views on the following questions;

- Do you agree that restricting the type of legal entities that can, in future, take ownership or a long lease over land in Scotland would help improve the transparency and accountability of land ownership in Scotland?
- Do you agree that in future land should only be owned (or a long lease taken over land) by individuals or by a legal entity formed in accordance with the law of a Member State of the EU?
- What do you think the advantaged or disadvantages of any restriction would be?
- How should any restriction operate and be enforced, and what consequences might follow if the restriction is breached?

The consultation stated that the Scottish Government was considering how such a proposal could work in practice and that it would be important that any proposal taken forward were proportionate, effective and comply with the requirements of EU law and the European Convention on Human Rights as well as other international obligations.

In total 944 respondents (81% of all respondents) answered the first question with the majority (79%) agreeing that restricting the type of legal entity the can, in future, take ownership or a long lease over land in Scotland would help improve the transparency and accountability of land ownership in Scotland. In answer to question specifically on EU entities in total 827 respondents (71% of all respondents) addressed this question with the majority (82%) agreeing that in future land should only be owned (or a long lease taken over land) by individuals or by a legal entity formed in accordance with the law of a Member State of the EU.

The main advantages identified by respondents were;

- transparency of ownership: knowing who owns what; owners becoming more responsible due to their identities being known; greater accountability;
- addressing tax avoidance: ensuring those receiving grants and incentives are paying appropriate tax; reducing loopholes which use foreign ownership of land as a vehicle for tax relief; and
- promotion of wider ownership of land in Scotland: reducing cost of land ownership; making more land available for purchase; increasing diversity of ownership.

The main disadvantages identified by respondents were:

- potential loss of inward investment: reduced GDP and restricted income generation or capital investment in a global market place. It could reduce flows of external funds into local economies;
- loopholes will be sought and exploited by those intent on owning land: the restriction will not be watertight; could result in reducing transparency rather than increasing it; and
- unfair: discourages a free market; possibly illegal.

The majority of the responses to the consultation did not provide an analysis of the LRRG proposal. The Law Society of Scotland did provide this specific comment and analysis of the proposal:

“We are concerned about this proposal. We would suggest that any such restrictions could be by-passed easily such as by non-EU corporates setting up a shell company in the EU. For example, a non EU company could simply set up a UK registered company. Therefore enacting the proposals would not necessarily fulfil the policy objective of achieving greater transparency regarding the real land owner. The proposal has the consequence of affecting not just ‘commercial’ land but all property including flats and other residential properties, agricultural land etc, whether it be rural or urban. This, we would suggest, may have a serious impact on commerce, possibly reducing investment. Overseas, non-EU companies may be dissuaded from investing in new office premises in Edinburgh / Glasgow for example.

We would suggest that the Scottish Government carefully consider if the proposal may breach of have other implications under the ECHR, in particular Article 1, Protocol 1.

We would further suggest that before considering this proposal further, the Scottish Government must carry out comparative research to ascertain how similar provisions operate in other European jurisdictions and what has been the advantage and disadvantage of these.”

Analysis of Policy

The Scottish Government considered this proposed policy and also consulted the Keeper of the Registers of Scotland on this proposed policy.

In analysing the proposal the following matters are relevant;

- What is meant by accountability and traceability of landownership in relation to land reform?
- What evidence is there of problems of accountability and traceability in relation to land reform?
- Would requiring the incorporation of a legal entity with the EU significantly increase traceability and accountability as regards land ownership in Scotland?
- Restriction could encourage the use of trusts, what would the impacts of this be on achieving the aim of greater transparency and accountability of landownership in Scotland?
- Would any provisions need to extend the restriction to the EEA, rather than just the EU? What impact would this have compared to just restricting ownership to EU legal entities?
- Would the proposal, if taken forward, be considered to be proportionate, effective and comply with the requirements of EU law and the European Convention on Human Rights as well as other international obligations?

Traceability and accountability in relation to land reform

In making their proposal in their report the LRRG made reference to this issue of accountability and traceability being raised in connection with tax evasion and tax fraud. Stakeholders and commentators have also commented on these provisions in relation to addressing money laundering. Generally addressing issues of money laundering, tax evasion and fraud are the responsibility of the UK Government (there are exceptions eg in relation to devolved taxes such Land and Buildings Transactions Tax).

The reasons for considering greater transparency and accountability of landownership in relation to land reform are that better information on control, interest and ownership of land in Scotland will be a key factor in designing and monitoring on-going policies relating to land, to ensure we get the most from our

land. There are practical reasons for being able to easily establish who owns land and who is making decisions on how land is used, managed and transferred. To purchase or lease land you need to know who the owner is and who to contact. If there are issues with the land that are impacting on neighbouring properties you need to establish who to contact in order to address these issues. There is anecdotal evidence to suggest that there are examples where the decisions and actions of certain individuals, who are not named as the legal owners, are exerting considerable influence over land. In some cases it may necessary to approach these people to have the matters addressed.

Would requiring the incorporation of legal entity within the EU significantly increase traceability and accountability as regards land ownership in Scotland?

One of the main suggested benefits of this policy is that it would ensure that there is a named individual(s), namely the director(s) of the company, who would be responsible and accountable for the affairs of the company.

In some EU jurisdictions the directors of companies can be other legal entities, that can be incorporated outside the EU. If such a structure were put in place there would be no benefit gained from having the company that owned land incorporated within the EU as it may still be difficult to trace the directors of the parent companies.

The transparency of companies, such as information about shareholders and directors, differs throughout the EU, therefore the fact that a company is formed in accordance with the laws of a Member State of the EU would not necessarily increase the transparency of land ownership in Scotland, for example information about the shareholders of company is not necessary in the public domain

Although the EU and UK Government are taking forward actions to improve the transparency of companies and trusts for the purposes of addressing money laundering, the EU's 4th Money Laundering Directive only requires information on beneficial ownership to be made available to what is termed in the directive as "competent authorities and by obliged entities", it is not required to be made publicly available. The UK Government has legislated to require the public disclosure of information on persons with significant control of certain UK companies, however, the provisions do not apply to trusts., These measures will only have a limited consequential impact on improving transparency in connection to landownership in Scotland.

From considerations to date, it does not appear that requiring land to be owned by a legal entity incorporated or formed under the law of the EU would substantially increase the accountability and traceability of the owners of land. It would not prevent the use of complex company structures which results in land ownership being obscured, e.g. where the shares of a company are owned by other companies which are not be based in EU member states. In these structures, nominee directors, appointed by a shareholder, can be used and this can also hinder traceability and accountability. The Scottish Parliament could not pass legislation that regulates corporate governance in EU member states.

Trusts

In Scotland trusts can own land, the rights to the property are held by trustees which are registered in the Land Register and Register of Sasines.

The proposed policy would still allow trusts to own land in Scotland. It has been suggested that the adoption of the proposed policy could result in a greater use of trusts for holding land in Scotland. Potentially holding land in the name of a trust can bring similar advantages as regards reduced accountability and traceability for the land owner as holding land in an 'off-shore' jurisdiction. When land is owned by a trust under Scottish law the right to land is held by the trustees on behalf of the trust. The majority of trusts are set up for legitimate purposes for example;

- A trust set up to run a village hall,
- In some case land owned by the Church of Scotland is held in trust,
- Small firms that are set up with partners and trustees, and
- trusts established for the benefit of an individual, for example a trust set up for children who have not reached legal capacity.

When land is held in trust the beneficiaries of the trust or a person that may have control of the trust may not be known. Although it may be possible for trusts established in Scotland to register the trust documents in the Books of Council and Session, this is a purely voluntary process. There is no requirement for public disclosure of information on trusts or to update any trust documents that are registered in the Books of Council and Session, should there be any changes to the trust.

There are good policy reasons to allow trusts to continue to own land in Scotland. The recent Scottish Law Commission report on trust law demonstrates the advantages of having a modernised and coherent trust law and the advantages that trusts can bring to the Scottish economy..

Trusts can, however, be used to obscure the owners of land, and there is anecdotal evidence to suggest that land owned by trusts has resulted in problems in relation to accountability and traceability. If the proposed policy was to encourage a greater use of trusts, as a landowner may simply set up a trust rather than set up a company registered in the EU. This could have a negative effect on the accountability and traceability of land owners in Scotland.

There would be significant legal and practical difficulties in preventing trusts from owning land that would need to be considered in greater detail, to a longer timescale, taking into consideration the Scottish Law Commission's recent report on trusts.

Other issues

For the reasons set out above it is not considered that there is any clear evidence that the proposal would achieve the policy aims desired. Given this it is was not considered necessary at this stage to undertake detailed analysis of the potential implications of this proposal in relation to EU law, ECHR and and other international obligations.

Conclusion

The primary reason the Review Group made this recommendation was to increase the transparency and accountability of land owners in Scotland. The Scottish Government have come to the view that the recommendation made by the Review Group would not achieve this aim. The main problems being;

- There is no clear evidence to suggest that having land owned by a company or legal entity incorporated in a Member State will increase transparency and accountability of land ownership in Scotland. To illustrate, the Tax Justice Network began publishing in 2013 a Financial Secrecy Index¹⁷ that ranks jurisdictions according to their secrecy and scale of their activities. The results from 2013 show that Luxembourg ranks second on the index, Germany eighth and Austria 18th. It is also worth noting that the United Kingdom ranks 21st (just behind the British Virgin Islands (20th) and somewhat higher than some of countries that are sometime perceived to be tax havens; Liechtenstein 33, Isle of Man 34, Turks and Caicos Islands 63).
- Limiting ownership to EU legal entities may encourage more land to be held by trusts or in even more complex corporate structures, for example landowners may form an EU registered company to hold the title to land but behind this company will be the existing ownership structure, that may include non EU companies registered in “off-shore” jurisdictions. This may have had the effect of reducing the accountability and traceability of land owners.
- There is no clear evidence base to establish that the fact that land is owned by a company or legal entity that is registered or incorporated outside the EU has caused detriment to an individual or community.
- There are many examples of concerns about the actions of landowners where the person or legal entity that owns the land is either a UK citizen or has been incorporated in the UK. There is no evidence to suggest that where a landowner is domiciled has bearing on how the land is managed and whether the land owner is prepared to engage with the community at large when making their land management decisions..

The Scottish Government does not consider that is appropriate to bring forward measures to Parliament that are known to have substantial flaws and would not achieve the desired policy objective.

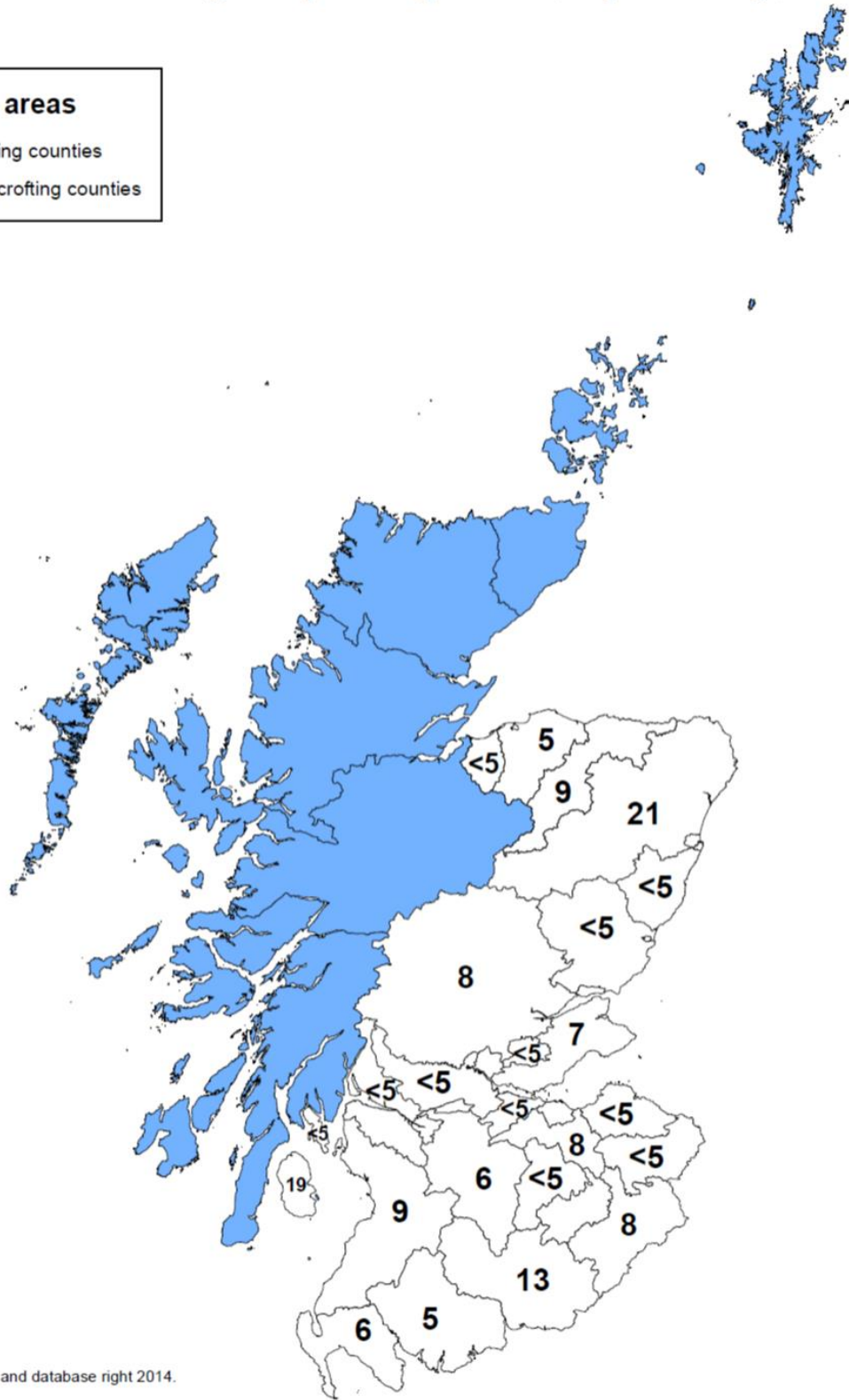
The challenge is to provide better information about land ownership to inform how the land reform agenda should be taken forward in Scotland in long term. This will partly be achieved by the completion of the Land Register. This will provide a clear picture of the individuals and organisation that own land in Scotland and how much they own. It will also be achieved by providing the public with better access to land ownership information. Both these measures are being taken forward and do not require legislation.

¹⁷ <http://www.financialsecrecyindex.com/introduction/fsi-2013-results>

Number of Holdings reporting SLAs, by County, 2014

Crofting areas

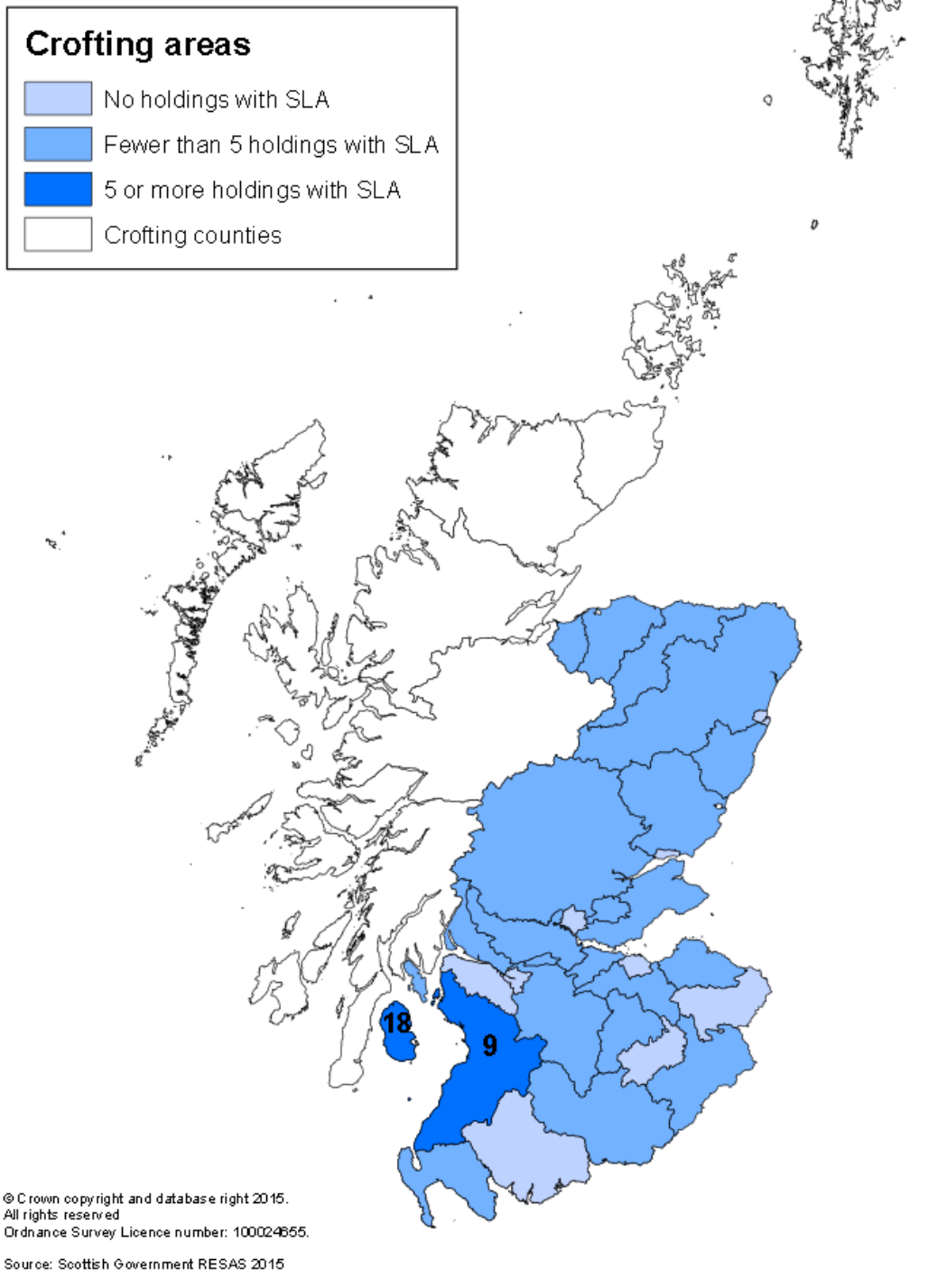
- Crofting counties
- Non-crofting counties



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Source: Scottish Government RESAS 2014

Estimated Number of Holdings reporting SLAs, by County, 2015



CURRENT AND PROPOSED AGRICULTURAL TENANCIES

TENANCY TYPE	LEGISLATIVE VEHICLE	LENGTH OF TERM & TERMINATION	SUBLETTING, ASSIGNATION & SUCCESSION	RENT ARRANGEMENTS	FIXED EQUIPMENT OBLIGATIONS FOR BOTH PARTIES AT THE START OF THE TENANCY	FIXED EQUIPMENT OBLIGATIONS FOR BOTH PARTIES THROUGHOUT THE TENANCY	BREAK CLAUSE
Grazing/Mowing Let	Agricultural Holdings (Scotland) Act 2003	Maximum length of 364 days. Must be one clear day between lets to the same tenant for the same purpose. Converts into an SLDT if the tenant remains in occupation beyond the end of the tenancy.	No statutory provision to sublet, assign or succeed.	No statutory provision. Agreed between parties.	No statutory provision, only limited obligations possible at common law	No statutory provision	None

<p>Smallholding</p>	<p>Crofters Holdings (Scotland) Act 1886</p> <p>Small Landholders (Scotland) Act 1911</p> <p>Small Landholders and Agricultural Holdings (Scotland) Act 1931</p>	<p>Cannot usually be removed from the holding unless breaches the conditions of the 1886 Act section 1 and in the 1911 Act at section 10(1). By failure to pay one year's rent, or on breach of other statutory conditions, the landlord may apply to the Land Court to remove the landholder.</p>	<p>Section 21 of the 1911 Act enables assignation of a small holding in the event of a landholder being unable to work the holding through illness, old age, or infirmity by applying to the Land Court to assign the holding to a member of the family (son-in-law or an actual or potential successor under the Succession (Scotland) Act 1964).</p> <p>Section 22 of the 1911 Act and section 16 of the 1886 Act enable</p>	<p>May be altered by agreement between landlord and tenant, so long as no different rent has been set by the Crofters Commission (precursor to the Scottish Land Court)</p>	<p>A Statutory Small Landholder (SSL) farmer, where the tenant farmer provides all or the majority of the fixed equipment on the holding; or a Statutory Small Tenant (SST) farmer, where the landlord provides all or the majority of the fixed equipment on the holding.</p>	<p>As previously</p>	<p>None</p>
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			succession of a small holding. No provision for subletting.				
Short Limited Duration Tenancy (SLDT)	Agricultural Holdings (Scotland) Act 2003	For a length of not more than 5 years. If the landlord and tenant are in agreement it can be continued for another 5 years or other shorter length agreed between the parties. Upon the second consecutive SLDT can be converted into and LDT with the agreement of both parties. New section	Section 6 of the 2003 Act prohibits assignation or subletting an SLDT. Ability for a bequest or successor to take on the tenancy.	By agreement between the parties	Within 6 months of the start of the tenancy or as soon as reasonably practical, the landlord must provide fixed equipment which will enable the tenant to maintain efficient production.	The landlord must renew and replace any fixed equipment due to natural decay or wear and tear. The tenant has a duty to maintain the fixed equipment in a good state of repair. Tenant has ability to apply to the Land Court to withhold rent if the landlord fails to fulfil their fixed equipment obligations.	None

		<p>5A(2) in the Bill would also enable conversion into an MLDT in the same way.</p> <p>No statutory termination process.</p>					
Limited Duration Tenancy (LDT)	Agricultural Holdings (Scotland) Act 2003	<p>For a length of not less than 10 years. Can continue with a cycle of continuation of three year, three year and ten year until the tenancy is brought to an end.</p> <p>Termination by statutory notice.</p>	<p>The 2003 Act enables the assignation and limited subletting of an LDT. Open assignation with the landlord's agreement to the assignee (landlord has the ability to object to the assignee on grounds set out in section 7 of that Act). Landlord also has the ability to take back the tenancy if</p>	<p>Where a lease makes no provision for review of rent, the rent must be reviewed based on open market rent test provided for in section 9 of the 2003 Act. Bill will change rent review test to fair market rent based on productive capacity.</p>	<p>Within 6 months of the start of the tenancy or as soon as reasonably practical, the landlord must provide fixed equipment which will enable the tenant to maintain efficient production.</p>	<p>The landlord must renew and replace any fixed equipment due to natural decay or wear and tear. The tenant has a duty to maintain the fixed equipment in a good state of repair. Tenant has ability to apply to the Land Court to withhold rent if the landlord fails to fulfil their fixed equipment obligations.</p>	n/a

			<p>the tenant applies for an assignation.</p> <p>Ability to bequeath to a specified group of relatives: son-in-law or daughter-in-law or to person entitled to succeed to the estate on intestacy under the Succession (Scotland) Act 1964.</p>				
1991 Act Tenancy	Agricultural Holdings (Scotland) Act 1991	Ongoing. Can be converted into an LDT by the agreement of both parties through section 2 of the Agricultural Holdings (Scotland) Act 2003. Pre-emptive right to buy (if intention to buy is	<p>Ability to assign (landlord has the ability to object to the assignee on grounds set out in section 10A of that Act). Limited subletting possible.</p> <p>Ability to</p>	Currently based on open market rent test set out in section 13 of the 1991 Act. May be altered, at an interval of not less than 3 years, under contract or by statutory procedure to the Scottish Land Court.	Section 5 of the 1991 Act (and associated section 8) sets out that a record of condition of fixed equipment should be made by the tenant and landlord which should be part	Section 5 of the 1991 Act requires the landlord to replace and renew buildings and other fixed equipment as rendered necessary by natural decay or fair wear and tear. The tenant must	n/a

		<p>registered with RoS).</p> <p>Notice to quit or intention to quit may be given by landlord and tenant respectively. If contested, notice to quit requires the Land Court's consent.</p> <p>When 6 months' rent unpaid, landlord may raise removal action in the Land Court which will determine if tenant should be removed at next term-day. Removal effectively annulled if the arrears are</p>	<p>bequeath to a specified group of relatives – son-in-law or daughter-in-law or to person entitled to succeed to the estate on intestacy under the Succession (Scotland) Act 1964.</p> <p>Ability for landlord to serve an "incontestable" notice to quit on those who are not near relatives.</p>	<p>Bill would change rent review test to fair market rent based on productive capacity.</p>	<p>of the lease. Within the lease there is deemed to be an undertaking by the landlord to put fixed equipment on the holding into thorough state of repair and to provide buildings and other fixed equipment which would enable an occupier reasonably skilled in husbandry to maintain efficient production as specified in the lease.</p>	<p>maintain the fixed equipment in a fair state of repair (natural decay and fair wear and tear excepted)</p>	
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		paid before that point, or caution for 1½ years' rent is decided upon by the Court.					
NEW TENANCY PROPOSAL- Modern Limited Duration Tenancy (MLDT)	Land Reform (Scotland) Bill	Minimum period of 10 years. Tenancy proposed to continue for a further 10 years.	Subletting only if the lease permits it. Ability to assign and succeed to the tenancy to a wider family group of individuals. Notices to quit are contestable.	Where the lease is silent on rent, the new provisions outlined in the Bill based on productive capacity will apply.	Within 6 months of the start of the tenancy or as soon as reasonably practical, the landlord must provide fixed equipment which will enable the tenant to maintain efficient production.	The Bill provisions provide the ability for both parties to contract out of their maintenance and replacement requirements for fixed equipment.	A break clause after 5 years for new entrants

Table 3: Number of holdings with tenancy and rental arrangements, 2008 to 2014 (from Scottish Government website)

Number of holdings with one or more...	2008	2009	2010	2011	2012	2013	2014
91 Act tenancy	6,441	6,723	6,497	6,327	6,100	5,086	4,993
91 Act Ltd Partnership	958	721	613	546	539	553	532
SLDT	509	526	506	539	551	648	834
LDT	205	247	259	289	322	389	528
SLA	98	94	112	119	124	156	149
Holdings with tenancies	8,047	8,144	7,806	7,637	7,450	6,598	6,725
percentage of holdings	<i>15.6</i>	<i>15.7</i>	<i>14.9</i>	<i>14.5</i>	<i>14.2</i>	<i>12.5</i>	<i>12.9</i>
Holdings with rented land	17,996	17,875	16,645	16,627	16,483	16,444	16,760
percentage of holdings	<i>35.0</i>	<i>34.4</i>	<i>31.8</i>	<i>31.6</i>	<i>31.3</i>	<i>31.2</i>	<i>32.1</i>

Note: the total number of holdings with rented land does not equal the sum of the holdings with each tenancy type as a holding may hold more than one type of tenancy.

More accurate data are available since 2013 which will account for some of the large changes between 2012 and 2013. However, there are still known issues with the data, and hence these figures should be regarded as our best estimates.

Comparison of Agricultural Rental Values in Scotland and England

DEFRA have published various time series of agricultural rent data, but the most complete goes back to 2001 and is by farm-type, namely

- Cereal
- General cropping
- LFA cattle & sheep
- Lowland cattle & sheep.

Scottish data are also available by farm-type, though split by LFA/non-LFA. The analysis in this briefing therefore uses non-LFA cereal and general cropping Scottish figures for comparison as this is considered more equivalent.

In each of the four categories considered, rental values are consistently higher in England than in Scotland (cereal 70 per cent higher, cropping 55 per cent higher, LFA cattle & sheep over three times greater, and lowland cattle & sheep 30 per cent higher). Even in the North East of England, England's lowest priced region, average rental values were three times higher than in Scotland.

Considering changes since 2001, rental values remained fairly constant until about 2005, since which several categories have seen steady increases.

Between 2001 and 2012 there were strong increases in

- England lowland cattle & sheep (up 58 per cent)
- England LFA cattle & sheep (up 57 per cent)

and to a lesser extent in

- England cereal (up 36 per cent)
- Scottish lowland cattle & sheep (up 32 per cent)
- England cropping (up 29 per cent)

Overall, between 2001 and 2012 average rents increased by 32 per cent in England, whereas in Scotland they increased by 11 per cent.

Figures do not take into account inflation, and all data have a margin of error which means that general trends should be considered rather than precise values.

England data relates to Full Agricultural Tenancies. Scotland data relate to tenancies of one year or more.

Conclusion: It would not be possible to assess impact of new rental provisions, in terms of rental levels, as this is based on the specific circumstances of individual business. However, it is not expected that rents will go down as a result of this work, as demonstrated here rental levels tend to increase over time not reduce. The action being taken through the LR Bill will however increase the transparency of rental assessments with a view to providing more certainty to those involved.